"BECAUSE OF SEX" AFTER *ONCALE*: SHOULD DIFFERENCES IN SUBJECTIVE EFFECTS BE CONSIDERED RELEVANT TO DETERMINE WHETHER MEN AND WOMEN ARE TREATED DIFFERENTLY IN THE WORKPLACE?

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I. INTRODUCTION

Title VII of the Civil Rights Act of 1964 provides, in relevant part, that "[i]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[467] Title VII's prohibition of discrimination "because of . . . sex" protects men as well as women.[468] The definition of *discrimination* for purposes of the Act has evolved to encompass so-called disparate treatment cases and disparate impact cases. Disparate treatment is often referred to as intentional discrimination where there exists either a company policy that, on its face, discriminates on a prohibited basis (a so-called non-neutral policy or practice), or a situation where a company that professes to be an equal opportunity employer (i.e. one that has only neutral policies), does not act accordingly (i.e. the policy is not applied neutrally). Disparate impact cases are often said to involve unintentional discrimination,[469] often defined as a facially neutral policy or practice that is applied neutrally.[470] Conduct is *facially neutral* if it does not implicate a protected characteristic, such as race, national origin, or sex.[471] Height requirements, high school education requirements, and passage of a written test are not mentioned in the Act; therefore they are neutral with respect to its terms.[472]

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[467] 78 Stat. 255, as amended, 42 U.S.C. § 2000e-2(a)(1) (1964).
[468] Newport News Shipbuilding & Dry Dock Co. v. EEOC , 462 U.S. 669, 682 (1983).
[469] The original disparate impact case was *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). In that case the Defendant corporation may have had a prohibited intent to circumvent Title VII by adopting a policy of requiring high school diplomas where the real purpose was probably to deny jobs to minorities, but the Court refused to delve into intentions.
[470] Pamela L. Perry, *Two Faces of Disparate Impact Discrimination*, 59 FORDHAM LAW REV. 523, 552 (1991).
[471] *Id*.: Facially neutral criteria are "criteria that are not explicitly prohibited by Title VII."
[472] Despite being neutral, they are considered illegal if they have a disproportionately negative impact on a protected group, unless there is a business necessity for the neutral requirement.

II. SEXUAL HARASSMENT OVERVIEW

The sexual harassment concept does not appear in Title VII as enacted. Instead, it was a concept created by lower Federal Court decisions[473] and the Equal Employment Opportunity Commission (hereinafter referred to as EEOC) and ultimately blessed by the Supreme Court in *Meritor Savings Bank, FSV v. Vinson* (hereinafter referred to as *Meritor*).[474] A good starting point for trying to understand what sexual harassment encompasses is EEOC's "Sexual Harassment Guidelines," where it is defined as follows:

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.[475]

Historically, there exist two approaches to a sexual harassment case, namely quid pro quo sexual harassment (numbers 1 and 2 in the EEOC definition) and hostile work environment sexual harassment (number 3 above).[476] Numbers 1 and 2 in the EEOC definition are sometimes referred to as economic harassment, while number 3 is sometimes referred to as environmental harassment. With respect to the propriety of the Guidelines,[477] the Supreme Court stated in *Meritor*:

> Courts have applied Title VII protection to racial harassment and nothing in Title VII suggests that a hostile environment based on discriminatory sexual harassment should not be likewise prohibited. The Guidelines thus appropriately drew from, and were fully consistent with, the existing case law.[478]

III. SEXUAL HARASSMENT: DISPARATE TREATMENT, DISPARATE IMPACT, OR BOTH?

As stated above, a distinguishing characteristic of the two different types of discrimination cases is the presence or absence of intent to discriminate. In *Griggs v. Duke Power Co.*,[479] the case that first set forth the disparate impact theory, the Court stated: "Good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in head winds' for minority groups and are unrelated to measuring job capability."[480] The

[473] KENNETH L. SOVEREIGN, PERSONNEL LAW 93 & note 24 (4th ed. Prentice-Hall 1999): "Harassment received its first formal judicial recognition in Williams v. Saxbe, 413 F.Supp. 654 (D.C. 1976) where the court held that Title VII's prohibition on sex discrimination includes a prohibition on sexual harassment."
[474] 477 U.S. 57 (1986).
[475] 29 C.F.R. § 1604.11(a).
[476] *But see* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998) where the Court indicated that the terms quid pro quo and hostile environment are not necessarily controlling, but are rather rough lines of demarcation.
[477] EEOC Notice Number N-915-050, 3/19/90, available online at http://www.eeoc.gov/policy/docs/currentissues.html (last visited Feb. 27, 2006).
[478] Meritor Sav. Bank, FSV v. Vinson., 477 U.S. 57, 66 (1986).
[479] 401 U.S. 424 (1971).
[480] *Id.* at 432.

term *intent* as used in sexual harassment cases means having a bad motive (or animus) toward a protected group, which differs from intent as it is used in the intentional tort area, for instance.[481]

Courts have seldom addressed the issue of whether a hostile environment sexual harassment claim is in the nature of a disparate treatment or a disparate impact claim.[482] Unlike a height requirement or the requirement that one have a high school diploma, which are "neutral" since neither involve characteristics enumerated in Title VII, conduct of a sexual nature is not neutral with respect to sex, unless the term "sex" in Title VII is read narrowly to mean "gender," the status of being a man or a woman.[483] There have been cases, however, in which unintentional acts (i.e. cases without animus toward the opposite), such as posting sexy calendars in the workplace have been deemed sexual harassment when they offend the sensibilities of female employees. Even in that situation, however, the offending material is itself of a sexual nature. Courts, of course, need not be limited by the EEOC's definitions and Guidelines.[484]

The EEOC distinguishes between conduct that is sexual in nature and that which is sex-based. According to EEOC Notice N-915-050:

> 4) Sex-based Harassment–Although the Guidelines specifically address conduct that is sexual in nature, the Commission notes that sex-based harassment - - that is, harassment not involving sexual activity or language - - may also give rise to Title VII liability (just as in the case of harassment based on race, national origin or religion) if it is "sufficiently patterned or pervasive" and directed at employees because of their sex. Acts of physical aggression, intimidation, hostility or unequal treatment based on sex may be combined with incidents of sexual harassment to establish the existence of discriminatory terms and conditions of employment.[485]

Conduct that is sexual in nature can be analogized to a non-neutral policy, such as a company policy that violates Title VII on its face. That was the situation in the case of *UAW v. Johnson Controls, Inc*.[486] in which an employer barred fertile women from jobs involving potential exposure to lead. Sex-based conduct can be analogized to a policy that is neutral on its face, but not in its application, such as a company with an equal employment policy that is accused of

[481] Several elements establish the legal requirement of intent in the intentional tort area. First is the state of mind of the defendant, which means the person knew what he was doing. Second is that the person knew, or should have known, the possible consequences of his act. Third is knowing that certain results are likely to occur. ROGER E. MEINERS, AL H. RINGLEB & FRANCES L. EDWARDS, THE LEGAL ENVIRONMENT OF BUSINESS 149 (9th ed. 2006).

[482] Since the EEOC Guidelines definition prohibits harassment if "such conduct has the purpose or effect" of creating a hostile work environment, the EEOC apparently believes it can be either disparate treatment (purpose), or disparate impact (effect). The term "such conduct," however, relates back to the earlier phrase, "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature." It is hard to imagine a case where sexual advances, or requests for sexual favors can be unintentional. Can other verbal or physical conduct of a sexual nature be unintentional under the Act?

[483] *See* DAWN D. BENNETT-ALEXANDER & LAURA P. HARTMAN, EMPLOYMENT LAW FOR BUSINESS 300 (4th ed. McGraw-Hill/Irwin 2004).

[484] An example of the confusion in this regard can be seen in a recent Third Circuit Decision written by newly appointed Supreme Court Justice Alito who wrote in *Jensen v. Potter*, 435 F.3d 444, 449 (3rd Cir. 2006): "In light of the consistency between the two provisions, our usual hostile work environment framework applies equally to Jensen's claim of retaliatory harassment. Thus, Jensen must prove that (1) she suffered **intentional** discrimination because of her protected activity; (2) the discrimination was severe or pervasive; pervasive; other, less objectionable, conduct will contaminate the workplace only if it is pervasive."). (3) the discrimination detrimentally affected her; (4) it would have detrimentally affected a reasonable person in like circumstances; and (5) a basis for employer liability is present."

[485] Available online at http://www.eeoc.gov/policy/docs/currentissues.html (last visited Oct. 10, 2006).

[486] 499 U.S. 187 (1991).

intentionally discriminating against women or minority group members in contravention of stated policy. This is the most common type of discrimination case.

A true disparate impact sexual harassment theory would involve facially neutral terms and conditions of employment applied equally across the workplace to both men and women. In other words, are non-sexual acts of physical aggression, intimidation, or hostility actionable if directed at both sexes equally?

IV. THE REASONABLE PERSON STANDARD

In *Rabidue v. Osceola Refining Co.*,[487] a female manager charged sexual harassment arising out of her bad working relationship with Mr. Henry, another supervisor, who was not her superior. According to the Court, "Henry was an extremely vulgar and crude individual who customarily made obscene comments about women generally, and on occasion, directed such obscenities to Rabidue."[488] The Court ruled against Rabidue, finding that "Henry's obscenities, although annoying, were not so startling as to have affected seriously the psyches of the plaintiff or other female employees."[489] The decision occasioned a strong dissent from Judge Keith, who argued for an approach that took cognizance of the perspective of the reasonable victim.[490]

According to EEOC Notice No. N-915-050 released four years after the *Rabidue* decision[491]:

> 1) Standard for Evaluating Harassment–In determining whether harassment is sufficiently severe or pervasive to create a hostile environment, the harasser's conduct should be evaluated from the objective standpoint of a "reasonable person." Title VII does not serve "as a vehicle for vindicating the petty slights suffered by the hypersensitive." Zabkowicz v. West Bend Co., 589 F. Supp. 780, 784, 35 EPD ¶ 34, 766 (E.D. Wis. 1984). See also Ross v. Comsat, 34 FEP cases 260, 265 (D. Md. 1984), rev'd on other grounds, 759 F. 2d 355 (4th Cir. 1985). Thus, if the challenged conduct would not substantially affect the work environment of a reasonable person, no violation should be found.[492]

The reasonable person standard was meant to be gender-neutral. Some, like Judge Keith, complained that the reasonable person standard too often tended to be the male perspective, to the

[487] 805 F.2d 611 (6th Cir. 1986).

[488] *Id*. at 615.

[489] *Id* at 622.

[490] *Id*. at 626. ("Nor do I agree with the majority's holding that a court considering hostile environment claims should adopt the perspective of the reasonable person's reaction to a similar environment. In my view, the reasonable person perspective fails to account for the wide divergence between most women's views of appropriate sexual conduct and those of men. I would have courts adopt the perspective of the reasonable victim which simultaneously allows courts to consider salient sociological differences as well as shield employers from the neurotic complaint.").

[491] Available online at http://www.eeoc.gov/policy/docs/currentissues.html (last visited Oct. 10, 2006).

[492] According to an example provided in that Notice: Charging Party alleges that her coworker made repeated unwelcome sexual advances toward her. An investigation discloses that the alleged "advances" consisted of invitations to join a group of employees who regularly socialized at dinner after work. The coworker's invitations, viewed in that context and from the perspective of a reasonable person, would not have created a hostile environment and therefore did not constitute sexual harassment. Similarly, the notice continues, a "reasonable person" standard also should be applied to the basic determination of whether the challenged conduct is of a sexual nature. Thus, in the above example, a reasonable person would not consider the co-worker's invitations sexual in nature, and on that basis as well no violation would be found. According to the Notice, the reasonable person standard should consider the victim's perspective and not stereotyped notions of acceptable behavior. For example, it continues, "a workplace in which sexual slurs, displays of 'girlie' pictures, and other offensive conduct abound can constitute a hostile work environment even if many people deem it to be harmless or insignificant."

detriment of the mostly female victims of sexual harassment.[493] Such arguments began to receive increasing support over the years, with an increasing number of courts and the EEOC showing more interest in looking at such cases from the "reasonable woman," or "reasonable victim"[494] standard.[495] Judge Keith's dissent had largely become the majority view in the lower federal court.[496] Ultimately, the Supreme Court adopted that view in *Harris v. Forklift Systems, Inc.*[497] This case was important for settling the dispute among lower federal courts as to whether objective medical proof was required to establish a cause of action for sexual harassment. The plaintiff, Teresa Harris, had no such evidence.[498] Justice Sandra Day O'Connor, writing for the majority, held that when the workplace is permeated with discriminatory intimidation, ridicule, and insult sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment, Title VII is violated. The Court established a middle ground between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury.[499]

V. ONCALE V. SUNDOWNER OFFSHORE SERVICES, INC.[500]

The Supreme Court weighed in on the reasonable person issue in the case of *Oncale v. Sundowner Offshore Services, Inc.* (hereinafter referred to as *Oncale*), authored by Justice Scalia. With respect to the proper objective standard, Justice Scalia wrote that "the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position." [501] The Court was concerned that sexual harassment not expand to the point that it would cause juries to mistake ordinary socializing in the workplace, which includes activities such as male-on-male horseplay, and flirtation between the sexes.[502] Title VII only forbids behavior that is so objectively offensive as to alter the conditions of the victim's employment.[503]

The main issue involved in this case, however, dealt with the viability of a same sex sexual harassment suit, with the additional twist that all parties involved were heterosexual. Joseph Oncale worked as a roustabout for Sundowner Offshore Services on an oil platform in the Gulf of Mexico. He was part of an eight-man crew. On several occasions, he was subjected to sex-related, humiliating conduct by other crew members. He claimed to have been physically intimidated in a

[493] DAWN D. BENNETT-ALEXANDER & LAURA P. HARTMAN, EMPLOYMENT LAW FOR BUSINESS 336 (5th ed. McGraw-Hill/Irwin 2007).
[494] For those situations where a male is a victim.
[495] DAWN D. BENNETT-ALEXANDER & LAURA P. HARTMAN, EMPLOYMENT LAW FOR BUSINESS 300 (5th ed. McGraw-Hill/Irwin 2007).
[496] *Id*.
[497] 510 U.S. 17 (1993).
[498] Teresa Harris worked as a rental manager for two years for Forklift Systems in Nashville. Her boss, Charles Hardy, often insulted her in front of others because of her sex and made her the target of sexual suggestions. In front of co-workers, he would say to her, "You're a woman, what do you know?" He suggested they "go to the Holiday Inn to negotiate her raise." He would ask Harris and other women to get coins from his front pants pocket, throw things on the ground and ask women to pick them up, and make sexual comments about women's clothing. Harris complained. Hardy said he was only kidding. When she was arranging a deal with a customer, Hardy asked her, "What did you do, promise the guy … [sex] Saturday night?" Harris quit and sued. The district and appeals court ruled against her, and she appealed to the United States Supreme Court.
[499] Justice O'Connor outlined the "test" of hostile environment sexual harassment to require a plaintiff to meet the following four-pronged test: The conduct is 1) frequent; 2) severe; 3) physically threatening or humiliating; and 4) unreasonably interferes with work performance. *Id*. at 23.
[500] 523 U.S. 75 (1998).
[501] *Id*. at 81.
[502] *Id*.
[503] *Id*.

sexual manner, and threatened with rape. His complaints to his supervisor went ignored,[504] causing him eventually to quit. He asked that his pink slip state that he "voluntarily left due to sexual harassment and verbal abuse."[505] In his deposition he stated "I felt that if I didn't leave my job, that I would be raped or forced to have sex."[506]

Oncale filed suit, alleging sex discrimination. The district court followed Fifth Circuit precedent holding that he had "no cause of action under Title VII for harassment by male co-workers."[507] The Fifth Circuit affirmed.[508] The Supreme Court reversed. On the heterosexuality issue, the Court held that "harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex."[509]

Much of the opinion was spent addressing concerns that overturning the lower courts could turn Title VII into a general workplace civility statute:

> Title VII does not prohibit all verbal or physical harassment in the workplace; it is directed only at "discriminat[ion] . . . because of . . . sex." We have never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations. "The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."[510]

The *Oncale* decision cannot be called a clear and enlightening opinion. There are a number of unresolved questions; for example, what were the disadvantageous terms and conditions to which females were not exposed? There was no mention in the Supreme Court's opinion, nor in that of the Fifth Circuit, that any women were even in the workplace. Another legitimate concern is whether the defendants would have been insulated from this action had female employees been similarly harassed, since then there would have been no disadvantageous terms to which members of the other sex were not exposed.

VI. EEOC V. NATIONAL EDUCATION ASSOCIATION, ALASKA:[511] TOWARD A PURE DISPARATE IMPACT ANALYSIS IN SEXUAL HARASSMENT CASES

The recent Ninth Circuit opinion, *EEOC v. National Education Association–Alaska*, represents a potentially significant extension of the scope of sexual harassment. At the center of the case was Thomas Harvey a hard charger who became Executive Director of the National Education Association-Alaska (NEA-Alaska). Three female employees of the Association had longstanding problems with Mr. Harvey, resulting in the resignation of two of them. It was claimed that Mr. Harvey had a penchant for shouting in a loud, hostile, and frequently profane manner at female employees, and that his verbal assaults were often accompanied by hostile physical conduct, such as lunging across tables or shaking his fists. The police were called after one such incident. Male employees confirmed Harvey's behavior, and claimed that it was directed at them also.

The district court granted summary judgment to the defendants, because it believed that "a reasonable trier of fact could not find that the alleged harassment was 'because of . . . sex' within

[504] *Id*. at 77. ("in fact, the company's Safety Compliance Clerk, Valent Hohen, told Oncale that Lyons and Pippen 'picked [on] him all the time too,' and called him a name suggesting homosexuality.")
[505] *Id*.
[506] *Id*.
[507] *Id*.
[508] 83 F. 3d 118 (5th Cir. 1996).
[509] 523 U.S. 75, 80 (1998).
[510] *Id*.
[511] 422 F.3d 840 (9th Cir. 2005).

the meaning of the statute."[512] The trial judge granted summary judgment because Harvey's behavior was not, on its face, sex- or gender-related; in other words, it was facially neutral. There had been no testimony stating that Harvey had made sexual overtures or lewd comments, nor that he referred to women employees in gender-specific terms.

The Ninth Circuit disagreed, relying heavily on *Oncale*. Citing that case, the Ninth Circuit pointed out that sexual harassment plaintiffs need not prove that that the defendant had a specific intent to discriminate against women or to target them as women, whether sexually or otherwise. It noted that Title VII is not a fault-based tort scheme, rather it "is aimed at the consequences or effects of an employment practice and not at the . . . motivation of co-workers or employers."[513] The Court cited its own precedent that "held that conduct may be unlawful sexual harassment even when harassers do not realize that their conduct creates a hostile working environment."[514] The district court erred, according to the Appellate Court by holding that the "because of . . .sex" element requires that the behavior be either "of a sexual nature" or motivated by "sexual animus." The trial judge had found it significant that Harvey did not seek to drive women from the workplace – it is a teacher's union where women are traditionally in the majority; nor was his behavior driven by lust or sexual desire. The Court *restated* Oncale's "critical issue" as follows: "the ultimate question under *Oncale* is whether Harvey's behavior affected women more adversely than it affected men."[515]

Defendants alleged that Harvey's treatment of women employees was no more abusive than his treatment of his male subordinates. According to the Appellate Court, however, the fact that Harvey treated both sexes equally badly would not be determinative, even if it could be proved, because the 9th Circuit had previously held that it is error to conclude that harassing conduct is not because of sex merely because the abuser "consistently abused men and women alike."[516] In that earlier case, however, the abuse was not facially neutral. The abuse toward the women had included numerous sexual references, which were clearly different in nature than his abuse directed at the males.[517]

The Court reiterated that it recognized that its precedent was rooted in the context of explicitly sex- or gender-specific conduct or speech. Regardless, the Court was very specific in its holding: "We now hold that evidence of differences in subjective effects (along with, of course, evidence of differences in objective quality and quantity) is relevant to determining whether or not men and women were treated differently, even where the conduct is not facially sex- or gender-specific."[518] In other words, a facially neutral policy, applied neutrally to both sexes, is still actionable as a disparate impact cause of action. The Fifth, Seventh, and Eleventh Circuits have declined to extend sexual harassment in such situations.[519]

[512] *Id*. at 842.
[513] *Citing* Ellison v. Brady, 924 F.2d 872, 880 (9th Cir. 1991).
[514] *Id*.
[515] This restatement of the "ultimate question" makes the fact that no women were involved in that case more confusing.
[516] Steiner v. Showboat Operating Co., 25 F.3d 1459, 1463 (9th Cir. 1994).
[517] Interestingly, though, the Court added as dicta to that case, that "even if the supervisor had used sexual epithets equal in intensity and in an equally degrading manner against male employees, he cannot thereby 'cure' his conduct toward Women [because] Ellison unequivocally directs us to consider what is offensive and hostile to a reasonable woman." *Id.*
[518] EEOC v. National Education Association-Alaska, 422 F.3d 840, 845-46 (9th Cir. 2005).
[519] *See* Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982), Butler v. Ysleta Ind. School District., 161 F.3d 263 (5th Cir. 1998), and Holman v. Indiana, 211 F.3d 399 (7th Cir. 2000).

VII. Disparate Impact Sexual Harassment: Logical Extension or Creeping Incrementalism?

In WORKPLACE SEXUAL HARASSMENT, the authors, an attorney and a psychologist, analyzed the legal and psychological implications of sexual harassment. They reported on empirical studies concerning male and female definitions of sexual harassment based on the respondents' actual experiences with harassment. They reported on five descriptive categories: gender harassment, seductive behavior, sexual bribery, sexual coercion, and sexual imposition or assault. Of those, the only one that could possibly support a disparate impact analysis is "gender harassment." The survey description, however, makes it clear that it could not be unintentional, or, more accurately, it could only involve sexual animus. According to the authors, gender harassment "consists of generalized sexist remarks and behavior not designed to elicit sexual cooperation, but to convey insulting, degrading or sexist attitudes about women."[520] The public's concern is obviously over sexist conduct tainted with animus toward people because of their sex (with the public realizing that the main issue is such behavior directed at women by men).

VIII. Conclusion

Sexual harassment is a confused and confusing area of the law. Part of the confusion, no doubt, comes from the presence of a multitude of differing situations within the ambit of Title VII sexual harassment law). It is hard to understand the EEOC's perceived need to advance this new interpretation of sexual harassment, made all the more incomprehensible during a supposedly conservative Republican Administration. Adding to the confusion is an inexact and flexible use of language, which has resulted in a sort of creeping incrementalism that has extended the reach of the concept. If we are to take judicial notice of stereotypical psychological differences between the sexes in the workplace, then women will have lost an important beachhead in workplace civil rights. Commendable or not, yelling, stress, and long hours are routine parts of many workplaces. If these characteristics can be shown to have more of an effect on women, then Title VII will have gone a long way toward becoming the generalized civility statute that Justice Scalia disclaimed. Distasteful job characteristics may be considered too demanding for women. If those are a necessary part of the job description, will they be justifiable bona fide occupational qualifications (bfoqs) used to deny women access? According to the U.S. Supreme Court's plurality opinion in *Price Waterhouse v. Hopkins*[521]:

> [A]n employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender. . . . As to the existence of sex stereotyping in this case, we are not inclined to quarrel with the District Court's conclusion that a number of the partners' comments showed sex stereotyping at work. As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for in forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes. An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind.[522]

[520] ANNE C. LEVY & MICHELE A. PALUDI, WORKPLACE SEXUAL HARASSMENT 62 (2nd ed. Prentice Hall 2002).
[521] 490 U.S. 228 (1989).
[522] *Id*. at 251.

It seems clear from the cases outlined above that the trend is to "make a Federal case" out of a situation that can easily be addressed by the protection of state laws. The conduct criticized as sexual harassment by the California EEOC quite easily fits a cause of action for assault (conduct that places the plaintiff in fear of imminent offensive bodily contact) or intentional infliction of emotional distress (intentional conduct on the part of the defendant considered extreme and outrageous that is intended to cause emotional distress). The United States Supreme Court may need to decide whether non-sexual conduct that is offensive and directed to both sexes is "because of sex" and actionable under Title VII.