Sexual Harassment and the Struggle for Equal Treatment under Title VII: Front Pay as an Appropriate Remedy

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I. INTRODUCTION ........................................................................................................ 744

II. SEXUAL HARASSMENT AS A LEGAL CLAIM ...................................................... 747
   A. Legislative History .................................................................................................. 747
   B. Early Cases: Sexual Harassment as Sex Discrimination ..................................... 749
   C. The EEOC Guidelines ......................................................................................... 751
   D. Supreme Court Definition ................................................................................. 753
   E. Additional Requirements: Welcomeness and Motive ......................................... 756
      1. Welcomeness ........................................................................................................ 756
      2. Motive .................................................................................................................. 759
   F. Sexual Harassment: Unlawful Discrimination Under Title VII .......................... 759

III. THE RECOVERY PHASE ......................................................................................... 760
   A. History of Title VII Remedial Provisions ............................................................ 760
      1. Influence of the National Labor Relations Act .................................................. 761
      2. Congressional Action ......................................................................................... 762
   B. Title VII Remedial Objectives ............................................................................ 764
      1. Make Whole Objective ....................................................................................... 764
      2. Deterrence ........................................................................................................... 765
   C. Remedial Similarities to the ADEA ................................................................. 766
   D. Fashioning Adequate Remedies ........................................................................ 767

IV. FRONT PAY AS A PROSPECTIVE REMEDY .......................................................... 768
   A. Definition and History of Front Pay .................................................................... 768
   B. Limitations of Back Pay ..................................................................................... 772
   C. Preference for Reinstatement .............................................................................. 773
      1. Judicial Preference, Not Statutory Mandate ....................................................... 773
      2. Difficulties With Reinstatement ....................................................................... 775
      3. Reinstatement Versus Front Pay Under the ADEA ............................................ 777
   D. A Call for Greater Acceptance of Front Pay .................................................... 778
      1. Overcoming Fear of Undue Speculation ............................................................ 778
      2. Inherent Controls on Front Pay Awards ............................................................ 779
      3. Ease of Administration ....................................................................................... 781

V. CONCLUSION ........................................................................................................... 783
I. INTRODUCTION

Studies and polls began revealing the pervasiveness of sexual harassment in the workplace in the mid-1970s. Despite Title VII of the Civil Rights Act of 1964, which prohibits discrimination in the workplace, sexual harassment itself was not recognized as a legal cause of action until 1976. Even then, the topic did not receive substantial public attention until the highly publicized confirmation hearings of Justice Clarence Thomas in October 1991.

For the past several years, sexual harassment issues and resulting litigation have been a topic of widespread publicity and research. Enhanced awareness of sexual harassment issues has made it more likely that victims will seek legal recourse. However, a difficult trial process often deters victims from doing so. In sexual

1. See Susan Estrich, Sex at Work, 43 Stan. L. Rev. 813, 821-22 (1991) (citing surveys finding that 36 to 53 percent of women questioned regard themselves to have been victims of sexual harassment); see also U.S. Merit Systems Protection Board Office of Policy and Evaluation, Sexual Harassment in the Federal Government: An Update 16 (1988) (finding that among federal employees, 14% of males and 42% females complained of being sexually harassed); 1 Alba Conte, Sexual Harassment in the Workplace: Law and Practice §1.1 (1994) (citing similar survey findings); see generally Catherine A. MacKinnon, Sexual Harassment of Working Women: A Case of Sex Discrimination (1979) (calling attention to the plight of working women). MacKinnon discusses the pervasiveness of sexual harassment in the workplace, citing several studies conducted during the 1970s, including a Redbook magazine poll in which nine out of ten women reported experiences of sexual harassment at work. See id. at 26-29 (citing Claire Safran, What Men Do to Women on the Job: A Shocking Look at Sexual Harassment, Redbook, Nov. 1976, at 149).


5. See Roberts & Mann, supra note 4, at 269 n.4 (citing a database containing more than 6500 articles from thirty leading newspapers referencing "sexual harassment" since 1989); see also Pamela Kruger, See No Evil, Working Woman, June 1995, at 33 (citing a study showing over one-third of Fortune 500 companies have faced sexual harassment suits in recent years); Sexual Harassment in the Fed. Gov't: Hearings Before the Subcomm. on Investigations of the House Comm. on Post Office and Civil Serv., 96th Cong. 1 (1979) (requesting that the Merit Systems Protection Board conduct a study on the scope of sexual harassment in federal employment, and that the EEOC make improvements to its processing of sexual harassment complaints).

6. See, e.g., Carrie A. Bond, Note, Shattering The Myth: Mediating Sexual Har-
harassment cases, the victim is forced to replay the traumatizing events during the discovery process, and again, before the judge or jury.7 In addition, the case is often a matter of balancing the victim’s word against the harasser’s, a match-up that rarely favors the victim.8

Plaintiffs have found the litigation process more attractive following the enactment of the Civil Rights Act of 1991 (1991 Act)9 and the extension of Rule 412 of the Federal Rules of Evidence10 to civil cases.11 Reflecting these developments, the number of sexual harassment cases filed with the Equal Employment Opportunity Commission (EEOC)12 and federal and state courts has continued

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7. See Bond, supra note 6, at 2504-05 (stating that “[b]eing harassed is emotionally distressing, but replaying it in front of a judge or jury in public may be even more traumatizing”).
8. See id. at 2505-06.
11. See id. Previously Rule 412, the federal rape-shield rule, prevented abuse of the unwelcomeness standard in criminal cases by barring admission of a plaintiff’s past sexual history unless it was constitutionally required. See text of former FED. R. EVID. 412 (codified at 28 U.S.C. app. F.R.E. 412 (1988)). The intent of the new Rule is to curb harassing inquiries into the sexual history of sexual harassment victims. See FED. R. EVID. 412 advisory committee’s notes. Although the recent amendment may reduce the use of this information, the plaintiff’s past sexual history is still admissible as far as specific acts showing intent of invitation to or provocation of the alleged harassment. See id.; see also Paul Nicholas Monnin, Note, Proving Welcomeness: The Admissibility of Evidence of Sexual History in Sexual Harassment Claims after the 1994 Amendments to Federal Rule of Evidence 412, 48 VAND. L. REV. 1155, 1169-77 (1995) (discussing motivations behind the Judicial Conference amendments to Rule 412).
to increase rapidly. However, statistics show that the percentage of sexual harassment incidents actually reported is still very low.

In addition to this increase, sexual harassment cases have changed in focus. Early litigation under Title VII centered first on defining sexual harassment as a Title VII violation. Later, the focus shifted to procedural problems and establishment of the elements constituting substantive violations. Litigation then progressed into what has been termed the "recovery stage" of the proceedings. The recovery stage focuses on resolving the issues of damages when the court has determined that a wrong has occurred. In such cases, the courts typically struggle to fashion the most appropriate remedy possible within the stated and implied objectives and limits of Title VII.

Sexual harassment plaintiffs face monumental obstacles in this stage of litigation as well. Not only is the plaintiff unduly hindered from commencing a suit, but once involved in litigation, the sexual harassment plaintiff must establish additional elements of proof, which are not required in other types of Title VII litigation. Even those successful in sexual harassment litigation still face an uphill battle in receiving the full range of remedies available under

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the law.\footnote{22} Prevailing stereotypes and the judicial preference for reinstatement may prevent the victim from receiving the complete relief mandated by Title VII.

Part II of this article explores the development of sexual harassment as a cause of action under Title VII. It highlights the prejudices that delayed the acceptance of sexual harassment as a legitimate complaint and that continue to limit the award of available remedies. Part III discusses the recovery phase of Title VII litigation and examines Congress' goals in granting the courts broad discretion to determine appropriate remedies to victims of unlawful discrimination. Part IV offers front pay as an important element of the remedial scheme necessary to achieve the objectives of Title VII. Specifically, it notes the advantages of front pay, both as a complement to back pay and as an alternative to reinstatement. It further examines the concerns that have limited the use of front pay and focuses on the need for increased acceptance of front pay as a remedy for sexual harassment cases under Title VII. Part V concludes that, in keeping with the ever-evolving nature of sexual harassment litigation, the courts should afford front pay equal consideration as an available prospective remedy for victims of sexual harassment.

II. SEXUAL HARASSMENT AS A LEGAL CLAIM

A. Legislative History

Title VII of the Civil Rights Act of 1964\footnote{23} bars discrimination by employers against employees on the basis of race, color, religion, sex, and national origin.\footnote{24} Title VII was passed to ensure equal opportunity by removing artificial barriers to employment.\footnote{25} Section 704 of Title VII also prohibits employers from retaliating against employees who file complaints under Title VII.\footnote{26}

Section 703(a)(1) of Title VII explicitly prohibits sex discrimination in conditions of employment. Sexual harassment, however,
is not expressly mentioned. Thus, the development of sexual harassment as a Title VII violation has suffered from a want of precise statutory mooring. In addition, the prohibition of sex discrimination, sexual harassment’s link to Title VII, is exceptional in that virtually no legislative history exists to guide the courts in interpreting its intended scope. This dilemma was created, in part, by the addition of the word “sex” to Title VII by a last minute floor amendment. The addition of sex as a protected category was apparently a final effort by opponents to defeat the passage of the Act. However, the plan backfired when female representatives, who might otherwise have opposed the Act’s passage, flocked to support it.

27. 42 U.S.C. § 2000e-2(a) (1994). Title VII prohibits discrimination because of an individual’s “race, color, religion, sex, or national origin.” Id.

28. See infra notes 34-77 and accompanying text.


30. The bill originally considered by Congress and debated in committee prohibited discrimination in the workplace only on the basis of race, color, religion, or national origin. See H.R. REP. No. 88-914, at 2 (1963), reprinted in 1964 U.S.C.C.A.N. 2391, 2392; see also 110 CONG. REC. 2577-82, 2851 (1964); Miranda Oshige, What’s Sex Got To Do with It?, 47 STAN. L. REV. 565, 566 (1995) (noting that the prohibition against sex discrimination was added as a last-minute amendment, resulting in a lack of guidance as to the contours of sex discrimination in the workplace); Vaas, supra note 29, at 441-42 (discussing the short House debate on the addition of sex to the protected categories).

31. See Paul C. Sweeney, Abuse, Misuse & Abrogation of the Use of Legislative History: Title IX and Peer Sexual Harassment, 66 U.M.K.C. L. REV. 41, 86 (1997). Representative Howard Smith of Virginia, a staunch opponent of civil rights, offered the floor amendment. See id. See also Vaas, supra note 29, at 441-42; 110 CONG. REC. 2577-82, 2851 (1964); 1 CONTE, supra note 1, § 2.1. Representative Smith offered the amendment in a satirical, almost malicious spirit, having offered similar amendments in other sections of the bill that were defeated. See Comment, Sex Discrimination in Employment: An Attempt to Interpret Title VII of the Civil Rights Act of 1964, 1968 DUKE L. J. 671, 676-77 (noting that Representative Smith alleged a sexual imbalance in the population was depriving women of a right to be husbands). The fact that every man supporting the amendment ultimately voted against the House bill, also brings into question the seriousness of the amendment as an attempt by its supporters to truly guarantee equal employment opportunities for women. See id.; 110 CONG. REC. 2804-05 (1964).

32. See Vaas, supra note 29, at 442; 110 CONG. REC. 2577, 2578-83 (1964). Despite the strong support by many Congresswomen, some key women opposed the amendment, fearing that it might be used to destroy the overall bill, and stressing the need to deal with the unique problems of sex discrimination separately. See Vaas, supra note 29, at 442; 110 CONG. REC. 2577-84 (1964).
The result was a sex-based protection for workers that was loosely defined and unsupported by documentation of congressional intent, leaving the EEOC and the federal courts with the burden of determining viable principles to aid in interpreting the scope of Title VII protection.35

B. Early Cases: Sexual Harassment as Sex Discrimination

The 1972 amendments to Title VII provided some clarification of Congressional intent to eliminate sexual discrimination through Title VII.34 Yet, the courts still struggled to find a cause of action for sexual harassment claims.35 This struggle seemed to stem, at least in part, from the idea that sexual harassment was a personal, rather than a social issue.36 In addition, early courts feared that allowing sexual harassment claims under Title VII would prompt a flood of litigation consisting of false and unnecessary claims.37 Rejecting this notion, feminist advocates continued to push for a shift in the paradigm to regard sexual harassment as a form of sex discrimination, recognized by the law.38

Despite these efforts, it was not until 1976 that a federal district court

33. See Oshige, supra note 30, at 566.
35. See I CONTE, supra note 1, § 2.1.
36. Topics of a sexual nature were generally considered sensitive and private, and early cases demonstrated the common view that sexual advances in the workplace were merely a manifestation of personal attractions, proclivities and mannerisms. See, e.g., Miller v. Bank of Am., 418 F. Supp. 233, 236 (N.D. Cal. 1976) (suggesting that courts should refrain from delving into matters regarding the natural sex phenomenon of attraction between the sexes), rev’d on other grounds, 600 F.2d 211 (9th Cir. 1979); Corne v. Bausch & Lomb, Inc., 390 F. Supp. 161, 163 (D. Ariz. 1975) (stating that the supervisor’s sexual advances arose from his own personal urges), vacated without opinion, 562 F.2d 55 (9th Cir. 1977); see also Katherine M. Franke, What’s Wrong With Sexual Harassment?, 49 STAN. L. REV. 691, 694 (1997) (recognizing the work of feminists to set aside the notion that “sexual harassment was a private, interpersonal kind of sexual mischief”); MACKINNON, supra note 1, at 27 (noting the sensitive, private nature of sexual subjects).
38. See generally MACKINNON, supra note 1 (framing sexual harassment as a problem of sex-based power); CARROLL M. BRODSKY, THE HARASSED WORKER (1976) (stating that harassment, in any form, is an attempt by the harasser to maintain a competitive advantage in the workplace); Franke, supra note 36, at 694, 698 (discussing the role of feminist theorists and litigators in bringing to light the view that sex harassment is a species of sex discrimination).
court first held that sexually harassing conduct constituted discriminatory treatment within the meaning of Title VII. The early cases provided a legal definition for unwanted sexual behavior in the workplace, but required that the plaintiff demonstrate a tangible job detriment in connection with the harassment in order to gain judicial relief. In the first recorded case, Williams v. Saxbe, the D.C. Circuit court recognized that the retaliation suffered by the plaintiff was a result of discrimination based on her sex, and thus violated Title VII. The court held that the conduct of the plaintiff's supervisor "created an artificial barrier to employment which was placed before one gender and not the other, despite the fact that both genders are similarly situated in the workplace.

The Williams decision was followed by Barnes v. Costle, in which the court found a violation of Title VII when the plaintiff's job was abolished after she refused a supervisor's sexual advances. The Barnes court rejected the lower court's reasoning that the plaintiff was discriminated against because she refused her supervisor's sexual advances, not because she was a woman. Rather, the court found that "gender was an indispensable [sic] factor in the job-retention condition" faced by the plaintiff. The Barnes court furthered clarified how the conditioning of a tangible job benefit

39. See Williams v. Saxbe, 413 F. Supp. 654 (D.D.C. 1976), rev'd sub. nom. on other grounds, Williams v. Bell, 587 F.2d 1240 (D.C. Cir. 1978). The plaintiff established that her former employer, the Justice Department, discharged her in retaliation for refusing a sexual advance from her immediate supervisor. See id. at 655-57.


42. See id. at 657-59; see also Chan, supra note 40, at 4.

43. Williams, 413 F. Supp. at 659.

44. 561 F.2d 983 (D.C. Cir. 1977). In Barnes, the plaintiff claimed that, despite her repeated refusals, her supervisor made numerous sexual remarks and offers for after-work social activities and suggested that her employment status would be enhanced if she cooperated with his advances. See id. at 985. When the plaintiff definitively refused the supervisor's sexual advances, the supervisor belittled her, stripped her of her job duties and ultimately abolished her job. See id.

45. See id.

46. See id. at 990.

47. Id. at 992. The court stated that gender would not have been an indispensable factor if the employer had imposed the same condition on a male co-employee. See id.
on sexual favors came under the definition of sex discrimination by noting that, "but for his or her sex" the employee would not have faced the discriminatory treatment.48

These cases signaled the beginning of the acceptance of sexual harassment as a Title VII action. However, the courts remained hesitant to accept the notion that sexual harassment constituted sex discrimination.49 It was clear that the courts did not yet fully understand the ramifications of sexual harassment in the workplace.50 Nearly another decade passed before the courts recognized that sexual harassment without a tangible job detriment of an economic character was also a violation of Title VII.51

C. The EEOC Guidelines

The EEOC is an independent, bipartisan commission established by Title VII.52 The EEOC is charged with enforcing Title VII, and it has the power to issue regulations concerning claims under Title VII.53 Prompted by confusion surrounding sexual harassment as a form of sex discrimination under Title VII following cases such as Williams and Barnes, the EEOC issued guidelines providing a framework for analyzing sexual harassment claims.54 These guidelines, issued in 1980,55 define conduct that constitutes an actionable claim for sex discrimination and affirm the EEOC position that sexual harassment in employment violates Title VII.56 The EEOC

48. Id. at 990 n.55.
49. See 1 CONTE, supra note 1, §§ 2.1, 2.5.
50. See CHAN, supra note 40, at 4 (explaining that even after Williams, women who suffered from sexual harassment were denied relief unless they could demonstrate a tangible job detriment); Franke, supra note 36, at 698 (noting that courts trivialized the effects of sexual harassment as merely an inescapable result of the workplace becoming sexually integrated).
51. See Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67 (1986) (recognizing a cognizable claim under Title VII without a detriment to a tangible job benefit). In 1981, the D.C. Circuit Court recognized that discrimination with respect to "terms, conditions, or privileges" of employment could be found in a "substantially discriminatory work environment" regardless of whether any tangible job benefit was affected. See Bundy v. Jackson, 641 F.2d 934, 943-46 (D.C. Cir. 1981).
52. See ARTHUR GUTMAN, EEO LAW & PERSONNEL PRACTICES 7 (1993).
53. See id. The EEOC also enforces the Equal Pay Act, the Age Discrimination in Employment Act, a portion of the Rehabilitation Act, and the Americans with Disabilities Act. See id.
54. See 1 CONTE, supra note 1, § 2.1.
56. See 29 C.F.R. § 1604.11(a) (1997) [hereinafter EEOC Guidelines]. The EEOC Guidelines on sex discrimination provide that:
Guidelines recognize that an employer does not have to threaten an individual's employment directly in order for the terms and conditions of employment to be discriminatory. The EEOC Guidelines provide a broad definition of sexual harassment and extend the scope of liability for the harassing conduct. The EEOC also advises the courts to consider the totality of the circumstances in determining whether the conduct in question constitutes sexual harassment.

While EEOC rulings, interpretations, and opinions are not binding on federal courts, the Supreme Court recognized that EEOC actions "do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." These guidelines, and the subsequent application of the regulations by the courts, encouraged victims of sexual harassment to come forward in far greater numbers than had previously been recorded. Thus, the EEOC Guidelines were extremely important in the process of legitimizing sexual harassment as a social and legal issue. However, not all courts accepted the EEOC

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

Id.

57. See 29 C.F.R. § 1604.11 (1997); see also Oshige, supra note 30, at 572 (stating that, "in many ways, the EEOC guidelines expanded the basis for employment discrimination claims").

58. See 29 C.F.R. § 1604.11 (1997); see also 1 CONTE, supra note 1, § 2.8.

59. See 29 C.F.R. § 1604.11(b) (1997); see also 1 CONTE, supra note 1, § 2.8.


61. See 1 CONTE, supra note 1, § 2.8. In 1981, the year following the issuance of the EEOC Guidelines, the number of sexual harassment complaints filed with the EEOC climbed to 3,812, from 75 in 1980. See id. Also in 1981, the D.C. Circuit court endorsed the EEOC definition of sexual harassment without loss of a tangible job benefit as an actionable claim. See Bundy v. Jackson, 641 F.2d 934, 939 (D.C. Cir. 1981) (finding sexual harassment where sexual intimidation was a "normal condition of employment").

62. See 1 CONTE, supra note 1, § 2.1; see also David Benjamin Oppenheimer, Exacerbating the Exasperating: Title VII Liability of Employers for Sexual Harassment Committed by Their Supervisors, 81 CORNELL L. REV. 66, 115-16 (1995). The author notes that the EEOC Guidelines were highly controversial when proposed, with some critics fearing that employers would be burdened with trivial charges. See id.
framework, and the standards of liability in sexual harassment cases continued to be applied inconsistently.

D. Supreme Court Definition

Finally, in 1986 the United States Supreme Court decided its first sexual harassment case in *Meritor Savings Bank v. Vinson.* In this landmark decision, the Supreme Court unanimously held that sexual behavior directed at terms, conditions, and privileges of employment is a form of sex discrimination prohibited by the language of Title VII because it infers that harassment is based on the victim's sex. The Court thus ratified the approach of the EEOC and some lower courts.

The *Meritor* Court echoed the EEOC Guidelines and recognized two legal grounds for sexual harassment claims under Title VII: quid pro quo harassment and hostile work environment. Under quid pro quo harassment, a person of authority conditions employment or advancement on acquiescence to a sexual demand. By definition, quid pro quo sexual harassment involves the

However, the guidelines were soon heavily relied on by the courts and became widely accepted. See id.

63. See 1 CONTE, *supra* note 1, §§ 2.1, 2.8. Most courts agreed that employers should be vicariously liable in quid pro quo harassment cases, but courts split on whether employer knowledge was required to impose liability in hostile work environment cases. See id. § 2.9; see also Katz v. Dole, 709 F.2d 251 (4th Cir. 1983) (requiring employer notice of harassing conduct in order to impose liability); Craig v. Y & Y Snacks, Inc., 721 F.2d 77 (3d Cir. 1983) (holding that actual knowledge at the time of the employment decision is sufficient); Vinson v. Taylor, 753 F.2d 141 (D.C. Cir. 1985) (imposing absolute liability), aff'd in part, rev'd in part sub nom. *Meritor Sav. Bank v. Vinson,* 477 U.S. 57 (1986); Horn v. Duke Homes, Inc., 755 F.2d 599, 605 (3d Cir. 1983) (imposing strict liability).

64. 477 U.S. 57 (1986).

65. See id. at 64-65 (recognizing hostile environment claim of sexual harassment as actionable as sex discrimination under Title VII). The *Meritor* Court cited both the EEOC Guidelines and the Eleventh Circuit decision in *Henson v. City of Dundee,* 682 F.2d 897, 902 (11th Cir. 1982) as support for hostile work environment claims. See *Meritor,* 477 U.S. at 65, 67; see also Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991) (stating that a plaintiff establishes a prima facie case for sexual harassment when "she alleges conduct which a reasonable woman would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment"); Huddleston v. Roger Dean Chevrolet, Inc., 845 F.2d 900, 905 (11th Cir. 1988) (stating that prima facie case for sex discrimination can be established by showing a pattern of sexual harassment that subjects the employee to disparate treatment discrimination with respect to a term, condition, or privilege of employment).

66. See *Meritor,* 477 U.S. at 65; see also 29 C.F.R. § 1604.11(a) (1997).

67. See, e.g., Gary v. Long, 59 F.3d 1391, 1395-96 (D.C. Cir. 1995) (finding no
express or implied threat of loss of a tangible employment benefit.\(^{68}\)

The other possible ground for sexual harassment claims recognizes allegations that the employee had to endure a hostile work environment.\(^{69}\) Hostile work environment claims arise when harassing conduct is "sufficiently severe or pervasive 'to alter the conditions of [the plaintiff's] employment and create an abusive working environment.'"\(^{70}\) In *Harris v. Forklift Systems, Inc.*,\(^{71}\) the Supreme Court of the United States held that a hostile work environment can be established with allegations of sexual harassment. The Court stated that "[t]o establish a prima facie case, it is sufficient for the plaintiff to prove that the environment was objectively hostile or abusive and subjectively experienced as such by the plaintiff."\(^{72}\)

To prove a hostile work environment claim, a plaintiff must establish the following elements: (1) that the plaintiff was a member of a protected class; (2) that the plaintiff was subjected to unwelcome sexual harassment; (3) that the harassment was based on sex; (4) that the plaintiff's reaction to the harassment affected a tangible term, condition, or privilege of employment; and (5) that the employer knew or should have known of the harassment and failed to take prompt and appropriate remedial action.\(^{73}\)

**Quid pro quo** sexual harassment claims are based on allegations that an employee was subjected to unwanted sexual advances in exchange for job benefits. In *Henson v. St. Louis Community College*\(^{74}\), the court held that a hostile work environment claim can be established with allegations of quid pro quo sexual harassment. The court noted that "[a]n employer who subjects an employee to unwelcome sexual advances and makes conditional offers of benefits upon the acceptance of those advances is violating Title VII."\(^{75}\)

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Court attempted to define what constitutes a hostile or abusive work environment. The Court, in reviewing the totality of the circumstances, listed several factors relevant to determining whether an environment is hostile or abusive, but did not specifically require the presence of any single factor. These factors include "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance"; and any psychological harm to the employee. While not a precise test, the courts are guided by these factors to determine whether the conduct is merely vulgar or offensive, and not necessarily behavior constituting a Title VII violation.

Justice Scalia, in his concurring opinion, immediately recognized the difficulties with this vague standard. The courts have legitimized Justice Scalia's concern, displaying difficulty in applying the standard, which takes into account both subjective and objective factors, to sexual harassment cases.

Thus, the judiciary began to recognize that sexual harassment must be given a legitimate legal foundation to meet the goal of the Title VII sexual discrimination text. Yet, vague and contradictory standards used to evaluate the merits of a sexual harassment case

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72. See id. at 21-22.
73. See Harris, 510 U.S. at 23.
74. Id.
75. See id.
76. See id. at 24-25 (Scalia, J., concurring) (stating that the vague standard provided by the majority was "faithful to the inherently vague statutory language" of Title VII).
77. See Edward Cerasia II, Harris v. Forklift Systems, Inc.: An Objective Standard, But Whose Perspective?, 10 LAB. LAW. 253, 265 (1994) (stating that the emphasis on case-by-case analysis will serve to "muddy the waters"). The Harris Court established a two-prong test for evaluating a hostile environment claim: 1) an objective standard (i.e. whether a "reasonable person" would find the environment hostile or abusive); and 2) a subjective standard (i.e. whether the plaintiff can show that she actually perceived the environment to be hostile or abusive). See Harris, 510 U.S. at 20-21. However, decisions following Harris have struggled with determining from whose perspective to view the objective standard. See Cerasia, supra, at 265.
78. See Harris, 510 U.S. at 25 (Ginsburg, J., concurring). Justice Ginsburg recognized that Title VII focuses on instances where members of one sex are exposed to disadvantages in terms or conditions of employment to which members of the other sex are not exposed. See id.
remain hurdles that a plaintiff must surmount.

E. Additional Requirements: Welcomeness and Motive

It is now clear that victims of sexual harassment have redress under Title VII. However, the process of presenting a viable case is still onerous. In addition to establishing a prima facie case, the plaintiff also faces additional elements of welcomeness and motive.

1. Welcomeness

A plaintiff in a sexual harassment case must show that the conduct complained of was “unwelcome.” No such requirement is imposed upon plaintiffs claiming other forms of discriminatory harassment, which presume that the harassing conduct is unwelcome. The courts and the EEOC have legitimized the imposition of this additional element by emphasizing the fact that sexually-oriented exchanges between two adults are often reciprocal and welcome.

Unfortunately, the courts have been unable to clearly define the criteria to prove that the conduct was unwelcome. The judi-

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79. See Henson v. City of Dundee, 682 F.2d 897, 903-05, 909-911 (11th Cir. 1982). The Henson court articulated the elements of a sexual harassment claim as: (1) membership in a protected class; (2) subjection to unwelcome sexual harassment; (3) the harassment was based upon sex; (4) the employee’s reaction to the harassment affected a tangible term, condition or privilege of employment; and (5) the employer knew or should have known of the harassment and failed to take prompt and appropriate remedial action. See id.

80. See, e.g., Meritor Sav. Bank v. Vinson, 477 U.S. 57, 68 (1986) (“The graveness of any sexual harassment claim is that the alleged sexual advances were ‘unwelcome’”) (citing 29 C.F.R. § 1604.11(a)). Section 1604.11(a) provides that “[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct . . . constitute sexual harassment.” 29 C.F.R. § 1604.11 (a) (1997). See also Henson, 682 F.2d at 903 (relying on the EEOC guidelines to define unwelcome sexual conduct); Monnin, supra note 11, at 1160-66 (discussing the development of the unwelcomeness requirement).

81. See BARBARA LINDEMANN & DAVID D. KADUE, SEXUAL HARASSMENT IN EMPLOYMENT LAW 135 (1992) (noting that the unwelcomeness requirement is unique to sexual harassment); Monnin, supra note 11, at 1160-66.

82. See Brief for the United States and Equal Opportunity Employment Commission as Amici Curiae at 13, Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986) (No. 84-1979) (“Whereas racial slurs are intrinsically offensive and presumptively unwelcome, sexual advances and innuendo are ambiguous: depending on their context, they may be intended by the initiator, and perceived by the recipient, as denigrating or complimentary, as threatening or welcome, as malevolent or innocuous”).

83. See Monnin, supra note 11, at 1165 (noting that, although the majority of
cial struggle to apply the objective and subjective standards, previously discussed, is pronounced in the welcomeness determination, as courts also disagree on the proper perspective from which to view the standard. This issue of perspective in viewing hostility and welcomeness in sexual harassment cases is problematic, in that both have potential pitfalls. Applying the objective reasonable person standard may ignore very real differences in perception between men and women. On the other hand, use of the reasonable woman standard may work to further entrench a stereotype that women are weak, and in need of a separate standard.

In 1993, the EEOC proposed a middle ground standard, which inquired "whether a reasonable person in the same or similar circumstances would find the conduct intimidating, hostile, or abusive." However, these guidelines were withdrawn in 1994, and the courts must continue to muddle through this unclear issue.

84. See supra note 77 and accompanying text.
85. See, e.g., Meritor Sav. Bank v. Vinson, 477 U.S. 57, 58 (1986) (applying an objective standard of conduct); cf. Henson, 682 F.2d at 903 (applying subjective standard under which plaintiff must have regarded the conduct as undesirable or offensive).
86. See, e.g., Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991) (applying a "reasonable woman standard" in a Title VII sexual harassment case); Lipsett v. University of P.R., 864 F.2d 881, 898 (1st Cir. 1988) (noting that the Meritor Court did not settle the issue of whose perspective should be used to determine welcomeness and holding that the trier of fact must consider the perspective of both the victim and the harasser); Bennett v. Corroon & Black Corp., 845 F.2d 104, 106 (5th Cir. 1988) ("[a]ny reasonable person would have to consider these cartoons highly offensive to a woman . . . ."); Radtke v. Everett, 501 N.W.2d 155, 167 (Mich. 1993) (applying reasonable person standard and finding it sufficient to incorporate gender differences); Lehmann v. Toys 'R' Us, Inc., 626 A.2d 445, 458 (N.J. 1993) (using an objective reasonable standard to determine welcomeness, but using victim's subjective experiences in determining damages); Robert S. Adler & Ellen R. Pierce, The Legal, Ethical, and Social Implications of the "Reasonable Woman" Standard in Sexual Harassment Cases, 61 FORDHAM L. REV. 773, 775, 777 (1993) (discussing the debate over the proper standard for evaluating hostile environment claims).
87. See Bond, supra note 6, at 2494-95.
88. See id.
Whatever the perspective applied, determination of welcome-ness has required scrutiny of the plaintiff’s manner of speech, dress, and conduct.91 This exposure has been limited by the recent extension of Rule 412 of the Federal Rules of Evidence (Amended Rule 412) to civil as well as criminal cases.92 Amended Rule 412 provides a balancing test to determine what, if any, evidence of a plaintiff’s alleged sexual behavior or predisposition will be admissi-ble in court.93 Such evidence will only be admitted if the probative value is substantially greater than the risk of harm to the plaintiff.94 In addition, Amended Rule 412 shifts the burden to the defendant to prove that the evidence should be admitted, rather than forcing the plaintiff to fight for exclusion.95 However, despite this narrow-ing range of evidence available to defendants,96 whether sexual conduct was welcome still typically involves close questions of fact.97

91. See Meritor Sav. Bank v. Vinson, 477 U.S. 57, 68-69 (1986) (finding that the plaintiff’s sexually provocative speech and dress were relevant to whether she found the conduct complained of welcome). Following the lead of Meritor, several courts have based decisions of welcomeness on evidence of the plaintiff’s speech, dress, and/or conduct. See, e.g., Wilson v. Wayne County, 856 F. Supp. 1254, 1260 (M.D. Tenn. 1994) (defendant claimed that plaintiff’s non-sexual horseplay with a co-worker and an incident when she was wearing shorts while off-duty at the office indicated her willingness to have sex with him); Honea v. S.G.S. Control Serv., Inc., 859 F. Supp. 1025, 1030 (E.D. Tex. 1994) (denying summary judgment where defendant’s evidence against conduct being unwelcome was that plaintiff did not always wear a bra to work); Burns v. McGregor Elec. Indus., Inc., 989 F.2d 959, 963 (8th Cir. 1993) (reversing the lower court’s finding that plaintiff could not have found the work environment offensive because she previously posed nude in a national magazine, which was distributed throughout the workplace); Loftin-Boggs v. City of Meridian, 633 F. Supp. 1323, 1327 (S.D. Miss. 1986) (plaintiff’s use of coarse language and joking in the workplace contributed to the workplace environ-ment such that she could not find it oppressive), aff’d mem., 824 F.2d 971 (5th Cir. 1987) (holding that plaintiff must show, with some precision, a point at which she made it known to her supervisors and co-workers that their conduct was offensive); Kresko v. Rulli, 432 N.W.2d 764, 768-69 (Minn. Ct. App. 1988) (allowing evidence of plaintiff’s subsequent relationships with other men as relevant and proba-tive to the question of welcomeness).

92. See FED. R. EVID. 412. The amended Rule 412 limits the use of evidence of sexual behavior or sexual predisposition in both civil and criminal cases. See FED. R. EVID. 412(a)(1), (2). The Advisory Committee Notes specifically state that the Rule will be applicable in sexual harassment cases under Title VII. See FED. R. EVID. 412 advisory committee’s notes.

93. See FED. R. EVID. 412.

94. See id.

95. See id.

96. See Monnin, supra note 11, at 1210.

2. Motive

As well as the welcomeness requirement, courts tend to probe the context of alleged sexually harassing conduct and the underlying motivation of the individual, rather than finding discrimination per se in the statement or conduct itself. Courts still seem wedded to the idea that conduct which is sexual in nature is a personal issue between the parties or a natural result of employee interaction in the workplace.

F. Sexual Harassment: Unlawful Discrimination Under Title VII

The courts and the EEOC have pronounced that Title VII was enacted with the goal of ending discrimination by allowing members of protected classes to compete and perform in employment on the basis of their individual qualifications, free from the hindrance of membership in a protected group. The Meritor Court clearly states that Title VII is Congress' vehicle to "strike at the entire spectrum of disparate treatment of men and women in employment." Thus, after a long struggle for recognition in the courts, victims of sexual harassment claims are legally entitled to Title VII protection. The courts and the EEOC have made it clear that sexual harassment claims are recognized and governed by the same standards as other forms of discrimination covered by Title VII.
It appears that there should be a "level playing field" to assert sexual harassment and other Title VII claims. However, this is not the case, as demonstrated by the imposition of judicially created hurdles, such as welcomeness, in sexual harassment claims.

The "teeth" that make the goal of Title VII protections possible are the remedies available to victims of unlawful discrimination. Unfortunately, the indecision and hesitancy that delayed the recognition of sexual harassment as a legal claim still haunt the award of remedies. The courts are still reluctant to afford sexual harassment victims the full range of protection provided by Title VII. The victims have a legal definition for their experiences and an avenue for legal recourse, but even when a verdict is rendered against a harasser, claimants struggle to meet the Title VII objectives in the damages phase of the proceedings.

### III. THE RECOVERY PHASE

#### A. History of Title VII Remedial Provisions

Title VII provides relief for victims of unlawful employment discrimination. In particular, courts may, at their discretion, is-

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F.3d 744, 753 n.7 (3d Cir. 1995) (stating that the Supreme Court does not recognize a difference in standards applicable to racially and sexually hostile work environments); Daniels v. Essex Group, Inc., 937 F.2d 1264, 1270-72 (7th Cir. 1991) (noting that the standards for sexual and racial harassment are interchangeable).

104. See Gregory, supra note 98, at 744 (focusing on the disparity between race- and sex-based harassment claims).

105. See infra notes 191-227 and accompanying text.

106. See infra notes 191-227 and accompanying text.

107. See MACKINNON, supra note 1, at 27 (noting that, until 1976, sexual harassment was "literally unspeakable" because the experience had no name).


[if the court finds that the [employer] has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the [employer] from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to reinstatement or hiring of employees, with or without back pay (payable by the employer . . . responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability
sue injunctions to prohibit the employer from engaging in the unlawful conduct and order other action including reinstatement, hiring, back pay, and any other appropriate equitable relief.\textsuperscript{110}

1. Influence of the National Labor Relations Act

The remedy provisions of Title VII are believed to be modeled after section 10(c) of the National Labor Relations Act (NLRA).\textsuperscript{111} Monetary remedies under the NLRA have traditionally been restricted to those which can be classified as back pay.\textsuperscript{112} Congress apparently intended that Title VII relief would be similar.\textsuperscript{113}

However, courts and commentators have questioned the sufficiency of using the NLRA model in determining remedies for Title VII cases.\textsuperscript{114} The Supreme Court noted in \textit{Franks v. Bowman Transportation Co.}\textsuperscript{115} that section 706(g) of Title VII contains "broader discretionary powers" than section 10(c) of the NLRA.\textsuperscript{116} In addition, while the NLRA is enforced exclusively through the administrative and judicial processes of the NLRB,\textsuperscript{117} Title VII emphasizes individual action by allowing individuals to bring suit against their employers after exhausting their administrative remedies with the EEOC.\textsuperscript{118} Thus, analogies to limitations placed on monetary relief shall not accrue from a date more that two years prior to the filing of a charge with the [EEOC]. Interim earnings or amounts earnable with reasonable diligence by the person . . . discriminated against shall operate to reduce the back pay otherwise allowable.”

\textit{Id.}

\textsuperscript{110} See \textit{id.}


\textsuperscript{112} See Irving M. Geslewitz, Understanding the 1991 Civil Rights Act, 38 PRAC. LAW. Mar., 1992, at 57, 59 (defining backpay). Back pay is monetary relief in the form of compensation and benefits lost as a result of the discrimination less any interim earnings or benefits. See \textit{id.}

\textsuperscript{113} See Geslewitz, supra note 112, at 59; Davidson, supra note 111, at 742. See also 110 Cong. Rec. 6549 (1964).

\textsuperscript{114} See, e.g., Grebeldinger, supra note 12, at 329-30 (stating that the missions of Title VII and the NLRA are significantly different); Grimsley, supra note 17, at 215-16 (discussing the difference in the powers vested by the NLRA and Title VII.)

\textsuperscript{115} 424 U.S. 747 (1976).

\textsuperscript{116} \textit{Id.} at 769 n.29.


\textsuperscript{118} See 42 U.S.C. §§ 2000e-4 to -7; see also Grebeldinger, supra note 12, at 322-
drawn from the context of the NLRA are not persuasive. Title VII remedies require a more flexible and individualized approach than the NLRA model provides.

2. Congressional Action

The Equal Employment Opportunity Act of 1972 ("1972 Act") greatly expanded the coverage of Title VII. The 1972 Act focused on strengthening the powers of the EEOC and added the catch-all phrase "any other equitable relief" to the list of remedial provisions in Title VII. Still, the remedial provisions of Title VII were inadequate to ensure the viability of the individual action and private enforcement on which Title VII claims depend.

The Civil Rights Act of 1991 ("1991 Act") took a further step toward providing adequate remedies for victims of sexual harassment. Prior to the 1991 Act, circuit courts unanimously held that

24 (noting the differences in the remedial and enforcement provisions of the NLRA and Title VII); 1 KENT SPRIGGS, REPRESENTING PLAINTIFFS IN TITLE VII ACTIONS § 1.8 (1994) (noting the importance of the individual litigant's role in the Title VII process).

119. See Minna J. Kotkin, Public Remedies for Private Wrongs: Rethinking the Title VII Back Pay Remedy, 41 HASTINGS L.J. 1305, 1319-20 (1990) (discussing the contrasts between the remedial provisions in Title VII and the NLRA both in terms of legislative history and statutory language).

120. See Grebeldinger, supra note 12, at 322-24.


122. See id. The Equal Employment Opportunity Act of 1972 extended Title VII protection to employees of state and local governments, expanded limitation periods, lowered the minimum number of persons employed that render an employer subject to the provisions of Title VII to fifteen, and authorized the EEOC to file suits. See id.; see also Stacey Elizabeth Tjon Aasland, Case Comment, Civil Rights-The Constructive Discharge Doctrine and Its Applicability to Sexual Harassment Cases: Does It Matter What the Employer Intended Anymore? Hukkanen v. International Union of Operating Engineers, 3 F.3d 281 (8th Cir. 1993), 71 N.D. L. REV. 1067, 1071 (1995).

123. See Kotkin, supra note 119, at 1320.


125. See Kotkin, supra note 119, at 1368 (claiming that the Title VII remedies available in 1990 were inadequate for the types of claims most commonly asserted because they failed to provide sufficient incentive for victims to pursue the arduous course of federal litigation).

Compensatory and punitive damages were not available under Title VII. In addition to reversing several Supreme Court cases which had made it more difficult for a plaintiff to prevail against an employer in a discrimination suit, the 1991 Act made compensatory and punitive damages, expert witness fees, and jury trials available in cases of intentional employment discrimination, including sexual harassment. Guaranteeing the right to a jury trial is a significant advancement for victims of sexual harassment, who tend to be more successful when they are able to tell their stories to juries.

Opponents of the 1991 Act feared that the availability of compensatory and punitive damages would detract from the conciliatory objectives of Title VII. However, provisions of the 1991 Act explicitly provided that the conciliatory provisions be left untouched. The 1991 Act also incorporated caps on the compensatory and punitive damages available. In addition, the history of racial discrimination claims under 42 U.S.C. § 1981 suggests that the availability of compensatory and punitive damages does not necessarily diminish the role of conciliation proceedings.

Despite assuring the right to a jury trial and providing a measure of parity with the remedies available for claims of racial discrimination under 42 U.S.C. § 1981, a close reading of the 1991 Act reveals that recovery possibilities for cases of sex discrimination,

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127. See 2 CHARLES A. SULLIVAN ET AL., EMPLOYMENT DISCRIMINATION LAW § 15.1, at 54 n.3.
133. See Vorwerk, supra note 130, at 1029-30 (discussing the debate surrounding compensatory and punitive damage provisions in the 1991 Act).
134. See 1 SPRIGGS, supra note 118, §1.9 (discussing the 1991 Act).
and thus sexual harassment, are still restricted in ways that some forms of discrimination are not. For instance, there are no caps on recovery for actions based on race or ethnicity under 42 U.S.C. § 1981. As occurred with the 1972 Act, compromise led to dilution of a proper remedial scheme.

B. Title VII Remedial Objectives

Courts have held and commentators have stated that Title VII must be interpreted as espousing dual remedial purposes in its efforts to eradicate discrimination in the workplace. The purposes are (1) providing sufficient remedy to return the plaintiff to the point at which she would have been "but for" the unlawful discrimination, and (2) deterring employers from continuing prohibited conduct.

1. Make Whole Objective

The first major remedial purpose of Title VII is to make the individual victim of discrimination whole. The two major components of a make whole remedy include (1) eliminating the unlawful employment practice and (2) restoring the victim to a position where he or she would have been but for the discriminatory practice. The Supreme Court held that Congress intended to vest a variety of discretionary powers in the courts to make possible


136. See Hernicz, supra note 130, at 73.

137. See, e.g., Kotkin, supra note 119, at 3127 (stating that Congress, in enacting the 1972 Act, recognized the inadequacies of Title VII, but addressed the enforcement, rather than the remedial provisions); Geslewitz, supra note 112, at 61-62 (noting that the imposition of caps on damages in the 1991 Act reflects a compromise in Congress arising from concerns for the effect of unlimited damages on employers).


139. See infra notes 141-47 and accompanying text.

140. See infra notes 148-52 and accompanying text.

141. See Albemarle, 422 U.S. at 417.

142. See Grebeldinger, supra note 12, at 323 (citing the 1972 Conference Report, 118 CONG. REC. 7166, 7168 (1972) and explaining that the 1972 amendments provided the courts with wide discretion to fashion relief).
The "fashion[ing] of the most complete relief possible." The EEOC also supports the application of a wide range of remedial measures in enforcing Title VII. Further, the legislative history of section 706(g), while sketchy, supports the make whole approach to Title VII relief. These factors support the interpretation of Title VII relief as designed to restore a plaintiff to the position that would have been attained absent the unlawful discrimination.

2. Deterrence

The second primary purpose of Title VII is to deter future discrimination in the workplace. The Supreme Court supported the deterrence purpose in Albemarle Paper Co. v. Moody and McKennon v. Nashville Banner Publishing Co. The remedy fashioned for de-

143. Albemarle, 422 U.S. at 421; see also McKennon, 513 U.S. at 357-58 (stating that compensation for injuries caused by unlawful discrimination is an object of Title VII and the ADEA); Lussier v. Runyon, 50 F.3d 1103, 1111 (1st Cir. 1995) (stating that courts must fashion relief that "create[s] and maintain[s] a level, discrimination-free playing field and ... make[s] victims of discrimination whole"); Sinai v. New England Tel. & Tel. Co., 3 F.3d 471, 476 (1st Cir. 1993) ("[t]he purpose of damages under Title VII is to make the plaintiff whole"); Grebeldinger, supra note 12, at 325-26 (noting the support in the federal courts and the EEOC for remedial measures which provide the victim with complete relief).

144. See 29 C.F.R. § 1614. 501(a) (1997). The EEOC encourages that the remedy for individual cases of discrimination against public employees must consist of elements appropriate to the specific circumstances. See id.

145. See Vaas, supra note 29, at 457 (stating that the legislative history of the Civil Rights Act of 1964 consists mainly of speeches and debates and is not the kind of statutory background upon which courts like to rely); see, e.g., 118 CONG. REC. 7168 (1972); 110 CONG. REC. 6549 (1964); H.R. REP. NO. 88-914 (1963), reprinted in 1964 U.S.C.C.A.N. 2391.

146. See Vaas, supra note 29, at 457; see also Grimsley, supra note 17, at 214. As cited by Grimsley, the analysis accompanying the Conference Committee Report on the 1972 amendments stated that:

The provisions of this subsection are intended to give the courts the wide discretion exercising their equitable powers to fashion the most complete relief possible. In dealing with the present section 706(g) the courts have stressed that the scope of relief under that section of the Act is intended to make the victim of unlawful discrimination whole, and that the attainment of the objective ... requires that persons aggrieved by the consequences ... be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination.

Id. at 214 (quoting 118 CONG. REC. 7168 (1972) (emphasis added)).

147. See Grimsley, supra note 17, at 214.

148. See Grebeldinger, supra note 12, at 326.

149. 422 U.S. 405, 417 (1975) (stating that the absence of complete remedies fails to serve as incentive to shun dubious employment practices).

150. 513 U.S. 352, 358 (1995) ("Deterrence is one object of these statutes."); see also Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971) (noting the objec-
terrence purposes should not only punish the employer but should also provide assurance to other workers that the statutes do provide protection.151

Following these precedents, the courts have utilized Title VII remedies to meet these dual purposes. One important element of relief is front pay, which, when correctly applied, meets the dual objectives of Title VII.152

C. Remedial Similarities to the ADEA

The Age Discrimination in Employment Act (ADEA),153 originally enacted in 1967, prohibits age discrimination in the employment, discharge, promotion, or treatment of persons over the age of forty.154 The Supreme Court has noted that "the prohibitions of the ADEA were derived in haec verba from Title VII."155 While many of the enforcement and remedial provisions of the ADEA were based in part upon the Fair Labor Standards Act (FLSA),156 the remedial language in section 7(b) of the ADEA is broader than that of the FLSA, and more analogous to that of Title VII.157

Further similarity to Title VII is found in the ADEA's emphasis on individual remedial efforts, rather than the public interest.158 For example, both statutes are enforced by the EEOC, with the right to private action following an exhaustion of the EEOC's at-

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151. See Grebledinger, supra note 12, at 326.
152. See infra notes 172-88 and accompanying text.
154. See id.
156. Fair Labor Standards Act of 1938, ch. 676, 52 Stat. 1060-1069 (1938) (codified as amended at 29 U.S.C. §§ 201-219 (1994)). The FLSA was passed in 1938 to regulate issues affecting the "health, efficiency, and general well-being of workers" such as child labor, overtime, and minimum wages. Id. § 202. See also Lorillard, 434 U.S. at 582 (discussing Congress' intent to incorporate provisions of the FLSA into the ADEA); 113 CONG. REC. 31,248, 31,254 (1967) (noting the incorporation of FLSA enforcement techniques and provisions into the ADEA).
157. See Grebledinger, supra note 12, at 325 (noting the use of language such as "without limitation" and "such legal or equitable relief as may be appropriate" in the ADEA as analogous to the language found in section 706(g) of Title VII).
158. See id.
tempts "to eliminate the discriminatory practice or practices alleged and to effect voluntary compliance."\(^{159}\)

In addition, the courts have made it clear that the ADEA shares Title VII's purpose of eliminating discrimination in the workplace, through the dual objectives of complete relief and deterring future discrimination.\(^{160}\) Thus, despite some differences in language and statutory model, courts frequently apply Title VII case law to ADEA suits and vice versa.\(^{161}\)

In enforcing the ADEA and Title VII, the EEOC provides the courts with broad discretion in fashioning remedies so as to provide the "most complete relief possible."\(^{162}\) Accordingly, courts must award successful plaintiffs in employment discrimination cases a full range of retrospective relief and prospective relief.\(^{163}\)

**D. Fashioning Adequate Remedies**

Prospective relief is most often applied where a victim of discrimination has been illegally discharged from his or her position. Generally, voluntary termination of employment terminates the right to damages.\(^{164}\) Constructive discharge, however, developed as a protection for the employee who is forced to resign as a result of

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159. 29 U.S.C. § 626 (1994); see also Grebeldinger, *supra* note 12, at 325 (stating that, like Title VII, the ADEA allows for a private cause of action once the administrative remedies of the EEOC have been exhausted).


161. See Grebeldinger, *supra* note 12, at 325; see also McKennon, 513 U.S. at 358 (stating that the ADEA and Title VII share common substantive features and the common purpose of eliminating discrimination from the workplace); McKnight v. General Motors Corp. 973 F.2d 1366, 1969 n.1 (7th Cir. 1992) (stating that Title VII and the ADEA both vest broad discretion in the trial courts for awarding legal and equitable relief) (citing Syvock v. Milwaukee Boiler Mfg. Co., 665 F.2d 149, 162 n.19 (7th Cir. 1981); Wildman v. Lerner Stores Corp., 771 F.2d 605, 615-16 (1st Cir. 1985) (surveying ADEA and Title VII holdings in other circuits before adopting a front pay rule for ADEA cases); but see Blim v. Western Elec. Co., 731 F.2d 1473, 1481 (10th Cir. 1984) (per curiam) (Seth, J. concurring and dissenting) (stating that it is not appropriate to analogize to Title VII for determining ADEA damages).

162. 29 C.F.R. § 1614.501(a) (1997); but see Albemarle, 422 U.S. at 417 (limiting judicial discretion by holding that the relief granted must effectuate the purposes of the statute and minimize inconsistencies that could thwart those purposes).


164. See, e.g., Derr v. Gulf Oil Corp., 796 F.2d 340, 342-43 (10th Cir. 1986); Satterwhite v. Smith, 744 F.2d 1380, 1381 n.1 (9th Cir. 1984) (citation omitted).
unlawful employment discrimination. 165

Constructive discharge has been applied to sexual harassment cases. 166 However, the circuit courts continue to disagree as to the appropriate standard for determining whether an employee has been constructively discharged as a result of the sexual harassment. 167 This disparity provides yet another gray area for plaintiffs attempting to successfully negotiate “the shifting shoals of present-day federal employment discrimination law.” 168

IV. FRONT PAY AS A PROSPECTIVE REMEDY

A. Definition and History of Front Pay

Front pay is a monetary award intended to compensate the victim of discrimination for future economic losses likely to be suffered between the date of judgment and the time the victim reaches his or her rightful place. 169 The courts have defined front pay in a variety of ways, all of which stress the make-whole theory of


166. See Henson v. City of Dundee, 682 F.2d 897, 907 (11th Cir. 1982) (“when ‘an employee involuntarily resigns in order to escape intolerable and illegal employment requirements’ to which he or she is subjected to because of . . . sex . . . the employer has committed a constructive discharge in violation of Title VII”) (citation omitted).

167. See Goss v. Exxon Office Sys. Co., 747 F.2d 885, 887 (3d Cir. 1984) (“there is a divergence of opinion as to the findings necessary for such application [of the constructive discharge] in specific instances”).


169. See, e.g., Downes v. Volkswagen of Am., Inc., 41 F.3d 1132, 1141 n.8 (7th Cir. 1994) (defining front pay as a lump sum “representing the . . . value of the difference between the earnings [an employee] would have received in his old employment and the earnings he can expect to receive in his present and future, and by hypothesis inferior, employment”); Fortino v. Quasar Co., 950 F.2d 389, 398 (7th Cir. 1991) (stating that front pay monetizes the value of lost employment opportunities); Kolb v. Goldring, Inc., 694 F.2d 869, 874 n.4 (1st Cir. 1982); 2 SPRIGGS, supra note 118, § 29.45 (discussing the merits of front pay); 45C AM. JUR. 2D Job Discrimination § 2973 (1993) (discussing the appropriateness of front pay). The rightful place theory of relief, adopted by the Supreme Court in Franks v. Bowman Transportation Co., 424 U.S. 747 (1976), is designed to put the victim of discrimination in the position that she or he would have been in but for the unlawful conduct. The Franks Court notes that both houses of Congress affirmed the rightful place objective and the remedies necessary to attain the objectives of Title VII. See id. at 764.
Although front pay has not been expressly mentioned as a remedy in federal job discrimination laws, the overwhelming weight of authority holds that front pay is available under these laws in appropriate circumstances.

Considered “prospective relief,” front pay is awarded to victims of employment discrimination to compensate them for the continuing future effects of discrimination until they can be made “whole.” The courts exert wide discretion in deciding whether to award front pay. Courts traditionally consider the following factors to determine whether front pay is appropriate: (1) whether the plaintiff has been made whole by back pay; (2) whether front pay would be unduly speculative given the plaintiff’s prospects for continued employment; (3) whether reinstatement is appropriate or feasible; (4) whether liquidated damages have been awarded; and (5) whether the former employer’s financial condition is adverse.
The Supreme Court provided indirect support for front pay in *Albemarle* by emphasizing the general make-whole purpose of back pay under section 10(c) of the NLRA. In this class action, the plaintiffs alleged discrimination in the employer's seniority and employment testing program, forcing the Court to determine the standard for awarding back pay to victims of unlawful discrimination. Although the issue in this case was back pay specific, the court stressed the necessity of Title VII remedies that are "consonant with the twin statutory objectives." Thus, the Supreme Court set the standard that remedial plans must necessarily provide the victim with complete relief.

Front pay was then directly endorsed by the Fourth Circuit in *Patterson v. American Tobacco Co.*, which is viewed as one of the seminal cases in support of front pay. The *Patterson* court addressed potential remedies for victims of discriminatory practices by the employer and union in promoting employees to supervisory positions, as well as the assignment of job duties. The district court required the employer to implement a "bumping" system, whereby senior minority or female employees could bump junior employees from preferred jobs. The Fourth Circuit noted that, while Congress did not view Title VII as a vehicle for displacing innocent incumbents, Congress did not intend to leave victims without a remedy. The court reiterated the make whole emphasis in *Albemarle* by stating that a back pay award from the "time the employee was unlawfully denied a position until the date of judgment" front pay was denied where plaintiff was only 37 years old, not too old to begin new employment, and where defendant business' financial difficulties made it likely that the business would not survive. See 921 F. Supp. at 844.

176. *See Albemarle*, 422 U.S. at 418. "[T]he [district] court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of past as well as bar like discrimination in the future." *Id.* (quoting *Louisiana v. United States*, 380 U.S. 145, 154 (1965)).

177. *Id.* at 421. The Supreme Court set the standard for federal district courts to follow in fashioning Title VII remedies that serve the dual purpose of "eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." *Id.*

178. *Id.* at 267.

179. 535 F.2d 257 (4th Cir. 1976).

180. *See Belton*, supra note 170, § 10.3. The importance of *Patterson* was its adoption of front pay as the means of harmonizing the presumption of reinstatement and the anti-bumping sentiment to effectuate the rightful place objectives of Title VII. *See id.*

181. *See Patterson*, 535 F.2d at 263-64.

182. *Id.* at 267.

183. *See id.* at 269.
should be supplemented by an award of the "estimated present value of lost earnings that are reasonably likely to occur between the date of judgment and the time when the employee can assume his new position."[^184] Although the court did not use the term "front pay," the intent was clearly to endorse prospective monetary remedies.[^185]

An award of front pay also meets the deterrent objective of Title VII. As noted by the Supreme Court in *Albremsale*, employers who face only the penalty of an injunctive order will have less incentive to eschew unlawful employment practices.[^186] While the *Albemarle* court spoke of the threat of back pay awards as the "spur or catalyst" to force employers and unions to examine and improve their employment practices,[^187] this reasoning supports the remedy of front pay as well.

In practice, courts have made large front pay awards in egregious cases, attempting to end illegal conduct.[^188] Front pay awards, as such, have been recognized as a deterrent against future violations.[^189]

Clearly, courts and scholars have demonstrated support for front pay, even pointing to its logical necessity.[^190] Yet for many years, front pay has been overlooked, denied, or unnecessarily lim-

[^184]: Id.

[^185]: See id.

[^186]: See *Albremsale*, 422 U.S. at 417.

[^187]: See id. at 417-18.

[^188]: See, e.g., Boehm v. ABC Co., 929 F.2d 482, 488 (9th Cir. 1991) (applying California law to uphold an award that included six years of projected future earnings losses); Deloach v. Delchamps, Inc., 897 F.2d 815, 822 (5th Cir. 1990) (finding that a five year award of front pay was within court's discretion); Dominic v. Consolidated Edison Co., 822 F.2d 1249, 1258 (2d Cir. 1987) (awarding two years of front pay); Pease v. Alford Photo Indus., 667 F. Supp. 1188, 1203 (W.D. Tenn. 1987) ("[A]n award of front pay in this egregious case will aid in ending the sexual harassment of women at [defendant company] and will aid in rectifying the harm caused [plaintiff]"); Snow v. Pillsbury Co., 650 F. Supp. 299 (D. Minn. 1986) (awarding three years of front pay); Hansen v. Regency Corp., No. C8-96-1640, 1997 WL 30695, at *1 (Minn. Ct. App. Jan. 28, 1997) (upholding a front pay award of 12 years in a sexual harassment case); see also Shore v. Federal Express Corp., 777 F.2d 1155 (6th Cir. 1985) (upholding the award of front pay in the situation but remanding for further determination of the amount).

[^189]: See EEOC v. Prudential Fed. Sav. & Loan Ass'n, 763 F.2d 1166, 1172 (10th Cir. 1985) (citing Koyen v. Consolidated Edison Co., 560 F. Supp. 1161, 1168 (S.D.N.Y. 1983)). The courts have the authority to authorize future damages as compensation for victims of discrimination and to deny that authority would remove a deterrent force against future violations. See id.

[^190]: See 2 SPRIGGS, supra note 118, § 29.45 ("Few concepts are more doctrinally sound than front pay").
ited as a remedy. The courts have tightly restricted the conditions under which front pay may be granted, unnecessarily showing a strong preference for the remedies of back pay and reinstatement.

B. Limitations of Back Pay

Back pay is the preferred remedy of the NLRA, on which the remedial provisions of Title VII were based. Courts in both Title VII and ADEA cases have presented back pay as a presumptive element of damages in a situation of illegal discharge. While not an automatic entitlement, back pay is awarded at the discretion of the court and should only be denied in the most limited of circumstances.

Because of its prospective coverage, front pay is a supplement to, not a replacement for, back pay. Courts will first determine whether the back pay awarded provides adequate remedy to make the plaintiff whole for the injuries caused by the discrimination, before considering front pay. However, the courts must be careful not to discount the necessity of front pay in reaching the “make whole” objective. The logical extension of the argument that

191. See supra notes 111-13 and accompanying text.
196. See, e.g., Patterson v. American Tobacco Co., 535 F.2d 257, 269 (4th Cir. 1976) (“back pay . . . until the date of judgment . . . should be supplemented by an award equal to the estimated present value of lost earnings that are reasonably likely to occur between the date of judgment and the time when the employee can assume his new position”); Grimsley, supra note 17, at 212 (“[f]ront pay is an affirmative order designed to compensate the plaintiff for economic losses that have not occurred as of the date of the court decree, but that may occur as the plaintiff works towards his or her rightful place”); 2 SPRIGGS, supra note 118, § 29.45 (“[f]ront pay is the pay to which a discriminatee is entitled from judgment day (end of back pay) until she reaches her rightful place”).
front pay is merely a continuation of back pay designed to make
the plaintiff whole leads to the conclusion that “prohibition of
front pay constitutes a prospective denial of back pay.”

Front pay and back pay must work together because each is in-
tended to compensate for different periods of harm. Rarely will a
plaintiff be “made whole” and reach his or her “rightful place” as of
judgment day with only an award of back pay. Until the plaintiff
has had the opportunity to move into the position denied by unlaw-
ful discrimination, he or she has not been fully compensated under
Title VI.

Moreover, there is danger in restricting the plaintiff to losses
sustained from the date of discharge to the date of the verdict or
judgment. It is possible that such a policy would encourage the
employee to delay the judgment date as long as possible in order to
obtain the benefit of increased verdicts by the mere passage of
time.

Clearly, there are risks inherent in limiting Title VII awards to
back pay alone. The courts should not overlook the possibility that
front pay is required as post-judgment compensation for earnings
lost between judgment day and attainment of the rightful job post
when fashioning remedies under Title VII.

C. Preference for Reinstatement

1. Judicial Preference, Not Statutory Mandate

Even where courts have recognized the need for prospective
relief, there has been a strong preference for reinstatement. In

197. Grimsley, supra note 17, at 224.
198. See Shore v. Federal Express Corp., 777 F.2d 1155, 1158 (6th Cir. 1985)
(stating that the purpose of front pay is compensation for “the post-judgment ef-
facts of past discrimination”).
199. See 2 SPRIGGS, supra note 118, § 29.45.
200. See id.; see also Patterson, 535 F.2d at 269 (stating that some victims of dis-
crimination “will be unable to move immediately into jobs to which their seniority
and ability entitle them” and awards “should be fashioned to compensate them
until they can obtain a job commensurate with their status”). Patterson was one of
the earliest cases to determine class-wide front pay. See 2 SPRIGGS, supra note 118, § 29.45.
201. See Koyen v. Consolidated Edison Co., 560 F. Supp. 1161, 1169 (S.D.N.Y.
1983).
202. See id. at 1169.
203. See 2 SPRIGGS, supra note 118, § 29.45.
204. See, e.g., Ford Motor Co. v. EEOC, 458 U.S. 219 (1982) (holding front pay
support of this preference, courts rely on the fact that the remedial provisions of Title VII and the ADEA specifically list reinstatement as a form of relief, while not mentioning front pay. However, merely by listing reinstatement, the statutes do not mandate preferential consideration of reinstatement. The Supreme Court, in Franks v. Bowman Transportation Co., ruled that remedies not specifically mentioned in statute are no less available than those listed. The Franks Court addressed the issue of whether seniority relief was available under section 706(g) of Title VII, even though it was not expressly listed as a remedy. Noting that the 1972 amendments to the Civil Rights Act affirmed the breadth of discretion Congress granted to courts in awarding appropriate remedies, the Court held that a potential remedy should not be disregarded merely because Congress did not mention it specifically in the remedial language. Following this, the courts have recognized that Title VII grants the discretion to determine remedies based on the facts of each case, rather than on preferential language.

Likewise, reliance on the NLRA model and its preference for reinstatement fails to support a reinstatement preference in Title VII actions. As previously discussed, the goals of Title VII differ significantly from those of the NLRA, and the discretion afforded to the courts in fashioning remedial provisions reflects those differences.

Finally, the courts seem to view reinstatement as the best means to meet the policy objectives of the statutes and the EEOC
Statement of Remedies and Relief.\textsuperscript{214} However, these arguments also assume a preference that is not explicit in the language and ignore not only the difficulties of reinstatement,\textsuperscript{215} but also the advantages of front pay.\textsuperscript{216}

2. \textit{Difficulties With Reinstatement}

Because of this judicial preference, the court will generally exercise its discretion to award the plaintiff front pay only where the remedy of reinstatement is not appropriate and when the plaintiff has not yet found comparable work.\textsuperscript{217} There are several potential difficulties created by reinstatement.\textsuperscript{218} The most frequent reason for finding reinstatement impracticable is that the relationship between employee and the former employer has been irreparably damaged by hostility such that a productive working relationship would be impossible.\textsuperscript{219} In such cases, the court may exercise its

\begin{footnotesize}
\begin{enumerate}
\item[214.] See Grebeldinger, \textit{supra} note 12, at 330-31.
\item[215.] See id. at 330-31; see also infra notes 217-26 and accompanying text.
\item[216.] See Grebeldinger, \textit{supra} note 12, at 332-33; see also \textit{supra} notes 173-89 and accompanying text.
\item[217.] See, e.g., Bruno v. Western Elec. Co., 829 F.2d 957, 966 (10th Cir. 1987) (reversing denial of front pay as a matter of law and remanding for determination of front pay availability); Nord v. United States Steel Corp., 758 F.2d 1462, 1474 (11th Cir. 1985) (noting that front pay is a possible remedy where reinstatement is not feasible); Whittlesey v. Union Carbide Corp., 742 F.2d 724, 728 (2d Cir. 1984) (awarding front pay where the employer-employee relationship was irreparably damaged); Mosley v. Clarksville Mem’l Hosp., 574 F. Supp. 224, 237 (M.D. Tenn. 1983) (awarding front pay under the discretionary equitable authority of the court); see also \textit{supra} note 170, § 10.5 (explaining the discretion of the courts to award front pay where reinstatement is inappropriate); Geslewitz, \textit{supra} note 112, at 59 (stating that some courts award front pay or projected earnings when the normal remedy of reinstatement was found to be either unworkable or unfeasible).
\item[218.] See Grebeldinger, \textit{supra} note 12, at 332-39 (discussing the difficulties of reinstatement). The author provides five significant problems created by reinstatement: (1) the passage of time due to litigation may make reinstatement impracticable for a variety of reasons; (2) reinstatement might require the “bumping” of another employee; (3) the workplace may still be hostile and even retaliatory; (4) the work relationship may not have been satisfactory for the parties, even aside from the discriminatory conduct; (5) and the court would need to keep continued jurisdiction over the workplace to assure compliance with the reinstatement. \textit{See id}.
\item[219.] See, e.g., Wildman v. Lerner Stores Corp., 771 F.2d 605, 615-16 (1st Cir. 1985); Nord v. United Steel Corp., 758 F.2d 1462, 1473 (11th Cir. 1985); Whittlesey v. Union Carbide Corp., 742 F.2d 724, 739 (2d Cir. 1984); Maxfield v. Sinclair Int’l Corp., 766 F.2d 788, 795-97 (3d Cir. 1985); Shore v. Federal Express Corp., 777 F.2d 1155, 1159 (6th Cir. 1985); see also \textit{supra} note 170, § 10.6 (discussing the claim that reinstatement is impracticable).
\end{enumerate}
\end{footnotesize}
discretion not to order reinstatement, rather than force the victim back into an atmosphere of hostility.\textsuperscript{220}

However, front pay is not awarded in lieu of reinstatement when the hostility claimed by the plaintiff is merely the inevitable bad feelings resulting from the conclusion of an employment discrimination case.\textsuperscript{221} The court views a plaintiff's request for the "alternative remedy" of front pay due to a disinclination to return to the employer with an extremely critical eye.\textsuperscript{222} This preference for reinstatement can be especially harsh in its application to sexual harassment claims.

At the point in the proceedings when damages are determined, it has already been held that the plaintiff was a victim of sexual harassment. Whether subjected to quid pro quo harassment or to a hostile work environment, there can be no question that the workplace was an intolerable place for the victim to work. The courts have determined that the damage suffered by the plaintiff is real.\textsuperscript{223} Yet, the court's preference in providing prospective relief is to send the victim back into this environment.\textsuperscript{224} This is often an unreasonable preference.

Front pay is also preferable to reinstatement when returning the plaintiff to the former position would require "bumping" someone else out of a job.\textsuperscript{225} Courts have provided factors to determine whether to bump an incumbent.\textsuperscript{226} In most cases, this incumbent is innocent of any wrongdoing in the situation and becomes yet another victim.

When a sexual harassment case has reached the remedies

\textsuperscript{220} See McKnight v. General Motors Corp., 973 F.2d 1366, 1370 (7th Cir. 1992) (noting that, although reinstatement is usually the preferred remedy, it is not always required); Fitzgerald v. Sirloin Stockade, Inc., 624 F.2d 945, 957 (10th Cir. 1980) (upholding front pay in lieu of reinstatement where defendant had engaged in psychological warfare against plaintiff).


\textsuperscript{222} See Price v. Marshall Erdman & Assoc., Inc., 966 F.2d 320, 325 (7th Cir. 1992) (holding that plaintiff's disinclination to return to former employer must be rational and sincere and not merely a maneuver to get front pay).


\textsuperscript{224} See supra notes 204-22 and accompanying text.


stage, it has already been established that a victim was either actu-
ally or constructively discharged from a workplace environment
that was hostile or abusive. Further, it may have been determined
that reinstatement was not appropriate either because the relations
between the victim and the former employer have deteriorated or
because reinstatement would disrupt the employment of others.
Even in these extreme cases, however, front pay is still not auto-
matic.227 This remaining hesitancy to award front pay, even when it
seems logically necessary to make the plaintiff whole, may lie in the
judicial concern that front pay as a future damage is speculative.228

3. Reinstatement Versus Front Pay Under the ADEA

Reinstatement has also been the preferred prospective remedy
in ADEA cases.229 Early ADEA cases considering prospective relief
reflect a conflict among the circuits regarding the appropriateness
of front pay in lieu of reinstatement.230 However, this conflict
seems to have been resolved.231 Recent ADEA cases have shown an
increased willingness to award front pay and to extend the award
period for a greater period of time,232 a trend which should, in
turn, benefit plaintiffs in sexual harassment cases.

227. Cf. Davis v. Combustion Eng’g, Inc., 742 F.2d 916, 922-23 (6th Cir. 1984)
(“Front pay does not lend itself to a per se rule. It is neither mandated nor pro-
hibited by the [ADEA]. Rather, it is but one of a broad range of remedial meas-
ures available under the ADEA”).

228. See infra notes 233-43 and accompanying text; see also Loeb v. Textron,
Inc., 600 F.2d 1003, 1013 (1st Cir. 1979).

229. See EEOC v. Prudential Fed. Sav. and Loan Ass’n, 763 F.2d 1166, 1172-73
(10th Cir. 1985) (stating that reinstatement is the preferred remedy and should be
ordered whenever possible). The court recognized the legitimacy of front pay, but
remanded for an articulation of why future damages were more appropriate in this
case than reinstatement. See id.

230. See, e.g., Prudential, 763 F.2d at 1172 (discussing the various decisions re-
garding reinstatement in lieu of front pay); Davis v. Combustion Eng’g, Inc., 742
F.2d 916, 922 (6th Cir. 1984) (discussing the conflict among the circuits).

231. See Prudential, 763 F.2d at 1172.

232. See, e.g., Padilla v. Metro-North Commuter R.R., 92 F.3d 117, 125-26 (2d
Cir. 1996) (awarding front pay for more than 20 years), cert. denied, 117 S. Ct. 2453
(1997); Tyler v. Bethlehem Steel Corp., 958 F.2d 1176, 1189 (2d Cir. 1992) (af-
firning an award of front pay for 17 years); Buckley v. Reynolds Metals Co., 690 F.
D. A Call for Greater Acceptance of Front Pay

1. Overcoming Fear of Undue Speculation

In addition to overcoming a preference for reinstatement, proponents of front pay also contend with the prejudice against front pay as being inherently indefinite and speculative. Plaintiffs have been denied front pay because courts found the evidence of future damages insufficient to warrant prospective relief. However, other courts, while recognizing the speculative nature of front pay, have not automatically objected to front pay relief, finding that uncertainty should be resolved in favor of the injured party. Courts in employment discrimination cases have drawn an analogy to the speculation of future earnings in tort litigation such as breach of employment contract and personal injury. Courts and juries regularly make these decisions and therefore possess ample experience in assessing damages for future loss of earnings in Title VII cases.

In addition, the mere fact that damages may be difficult to

233. See Wilcox v. Stratton Lumber, Inc., 921 F. Supp. 837, 844 (D. Me. 1996) (awarding compensatory and punitive damages, but denying front pay because the court found plaintiff's testimony about limited prospects for similar employment was speculative and not supported by any expert testimony).

234. See Eldred v. Consolidated Freightways Corp., 907 F. Supp. 26, 28 (D. Mass. 1995) (speculative inquiry precluded award of front pay); Easter v. Jeep Corp., 538 F. Supp. 515, 521 (N.D. Ohio 1984) (finding front pay inappropriate in sexual harassment case where "evidence adduced at the hearing [did not] form any basis for an award of future damages"). The Easter court held that future damages can only be compensated for when they are reasonably certain to result. See 538 F. Supp. at 521. See also McKnight v. General Motors Corp., 973 F.2d 1366, 1372 (2d Cir. 1992). The McKnight court held that the plaintiff must provide the necessary data to calculate a reasonably certain front pay award including such factors as (1) the length of time the plaintiff expected to work for the defendant, (2) the discount rate, and (3) the amount of the award. See id. at 1372.

235. See Kotkin, supra note 119, at 1377; see also Barbour v. Merrill, 48 F.3d 1270, 1280 (D.C. Cir. 1995) (holding that front pay should not be denied merely because some speculation is necessary); Dominic v. Consolidated Edison Co., 822 F.2d 1249, 1258 (2d Cir. 1987) (finding that award of front pay is within judge's equitable discretion); Wildman v. Lerner Stores Corp., 771 F.2d 605, 616 (1st Cir. 1985) (finding district court has discretion to award front pay, though speculative, upon consideration of circumstances of case).

236. See Barbour v. Merrill, 48 F.3d 1270, 1280 (D.C. Cir. 1995).

237. See id. (holding that courts are capable of resolving the uncertainties of a front pay award); Koyen v. Consolidated Edison Co., 560 F. Supp. 1161, 1167-69 (S.D.N.Y. 1983) (stating that courts and juries can readily decide an award of prospective losses in a case upon its individual facts).
compute should not exonerate a wrongdoer from liability. The oft-cited case of Koyen v. Consolidated Edison Co., an ADEA case, held that the wrongdoer must "bear the risk of the uncertainty which his own wrong has created." Koyen held that this imposition of risk and the duty to mitigate the damages suffered by the plaintiff are public policy considerations that defeat a blanket rejection of front pay merely because it may require a measure of speculation.

Courts have also found that front pay awards can be made much less uncertain and speculative by considering some of the inherent and court-implied limitations of front pay. The critical question seems to be whether the court, in considering all of the applicable circumstances, finds the speculation of a front pay award to be "undue."

2. Inherent Controls on Front Pay Awards

Front pay is intended to be temporary in nature. Therefore,
should front pay be awarded, the courts generally limit the award to a relatively brief period of time. The time period allotted for a front pay award is typically that which is shown to be sufficient to enable the plaintiff to secure alternative comparable employment. The courts impose upon this time frame a presumption that the plaintiff is searching for work in a fair job market.

An illegally discharged Title VII plaintiff has a duty to mitigate damages. The principle of mitigation requires a victim to take reasonable steps to minimize the harm, or risk having the award of damages reduced. Known in tort law as "avoidable consequences," mitigation in employment discrimination cases is measured by a test of reasonable diligence. Implicit in the front pay doctrine, then, is the plaintiff's duty to mitigate damages through a reasonable search for comparable employment. Further, in or-

F. Supp. 1408, 1416 (M.D. Fla. 1987) (characterizing front pay as a "short-term alternative"), aff'd in pertinent part, 863 F.2d 1503, 1506 (11th Cir. 1989). 245. See Duke v. Uniroyal Inc., 928 F.2d 1413, 1424 (4th Cir. 1991) ("Because of the potential for windfall, [the] use [of front pay] must be tempered"). 246. See, e.g., Dominic v. Consolidated Edison Co., 822 F.2d 1249, 1258 (2d Cir. 1987) (awarding two years of front pay as reasonable time to find comparable employment); Goss v. Exxon Office Sys. Co., 747 F.2d 885, 889-91 (3d Cir. 1984) (affirming the trial court's front pay award for period of four months to cover reasonable expected period of job loss); see also David A. Cathcart, Emerging Standards Defining Contract, Emotional Distress, and Punitive Damages in Employment Cases, SB36 A.L.I.-A.B.A. 1507, 1544 (1997) ("Federal courts may award front pay in lieu of reinstatement for a period of time until the plaintiff is likely to become reemployed"). 247. See Briggs v. City of Madison, 536 F. Supp. 435, 447 (W.D. Wis. 1982) ("Nothing in [Title VII] indicates that the employer's liability extends to conditions of the marketplace which it did not create"). 248. See Whittlesey v. Union Carbide Corp., 742 F.2d 724, 728 (2d Cir. 1984). The court stated that an award of front pay "does not contemplate that a plaintiff will sit idly by and be compensated for doing nothing, because the duty to mitigate damages by seeking employment elsewhere significantly limits the amount of front pay available." Id. (citing Koyen v. Consolidated Edison Co., 560 F. Supp. 1161, 1168 (S.D.N.Y. 1983)). The Koyen court defined mitigation as reasonable efforts by the plaintiff to secure gainful employment given the available job market. See 560 F. Supp. at 1168 (footnote omitted); see also Ford Motor Co. v. EEOC, 458 U.S. 219, 251 & nn.14-15 (1982) (holding that a plaintiff in an employment discrimination action has the same duty to mitigate as a plaintiff bringing tort or breach of contract claims). 249. See Hunter v. Allis-Chalmers Corp., 797 F.2d 1417, 1427 (7th Cir. 1986). 250. See id. In Hunter, the plaintiff applied to only 16 employers in five years and worked only sporadically in that time. See id. at 1427-28. The court found that his efforts did not constitute reasonable diligence. See id. at 1428. 251. See Cassino v. Reichhold Chems., Inc., 817 F.2d 1398, 1347 (9th Cir. 1987) ("It is clear that front pay awards, like back pay awards, must be reduced by the amount plaintiff could earn using reasonable mitigation efforts"); Reneau v.
der to receive an award of front pay the plaintiff must be available, willing, and able to work. Thus, a discharged victim of discrimination cannot sit idly by, but must fulfill the duty to mitigate damages by making reasonable efforts to obtain gainful employment in the available market.

It has been argued that the potential of the more attractive remedy of front pay could discourage settlement. However, courts have determined that this institutional risk is balanced against the defendants' increased inclination to compromise with potential liability for front pay.

3. Ease of Administration

Early cases addressing prospective monetary remedies struggled with the proper method of implementing front pay. However, more recent cases have utilized a variety of effective methods. In general, for the award to be precise, it should be gauged to the specific difference between the actual earnings of the injured employee and those the victim would have made had he or she been in the rightful place. There are a variety of methods for implementing an award of front pay, depending on the circumstances of the case. For instance, when front pay is only a temporary substitute for reinstatement until an appropriate position becomes available, courts have made periodic awards based on the

Wayne Griffin & Sons, Inc., 945 F.2d 869, 870 (5th Cir. 1991) ("Front pay may be denied or reduced when the employee fails to mitigate damages by seeking other employment"); EEOC v. Kallir, Philips, Ross, Inc., 420 F. Supp. 919, 925 (S.D.N.Y. 1976), (allowing the plaintiff a broad range of reasonable conduct in conducting a job search and giving the plaintiff the benefit of every doubt), aff'd, 559 F.2d 1203 (2d Cir. 1977).

252. See, e.g., Floca v. Homecare Health Servs., Inc., 845 F.2d 108, 112-13 (5th Cir. 1988) (denying front pay when plaintiff returned to school); Wehr v. Burroughs Corp., 619 F.2d 276, 283-84 (3d Cir. 1980) (holding the question of front pay was not properly before the court where plaintiff, formerly an engineer, entered law school following illegal discharge and had specifically disclaimed any interest in reinstatement).

253. See Koyen, 560 F. Supp. at 1167-69; see also Kallir, 420 F. Supp. at 926-27 (allowing the plaintiff a broad range of reasonable conduct in conducting a job search).


255. See Whittlesey, 742 F.2d at 728.

256. See 2 SPRIGGS, supra note 118, § 29.46.

257. See infra notes 258-61 and accompanying text.

258. See 2 SPRIGGS, supra note 118, § 29.46.
difference between the specific earnings in each time frame. This requires courts to make up the difference between the victim and an actual or hypothetical person in the rightful place for an extended period of time, particularly when it appears unlikely that the victim will find another job paying as much as the former position. "Red circling," a method most frequently used in seniority discrimination cases, allows the victim to maintain wage status while training for a position that the victim might have advanced to earlier but for unlawful discrimination.

When front pay is a permanent substitute for reinstatement, the court may rely on the expert testimony provided to estimate a lump-sum amount of front pay at the time of judgment, reflecting reduction to present value. Whatever method is chosen, courts should not be hindered by the seeming lack of presumptive entitlement to front pay. Instead, courts should focus on fashioning the most complete and fair remedy possible from the broad range of remedial measures available.


260. See Padilla v. Metro-North Commuter R.R., 92 F.3d 117, 125-26 (2d Cir. 1996) (upholding 23 years of front pay compensation to victim of unlawful demotion in violation of the ADEA). Because the plaintiff had worked on the rails for more than 20 years, he had obtained specialized skills, but lacked the higher education necessary to find a job that would pay a comparable salary. See id. at 124. The plaintiff was awarded front pay equal to the difference between the salary after the unlawful demotion and the salary of the rightful place position until he reached his pension when he is 67 years old. See id.

261. See United States v. United States Steel Corp., 371 F. Supp. 1045, 1046 (N.D. Ala. 1973); see also BELTON, supra note 170, § 10.23. The theory behind red circling is that the victim should not bear the cost of remedying the employer's past discriminatory practices. See id.

262. See Tyler v. Bethlehem Steel Corp., 958 F.2d 1176, 1189 (2d Cir. 1992) (affirming award of $667,000 of front pay after reduction for present value). In Tyler, expert testimony was presented as to expected income, future work-life and the possibility of earnings from other employment. See id. The amount awarded was to cover an expected work-life of 17 years, with each year averaging substantially less than the victim had been making. See id.

263. See BELTON, supra note 170, § 10.5. Discussing the fact that the Albemarle presumptive entitlement rule is applied to back pay and reinstatement, but is rarely discussed in connection with front pay, even though it seems equally applicable. See id.

264. Cf. Davis v. Combustion Eng'g, Inc., 742 F.2d 916, 922-23 (6th Cir. 1984) ("[Front pay] is but one of a broad range of remedial measures available under the ADEA"); see also BELTON, supra note 170, § 10.5.
V. CONCLUSION

Sexual harassment carries substantial costs to individuals, employers, and society. The development of sexual harassment as a Title VII violation has no precise statutory mooring. Rather, it is the courts that have made sexual harassment legally actionable conduct. Having originated as a piecemeal administrative and judicial construct, the legal status of sexual harassment continues to develop as a patchwork of judicial opinions, and it is therefore subject to judicial change.

Title VII was enacted to eliminate prevailing sexist prejudices and sexual stereotypes from the workplace. However, the imposition of additional "elements" necessary to prove a case of sexual harassment suggest that such prejudices and stereotypes are still present, not only in the workplace, but in the judiciary as well. Congress clearly intended the language of Title VII to be read broadly in order to eliminate the vestiges of discrimination in employment and to fully compensate its victims. Yet, courts have been painfully slow to grant the full range of remedies available to successful plaintiffs, deferring, instead, to judicially created preferences with no statutory mandate. While it is understandable that courts wish to guard against making windfall awards to victims, it is a far greater atrocity to allow an employer, who has been found to have violated Title VII, to dictate the terms of the victim's recovery.

Front pay can be an effective tool for meeting the dual objectives of Title VII by serving to make the victim of discrimination whole and by deterring the employer from future discriminatory conduct. While front pay may not be appropriate in every case, it should be given the same presumptive consideration as reinstatement when the court elects to fashion a prospective remedy.

Courts have been granted the necessary discretionary authority to establish a fair and equitable process and result for individuals litigating sexual harassment cases. This authority must continue to manifest itself in case law that reflects the ever-evolving nature of the workplace and grants victims of sexual harassment the totality of rights, protections, and remedies provided by Title VII.

Elizabeth Papacek