DISCRIMINATION—SEX—BURDEN OF PERSUASION SHIFTS IN REMEDIAL CLAIM AFTER FINDING OF SEXUAL HARASSMENT IN WORK ENVIRONMENT—*Bundy v. Jackson*, 24 Empl. Prac. Dec. ¶ 31,439, at 18,528 (D.C. Cir. 1981).

The courts have consistently expanded the recognition of women's employment rights[1] since the passage of Title VII of the Civil Rights Act of 1964.[2] One of the more recent protections afforded is that against sexual harassment of a female employee by her male supervisor.[3] Although such conduct gave rise to a cause of action under Title VII, a new dimension to that right was realized in *Bundy v. Jackson*.[4] Chief Judge Skelly Wright, speaking for the United States Court of Appeals for District of Columbia Circuit extended coverage to include women who were subjected to sexual harassment which "polluted" the work environment even if the harassment failed to result in a tangible economic injury.[5] Adjusting the proof requirements on the issue of the plaintiff's right to back pay and promotion, the court determined that the defendant had to discharge the burden of persuasion by clear and convincing evidence.[6]

In 1972, Sandra Bundy, a civil service employee of the District of Columbia Department of Corrections,[7] rejected the sexual importunings of a co-worker, Delbert Jackson, the future Department Director.[8] By 1974, Ms. Bundy's first and second line supervisors, James Gainey and Arthur Burton, had initiated a pattern of sexual entreaties

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[1] *See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321 (1977) (eliminating gender-based height and weight strictures); Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) (reversing decision permitting defendant to deny applications from mothers with preschoolers); Sprogis v. United Airlines, Inc., 444 F.2d 1194 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971) (striking down no-marriage rule for stewardesses).

[2] 42 U.S.C. §§ 2000e to 2000e-16 (1976). The pertinent part provides: "[i]t shall be an unlawful employment practice for an employer - (1) . . . 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."

[3] Miller v. Bank of America, 600 F.2d 211 (9th Cir. 1979); Tomkins v. Public Serv. 568 F.2d 1044 (3d Cir. 1977); Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977); Garber v. Saxon Business Prods., 552 F.2d 1032 (4th Cir. 1977).

[4] 24 Empl. Prac. Dec. ¶ 31,439, at 18,528 (D.C. Cir. 1981).

[5] *Id.* at 18,532.

[6] *Id.* at 18,538.

[7] *Id.* at 18,530. Ms. Bundy entered federal service in 1970 as a personnel clerk but had attained the position of Vocational Rehabilitation Specialist prior to litigation. *Id.*

[8] Brief for Appellant at 3, Bundy v. Jackson, 24 Empl. Prac. Dec. ¶ 31,439, at 18,528 (D.C. Cir. 1981) (hereinafter cited as Brief for Appellant). Despite Bundy's consistent refusals, Jackson repeatedly phoned with invitations to join him at his apartment. *Id.*

leading to her first complaint of sexual harassment.[9] Lawrence Swain, the supervisor of Burton and Gainey, to whom she appealed for assistance, summarily dismissed the complaint as frivolous, and then he sexually propositioned her.[10]

Following the harassment complaint to Swain, Burton and Gainey began to criticize Bundy's work performance.[11] When she became eligible for promotion, Gainey claimed that a hiring freeze precluded his recommending her, though others received advancement recommendations shortly thereafter.[12] Upon the advice of an Equal Employment Opportunity Officer, Bundy complained of sexual harassment to Swain's supervisor.[13] Failing to resolve her dilemma, she consulted the Chief EEO Officer. The officer, however, did not bring the allegations to the Director's attention.[14] Finally, Bundy complained to Jackson and a meeting was held with her male supervisors. Her alleged inadequate work performance was discussed at the meeting, but her sexual harassment complaints were not reviewed.[15] She continued to file employment discrimination charges through the Department grievance procedure. Jackson failed, though, to investigate the assertions beyond cursory questioning of the line supervisors.[16]

Bundy filed suit in the United States District Court for the District of Columbia, praying for declaratory and injunctive relief, back pay, and promotion.[17] She alleged that because of her womanhood she had been subjected to oppressive working conditions different from those imposed upon her male co-workers.[18] The gravamen of the complaint was that sexual innuendo and requests for sexual favors created a psychologically harmful work environment which, in itself,

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[9] 24 Empl. Prac. Dec. ¶ 31,439, at 18,530. On one occasion, Burton suggested that her horseback riding hobby was pursued in order to relieve unfulfilled sexual desires. He then requested that they view sexual literature together to test his theory. *Id.* at 18,539-40 n.2. Gainey repeatedly pressed her to accompany him to motels or to the Bahamas. *Id.* at 18,530.

[10] *Id.* at 18,530. Upon hearing her grievance, Swain declared, "'any man in his right mind would want to rape you.'" *Id.*

[11] *Id.* They chastised her for excessive leave-taking and questioned the quality of her work.

[12] *Id.*

[13] *Id.* at 18,530-31. The supervisor responded that Bundy was not recommended for promotion due to her unsatisfactory employment record. *Id.*

[14] *Id.* at 18,531. The EEO officer further warned Bundy of the difficulties inherent in proving sexual harassment and cautioned against bringing unfounded claims. *Id.*

[15] *Id.*

[16] *Id.*

[17] Bundy v. Jackson, 19 Empl. Prac. Dec. ¶ 9154, at 7003 (D.D.C. 1979). She exhausted administrative remedies by instituting suit six months after filing the agency grievance. 24 Empl. Prac. Dec. ¶ 31,439, at 18,540 n.6.

[18] Brief for Appellant, *supra* note 8, at 20.

justified a finding of illegality.[19] In his answer, Jackson denied that agency personnel had engaged in sexual improprieties, asserting that poor work performance justified Ms. Bundy's non-promotion.[20]

Although the trial court recognized that improper sexual advances were "standard operating procedure, a fact of life, a normal condition of employment in the office," it held that the defendant had not discriminated on the basis of sex.[21] The lower court found that Bundy's superiors failed to take the harassment ritual seriously and thus lacked the requisite retaliatory motive.[22] The United States Court of Appeals for District of Columbia Circuit overruled the district court's findings that terms, conditions, or privileges of employment had not been violated in the absence of a loss of employment benefits.[23] Stopping just short of a ruling of "clearly erroneous" on the lower court's fact-finding, the circuit court remanded with guidance because it adjudged that the evidentiary burdens had been improperly allocated.[24]

The court of appeals reaffirmed its landmark holding in *Barnes v. Costle*[25] that sexual harassment which conditioned continued employment on submission to sexual advances violated the Title VII ban on sex discrimination. In that case, the plaintiff's job was abolished because she refused her supervisor's sexual advances.[26] The court found gender discrimination in that, "but for her womanhood," the plaintiff would not have been pressed to submit to sexual relations.[27] As "a woman subordinate to the inviter in the hierarchy of agency personnel,"[28] she was vulnerable to her supervisor's retaliatory actions.

Relying on *Barnes*, Chief Judge Wright stated that Bundy had endured similar discriminatory treatment.[29] The principle that employers were liable for their supervisor's discriminatory conduct was

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[19] *Id.* at 25.

[20] *Id.* at 21.

[21] Bundy v. Jackson, 19 Empl. Prac. Dec. ¶ 9,154, at 7007 (D.D.C. 1979).

[22] *Id.*

[23] 24 Empl. Prac. Dec. ¶ 31,439, at 18,532.

[24] *Id.* at 18,537.

[25] 561 F.2d 983 (D.C. Cir. 1977).

[26] *Id.* at 989.

[27] *Id.* at 990. The "but for" test is equally applicable to cases involving homosexual advances or harassment of men by women. *Id.* 990 n.55. While it is logically correct that a bisexual supervisor could harass both men and women, and that this scenario would fall outside the spectrum of sex discrimination, it carries the criticism of the "but for" analysis to an absurd extreme. 24 Empl. Prac. Dec. ¶ 31,439, at 18,540 n.7.

[28] 561 F.2d at 990.

[29] 24 Empl. Prac. Dec. ¶ 31,439, at 18,532. *See generally* cases cited in note 3 *supra.*

equally applicable in *Bundy*.[30] An employer could be excused from liability, however, if it took swift action to eliminate harassment by a supervisor who acted in disregard of company policy and without the employer's knowledge. The officials in *Bundy* could not avail themselves of this plea since they had failed to effectively curtail the conduct despite having "full notice" of the harassment.[31]

The circuit court next examined the unique question of whether the pattern of sexual harassment was in itself sex discrimination without the attendant loss of tangible employment benefit.[32] It followed the principle espoused in *Rogers v. Equal Employment Opportunity Commission*[33] that employers who encouraged or created "substantially discriminatory work environment[s]"[34] based on race or ethnicity violated the provision against discriminatory conditions.

The Hispanic plaintiff in *Rogers* suffered a Title VII injury because her employer segregated clients based on race,[35] thereby offending the worker's sensibilities.[36] Judge Goldberg emphasized that "nuances and subtleties of discriminatory employment practices are no longer confined to bread and butter issues" but extend beyond "hiring, firing, and promoting" to "intangible fringe benefits."[37] He concluded that the psychological and emotional work environment falls within the protective ambit of the statute.[38]

In *Bundy*, Chief Judge Wright noted that environment cases such as *Rogers*, and those involving unequal dress codes,[39] demonstrated violations under the Act, even though the defendant manifested a

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[30] 24 Empl. Prac. Dec. ¶ 31,439, at 18,532.

[31] *Id.* The higher respondeat superior employer liability standard espoused in Judge MacKinnon's concurrence in the *Barnes* case was also satisfied. The court speculated that Jackson's claim that he did not take the practice of harassment seriously was because an admission of such activity would impact adversely upon the department. *Id.* at 18,540 n.8.

[32] *Id.* at 18,532 (emphasis omitted).

[33] 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972).

[34] 24 Empl. Prac. Dec. ¶ 31,439, at 18,532 (emphasis omitted). *See also* Firefighters Inst. for Racial Equality v. City of St. Louis, 549 F.2d 506, 514-15 (8th Cir.), *cert. denied*, 434 U.S. 819 (1977); Gray v. Greyhound Lines, E., 545 F.2d 169, 176 (D.C. Cir. 1976); United States v. City of Buffalo, 457 F. Supp. 612, 631-35 (W.D.N.Y. 1978).

[35] 454 F.2d at 237-38.

[36] *Id.* at 238.

[37] *Id.*

[38] *Id.*

[39] *See, e.g.*, Carrol v. Talman Fed. Sav. & Loan Ass'n, 604 F.2d 1028 (7th Cir. 1979), *cert. denied*, 445 U.S. 929 (1980); Laffey v. Northwest Airlines, Inc., 366 F. Supp. 763 (D.D.C. 1973), *vacated and remanded in part and affirmed in part*, 567 F.2d 429 (1976), *cert. denied*, 434 U.S. 1086 (1977). *But cf.* Willingham v. Macon Tel. Publishing Co., 507 F.2d 1084 (5th Cir. 1975), *vacating*, 482 F.2d 535 (5th Cir. 1973) (hair length rules for men not prohibited by Title VII).

benign intent.[40] Surely sexual harassment which purposely infuses "the most demeaning sexual stereotypes" into the workplace and invades one's "innermost privacy" deserves a similar interpretation.[41]

In determining that a pattern or practice of sexual harassment was in itself illegal, the court reasoned that women subjected to subtle discriminatory schemes would continue to suffer if the court refused to afford equitable relief.[42] The employer's sexual innuendo and advances would accomplish the same result as a denial of tangible benefits but would leave the impression that the ritual has no bearing on employment decisions.[43] The alternatives available to the female employee when no loss of employment benefit is threatened points out the "'cruel trilemma'" which faces her. She may endure the demeaning gestures or slurs when good natured tolerance is required, dramatically refuse to cooperate and risk retaliation, or voluntarily quit her employment with little prospect of legal redress.[44] Finding that Bundy was the victim of an environment "polluted" with sex discrimination, the court reversed and remanded with instructions to grant injunctive relief,[45] based on the Equal Employment Opportunity Commission Final Guidelines on Sexual Harassment in the Workplace.[46] The Guidelines offer a broad definition of sexual harassment.[47] They support the proposition that employers should be held strictly liable for discriminatory actions of agents and supervisory personnel.[48] The essential thrust of the Guidelines is to prevent the occurrence of harassment.[49] Although preventive measures are pre-

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[40] 24 Empl. Prac. Dec. ¶ 31,439, at 18,533-34.

[41] *Id.* at 18,534.

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *Id.* Remedies under Title VII are confined to equitable relief. 42 U.S.C. § 2000e-5(g) (1976). Although back pay and reinstatement are inapplicable, and emotional damages unaffordable, the district court could consider an award of attorneys' fees on remand. *See id.* § 2000e-5(k).

[46] 45 Fed. Reg. 74676-77 (1980) (to be codified in 29 C.F.R. §§ 1604.11(a)-11(f)).

[47] *Id.* at 74677 (to be codified in 29 C.F.R. § 1604.11(a)).

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

Id.

[48] *Id.* (to be codified in 29 C.F.R. § 1604.11(c)). An employer should be liable for co-worker harassment when authorization or knowledge is proven. *Id.* (to be codified in 29 C.F.R. § 1604.11(d)).

[49] *Id.* (to be codified in 29 C.F.R. § 1604.11(f)).

ferred, corrective measures might negate liability in appropriate circumstances.[50] Chief Judge Wright applied the foregoing recommendations, ordering the Director to undertake certain remedial steps.[51]

Turning to the proof issue on the claim for back pay and promotion, the court declared that *McDonnell Douglas Corp. v. Green*[52] and *Day v. Mathews*[53] together enunciated the proper evidentiary standards for sexual harassment cases.[54] In *McDonnell Douglas*, the Supreme Court defined the prima facie case for refusal to hire based on race[55] and declared that after the plaintiff makes out a prima facie case, the burden of demonstrating legitimate and nondiscriminatory reasons for denial shifts to the employer.[56] If the employer discharges this burden, the applicant is still accorded a "full and fair opportunity" to submit evidence refuting the employer's rationale.[57] Under this formula, the burden of persuasion rests ultimately with the plaintiff.[58]

The *Bundy* court adjusted the *McDonnell Douglas* formula to analyze the claim for back pay and promotion.[59] To make out a prima facie case Bundy would have to show that, as a woman, she was a member of a protected group who, though qualified, was refused a promotion, and that co-workers not within the group yet similarly situated were promoted instead.[60] Unlike an individual claimant, however, the court reasoned that since Bundy had already

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[50] *Id.* (to be codified in 29 C.F.R. §§1604.11(d)-11(e)).

[51] 24 Empl. Prac. Dec. ¶ 31,439, at 18,535. The employer must set up a policy prohibiting sexual harassment, adequately educate employees as to its existence, investigate alleged misconduct, and employ disciplinary measures pursuant to Civil Service Commission Regulations §§ 713,211-823, Fed. Pers. Manual Supp. 990-1 (1978) (cited in Bundy, 24 Empl. Prac. Dec. ¶ 31,439, at 18,535).

[52] 411 U.S. 792 (1973).

[53] 530 F.2d 1083 (D.C. Cir. 1976).

[54] 24 Empl. Prac. Dec. ¶ 31,439, at 18,535-39.

[55] 411 U.S. at 802. In the words of the Court:

> This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

Id. (footnote omitted) (cited in Bundy, 24 Empl. Prac. Dec. ¶ 31,439, at 18,537).

[56] 411 U.S. at 802.

[57] *Id.* at 805.

[58] *Id.*

[59] 24 Empl. Prac. Dec. ¶ 31,439, at 18,538.

[60] *Id.* The criteria used to judge the qualifications for a particular position varies from case to case but proof of certain factors, including technical eligibility or current job ratings, could satisfy a prima facie element. *Id.*

proven systemic sexual discrimination, it proposed that she "enter the ritual of order of proof at an advantage."[61]

Citing *Day v. Mathews*,[62] the *Bundy* court analogized to employment discrimination based on race.[63] *Day* involved a claim by a black employee of the Department of Health, Education and Welfare who had established a prima facie case of racial discrimination by his supervisors.[64] The court declared that the burden of articulating legitimate reasons for non-promotion must be discharged through clear and convincing evidence.[65] Based on *Day*, the court in *Bundy* posited two requirements for the prima facie showing of retaliation for refuting sexual advances:

> (1) that she was a victim of a pattern or practice of sexual harassment attributable to her employer; and (2) that she applied for and was denied a promotion for which she was technically eligible and of which she had a reasonable expectation.[66]

The court eliminated an element of the prima facie case under *McDonnell Douglas* by excusing the plaintiff from evincing that others who were not members of the disadvantaged group received promotions.[67] It reasoned that once a woman has proved unlawful discrimination in itself, it is fair to lessen the burden of proving that men in similar positions were promoted instead.[68] After the case is made out, if the employer successfully demonstrated legitimate non-discriminatory reasons for denial by clear and convincing evidence, the claimant may still offer proof that the reasons were mere pretexts for discrimination.[69]

The *Bundy* decision is significant for its understanding of sexual harassment as a "pattern or practice" of discrimination in the work

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[61] *Id.*

[62] 530 F.2d 1083 (D.C. Cir. 1976).

[63] 24 Empl. Prac. Dec. ¶ 31,439, at 18,538.

[64] 530 F.2d at 1083.

[65] *Id.* at 1085. *See also* Baxter v. Savannah Sugar Ref. Corp., 495 F.2d 437, 444-45 (5th Cir.), *cert. denied*, 419 U.S. 1033 (1974).

[66] 24 Empl. Prac. Dec. ¶ 31,439, at 18,539.

[67] *Id. Cf.* Pettit v. United States, 488 F.2d 1026, 1033 (Ct. Cl. 1973) (claim of failure to promote because of racial bias) (cited in Bundy, 24 Empl. Prac. Dec. ¶ 31,439, at 18,542 n.18). In *Pettit*, the court adjusted the *McDonnell Douglas* formula and posited four elements necessary to establish a prima facie case of discrimination. The critical omission in that test related to proving the qualifications of co-workers, implying that the employer must rebut by demonstrating their worthiness for promotion.

[68] 24 Empl. Prac. Dec. ¶ 31,439, at 18,542.

[69] *Id.*

environment.[70] Although the case involved a solitary claim, the plaintiff offered proof that other women were subjected to similar harassment.[71] As a systemic discrimination case, the *Bundy* allocation of the proof burden on the remedial issue of back pay and promotion is analogous to that employed in a Title VII class action case[72] and in a pattern or practice suit.[73]

In *Franks v. Bowman Transportation Co.*, the plaintiff-class proved a prima facie case of systemic racial discrimination in hiring, firing, and transfer.[74] As a result, the defendant was enjoined from continuing the discriminatory practices.[75] When the Court considered the individual member's entitlement to back pay, the burden of proving that each employment decision was based on nondiscriminatory policy shifted to the employer.[76] This holding was followed in *International Brotherhood of Teamsters v. United States*, where the government proved that the defendant engaged in a regular practice of racial and ethnic discrimination in implementing its seniority system.[77] In *Teamsters*, the Court declared that the force of the evidence of discriminatory practices which necessitated equitable relief did not disappear when the second question of individual relief arose.[78] The defendant was required to dispel the inference that specific employment decisions were based on discriminatory policy.[79]

The *Bundy* court, in effect, applied this burden of proof theory in systemic cases to the pattern of sexual harassment which pervaded the Department of Corrections. The "standard operating procedure" of sexual advancements and innuendo gave rise to a "polluted" discriminatory environment.[80] Accordingly, the court ordered the district

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[70] A pattern or practice of disparate treatment based on sex is prohibited under Title VII. 42 U.S.C. § 2000e-6(a)(1974). Legislative history defines a pattern or practice in the usual sense:

> [A] pattern or practice would be present only where the denial of rights consists of something more than an isolated, sporadic incident, but is repeated, routine, or of a generalized nature. There would be a pattern or practice if . . . a company repeatedly and regularly engaged in acts prohibited by the statute . . . [s]ingle insignificant, isolated acts of discrimination by a single business would not justify a finding of a pattern or practice.

110 CONG. REC. 14270 (1964) (remarks of Senator Humphrey).

[71] 24 Empl. Prac. Dec. ¶ 31,439, at 18,540 n.3.

[72] Franks v. Bowman Transp. Co., 424 U.S. 747 (1976).

[73] International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977).

[74] 424 U.S. 747, 751 (1976).

[75] *Id.*

[76] *Id.* at 772.

[77] 431 U.S. 324, 360 (1977).

[78] *Id.* at 361-62.

[79] *Id.* at 362.

[80] 24 Empl. Prac. Dec. ¶ 31,439, at 18,532.

court to issue an injunction which would prevent further harassment.[81] Based on *Franks* and *Teamsters*, the burden of persuasion properly shifted to the defendant in the determination of Bundy's entitlement to back pay and promotion.[82] On remand, the defendant was required to show by clear and convincing evidence that an adverse employment decision did not result from the practice of sexual harassment.[83]

The more stringent "clear and convincing" standard is also employed in systemwide private sector cases.[84] The rationale is that a court cannot exactly predict how an individual discriminatee would have behaved in a nondiscriminatory environment.[85] Consequently, the resulting uncertainty should be resolved against the party whose activity gave rise to the controversy.[86] When a discriminatory environment has been proved, as in *Bundy*, a strict showing by the employer comports with the broad remedial thrust of Title VII cases to make the injured person whole.[87]

The *McDonnell Douglas* proof standard for individual disparate treatment cases has been recently clarified by the Supreme Court in *Texas Department of Community Affairs v. Burdine*.[88] The plaintiff in *Burdine* alleged that she had been denied promotion based on her sex.[89] Justice Powell stated that once the plaintiff had made out the prima facie case, the "intermediate burden" of clearly setting forth "legitimate nondiscriminatory reasons" through admissible evidence shifted to the employer.[90] If the employer's burden of going forward is discharged, the employee is then required to demonstrate intentional discrimination[91] by a preponderance of the evidence.[92] Furthermore, the plaintiff must show that similarly situated employees

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[81] *Id.* at 18,534.

[82] *Id.* at 18,539.

[83] *Id.*

[84] Baxter v. Savannah Sugar Ref. Corp., 495 F.2d 437, 445 (5th Cir.), *cert. denied*, 419 U.S. 1033 (1974).

[85] Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364, 1379 (5th Cir. 1974).

[86] Day, 530 F.2d at 1086.

[87] Albermarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975). The Court emphasized:

> It is the reasonably certain prospect of a backpay award that 'provide[s] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history.'

Id. at 417-18 (quoting United States v. N.L. Industries, 479 F.2d 354, 379 (8th Cir. 1973)).

[88] 101 S. Ct. 1089 (1981).

[89] *Id.* at 1092.

[90] *Id.* at 1096.

[91] *Id.* at 1095.

[92] *Id.* at 1093.

were accorded favorable treatment.[93] The court emphasized that the ultimate burden of persuasion always remains on the plaintiff.[94]

Thus, in individual sexual harassment cases, the plaintiff must carry the burden of persuasion on the issue of intentional discrimination. Moreover, in contrast to *Bundy*, she must prove, as part of the prima facie case, that male employees in similar positions were given favorable treatment. Although *Burdine* clearly construes evidentiary burdens in favor of the defendant, it is distinguishable from *Bundy* because it applies to individual disparate treatment cases rather than systemic cases. Arguably, the *Bundy* rationale is consistent with *Burdine* because the plaintiff was required to discharge the burden of persuasion by demonstrating sexual harassment.

Bundy represents an expansion of sex-based discriminatory conditions under section 703(a) of Title VII. Courts have consistently been willing to identify disparate treatment in conditions based on race, readily extending coverage to include patterns of derogatory nonverbal conduct.[95] Findings of impermissible sex-based conditions, though, have not enjoyed a comparable evolution.[96]

In *Carroll v. Talman Federal Savings & Loan Ass'n*,[97] the Court of Appeals for the Seventh Circuit held that the class of female bank employees required by the defendant to wear uniforms suffered disparate treatment since similarly situated males were not likewise imposed upon.[98] The court founded its determination on the employer's implication that women did not exercise good business judgment in deciding how to dress for work. Overruling this justification as "anathema to the maturing state of Title VII analysis,"[99] the court emphasized the offensiveness of demeaning stereotypical assumptions.[100] Viewing discriminatory dress codes as less invidious than sexual harassment, Chief Judge Wright in *Bundy* likewise expressed concern that women were unfairly stereotyped in the workplace.[101]

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[93] *Id.* at 1096.

[94] *Id.* at 1093.

[95] United States v. City of Buffalo, 457 F. Supp. 612, 632 (1978) (displaying picture of Martin Luther King family with inscription "A bunch of niggers" written on it, wearing "Wallace for President" buttons, and displaying other racially derogatory drawings).

[96] For a discussion of unemployment compensation cases alleging sexist environment was "good cause" for voluntarily leaving work, see Note, *Protecting Women from Sexual Harassment in the Workplace*, 58 TEX. L. REV. 671, 683-85 (1980).

[97] 604 F.2d 1028 (7th Cir. 1979).

[98] *Id.* at 1033.

[99] *Id.*

[100] *Id.*

[101] 24 Empl. Prac. Dec. ¶ 31,439, at 18,533.

This rationale has been adopted in a recent case, *EEOC v. Sage Realty*,[102] in which the plaintiff was required as a condition of her employment as a lobby attendant to wear a suggestive uniform. She was therefore subjected to obscene comments and gestures by the public.[103] Decided almost concurrently with *Bundy*, *Sage Realty* relied on *Barnes* in holding that the employer's condition offended the Title VII proscription against sexual harassment.[104]

Given the occasion to construe sexual harassment as a Title VII cause of action, early district court decisions preferred instead to characterize the problem solely as one of "inharmonious personal relationships."[105] The judicial fear of a multiplicity of suits arising from the recognition of sexual harassment[106] demonstrated the pervasiveness of the phenomenon.[107] The *Bundy* court, in contrast, squarely faced the problem by choosing to utilize broad remedial guidelines as a preventive remedy. In fashioning injunctive relief, the court in *Bundy* accorded deference to the agency guidelines; employees were encouraged to utilize existing grievance mechanisms.[108] The scope of the measures extended to disciplining the offender[109] and comported with the court's viewpoint that patterns and practices of sexual harassment should be affirmatively uprooted.

Sexual harassment is highly subjective, encompassing a range of possible behavior.[110] In theory, men and women business executives generally agree in their definition of the activity.[111] Yet, there is a wide disparity in its perceived frequency, with women in middle level management reporting a higher incidence than men in upper level management.[112] Social conditioning, lack of awareness, or denial by

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[102] 507 F. Supp. 599 (S.D.N.Y. 1981).

[103] *Id.* at 605.

[104] *Id.* at 609.

[105] Barnes v. Train, 13 Fair Empl. Prac. Cas. 123 (D.D.C. 1974), *rev'd sub nom.* Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977).

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

[107] L. FARLEY, SEXUAL SHAKEDOWN: THE SEXUAL HARASSMENT OF WOMEN ON THE JOB 37-41 (1978).

[108] 24 Empl. Prac. Dec. ¶ 31,439, at 18,535.

[109] *Id.* Although the EEOC has promulgated recommendations respecting co-worker harassment, courts have generally failed to address the issue.

[110] *See* WORKING WOMEN'S INSTITUTE; COMMENTS ON E.E.O.C.'S PROPOSED AMENDMENTS TO ITS GUIDELINES ON DISCRIMINATION BECAUSE OF SEX TO ADD SEC. 1604.11, SEXUAL HARASSMENT 3-4.

[111] Collins & Blodgett, *Sexual Harassment: Some See It . . . Some Won't*, HARV. BUS. REV. 77, 80 (1981). Survey respondents specifically agree in their definition of blatant patterns, while finding subtle examples ambiguous but, nevertheless, offensive. *Id.*

[112] *Id.* at 81-82.

men of the existence of such behavior could account for this discrepancy.[113] Women executives view sexual harassment more seriously than men. The degree to which it is treated seriously depends largely on the amount of power retained by the individual making the advance. Since women remain in low paying, low status jobs,[114] their vulnerability to sexual harassment by their supervisors is more acute. Sexual harassment which reinforces the stereotypical attitude that women are sexual objects helps to perpetuate the existing male-female distribution of power in the workplace.[115]

The Equal Employment Opportunity Commission guidelines on Sexual Harassment advocate strict employer liability for acts committed by supervisory personnel.[116] In traditional Title VII cases alleging racial or religious bias, the courts have generally applied absolute employer liability.[117] In sexual harassment cases, though, courts insist on requiring some measure of employer knowledge of or acquiescence in the conduct. The *Barnes* formula, directly relied upon in *Bundy*, endorses the general rule in Title VII cases that a violation automatically occurs unless the employer can demonstrate that: (1) the supervisor defied company policy in the absence of employer knowledge; and, (2) the employer took ameliorative action when the harassment was discovered.[118] In the absence of a reliance on respondeat superior principles, an "enormous loophole" in the statute would be available to disavow a supervisor's sexual harassment of an employee.[119] While the plaintiff is not required to exhaust formal company procedures as a basis for notice,[120] one court, attempting to distinguish the *Barnes* opinion, imposed an affirmative duty to notify management, finding that notice to the supervisor/harasser was insufficient.[121] In the Third Circuit, some measure of "constructive

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[113] *Id.* at 82. Women report an absence of managerial willingness to involve itself in alleged instances of harassment, and a corresponding lack of support in dealing with such incidents. *Id.* at 83-90.

[114] WOMEN'S BUREAU, U.S. DEP'T OF LABOR, THE EARNING GAP BETWEEN WOMEN AND MEN (1979). For every $1.00 earned by men, similarly situated women earn $.59. Women continue to retain lower status jobs in the labor market, comprising clerical and service workers. U.S. DEP'T OF LABOR STATISTICS, EMPLOYMENT AND EARNINGS (Feb. 1981).

[115] Taub, *Keeping Women in Their Place: Stereotyping Per Se as a Form of Employment Discrimination*, 21 B.C. L. REV. 345 (1980).

[116] 45 Fed. Reg. 74677 (1980) (to be codified in 29 C.F.R. 1604.11(c)).

[117] Young v. Southwestern Sav. & Loan Ass'n, 509 F.2d 140, 144 n.7, 145 (5th Cir. 1975); Croker v. Boeing Co. (Vertol Div.), 437 F. Supp. 1138, 1194 (E.D. Pa. 1977). *But see* United States v. United States Steel Corp., 371 F. Supp. 1045, 1054 (N.D. Ala. 1973), *modified on other grounds*, 520 F.2d 1043 (5th Cir. 1975).

[118] 561 F.2d at 993. *But see id.* at 995 (MacKinnon, J., dissenting).

[119] Miller v. Bank of America, 600 F.2d 211 (9th Cir. 1979).

[120] *Id.* at 214.

[121] Vinson v. Taylor, 22 Empl. Prac. Dec. 30, 708 (D.D.C. 1980).

knowledge" is needed, but the requirement is ambiguous since it mitigates the affirmative duty to complain.[122] The *Bundy* court applied the liberal but qualified *Barnes* analysis, raising the issue of notice to explain that it had been fulfilled but failing to clarify the requirement any further.[123]

Whether the plaintiff must complain, and, if so, to whom and in what manner, obviously awaits future resolution. Consistent with the recent trend in sexual harassment cases to utilize principles postulated in racial discrimination decisions, and, in view of the congressional desire to eliminate disparate treatment of the sexes,[124] courts should adopt strict employer liability in all instances. The lack of a cogent rationale for applying a differential notice standard for sex discrimination is peculiarly glaring. In addition to the notion that strict liability is fair because employers benefit from the activities of supervisory personnel under their direction,[125] effective enforcement of the statute necessitates an adoption of this approach. Furthermore, imposition of strict liability allows the costs of discrimination to be distributed.[126]

The *Bundy* opinion is another attempt to render Title VII sexual proscriptions viable despite persistent and subtle discriminatory schemes, of which sexual harassment is one example. It signals a commitment to a more flexible interpretation of conditions resulting in deleterious stereotyping. Additional delineation on a fact by fact basis will be unavoidable. As women become further engaged in non-traditional occupations in which there are still disproportionate numbers of men, they are apt to confront pervasive male sexual aggression and offensive environments on the job.[127] In this particular arena, the willingness to continue to enforce Title VII prohibitions against sex discrimination will, no doubt, be tested.

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[122] Tomkins v. Public Serv. Elec. & Gas Co., 568 F.2d 1044, 1048 (3d Cir. 1977).
[123] 24 Empl. Prac. Dec. ¶ 31,439, at 18,532.
[124] S. REP. No. 92-415, 92d Cong., 1st sess. 7-8 (1971).
[125] W. PROSSER, HANDBOOK OF THE LAW OF TORTS 459 (4th ed. 1971).
[126] Taub, *supra* note 115, at 386-87.
[127] FARLEY, *supra* note 107, at 73-77.