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The Forgotten Interest Group: Reforming Title VII to Address the Concerns of Workers While Eliminating Sexual Harassment

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I. INTRODUCTION

Since 1980, Equal Employment Opportunity Commission ("EEOC") guidelines have made employers liable for harassment perpetrated by their agents and supervisory employees,[1] and, in some cases, for harassment occurring between co-workers in their employ.[2] In 1991, Congress amended Title VII (the "Act") to provide compensatory and punitive damages for victims of sexual

1. The guidelines state that an employer is liable for sexual harassment perpetrated hy its agents or supervisory employees "regardless of whether the specific acts complained of were authorized or even forhidden by the employer and regardless of whether the employer knew or should have known of their occurrence." EEOC, Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(c) (1994).

2. The guidelines state that "[w]ith respect to conduct between fellow employees, an employer is respensible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action." 29 C.F.R. § 1604.11(d).

harassment.[3] The increased damages heightened the stakes in lawsuits concerning employer liability for sexual harassment, and thus provided increased incentives for employers to implement sexual harassment policies and to discipline harassers.

The extant EEOC guidelines already had defined sexual harassment broadly to include "verbal or physical conduct of a sexual nature . . . [when] 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."[4] The 1991 amendments thus aimed to transform personal interaction between men and women in the workplace, not only in a supervisory context but also between fellow workers. Responding to the urgings of feminist intellectuals,[5] Congress created a statute-driven revolution of gender attitudes in the workplace, a major victory for feminism.

Even as the amendments advanced the interests of feminists in deterring harassment through increased compensation for victims, however, Title VII's procedural protections continued to safeguard the interests of employers charged with harassment under the Act.[6] In order to pursue a claim of sexual harassment, a woman[7] must first file

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3. Civil Rights Act of 1991, § 102, Pub. L. No. 102-166, 105 Stat. 1071, 1072, codified at 42 U.S.C. § 1981a (1988 & Supp. 1994).

4. 29 C.F.R. § 1604.11(a).

5. See, for example, Deborah L. Rhode, *Justice and Gender: Sex Discrimination and the Law* 235-36 (Harvard U., 1989) (advocating an expansion of liability for sexual harassment in order to promote the adoption of new behavioral norms in place of sexually offensive ones); Susan M. Mathews, *Title VII and Sexual Harassment: Beyond Damages Control*, 3 Yale J. L. & Feminism 299, 302-04 (1991) (recommending adoption of an amendment to Title VII expanding remedies for sexual harassment). In addition, well-known feminist legal scholar Catharine MacKinnon was instrumental in securing a remedy for sexual harassment as a form of sex discrimination under Title VII. See generally Catharine A. MacKinnon, *Sexual Harassment of Working Women: A Case of Sex Discrimination* (Yale U., 1979). In advocating increased remedies for sexual harassment victims, these feminists represented the interests of a much larger group of workers. Many men and women favored the elimination of harassment in the workplace, and everyone conceivably stood te benefit from a harassment-free workplace. This Note, however, argues that the feminist leaders of this movement overlooked the interests of those workers who are unfamiliar with these new norms. By exposing at-will workers accused of sexual harassment te immediate discharge, regardless of actual guilt, prior track record, or willingness to reform, feminists and legislators have created an arbitrary system which unnecessarily alienates individual workers and larger segments of the public.

6. The EEOC guidelines imposing liability on employers for harassment perpetrated by their agents and supervisors, regardless of whether the employer knew or should have known of the harassment, give employers strong incentive to seek procedural protection under Title VII. See 29 C.F.R. § 1604.11(c).

7. Although sexual harassment sometimes involves men as victims and women as perpetrators, the vast majority of persons filing sexual harassment claims with the EEOC are women. See, for example, Barbara A. Gutek, *Sex and the Workplace: The Impact of Sexual Behavior and Harassment on Women, Men, and Organizations* 49 (Jossey-Bass, 1985) (reporting that, of workers surveyed for a Los Angeles County Study, 21 to 53% of women, as compared to nine to 37% of men, have experienced sexual harassment). Thus, for simplicity's sake, this Note

a complaint with the EEOC.[8] The Act requires the EEOC to investigate the charges and, upon a determination of reasonable cause, to seek voluntary conciliation with the employer.[9] If the employer refuses to cooperate, the EEOC or the accuser may then bring suit against it.[10] Even under these circumstances, however, Title VII guarantees the accused employer the right to litigate the claim against it in the neutral forum of a federal court before incurring any penalty.[11] Just as feminists secured improved remedies to compensate the victims and penalize the perpetrators of sexual harassment, employers secured procedural protections to ensure that they would receive fair hearings before incurring any penalties.[12]

In its effort to accommodate feminists and employers, however, Congress overlooked the interests of one key group—the predominantly working-class men at whom the statute was aimed.[13] Title VII's prohibition of sexual harassment represents a dramatic departure from pre-existing workplace norms. While the new behavioral norms may appear obvious to the feminist intellectuals who promoted them, they are far from obvious to the male and female workers who must learn to live by them.[14] Nonetheless, the current statutory scheme demands immediate and flawless compliance with the Act and provides no procedural protections to ensure that workers

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refers to alleged harassers with masculine nouns and pronouns and to complainants of harassmement with feminine nouns and pronouns.

8. 42 U.S.C. § 2000e-5(e) (1988 & Supp. 1991 and 1992).

9. 42 U.S.C. § 2000e-5(b) (1988).

10. 42 U.S.C. § 2000e-5(f)(1) (1988).

11. 42 U.S.C. § 2000e-5(f)(3) (1988).

12. Some scholars have argued that employers receive excessive procedural protection under Title VII's conciliation process. Characterizing the process as a series of hoops through which an alleged victim must jump in order to obtain relief, these scholars argue that the process unduly hinders and discourages victims from pursuing their claims. See, for example, Nancy Levit, *Preemption of Section 1983 by Title VII: An Unwarranted Deprivation of Remedies*, 15 Hofstra L. Rev. 265, 294-95 (1987) (favoring Section 1983 over Title VII as an enforcement mechanism because of the "administrative hoops" through which a Title VII complainant must jump).

13. It is true that supervisory employees and co-workers may receive a hearing during the EEOC conciliation process and in federal court when an alleged victim pursues a complaint against her employer, charging vicarious liability for harassment perpetrated by one of these employees. A positive or negative outcome at these hearings, however, affects only the employer's liability under Title VII and in no way restricts the employer's ability to fire at-will employees accused of harassment. Putting to one side this tangential procedural protection afforded employees in the context of employer liability, this Note focuses exclusively on the penalties that employees accused of harassment may incur at the hands of their employers.

14. See, for example, *Young v. Hobart Brothers Co.*, 1991 Ohio App. LEXIS 141, *23 (upholding an employer's discharge of a worker for sexual harassment even though both the alleged harasser and the alleged victim characterized the incident at hand as a joke rather than as sexual harassment).

accused of harassment receive either a fair hearing or an appropriate penalty.[15]

This lack of procedural protection for alleged harassers is especially troubling in the context of at-will employment. While workers in union and government settings typically receive a full range of procedural protections akin to those guaranteed employers under Title VII,[16] workers in at-will settings may be fired for any reason, good or bad, or for no reason at all.[17] Injected into the at-will context are EEOC guidelines insulating employers from liability for known harassment between fellow workers so long as employers take "immediate and appropriate corrective action."[18] With the EEOC guidelines on one hand and the lack of procedural protection for at-will workers on the other, employers have little incentive to invest resources in investigating claims and providing hearings for alleged harassers, and have great incentive to fire them immediately.

Far from advancing the goals of Title VII, the immediate firing of a worker accused of sexual harassment may very well embitter the worker and more deeply entrench his pre-existing biases against women in the workplace. Because the accused worker loses his job regardless of whether he regrets his behavior or refuses to acknowledge fault, the worker has little incentive to learn from prior mistakes and reform himself. Moreover, the stakes for the worker charged with harassment are high. Not only does immediate discharge for sexual harassment deprive the worker of his livelihood, the worker may also suffer serious repercussions in his search for a new job, in his familial relationships, and in his standing in the community.[19]

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15. Neither the Act itself nor its legislative history alludes to the effect of Title VII on alleged individual perpetrators of harassment or discrimination in the workplace.

16. See Michael D. Fabiano, Note, *The Meaning of Just Cause for Termination When an Employer Alleges Misconduct and the Employee Denies It*, 44 Hastings L. J. 399, 401-02 (1993) (noting that most collective hargaining agreements and civil service systems have just-cause limits on an employer's ability to discharge employees). See also notes 57-61 and accompanying text.

17. See Richard Harrison Winters, Note, *Employee Handbooks and Employment-at-Will Contracts*, 1985 Duke L. J. 196, 197-200 (describing the background of the employment-at-will doctrine); Arthur S. Leonard, *A New Common Law of Employment Termination*, 66 N.C. L. Rev. 631, 647-63, 680-85 (1988) (discussing common law exceptions to the at-will doctrine and arguing for a new presumption under which employers must justify their termination of employees who have passed a probationary period). See also notes 54-55 and accompanying text.

18. 29 C.F.R. § 1604.11(d). While employers may insulate themselves from liability hy taking corrective action with respect to fellow employees, no subsequent action will insulate employers from liability for harassment perpetrated hy their agents or employee supervisors. Thus, the incentive for employers to respond to charges of harassment by firing alleged perpetrators may be stronger with respect to co-workers than with respect to agents and supervisors.

19. See *In re King Soopers, Inc. and United Food and Commercial Workers Union*, 86 Labor Arb. (BNA) 254, 258 (1985) (Sass, Arhitrator) (noting that the charge may attach a social

As the number of workers fired for harassment without a hearing or any objective determination of guilt increases, the public's focus may well shift from the victims of sexual harassment to the injustice suffered by alleged harassers.[20] Feminists and legislators who seek to change the public's perception of women in the workplace thus also have an interest in providing procedural protections to assure alleged harassers fair treatment and promote on-the-job reform. In order to promote the public's commitment to eliminating sexual harassment over the long term, to increase incentives for employers to invest in sound sexual harassment policies, and to encourage reform on the part of workers, Congress and the courts should increase the procedural protections available to alleged harassers in at-will settings. Just as Title VII protects the interest of employers in receiving a fair hearing before incurring monetary penalties under the Act, Title VII should protect the interest of workers in receiving a fair hearing before losing their jobs for alleged violations of the Act.

Accepting as given the enormous value to be gained from eliminating sexual harassment in the workplace, this Note compares the procedural protections available to employers under Title VII with those available to workers in just cause, due process, and at-will employment settings. Part II traces the structural development of Title VII, examining the ways in which this structure has continued to protect the interests of employers in receiving a fair hearing even as it has gradually increased the enforcement mechanisms and remedies available to alleged victims of harassment. Part III describes the procedural protections available to individual alleged harassers under just cause and due process systems, concluding that these settings provide protections for workers similar to those that Title VII pro-

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stigma that could be damaging to the accused's standing in the community); *Ashway v. Ferrellgas, Inc.*, 59 F.E.P. Cases (BNA) 375, 377 n.6 (1989) (noting that a charge can impair a person's ability to earn a livelihood, and can harm his reputation); Barbara Lindemann and David D. Kadue, *Sexual Harassment in Employment Law* 526 (BNA, 1992) (stating that a charge may hurt the accused's reputation within the company, community, and industry in which he works). An employee would probably encounter similar difficulties if fired for committing any crime, such as pilfering funds from the company cashbox. Sexual harassment is distinct from these crimes, however, because of the new behavioral norms imposed by Title VII. While our society's prohibitions against stealing and other crimes have been in place for a long time and reflect relatively well-understood behavioral norms, Title VII's prohibition of sexual harassment represents a recent effort to dramatically change behavioral norms. This normative change argues for greator protections on behalf of alleged harassers, who may not fully understand the new behavioral code before incurring a penalty under it.

20. See, for example, Kathleen Murray, *At Work; A Backlash on Harassment Cases*, N.Y. Times 3-23 (Sept. 18, 1994) (describing the recent increase in lawsuits brought by alleged harassers in an effort to clear their names).

vides for employers. Part IV describes the procedural protections available to at-will workers and concludes that no appropriate procedural protections exist to assure that such workers accused of harassment receive fair hearings and just penalties. Part IV further describes the injustice that results from this lack of protection and its potential dangers. Finally, Part V suggests that providing greater procedural protection for at-will workers accused of sexual harassment would create a balance of interests more closely akin to that achieved by Title VII between alleged victims and employers, thus respecting the interests of workers and encouraging on-the-job reform of inappropriate behaviors and attitudes toward women in the workplace.

II. TITLE VII: BALANCING INTERESTS OF VICTIM ADVOCATES IN OBTAINING COMPLIANCE AND OF EMPLOYERS IN RECEIVING FAIR HEARINGS

Since the initial passage of Title VII in 1964, Congress has attempted to accommodate the interests of civil rights advocates and employees encountering discrimination on the one hand, and the interests of employers accused of discrimination on the other. The original 1964 Act addressed both interests primarily by creating the EEOC conciliation process[21] and by creating a cause of action under which victims of discrimination could obtain damages if the conciliation process failed to resolve the issue.[22] Because the 88th Congress viewed employment discrimination as a " 'human' problem" occurring

21. Civil Rights Act of 1964, § 706(a), Pub. L. No. 88-352, 78 Stat. 241, 249, codified at 42 U.S.C. § 2000e-5(b) (1988 & Supp. 1994).

22. Civil Rights Act of 1964 § 706(e), 78 Stat. at 260. In addition, § 707 gave the Attorney General authority to bring a civil action in response to a pattorn or practice of discrimination. Civil Rights Act of 1991, § 707(a), 78 Stat. at 261-62. Between 1965 and 1971, the Attorney General brought only 57 suits on behalf of employees encountering pattern or practice discrimination. Although the small number of suits enabled the Attorney General and the Justice Department to achieve their goals of establishing key precedent, this strategy failed to secure individual relief for the larger number of employees experiencing this type of discrimination. Minna J. Kotkin, *Public Remedies for Private Wrongs: Rethinking the Title VII Back Pay Remedy*, 41 Hastings L. J. 1301, 1322 (1990).

in isolated incidents,[23] it believed informal conciliation and voluntary compliance constituted the most effective means of ending discrimination.[24]

Upon receipt of a complaint, the EEOC was to provide the employer with a copy of the charge and perform an investigation to determine whether it merited further action.[25] If the investigation provided reasonable cause to believe that the charge was true, the EEOC would then attempt to eliminate the unlawful practice through "informal methods of conference, conciliation, and persuasion."[26] If the EEOC failed to achieve voluntary compliance within thirty days, the aggrieved employee could bring an independent Title VII action against the employer in federal court.[27] The 1964 Act thus protected the employer's interests by providing an opportunity to resolve charges voluntarily and, if conciliation efforts failed,[28] by providing an opportunity to litigate the charges against it in federal court. The Act likewise protected the alleged victim's interests by encouraging voluntary conciliation with the employer and, if conciliation efforts failed,

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23. The House Report in support of subsequent amendments to Title VII in 1972 characterized Congress' view of employment discrimination in 1964 "as a series of isolated and distinguishable events, due, for the most part, to ill-will on the part of some identifiable individual or organization. It was thought that a scheme which stressed conciliation rather than compulsory processes would he more appropriate for the resolution of this essentially 'human' problem." H.R. Rep. No. 238, 92d Cong., 1st Sess. (1972), in 1972 U.S.C.C.A.N. 2137, 2144.

24. See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974) (stating "Congress enacted Title VII of the Civil Rights Act of 1964 to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin. Cooporation and voluntary compliance were selected as the preferred means for achieving this goal" (citations omitted)).

25. Civil Rights Act of 1964, § 706(a), 78 Stat. at 249. The purpose of the preliminary investigation was to determine whether "there is reasonable cause to believe that the charge is true." Id.

26. Id. Conciliation agreements often include remedies to make the grievant whole, such as back pay, and to promote compliance with the Act, such as reporting and affirmative action. Lawrenco Allen Katz, *Investigation and Conciliation of Employment Discrimination Charges Under Title VII: Employers' Rights in an Adversary Process*, 28 Hastings L. J. 877, 916 (1977). Conciliation agreements bind only the parties who have consented to them in writing. Id. at 915. Thus, the EEOC, the employee grievant, and the employer charged with harassment must all execute the agreement to ensure effective resolution of the dispute. Id.

27. Civil Rights Act of 1964, § 706(e), 78 Stat. at 260.

28. Under the current Civil Rights Act, as amended in 1972 and 1991, if the EEOC is unable to reach a settlement agreement within 180 days, it then issues a letter authorizing the complainant to bring suit within 90 days after the issuance of the letter. 42 U.S.C. § 2000e-5(f)(1). Due to a substantial backlog of cases, the EEOC is unable to attempt conciliation in the vast majority of cases, so enforcement of Title VII falls primarily on individual complainants to bring suit independently. See Alan O. Sykes, *The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines*, 101 Harv. L. Rev. 563, 603-04 (1988).

by creating a cause of action through which the victim could force compliance and receive compensation.[29]

Some supporters of the 1964 Act initially recommended that the EEOC be given power either to bring suit on behalf of private citizens or to adjudicate disputes between accused employers and their accusers.[30] In order to secure passage of the Act, these supporters agreed to adopt neither proposal and instead limited the EEOC's role to that of conciliator.[31] Explaining the rationale of those who favored the withholding of adjudicative power, Congressman William M. McCulloch argued that the federal court system would provide employers with a fairer forum in which to contest charges against them.[32] By channeling Title VII litigation to the federal courts, Congress sought to place accused employers and their accusers on a level playing field to prevent bias leading to unjust results. Had this proven correct, the conciliation process would have fully accommodated both civil rights advocates' interests in enforcing compliance with the Act and employers' interests in receiving fair hearings before incurring penalties.

It soon became apparent, however, that the balance struck in 1964 tilted too heavily toward accused employers. Between the initial passage of Title VII in 1964 and 1972, the EEOC resolved less than half of the cases recommended for investigation through conciliation.[33] Instead of cooperating with the EEOC to resolve charges against them, employers ignored the conciliation process and relied, often successfully, on the assumption that aggrieved employees would fail to litigate their claims independently.[34] In fact, less than ten percent of aggrieved employees brought suit independently when the EEOC

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29. See Robert Belton, *A Comparative Review of Public and Private Enforcement of Title VII of the Civil Rights Act of 1964*, 31 Vand. L. Rev. 905, 907-08, 817, 961 (1978) (describing the role of private litigation in the enforcement of Title VII and development of legal precedent in this area).

30. See, for example, Kotkin, 41 Hastings L. J. at 1315 (cited in note 22); Laurie M. Stegman, Note, *An Administrative Battle of the Forms: The EEOC's Intake Questionnaire and Charge of Discrimination*, 91 Mich. L. Rev. 124, 131-32 (1992).

31. See Kotkin, 41 Hastings L. J. at 1315-17 (describing the initial Senate and House proposals which both provided for EEOC enforcement power and the compromise which resulted in the 1964 scheme).

32. H.R. Rep. No. 914, 88th Cong., 2d Sess. (1964), in 1964 U.S.C.C.A.N. 2391, 2487, 2515-16 (Additional Views of Honorable William M. McCulloch, et al.). See also Stegman, 91 Mich. L. Rev. at 132 (cited in note 30) (noting that Congress viewed the federal courts as "the fairer, more appropriate arbiters on the sensitive question of employment discrimination").

33. H.R. Rep. No. 238, in 1972 U.S.C.C.A.N. at 2144 (cited in note 23).

34. Id.

failed in its conciliation efforts.[35] Because the EEOC had no means of directly enforcing compliance with Title VII, employers had little reason to change their practices voluntarily.[36]

Amendments to Title VII in 1972 granted the EEOC power to bring suit on behalf of aggrieved individuals,[37] thus providing a counterweight to offset the substantial protections afforded accused employers under the 1964 Act. Continuing nonetheless its protection of the accused employers' interests, Congress retained Title VII's emphasis on voluntary compliance through conciliation and made the conciliation procedure a prerequisite to any suit brought by the EEOC.[38] EEOC enforcement power thus functioned as an incentive for employers te comply with the conciliation process, rather than as a replacement for the process.[39]

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35. Kotkin, 41 Hastings L. J. at 1322 (cited in note 22). But see Belton, 31 Vand. L. Rev. at 961 (cited in note 29) (arguing that scholars have underestimated the impact of private litigation on enforcement of Title VII).

36. H.R. Rep. No. 238, in 1972 U.S.C.C.A.N. at 2144 (cited in note 23). The additional means of enforcement provided under the 1964 Act through pattern or practice cases brought by the Attorney General also proved to be of little consequence. See note 22 (noting that, from 1965 to 1971, the Attorney General brought only 57 suits charging pattern or practice discrimination).

37. Equal Employment Opportunity Act of 1972, § 706(f)(1), Pub. L. No. 92-261, 86 Stat. 103, 105 codified at 42 U.S.C.A. § 2000e-5(f)(1) (1994). For a detailed description of the legislative history pertaining to the passage of the 1972 amendments, see George P. Sape and Thomas J. Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 Geo. Wash. L. Rev. 824, 836-46 (1972).

38. Equal Employment Opportunity Act of 1972, § 706(f)(1), 86 Stat. at 105. See also Katz, 28 Hastings L. J. at 916 (cited in note 26) (stating that an attempt at conciliation is a "jurisdictional prerequisite" to any suit brought under Title VII by the EEOC); Sape and Hart, 40 Geo. Wash. L. Rev. at 862-64 (summarizing the procedure for filing a complaint as required by the 1972 amendments); Note, *Judicial Responses to the EEOC's Failure to Attempt Conciliation*, 81 Mich. L. Rev. 433, 434-37 (1982) (arguing that when courts refuse to hear a Title VII case becanse the EEOC failed to attempt conciliation, they should dismiss the case without prejudice rather than grant summary judgment for the defendant).

39. See *Firefighters v. Clevelaud*, 478 U.S. 501, 515 (1986) (noting that Congress intended the objectives of Title VII to be met through voluntary compliance); *Ford Motor Co. v. EEOC*, 458 U.S. 219, 228 (1982) (stating that rules implementing Title VII should seek to bring defendants into voluntary compliance); Note, 81 Mich. L. Rev. at 441-42 (noting that the amended Act provides employees greater incentives to comply voluntarily). See also Katz, 28 Hastings L. J. at 879 (stating that the EEOC's ability to bring suit under the 1972 amendments "undoubtedly increased its credibility with employers and . . . substantially augmented its ability to investigate and conciliate charges of discrimination"); Sape and Hart, 40 Geo. Wash. L. Rev. at 846 (noting Congress' intention to retain all principles in the 1964 Act not explicitly altered by the 1972 amendments). But see Wayne E. McDowell, Note, *Title VII—The Tolling of the Accrual of Back Pay Liability by the Tender of an Uncouditional Job Offer Witheut Retroactive Seniority:* Ford Motor Company v. Equal Opportunity Employment Commission, 27 Howard L. J. 575, 594-95 (1984) (arguing that Congress intended to replace the cenciliation process with EEOC enforcement pewers when it enacted the Equal Employment Opportunity Act in 1972).

Under the 1972 amendments, aggrieved employees retained the right to bring suit independently in federal court against their employers after the EEOC had exhausted its efforts at conciliation.[40] By again withholding adjudicative power from the EEOC, Congress continued to provide employers with the procedural protection of a neutral forum in which to litigate these claims.[41] Thus, even if an employer refused to cooperate during conciliation proceedings or if the EEOC's backlog of cases prevented it from attempting conciliation,[42] the employer had a full opportunity to refute the charges against it before incurring liability. Moreover, in determining appropriate penalties for employers who had violated the Act, courts considered the egregiousness of the employer's offense, the employer's prior track record of compliance with the Act, and the employer's apparent willingness to change its behavior.[43] The 1972 scheme thus continued to protect the interests of accused employers in receiving a fair hearing and incurring a fair penalty, even as it provided accusers with greater enforcement power.

By the early 1990s, Congress recognized that it had still not struck an even balance between employers accused of discrimination and their accusers. The 1964 and 1972 Acts had provided equitable remedies of injunction, reinstatement, and backpay to compensate

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40. Equal Employment Opportunity Act of 1972, § 706(f)(1), 86 Stat. at 105. See also Sape and Hart, 40 Geo. Wash. L. Rev. at 879-80 (discussing congressional recognition of the importance of an independent right to sue). As discussed in note 28, because of the substantial backlog of cases filed, the EEOC was often unable to pursue its initial investigation and conciliatory efforts before the allotted time period expired. Most complainants thus received permission to bring suit independently. See Sykes, 101 Harv. L. Rev. at 603-04 (cited in note 28). Available remedies included injunction, reinstatement, backpay, and "other equitable relief." Equal Employment Opportunity Act of 1972, § 706(g), 86 Stat. at 107. One scholar has argued that courts could reasonably have read the phrase "other equitable relief" as giving courts broader latitude to award appropriate damages, rather than as restricting damages to those of a purely equitable character. Kotkin, 41 Hastings L. J. at 1325-27 (cited in note 22).

41. See Equal Employment Opportunity Act of 1972, § 706(f)(3), 86 Stat. at 106 (granting jurisdiction over Title VII actions to United States district courts and United States courts "of a place subject to the jurisdiction of the U.S.").

42. See note 28 (discussing the inability of the EEOC to attempt conciliation due to case backlog).

43. See, for example, *Bahadirli v. Domino's Pizza*, 873 F. Supp. 1528, 1535 (M.D. Ala. 1995) (citing *Ford Motor Co.*, 458 U.S. at 231-32) (stating that an employer's liability for back pay ceases as of the moment it unconditionally offers to provide a job, and noting that this rule stems from a policy of encouraging voluntary compliance with Title VII); *Saxton v. AT&T*, 10 F.3d 526, 535 (7th Cir. 1993) (holding that an employer incurs no liability under Title VII when it takes "prompt and appropriate remedial action upon discovering [co-worker] harassment"); *Hudson v. Soft Sheen Products*, 873 F. Supp. 132, 136 (E.D. Ill. 1995) (noting that the legislative history to Title VII indicates that compensatory and punitive damages are available only in certain cases: compensatory damages are available if the employer's acts were intentional, and punitive damages are available if the employer acts with malice or with reckless or callous indifference).

victims of harassment and other forms of discrimination for their injuries.[44] Although these remedies provided some relief for those who responded to harassment or discrimination by quitting their jobs, it left those who continued working with no meaningful remedy besides injunction.[45] The Civil Rights Act of 1991 provided these workers with compensatory and punitive damages in cases of intentional discrimination.[46]

Some members of Congress feared that the availability of compensatory and punitive damages would detract from the conciliatory goals of Title VII,[47] thus tilting the Act too heavily in favor of accusers. They argued that, given a free choice of whether to pursue settlement through arbitration or tort damages through litigation, most plaintiffs would choose litigation.[48] Other members responded to this concern by noting that, despite the long-time availability of compensatory and punitive damages for racial discrimination under 28 U.S.C. § 1981, complainants had consistently pursued both damages under Section 1981 and conciliation proceedings under Title VII.[49]

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44. Civil Rights Act of 1964, § 706(g), 86 Stat. at 107; Equal Employment Opportunity Act of 1972, § 706(g), 78 Stat. at 261.

45. See H.R. Rep. No. 102-40(II), 102d Cong., 1st Sess. (1991), in 1991 U.S.C.C.A.N. 694, 718-21 (recounting stories of discrimination victims who were inadequately compensated); Kotkin, 41 Hastings L. J. at 1357 (cited in note 22) (discussing the lack of monetary relief under the post-1972 version of Title VII). When Congress passed the 1991 Act, it listed improved remedies for harassment as one of its four primary goals. Civil Rights Act of 1991, § 3, 105 Stat. at 1071.

46. Civil Rights Act of 1991, § 102, 105 Stat. at 1072. The Act achieved this outcome by extending componsatory and punitive damages te victims of all types of intentional discrimination prohibited by Title VII. Id. The Act defines "intentional discrimination" to mean "not an employment practice that is unlawful because of its disparate impact." Id. For an argument that compensatory and punitive damagos should also be allowed for disparate impact and mixed-motive claims, see Robert Belton, *The Unfinished Agenda of the Civil Rights Act of 1991*, 45 Rutgers L. Rev. 921, 947-50 (1993).

47. H.R. Rep. No. 102-40(I), 102d Cong., 1st Sess. (1991), in 1991 U.S.C.C.A.N. 549, 671-75 (Minority Views). The minority feared that the availability of tort remedies would "transform Title VII from a statute rightfully focused on the prompt resolution of disputes through settlement and conciliation and the repair of the employment relationship . . . to a litigation and attorneys' fee gonerating machine." Id. at 676. See also H.R. Rep. No. 102-40(II), in 1991 U.S.C.C.A.N. at 758-59 (cited in note 45) (Dissenting Views of Honorable Henry J. Hyde, et al.) (arguing that the proposed amendments would shift the focus of Title VII from conciliation and preservation of the employment relationship te litigation); Cynthia L. Alexander, Note, *The Defeat of the Civil Rights Act of 1990: Wading Through the Rhetoric in Search of Compromise*, 44 Vand. L. Rev. 595, 623-25 (1991) (arguing that a provision for compensatory and punitive damages may have the undesireable effect of undermining the conciliatory focus of Title VII).

48. H.R. Rep. No. 102-40(I), in 1991 U.S.C.C.A.N. at 672.

49. H.R. Rep. No. 102-40(I), in 1991 U.S.C.C.A.N. at 611-12. The majority repert favoring the new provision for tort remedies stated: "Of course, expanding Title VII's remedial scheme to permit recovery of damages in cases of intentional discrimination would neither 'jettison' nor 'scuttle' any of the statute's existing remedial or conciliation procedures [as opponents of tort

Moreover, Section 116 of the 1991 Act explicitly provides that the amendments do not detract from the validity of conciliation agreements in any way.[50] The 1991 amendments also incorporate caps on compensatory and punitive damages to retain a balance between incentives for complainants to litigate and incentives to settle under the conciliation procedures.[51] Thus, neither supporters nor opponents of the provision for compensatory and punitive damages intended their availability to negate the conciliatory framework so central to the 1964 and 1972 Acts.[52]

Even if the 1991 Act's provision for compensatory and punitive damages results in accusers forsaking the Title VII conciliation process in favor of litigation under 42 U.S.C. § 1981, a balance between the interests of the accused employer and its accuser will nonetheless continue; even if accusers circumvent the entire conciliation process, they must still litigate their claims in federal court in order to impose liability on an employer.[53] The neutrality of this forum continues to protect the interests of accused employers in fairly determining guilt and imposing penalties even as the stakes of liability increase.[54]

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remedies feared]. Such procedures would continue to be available, and victims of intentional discrimination would continue to use them." Id. at 611. See also H.R. Rep. No. 102-40(II), in 1991 U.S.C.C.A.N. at 722 (cited in note 45) (stating that an award of tort remedies in intontional discrimination cases will not subvert the conciliation process).

50. Civil Rights Act of 1991, § 116, 105 Stat. at 1079. Section 116 reads: "Nothing in the amendments made by this title shall be construed to affect court-ordered remedies, affirmative action, or conciliation agreements, [sic] that are in accordance with the law." Id. Thus, in addition to leaving the conciliation provisions untouched, the 1991 Act explicitly states that agreements reached through the conciliation process should continue to govern parties to an EEOC complaint.

51. Id., § 102, 105 Stat. at 1072. See also H.R. Rep. No. 102-40(II), in 1991 U.S.C.C.A.N. at 760 (cited in note 45) (arguing that recently defeated amendments to the 1991 Act providing for a cap on compensatory and punitive damagos, which eventually passed, would reinforce the conciliatery aspects of Title VII). But see Belton, 45 Rutgers L. Rev. at 947 (cited in note 46) (arguing for a removal of the statutory caps on compensatory and punitive damages in order to more effectively deter discriminatory behavior on the part of employers and more fully compensate victims of discrimination).

52. Also indicative of Congress' intent to retain the conciliatory focus of the Act is the rationale presented in the House Report for overturning the Supreme Court's holding in *Martin v. Wilks*, 490 U.S. 755 (1989), which permitted collateral attacks on settlement agreements. H.R. Rep. No. 102-40(I), in 1991 U.S.C.C.A.N. at 589-91 (cited in note 47). Noting that "[o]ne of Title VII's goals is the encouragement of voluntary settlements as the 'preferred means' of resolving employment discrimination disputes," the report then reasoned that the *Wilks* rule should be overturned te provide permanence and stability to settlement agreements. Id. But see Major Charles B. Hernicz, *The Civil Rights Act of 1991: From Conciliation to Litigation—How Congress Delegates Lawmaking to the Courts*, 141 Milit. L. Rev. 1, 4, 81 (1993) (arguing that in enacting the 1991 amendments, Congress unwisely shifted the focus of the Act from conciliation to litigation).

53. 42 U.S.C. § 2000e-5(f)(3).

54. The 1991 Act gives those complaining parties seeking compensatory or punitive damages the right to a jury trial if they demand one. 42 U.S.C. § 1981(a)(c) (1988 & Supp. 1994). To the extent that juries may be biased in favor of either the complaining party or the

For the worker charged with sexual harassment, however, Title VII lacks any procedural safeguards designed to protect his interest in receiving a fair hearing and appropriate penalty at the hands of his employer. With no statutory procedures in place, the procedural protections available to alleged harassers vary according to employment setting. Parts III and IV discuss the procedural protections available to workers in union, government, and at-will settings.

III. THE JUST CAUSE STANDARD AND CONSTITUTIONAL PROTECTIONS: BALANCING INTERESTS OF EMPLOYEES ACCUSED OF HARASSMENT AND THEIR ACCUSERS

Since the late nineteenth century, American common law has presumed employment relationships of indefinite duration to be at

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employer charged with discrimination, federal court may not constitute a completely "neutral" forum. Nonetheless, a jury trial in federal court is still likely to provide a more neutral forum in which to litigate claims of discrimination than would adjudication by the EEOC, the agency charged with enforcing compliance with Title VII. See note 32 and accompanying text (discussing Congressman McCulloch's view regarding the fairness of the federal courts as a forum).

It is worth noting that in extending coverage of Title VII to Senate employees under the 1991 Act, Senators gave themselves procedural protections closely resembling those available to employers under Title VII's conciliation process. Civil Rights Act of 1991, §§ 301-317, 105 Stat. 1088-96. In order to obtain Title VII remedies, a Senate employee alleging sexual harassment against a Senator or member of a Senator's staff must first request counseling by the Office of Senate Fair Employment Practices ("OSFEP"). Government Employee Rights Act of 1991, 2 U.S.C. § 1205 (1988 & Supp. 1994). In order to pursue the complaint further, the employee must then request mediation with the OSFEP "for the purpose of resolving the dispute between the employee and the employing office." 2 U.S.C. § 1206(a) (Supp. 1994). The mediation period continues for thirty days and may be extended for an additional thirty days at the OSFEP's discretion. 2 U.S.C. § 1206(b). Only after exhaustion of the counseling and mediation provisions is the employee entitled to a formal hearing and award of Title VII remedies against the offending party, if the hearing board finds in favor of the employee. 2. U.S.C. § 1207 (Supp. 1994). The hearing board is composed of three independent hearing officers who are not Senators, Officers, or employees of the Senate and who are designated by the Director of the OSFEP. Id. Decisions of the hearing board are reviewable by the Select Committee on Ethics and by the U.S. Court of Appeals for the Federal Circuit. 2 U.S.C. §§ 1208-1209 (Supp. 1994). See also 137 Cong. Rec. S.15348, 15386 (daily ed. Oct. 29, 1991) (statement of Sen. Chafee) (summarizing the proposed procedure for Senate employees pursuing allegations of sexual harassment against a Senator).

Like an employer subject to Title VII's conciliation procedures, any Senator or staff member charged with sexual harassment has a full opportunity to resolve the charges voluntarily before submitting to a hearing at which he may incur liability under Title VII. 2 U.S.C. §§ 1205-1206. Moreover, in the event that counseling or mediation fails, both Senators and their staff members are entitled to a full hearing to determine liability and the appropriate remedy. 2 U.S.C. §§ 1207-1209.

will.[55] An employer may thus fire a worker for any reason, good or bad, or for no reason at all.[56] Union and government employment constitute two major exceptions to the at-will rule.[57] When union workers negotiate collective bargaining agreements with their employers, they focus primarily on increasing job security,[58] typically through adoption of a "just cause" standard for discharge.[59] The Federal Civil Service Reform Act of 1978[60] and analogous state statutes[61] place similar for-cause limitations on the firing of most government workers.[62]

State and federal government employees who do not receive protection under the Civil Service Reform Act or an analogous state statute have constitutional due process protection through the Fifth and Fourteenth amendments if they can demonstrate a liberty or property interest in their jobs.[63] Due process entitles such workers to notice of the reasons for discharge and a hearing either for the purpose of refuting the charges or for the purpose of clearing their names if the charge was stigmatizing.[64] In addition, government employees

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55. See Henry H. Perritt, Jr., 1 *Employee Dismissal Law and Practice* §§ 1.1, 1.4 at 3, 10-15 (Wiley, 3d ed. 1992 & Supp. 1992) (discussing the development and recent erosion of the employment-at-will doctrine). For a discussion of the rule's origin, see Leonard, 66 N.C. L. Rev. at 640-41 (cited in note 17); Jack M. Beermann and Joseph William Singer, *Baseline Questions in Legal Reasoning: The Exdmple of Property in Jobs*, 23 Ga. L. Rev. 911, 920-22 (1989); Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 Harv. L. Rev. 1816, 1824-25 (1980).

56. Leonard, 66 N.C. L. Rev. at 632; Fabiano, 44 Hastings L. J. at 401 (cited in note 16).

57. Note, 93 Harv. L. Rev. at 1816 (cited in note 55); Leonard, 66 N.C. L. Rev. at 632-33; Fabiano, 44 Hastings L. J. at 401-02.

58. Roger I. Abrams and Dennis R. Nolan, *Toward a Theory of "Just Cause" in Employee Discipline Cases*, 1985 Duke L. J. 594, 599.

59. Id. A study conducted by the Bureau of National Affairs found that 86 percent of 400 union-management agreements studied contained a "cause" or "just cause" provision. Bureau of National Affairs, *Basic Patterns in Union Contracts* 7 (BNA, 12th ed. 1989).

60. 5 U.S.C. §§ 7501-7521, 7701-7703 (1988 & Supp. 1989, & Supp. 1990).

61. See Perritt, 2 *Employee Dismissal* § 6.5 at 10-13 (cited in note 55) (summarizing statutory and regulatory just cause provisions for state government employees).

62. Fabiano, 44 Hastings L. J. at 413 (cited in note 16). Fabiano classifies the standard of proof for firing government employees covered by the Civil Service Reform Act as the most demanding level of just cause analysis. Instead of allowing either a government supervisor's good faith belief of employee misconduct or finding of substantial evidence supporting allegations of employee misconduct to constitute "just cause," the Act requires a finding of actual misconduct. Id. Most state government employees receive similar protection under state civil service regulations. Id.

63. See, for example, *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985) (stating that "[r]espondents' federal constitutional claim depends on their having had a property right in continued employment"); *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 576-78 (1972) (discussing respondent's need te show a liberty or property interest in his job). For a general discussion of the constitutional due process rights afforded government employees, see *Developments in the Law: Public Employment*, 97 Harv. L. Rev. 1611, 1780-1800 (1984).

64. *Loudermill*, 470 U.S. at 546; *Roth*, 408 U.S. at 569-70.

may receive a hearing if their case implicates some other constitutional provision, such as the Equal Protection Clause or the First Amendment.[65]

In contrast, private sector workers who are not parties to collective bargaining agreements receive very little procedural protection under the common law at-will doctrine.[66] Many courts, however, have modified the at-will doctrine in recent years by (1) recognizing express or implied contracts in certain factual situations; (2) recognizing a public policy exception; and (3) in a few jurisdictions, implying a duty of good faith and fair dealing into all employment relationships.[67] Nonetheless, because the procedural protections available to at-will workers differ so substantially from those available to workers under just cause and due process systems, discussion of at-will employment is reserved for Part IV. Part III will now provide a detailed description of the procedural protections available to workers under just cause systems and to government workers who establish a claim for constitutional protection.

A. Union and Government Employment with Just Cause Limits on Firing

The just cause standard provides union employees and civil servants charged with sexual harassment procedural protections similar to those extended to employers under Title VII. For instance, the just cause standard entitles alleged harassers to a preliminary investigation into the charges against them.[68] Like employers under-

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65. See, for example, *Black v. City of Auburn*, 857 F. Supp. 1540 (M.D. Ala. 1994) (considering an alleged harasser's claims under the Due Process Clause, the Equal Protection Clause, and the First Amendment).

66. Leonard, 66 N.C. L. Rev. at 632 (cited in note 17); Fabiano, 44 Hastings L. J. at 401 (cited in note 16).

67. See Note, *Protecting Employees At Will Against Wrongful Discharge: The Public Policy Exception*, 96 Harv. L. Rev. 1931, 1935-37 (1983) (describing exceptions to the at-will rule and citing pertinent cases); Leonard, 66 N.C. L. Rev. at 635-36 (same). Federal and state legislation, such as the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1988 & Supp. 1994), the Labor Management Relations (Taft-Hartley) Act of 1947, 29 U.S.C. §§ 141-197 (1988 & Supp. 1994), the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1988 & Supp. 1994), and the Employment Retirement Income Security Act of 1974, 29 U.S.C. § 1140 (1988 & Supp. 1994), place additional restrictions on private sector discharge. Note, 96 Harv. L. Rev. at 1934; Leonard, 66 N.C. L. Rev. at 632-33.

68. See *In re Heublein, Inc. and Teamsters Local Union No. 283*, 88 Labor Arb. (BNA) 1292, 1295 (1987) (Ellmann, Arbitrator) (explaining that a provision for just cause discharge entitles an employee to reasonable advance notice of the charges against him, a reasonable and objective investigation in which the employee is permitted to explain his side of the story, and a finding of guilt supported by credible evidence); *In re DeVry Institute of Technology and*

going an EEOC investigation under Title VII, alleged harassers subject to just cause discharge have an opportunity to present their side of the story and to challenge the discipline imposed.[69] In addition, the employer must support a finding of guilt and any resulting penalty with credible evidence.[70] In the same way that the EEOC may not proceed against an employer under Title VII until it has determined that reasonable cause exists to believe the allegations,[71] an employer subject to just cause limits may not discipline a worker until it has discovered credible evidence to support the charge.[72]

This investigatory procedure, however, carries much greater significance for the alleged harasser in a just cause employment setting than for an employer charged with harassment under Title VII. If the EEOC is unable to investigate a claim due to its substantial backlog of cases, the individual grievant may still pursue it by filing the case in federal court.[73] If the court determines that the employer violated Title VII, it will impose liability despite the fact that no preliminary investigation ever occurred.[74]

On the other hand, if an employer fails to investigate a charge properly under a just cause system, this procedural defect often renders illegitimate any penalty imposed on the alleged harasser by the employer.[75] Procedural defects in the just cause setting sometimes predominate over substantive concerns regarding the actual guilt or innocence of the alleged harasser, resulting in reinstatement of em-

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Individual Grievant, 87 Labor Arb. (BNA) 1149, 1157 (1986) (Berman, Arbitrator) (stating that basic due process requires an employer to inform the employee of charges against him, notify the employee of evidence so that he may respond, and investigato the charges within a reasonable period); Adolph M. Koven and Susan L. Smith, *Just Cause: The Seven Tests* 180-81 (BNA Books, 1992) (stating that an employee subject to just cause provisions has the right to be informod of the charges against him, to cenfront his accusers, to present evidence in his defense, and to receive legal counsel).

69. *In re Heublein*, 88 Labor Arb. (BNA) at 1295; *In re DeVry Institute*, 87 Labor Arb. (BNA) at 1157; Koven and Smith, *Just Cause* at 182.

70. *In re Heublein*, 88 Labor Arb. (BNA) at 1295. If the employer warns an employee that he must cease a certain type of misconduct, the employer cannot later fire the employee for misconduct that preceded this warning. *In re DeVry Institute*, 87 Labor Arb. (BNA) at 1158.

71. 42 U.S.C. § 2000e-5(b).

72. *In re Heublein*, 88 Labor Arb. (BNA) at 1295.

73. See note 28 and accompanying text.

74. Although an EEOC investigation and attempt at conciliation is a prerequisite to the EEOC bringing suit, it is not a prerequisite to the individual claimant bringing suit. See note 28 and accompanying text.

75. See *In re Heublein*, 88 Labor Arb. (BNA) at 1296 n.2 (noting that "[a] discharge violative of procedural protections cannot stand"); *Federated Dept. Stores v. United Food & Commercial Workers Union*, 901 F.2d 1494, 1495 (9th Cir. 1990) (upholding reinstatement of employees when the employer gave them no opportunity to respond to the charges against them).

ployees found guilty of harassment.[76] In this respect, workers in a just cause setting receive greater procedural protection than do employers under Title VII.

Moreover, when arbitrators consider whether an employer had just cause to fire or otherwise discipline a worker, they generally look exclusively to the collective bargaining agreement, with no consideration of public law.[77] Because arbitrators are therefore unlikely to consider Title VII's prohibition against sexual harassment, they may be more likely to make a finding of no just cause in the context of sexual harassment than would a federal judge taking public law into account. Moreover, while the union presents the alleged harasser's side of the case,[78] the alleged victim's interests are represented only indirectly by the employer's attempts to justify the discipline imposed. This personal representation versus the indirect representation of the alleged victim's interests may provide an additional advantage for alleged harassers in just cause settings.

On the whole, however, the procedural protections afforded workers under a just cause system resemble those afforded employers under Title VII in that both accused parties have an opportunity to present their case in a neutral forum—an arbitration hearing in a just cause system[79] and a trial in federal court under Title VII.[80] In both settings, the party making the charge of sexual harassment carries the burden of proving the allegation.[81] In addition, the judgment of

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76. But see *Stroehmann Bakeries, Inc. v. Local 776, Intl. Brotherhood of Teamsters*, 969 F.2d 1436, 1445 n.7 (3d Cir. 1992) (stating that the definitive public policy against sexual harassment would outweigh a procedural defect in the investigation; thus, discipline of the alleged harasser would be necessary despite the existence of errors in the investigatory process).

77. See Katherine Van Wezel Stone, *The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System*, 59 U. Chi. L. Rev. 575, 596 (1992) (noting the agreement of most commentators that when a collective bargaining agreement makes no mention of external law, an arbitrator may not consider external law in making her decision). But see *Stroehmann Bakeries*, 969 F.2d at 1446 (affirming the reversal of an arbitrator's reinstatement of a worker accused of sexual harassment on the ground that reinstatement violated public policy as embodied in Title VII).

78. See Perritt, 1 *Employee Dismissal* § 3.9 at 217 (cited in note 55) (describing how the union, as the exclusive representative of the worker, controls the grievance procedure on the worker's behalf).

79. Although collective bargaining agreements typically provide for a hearing before an arbitrator, government workers covered under the Civil Service Reform Act receive a hearing before the Merit Systems Protection Board ("MSPB") after agency action against them is complete. 5 U.S.C. § 7701(a) (Supp. 1994); Perritt, 2 *Employee Dismissal* § 6.4 at 7-8. For the sake of simplicity, this Note refers to both arbitration hearings before arbitrators and hearings before the MSPB as arbitration hearings and refers to hearing officers in both cases as arbitrators.

80. 42 U.S.C.A. § 2000e-5(f)(3).

81. A claimant alleging sexual harassment under Title VII must show by a preponderance of the evidence that the harassment occurred. Susan M. Omilian, *Sex-Based Employment*

the arbitrator in the just cause system and of the district court judge or jury under Title VII carries great weight with regard to witness credibility determinations.[82] As these credibility judgments often determine the outcome of the case,[83] the involvement of a neutral fact-finder in making these decisions is critical to the perceived fairness of the hearing.

The just cause standard also resembles Title VII procedural protection in that it entitles the alleged harasser to an imposition of penalties in accordance with the egregiousness of his offense,[84] his prior track record,[85] and his potential for reform.[86] If the offense is

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Discrimination § 22.01 (CBC, 1994). Either party may appeal the district court's finding to the court of appeals, but the appellate court may not disturb such a factual finding unless the lower court's judgment was "clearly erroneous." 28 U.S.C. §§ 1291-1292 (1988 & Supp. 1994); Fed. R. Civ. P. 52(a) (1994); *Cortes v. Maxus Exploration Co.*, 977 F.2d 195, 198 (5th Cir. 1992).

Likewise, a government agency impesing discharge for sexual harassment must show by a preponderance of the evidence that the harassment occurred. 5 U.S.C. § 7701(c) (Supp. 1994); *Jackson v. Veterans Admin.*, 768 F.2d 1325, 1329 (Fed. Cir. 1985). If the worker appeals his agency's determination, the MSPB will review it, ensuring that the agency based on substantial evidence both its finding of guilt and its finding that removal will best promote the efficiency of the service. Perritt, 2 *Employee Dismissal* § 6.4 at 8 (cited in note 55). Although either party may appeal the MSPB's decision to federal court, the appellate court may not disturb the MSPB's judgment unless it was not based on substantial evidence or was arbitrary and capricious. 5 U.S.C. §§ 7703(c), 7513(a) (Supp. 1994); *Snipes v. USPS*, 677 F.2d 375, 376 (4th Cir. 1982).

An employer subject to a collective bargaining agreement with a just cause provision must prove beyond a reasonable doubt that sexual harassment occurred in order for an allegation of such misconduct to constitute just cause for dismissal. See Perritt, 1 *Employee Dismissal* § 3.5 at 208 (cited in note 55) (stating that the employer always carries the burden of proving wrongdoing in just cause dismissal cases). Although either party may appeal the arbitrator's decision to federal court, the appellate court will not disturb the arbitrator's finding unless it falls within one of the following narrow exceptions: (1) the dispute was not arbitrable; (2) the arbitrator did not draw the essence of the decision from the collective bargaining agreement; (3) the decision violates public policy; or (4) the decision involved fraud or corruption. Id. at § 3.24 at 243.

82. See note 81 (describing standards of review of MSPB decisions and arbitrations).

83. See, for example, *Carosella v. USPS*, 816 F.2d 638, 641-42 (Fed. Cir. 1987) (upholding dismissal of alleged harasser on basis of presiding official's determination that alleged harasser's testimony was less credible than alleged victim's testimony); *King Soopers*, 86 Labor Arb. (BNA) at 260-62 (removing suspension for sexual harassment after finding alleged harasser's testimony more credible than alleged victim's testimony).

84. See, for example, *Sugardale Foods Inc. and Local 17A, United Food and Commercial Workers*, 86 Labor Arb. (BNA) 1017, 1022 (1986) (Duna, Arbitrator) (holding that a reduction of penalty from discharge to suspension was appropriato for an employee with a 25-year clean record, who touched female co-worker inappropriately during a power failure).

85. See, for example, id.; *Chrysler Motors v. Int'l Union, Allied Industrial Workers of America*, 959 F.2d 685, 688-89 (7th Cir. 1992) (upholding an arbitrator's reinstatement of an employee who had engaged in sexual harassment when the employee had no record of prior misconduct and was suitable for rehabilitation); *Communications Workers of America v. Southeastern Electric Cooperative*, 882 F.2d 467, 469 (10th Cir. 1989) (upholding an arbitrator's reinstatoment of an employee who had engaged in sexual harassment when the employee was apologetic and possessed an otherwise clean work record).

86. See, for example, *In re Hyatt Hotels Palo Alto and Hotel, Motel, Restaurant Employees and Bartenders Union, Local 19*, 85 Labor Arb. (BNA) 11, 15-17 (1985) (Oestreich, Arbitrator) (lessening penalty of discharge to 15-day suspension upon finding that the employer failed to

relatively minor and the track record good, the arbitrator may find discharge to be too harsh and replace this penalty with a less severe one, such as suspension without pay.[87] Likewise, under Title VII, the EEOC considers the prior track record of an employer and its willingness to reform when determining whether reasonable cause exists to pursue a claim beyond the preliminary investigation stage.[88] Federal judges also consider these factors when determining whether employers should incur liability under Title VII and, if so, to what extent.[89]

The procedural protections afforded alleged harassers in union and civil service employment settings thus closely resemble the procedural protections available to employers under Title VII and, in turn, strike similar balances between competing interests. The accuser may enforce Title VII by complaining to her employer, filing a complaint with the EEOC, and bringing suit against her co-worker and potentially against her employer. These enforcement mechanisms, together with the availability of tort remedies if her suit is successful, protect the interests of the accuser in eliminating discrimination in the workplace and obtaining compensation for injuries incurred. At the same time, the alleged harasser may protect himself from unjust penalties by giving his side of the story during the investigation and, if necessary, disputing the charges before a neutral arbitrator. Like Title VII in the context of accused employers, the just cause system provides procedural protections for accused employees to ensure that their interests are effectively balanced against the interests of their accusers.

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show that employee who had engaged in sexual harassment could not be rehabilitated); *In re IBP, Inc. and United Food and Commercial Workers Int'l Union, AFL-CIO, CLC, Local 222*, 89 Labor Arb. (BNA) 41, 45 (1987) (Eisler, Arbitrator) (upholding discharge for sexual harassment on grounds that harasser's refusal to submit to psychological evaluation indicated that reform was unlikely); *In re United Electric Supply Co. and Int'l Brotherhood of Electrical Workers, Local 1*, 82 Labor Arb. (BNA) 921, 926 (1984) (Madden, Arbitrator) (upholding discharge for sexual harassment on grounds that harasser's poor performance record indicated that "further corrective measures would be unavailing").

87. See notes 83-85.

88. For example, the EEOC may give considerable weight to an employer's showing of steadily increasing minority and female hiring in its investigation of race and gender discrimination allegations. Katz, 28 Hastings L. J. at 907 (cited in note 26).

89. See note 43 and accompanying text. See also Katz, 28 Hastings L. J. at 906-07 (describing how an employer's supplying of statistics showing steadily increasing compliance with Title VII may reduce or eliminate the employer's liability).

B. Government Employment with Constitutional Protections

A termination from government employment necessarily involves state action. Unlike their at-will counterparts in the private sector, government workers who fall outside the coverage of the Civil Service Reform Act may therefore be entitled to some constitutional procedural protection when they are discharged for sexual harassment.[90] A discharge for sexual harassment most commonly implicates the Due Process Clause of the Fifth and Fourteenth amendments, although alleged harassers may also pursue other constitutional claims, such as violations of the First Amendment or the Equal Protection Clause, if the facts surounding their dismissal implicate one of these provisions.[91] Because due process protections are more directly analogous to procedural protections extended to employers under Title VII and employees in just cause settings, this Part will focus on due process protections to the exclusion of these other potential constitutional protections.

In order to trigger a right to constitutional due process, a worker must establish that he has been discharged,[92] that the discharge occurred under color of state law,[93] and that the discharge

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90. Perritt, 2 *Employee Dismissal* § 6.2 at 51-57 (cited in note 55) (discussing the allowable Section 1983 actions against state and local governments).

91. 42 U.S.C. § 1983. Government workers dismissed on chargos of sexual harassment may claim, for example, that their discharge implicates liberty interests protected by the Constitution such as free speech and freedom of religion. Perritt, 2 *Employee Dismissal* § 7.21 at 95-98 (describing the constitutional rights of public employees). See, for example, *Barnes v. McDowell*, 848 F.2d 725, 726 (6th Cir. 1988) (considering claims by two government workers dismissed for sexual harassment that their dismissals actually occurred in retaliation for their exercise of free speech); *Clark v. Yosemite Community College Dist.*, 785 F.2d 781, 789-90 (9th Cir. 1986) (holding that a teacher's lack of a vested right in a particular teaching assignment does not bar his action for violation of his First Amendment rights); *Silva v. University of New Hampshire*, 1994 WL 504417 at *23 (D. N.H.)(denying summary judgment te defendant state university on the grounds that a professor discharged from his post for sexual harassment was likely te prevail in his claim that this discharge violated his First Amendment rights).

A few government workers discharged for sexual harassment have also challenged their dismissals under the Equal Protection Clause of the Fourteenth Amendment, with little success. See, for example, *Black*, 857 F. Supp. at 1548 (holding that the alleged harasser failed to show that his employer treated him differently than other workers also accused of sexual harassment and that this treatment resulted from constitutionally improper considerations).

92. *Paul v. Davis*, 424 U.S. 693, 706 (1976) (holding that, in the absence of an actual loss of government employment, defamation of a government employee does not triggor due process protections); *Koelsch v. Town of Amesbury*, 851 F. Supp. 497, 500-01 (D. Mass. 1994) (stating that impairment of future employment opportunities and suspension with pay do not implicate a constitutionally protected property interest). See also *Workman v. Jordan*, 32 F.3d 475, 481 (10th Cir. 1994) (holding a loss of future employment opportunity "too speculative" te implicate a liberty interest when allegations of sexual harassment were resolved in favor of the employee and the employee retained his job).

93. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981), overruled on other grounds by *Daniel v. Williams*, 474 U.S. 327 (1986).

implicates either a property or a liberty interest.[94] Because a property or liberty interest is implicated only upon discharge, government workers are entitled to no due process protection when they incur lesser penalties, such as demotion, for harassment and other misconduct.[95] This limitation distinguishes constitutional due process protection from the procedural protections available to employers under Title VII and to workers in just cause settings, which include the right to a hearing in a neutral forum to challenge the imposition of any penalty.

Whether a worker can establish a property interest in his job depends on the structure of the state or federal law that creates the job.[96] If the law creates an expectation of entitlement to the job, the worker has a property interest.[97] An alleged harasser's success or failure in establishing a property interest thus hinges on the terms of his employment; the fact that he has been discharged for sexual harassment has no impact on the property interest analysis.

In order to establish a liberty interest, on the other hand, an employee must show that a state actor made statements in connection with his dismissal that damaged his reputation or foreclosed other employment opportunities,[98] that the statements were false,[99] that the statements foreclosed other employment opportunity, and that the statements were published.[100] Because courts typically view sexual harassment charges as marring one's reputation and marketability, alleged harassers can usually establish damage of reputation and foreclosure of employment opportunity.[101] Establishing falsehood may

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94. *Roth*, 408 U.S. at 576-78.

95. See note 92 and accompanying text.

96. *Roth*, 408 U.S. at 577-78. A government employee may also establish a property interest in his job by reference te an employment contract establishing a specific duration of employment or providing specific criteria for dismissal. See *Kirschling v. Lake Forest School Dist.*, 687 F. Supp. 927, 933-34 (D. Del. 1988) (holding that an employment contract between a school district and a prospective school principal providing for just cause dismissal created a property interest).

97. *Roth*, 408 U.S. at 577.

98. *Sullivan v. Stark*, 808 F.2d 737, 739 (10th Cir. 1987).

99 *Codd v. Velger*, 429 F.2d 624, 627 (1977).

100. *Workman*, 32 F.3d at 481.

101. See, for example, *Huff v. County of Butler*, 524 F. Supp. 751, 753 (W.D. Pa. 1981) (holding that a county employee's forced resignation amidst allegations of sexual harassment implicated a liberty interest); *Solomon v. Royal Oak Township*, 656 F. Supp. 1254, 1264 (E.D. Mich. 1986), aff'd in part, rev'd in part, and remanded, 842 F.2d 862 (1988) (holding that a police officer's dismissal amidst allegations of sexual harassment implicated a liberty interest); *Silva*, 1994 WL 504417 at *24 (holding that a charge of sexual harassment implicated a liberty interest).

present greater difficulty, as the harasser must dispute the fact that the alleged incident actually occurred, rather than disputing the conclusion that a given incident amounted to sexual harassment.[102] In addition, most courts hold that the employer must affirmatively inform the public of the damaging reason for the firing in order to satisfy the publication requirement.[103]

If an alleged harasser succeeds in establishing a property or liberty interest, he is entitled to a hearing in which to refute the charges against him.[104] Just as federal court hearings under Title VII and arbitration hearings in just cause employment settings provide a neutral forum in which to determine an alleged harasser's guilt or

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102. *Codd*, 429 U.S. at 627.

103. See, for example, *Derstein v. Kansas*, 915 F.2d 1410, 1414 (10th Cir. 1990) (holding that an alleged harasser's revelation of the reason for discharge to future employers did not constitute publication: " '[t]o impinge on a liberty interest, the stigmatizing information must be made public by the offending governmental entity' " (quoting *Rich v. Secretary of the Army*, 735 F.2d 1220, 1227 (10th Cir. 1984)); *Dubose v. Oustalet*, 738 F. Supp. 188, 191 (S.D. Miss. 1990) (holding that "publication by someone other than the government employer does not trigger [a liberty interest]"). For a different view, see *Marwanga v. Human Resources Admin. Dept. of Social Services*, 1989 U.S. Dist. LEXIS 12087 at *5-6 (S.D. N.Y.) (holding that allegations of sexual harassment documented in an employee's personnel file should implicate a liberty interest when the file is available to other employers); *Bailey v. Kirk*, 777 F.2d 567, 580 n.18 (10th Cir. 1985) (noting that the presence of false and defamatory information in an employee's personnel file triggors a liberty interest if the file is not restricted to internal use).

104. In most cases, an employee's interest in preserving his livelihood outweighs his employer's interest in immediate termination, and so a pre-termination bearing is required. *Loudermill*, 470 U.S. at 543-45. The pre-termination hearing need not consist of a full evidentiary hearing, but instead need only provide the employee with "oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." Id. at 546. See also *Schleck*, 939 F.2d at 641-42 (holding that the employer need not provide a full hearing or provide the alleged barasser with specific details of the charges against him); *Black*, 857 F. Supp. at 1547-48 (holding that an alleged harasser need not have an opportunity to discuss the charges against him during his employer's internal investigation); *Leftwich v. Bevilacqua*, 635 F. Supp. 238, 241 (W.D. Va. 1986) (holding that the employer's explanation of evidence need not be detailed or comprehensive). If the pre-deprivation hearing is defective, a full post-termination evidentiary hearing may suffice to cure the defects. *Loudermill*, 470 U.S. at 546-47; *Adams v. Sewell*, 946 F.2d 757, 765 (11th Cir. 1991), overruled in part by *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994).

The court determines the scope of the hearing required in a particular situation by weighing three factors: (1) the private interest to be affected be affected by state action; (2) the risk of erroneous deprivation through the procedures used and the value of additional procedural protections; and (3) the stato's interest in keeping fiscal and administrative burdens to a minimum. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

Courts have not generally viewed allegations of sexual harassment as an emergency warranting an exception to the pre-tormination hearing requirement. For examples of courts holding that a dischargo for sexual harassment warrants a pre-tormination bearing, see *Kirschling*, 687 F. Supp. at 934; *Lyons v. Barrett*, 851 F.2d 406, 410 (D.C. Cir. 1988). Moreover, the preferred means of affording due process protection to an employee posing a significant hazard to the workplace is suspension with pay pending the employee's pre-termination hearing. *Loudermill*, 470 U.S. at 544-45; *Zavala v. Ariz. State Personnel Bd.*, 159 Ariz. 256, 766 P.2d 608, 615 (1987).

innocence, due process assures employees a hearing free from bias.[105] To ensure the employee a full opportunity to rebut the charges against him, due process also entitles him to general notice of the allegations and evidence supporting them.[106]

However, due process hearings differ from Title VII and just cause hearings in that a due process hearing need not be a full-blown evidentiary hearing on the merits of the case.[107] Instead, the worker need only receive an opportunity to tell his side of the story.[108] Once he has received some opportunity to be heard, the worker has no further right to challenge the judgment of his employer in determining guilt and imposing the penalty of discharge.[109]

If a worker shows that he has been deprived of a property interest without an opportunity to be heard, he may receive compensatory and punitive damages from his employer.[110] The court may also direct the employer to reinstate the worker.[111] On the other hand, if the worker shows that he has been deprived of a liberty interest, he may receive compensatory and punitive damages, but is generally not entitled to reinstatement.[112] Thus, a court's finding that a government worker was deprived of a liberty interest nonetheless allows for imposition of a severe penalty—discharge—even in cases where the worker was, in fact, innocent of the charges against him.

Significantly, a government worker asserting a liberty interest receives no due process protection unless he establishes that the

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105. *Levitt v. Univ. of Texas at El Paso*, 759 F.2d 1224, 1228 (5th Cir. 1985). The *Levitt* court specifically noted that due process entitles an employee to "a hearing before a tribunal that possesses some academic expertise and an apparent impartiality toward the charges." Id. at 1227-28. See also *McDaniels v. Flick*, 1993 U.S. Dist. LEXIS 6600 at *12 (E.D. Pa.) (holding that an apparent aim of catching an alleged harasser "off guard" deprived him of a meaningful hearing).

106. *Levitt*, 759 F.2d at 1228. See also *Adams*, 946 F.2d at 765-66 (holding that an employer's refusal to allow an alleged harasser access to lab records forming the basis of his alibi deprived him of an adequate pre-termination hearing).

107. *Loudermill*, 470 U.S. at 545.

108. Id. at 546.

109. The Court noted that additional procedural protections "would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee." *Loudermill*, 470 U.S. at 546.

110. 42 U.S.C. § 1983.

111. See, for example, *Derstein v. Benson*, 747 F. Supp. 1414, 1415 (D. Kan. 1989) (holding that employee's rebuttal of sexual harassment charges entitles him to reinstatement); *Jackson v. City of Albuquerque*, 890 F.2d 225, 231-32 (10th Cir. 1989) (holding that employee's rebutting of sexual harassment chargos entitles him to lost wages and reinstatement, despite possible workplace hostility).

112. *Lyons*, 851 F.2d at 411.

allegations triggering his discharge were false.[113] Thus, an alleged harasser who admits to the facts charged, but claims he misunderstood their significance as sexual harassment establishes no due process claim.[114] Likewise, a worker with a good prior record and a willingness to reform his behavior and attitude asserts no due process claim so long as he admits that the factual scenario underlying his discharge occurred.[115] Due process protection of a liberty interest thus differs significantly from just cause protection in its lack of concern for the progressive discipline and rehabilitation of the worker.[116]

Due process thus plays a more limited role in providing procedural protections for government workers accused of sexual harassment. Because alleged harassers who cannot establish a property or liberty interest have no due process rights, their interests remain unprotected. In addition, due process hearings do not allow an alleged harasser to dispute the characterization of a certain factual pattern as sexual harassment, nor do they mandate consideration of an alleged harasser's prior track record or potential for reform before imposing a penalty. Nonetheless, because it entitles alleged harassers to a neutral forum in which to dispute the allegations against them, due process provides some balance between the interests of accusers in enforcing Title VII and the interests of alleged harassers in protecting themselves from unjust penalties.

Government workers who fall outside the protection of the Civil Service Reform Act are thus entitled to a hearing free from bias to tell their side of the story, so long as they can show a property or liberty interest in their jobs. Although this procedural protection falls short of that available to workers in a just cause setting, it nonetheless provides government workers minimum protection to ensure, in many cases, some opportunity to be heard. Their at-will counterparts in the private sector, however, receive none of this

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113. See notes 99 and 102 and accompanying text.

114. See *Codd*, 429 U.S. at 628 (holding that a parolee's characterization of an attempted suicide as "horseplay" did not constitute a challenge to the truth of the allegation and thus implicated no liberty interest).

115. See id. (holding that a challenge to the penalty imposed for a given set of facts does not constitute a challenge to the truth of the allegations and thus implicates no liberty interest).

116. Because the scope of due process protection when a property interest is involved varies with both the terms of the law or contract creating the property interest and the factors defined in *Mathews*, 424 U.S. at 335, due process protection of a property interest also may fail to ensure that the penalty a worker receives is appropriate in light of prior track record and willingness to reform. See notes 65 to 96, 103 and accompanying texts. See also *Loudermill*, 470 U.S. at 545-46 (noting that the state law creating the property interest at issue required a full evidentiary hearing after termination, but that due process required lesser protection prior to termination—namely, notice of charges, explanation of employer's proof, and opportunity for worker to tell his side of the story).

constitutional protection. With no statutory or constitutional provisions protecting their interests in a fair hearing against the interests of employers in firing workers accused of sexual harassment to insulate themselves from liability, the at-will worker in the private sector must rely on traditional tort claims and limited common law exceptions to the at-will doctrine. Part IV describes these claims and evaluates their effectiveness in addressing the interests of at-will workers charged with sexual harassment.

IV. EMPLOYMENT AT WILL: THE VIRTUAL ABSENCE OF PROCEDURAL PROTECTIONS FOR WORKERS ACCUSED OF SEXUAL HARASSMENT

Under traditional employment-at-will doctrine, an employer may fire an employee for good reason, bad reason, or no reason at all.[117] Thus, an alleged harasser typically has no right to notice of the charges against him and no opportunity to refute these charges prior or subsequent to dismissal. An alleged harasser may nonetheless obtain judicial review on the merits of his discharge if the discharge implicates a tort claim or if he falls within one of the exceptions his jurisdiction has recognized to at-will employment: implied contract, implied duty of good faith and fair dealing, or public policy.[118] This Part considers the impact of each of these options on the procedural rights of alleged harassers to determine whether any protective mechanism exists to accommodate the interests of an at-will worker accused of harassment in obtaining a fair hearing and appropriate penalty.

Under traditional employment-at-will doctrine, a discharged employee has recourse to judicial review only if his dismissal implicates a tort claim, such as defamation or infliction of emotional distress.[119] The efficacy of these tort actions in providing procedural

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117. Perritt, 1 *Employee Dismissal* § 1.1 at 3 (cited in note 55); Note, 96 Harv. L. Rev. at 1931 (cited in note 67).

118. See notes 132-53 and accompanying text. For a summary of the exceptions to the at-will doctrine recognized by each state, see Perritt, 1 *Employee Dismissal* §§ 1.13-1.63 at 26-66.

119. See, for example, *Lawson v. Boeing Co.*, 58 Wash. App. 261, 792 P.2d 545, 549-51 (1990) (considering an alleged harasser's claims for defamation, tortious interference with prospective economic advantage, and outrage in the context of employment at will); *Nijjar v. Peterbilt Motors Co.*, 1993 U.S. Dist. LEXIS 619 at *12, 15-16 (N.D. Cal. 1993), aff'd, 42 F.3d 1401 (1994) (considering an alleged harasser's claims for defamation and negligent infliction of emotional distress in an employment-at-will setting); *Sloan v. Boeing Co.*, 1994 U.S. Dist. LEXIS 4795 at *43-53 (D. Kan. 1994) (considering claims of intentional infliction of emotional distress and defamation in an employment-at-will setting).

protection to alleged harassers is limited by the nature of the claims themselves. Defamation, for instance, typically requires publication of libelous matter.[120] Like a government worker making a due process claim, an at-will worker claiming defamation must deny the truth of the facts alleged in the defamatory statement.[121] If an alleged harasser admits that the facts in the statement occurred, but denies the conclusion that these facts amount to sexual harassment, he will fail in his claim for defamation and thus be denied relief.[122]

Most courts also grant employers a conditional privilege that protects them from defamation claims arising from in-house investigations of sexual harassment.[123] An alleged harasser may overcome this privilege if he can show malice, bad faith, or abuse on the part of the employer,[124] but very few alleged harassers successfully clear these hurdles.[125] Likewise, alleged harassers rarely succeed in claims of infliction of emotional distress.[126] Typically, the court finds that an employer's investigation or firing of an alleged harasser falls short of the "extreme and outrageous" conduct required for intentional and negligent infliction of emotional distress.[127]

Nonetheless, those few alleged harassers who succeed in making out a tort claim may receive a hearing on the sexual harassment charge itself[128] and on the employer's treatment of the charge.[129]

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120. Restatement (Second) of Torts § 558 (1977); *Ekokotu v. Pizza Hut, Inc.*, 205 Ga. App. 534, 422 S.E.2d 903, 904 (1992). Thus, the truth of an allegedly libelous statement constitutes a complete defense to defamation. *Int'l Mincrals & Chem.*, 42 Empl. Prac. Dec. (CCH) ¶ 45,361 (May 27, 1986).

121. *Lambert v. Morehouse*, 68 Wash. App. 500, 843 P.2d 1116, 1120 (1993).

122. Id.

123. See *Lambert*, 843 P.2d at 1120. See also *Garziano v. E.I. Du Pont de Nemours & Co.*, 818 F.2d 380, 385 (5th Cir. 1987) (discussing the jurisprudential basis of the privilege).

124. *Garziano*, 818 F.2d at 386.

125. For examples of cases dismissing alleged harassers' defamation claims upon a finding that the employer did not abuse its qualified privilege, see *Lambert*, 843 P.2d at 1120; *Garziano*, 818 F.2d at 389-91; *Ekokotu*, 422 S.E.2d at 904; *Manning v. Cigna Corp.*, 807 F. Supp. 889, 898-99 (D. Conn. 1991).

126. See, for example, *Agugliaro v. Brooks Brothors*, 802 F. Supp. 956, 964 (S.D. N.Y. 1992) (finding that the plaintiff's allegations were not sufficiently outrageous); *Sloan*, 1994 U.S. Dist. LEXIS 4795 at *45-46 (noting that the overwhelming majority of Kansas cases have rejected such claims); *Nijjar*, 1993 U.S. Dist. LEXIS 619 at *15 (stating that plaintiff failed to support his claim).

127. *Agugliaro*, 802 F. Supp. at 964; *Int'l Mincrals*, 42 Empl. Prac. Dec. (CCH) ¶ 45,363. For a survey of other traditional tort claims available to alleged harassers, see Perritt, 1 *Employee Dismissal* §§ 5.41-5.48 at 537-75 (cited in note 55).

128. In a trial for defamation, the factfinder must determine whether the allegations of harassment are true. See note 122 and accompanying text.

129. In a claim for defamation, for instance, the factfinder must determine whether the employer abused its privilege and behaved negligently in publicizing the charges against the alleged harasser. See Perritt, 1 *Employee Dismissal* § 5.44 at 552-59 (cited in note 55). Likewise, in a claim for intentional or negligent infliction of emotional distress, the factfinder

Unlike workers in a just cause system, at-will workers carry the burden of proof in establishing that harassment did not occur, when such proof is required.[130] Moreover, this showing alone triggers no relief for the at-will worker. He must also show that the employer's behavior constituted a tort.[131] Because tort law protects only alleged harassers who can prove their employer's guilt, apart from their own innocence, traditional tort claims are ill-suited for protecting the interests of alleged harassers.

Although some courts have recognized limited exceptions to the employment-at-will doctrine, these exceptions provide little assurance that an alleged harasser will receive a fair hearing or an appropriate penalty. For instance, a majority of courts recognize an exception to the at-will doctrine when the worker demonstrates the existence of an implied employment contract.[132] A worker may establish the existence of such a contract through reference to a personnel manual or grievance procedure setting forth disciplinary procedures or limitations on discharge.[133] However, a court may find these procedures insufficient to alter the at-will presumption if the worker was not aware of them and thus did not rely on them.[134] In addition,

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must determine whether the employer's treatment of the allegations was sufficiently outrageous to trigger liability. Id. at § 5.42 at 543-48.

130. See, for example, *Sloan*, 1994 U.S. Dist. LEXIS 4795 at *51 (stating that in order to bring a defamation action, plaintiff must prove that defendant's statement was false and defamatory).

131. Even if an alleged harasser establishes his innocence, he will receive no tort relief unless he also shows that the employer defamed him or inflicted severe and unwarranted emotional distress upon him or engaged in some other tortious behavior. See 1 Perritt, *Employee Dismissal* § 5.40 at 533-37 (cited in note 55) (noting that a worker bringing a tort claim against his employer carries the burden of showing a specific intent to harm on the part of the employer).

132. As of 1987, more than half the states had recognized a finding of an implied contract as a means of rebutting the at-will presumption. Leonard, 66 N.C. L. Rev. at 635-36 (cited in note 17).

133. See, for example, *Saini v. Cleveland Pneumatic Co.*, No. 51913, slip. op. (Ohio Ct. App., May 14, 1987) (holding that a sexual harassment policy contained an implied promise that discharge would be imposed only after an appropriate investigation); *Starishevsky v. Hofstra Univ.*, 612 N.Y.S.2d 794, 803 (1994) (holding that Title IX's requirement of a grievance procedure for sexual harassment allegations in school settings, combined with the specific provisions of the defendant employer's procedure, restricted the employer's right of discharge in harassment cases to individuals who are "actually found guilty" under such procedures); *Kestenbaum v. Penzoil Co.*, 108 N.M. 20, 766 P.2d 280, 285 (1988) (holding that employer's representations to alleged harasser that he could only be fired for " 'a good reason, a just cause,' " taken together with other facts, established a just cause limitation on firing); *Baxter v. Greeley Gas Co.*, 1990 U.S. Dist. LEXIS 8725 *1, 6-7 (D. Kan.) (holding that personnel manual established program of progressive discipline and created an issue of fact for jury as to whether manual created an implied employment contract).

134. For an argument in support of this requirement, see Winters, 1985 Duke L. J. at 213 (cited in note 17). The reliance requirement for creation of an implied contract links this

courts will often refuse to enforce such procedures if the manual or policy specifically provides that the procedures do not alter the employment-at-will relationship.[135]

Implied contracts thus constitute an unreliable means of affording alleged harassers procedural protections similar to those provided employers under Title VII.[136] If the alleged harasser successfully establishes the existence of such a contract, the contract will entitle him only to varying degrees of protection according to its particular terms.[137] Moreover, employers can easily evade the limitations imposed by such contracts by including disclaimers in all policies and manuals distributed to employees.[138] The implied contract exception thus fails to provide alleged harassers with reliable procedures to balance their interests against those of their accusers.

A few states imply a covenant of good faith and fair dealing into all employment relationships.[139] Because such a covenant arises from contract law, some courts disallow tort remedies, such as damages for pain and suffering.[140] Likewise, courts vary in the extent to which they impose obligations not already explicit in the employment

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analysis closely to promissory estoppel; indeed, several courts have applied promissory estoppel theory in addition to implied contract analysis. See, for example, *Young*, 1991 Ohio App. LEXIS 141 at *24-25 (denying plaintiff relief under a promissory estoppel theory).

135. See, for example, *Talanda v. KFC Nat'l Mgmt. Co.*, 863 F. Supp. 664, 666-70 (N.D. Ill. 1994) (holding that an employer's handbook did not create an implied contract when it specifically disclaimed an interpretation altering the at-will relationship); *Saini*, No. 51913, slip. op. (holding that, in light of disclaimer specifically stating that handbook provisions do not constitute contractual terms, employee had no right to rely on the provisions as an implied contract). See also *Galieti v. State Farm Mutual Auto. Ins. Co.*, 1994 U.S. Dist. LEXIS 11858 *1, 5 (D. Colo.) (discussing and then rejecting the principle that, despite a specific disclaimer, an employer may be contractually bound by mandatory termination procedures or requirements for just cause termination set forth in a personnel manual).

136. For a similar view of implied contracts, see Leonard, 66 N.C. L. Rev. at 653 (cited in note 17) (noting the fragile nature of the implied contract).

137. If a personnel manual provided for just cause termination, for example, the alleged harasser would receive extensive protections similar to those discussed in Part III.A above. On the other hand, if the manual provided only for an investigation into charges of misconduct prior to firing, the alleged harasser would receive lesser protections similar to those afforded alleged harassers in states recognizing a tort similar to negligent investigation as discussed in notes 150 to 153 and accompanying text.

138. See note 135 and accompanying text.

139. See, for example, *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549, 551-52 (1974) (holding that an employer breached an employment-at-will contract by acting in bad faith); *Noye v. Hoffman-La Roche, Inc.*, 238 N.J. Super. 430, 570 A.2d 12, 13 (1990) (stating that all contracts contain an implied contract of good faith and fair dealing); *Fortune v. The National Cash Register Co.*, 373 Mass. 96, 364 N.E.2d 1251, 1256-57 (1977) (noting the general contractual requirement of good faith). Montana imposes such an implied covenant by means of a statute. Mont. Code. Ann. § 39-2-503 (1987). For a description of the judicial innovations in Montana's common law that led the state legislature to adopt this statute, see Leonard, 66 N.C. L. Rev. at 663-71 (cited in note 17).

140. *Noye*, 570 A.2d at 15.

relationship on the basis of this covenant.[141] The "good faith" standard also involves a subjective judgment on the part of the factfinder concerning the employer's motivation in pursuing a particular course of conduct, resulting in uncertainty of application and result.[142]

Nonetheless, a court's imposition of a covenant of good faith and fair dealing on at-will employment relationships will provide a minimal degree of protection for alleged harassers.[143] Employers must, at a minimum, show that they reasonably believed that the accused worker had committed sexual harassment.[144] An implied covenant of good faith and fair dealing thus increases the degree of employer neutrality when investigating claims of sexual harassment. Nonetheless, the degree of subjectivity and variance in application of this standard from jurisdiction to jurisdiction, together with the small number of jurisdictions recognizing a covenant of good faith, renders this exception to employment at will an unreliable means of protecting the interests of alleged harassers.

In contrast to the small number of courts implying a covenant of good faith and fair dealing into the employment relationship, a majority of courts currently recognize a public policy exception to the employment-at-will doctrine.[145] Courts typically use this exception, however, to enforce dismissals of alleged harassers instead of ensuring that alleged harassers receive procedural protections.[146] When

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141. Compare *Fortune*, 364 N.E.2d at 1257 (stating that the implied covenant of good faith merely assures that neither party will do anything to prevent the other party from receiving the "fruits of the contract," quoting *Uproar Co. v. National Broadcasting Co.*, 81 F.2d 373, 377 (1st Cir. 1936)), with *Monge*, 316 A.2d at 551-52 (using a balancing tost to determine that an employer must act in good faith to avoid breaching an employment contract).

142. Leonard, 66 N.C. L. Rev. at 655 (cited in note 17).

143. See id. at 656 (noting that courts have not used the covenant of good faith and fair dealing to reinstate an unwanted employee, but rather to ensure a certain degree of fairness in termination decisions).

144. *Noye*, 570 A.2d at 13. Thus, even if a jury finds that allegations of harassment are false, an employer's decision to terminate the alleged harasser does not violate the implied covenant of good faith and fair dealing so long as the employer reasonably believed the alleged harasser to be guilty. Id.

145. More than 30 states currently recognize this exception. Leonard, 66 N.C. L. Rev. at 635 (cited in note 17). Courts vary in the degree to which they allow themselves discretion to define public policy in the absence of a specific statutory mandate. See, for example, *Simpson v. Pizza Hut, Inc.*, 58 F.E.P. Cases (BNA) 558, 562 (E.D. Pa. 1991) (holding that the court was not allowed any discretion).

146. See, for example, *Williams v. Maremont Corp.*, 875 F.2d 1476, 1485 (10th Cir. 1989) (holding that "public policy operates to require a construction of contract terms in favor of giving the employer broad discretion in its efforts to eliminate sexual harassment from the workplace"); *Simpson*, 58 F.E.P. Cases (BNA) at 563 (holding that an employee's discharge on allegations of sexual harassment "can hardly be said to violate a 'clear mandate of public policy' "); *Willis v. Ideal Basic Industries, Inc.*, 484 S.2d 444, 446 (Ala. 1986) (stating that

courts reference Title VII as a statutory mandate evidencing a specific public policy against sexual harassment, they view alleged victims as the statute's exclusive concern.[147]

Nonetheless, at least one court has recognized that Title VII's policy against sexual harassment requires a balancing of the interests of alleged victims and alleged harassers. In *Ashway v. Ferrellgas, Inc.*,[148] the U.S. District Court for the District of Arizona held that Title VII's public policy against sexual harassment imposes on employers a duty toward both alleged victims and alleged harassers to investigate charges in a non-negligent manner.[149] The court thus extended the tort of negligent supervision[150] to encompass claims that an employer had negligently investigated charges of harassment.[151] This holding ensured that a worker charged with sexual harassment would receive a reasonable investigation of the claim against him before losing his job.[152]

Like the tort claims discussed above, a claim for negligent supervision provides some protection for alleged harassers, but falls short of the protection afforded employees under just cause systems and employers under Title VII. Again, the alleged harasser recovers only if he shows tortious behavior on the part of his employer. While he may challenge his employer's methods of investigation, he may not challenge the conclusions his employer draws from it.[153] In addition,

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charges of sexual harassment would remove an employee from even a broad public policy concern of wrongful discharge).

147. See, for example, *Willis*, 484 S.2d at 446 (holding that an alleged harasser's petition of the court to adopt a tort of wrongful discharge was misplaced because one dismissed for sexual harassment would have no claim under such a tort).

148. 59 F.E.P. Cases (BNA) 375 (Dec. 6, 1989).

149. Id. at 377 (stating: "It seems somewhat absurd that the public policy against sexual harassment in the work place, requiring an employer to investigate charges of sexual harassment, creates an obligation to protect a complainant, but does not protect an innocent person who has been accused").

150. Restatement (Second) of Agency § 213 (1958).

151. Id. Montana courts also have recognized a tort of negligent investigation, effectively creating a cause of action for wrongful discharge. *Flanigan v. Prudential Fed. Sav. & Loan Ass'n*, 221 Mont. 419, 720 P.2d 257, 263 (1986). Montana's recognition of this tort is consistent with its statutory recognition of an implicit covenant of good faith and fair dealing in all employment contracts. See Leonard, 66 N.C. L. Rev. at 667-70 (cited in note 17) (describing the role of the *Flanigan* decision in prompting the Montana legislature to codify an action for wrongful termination). Most other jurisdictions, however, have declined to follow Montana's lead and have refused to recognize a tort of negligent investigation. See, for example, *Lambert*, 843 P.2d at 1119-20; *Wiggins*, No. 85-2200-S, slip. op. at 1.

152. *Ashway*, 59 F.E.P. Cases (BNA) at 377.

153. Id. at 378. The *Ashway* court noted that this limitation on the tort of negligent investigation preserves the employer's freedom to operate its business in an efficient and profitable manner. Id. at 378 n.10. Recognizing a tort claim of negligent investigation thus gives at-will employees similar protection to that afforded government employees under the Due Process Clause. While due process guarantees government workers an opportunity to be heard, it does

the tort provides no means for employees to challenge the appropriateness of discharge in light of prior track record and potential for reform. The claim thus fails to ensure alleged harassers a hearing in a neutral forum and an imposition, if necessary, of a fair penalty.

Nonetheless, a conception of public policy that requires employers to investigate charges of harassment in a non-negligent manner ensures minimal procedural protection to all alleged harassers in at-will settings. If alleged harassers cannot challenge the conclusions their employers draw, they can at least challenge the investigatory methodology by which the employers arrived at those conclusions. To date, only one federal district court has interpreted the public policy exception to require a non-negligent investigation of harassment claims. The *Ashway* court's view of the public policy exception does, however, provide a starting point for achieving some balance between the interests of alleged harassers and their accusers.

Alleged harassers in at-will employment settings thus possess virtually no procedural protections akin to those afforded employers under Title VII. Traditional tort claims generally do not address the concerns of alleged harassers regarding a fair determination of guilt and imposition of penalty and are thus ill-suited to improving the balance between alleged harassers and their accusers. The implied contract and implied covenant of good faith and fair dealing exceptions to the at-will rule also provide little protection for harassers because of the varying degrees of protection that they provide and, in the case of implied contracts, the ease with which employers may avoid them.

Courts usually construe Title VII's public policy against sexual harassment as protecting only alleged victims. The public policy exception thus typically affords no additional rights to alleged harassers, but instead encourages dismissal of alleged harassers without regard to how well guilt has been established, the egregiousness of the offense, and the alleged harasser's prior track record and potential for reform. The public policy exception thus fails to reflect Title VII's model of balancing the interests of accused and accuser.

This lack of procedural protection increases the possibility that workers who are innocent of the charges against them will unjustly suffer the severe penalty of discharge. In addition, workers who are

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not necessarily guarantee a full hearing on the facts of the case or the conclusion the employer draws from these facts. See notes 104, 107 to 109 and accompanying text.

guilty of sexual harassment but who regret their actions have no opportunity to reform their behavior and attitudes on the job. These results should trouble policymakers, because they undermine Title VII's goal of eliminating sexual harassment in the workplace on two levels: behavioral reform on the part of individual workers and attitudinal reform on the part of society at large.

On an individual level, allegations of sexual harassment typically give rise to enormous repercussions in the alleged harasser's professional and personal life. An arbitrator considering charges of sexual harassment against a worker in a just cause setting described the significance of the allegations by noting: "[I]t is not overly dramatic to say . . . that the Grievant's very life is on the line. All that he is: his marriage; his relationship with his children; his karate school; his standing in the community; his relationships with other employees—all of this is on the line."[154] With such high stakes involved, a dismissal based on unjust allegations with no investigation or opportunity for the alleged harasser to present his side of the story may lead the alleged harasser to develop more negative views of women in the workplace and insensitivity to the harm caused by real instances of sexual harassment.

In *Williams v. Maremont Corp.*,[155] a worker, Williams, was fired from his job as general foreman at a plant due to allegations that he had pulled down the zipper of his pants in front of male and female workers while on the job.[156] Williams admitted that he had "reached down" toward his crotch area, but claimed that the incident did not amount to sexual harassment because it occurred while he was joking with a female employee that he used to date, and who had joked that he was too old "to get it up."[157] Williams nonetheless admitted that the act was wrong and that discipline was appropriate, but claimed that discharge was too harsh a penalty.[158]

Finding that Williams did not fall within one of the exceptions to the at-will rule, the appellate court overturned a jury award of $750,000 in actual damages and $250,000 in punitive damages, and upheld the legitimacy of his dismissal.[159] The court noted that the jury clearly thought discharge to be too harsh a penalty, and re-

154. *In re King Soopers, Inc.*, 86 Labor Arb. (BNA) 254. Although the worker in this case was employed full time by King Soopers, Inc., he ran his own karate school on the side. Id. at 257.

155. *Williams*, 875 F.2d 1476.

156. Id. at 1477.

157. Id. at 1477-78.

158. Id. at 1478.

159. Id. at 1478, 1484-86.

marked that a lesser penalty may have been more appropriate. Because of Williams' status as an at-will employee, however, the court held that it lacked the power to question the penalty imposed; as an at-will employer, Maremount was free to exact whatever sanction it deemed appropriate.[160]

The disparity between the jury verdict and the court's stated opinion of the case on the one hand and the case's outcome on the other suggests that the severe penalty of discharge in the case of a first-time offender who admits fault conflicts with general notions of fair play. Moreover, because workers like Williams who sexually harass a co-worker receive the same discipline regardless of whether they regret their behavior or refuse to acknowledge their mistake, the at-will system provides little incentive for them to admit their harassing behavior and work to alter it.

The penalty of discharge for first-time harassers seems especially harsh considering how dramatically the standard of behavior imposed by Title VII differs from pre-existing workplace norms and thus takes many alleged harassers by surprise. For example, in *Young v. Hobart Brothers Co.*,[161] an employer discharged a twelve-year veteran worker, Young, on charges of sexual harassment after a female worker under his supervision was taped to a pole on the shop floor.[162] Although viewed objectively this incident would seem to violate directly Title VII's prohibition of sexual harassment in the workplace, the female employee herself did not agree with this assessment.[163] Claiming that the incident was a joke perpetrated by her co-workers who did not wish to see her leave, the female employee denied that she had been sexually harassed.[164]

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160. Id. at 1486. The court noted:
It is clear by the size of the award, and punitive damages, that the jury in this case thought that Maremont acted too severely by terminating Williams for what it must have regarded as a comparatively small event after twelve years of blemish-free service. Unquestionahly, Maremont could have disciplined Williams in ways short of discharge, and in doing so made it clear to all concerned that his conduct was absolutoly unacceptable, and any other improper speech or conduct would result in immediate discharge. In retrospect, that, perhaps, would have been wisest. But the question is not whether Maremont was uriduly harsh in this instance, the question is whether it had the legal right to terminato Williams under the circumstances. We conclude that it did.
Id.

161. 1991 Ohio App. LEXIS 141.
162. Id. at *4.
163. Id.
164. Id.

Despite this confusion as to whether the incident amounted to joking or sexual harassment under Title VII,[165] the employer fired Young.[166] Because of his status as an at-will employee who did not fall within any of the exceptions recognized in his jurisdiction, Young was powerless to challenge his discharge.[167] Young's case illustrates the dilemma of both male and female at-will workers who must comply fully with Title VII's new behavioral norms before they have developed a full understanding of what these norms are. In order for Title VII to respect the interests of workers to the same extent it respects the interests of feminists and employers, it must make allowances for the learning process that necessarily precedes workers' ability to comply fully with the Act.

Six major newspapers recently carried a New York Times article describing the trend amongst at-will employees unjustly dismissed on charges of sexual harassment to bring suit against their accusers and their employers for the purpose of clearing their names.[168] In addition, several dramatic cases of alleged harassers committing suicide out of despair over what they perceived to be unfair charges against them have raised the public's concern about the type of procedural protection available to at-will employees accused of sexual harassment.[169] As these cases grow in number and receive increasing

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165. Because EEOC guidelines require that conduct be "unwelcome" by the alleged victim in order for it to constitute sexual harassment, the behavior at issue in this case probably would not amount to sexual harassment under Title VII. EEOC, Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a). See also Kelly Ann Cahill, Note, *Hooters: Should There Be an Assumption of Risk Defense to Some Hostile Work Environment Sexual Harassment Claims?*, 47 Vand. L. Rev. 1107, 1122-25 (1995) (distinguishing assumption of risk from unwelcomeness).

166. *Young*, 1991 Ohio App. LEXIS 141 at *5. Although the employer claimed that Young had resigned by mutual agreement, Young maintained that he had been wrongfully discharged. Id.

167. Id. at *8-26. Despite the company's failure to adhere to the four-step progressive disciplinary procedure contained in its policy manual, the court held that Young had no right to challenge his discharge because the manual contained a disclaimer and thus did not amount to an implied contract altering the at-will relationship. Id. at *3-4, 12-14.

168. Murray, N.Y. Times at 3-23 (cited in note 20). The same article also appeared under different titles in the following newspapers: *Suit-Countersuit: Men Accused of Sexual Harassment Are Fighting Back—And Winning*, Chicago Tribune, Womanews Sect. at 4 (Oct. 2, 1994); *Men Fight Harassment Charges: Suits Contend Accused is a Victim*, The Houston Chronicle, Business Sect. at 5 (Sept. 18, 1994); *Sexual Harassment Cases Reveal Another Side of the Issue*, The Atlanta Journal and Constitution, Q-10 (Sept. 18, 1994); *Harassment Suits: Men Fight Back*, International Herald Tribune (Sept. 17, 1994); *The Other Side of Sexual Harassment*, The Tennessean 5E (Sept. 18, 1994).

169. See, for example, Libby Lewi, *Suit Blames Son's Suicide on AT&T*, News & Record (Greensboro, NC) A1 (July 24, 1994) (describing the lawsuit brought by a suicide victim's family charging that his employer's aggressive handling of a sexual harassment complaint caused his death, noting: "Less and less, the legal question isn't whether companies are dealing with complaints of sexual harassment. More and more, the question is how"); *Teacher's Suicide*

publicity,[170] public attention could well shift from the problem of sexual harassment to the injustice of alleged harassers receiving severe penalties without fair hearings. To ensure continuing public support for the elimination of sexual harassment in the workplace, Congress should temper the incentives for employers to insulate themselves from liability by immediately firing alleged harassers with mandatory procedural protections for workers accused of harassment.

The alternative view of public policy as mandating fair treatment of both alleged victims and alleged harassers provides for at least minimal protection of alleged harassers in the at-will setting. This view ensures that all alleged harassers will receive some hearing in the context of a fair investigation. The non-negligent investigation requirement parallels Title VII's emphasis on a neutral forum in which to determine the legitimacy of claims against employers and thus provides a starting point for achieving a balance of competing interests. Part V considers this possibility for increasing procedural protections available to at-will workers accused of harassment and others.

Draws Sexual Harassment Concerns, National Public Radio, Morning Edition (June 15, 1993) (noting that a high school teacher's suicide over charges of sexual harassment "has raised some difficult questions about sexual harassment in schools and the ability of school officials to balance their concerns for students who are victimized with the rights of teachers who are accused"). For an example of a similar incident in Western Europe, see *Sports Chief Clears Name of Journalist*, The Herald (Glasgow) 6 (April 18, 1994) (reporting that the British Athletic Federation cleared the name of a well-known journalist and coach in its employ of sexual harassment charges after he committed suicide over the allegations).

170. For examples of additional newspaper articles discussing the injustice of discharging at-will employees without a hearing, see L.G., *Cleared of Sex Harassment Charge, Yet Scarred for Life*, Orlando Sentinel Tribune G-3 (Oct. 27, 1991) (describing the author's own experience as an alleged harasser and declaring: ". . . Americans must demand confidential investigations and guarantees that the benefit of the doubt goes to the accused"); Pat Dunnigan, *Newspaper Settles Fight With Former Publisher*, Miami Daily Business Review, 1-1 (Sept. 28, 1993) (reporting that a newspapor agreed to pay a former publisher $40,000 to settle a defamation suit brought by the publisher, who was fired amidst allegations of sexual harassment without an investigation into the charges).

V. RECOMMENDATIONS

In order to accommodate the interests of at-will workers charged with sexual harassment and thereby promote the effectiveness and fairness of Title VII, Congress should consider amending Title VII in one of two ways. At a minimum, Congress should direct the EEOC to amend its guidelines to state that simply firing the alleged harasser, without more, will not insulate employers from liability for sexual harassment occurring between fellow employees.[171] The EEOC should then set forth examples of "appropriate" penalties that would suffice to insulate employers from liability in this area, such as mandatory counseling, formal reprimands, and suspension. This rule would provide incentive for employers to invest resources in developing penalties for sexual harassment that both encouraged on-the-job reform by alleged harassers and recognized the complex process involved as workers learn to adapt their behavior to new standards.

The guidelines should also set forth instances in which firing the alleged harasser would constitute an "appropriate" penalty, and would thus suffice to insulate the employer from liability. Such instances could include cases in which an alleged harasser had been disciplined for other incidents of sexual harassment in the past. Likewise, discharge could constitute an appropriate penalty when the employer had conducted a reasonable investigation to determine the guilt of the alleged harasser, but the alleged harasser refused to acknowledge his mistake. Because the alleged harasser in each of these instances would have received an opportunity to conform his behavior to Title VII's standards but nonetheless exhibited an unwillingness or inability to do so, discharge would constitute an appropriate penalty.

Second, Congress should amend Title VII to require employers to develop and publish grievance procedures for the prompt and fair resolution of sexual harassment complaints and to abide by these procedures in resolving all claims of sexual harassment.[172] Congress could state this requirement in general terms or instead choose to mandate particular steps that every grievance procedure must include to be considered "fair." Such mandatory steps might include a rea-

171. The guidelines currently state: "With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action." 29 C.F.R. § 1604.11(d).

172. The federal regulations implementing Title IX currently require educational institutions te implement and abide by such policies. 34 C.F.R. § 106.8(b)(1994).

sonable investigation into the charges and an opportunity for both alleged victims and alleged harassers to tell their sides of the story.

Congress should also consider requiring that these grievance procedures place the burden of proof on alleged victims of harassment so that alleged harassers would not incur a penalty unless there was reasonable cause to believe the charges were true. Placing the burden of proof on alleged victims would accommodate the interests of alleged harassers in incurring a penalty only after guilt has been determined. The requirement would thus extend procedural protection to at-will workers accused of harassment similar to that currently afforded employers under Title VII and workers in just cause settings.

If Congress fails to adopt the above proposals or comparable solutions, the courts could improve the procedural protections available to alleged harassers in at-will settings by following the lead of the Arizona district court in *Ashway v. Ferrellgas*.[173] By broadening the public policy exception to at-will employment to require employers to conduct a non-negligent investigation of sexual harassment charges before imposing a penalty, the courts would provide a minimal level of procedural protection to promote fair resolution of harassment claims. This promotion of fairness in the resolution of sexual harassment complaints would better advance the goals of Title VII, as it would lessen the potential for resentment on the part of alleged harassers and for criticism by society at large.[174]

VI. CONCLUSION

When Congress amended Title VII in 1991 to provide increased remedies for sexual harassment, it accommodated the interests of feminists in eliminating harassment from the workplace and effecting a dramatic transformation of the interaction between men and women in the workplace. Likewise, Congress continued to accommodate the interests of employers in receiving a fair hearing before incurring any penalty under the Act. Congress, however, overlooked the interests of the workers at whom the statute was primarily directed. With EEOC guidelines insulating employers from Title VII liability if they take immediate action against alleged harassers, but mandating no proce-

173. See notes 148-53 and accompanying text.
174. See notes 161-70 and accompanying text.

dures to protect alleged harassers, employers have a great incentive to fire alleged harassers immediately and little incentive to invest resources in investigation of charges and on-the-job reform. Because at-will workers have no procedural protections to ensure a fair hearing when harassment allegations arise, they are especially vulnerable to employers' efforts to insulate themselves by firing suspected harassers.

With no opportunity to tell their side of the story and no guarantee of a reasonable investigation of the charges against them, workers fired for sexual harassment are more likely to consider themselves victims of the effort to eliminate sexual harassment than to enthusiastically reform their behavior and attitudes. To prevent a deepening of entrenched biases against women in the workplace amongst alleged harassers and a shift in the public's focus from the problem of sexual harassment to the injustice experienced by alleged harassers, Congress must provide mandatory procedural protections for alleged harassers to ensure that they are treated fairly. Only by accommodating the interests of workers as they struggle to adopt the new set of behavioral norms mandated by Title VII will Congress and feminists achieve their long term goal of eliminating sexual harassment in the American workplace.

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