DISCRIMINATION: SEX—TITLE VII—CAUSE OF ACTION UNDER TITLE VII ARISES WHEN SUPERVISOR, WITH EMPLOYER'S KNOWLEDGE AND ACQUIESCENCE, MAKES SEXUAL ADVANCES TOWARD SUBORDINATE EMPLOYEE AND CONDITIONS EMPLOYEE'S JOB STATUS ON FAVORABLE RESPONSE—*Tomkins v. Public Service Electric & Gas Co.*, 568 F.2d 1044 (3d Cir. 1977).

Adrienne Tomkins was initially hired as an office worker by Public Service Electric & Gas Co. (PSE&G) in April of 1971.[1] For more than two years she advanced to positions bearing additional responsibilities.[2] In August 1973, she began working in a secretarial position under the direction of a male supervisor.[3]

Two months later, Tomkins' supervisor invited her to lunch "in order to discuss his upcoming evaluation of her work, as well as a possible job promotion."[4] While at the restaurant, advances were made toward her by the supervisor who suggested that sexual intimacy would be required in order "to have a satisfactory working relationship."[5] Attempting to end this discussion by leaving the restaurant, Tomkins was subjected to threats of reprisal against her as an employee.[6] When these proved ineffective, the supervisor then threatened her with bodily abuse and finally resorted to actual physical restraint.[7] Additionally, she was warned that PSE&G personnel would not be sympathetic should she complain about this particular episode.[8]

The following day, Tompkins conveyed to PSE&G her desire to leave its employ as a result of the previous day's events.[9] The company induced her to stay by offering her "a transfer to a comparable

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[1] Tomkins v. Public Serv. Elec. & Gas Co., 422 F. Supp. 553, 555 (D.N.J. 1976), *rev'd and remanded*, 568 F.2d 1044 (3d Cir. 1977).

[2] Tomkins v. Public Serv. Elec. & Gas Co., 568 F.2d 1044, 1045 (3d Cir. 1977).

[3] Tomkins v. Public Serv. Elec. & Gas Co., 568 F.2d 1044, 1045 (3d Cir. 1977). The supervisor was a named defendant when Tomkins initially brought suit. The district court, however, granted his motion to dismiss any claims against him due to lack of pendent jurisdiction. 422 F. Supp. 553, 557 (D.N.J. 1976), *rev'd and remanded*, 568 F.2d 1044 (3d Cir. 1977).

[4] Tomkins v. Public Serv. Elec. & Gas Co., 568 F.2d 1044, 1045 (3d Cir. 1977).

[5] Tomkins v. Public Serv. Elec. & Gas Co., 568 F.2d 1044, 1045 (3d Cir. 1977).

[6] Tomkins v. Public Serv. Elec. & Gas Co., 568 F.2d 1044, 1045 (3d Cir. 1977).

[7] Tomkins v. Public Serv. Elec. & Gas Co., 568 F.2d 1044, 1045 (3d Cir. 1977).

[8] Tomkins v. Public Serv. Elec. & Gas Co., 568 F.2d 1044, 1045 (3d Cir. 1977).

[9] Tomkins v. Public Serv. Elec. & Gas Co., 568 F.2d 1044, 1046 (3d Cir. 1977). In the interim, Tomkins contacted a New Jersey Unemployment Insurance Claims Office and was informed of her eligibility for benefits in the event she quit her position at PSE&G. Plaintiff-Appellant's Appeal Brief at 6, Tomkins v. Public Serv. Elec. & Gas Co., 568 F.2d 1044 (3d Cir. 1977) [hereinafter cited as Brief for Appellant].

position."[10] Rather than remain with her supervisor and wait for such a "comparable position" to open up, Tomkins accepted placement in a lesser position.[11] Following this transfer "she was subjected to false and adverse employment evaluations, disciplinary layoffs, and threats of demotion by various PSE&G employees."[12] In January 1975, as a result of an "extremely poor attendance record,"[13] Tomkins was fired.[14]

Subsequently, Tomkins filed suit[15] in federal district court "alleg[ing] that PSE&G and certain of its agents knew or should have known" that events such as those which had transpired would in fact occur and that, in spite of such knowledge, took no action to avert such conduct by its employees.[16] PSE&G moved to dismiss the action on several grounds[17] "including failure to state a claim upon

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[10] Tomkins v. Public Serv. Elec. & Gas Co., 568 F.2d 1044, 1046 (3d Cir. 1977).

[11] Brief for Appellant, *supra* note 9, at 7; Tomkins v. Public Serv. Elec. & Gas Co., 568 F.2d 1044, 1046 (3d Cir. 1977).

[12] Tomkins v. Public Serv. Elec. & Gas Co., 568 F.2d 1044, 1046 (3d Cir. 1977). Because of the luncheon incident and her treatment by PSE&G and various personnel following her protest and transfer, Tomkins maintained she suffered both physically and emotionally, "resulting in absenteeism and loss of income." *Id.*

[13] Brief of Defendants-Appellees at 3, Tomkins v. Public Serv. Elec. & Gas Co., 568 F.2d 1044 (3d Cir. 1977) [hereinafter cited as Brief of Appellee]. Tomkins was employed at PSE&G for a period of three years and nine months. During that time, she was absent 130 days and suspended 15 days due to chronic absenteeism. *Id.*

[14] Tomkins v. Public Serv. Elec. & Gas Co., 422 F. Supp. 553, 555 (D.N.J. 1976), *rev'd and remanded*, 568 F.2d 1044 (3d Cir. 1977). PSE&G contended that Tomkins' absenteeism was the "sole reason" for her dismissal. Brief of Appellee, *supra* note 13, at 3.

[15] Following her termination, Tomkins filed an employment discrimination charge with the Equal Employment Opportunity Commission. Upon investigation of the complaint, the EEOC dismissed the charge and notified Tomkins of her right to sue. Tomkins v. Public Serv. Elec. & Gas Co., 422 F. Supp. 553, 555 (D.N.J. 1976), *rev'd and remanded*, 568 F.2d 1044 (3d Cir. 1977).

Title VII of the Civil Rights Act of 1964 provides in pertinent part that "[i]f a charge filed with the Commission . . . is dismissed by the Commission, . . . the Commission . . . shall so notify the person aggrieved and . . . a civil action may be brought against the respondent named in the charge . . . . " 42 U.S.C. § 2000e-5 (f)(1) (Supp. V 1975).

For a more complete discussion of the powers and procedures of the EEOC, see generally Comment, *The Permissible Scope of Title VII Actions*, 8 SETON HALL L. REV. 493 (1977).

[16] Tomkins v. Public Serv. Elec. & Gas Co., 422 F. Supp. 553 (D.N.J. 1976), *rev'd and remanded*, 568 F.2d 1044, 1045 (3d Cir. 1977). Specifically, Tomkins alleged that PSE&G's actions and omissions constituted a violation of Title VII "by discriminating . . . in her terms, conditions, and privileges of employment on the basis of her sex." Amended Complaint at 8, ¶ 39, Tomkins v. Public Serv. Elec. & Gas Co., 422 F. Supp. 553 (D.N.J. 1976), *rev'd and remanded*, 568 F.2d 1044 (3d Cir. 1977).

[17] Tomkins v. Public Serv. Elec. & Gas Co., 422 F. Supp. 553, 555 (D.N.J. 1976), *rev'd and remanded*, 568 F.2d 1044 (3d Cir. 1977). Among other defenses, PSE&G essentially averred that the supervisor's actions "were outside the scope of his employment;" "were not ratified by" PSE&G; and "were not and could not have been anticipated. . . ." Additionally, PSE&G contended that neither its acts nor the acts of its agents constituted employment discrimination in violation of Title VII. Answer to Amended Complaint of Defendant, Public Service Electric

which relief may be granted."[18] With respect to Tomkins' allegation of sexual harassment, the United States District Court for the District of New Jersey granted the company's motion based on its interpretation of Title VII as precluding a cause of action against an employer for the "personal" activities of its supervisors.[19]

On appeal, the United States Court of Appeals for the Third Circuit, in *Tomkins v. Public Service Electric & Gas Co.*,[20] reversed the district court's dismissal of the complaint and remanded the case for further proceedings.[21] Judge Aldisert, speaking for the court, interpreted the applicable provision of Title VII as requiring "both that the acts complained of constitut[e] a condition of employment, and that this condition [is] imposed by the employer on the basis of sex."[22] Accordingly, the appellate court found that the dismissal of the claim overlooked the fundamental "thrust[s] of Tomkins' complaint," that PSE&G, "either knowingly or constructively," imposed

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and Gas Company at 6, 7, Tomkins v. Public Serv. Elec. & Gas Co., 422 F. Supp. 553 (D.N.J. 1976), *rev'd and remanded*, 568 F.2d 1044 (3d Cir. 1977).

[18] Tomkins v. Public Serv. Elec. & Gas Co., 422 F. Supp. 553, 555 (D.N.J. 1976), *rev'd and remanded*, 568 F.2d 1044 (3d Cir. 1977). As stated by the court, the issues were

> whether sexual harassment of a female employee by a male supervisor constitutes sex discrimination within the meaning of Title VII; and whether the conduct of an employer after a complaint of such harassment can amount to sex discrimination within the meaning of Title VII.

422 F. Supp. at 556. The district court bifurcated the two issues, denying PSE&G's motion to dismiss on the question of company retaliation following Tomkins' grievance. *Id.* at 557. According to the court, a violation of Title VII may exist when an employer elects to ignore a complaint of sexual harassment, opting instead to fire the female victim of the abuse. The court reasoned that such a decision may evidence a preference for male employment rather than female employment. *Id.*

[19] Tomkins v. Public Serv. Elec. & Gas Co., 422 F. Supp. 553, 556–57 (D.N.J. 1976), *rev'd and remanded*, 568 F.2d 1044 (3d Cir. 1977). Sexual harassment in employment engaged in by supervisory personnel was conceded to be an "abuse of authority" and "an unhappy and recurrent feature of our social experience." In the court's view, however, such factual reality was not sufficient for purposes of defining it as sex discrimination within the scope of Title VII. 422 F. Supp. at 556. For further discussion of the court's rationale, see notes 109–12 *infra* and accompanying text.

[20] 568 F.2d 1044 (3d Cir. 1977).

[21] *Id.* at 1045, 1049. A consent order was subsequently handed down by the New Jersey district court on July 6, 1978 wherein PSE&G acknowledged "sexual advances or sexual harassment" as violative of Title VII when a term or condition of employment is imposed. Consent Order No. 75-1673 at 1, Tomkins v. Public Serv. Elec. & Gas Co., 568 F.2d 1044 (3d Cir. 1977). Such recognition required the implementation of an official policy, including dissemination of information to all employees regarding such policy, investigation of complaints and establishment of grievance procedures, designed to "fully comply" with its responsibilities under the Act. *Id.* at 2–4. Additionally, Adrienne Tomkins was awarded $20,000. *Id.* at 4.

[22] 568 F.2d at 1046, 1048. Tomkins had specifically alleged both elements. *See* note 16 *supra*.

upon her an additional condition of employment[23] and that this additional condition was imposed because of gender.[24] Applying the necessary requirements to Tomkins' complaint, the court concluded that a cause of action within the permissible scope of Title VII had been sufficiently pleaded.[25] Thus, aligning itself with both the Courts of Appeals for the District of Columbia Circuit[26] and the Fourth Circuit,[27] the Third Circuit has held, for the first time, that sexual harassment constitutes a valid cause of action under Title VII.

Since the enactment of the Civil Rights Act of 1964, Title VII of that Act has proscribed sex discrimination in employment.[28] Unfortunately, however, the permissible scope of this prohibition has been difficult to gauge given the sparse legislative history underlying the inclusion of the word "sex" into the final bill.[29] In 1972, when the Act

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[23] *Id.* at 1046–47. Unlike the lower court, this court did not view the supervisor's actions as purely personal but as realistically infringing upon Tomkins' employment situation. His express proposition, as well as the context within which it occurred, clearly evidenced the foretelling of adverse employment consequences. *Id.*

[24] *Id.* at 1047. It should be noted that this case was before the court on appeal from a motion to dismiss. Thus, the court was satisfied that a requisite element of the Title VII violation and "the essence of . . . [Tomkins'] claim"—discrimination based on sex—was clearly alleged in the complaint. *Id.*

[25] *Id.* at 1048–49. Specifically, the court held

> that Title VII is violated when a supervisor, with the actual or constructive knowledge of the employer, makes sexual advances or demands toward a subordinate employee and conditions that employee's job status—evaluation, continued employment, promotion, or other aspects of career development—on a favorable response to those advances or demands, and the employer does not take prompt and appropriate remedial action after acquiring such knowledge.

Id.

[26] Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977); *see* notes 85–95 *infra* and accompanying text.

[27] Garber v. Saxon Business Products, Inc., 552 F.2d 1032 (4th Cir. 1977); *see* notes 96–98 *infra* and accompanying text.

[28] Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 701–716, 78 Stat. 253 (1964) (current version at 42 U.S.C. §§ 2000e to 2000e-17 (1970 & Supp. V 1975)). The applicable provision for purposes of this note states in pertinent part:

> It shall be an unlawful employment practice for an employer—
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> . . . to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .

42 U.S.C. § 2000e-2(a)(1) (1970 & Supp. V 1975).

[29] On February 8, 1964, an amendment was proposed in the House of Representatives by Congressman Smith (D. Va.) to insert the word "sex" into the final bill. 110 CONG. REC. 2577 (1964). It is generally believed that this proposal was an attempt by one opponent of the bill to deliberately effect its demise. *See* Rosen v. Public Serv. Elec. & Gas Co., 328 F. Supp. 454, 462 n.4 (D.N.J. 170), *aff'd in part and remanded in part on other grounds*, 477 F.2d 90 (3d Cir. 1973); Barnes v. Costle, 561 F.2d at 987.

The limited debate on the proposal implied that Title VII as so amended would have little chance of successful passage. 110 CONG. REC. 2577–84 (1964). The opponents' tactical maneuver

was amended to provide the Equal Employment Opportunity Commission (EEOC) with enforcement powers,[30] sex discrimination in employment was acknowledged by the House Education and Labor Committee as one area warranting particular congressional action.[31] Thus, lacking specificity both from the language of the Act itself and from its legislative history, the proper scope of sex discrimination is gleaned primarily from judicial opinions interpreting the whole of Title VII's employment discrimination proviso.[32]

The United States Supreme Court has determined that the language of the statute clearly evinces a congressional purpose "to assure equality of employment opportunities" without regard to "race, color, religion, sex or national origin."[33] Moreover, in affording equitable relief, the courts see as their duty both the elimination of "the discriminatory effects of the past" and, concomitantly, the prevention of comparable "discrimination in the future."[34] Since the policy to eradicate discrimination was considered by Congress "to be of the 'highest priority,' "[35] the courts have enunciated and effected a liberal construction of the act.[36]

The Supreme Court has also emphasized that Title VII is no less available to vindicate an individual, as opposed to a class, right to non-discriminatory employment.[37] Further, there is a presumption

failed, however, and the amendment was adopted with minimal substantive discussion by a vote of 168 to 133. 110 CONG. REC. 2584 (1964).

[30] Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972) (codified at 42 U.S.C. §§ 2000e to 2000e-17 (Supp. V 1975)) (amending Title VII).

[31] H.R. REP. NO. 92-238, 92d Cong., 1st Sess. 4, 5, *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 2140–41. Although eight years had passed since the enactment of Title VII, current statistics evidenced a need to provide additional impetus in order to alleviate the continuing problem of sex discrimination in employment. *Id.* at 2140.

[32] The EEOC also issues guidelines interpreting Title VII and, while not binding on the courts, these guidelines are frequently "entitled to great deference." Griggs v. Duke Power Co., 401 U.S. 424, 434 (1971). *But see* General Elec. Co. v. Gilbert, 429 U.S. 125, 141 (1976) ("courts properly may accord less weight to such guidelines").

[33] Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974) (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973); Griggs v. Duke Power Co., 401 U.S. 424, 429–30 (1971)).

[34] Louisiana v. United States, 380 U.S. 145, 154 (1965).

[35] 415 U.S. at 47 (quoting Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968)).

[36] *See, e.g.*, Willingham v. Macon Tel. Publishing Co., 482 F.2d 535, 538 n.3 (5th Cir. 1973) ("a broad interpretation of discrimination was intended"); Henderson v. Eastern Freight Ways, Inc., 460 F.2d 258, 260 (4th Cir. 1972), *cert. denied*, 410 U.S. 912 (1973) ("Act . . . is remedial in character and should be generously construed to achieve its purposes"). *But see* General Elec. Co. v. Gilbert, 429 U.S. 125 (1976).

[37] *See generally* 415 U.S. at 45–51. The Court in *Alexander* reasons that Title VII, in providing for a private right of action in addition to empowering the EEOC to bring its own suits, allows "the private litigant not only [to] redres[s] his own injury but also [to] vindicat[e] the important congressional policy against discriminatory employment practices." *Id.* at 45. Essentially, the Court is propounding a private attorney general theory under Title VII.

underlying Title VII analysis that no relative distinctions exist between the protected classes, that is, Title VII accords no priorities to any one class over another.[38]

With respect to sex discrimination specifically, it was recognized by the Seventh Circuit, in the seminal decision of *Sprogis v. United Air Lines, Inc.*,[39] that Congress did not intend to limit the scope of section 703(a) of Title VII to discriminatory conduct "based 'solely' on sex."[40] The Act prohibits discriminatory employment practices based on cultural stereotypes or physical attributes even if such practices affect only a portion of the protected class.[41]

Initially, Title VII was applied to invalidate blatant discriminatory policies and practices affecting the protected class.[42] It soon became obvious, however, that certain discriminatory conduct was much more subtle though clearly contrary to the stated purpose of

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[38] *See, e.g.*, Rosen v. Public Serv. Elec. & Gas Co., 409 F.2d 775, 781 (3d Cir. 1969) ("discrimination on account of sex is . . . [not] less reprehensible . . . [nor] less protected than discrimination because of race").

This presumption legitimately reflects a congressional purpose of the Act in view of committee discussions prior to amending Title VII where it was stated that "[d]iscrimination against women is no less serious than other forms of prohibited employment practices and is to be accorded the same degree of social concern given to any type of unlawful discrimination." H.R. REP. NO. 92-238, 92d Cong., 1st Sess. 5, *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 2141.

The great bulk of Title VII case law exists in the area of racial discrimination. Utilizing the above presumption allows foundational bases, tests and principles, developed to eradicate racial employment discrimination, to be applied without reservation in a sex discrimination context as well. *See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321, 329 (1977). This is particularly important for analytical purposes when a court initially propounds a new cause of action under Title VII, as is the case in *Tomkins*, for then rational analogies may be made in order to define the parameters of a newly prohibited discriminatory act.

[39] 444 F.2d 1194 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971).

[40] 444 F.2d at 1198. United Air Lines, employment policy required that their stewardesses be unmarried, but a similar policy was not imposed on any male employees including stewards. *Id.* at 1196. The court, in holding this policy violative of Title VII, cited with approval EEOC guidelines construing sex discrimination to exist "so long as sex is a factor in the application of the rule." *Id.* at 1198; 29 C.F.R. § 1604.4(a) (1977).

Sprogis' analysis is a reasonable reading of congressional intent, *see* 110 CONG. REC. 13837–38 (1964), and rejects what has come to be labeled "sex-plus" discrimination wherein classifications are established on the basis of sex plus an additional factor, *e.g.*, marriage. For a more comprehensive discussion of "sex-plus" discrimination, see generally *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1171–72 (1971); Comment, *Sex Discrimination in Hiring Practices of Private Employers: Recent Legal Developments*, 48 TUL. L. REV. 125, 141–44 (1973).

[41] 444 F.2d at 1198 (footnote omitted).

[42] *See, e.g.*, International Bhd. of Teamsters v. United States, 431 U.S. 324, 335–36 n.15 (1977) (referring to congressional discussion of Act, Court noted that "[u]ndoubtedly disparate treatment was the *most obvious* evil Congress had in mind when it enacted Title VII") (emphasis added).

the Act.[43] Faced with this reality, the United States Supreme Court in *Griggs v. Duke Power Co.*[44] ruled that "[u]nder the Act, practices, procedures, or tests *neutral on their face, and even neutral in terms of intent,* cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."[45] While *Griggs* involved racial discrimination, the Supreme Court subsequently recognized the viability of the "disproportionate impact" test in a sex discrimination context.[46]

In *General Electric Co. v. Gilbert,*[47] the Court considered whether an employer's disability plan excluding "disabilities arising from pregnancy" constituted sex discrimination as proscribed by Title VII.[48] While the Court held that the plan did not discriminate on the basis of sex,[49] it affirmed the disproportionate impact rationale, implying its applicability in instances of sex discrimination.[50] Subsequently, in *Dothard v. Rawlinson,*[51] the Court determined that an Alabama statute establishing "facially neutral" minimum height and weight requirements for the position of prison guard was prima facie sex discrimination.[52] According to the Court, national statistics produced at trial sufficiently presented a case of discriminatory impact—a majority of women were effectively made ineligible for the position.[53] Since discriminatory intent need not be shown to prove a Title VII disproportionate impact violation,[54] statistical evidence de-

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[43] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973) ("Title VII tolerates no racial discrimination, *subtle* or otherwise") (emphasis added).

[44] 401 U.S. 424 (1971).

[45] *Id.* at 430 (emphasis added). Since *Griggs,* unless an employer can show "business necessity," a facially neutral employment practice which disproportionately affects one class over another is prima facie discriminatory despite a non-discriminatory intent. *Id.* at 430–32.

[46] *See* General Elec. Co. v. Gilbert, 429 U.S. 125, 136–37 (1976); Dothard v. Rawlinson, 433 U.S. 321, 329 (1977).

[47] 429 U.S. 125 (1976).

[48] *Id.* at 127–28.

[49] *Id.* at 128, 145–46. The Court analogized to a prior decision decided under equal protection analysis involving a similar disability plan. *Id.* at 133–40. The Court reasoned that the exclusion of pregnancy-related disabilities from the plan does not disproportionately affect women because under the terms of the plan both men and women possess equal coverage. *Id.* at 138–39.

[50] *Id.* at 136–37. The test was inapplicable in *Gilbert* because the respondents had not met their burden of proving "gender-based" effect. *Id.* at 137. "Absent a showing of . . . [such] gender-based effect, there can be no violation of § 703(a)(1)." *Id.* at 137 n.15.

[51] 433 U.S. 321 (1977).

[52] *Id.* at 331.

[53] *Id.* at 329–31. The minimum 5' 2", 120 lb. standards required by Alabama statute to qualify for the position were found to "exclude 41.13% of the female population" and "between 2.35% and 3.63%" of the male population. *Id.* at 329–30 & n.12.

[54] 401 U.S. at 430, 432. *But cf.* International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977). The Court in Teamsters distinguishes between "disparate impact" and "disparate

noting a disproportionate impact[55] coupled with the courts' conception of the particular purposes and policies to be furthered by the Act were relevant factors in developing a certain sophistication necessary to deal with the subtler forms of employment discrimination.

Sexual harassment in the work environment[56] was not initially accepted as discrimination within the purview of Title VII.[57] The courts had difficulty in conceptualizing sexual harassment as actionable—either as sex discrimination per se,[58] or as an additional term or condition of employment.[59] In *Barnes v. Train*,[60] a woman employee of the federal government filed a complaint alleging that her refusal to engage in sexual relations resulted in the abolition of her former position and subsequent reassignment to a substantially inferior one.[61] The issue before the court was whether the alleged retaliatory actions of the plaintiff's supervisor constituted sex discrimination under Title VII.[62] The United States District Court for the District of Columbia concluded that no claim had been stated since the alleged retaliation was in response to the plaintiff's refusal to engage in sexual relations with her supervisor, not because she was a woman.[63] Therefore, no gender-based discrimination as required

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treatment." *Id.* at 335–36 n.15. While affirming the irrelevancy of intent in a disproportionate impact context, the Court made it clear that "discriminatory motive is critical" in cases alleging disparate treatment. *Id.*

[55] *See, e.g.*, 433 U.S. at 330–31.

[56] "Sexual harassment at the workplace" has been defined to "include verbal harassment or abuse, subtle pressure for sexual activity, as well as rape and attempted rape." ALLIANCE AGAINST SEXUAL COERCION, SEXUAL HARASSMENT AT THE WORKPLACE 1 (1977).

[57] *See* notes 60–77, 105–113 *infra* and accompanying text. The underlying rationale for the courts' original position seems to reflect a genuine lack of awareness of the enervating employment effects burdening the victim as a result of sexual harassment. The opinions all expressly or impliedly fear "a federal challenge based on alleged sex motivated considerations . . . in every case of a lost promotion, transfer, demotion or dismissal." Miller v. Bank of America, 418 F. Supp. 233, 236 (N.D. Cal. 1976). Thus, it was considerably less difficult to view the conduct as primarily "personal" in nature. *See, e.g.*, Barnes v. Train, 13 Fair Empl. Prac. Cas. 123, 124 (D.D.C. 1974), *rev'd and remanded sub nom.* Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977).

[58] *See* Tomkins v. Public Serv. Elec. & Gas Co., 422 F. Supp. 553 (D.N.J. 1976), *rev'd and remanded*, 568 F.2d 1044 (3d Cir. 1977); Barnes v. Train, 13 Fair Empl. Prac. Cas. 123 (D.D.C. 1974), *rev'd and remanded sub nom.* Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977).

[59] *See* Miller v. Bank of America, 418 F. Supp. 233 (N.D. Cal. 1976); Corne v. Bausch & Lomb, Inc., 390 F. Supp. 161 (D. Ariz. 1975), *vacated and remanded on other grounds*, 562 F.2d 55 (9th Cir. 1977).

[60] 13 Fair Empl. Prac. Cas. 123 (D.D.C. 1974).

[61] Barnes v. Costle, 561 F.2d 983, 985 & n.7 (D.C. Cir. 1977).

[62] 13 Fair Empl. Prac. Cas. at 124. In *Train*, as in all the cases considering sexual harassment, the issue arose in the context of the defendants' motions to dismiss for failure to state a claim. The courts, therefore, were evaluating plaintiffs' complaints and a procedural evolutionary pattern can be seen. Allegations in subsequent complaints incorporated substantive matter from prior decisions. Eventually, the courts were bound to recognize a stated cause of action.

[63] *Id.*

by the Act was shown.[64] Additionally, the court viewed the situation as "a controversy underpinned by the subtleties of an inharmonious personal relationship" and thus not evidential of a gender-based, arbitrary barrier to continued employment.[65]

In *Corne v. Bausch & Lomb, Inc.*,[66] the plaintiffs contended they were women, "that they were repeatedly subjected to verbal and physical sexual" abuses by their supervisor, and as a result, were forced to resign.[67] The Arizona district court found no cause of action under Title VII concluding that " 'verbal and physical sexual advances' " could not reasonably be construed as falling within the scope of the Act.[68] In interpreting prior Title VII sex discrimination cases, the court found it significant that the conduct in this instance did not arise out of a company policy whereby benefits to the company would inure.[69] Though occurring within a supervisory/subordinate context, such actions were not related to the natural employment relationship.[70]

Although distinguishable on its facts, the alleged sexual harassment in *Miller v. Bank of America*[71] was similarly outside the reach of Title VII protection.[72] The plaintiff therein asserted that her supervisor promised her a better position conditioned upon her being "sexually 'cooperative.' "[73] When she refused, her employment was terminated.[74] It was undisputed that the Bank's company-wide pol-

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[64] *Id.* While conceding that Title VII discrimination has generally been broadly construed, the court nevertheless was of the view that sexual harassment could not be understood to fall within the intended scope of the Act. *Id.*

[65] *Id.*

[66] 390 F. Supp. 161 (D. Ariz. 1975).

[67] *Id.* at 162.

[68] *Id.* at 163. The court reasoned that sexual harassment was not sex discrimination. If males were sexually harassed, there would be no discriminatory basis for a suit under the Act. *Id.*

[69] *Id.* The court very narrowly construed "employer" in rejecting the plaintiffs' claim. It viewed the supervisor's conduct as "nothing more than a personal proclivity, peculiarity or mannerism." *Id.* Thus, based on the *Corne* decision, sexual harassment is not employment discrimination within the scope of Title VII absent a specific employer policy condoning such conduct. *Id.*

[70] *Id.* It appears from the obvious omission of any reference to an agency relationship that the court was unwilling to impute liability to the employer for this type of conduct by its supervisory personnel.

[71] 418 F. Supp. 233 (N.D. Cal. 1976). The plaintiff had pursued relief under the provisions of Title VII without first making known her grievance to the employer. *Id.* at 234.

[72] *Id.* at 236. In exculpating the employer from liability, the *Miller* court expressly relied upon the failure of the plaintiff to utilize the employer's internal grievance procedure. *Id.* at 236 n.2. Underlying determinative considerations of the type expressed or implied in the *Train* and *Corne* decisions, however, may be abstracted from a fair reading of the opinion.

[73] *Id.* at 234.

[74] *Id.* The court viewed the issue to be whether Title VII was meant to impose liability upon an employer for what was in essence "the isolated and unauthorized sex misconduct of one

icy expressly discouraged such employee misconduct and provided relief through a grievance and remedial procedure.[75] Since the plaintiff failed to avail herself of these internal processes, the court concluded it would be unreasonable to find the employer culpable in such a situation.[76] Significantly, the court emphasized the importance of specific factual allegations for purposes of finding employer liability, conceding that an employer's active or constructive approval of a policy imposing sexual favors as a condition of employment might be actionable sex discrimination under Title VII.[77]

In April 1976, four months prior to the *Miller* decision, the District Court for the District of Columbia held in *Williams v. Saxbe*[78] that the "retaliatory actions of a male supervisor, taken because a female employee declined his sexual advances, constitutes sex discrimination within the definitional parameters of Title VII of the Civil Rights Act of 1964."[79] The court analogized the "willingness to pro-

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employee to another." *Id.* (footnote omitted). The United States Supreme Court has since stated that "[t]here is no exception in the terms of the Act for *isolated* cases." McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 281 n.8 (1976) (emphasis added).

The court here is fundamentally grappling with the concept of employer liability for the acts of its employees within the employment environment. Acceptance of the principle of respondent superior within the context of sexual harassment is a most important factor for ultimately finding a Title VII violation. Once agency was recognized conceptually, Title VII provided a remedy. For further discussion, see notes 84, 94, 103–04, 108, 112, 120 *infra* and accompanying text.

[75] 418 F. Supp. at 234. Affidavits offered by management alleged that it was the Bank's policy "to prevent and prohibit moral misconduct . . . and to suspend and/or dismiss and/or reprimand . . . employees who have made sexual advances to their co-employees, subordinate employees or superior employees." *Id.* at 235.

[76] *Id.* at 236 n.2.

[77] *Id.* at 236. The court's concession was in light of a District of Columbia district court case decided prior to *Miller*. *See* notes 78–84 *infra* and accompanying text. Such deference, however, was immediately qualified by an approving citation to *Corne* and the court's own express apprehensions regarding the potential abuse if employer liability were to be imposed. 418 F. Supp. at 236.

[78] 413 F. Supp. 654 (D.D.C. 1976).

[79] *Id.* at 657. The plaintiff alleged the working relationship with her supervisor was normal until she declined his sexual advances. *Id.* at 655. Thereafter, she was subjected to "a continuing pattern and practice of harassment and humiliation" resulting in eventual termination. *Id.*

The core of the defendant's argument was that, even assuming a sexual stereotype precipitated the supervisor's conduct, the class to be protected cannot be defined in terms of the particular stereotype, but rather must be described by a variable which distinguishes its members from those outside the class, *i.e.*, gender. Here, the "primary variable" which distinguished the class was "willingness *vel non* to furnish sexual consideration," applicable to both men and women. *Id.* at 657. Hence, both genders were similarly situated. Since Title VII requires sex discrimination to be gender-based, the conduct complained of was not within the definitional scope of the Act. *Id.*

This argument was based on the rationale advanced in *Train*. In rejecting it, the *Williams* court was essentially overruling its own Title VII analysis, declining to adhere to so confining a view of the prohibitional scope of the Act. *See* notes 60–65 *supra* and accompanying text.

vide sexual consideration" requirement to the "sex-plus" requirements[80] of *Sprogis* and *Phillips v. Martin Marietta Corp.*[81] The rationale of those cases—that a Title VII violation does not occur only when an employment practice or policy turns upon a characteristic peculiar to one of the genders, *i.e.*, "solely" on sex —was adopted by *Williams.*[82] In the court's view, the supervisor's conduct "created an artificial barrier to employment" effectively burdening one gender and not the other, though theoretically "both . . . were similarly situated."[83] The court also determined that if, as alleged, it was the supervisor's practice to impose on female employees a condition of sexual submission, then it was imputedly the practice of his employer.[84]

Barnes v. Costle,[85] reversing the summary judgment awarded in *Barnes v. Train,*[86] represented the District of Columbia Circuit's attempt, in light of *Williams v. Saxbe,* to further erode the reasoning of *Train.*[87] The appellate court found that the conduct at issue was clearly based on gender since the imposed condition—sexual submission in return for job retention—would never have been required

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[80] 413 F. Supp. at 658–59; *see* note 40 *supra.*

[81] 400 U.S. 542 (1971). In *Phillips,* the employer refused to hire any woman with pre-school age children whereas fathers with children of similar age were not disqualified from employment. *Id.* at 543.

[82] 413 F. Supp. at 659. It was the court's view that a literal interpretation of " 'sex discrimination' " within the meaning of the statute includes all discrimination based on gender, noting that Title VII applies to both men and women. *Id.* at 658.

[83] *Id.* at 657–58, 659. Under the *Williams* holding, it is the retaliatory actions following rejection of the suggested sexual activity and not the sexual harassment per se which constitutes a violation of Title VII. *Id.* at 657–61.

Though the *Williams* court disclaimed the theory that a finding of discrimination was dependent upon the supervisor's sexual preference, it expressed the view that a finding of discrimination would be precluded were the supervisor bisexual. Yet, a cause of action would exist where the supervisor imposing a sexual condition was homosexual or female heterosexual. *Id.* at 659 n.6. For further discussion, see notes 139–42 *infra* and accompanying text.

[84] *Id.* at 660. This is a very broad interpretation of agency principles. The rationale, however, indicates an unwillingness to defeat the plaintiff's claim at the pleading stage, for as the court points out, whether the conduct represents an employment policy or is purely personal in nature "requires a factual determination" at trial. *Id.*

[85] 561 F.2d 983 (D.C. Cir. 1977).

[86] *Id.* at 984, 995. The sole issue on appeal was whether the discrimination alleged—abolition of appellant's position—was gender-based. *Id.* at 988–89. It was additionally alleged that prior to the ultimate elimination of the position, the supervisor and other agents of the employer joined in an intentional effort " 'to belittle . . . harass . . . and . . . strip . . . [appellant] of her job duties.' " *Id.* at 985.

[87] *Id.* at 989–94. The court rejected the analysis of the lower court which had proposed that the employment retaliation was not gender-based but had occurred because of a refusal to engage in sexual activity. *See* text accompanying note 63 *supra.* The appellate court maintained that such a view ignores the fact that the reason sexual activity was suggested at all was precisely because the employee was a woman. *Id.* at 990.

had the employee been male.[88] Thus, the supervisor's particular demand was "immaterial" to a finding of sex discrimination.[89] The decision was grounded upon the fact that some term of employment, not reasonably related to job performance, was required of one gender and not the other.[90] Since gender was such a substantial factor in the discriminatory scheme, a prima facie case of sex discrimination within the scope of Title VII had been advanced.[91]

Uncertain of its meaning, yet aware of its implications, the appellate court felt compelled to confront the "inharmonious personal relationship" language used by the district court,[92] alluding to two possible interpretations and disposing of each.[93] First, the court determined that the supervisor's conduct could not be regarded as purely personal for purposes of evading Title VII's proscriptions, since generally an employer is responsible under the Act for the "discriminatory practices of [its] supervisory personnel."[94] Alterna-

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[88] *Id.* at 989–90. In so finding, the court relied on a "but for" analysis—"[b]ut for her womanhood," she would not have been approached nor required to acquiesce in sexual activity in order to retain her position. *Id.* at 990.

[89] *Id.* at 989 n.49. This conclusion is substantially in accord with the *Williams* rationale. *See* note 83 *supra*. It is not the request for sexual activity itself that establishes sex discrimination under the Act, but that such a request with attendant employment ramifications was initiated because the employee was female. *Id.*

[90] *Id.* at 989–90 & n.49.

[91] *Id.* at 990. In recognizing that discrimination under these circumstances was not based solely on sex, this court rejected, as did the district court in *Williams*, the "sex-plus" rationale. *See* note 40 *supra*. Essentially, the court found that gender plus cooperation were indispensible elements of job-retention whereas male employees were not faced with similar impositions for their continued employment. 561 F.2d at 992.

[92] 13 Fair Empl. Prac. Cas. at 124; *see* text at note 65 *supra*.

[93] 561 F.2d at 992–94. The two possible underlying purposes for the statement, according to the appellate court's interpretation, were either a rejection of the applicability of agency principles or a preclusion of a discrimination finding because only one employee was affected. *Id.* at 992–93.

[94] *Id.* at 993. The court deferred to the *Miller* decision, but found the facts of *Costle* to be significantly distinguishable. There was no showing that the employer was without knowledge of the conduct of its agents or that the situation would have been corrected once notice was given. *Id.* & n.72.

While the majority's reference to employer liability was limited to this brief holding, the basis of the concurring opinion was an in-depth comparative analysis of common law and statutory principles of vicarious liability. *Id.* at 995-1001 (MacKinnon, J., concurring). The ultimate result of Judge MacKinnon's analysis was to narrowly define the permissible boundaries of employer liability in sexual harassment circumstances. *Id.* at 1001. Concluding that the employer could not be found liable under general principles of agency and tort law, *id.* at 996, the statutory language and intent of Title VII was examined and analogized to prior interpretations of the National Labor Relations Act. *Id.* at 997–1001. The opinion reasons that only one statutory rationale for imposing employer liability is applicable—the employer is in the best position to know of the employment harm after having been apprised of the situation. *Id.* at 999–1000. It is also fundamental under this reasoning that other agents of the employer, in addition to the supervisor, participated in conduct detrimental to the complaining employee. *Id.*

tively, the conduct could not be regarded as non-discriminatory because only one employee was affected as Title VII protects the individual as well as the entire class.[95]

In *Garber v. Saxon Business Products, Inc.*,[96] the Fourth Circuit reversed and remanded the district court's dismissal of a complaint which had alleged sex discrimination in violation of Title VII.[97] Broadly interpreting the complaint, the court held that allegations of "employer policy or acquiescence in a practice . . . compelling female employees to submit to the sexual advances of their male supervisors" sufficiently stated a cause of action.[98]

In *Munford v. James T. Barnes & Co.*,[99] it was held that a cause of action under Title VII was stated when a female employee was terminated in retaliation for spurning the sexual advances of her supervisor.[100] The court considered the pivotal issues to be: first, whether sexual harassment was sex discrimination within the purview

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at 1000. Under the facts, therefore, employer liability may be imposed if it can be shown "that other management personnel harassed petitioner, . . . that her supervisors retaliated against her for . . . [filing a complaint] and that her employer, with knowledge of the facts alleged by her, *ratified* the discrimination that her supervisor had improperly imposed upon her." *Id.* at 1001 (emphasis added).

While the concurrence was an attempt to qualify what was perceived to be the majority's broad statement of liability, it appears that both opinions, though premised on opposite principles, effect substantially similar results. The only discernible distinction substantively seems to be the concurrence's requirement that other agents must participate in the discriminatory conduct. Such a requirement may not be entirely reasonable; the possibility exists that one supervisor, acting alone, can, by virtue of his position in the management hierarchy, cause similar employment harm.

The crucial differentiation between the two opinions is essentially procedural. The majority assumes the employer is liable for the acts of its agents unless it shows that it was without knowledge of acts in contravention of employer policy and it would have rectified the harm incurred once it attained knowledge of the facts. *Id.* at 993. The concurrence assumes an employer is not liable for the acts of its agents unless it is shown that the employer, with knowledge of the retaliatory conduct, ratified the acts of its agents. *Id.* at 1001. Thus, under the majority's presumption, the plaintiff would only have the burden of introducing the evidence while the burden of persuasion falls on the defendant-employer. Under the concurrence's presumption, however, the burdens of introduction and of persuasion are borne by the plaintiff-employee.

[95] *Id.* at 993–94; *see* note 37 *supra* and accompanying text.

[96] 552 F.2d 1032 (4th Cir. 1977) (per curiam).

[97] *Id.* at 1032.

[98] *Id.*

[99] 441 F. Supp. 459 (E.D. Mich. 1977).

[100] *Id.* at 466. The claimed sexual harassment consisted of "overt" demands of sexual intimacy and "repeated sexual suggestions and innuendoes." *Id.* at 460. Additionally, it was alleged that the supervisor threatened to fire the plaintiff for noncompliance with his demands. *Id.* When he ultimately carried out his threat, a protest was presented to his immediate supervisor who ratified the termination. *Id.* A subsequent meeting with these parties plus the company's owner and representing attorneys failed to culminate in a settlement. *Id.*

of Title VII; and second, whether an "employment practice" was involved so as to impose employer liability.[101]

As to the first issue, this court expressly agreed with both the *Costle* and *Williams* sex discrimination analyses, rejecting any suggestion that discrimination under the Act was "limited to sexual stereotyping."[102] Turning to the second issue, the court was of the view that a failure to follow through on employee discrimination grievances may be sufficient to impute liability to the employer for the discriminatory conduct of its agents.[103] Thus, "an employer has an *affirmative duty* to investigate complaints of sexual harassment and deal appropriately with the offending personnel."[104]

When the New Jersey district court in *Tomkins v. Public Service Electric & Gas Co.*[105] first considered the issue of sexual harassment under Title VII analysis, *Williams v. Saxbe* was the sole decision favoring such a cause of action under the Act.[106] The lower court rejected the *Williams* conclusion, aligned itself with those cases adjudging otherwise,[107] and held "that *sexual* harassment and *sexually* motivated assault do not constitute sex discrimination under Title VII."[108]

The primary basis for so concluding appeared to rest on the view that gender-based discrimination under these circumstances was to-

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[101] *Id.* at 465. The court considered these issues to be separate yet "interrelated" aspects of a valid cause of action as determined by prior interpretation of sexual harassment under Title VII analysis. *Id.*

[102] *Id.* at 465–66; *see* notes 80–83, 88–91 *supra* and accompanying text. The court also deemed the legislative intent of the Act and EEOC regulations as pertinent support for its conclusion. 441 F. Supp. at 465–66.

[103] 441 F.Supp. at 466. The court preliminarily determined that the defendant company was plainly within the statutory definition of "employer." *Id.* The two supervisors, because of their personnel decision-making responsibilities, were deemed agents of such employer. *Id.*

[104] *Id.* (emphasis added). The court interpreted *Costle* as imposing automatic vicarious liability upon an employer and specifically declined to follow suit. *Id.* Under *Munford,* therefore, the burden is upon the plaintiff-employee to prove a discriminatory scheme by the defendant-employer. *Id.* This view is in substantial agreement with the *Costle* concurrence. *See* note 94 *supra.*

[105] 422 F. Supp. 553 (D.N.J. 1976), *rev'd and remanded,* 568 F.2d 1044 (3d Cir. 1977).

[106] *See* notes 78–84 *supra* and accompanying text.

[107] *See* notes 60–77 *supra* and accompanying text.

[108] 422 F. Supp. at 556 (emphasis in original). The court, however, bifurcated the issues, recognizing a distinction between the supervisor's sexual misconduct and the employer's acts following Tomkins' complaint of sexual abuse. *Id.* While unwilling to impute liability to the employer for the acts of her supervisor, *but see* note 112 *infra,* the court denied PSE&G's motion to dismiss on the issue of employer retaliation since such actions may constitute Title VII sex discrimination. 422 F. Supp. at 557. The court reasoned that in choosing to fire Tomkins rather than investigate her charge, the company may consciously be placing a higher value on the services of the male employee to the detriment of the female employee, thereby discriminating on the basis of sex. *Id.*

tally outside the realm of conceivability.[109] Therefore, though "an unhappy and recurrent feature of our social experience," the supervisor's conduct was purely personal and not sex discrimination as defined by Title VII.[110] Policy considerations, expressed and implied in previous legal determinations which rejected a cause of action for sexual harassment, also emerged as the basis for the district court's rationale.[111] Recognizing "that the power inherent in a position of authority is necessarily coercive,"[112] the court expressly feared that should Tomkins prevail, any sexual advance by a superior to a subordinate would theoretically constitute a Title VII violation.[113]

In its reversal and remand of the district court's opinion, the Third Circuit decided the case by initially accepting as true the allegations as pleaded, followed by an evaluation of those allegations as stated by the appellant.[114] Based on its interpretation of the applicable provision of Title VII[115] and utilizing the distinctions gleaned

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[109] *Id.* at 556. The court was not predisposed to a finding that Title VII was intended to remedy what was seen as simply the tortious conduct of one person towards another "which happened to occur in a corporate corridor rather than a back alley." *Id.*

[110] *Id.* (footnote omitted). That the supervisor was male and the subordinate female was irrelevant under the theory posited by the lower court. *Id.* Conceivably, the genders of the parties may "have been reversed, or even not crossed at all." *Id.* Therefore, gender per se was "incidental" to the abusive conduct. *Id.*

[111] *Id.* at 556–57. *See, e.g.*, Corne v. Bausch & Lomb, Inc., 390 F. Supp. at 163 ("an outgrowth of holding such activity [sexual harassment] to be actionable under Title VII would be a potential federal lawsuit every time any employee made amorous or sexually oriented advances toward another"); Miller v. Bank of America, 418 F. Supp. at 236 ("It is conceivable, under plaintiff's theory, that flirtations of the smallest order would give rise to liability."); Barnes v. Train, 13 Fair Empl. Prac. Cas. at 124 (conduct alleged was "not the *type* of discriminatory conduct contemplated by the 1972 Act") (emphasis added).

[112] 422 F. Supp. at 557. It should be noted that had the district court initially succeeded in perceiving discrimination on the basis of sex, it would not have had as much difficulty as did prior cases in imputing liability to the employer for purposes of finding a Title VII violation. The court viewed the supervisor's acts as personal only because it did not view them as gender-based. The viability of the doctrine of respondeat superior was acknowledged when the acts are performed within the scope of employment. *Id.* at 556 n.*. This position is considerably broader than the *Costle* concurrence and the *Munford* opinion. *See* notes 94, 103–04 *supra* and accompanying text. However, as the court reiterated, "if the underlying wrong does not constitute sex discrimination, sex discrimination cannot be imputed to the employer." 422 F. Supp. at 556 n.*.

[113] *Id.* at 557. Thus, the court's reasoning appears to be an attempt to dam the "floodgates of litigation" envisioned to ensue should sexual harassment be seen as remedied by Title VII. *Id.* For further discussion, see notes 140–43 *infra* and accompanying text.

[114] Tomkins v. Public Serv. Elec. & Gas Co., 568 F.2d 1044, 1045–49 (3d Cir. 1977). The appellate court was much more disposed than was the lower court to adhere to the spirit and letter of Rule 12(b)(6) of the Federal Rules of Civil Procedure as construed by the United States Supreme Court. Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 174–75 (1965) ("the allegations of the counterclaim . . . as well as the resulting damage suffered . . . are taken as true") (footnote omitted).

[115] *See* note 28 *supra*.

from prior decisions involving sexual harassment,[116] the court recognized two factors necessary for a cognizable claim of sex discrimination: first, the imposition of a term or condition of employment; and second, such term or condition "imposed by the employer on the basis of sex."[117] As to the first requirement, the "major thrust" of Adrienne Tomkins' allegation was "that her employer, either knowingly or constructively, made acquiescence in her supervisor's sexual demands a necessary prerequisite to the continuation of, or advancement in, her job."[118] Thus, the court viewed these specific allegations as precluding a finding, as had the district court, that the supervisor's conduct was a purely " 'personal' " endeavor without employment repercussions.[119] Implicit both in the court's exposition and in its specific holding is the premise that a Title VII cause of action against an employer is established if the complaint alleges employer knowledge and acquiescence in the discriminatory conduct of its agents.[120]

Because the court relied wholly on the pleadings in concluding that an additional condition of employment had been imposed, it expressly reserved consideration of an alternative theory of employer liability which had been presented by appellant Tomkins.[121] It was proposed that Title VII provides a "right to a work environment free from the psychological harm flowing from an atmosphere of discrimination."[122] In essence, this theory analogizes to cases which have

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[116] According to the court, the key variation in prior cases which determined whether a violation of Title VII had been advanced originated with the complaints themselves, *i.e.*, whether the complaint "alleg[ed] sexual advances of an individual or personal nature . . . [or] direct employment consequences flowing from the advances." 568 F.2d at 1048.

[117] *Id.* at 1046, 1048. The court's intepretation is substantially similar to the analytical result. reached by the *Munford* court as to the requirements for a Title VII sex discrimination action. While *Munford* evaluated the "employment practice" alleged for purposes of imputing liability to the employer, *Tomkins* looked to whether a "term or condition of employment" had been imposed. *See* text accompanying note 101 *supra*.

[118] 568 F.2d at 1046. Since the opinion was so procedurally oriented, it is interesting to note the implication that the alleged facts raised inferences of an additional condition of employment. *Id.* at 1047. One might conclude, therefore, that had Adrienne Tomkins' complaint not been as procedurally sufficient, the court may have been disposed to find an additional condition of employment based upon inferences gleaned from the facts rather than from express allegations.

[119] *Id.* at 1046. The court cited *Griggs* with approval alluding to the Supreme Court's declaration "that the purpose of . . . Title VII was 'the removal of artificial, arbitrary, and unnecessary barriers to employment. . . .' " *Id.* at 1047 n.2 (quoting 401 U.S. at 431); *see* notes 44–45 *supra* and accompanying text.

[120] 568 F.2d at 1047, 1048–49. Of course, as the court notes, a plaintiff must prove the allegations at trial in order to ultimately impose vicarious liability upon the employer for the acts of its supervisory personnel. *Id.* at 1047 n.3, 1049; *accord*, Williams v. Saxbe, 413 F. Supp. at 660; *see* note 84 *supra*.

[121] 568 F.2d at 1046 n.1.

[122] Brief for Appellant, *supra* note 9, at 15.

held that Title VII's proscription regarding " 'terms, conditions, or privileges of employment' " is a comprehensive proposition protective of "employees' psychological as well as economic fringes."[123] This view is also in accord with EEOC decisions which "ha[ve] consistently ruled that Title VII obligates an employer to maintain a working atmosphere free of intimidation based upon race, color, religion, sex or national origin.' "[124]

The crux of the theory is that Title VII not only prohibits specific discriminatory practices of economic impact, *i.e.*, hiring, firing, and promotional policies, but the prohibition also encompasses those subtler practices impacting emotionally and psychologically upon an employee.[125] Thus affected, an employee is burdened with "the inconvenience, unfairness, and humiliation of . . . discrimination" because of his or her class status.[126] Based on the premise that Title VII mandated "a work environment free from psychological harm," it was proposed that the supervisor's gender-based conduct gave rise to an atmosphere of sexual intimidation and coercion, no less harmful in effect than racial epithets or ethnic jokes, thereby engendering a barrier to Tomkins' employment opportunities.[127]

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[123] Rogers v. Equal Employment Opportunity Comm'n, 454 F.2d 234, 238 (5th Cir. 1971) (opinion of Goldberg, J.) (employer held in violation of Title VII in that he segregated his patients based on national origin causing his employee of same minority national origin psychological harm by such discriminatory segregation), *cert. denied*, 406 U.S. 957 (1972). *See also* Gray v. Greyhound Lines, E., 545 F.2d 169, 176 (D.C. Cir. 1976) (discriminatory hiring practices by employer "support and atmosphere of discrimination which has caused . . . psychological harm" to black employees and can reasonably be construed as violative of present minority employees' Title VII employment interests).

[124] EEOC Decision No. 72-1114, 4 Fair Empl. Prac. Cas. 842, 843 (1972) (Title VII violated when employer permits supervisor to proselytize his religious beliefs during work hours because of intimidating effect on employees). *E.g.*, EEOC Decision No. 72-0679, 4 Fair Empl. Prac. Cas. 441, 442 (1971) (Title VII's race and sex discrimination provisions violated when employer refers to black female employees as " 'girls' " since such racial reference "is inherently more offensive . . . because of the repellant historical images the term understandably evokes" and from historical perspective it intrinsically embraces "an implication of female inferiority"); EEOC Decision No. 70-683, 2 Fair Empl. Prac. Cas. 606, 607 (1970) (supervisors' disparaging statements regarding employees' national origin violative of Title VII since indicative of disparate condition of employment).

[125] Rogers v. Equal Employment Opportunity Comm'n, 454 F.2d at 238.

[126] *Id.* Although not pertinent to the theory as advanced, overlapping into the economic sphere may occur. In some situations, the debilitating effects will ultimately have an adverse impact upon the quantity and quality of an employee's output with resulting economic ramifications.

[127] Brief for Appellant, *supra* note 9, at 14–18. Perhaps an additional analogy can be made to a relatively recent New Jersey case which concluded that an employee, allergic to her fellow employees' cigarette smoke, "ha[d] a common law right to a safe working environment." Shimp v. New Jersey Bell Tel. Co., 145 N.J. Super. 516, 525, 368 A.2d 408, 413 (Ch. Div. 1976). Her employer, therefore, was placed under "a duty to abate the hazard which cause[d] the discomfort." *Id.* at 531, 368 A.2d at 416.

To state a valid claim under Title VII pursuant to *Tomkins*, an allegation that a gender-based term or condition of employment has been imposed will assure a trial on the merits.[128] Absent this express allegation, the facts alone may be sufficient to raise an inference of a sex-based additional condition of employment, thus avoiding dismissal of the action.[129] Once in court, however, the plaintiff bears the initial burden of persuasion in order to establish a prima facie case of sex discrimination.[130] Problems may arise in instances where an employer, while denying the charge of sexual harassment, produces an employment record revealing excessive absenteeism or other indicia of poor performance as justification for whatever adverse employment consequences ensued.[131]

The *Tomkins* court's express deferment of the "psychological harm" theory restricts the plaintiff's claims, especially against substantial rebuttal evidence. Yet, one can conceptualize sexual coercion and intimidation as bearing heavily on an employee's ability to work at optimum capacity. Expansion of the "terms, conditions, or privileges" requirement to encompass the "psychological harm" theory in sexual harassment claims would more realistically promote the declared purposes and policies of the Act by allowing "the trier of fact . . . [to] make the necessary determination based upon 'reasonable inferences drawn from the totality of facts, the conglomerate of activities, and the entire web of circumstances presented by the evidence on the record as a whole.' "[132]

It would seem that "a safe working environment" could be construed as including not only physical but psychological effects as well. Thus, an employer may well have a duty to restrict the uninvited and offensive sexual advances of its employees. Under Title VII analysis, "a safe working environment" might be considered "a privilege of employment" protected from discriminatory encroachment based on impermissible classifications.

[128] 568 F.2d at 1046, 1048; *see* note 117 *supra* and accompanying text.

[129] *See* note 118 *supra*.

[130] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). While *McDonnell* established the burden procedure in a racial discrimination context, "the same rules would apply to sex discrimination." Ostapowicz v. Johnson Bronze Co., 369 F. Supp. 522, 533 n.4 (W.D. Pa. 1973); *accord*, Dothard v. Rawlinson, 433 U.S. at 329 (1977).

Once a prima facie case has been shown, the burden "shift[s] to the employer to articulate some legitimate, nondiscriminatory reason" for its actions. 411 U.S. at 802. In the event the employer meets its rebuttal burden, the plaintiff still has the "opportunity to demonstrate by competent evidence that the presumptively valid reasons . . . were in fact a coverup for a . . . discriminatory decision." *Id.* at 805.

[131] For example, PSE&G alleged that Tomkins was terminated solely because of her "poor attendance record." Brief of Appellee, *supra* note 13, at 3; *see* note 13 *supra* and accompanying text.

[132] Slack v. Havens, 522 F.2d 1091, 1095 (9th Cir. 1975) (quoting Aeronca Mfg. Co. v. NLRB, 385 F.2d 724, 728 (9th Cir. 1967)).

Generally, Title VII's "terms and conditions" clause is analyzed by the courts only in cases where the discrimination is subtle. In blatant cases, it is obviously implied.

Once the *Tomkins* court determined that an additional condition of employment had been imposed, it next considered whether it was imposed because of gender.[133] The court again went no further than the facial allegations, noting the "essence" of Tomkins' sex discrimination claim to be "that her status as a female was the motivating factor in the supervisor's conditioning her continued employment on compliance with his sexual demands."[134] By reasoning procedurally, the court deemed "irrelevant" the substantive hypothetical posited by PSE&G that a party demanding sexual relations "could . . . [be] either male or female with homosexual, heterosexual or bisexual tendencies" hence, the class discriminated against would not be gender-based but would only include those subjected to and declining such demands—presumably, both males and females.[135] The court noted, however, that the district court, in accepting this rationale for purposes of its analysis, had "t[aken] much too narrow a view of what can constitute sex-based discrimination under Title VII."[136] The probability of such a case occurring, it was also noted, "would cause no great concern" since in the sex discrimination sphere, Title VII protects both men and women.[137]

While this implies that men may also bring a sex discrimination action if sexually harassed,[138] it does not expressly deal with the conceptual problems raised by previous cases analyzing sexual harassment—specifically, the "bisexual supervisor" theory.[139] This proposition, enunciated in *Williams* and confirmed in *Costle*, is that sexual harassment initiated by a bisexual supervisor is not sex discrimination

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[133] 568 F.2d at 1047.

[134] *Id.* (footnote omitted).

[135] Brief of Appellee, *supra* note 13, at 8; 568 F.2d at 1047 n.4. PSE&G argued that Tomkins was discriminated against not because she was a woman but because she refused to submit to her supervisor's demands. *Id.* Moreover, because her gender was incidental, her supervisor's conduct, though sexual in nature, involved merely an employee interpersonal relationship and was not discrimination as envisioned under Title VII. *Id.* To summarize, sex was not a factor.

This argument is based on the "personal relationship" finding of *Barnes v. Train*, *see* text at notes 64–65 *supra*, which in turn provided the foundation of the defendant's argument in *Williams*. *See* note 79 *supra*. Additionally, PSE&G incorporated the tenuous analysis of "supervisor preference" originating in *Williams*. *See* notes 83 *supra* and 141 *infra*.

[136] 568 F.2d at 1047 n.4. The court essentially adopted the EEOC interpretation of sex discrimination stating that an allegation is sufficient where "gender is a substantial factor in the discrimination" and where the alleged conduct would not have occurred had the employee been of the opposite sex. *Id.* In so reiterating, the court implicitly rejected the "sex-plus" theory. *See* note 40 *supra*.

[137] 568 F.2d at 1047 n.4.

[138] *Accord*, Barnes v. Costle, 561 F.2d at 990 n.55; Williams v. Saxbe, 413 F. Supp. at 659 n.6.

[139] Note that while not of significant impact in reality, it is important to point out the difficulties with present sexual harassment rationale.

since such conduct is *de facto* regardless of sex.[140] This conclusion raises an inference that these courts may not be basing their analysis of sex discrimination solely on the gender of the harassed employee, but may subconsciously be considering the sexual preference of the supervisor as partially determinative of the issue.[141] Perhaps, the obvious omission of the bisexuality concept from both the district and appellate courts' analysis, though considering the hypothesis in terms of heterosexuality and homosexuality, impliedly reflects the tenuousness of such a theory.[142] In any event, the perceptions embodied within the "psychological harm" theory would again seem to alleviate

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[140] *See* 413 F. Supp. at 659 n.6; 561 F.2d at 990 n.55.

[141] The court in *Williams* expressly rejected this contention but noted in any event that the reason for the discrimination is irrelevant to the finding of discrimination. 413 F. Supp. at 659 n.6. It subsequently stated, however, that a finding of discrimination could not be made where the supervisor was bisexual. *Id.*

Note also that the "but for" test of *Costle* does not survive the "bisexual supervisor" theory because, as the court reasons, the condition imposed would apply to both males and females. 561 F.2d at 990 n.55. The distinction, however, is illusory for if in each individual case of sexual harassment, regardless of supervisor preference, an additional condition is imposed which would not have existed if the particular employee's sex was not a pertinent factor, the gender class of any other employee not approached is irrelevant. In other words, it is not a question of to who the additional condition would apply but to whom in fact it did apply. This would be true in instances where the supervisor is either heterosexual or homosexual and should similarly apply where the supervisor is bisexual. It might even be palpably argued that Title VII, in prohibiting discrimination based on sex, establishes sex as the class, interpretable not only in terms of male/female distinctions, but also in terms of gender/non-gender distinctions.

It is possible that the problem has arisen because the courts are not sufficiently distinguishing between two connotations of the term "sex," that is, sex as "one of the two divisions of . . . human beings respectively designated male or female," *i.e.*, gender, and sex as "the phenomena of sexual instincts and their manifestations." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1081 (1971). If harassment is not sexual in nature but its effect, through intimidation and coercion, is to impose a term or condition of employment because of the employee's sex, it is prohibited by Title VII as sex discrimination. *See, e.g.*, Skelton v. Balzano, 424 F. Supp. 1231, 1235 (D.D.C. 1976) (since courts would not involve themselves in remedying employment inequities and personnel judgments, crucial question for Title VII to be operative was whether employer's actions "reflected an antipathy to women rather than an antipathy solely to this woman's personality").

Similarly, sexual harassment is prohibited by Title VII, not because its underlying purpose is sexual, but because of the imposition of a term or condition of employment on the basis of the employee's gender. Alternatively, if an employee is harassed, intimidated or coerced because of a personality conflict or some other manifestation unrelated to race, color, religion, sex or national origin, there would be no violation of Title VII even though a term or condition of employment had been imposed. Alternative relief may be available to an employee so harassed, but Title VII would not be an option. *See, e.g.*, Associated Util. Serv. v. Board of Review, 131 N.J. Super. 584, 589, 331 A.2d 39, 41 (App. Div. 1974) ("intentional harassment" causing "intolerable and abnormal working conditions" would justify leaving job and under circumstances, such employee would qualify for unemployment benefits). Assuming, however, that sexual harassment by its very nature requires the victim to be of a particular gender, then it is discrimination on account of sex and the initiator's sexual preference is of no bearing.

[142] *See* 568 F.2d at 1047 n.4; 422 F. Supp. at 556.

the conceptual difficulties burdening present sexual harassment analysis.

After ultimately determining that Title VII sex discrimination encompasses sexual harassment, the *Tomkins* court felt compelled to comment disapprovingly on the district court's cynicism concerning potential complaintants should such a cause of action be made available.[143] Predicating its commentary on the policy underlying the very existence of the federal courts and expressing its faith in the judicial system to competently further such policy, the *Tomkins* court manifestly indicated that the decision to consider Title VII as viable in a sexual harassment suit "in no way relieves the plaintiff of the burden of proving the facts alleged to establish the required elements of a Title VII violation."[144] Considering the particularity with which the Third Circuit enunciated the requirements necessary to formulate a sexual harassment claim,[145] in addition to the burden of proving the particular facts at trial, it appears unlikely that an employer need fear, as did the district court, the potentiality of "[a]n invitation to dinner . . . becom[ing] an invitation to a federal lawsuit."[146]

The significance of *Tomkins* lies in the simplicity of its logic. A federal statute existed which proscribed employment discrimination on the basis of certain impermissible classifications. A reasonable interpretation of such statute required that sexual harassment be recognized as prohibited gender-based discrimination when an overt term or condition of employment was imposed.[147] Adherence to a firm federal policy, mandating that aggrieved citizens be provided a forum

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[143] 568 F.2d at 1049. Conventional prejudicial attitudes rather than sound legal reasoning seem to have formed the basis for the lower court's attempted prophecy:

> [I]f an inebriated approach by a supervisor to a subordinate at the office Christmas party could form the basis of a federal lawsuit for sex discrimination if a promotion or a raise is later denied to the subordinate, we would need 4,000 federal trial judges instead of some 400.

422 F. Supp. at 557.

[144] 568 F.2d at 1049.

[145] *Id.* at 1048–49; *see* note 25 *supra*.

[146] 422 F. Supp. at 557.

[147] Under *Tomkins*, the employment harm must be obvious. The question of whether the imposition of a psychological barrier, as opposed to an economic barrier, is prohibited remains left open for future determination, *see* notes 121–27 *supra* and accompanying text. It seems plain that co-worker sexual advances are not violative of Title VII. It is unclear, however, whether the employment harm must be actual or potential, that is, must the employee show apparent economic injury or, by virtue of the supervisor's authoritative position, will verbalization of imminent injury be sufficient. Adrienne Tomkins was ultimately fired, but the court's opinion speaks in terms of conditioning job status, perhaps implying that the threat of economic retaliation itself would require employer intervention. In any event, *Tomkins* stands as a message for employers to "nip such conduct in the bud."

in which claimed infringements upon their federal rights may be asserted and litigated, necessitated that a cause of action be promulgated. And finally, delineation of the precise conduct and circumstances necessary to assert this claimed right[148] both ensured fairness to litigants and preserved the credibility of the courts.[149]

"The mills of the law grind slowly—but not inexorably."[150]

Marie Nardino

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[148] *See* note 25 *supra*. The issue of employer liability under the Act appears foreclosed to the extent that the sexual harassment occurs within the confines of a supervisor/subordinate relationship and the employer, with knowledge, takes no affirmative steps to remedy the situation. Thus, as a legal concept, "sexual harassment in employment" may be considered two-pronged, consisting of both the intimidating words or acts and the coercive power to "reek economic havoc" should the words or acts remain unheeded.

[149] *See* text accompanying notes 143–44 *supra*.

[150] United States v. Barnett, 346 F.2d 99, 109 (5th Cir. 1965) (Wisdom, J., dissenting).