PRIVATIZING WORKPLACE JUSTICE: THE ADVENT OF MEDIATION IN RESOLVING SEXUAL HARASSMENT DISPUTES

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The recent growth of mediation as a means of resolving legal disputes has been matched by heightened public interest in workplace sexual harassment controversies. The author examines the possibilities and problems of mediating sexual harassment cases. After reviewing current workplace harassment law and tracing the emergence of mediation as a preferred method of resolving employment disputes, the author outlines the pros and cons of mediating sexual harassment cases. Concluding that mediation's advantages outweigh its disadvantages in this arena, the author then sounds a note of caution about the prospects for mediation as the landscape of sexual harassment law and practice continues to change.

When the moon is in the seventh house
And Jupiter aligns with Mars,
Then peace will guide the planets
And love will steer the stars.

This is the dawning of the age of Aquarius.[1]

INTRODUCTION

A remarkable confluence of developments in the law may foreshadow a profound change in the way employees resolve their sexual harassment claims. Mediation has emerged as a dispute resolution technique just as public awareness of sexual harassment[2] has

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1. GEROME RAGNI & JAMES RADO, *Aquarius, on* HAIR (RCA 1968).

2. The Equal Employment Opportunity Commission ("EEOC") reports that the number of sexual harassment charges has more than doubled within the last six reporting years, reaching a peak of 15,889 in fiscal year 1997. *See Sexual Harassment Charges, EEOC & FEPA Combined: FY 1991-FY 1997* (vis-

reached a zenith with the impeachment of President Clinton[3] and the Supreme Court's[4] recent attention to workplace harassment. Whether this alignment of phenomena marks the dawning of an age of sexual harassment mediation remains to be seen. Derek Bok, former president of Harvard University, foresaw a propitious moment like this when he remarked more than a decade ago in the Thirty-Seventh Annual Benjamin N. Cardozo Lecture at the Association of the Bar of the City of New York:

> Over the next generation, I predict that society's greatest opportunities will lie in tapping human inclinations toward collaboration and compromise rather than stirring our proclivities for competition and rivalry. If lawyers are not leaders in marshaling cooperation and designing mechanisms which allow it to flourish, they will not be at the center of the most creative social experiments of our time.[5]

This Essay posits the notion that, despite some legitimate concerns about privatizing justice in the workplace, lawyers are now in an opportune position to take the lead in utilizing mediation to handle sexual harassment disputes. Based on the evidence available so far, mediation appears to offer a uniquely suitable method for pursuing the overriding purposes of federal sexual harassment law—namely, eradicating sex discrimination, compensating the victims of such discrimination, and permitting all individuals to have an equal opportunity for success in the workplace.

First, this Essay reviews current federal sexual harassment law with particular emphasis on unresolved issues under the primary regulatory statute, Title VII of the Civil Rights Act of 1964 ("Title VII").[6] Second, the advent of ADR[7] and the recent emergence of mediation as a preferred means of dealing with employment disputes is summarized. Third, this Essay outlines the advantages and disadvantages of mediation as a means of resolving employment disputes generally and sexual harassment claims in particular. The focus in this part of the Essay is on both the alleged victim

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ited Jan. 13, 1999) <http://www.eeoc.gov/stats/harass.html> [hereinafter *EEOC & FEPA Combined: FY 1991-FY 1997*].

3. *See* H. R. Res. 611, 105th Cong. (1998).

4. *See infra* Part I; *see also* Gebser v. Lago Vista Indep. Sch. Dist., 118 S. Ct. 1989 (1998); City of Belleville v. Doe, 118 S. Ct. 1183 (1998).

5. Derek Bok, *Law and Its Discontents: A Critical Look at Our Legal System*, 38 THE RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 12, 30 (1983).

6. 42 U.S.C. §§ 2000e to 2000e-17 (1994 & Supp. II 1996).

7. Alternative or appropriate dispute resolution, commonly referred to as "ADR," comprises both adjudicatory means (such as arbitration, mini-trials, and summary jury trials) and non-adjudicatory methods (such as mediation, facilitation, and negotiations).

and her[8] employer. Finally, this Essay discusses a number of problems that have the capacity to forestall the sustained use of mediation to resolve workplace sexual harassment disputes.

I. SEXUAL HARASSMENT AND TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

Title VII says nothing explicitly about "harassment," sexual or otherwise. Instead, it forbids an employer to "discriminate" against an individual with respect to "terms, conditions, or privileges" of employment "because of such individual's . . . sex."[9] The statute does not, however, define such operative terms as "discriminate" or "conditions or privileges of . . . employment." Because there is no provision in Title VII explicitly forbidding "sexual harassment," the tough question is whether such harassment is actionable at all and, if so, on what basis.

A. "Power can be sexualized."[10]

That simple proposition helps to define sexual harassment as "discrimination" under Title VII. Here is why that is so. Workplaces in our nation typically are organized by rank, grade, or status and, for the most part, operate in a hierarchical fashion. The consequent absence of complete equality of authority among employees, therefore, means that individuals in a superior rank or position have some measure of power or authority over employees in a subordinate or inferior position. Those individuals with power can, therefore, coerce sexual compliance regardless of desire or consent.[11] This recognition that "power can be sexualized" has permitted the courts to hold that sexual harassment in a hierarchical setting is actionable as sex discrimination. Only five times, however, since the enactment of Title VII (all within the last thirteen years) has the Supreme Court dealt directly with this topic. A brief review of these cases, with special emphasis on the two recent ones involving em-

8. This Essay is premised on the demonstrable reality that the overwhelming incidence of sexual harassment in the workplace involves women as victims and men as perpetrators. The EEOC's Charge Data System reveals that during the past seven fiscal years more than 91% of all sexual harassment charges involve female victims of male harassment. *See EEOC & FEPA Combined: FY 1991-FY 1997*, *supra* note 2.

9. 42 U.S.C. § 2000e-2(a) (1994).

10. Catharine A. MacKinnon, *Sexual Harassment Law*, 7 PERSPECTIVES 8, 8-9 (1998). There is, of course, a wealth of scholarship supporting and criticizing Professor MacKinnon's perspective, all of which is beyond the scope of this Essay.

11. *See id*. at 9.

ployer liability, will reveal the contours of sexual harassment law as well as some of the unanswered questions in this area.[12]

B. Meritor Savings Bank, FSB v. Vinson[13]

In *Meritor*, the Supreme Court recognized for the first time that sexual harassment which is "sufficiently severe or pervasive to alter the conditions of a victim's employment and create an abusive working environment" discriminates against the victim because of her sex in violation of Title VII.[14] Mechelle Vinson became employed by Meritor Savings Bank in 1974 after meeting Sidney Taylor, a bank vice president.[15] Vinson advanced from teller-trainee to branch manager based on "merit alone."[16] In September of 1978, Vinson took sick leave for an indefinite period, and on November 1, 1978, she was fired "for excessive use of that leave."[17] She then sued the bank and Taylor claiming that she had "constantly been subjected to sexual harassment" by Taylor during her four years at the bank.[18]

The case was tried for eleven days during which Vinson testified that Sidney Taylor initially treated her in a fatherly way, but soon thereafter invited her to dinner and suggested that they have sexual relations.[19] Vinson initially refused, but because she feared losing her job, she eventually agreed to have sexual relations with Taylor some forty or fifty times over the next several years.[20] Vinson also testified that Taylor fondled her in the presence of other employees, followed her into the women's restroom, exposed himself to her, and raped her on several occasions.[21] These activities ceased when Vinson started dating a steady boyfriend more than a year before her departure.[22] The bank had a complaint procedure, but Vinson did not use it because she was afraid of Taylor.[23] Taylor denied having engaged in sexual activity with Vinson, denied making any suggestive remarks to her, and contended that Vinson had accused him of this conduct because of a business-related dispute.[24]

12. Some of the material in this section is adapted from Jonathan R. Harkavy, Supreme Court Update 1997-98 Term (Oct. 30, 1998) (unpublished manuscript, on file with author).

13. 477 U.S. 57 (1986).

14. *Id*. at 67.

15. *See id*. at 59.

16. *Id*. at 59-60.

17. *Id*. at 60.

18. *Id*.

19. *See id*.

20. *See id*.

21. *See id*.

22. *See id*.

23. *See id*. at 61.

24. *See id*.

In deciding the case, the Supreme Court ruled first that unwelcome sexual advances that create an offensive or hostile working environment violate Title VII regardless of whether the victim suffers any tangible economic loss.[25] In doing so the Court relied on Title VII's language, which does not limit discrimination to "economic" or "tangible" losses.[26] The Court also found the EEOC's 1980 Guidelines[27] supportive of the view that harassment leading to non-economic injury can violate Title VII.[28]

As to whether harassment is discrimination, the Court found irrelevant the trial court's conclusion that even if Vinson and Taylor engaged in a sexual relationship, it was a "voluntary" one.[29] The Court noted that "[t]he correct inquiry is whether . . . [the conduct was] unwelcome, not whether . . . participation in [the conduct] was voluntary."[30] In this regard the Court effectively embraced the notion of sexualized power by recognizing explicitly that in a hierarchical workplace, even voluntary or consensual sexual activity can be actionable as discrimination where it is unwelcome.[31] The Court remarked that "whether particular conduct . . . [is] unwelcome presents difficult problems of proof and turns largely on credibility determinations."[32] In this regard, the Court said that "a complainant's sexually provocative speech or dress is . . . obviously relevant . . . in determining whether [the employee] found particular sexual advances unwelcome."[33] The existence of sexual harassment, therefore, is to be determined in light of the totality of circumstances including, in this case, testimony about Vinson's provocative manner of dress and her publicly expressed sexual fantasies.[34]

As to the question of the bank's liability, the Court declined the parties' invitation to issue a definitive rule on employer liability because of the absence of proper findings about whether Taylor's conduct was actionable and whether the bank should have known about it.[35] The Court did, however, agree with the EEOC that Congress wanted courts to look to agency principles for guidance in this area.[36] The majority opinion referred specifically to Congress' inclusion of "agents" in the definition of "employer" as a limit on em-

25. *See id*. at 64-66.
26. *Id*. at 64.
27. EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11 (1998).
28. *See Meritor*, 477 U.S. at 65.
29. *See id*. at 68.
30. *Id*.
31. *See id*.
32. *Id*.
33. *Id*. at 69.
34. *See id*.
35. *See id*. at 72.
36. *See id*.

ployer liability.[37] Ultimately, the Court said that "employers are not always automatically liable for sexual harassment by their supervisors," but that employers are not necessarily insulated from such liability just because they do not have notice of the supervisors' harassment.[38]

Finally, in a passage that foreshadowed current employer liability law, the Court rejected the bank's argument that its policy against discrimination and grievance procedure, coupled with Vinson's failure to invoke that procedure, insulated the bank from liability.[39] Finding that the policy did not address sexual harassment in particular and required Vinson to complain first to her supervisor (Taylor in this case), the Court noted that the bank's argument might be substantially stronger "if its procedures were better calculated to encourage victims of harassment to come forward."[40]

C. Harris v. Forklift Systems, Inc.[41]

In *Harris*, the Court reaffirmed the theory of discrimination adopted in *Meritor* and ruled that an employer's conduct need not cause concrete psychological harm to the victim to be actionable under Title VII.[42]

Teresa Harris managed an equipment rental company where Charles Hardy was the president.[43] Hardy often insulted Harris by making her the target of unwanted sexual innuendos.[44] Hardy also asked Harris and other female employees to get coins from his front pants pocket and threw objects on the ground in front of Harris and other women and asked them to pick up the objects.[45] After Harris complained to Hardy about his conduct, Hardy claimed that he was only joking, said he was surprised that Harris was offended, and apologized to her.[46] He also promised he would stop the offensive conduct.[47] However, shortly thereafter Hardy embarrassed Harris again with a sexual comment in front of other employees.[48] Harris then quit and sued Forklift, claiming that Hardy's conduct created an abusive work environment.[49]

37. *See id.* For the definitional section of Title VII, see 42 U.S.C. § 2000e(b) (1994).
38. *Id.* at 72.
39. *See id.* at 72-73.
40. *Id.* at 73.
41. 510 U.S. 17 (1993).
42. *Id.* at 22.
43. *See id.* at 19.
44. *See id.*
45. *See id.*
46. *See id.*
47. *See id.*
48. *See id.*
49. *See id.*

Justice O'Connor's opinion for a unanimous Court reaffirmed its *Meritor* rationale that the definition of an unlawful employment practice under Title VII is not limited to economic or tangible discrimination, but rather "'strike[s] at the entire spectrum of disparate treatment' . . . includ[ing] requiring people to work in a discriminatorily hostile or abusive environment."[50] Justice O'Connor's opinion purports to steer a middle path between making actionable any conduct that is merely offensive and requiring such conduct to cause a tangible psychological injury.[51] The Court emphasized that "[c]onduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment . . . is beyond Title VII's purview."[52] On the other hand, concrete psychological harm is not a necessary element of a Title VII claim; rather, Title VII "comes into play before the harassing conduct leads to a nervous breakdown."[53] The Court thus held that the trial court's reliance on whether the employer's conduct "seriously affect[ed] [Harris'] psychological well-being" or led her to "suffe[r] injury" was erroneous.[54] Therefore, the Court remanded Harris' case for further proceedings to determine whether, under all the circumstances, her work environment had been discriminatorily altered.[55]

Although the Court did not set forth a definitive test for what is a hostile or abusive work environment, the opinion stressed that trial courts need to consider all the circumstances, including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."[56] The employee's psychological well-being is relevant, but is not a necessary factor in the determination.[57] Justice Scalia's concurring opinion suggested that unreasonable interference with an employee's work performance would provide greater guidance to juries and employers alike, but concluded, nonetheless, that the test is not whether the work has been impaired, but "whether working conditions have been discriminatorily altered"—a test required by the language of an inherently vague statute.[58] Justice Ginsburg concurred and stressed the equal protection aspect of a hostile or abusive work environment claim and pointed out that

50. *Id*. at 21 (quoting Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986)).
51. *See id*.
52. *Id*.
53. *Id*. at 22.
54. *Id*. (quoting Harris v. Forklift Sys., Inc., No. 3-89-0557, 1991 WL 487444, at *7 (M.D. Tenn. Feb. 4, 1991), *aff'd,* 976 F.2d 733 (1992), *rev'd*, 510 U.S. 17 (1993)).
55. *See id*. at 23.
56. *Id*.
57. *See id*.
58. *Id*. at 24-25 (Scalia, J., concurring).

the critical statutory issue is "whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not so exposed."[59]

D. Oncale v. Sundowner Offshore Services, Inc.*[60]*

In *Oncale*, the Court decided that same-sex harassment can violate Title VII.[61] In 1991, Joseph Oncale was working as a roustabout for Sundowner Offshore Services on a Chevron oil platform in the Gulf of Mexico.[62] On several occasions, Oncale was forcibly subjected to humiliating sex-related conduct by John Lyons, the crane operator, Danny Pippen, the driller, and Brandon Johnson, a fellow crew member.[63] Lyons threatened Oncale with rape, and, along with Pippen, physically assaulted Oncale in a sexual manner.[64] Oncale complained to supervisory personnel, but eventually quit when no remedial action was taken.[65] At his deposition, Oncale stated that he felt that if he did not leave his job, he would have been raped or forced to have sex.[66]

Justice Scalia's opinion for a unanimous Court held that same-sex sexual harassment is actionable under Title VII because nothing in the statute bars a claim for sex discrimination "merely because the plaintiff and defendant or the person charged with acting on behalf of the defendant are of the same sex."[67] Justice Scalia noted that courts have had little trouble with this principle in ordinary discrimination claims, but that in hostile environment cases the courts have taken a "bewildering variety of stances."[68] Seeing no justification in the statutory language for a categorical rule excluding same-sex harassment, the Court reversed the Fifth Circuit and remanded the case for further proceedings.[69]

Justice Scalia's opinion cautioned that Title VII is not a "general civility code for the American workplace" and stressed that harassment is not "automatically discrimination merely because the words used have sexual content or connotations."[70] The critical issue continues to be whether behavior is so objectively (and subjectively) offensive as to alter the conditions of a victim's employ-

59. *Id*. at 25 (Ginsburg, J., concurring).
60. 118 S. Ct. 998 (1998).
61. *Id*. at 1003.
62. *See id*. at 1000.
63. *See id*. at 1001.
64. *See id*.
65. *See id.*
66. *See id*.
67. *Id*. at 1001-02.
68. *Id*. at 1002.
69. *See id*. at 1002-03. In a timely twist of fate, Oncale mediated his claim on remand and settled it. *See* 34 [Summary of Latest Developments] Fair Empl. Prac. (BNA) 13 (Nov. 12, 1998).
70. *Oncale*, 118 S. Ct. at 1002.

ment.[71] This requirement is crucial in order to ensure that courts do not mistake ordinary socializing (including horseplay and flirtation) for discriminatory conditions of employment.[72] According to Justice Scalia, "[c]ommon sense and an appropriate sensitivity to social context[ ] will enable courts . . . to distinguish between simple teasing or roughhousing . . . and conduct which a reasonable [victim] . . . would find severely hostile or abusive."[73]

Finally, the Court concluded that "harassing conduct need not be motivated by sexual desire to support an inference of discrimination."[74] But the Court did stress that the discrimination must be "because of sex."[75] A same-sex harassment plaintiff may, therefore, offer comparative evidence about how an alleged harasser treated members of both sexes in a mixed-gender workplace.[76] Furthermore, a plaintiff also may rely on evidence that a perpetrator is motivated by general hostility to the presence of one sex or the other in the workplace.[77]

While rejecting Title VII as a "general civility code," Justice Scalia subtly, but explicitly, codified principles of conduct applicable to a wide variety of circumstances.[78] This code offers to judges, juries, arbitrators, and mediators, as well as to employers and employees, support for a distinction between conduct that is actionable as discrimination and conduct that may be boorish or offensive, but not prohibited under Title VII. Of course, the Court did not explain exactly how to make that distinction, leaving that task to fact-finders in adjudication and the parties in mediation. Likewise, the Court left in limbo the question of how a harassment victim in a single-sex workplace can ever prove discrimination "because of sex."[79]

E. Burlington Industries, Inc. v. Ellerth[80]

Kimberly Ellerth worked in sales at one of Burlington's divisions in Chicago.[81] Ted Slowik was a vice president in one of the five business units within Ellerth's division.[82] Subject to his supervisor's approval, Slowik was vested with authority to make hiring

71. *See id*. at 1003.
72. *See id*.
73. *Id*.
74. *Id*. at 1002.
75. *Id*.
76. *See id*. That method of proof apparently would not have availed Joseph Oncale, who worked on a single gender crew.
77. *See id*.
78. *See id*. at 1003.
79. *Id*. at 1002.
80. 118 S. Ct. 2257 (1998).
81. *See id*. at 2262.
82. *See id*.

and promotion decisions.[83] Slowik, who worked in New York, was not Ellerth's immediate supervisor.[84] During her employment at Burlington, however, Ellerth was subjected to constant sexual harassment by Slowik, including comments about her body, an unwelcome touch on her knee, and comments during a promotion interview about Ellerth's uptight attitude.[85] After Ellerth was promoted, comments by Slowik about her manner of dress caused Ellerth to end a telephone conversation with him.[86] A short time following this conversation, Ellerth was cautioned by her immediate supervisor about returning customer calls promptly, and she quit her job without citing any harassment problem.[87] Three weeks after she resigned, Ellerth sent a letter to Burlington indicating that she had quit because of Slowik's behavior.[88]

Burlington had a policy prohibiting sexual harassment and a procedure for employees to make complaints about improper conduct.[89] Prior to leaving her employment, Ellerth had not informed her immediate supervisor (who reported to Slowik) or anyone else in authority about Slowik's conduct, although she told Slowik himself on one occasion that a comment he made was inappropriate.[90]

Justice Kennedy's opinion for six members of the seven-to-two majority first assumed that Ellerth could prove discrimination under Title VII based on acceptance of the district court's finding that Slowik's conduct was severe or pervasive.[91] Because this case involved numerous alleged threats, however, the Court expressed no opinion as to whether a single unfulfilled threat would be sufficient to constitute discrimination.[92] On the issue of employer liability, the Court found the distinction between quid pro quo cases and hostile work environment cases irrelevant, although the Court suggested that the distinction was useful, but not controlling, in assessing whether discrimination has occurred.[93] Referring to principles of agency law, the Court concluded that a supervisor's "tangible employment action" against a subordinate makes the employer vicariously liable based on the "aided in the agency relation"

83. *See id.*
84. *See id.*
85. *See id.*
86. *See id.*
87. *See id.*
88. *See id.*
89. *See id.*
90. *See id.* at 2262-63.
91. *See id.* at 2265.
92. *See id.* The EEOC takes the position that a single isolated occurrence of harassment can be actionable under Title VII. *See* EEOC Notice 915-050, Policy Guidance on Sexual Harassment (March 19, 1990); *see*, *e.g.*, *Fall v. Indiana Univ. Bd. of Trustees*, 12 F. Supp. 2d 870, 879 (N.D. Ind. 1998) (citing with approval the EEOC's position that a "single unwelcome physical advance" can rise to the level of a Title VII violation).
93. *See Burlington*, 118 S. Ct. at 2264.

standard found in Section 219(2)(d) of the Restatement (Second) of Agency.[94] In cases such as this one, where there is no tangible employment action taken against the employee, an employer's vicarious liability for its supervisor's tort should be subject to an affirmative defense based on satisfaction of the employer's duty to prevent and correct misuse of supervisory authority.[95] Accordingly, the Court adopted the following framework for liability:

> An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence. The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. While proof that an employer had promulgated an anti-harassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing any unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense. No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment.[96]

Viewing sexual harassment as an abuse of hierarchical power, the decision in this case appears well suited to Title VII's ends. Moreover, it is both consistent with the supposition of sexualized power and firmly anchored to the economic realities of the American workplace. The Court has imposed a high degree of care on *corporate* employers—which are, after all, groups of individuals functioning behind the veil of a government-sanctioned fictional entity. The decision speaks to corporations in terms their owners and managers understand—business incentives. Employers now have an explicit economic inducement to prevent and correct abuses of

94. *Id.* at 2267-69 (citing RESTATEMENT (SECOND) OF AGENCY § 219(2) (1958)).

95. *See id.*

96. *Id.*

power by their employees with supervisory power through the creation of effective complaint and disciplinary procedures. As a matter of social policy, this allocation of responsibility does not seem unjust. Viewed more narrowly as an exercise in statutory construction, the Court's decision has substantial justification, although it is somewhat discomforting to see an entire body of law being established by judges. Nonetheless, Title VII itself defines "employer" to include "agents,"[97] thereby implying a limit on strict employer liability and arguably empowering the courts to create a body of "Title VII common law" based on agency principles. Notably, that is what Chief Justice Rehnquist's opinion in *Meritor* contemplated more than a decade ago,[98] and Congress has since failed to alter this interpretation or provide any further guidance, even though the statute was extensively amended in 1991.[99] In any event, the Court's conclusion that a uniform and predictable standard of employer liability must be established as a matter of federal law makes good sense and is justified by language in the statute itself. Whether the Court's incentive-based approach works to prevent discrimination in the way Congress intended, however, remains to be seen.

F. Faragher v. City of Boca Raton[100]

Beth Ann Faragher, who is now a lawyer, worked part-time and during the summers as an ocean lifeguard between 1985 and 1990 for the City of Boca Raton's Parks and Recreation Department.[101] Her immediate supervisors were Bill Terry, chief of the marine safety division, David Silverman, the marine safety officer, and Robert Gordon, a training captain.[102] All these individuals were stationed at the City beach and had no significant contact with higher City officials.[103] The City had a sexual harassment policy with a complaint procedure, but failed to circulate the policy among the lifeguards.[104] During Faragher's employment, she was subjected to uninvited and offensive touching, lewd remarks, and a threat to "[d]ate me or clean the toilets for a year."[105] Faragher

97. 42 U.S.C. § 2000e(b) (1994).

98. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 72 (1986) (discussing congressional desire that principles of agency law be made applicable to litigation arising under Title VII). For more discussion of *Meritor*, see *supra* Part I.B.

99. *See* 42 U.S.C. § 2000e(b).

100. 118 S. Ct. 2275 (1998).

101. *See id.* at 2280; *see also* Terry Carter, *Both Sides Now*, 85 A.B.A. J. 56, 57 (1999) (providing an update on Beth Ann Faragher).

102. *See Faragher*, 118 S. Ct. at 2280.

103. *See id.*

104. *See id.* at 2280-81.

105. *Id.* at 2280.

commented about this behavior to Robert Gordon, but she did not report the incidents to anyone.[106]

Before Faragher's resignation in 1990, however, another female lifeguard wrote to the City's Personnel Director claiming that Terry and Silverman had harassed her and other female lifeguards.[107] The City investigated and found that the two marine safety officers had behaved improperly, reprimanded them, and required them to choose either a suspension without pay or forfeiture of their annual leave.[108]

In 1992, two years after Faragher resigned, she filed suit against Terry, Silverman, and the City.[109] The district court concluded that Terry's and Silverman's conduct was "sufficiently serious to alter the conditions of Faragher's employment" and that the City was liable for those harassing acts.[110] The trial court awarded Faragher one dollar in nominal damages on her Title VII claim.[111]

The Supreme Court, in a majority opinion by Justice Souter, agreed that the City was liable for the supervisors' harassment and remanded the case for entry of a judgment in Faragher's favor.[112] The Court noted a divergence of approaches to employer liability between strict liability cases, which regard a supervisor's harassment as a foreseeable consequence of the employer's business, and negligence cases, which regard such harassment as outside the scope of employment and thus serving no purpose of the employer.[113] The Court ultimately rejected imposing vicarious liability on an employer just because it could reasonably anticipate the possibility of harassment occurring in its workplace.[114] Instead, the Court again turned to the "aided in the agency relation" principle as a starting point for determining such liability.[115] Since it is difficult to draw a clear line between a supervisor's explicit and implicit use of power in harassment situations, the way to avoid vicarious liability and give employers an incentive to prevent and eliminate harassment is to require employees to take advantage of a preventive or corrective apparatus.[116] For this reason, the Court adopted the liability framework quoted above in the *Burlington* case.[117] Applying that standard to Beth Faragher, the majority found that the degree of hostility at the beach rose to an actionable level and that the City

106. *See id.* at 2281.
107. *See id.*
108. *See id.* at 2281.
109. *See id.* at 2280.
110. *Id.* at 1281.
111. *See id.*
112. *See id.* at 1282.
113. *See id.* at 2286-90.
114. *See id.* at 2287-88.
115. *Id.* at 2290.
116. *See id.* at 2291-92.
117. *See id.* at 2292-93.

could not raise an affirmative defense because it had failed to circulate its sexual harassment policy among beach employees.[118] Accordingly, the Court affirmed the nominal award to Faragher.[119] As in *Burlington*, Justice Thomas dissented in an opinion that Justice Scalia joined.[120]

Justice Souter's opinion took pains to restate the standards for determining when harassment is sufficiently abusive to be actionable. The opinion, much like Justice Scalia's opinion in *Oncale*,[121] put special emphasis on the notion that offhand comments, isolated incidents, simple teasing, the use of abusive language, and even gender-related jokes are not ordinarily actionable unless they amount to a discriminatory change in the terms and conditions of a person's employment.[122] On the definition of harassment as discrimination, therefore, the Court has consistently stressed disparate conditions of employment as the prime indicator of what is illegal. Moreover, the Court has not backed away from the central notion that power in a hierarchical work force can be sexualized.

As to employer liability, Justice Souter stressed that the principles set forth in *Meritor* are still good law,[123] though apparently not clear enough to decide Beth Faragher's case. Ultimately, Justice Souter's opinion reflects a pragmatic business judgment that it is fair to allocate liability for supervisors' acts to employers so long as the latter are provided with an incentive to avoid liability by encouraging and correcting complaints about improper behavior. By constructing an affirmative defense that requires employees to complain and requires employers to have a mechanism for dealing effectively with those complaints, the Court hands employers the keys to avoiding liability and gives employees a means to combat their supervisors' misuse of hierarchical power. By this decision and *Burlington*,[124] the Court has placed the primary burden of combating harassment and enforcing Title VII on the shoulders of employers and workers. In the long run, therefore, if this self-enforcement strategy works, justice in our nation's workplaces may be privatized to a considerable extent with the aid of mediators and other ADR providers.

118. *See id*. at 2293.
119. *See id*. at 2294.
120. *See id*. (Thomas, J., dissenting); *see also* Burlington Indus., Inc. v. Ellerth, 118 S. Ct. 2257, 2271-75 (1998) (Thomas, J., dissenting).
121. Oncale v. Sundowner Offshore Servs., Inc., 118 S. Ct. 998 (1998).
122. *See Faragher*, 118 S. Ct. at 2284 (citing B. LINDERMANN & D. KADUE, SEXUAL HARASSMENT IN EMPLOYMENT LAW 175 (1992)).
123. *See id*. at 2291 & n.4.
124. Burlington Indus., Inc. v. Ellerth, 1118 S. Ct. 2257 (1998).

G. The Unanswered Questions

Despite its recent attempts at clarification, the Supreme Court has left open a number of important questions ranging from what is actionable as sexual harassment to what responsibility employers bear for certain types of harassment. Among the most important unresolved issues are the following: First, how can the courts distinguish between conduct that is offensive and conduct that is actionable as hostile and abusive?[125] Second, what constitutes "tangible employment action"?[126] Third, is there a way to measure objectively when an employee's terms, conditions, and privileges of employment are altered to her detriment in the absence of a tangible employment action?[127] Fourth, what liability should an employer bear for harassment perpetrated by a co-employee or other individual with no supervisory power over the victim?[128] Fifth, what liability should an employer bear for harassment perpetrated in a non-hierarchical workplace?[129] Sixth, what kind of complaint procedures will satisfy the first prong of an employer's affirmative defense to a hostile environment claim?[130] Seventh, under what circumstances may a victim be excused from invoking an employer's complaint procedure under the second prong of that affirmative defense?[131]

These questions and others engendered by the Supreme Court's sporadic forays into this field make litigation an uncertain enterprise for employees and employers alike. To be sure, the Court has anchored its sexual harassment jurisprudence to a theory of dis-

125. Presently, many courts leave the determination to the jury. *See, e.g.*, Bales v. Wal-Mart Stores, Inc., 143 F.3d 1103, 1109 (8th Cir. 1998) ("There is no bright line between sexual harassment and merely unpleasant conduct, so a jury's decision must generally stand unless there is trial error.").

126. *Compare* Phillips v. Taco Bell Corp., 156 F.3d 884, 889 n.6 (8th Cir. 1998) (implying that assignment to night shift would not be tangible employment action), *with* Reinhold v. Virginia, 151 F.3d 172, 175 (4th Cir. 1998) (finding that extra work absent a change in employment status is akin to demotion or reassignment and does not rise to the level of a tangible employment action).

127. *See Bales*, 143 F.3d at 1109 (determining that a jury's decision must stand absent error at trial); *see also* Gallagher v. Delaney, 139 F.3d 338, 342-43 (2d Cir. 1998) (finding that juries should determine if sexual harassment occurred in borderline cases).

128. The Supreme Court has granted certiorari on the question of peer hostile environment sexual harassment in federally funded education programs. *See* Davis v. Monroe County Bd. of Educ., 120 F.3d 1390 (11th Cir. 1997), *cert. granted*, 119 S. Ct. 29 (U.S. Sept. 29, 1998) (No. 97-843).

129. *See* MacKinnon, *supra* note 10, at 9.

130. *See Phillips*, 156 F.3d at 889 (stating that the sufficiency of a policy and its publication to employees is "best left to the finder of fact").

131. *Compare* Montero v. AGCO Corp., 19 F. Supp. 2d 1143, 1146 (E.D. Cal. 1998) (concluding that waiting two years to complain is unreasonable), *with Phillips*, 156 F. 3d at 889 (finding that the reasonableness of a three month delay is a question of fact for the jury).

crimination which makes sense in an economy where males are essentially in control and where workplaces are hierarchical in structure. Indeed, this theory and present economic realities can, for example, comfortably explain why co-employee harassment of women subjects them to discrimination just as supervisory harassment does. Should there come a time, however, when economic, political, and social power is more equitably shared between the sexes or when workplaces become essentially non-hierarchical, the notion of harassment as discrimination may have to be reconsidered. For the time being, however, the Court's premise that sexual harassment is an unlawful employment practice seems well established.[132] So, too, is the Court's newly minted framework for determining employer liability for supervisory conduct. But these certainties in the law do not, by themselves, constitute a fully formed set of rules that can be used to determine sexual harassment disputes. Thus, finding alternatives to the vagaries of litigation is in the best interest of employers and employees alike.

II. ADR AND THE EMERGENCE OF MEDIATION AS AN APPROPRIATE MEANS OF RESOLVING EMPLOYMENT DISPUTES

For many years, the public policy of the United States has encouraged ADR for certain types of employment-related cases.[133] Yet, not until recently has ADR achieved prominence outside the area of labor relations. Because of its relative immaturity as a significant alternative to lawsuits, no single mode of ADR has assumed a preferred position, although many employers[134] and some legal scholars[135] have pressed for arbitration as the primary means of resolving employment disputes. In the last few years, however, as questions about arbitrating statutory employment disputes have

132. Despite the force and clarity of Title VII's basic principles, the United States remains the only Western nation, the only NATO member, and the only democracy that has failed to ratify the Convention on the Elimination of All Forms of Discrimination Against Women. *See Recommendation on the Ratification of the Convention on the Elimination of All Forms of Discrimination Against Women*, 53 THE RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 511 (1998).

133. *See* Ronald Turner, *Compulsory Arbitration of Employment Discharge Claims with Special Reference to the Three A's—Access, Adjudication and Acceptability*, 31 WAKE FOREST L. REV. 231, 237-39 (1996) (discussing the use of compulsory arbitration as a means to resolve employment discrimination cases).

134. *See*, *e.g.,* Johnson v. Circuit City Stores, Inc., 148 F.3d 373 (4th Cir. 1998) (holding that summary judgment in favor of the employer was proper where job applicant failed to abide by arbitration agreement).

135. *See* Turner, *supra* note 133 (proposing a framework to be used in arbitrating employment discrimination claims).

remained unresolved,[136] mediation has emerged as an appropriate means for resolving workplace sexual harassment claims.

In 1935, following a period of labor unrest and government by injunction, Congress declared in the Wagner Act[137] that private resolution is the preferred mode of dealing with disputes between employers and the bargaining representatives of their workers.[138] Although the practical importance of this declaration has ebbed with the demise of collective bargaining in the private sector since the 1950s, today's interest in arbitration as an ADR device in employment disputes probably owes its renaissance in part to the success arbitration has enjoyed with unionized employers. In any event, ADR is nothing new, although its acceptance has been limited and cautious. Moreover, its newer non-determinative forms have only recently been tested outside the area of labor relations.

The original version of Title VII enacted in 1964 expressed a preference for resolving disputes by methods of "conference, conciliation, and persuasion"[139] instead of administrative or judicial enforcement. When Title VII was amended by the Civil Rights Act of 1991, Congress specifically "encouraged [parties] to resolve [their] disputes" by utilizing alternative means of dispute resolution.[140]

Most recently, Congress enacted the Alternative Dispute Resolution Act of 1998,[141] which adopts a multi-door approach to dispute resolution in the federal courts. After research indicated that experiments with court-annexed arbitration appeared to be of uncertain value,[142] Congress decided that litigants should be provided

136. *See, e.g.,* Wright v. Universal Maritime Corp., 119 S. Ct. 391 (1998) (concluding that an arbitration clause in a collective bargaining agreement did not foreclose plaintiff's suit for violation of the Americans with Disabilities Act); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) (concluding that a brokerage employee's claim under the Age Discrimination Employment Act of 1967 could be subject to compulsory arbitration as provided in a stock exchange registration form); Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) (determining that a statutory cause of action under Title VII is not waived by an arbitration provision in a collective bargaining agreement); Duffield v. Robertson Stephens & Co., 144 F.3d 1182 (9th Cir.), (holding that the Civil Rights Act of 1991 precludes enforcement of an arbitration agreement that provides for compulsory arbitration of Title VII or other civil rights claims), *cert. denied,* 119 S. Ct. 445 (1998).

137. National Labor Relations Act, 29 U.S.C. §§ 151-169 (1994).

138. *See id.* § 173(d).

139. Civil Rights Act of 1964 § 706(a), Pub. L. No. 88-352, 78 Stat. 241, 259 (1964).

140. Civil Rights Act of 1991, Pub. L. No. 102-166, § 118, 105 Stat. 1071, 1081 (1991). Similarly, Congress encourages the use of ADR to resolve disputes under the Americans with Disabilities Act. 42 U.S.C. § 12212 (1994).

141. Pub. L. No. 105-315, 112 Stat. 2993 (1998) (to be codified at 28 U.S.C. §§ 651-658).

142. *See* ELIZABETH PLAPINGER & DONNA STEINSTRA, ADR AND SETTLEMENT IN THE FEDERAL DISTRICT COURTS: A SOURCEBOOK FOR JUDGES & LAWYERS 4-5, 61-62 (1996).

with a wider opportunity to resolve their disputes through ADR. Each federal district court, therefore, is directed by this legislation to provide a choice of ADR programs (including mediation) for resolving civil cases.[143] An employee devoted to administering each district's program shall be hired or assigned by the court clerk.[144] The effectiveness of existing programs is to be studied, and neutrals who work within the programs are to be trained.[145] Finally, each district's local rules are to be amended to the extent necessary so that litigants are required to consider ADR.[146] This legislation institutionalizes ADR in the federal courts to a greater extent than ever before and portends expanded use of mediation and perhaps other ADR techniques for federal claims, including employment discrimination disputes.

The advent of ADR within federal agencies and departments during the last decade has been notable on a number of fronts. Congress enacted the Administrative Dispute Resolution Act[147] in 1990 to encourage the use of ADR to resolve disputes involving federal agencies. During his second term, President Clinton has promoted the appropriate use of ADR techniques in the federal sector.[148] Likewise, Attorney General Janet Reno has promoted the broader use of ADR to resolve internal agency disputes.[149] Finally, the President issued an Executive Order requiring consideration of dispute resolution methods in handling employment disputes involving federal agencies.[150]

Although comprehensive statistical results are not readily available (if they are being kept at all), a recent report of the General Accounting Office summarized in the secondary ADR literature apparently indicates that mediation as an ADR technique sampled in five federal agencies (as well as fifteen private companies) enjoyed a fifty-nine percent settlement rate.[151] Indeed, in one of the large federal facilities surveyed in California, the settlement rate exceeded ninety percent.[152] Mediation is thus proceeding apace within the federal workplace.

143. *See* Alternative Dispute Resolution Act of 1998 § 4 (to be codified at 28 U.S.C. § 652(a)).

144. *See id.* § 3 (to be codified at 28 U.S.C. § 651(d)).

145. *See id.* § 5 (to be codified at 28 U.S.C. § 653(b)).

146. *See id.* § 4 (to be codified at 28 U.S.C. § 652(a)).

147. 5 U.S.C. §§ 571-583 (1994 & Supp. 1998).

148. *See* Robert G. Fryling and Edward J. Hoffman, *Step by Step, How the U.S. Government Adopted the ADR Idea*, DISP. RESOL. J., May 1998, at 80, 80-84.

149. *See Reno to Lawyers: Consider ADR*, DISP. RESOL. J., Aug. 1998, at 48, 48.

150. *See* Exec. Order No. 12,988, 61 Fed. Reg. 4729 (1996).

151. *See GAO Report Surveys ADR Use in Federal Agencies and Private Companies: Mediation is ADR Method of Choice*, DISP. RESOL. J., Fall 1997, at 6, 6.

152. *See id.*

While ADR has received some considerable attention at the federal level, it has not been ignored at the state level. Approximately thirty-five states have adopted or are considering adopting some form of dispute resolution procedure to complement their judicial systems.[153] In fact, mediation has apparently worked well enough in states that have tried it for the National Conference of Commissioners on Uniform State Laws to authorize the establishment of a drafting committee whose work may ultimately lead to a uniform mediation act.[154] Further, work on a three year project leading to a model mediation statute has begun under the auspices of the American Bar Association's Section of Dispute Resolution.[155]

The growth and popularity of mediation has led to its institutionalization in state courts and administrative agencies. In North Carolina, for example, a pilot program in ten counties has led to statewide adoption of mediation as a preferred means of alternative dispute resolution in most urban trial courts.[156] There are now hundreds of certified mediators in North Carolina, a Dispute Resolution Commission which oversees certification for mediators at the trial court level, and numerous voluntary and semi-mandatory mediation requirements in various trial courts for civil cases, including employment disputes. ADR also plays a significant role in administrative employment-related disputes. Again, to take North Carolina as an example, the secondary literature reports that about seventy to eighty percent of all workers compensation disputes are now being mediated,[157] and there is a large cadre of trained mediators in this area of employment law. The results from this effort appear stunning. In fiscal year 1995, the Industrial Commission (the agency with jurisdiction over workers compensation claims) held 7453 hearings.[158] By fiscal year 1998, the number of hearings had been reduced to 4333, a drop of more than forty percent in just three years.[159] Anecdotal evidence suggests that this drop in the number of hearings is attributable mostly to the advent of mediation.[160]

ADR has attracted the attention of institutions dealing with problems that are not employment-related, but that are similar in their human and emotional dimension to sexual harassment cases.

153. *See* Stuart H. Bompey et al., *The Attack on Arbitration and Mediation of Employment Disputes*, 13 LAB. LAW. 21, 24 (1997).

154. *See* James B. Boskey, *An Exciting Summer for ADR*, DISP. RESOL. MAG., Summer 1998, at 20.

155. *See id.*

156. *See* N.C. GEN. STAT. § 7A-38.1 (1997).

157. *See* J. Howard Bunn, Jr., *Workers Compensation and the North Carolina Industrial Commission*, N.C. STATE BAR J., Winter 1998, at 22, 24.

158. *See id.* at 23.

159. *See id.*

160. *See* Interviews with Henry N. Patterson, Jr., former chair of the Workers Rights Section of the North Carolina Academy of Trial Lawyers, in Raleigh, N.C. (Jan. 1999).

In the area of managed health care, for instance, the advent of esoteric and emotional patient treatment and coverage disputes has focused attention on how to resolve these disputes outside the normal judicial processes.[161] The American Bar Association, the American Medical Association, and the American Arbitration Association have recently collaborated in a unified national effort to address this situation. Their Joint National Commission on Healthcare Alternative Dispute Resolution is presently considering various ADR alternatives, including mediation, as a way to resolve these patient health care problems that share with sexual harassment claims some of the same emotional difficulties and some of the same reasons for avoiding judicialization and encouraging privatization.[162]

Private interest in ADR generally, and mediation in particular, has spread to law firms themselves. Some firms have mediation "departments" or "sections" which they advertise as part of their business-related expertise.[163] Other firms utilize ADR in administering employment policies for their own employees.[164] Additionally, some law firms are advising their business clients to utilize ADR in a wide variety of circumstances. For example, the president of the CPR Institute for Dispute Resolution recently explained how many lawyers are working to avoid litigation over year 2000 ("Y2K") problems:

> The CPR Year 2000 Alternative Dispute Resolution, a document already signed by numerous corporations, obligates the signatory company to offer to negotiate and, failing negotiation, to mediate Year 2000 disputes. These sophisticated business lawyers recognize that Y2K poses a business problem that can be solved cooperatively within business relationships. In contrast, litigation will destroy those valued relationships, add costs and not solve the problem at hand.[165]

Despite this federal, state, and private interest in ADR, no national consensus about its use has emerged, except, perhaps, that ADR seems worth pursuing. At the virtual nadir of unionization and collectively bargained dispute resolution procedures, the Secretary of Labor appointed a commission to consider broad policy issues facing both employers and employees toward the end of the

161. *See* Roderick B. Mathews, *ADR for Managed Health Care Disputes*, HUM. RTS., Fall 1998, at 21.

162. *See id.* at 22.

163. For examples of advertisements, see, for example, 11 N.C. Law. Wkly. 1327, 1347 (1999), which displays advertisements for law firms that offer mediation services.

164. *See, e.g.*, Williams v. Katten, Muchin & Zavis, 837 F. Supp. 1430 (N.D. Ill. 1993) (enforcing a law firm's arbitration agreement against an employee alleging employment discrimination by the firm).

165. James F. Henry, *Letter to the Editor*, N.Y. TIMES, Dec. 29, 1998, at A18.

millennium.[166] The Commission on the Future of Worker-Management Relations (the so-called Dunlop Commission) issued a report in 1995 urging, among other things, the adoption of voluntary arbitration agreements to resolve statutory workplace disputes.[167] So far, however, this recommendation has only met with limited success because of unresolved issues about its legality and practical questions about its acceptance by employees and employers alike.[168] Moreover, as noted above, the empirical data garnered from experiments with arbitration of civil disputes in the federal courts suggests that arbitration does not materially save time or expense in prosecuting civil cases, and the parties' satisfaction with this ADR device—to the extent that it can be accurately measured at all—does not appear to be so high as to outweigh its uncertainties.[169] Court-annexed arbitration, therefore, appears to be an experiment that is unlikely to ripen into a preferred means of resolving sexual harassment cases. Whether employer-sponsored arbitration will be a prominent choice depends on how the issues about its use by employers are resolved. In any event, the attention that the Dunlop Commission's report focused on the need for appropriate resolution of employment disputes has resulted, perhaps unintentionally, in the emergence of mediation instead of arbitration as a default means of resolving certain employment disputes.

Finally, the EEOC began experimenting with mediation as an ADR device for dealing with its burgeoning load of charges in 1993.[170] Its pilot project involved 920 complainants who were offered an opportunity to mediate their charges of discrimination.[171] Ninety percent of the charging parties accepted the invitation to mediate,[172] and thirty-nine percent of the employers involved in those charges also consented to mediation.[173] Of the 267 charges in which mediation was completed, fifty-two percent of those cases settled.[174] Moreover, the average time from the charge filing date to mediation was sixty-seven days, in contrast to the average time of 300 days from the charge filing date to disposition in non-mediated cases.[175] Partly as a result of the success of this pilot project and partly because of the EEOC's observations of the successes and failures in other ADR programs, the EEOC's ADR Task Force recommended mediation as a means of dealing with charges of discrimi-

166. *See* Bompey et al., *supra* note 153, at 85.
167. *See id.*
168. *See* JAMES S. KAKALIK ET AL., AN EVALUATION OF MEDIATION AND EARLY NEUTRAL EVALUATIONS UNDER THE CIVIL JUSTICE REFORM ACT 11-12 (1996).
169. *See id.* at 12.
170. *See* Bompey et al., *supra* note 153, at 70.
171. *See id.*
172. *See* Turner, *supra* note 133, at 282 n.388.
173. *See id.*
174. *See id.*
175. *See* Bompey et al., *supra* note 153, at 70.

nation at an early date in their processing.[176] Mediation of charges, including sexual harassment cases, is now a regularized part of charge processing in a number of district offices throughout the country, and the EEOC is in the process of training private mediators to handle these cases.[177] Toward the end of the 105th Congress, the budget of the EEOC was increased by thirty-seven million dollars for fiscal year 1999, partly for the purpose of implementing mediation of charges as the appropriate means of resolving cases in a timely and just manner.[178] President Clinton's message accompanying the budget bill's approval referred explicitly to the EEOC's adoption of mediation as a preferred method of resolving discrimination charges.[179]

Although the evidence is largely anecdotal and somewhat inconclusive, mediation appears to be emerging as a favored form of ADR in the federal courts, at the EEOC, and among parties to employment discrimination disputes. Plaintiffs in particular are understandably looking for relief from the high cost of discovery-driven litigation. As Judge Paul V. Niemeyer recently reported in his role as Chair of the Advisory Committee on Rules of Civil Procedure, discovery accounts for approximately fifty percent of the total cost of a typical civil case and approximately ninety percent of the total cost of the most costly five percent of all civil cases.[180] Utilizing an appropriate dispute resolution device without engaging in full discovery, therefore, can result in significant cost savings to all parties, as well as the judiciary. Mediation appears well suited to this particular task. In any event, reports by the Federal Judiciary to Congress in 1998 suggested that mediation be considered as a device to alleviate the burden that docket increases continue to place on a court system with numerous vacancies.[181] That stamp of approval confirms mediation's new level of maturity and acceptance.

176. *See id*.

177. *See History of EEOC Mediation Program* (visited Feb. 12, 1999) <http://www.eeoc.gov/mediate/history.html>.

178. *See* Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 105-277, 112 Stat. 2681 (1998).

179. *See* 34 [Summary of Latest Developments] Fair Empl. Prac. (BNA) 127 (Dec. 11, 1998).

180. Letter from Paul V. Niemeyer, Chair of the Advisory Committee on Rules of Civil Procedure, to Hon. Alicemarie H. Stotler, Chair of the Standing Committee on Rules of Practice and Procedure (June 30, 1998), *in* PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND EVIDENCE 2 (1998).

181. *See Coble Takes On Task of Overseeing Courts*, 30 THE THIRD BRANCH 3 (1998).

III. THE ADVANTAGES AND DISADVANTAGES OF MEDIATING EMPLOYMENT DISCRIMINATION DISPUTES

Although mediation may not be a panacea[182] for the problems that beset the American judicial system generally, when applied to sexual harassment claims the advantages of mediation appear to outweigh its disadvantages. What follows is a summary of the pluses and minuses of mediation based in part on the works of other ADR professionals and scholars.[183]

A. Advantages of Mediation in Sexual Harassment Disputes

1. Mediation provides a comfortable forum for all parties and thus is more likely to facilitate a workable resolution to a dispute than a more adversarial process involving rights adjudicated in a formal setting under a fixed set of rules. From the employee's standpoint, the safety of a mediated settlement conference permits her to assert her claims and confront her employer with less apprehension about being further victimized and with some (though not guaranteed) protection against retaliation.[184] From the standpoint of the alleged harasser, the mediated settlement conference is also a safe forum for trying to explain (if not deny) the conduct at issue. Even from the standpoint of the employer, mediation offers an opportunity to meet a problem head-on and obtain feedback about it without fear of its position being misconstrued by either the victim or the harasser, both of whom may be productive, valued employees.[185]

2. Mediation provides a confidential forum for resolving disputes without revealing publicly the intimate and embarrassing details of conduct that might otherwise have to be disclosed in adjudication. Particularly from the standpoint of the victim, the confidentiality of mediation offers a considerable advantage over adjudicatory proceedings where intimacies and degradations would likely be revealed for public consumption and consequent personal embarrassment. Indeed, if mediation becomes the norm for resolving sexual harassment complaints, the very fact of making such a

182. *See generally* KAKALIK ET AL., *supra* note 168.

183. *See* RENÉ STEMPLE ELLIS ET AL., NORTH CAROLINA ADR (1996); Bompey et al., *supra* note 153, at 77-80; Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 U.C.L.A. L. REV. 485 (1985).

184. *Compare* Sandra Zaher, *The Feminization of Family Mediation*, DISP. RES. J., May 1998, at 36, 41-42 (discussing mediation as an alternative to litigation when violence against women is involved), *with* Lisa G. Lerman, *Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women*, 7 HARV. WOMEN'S L.J. 53 (1984) (criticizing informal dispute resolution because of fear, inequality of bargaining power, and structural defects of mediation).

185. *See* John Montoya, *Let's Mediate—A Whole New Ball Game at EEOC*, 24 EMP. REL. L.J. 53, 59 (1998).

claim may only be disclosed to a few lawyers, employer managers, and some experts if the parties try to resolve their dispute prior to filing an action or even a charge of discrimination. Finally, most accused harassers will assuredly prefer the confidentiality offered by mediation, particularly if the alleged conduct might have an impact on their own marriages, other familial relationships, and employment opportunities.

3. The prospect of settlement at an early stage offers substantial advantages to all parties. The victim, who may be quite traumatized by the harassment, will be permitted to obtain appropriate treatment which she might not otherwise have been able to afford and will generally be able to get on with her life. Indeed, the advantage to putting a personally demeaning event behind her may better enable the victim to regain her personhood and her ability to be a productive employee and a functioning family member and adult. Likewise, the accused harasser can be brought to justice more quickly, punished more appropriately, and trained or sensitized more effectively through early intervention. Or, if the dispute is resolved without any attribution of responsibility, the accused harasser will be able to resume his employment with a minimum of interruption and embarrassment. From the standpoint of the employer, early settlement offers the obvious advantages of both cost savings and minimal diversion from the employer's ordinary business. Finally, given the cost of litigation,[186] and particularly the financial, emotional, and lost opportunity costs of discovery, early settlement through mediation offers all parties a significant incentive to participate substantially and in good faith.

4. Mediation provides an opportunity to redirect emotions in a productive manner. In contrast to the courtroom or the arbitral forum, where the adversarial process puts parties under stress by subjecting them to cross-examination in the context of rights and rules, mediation is designed to put the parties at ease in the context of exploring their interests and needs. That is not to say that emotions in a sexual harassment case are left outside the door of the conference room. Indeed, both the general session and the private caucuses may involve displays of emotion by all sides. Such displays are sometimes therapeutic and may ultimately be useful to mediators in ferreting out a victim's true concerns and interests. Whether emotional displays at mediation are as useful to victims in working through their problems is less clear and is a subject begging for attention from psychologists, counselors, and psychiatrists. In any event, what is clear is that in a sexual harassment case the unhealthy aspects of the participants' emotions can best be controlled, while the positive aspects of these emotions can best be utilized in a setting where the parties are in control of the proceed-

186. *See* Bompey et al., *supra* note 153, at 34-35.

ing and are made to feel that way. Among the commonly used ADR alternatives, only mediation offers this opportunity.

5. Adaptability of procedures and flexibility of outcomes are among mediation's primary advantages in sexual harassment cases. Aside from the obvious adjustability of procedures allowing mediation to be physically and emotionally comfortable, the range of remedies available to the parties is bounded only by their creativity. In contrast to judicial or arbitral forums, mediation allows parties to craft remedies without regard to the confines of Title VII or other statutes. Thus, a requirement that a sexual predator undergo training and be subject to monitoring may be easier to achieve in a mediated settlement agreement than in a court judgment or arbitral award. Indeed, much of what courts cannot do or are not likely to do can be accomplished in mediation if the parties are sufficiently motivated and creative. Employers can also be attracted to mediation because of its remedial flexibility. Requirements that flow from a private agreement may be easier to swallow than the same or even less rigorous requirements embodied in a judgment or a consent decree. Employers, in fact, may regard negotiated obligations as a form of insurance against future claims, although the law may not recognize them as such. In any event, employers are less likely to be subject to punitive damages for "intentional" conduct after they have voluntarily undertaken obligations beyond what Title VII requires in a mediated settlement agreement.[187] Finally, from the accused harasser's standpoint, a mediated settlement may offer the opportunity to keep one's job, albeit under close monitoring and serious probationary obligations not otherwise provided for in an employer's personnel policy. So long as the victim is comfortable with the resulting strictures on a harasser, the predator may yet retain his livelihood in a way that might not have been possible if the case were litigated.

6. Although there does not appear to be any hard evidence to affirm or deny it, there is considerable anecdotal evidence to suggest that both victims and their employers in sexual harassment cases can benefit financially from mediating these disputes. My own observation is that employers can avoid liability at the high end of the damage scale in mediated settlements, but are more likely to pay something in a greater number of cases. On the other hand, victims of sexual harassment can expect a more certain recovery through mediation, though they may have to forego the prospect of the maximum possible relief which is always available (though not often attainable) in court. Continued experience with mediation of sexual harassment cases will provide more complete data so that, from a pure financial standpoint, parties can assess mediation's impact on the monetary value of harassment claims. For the time be-

187. *See* 42 U.S.C. § 2000e-5 (1994); *see also* 42 U.S.C. § 1981a(b)(1) (1994).

ing, however, there certainly does not appear to be any significant financial disincentive to mediate sexual harassment cases, and the anecdotal evidence suggests the opposite.[188]

7. The avoidance of troublesome precedent is a positive consequence of mediation's inherent privacy. Victims, of course, may not care about the effect of their own settlements on other situations, although there is often a desire to change an employer's practices so that future disputes will not arise. On the other hand, employers are understandably concerned about the precedential effect of any disposition of an employment discrimination claim, and particularly in the area of sexual harassment, where valuing a claim is so difficult and non-standardized. The fact that an employer may have paid one employee a certain amount of money to settle her claim may, in the mind of an employer's human resources manager, put a floor on future claims of the same kind, even though the surrounding circumstances might suggest a markedly different outcome. Mediated settlements, conceived in private negotiations and effectuated by the parties themselves outside of a public forum, minimize the risk that such settlements will be regarded as precedential by anyone else. Certainly, the absence of any judicial, administrative, or arbitral determination of fault, responsibility, fact, or law eliminates the prospect that a mediated settlement can have any preclusive effect in any other legal proceeding.[189]

8. One of the principal values of mediation—the resolution of a dispute in a manner so that the parties can continue their business, professional, or personal relationships—makes mediation appear superior to adjudicatory forms of dispute resolution. Judicial litigation and private arbitration, with their emphasis on adversary procedures, tend to drive parties further apart, thus making continuance of the employer-employee relationship much more difficult. Mediation, by contrast, emphasizes a non-adversarial exploration of the parties' common interests and personal concerns, thereby making it far less likely that the employment relationship becomes irreparably fractured.[190] In terms of Title VII's overriding purpose of making the workplace hospitable for women so that women and

188. A study of pilot mediation and early neutral evaluation programs in six federal district courts concluded that monetary settlements are more likely when cases are mediated. *See* KAKALIK ET AL., *supra* note 168, at xxxii. The EEOC's charge data system reports that on a per-charge basis, average EEOC sexual harassment settlements have ranged from less than $4000 to $15,000 during the last seven fiscal years. During this time between 18.8% and 28.9% of charges filed were resolved with benefits to the charging party. *See EEOC & FEPA Combined: FY 1991-FY 1997*, *supra* note 2.

189. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1981) (discussing preclusion).

190. *See* Robert A. Baruch Bush, *Efficiency and Protection, or Empowerment and Recognition?: The Mediator's Role and Ethical Standards in Mediation*, 41 FLA. L. REV. 253 (1989) (discussing the purpose and special role of mediation).

men alike can share in the bounty of our nation's employment opportunities, non-adjudicatory ADR devices like mediation are the most promising means of handling sexual harassment cases. To put it otherwise, if the Supreme Court is correct that employees are interested primarily in securing and maintaining employment,[191] mediation offers a considerable advantage over adjudicatory forms of dispute resolution.

9. Another of mediation's advantages has a special meaning in the field of sexual harassment. The shift of focus in mediation away from the technical legal merits of a dispute lessens the impact that undecided legal issues may have on resolving a dispute.[192] As noted above, questions abound concerning what is actionable and who is liable in Title VII cases, despite the Supreme Court's recent effort to bring some order to how these issues are determined.[193] By directing the parties' attention to their interests instead of to their legal positions, a mediator can sidestep the uncertainties in Title VII law to a far greater extent than is possible with other ADR techniques.

10. Perhaps the most significant advantage mediation has to offer in sexual harassment cases is personal empowerment and recognition.[194] After all, in mediation it is a party herself, not some outside determinative force such as a jury, judge, or arbitrator, who decides whether or not to resolve her dispute and on what terms. Particularly for victims of sexual harassment, the prospect of controlling a situation instead of being controlled by it may be critical to recovering self-esteem, continuing employment, and stabilizing personal situations. In this regard, personal autonomy is recognized and rewarded in mediation. Recognition of personhood is, of course, at the heart of Title VII's promise. Self-resolution through mediation thus advances Title VII's goal of eradicating discrimination in a poignant and powerful way.

Empowerment, of course, carries with it the germ of its own destruction, for the parties can halt the process at any time and resort to adjudication. But mediators trained in facilitation and experienced in the general area of sexual harassment law can use a number of techniques to remind the parties about considering their interests and needs instead of dwelling on the differences in their legal positions. In the end, however, the parties will do what they will. Personal empowerment and recognition should thus be regarded as advantageous, whether the case actually settles or not.[195]

191. *See* Ford Motor Co. v. EEOC, 458 U.S. 219, 230 (1982).
192. *See* Baruch Bush, *supra* note 190, at 283.
193. *See supra* Part I.D-F.
194. *See* Baruch Bush, *supra* note 190, at 276-83.
195. *See* Robert A. Baruch Bush, *What Do We Need a Mediator For? "Value-Added" for Negotiators*, 12 OHIO ST. J. ON DISP. RES. 1, 36 (1996).

B. Disadvantages of Mediation in Sexual Harassment Cases

1. Mediation may impair the orderly development of a coherent sexual harassment jurisprudence. To the extent that it is successful in resolving large numbers of disputes, the cases left for adjudication may involve such unique factual situations that the resultant body of case law will be shaped—and possibly warped—by mediation's leftovers. Success in resolving so many sexual harassment cases out of court may thus spawn an unclear, inconsistent, and aberrant set of rules that will neither advance the aims of Title VII nor provide employers with the clarity needed for efficient self-enforcement. The familiar refrain that "hard cases make bad law"[196] may turn out to be more of an unwelcome reality than a distant aphorism.

2. The absence of public vindication is a distinct disadvantage of mediation. Particularly for victims of sexual harassment, personal vindication—being believed in a "he said/she said" situation—may be important to one's marriage, one's family, and one's self-esteem. A decision by an impartial adjudicator, whether a judge, jury, arbitrator, or evaluator, provides the kind of third-party vindication that mediation cannot. Moreover, to the extent that a victim of sexual harassment needs public approbation of her own behavior, the confidential nature of mediation cannot satisfy that need. Public vindication also may be important from the employers' standpoint. One often hears that certain cases simply cannot be settled because the other employees are looking to the employer to defend its position. Particularly after a dispute becomes common knowledge among other employees, the employer may need to pursue public vindication in order to maintain morale in the workplace.

3. Some parties, typically employers, but occasionally employees, believe that proposing or even agreeing to mediation is a sign of weakness or an admission of responsibility.[197] Whatever disadvantage may be entailed by that perception, the increased use of mediation as an ADR device required by court rules will render that argument less substantial and virtually moot. Also, as mediation moves toward being the norm in resolving employment disputes, the worry about agreeing to mediate before the dispute reaches litigation will dissipate—or, at least, it will have less substance to it.

4. Disclosure of unrevealed information that may be used at trial is another perceived disadvantage of mediation. Mediators often hear experienced trial counsel lament the prospect of having to deal with "trial secret" type of information during a mediation.[198] Sexual harassment cases appear no different in this regard from other forms of civil litigation. Indeed, the kind of intimate, per-

196. Hudson v. United States, 118 S. Ct. 488, 497 (1997) (Stevens, J., concurring).

197. *See* Bompey et al., *supra* note 153, at 79.

198. *See id.*

sonal, and potentially embarrassing information about parties to a sexual harassment dispute magnifies the disadvantage that some parties and trial lawyers believe mediation entails. Responsible mediators can minimize much of the worry about secret information and trial strategies through scrupulous adherence to their duty of confidentiality.[199] Of course, the parties have to make clear what they do and do not want the other side to know. Ultimately, the parties have to decide whether revealing undisclosed material information will be more helpful in resolving a dispute than keeping it secret will be in litigating the case if it is not resolved.

5. Mediated settlements may not fully serve the deterrence objective of Title VII.[200] The lack of public disapproval, the prospect of cheaper and quicker settlements, and other advantageous aspects of privately negotiated and confidentially performed settlements may, in effect, provide an insufficient incentive to employers to control the conduct of supervisors. That is, some employers are more likely to obey the law fully if their feet are held to the fire of a public trial of a sexual harassment dispute. Mediation may, therefore, disserve a central objective of Title VII by permitting and encouraging employers to resolve their way out of a dispute instead of facing the cost and humiliation of a trial. Experience with mediation will measure the substance of this concern. As the jurisprudence of employer liability matures and a body of settlements grows, mediated resolutions should reflect in rough terms the economic merits of individual cases. If mediation does not provide economic justice, it will resolve fewer cases, and the parties will turn to adjudication to obtain that justice.

6. The confidentiality of most mediated settlements of individual sexual harassment cases deprives the community of information about what the law actually is, who is violating the law, and what the costs of illegal conduct are.[201] Some prominent members of the academic community see this aspect of mediation—and of settlement in general—as a substantial departure from sound public policy.[202] Whether respect for the law in such a high-profile area as sexual harassment will suffer materially as a result of non-adjudicatory dispositions seems more doubtful than the abstract ju-

199. *See, e.g.,* STANDARDS OF PROFESSIONAL CONDUCT § III (N.C. Disp. Resol. Commission 1996); *cf.* Model RULES OF PROFESSIONAL CONDUCT Rule 1.6(a) (1983) (setting forth a lawyer's duty of confidentiality); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101 (1980) (same).

200. The "primary objective" of Title VII "is not to provide redress but to avoid harm." Faragher v. City of Boca Raton, 118 S. Ct. 2275, 2292 (1998) (citing Albemarle Paper Co. v. Moody, 422 U.S. 405, 417 (1975)).

201. *See* EEOC Notice No. 915-002, Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment § V(A)(2) [hereinafter EEOC Policy Statement].

202. *See* Owen M. Fiss, Comment, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984).

risprudential proposition that settlement generally is bad for the law.[203] As a practical matter, the debate about "settlement or not" appears moot for the present because ADR generally and mediation in particular are on a fast track of implementation in federal and state courts alike. With the passage of time the philosophical debate may become more informed and more pertinent. For now, at least, this disadvantage to mediation is outside the circle of concern.

7. The absence of public scrutiny of how sexual harassment law is being developed and applied may be a significant disadvantage of privatizing workplace justice. Not only is there little assurance about how the careful framework of employer liability is being construed and applied at the negotiating table, but the lack of public control and reporting of negotiations and outcomes makes it unlikely that the law can be applied in any uniform way across the country. These criticisms impelled the EEOC to oppose arbitration agreements covering statutory claims.[204] Moreover, justice achieved in private may be regarded by some as an abdication by our overworked court system to an essentially unregulated profession of mediators. Whatever force these arguments about public oversight may have in other areas, Congress long ago expressed a legislative preference in Title VII sexual harassment cases for methods of conference, conciliation, and persuasion to resolve these disputes.[205] And, most importantly, the fact that resolution by mediation is entirely consensual and is backed up by an adjudicatory system to handle disputes that do not settle, is some assurance that privatization is not being pursued in a way that offends either our system of public justice or the manner in that Congress said Title VII should be enforced.[206]

IV. OBSTACLES TO THE DIALOGUE OF RESOLUTION

However tempting the prospect of mediation may be as an effective means of enforcing Title VII, it should be regarded with caution, for there are both new developments and existing problems that may impair the ability of mediators to maintain a meaningful dialogue among the parties. Without due regard by the bar and the judiciary for these problems, mediation of sexual harassment cases may turn out to be a flash in the pan.

203. *See id.*
204. *See* EEOC Policy Statement, *supra* note 201, § (V)(A)(1).
205. *See* 42 U.S.C. § 2000e-5(f)(1) (1994).
206. Some commentators question the constitutionality of mandatory mediation. *See, e.g.,* Jay W. Stein, *Mediation and the Constitution*, DISP. RES. J., May 1998, at 22-28.

A. Insurance

A significant uncertainty clouding mediation's future is the emergence of employment practices liability insurance ("EPLI").[207] In recent years, coverage for discrimination claims under traditional commercial general liability policies was unlikely at best.[208] Today, there are upwards of fifty carriers vying for EPLI business from employers.[209] Competition is so vigorous that even coverage of purposeful violations of Title VII (such as sexual harassment by supervisory officials) appears readily available.[210] Insurance coverage for employer liability for sexual harassment, however, portends many difficulties.

First, the presence of adjusters in the mediation process means that the participant with the least investment in the human dimension of the dispute may be the one holding the financial key to settlement. Mediation rules typically require the participation of insurance carrier representatives in settlement conferences, so there is every reason to believe that adjusters will be full participants in the settlement process. Injection of a participant whose interest is mainly financial alters the employer-employee dynamic and will make communication between the real parties about their needs and interests more difficult.

Second, insurance carriers may not invest their representatives with full discretion to settle at mediation, relying instead on the traditional telephone calls to home office officials or others with greater access to members of review committees. Aside from questions about compliance with participation rules, as a practical matter, when all of the parties appear and an adjuster has limited authority, most participants and mediators want to proceed even if the late afternoon telephone call appears to be unavoidable. Unless sexual harassment mediations are to be handled in a different fashion, it is possible that these mediations will become routine and ultimately unproductive.

Third, coverage questions involving both primary and excess carriers[211] may, in the short run at least, make mediation more

207. *See* Robert L. Carter, Jr., *An Employment Practices Liability Insurance Primer*, EMPL. L. STRATEGIST, Feb. 1997, at 1, 1.

208. *See id.*

209. *See* Mark Hansen, *Love's Labor Laws: Novel Ways to Deal with Office Romances after the Thrill is Gone*, A.B.A. J., June 1998, at 78, 80.

210. *See* Kearney W. Kilens, *Assessing EPLI Coverage: Helpful Questions for Potential Insureds*, 24 EMP. REL. L.J. 101, 102 (1998); Interview with William P.H. Cary, Esq., in Greensboro, N.C. (Dec. 17, 1998).

211. The subject of excess coverage for employment discrimination claims is one fraught with considerable complexity. *See* Fieldcrest Cannon, Inc. v. Fireman's Fund Ins. Co., 127 N.C. App. 729, 731-33, 493 S.E.2d 658, 659-60 (1997) (illustrating extended litigation over whether excess coverage carriers were liable for settlements paid for employment discrimination claims), *disc. rev. denied*, 348 N.C. 497 (1998).

complicated and less attractive. Not only is EPLI so new that the scope of its coverage is unexplored, but there are also unresolved questions about whether some aspects of this coverage may be contrary to public policy.[212] Moreover, the Supreme Court's latest employer liability cases explicitly suggest that employers should have an incentive to avoid liability by overseeing and regulating their supervisors' conduct.[213] That is why the affirmative defense framework was crafted as an exception to vicarious liability. An employer that purchases EPLI coverage might arguably have a more difficult time defending against strict liability because insurance has reduced its financial incentive to train, monitor, and control its supervisors as well as to encourage victims of discrimination to complain. These and other questions about coverage for punitive damages and for conduct that is substantially certain to cause harm, leave employers and employees alike so uninformed about the financial component of a multi-sided settlement negotiation that mediation could founder at its inception.

Fourth, attorneys who lack experience in sexual harassment cases may be retained by insurance carriers to represent employers in place of employment law specialists (or at least lawyers who emphasize employment law in their practices). With respect to mediation's potential, this could be an unfortunate development. Having built up expertise in employment disputes, having learned about the particular needs of their regular clients, and having even established some rapport with employees and their counsel, many reputable and experienced counsel for employers are attuned to mediating sexual harassment disputes and can do so with great facility. Given the number and importance of unresolved legal issues in the sexual harassment area, the need for informed and experienced counsel is self-evident. Nonetheless, insurance carriers may prefer to retain counsel who are familiar to them, who are often among the ablest and seasoned jury trial attorneys, and who are more willing than the employment law bar to accept the lower hourly rates that insurance trial counsel are paid.[214]

212. *See* Sean W. Gallagher, *The Public Policy Exclusion and Insurance for Intentional Employment Discrimination*, 92 MICH. L. REV. 1256, 1258-59, 1263-1301 (1994) (discussing judicial refusal to enforce employment discrimination insurance based on public policy grounds); *cf.* North Bank v. Cincinnati Ins. Cos., 125 F.3d 983, 987-88 (6th Cir. 1987) (finding that public policy does not preclude coverage of an employment discrimination claim); Russ v. Great Am. Ins. Cos., 121 N.C. App. 185, 189, 464 S.E.2d 723, 725-26 (1995) (disallowing coverage for sexual harassment claim under terms of comprehensive general liability policy because sexual harassment is substantially certain to cause injury).

213. *See* Faragher v. City of Boca Raton, 118 S. Ct. 2275, 2292 (1998); Burlington Indus., Inc., v. Ellerth, 118 S. Ct. 2257, 2270 (1998).

214. *See* 1998 Economic Survey Question 23, at 29-30 (N.C. Bar Ass'n); *see also* interview with William P. H. Cary, *supra* note 210.

All of these potential problems have the capacity to undermine mediation as an appropriate dispute resolution technique in sexual harassment cases.[215] Worse yet, absent court decisions holding that insurance against vicarious employer liability for sexual harassment committed by supervisors is contrary to public policy, there is little that courts can do to alter the practices of insurance carriers. Mediation's short-term prospects in the area of sexual harassment are thus difficult to predict if insured employers and insurance-driven negotiations become the norm.

B. Attorneys

Attorneys themselves may turn out to be among the largest obstacles to mediation's success as an alternative to litigation of sexual harassment cases. The "gunslinger" attitude which many attorneys exhibit—particularly in front of their clients—is distinctly disadvantageous to mediation of sexual harassment disputes. That goes for both sides. Plaintiffs' lawyers whose verbal focus is on the largest recovery possible may not be advancing their clients' best interests, particularly for employees who need job security. In addition, the personal vindication which many victims need and seek is not entirely dependent upon obtaining the largest amount of money from their employers. On the other side of the table, employer attorneys whose verbal focus is on intimidating an employee about her case may not be advancing the employer's interest in settlement. In fact, exhibiting a hostile attitude and zeroing in on a victim's vulnerabilities in a general session is likely to make settlement a much more remote prospect. Both employer and claimant attorneys are, of course, heavily invested in the legal merits of the dispute, while the parties themselves are more likely to be concerned about their needs, common interests, and the human dimension of the dispute. Lawyers, therefore, can stymie the potential for good communication when their eyes are fixed on their clients' legal positions. Education about mediation and experience with it, however, can alleviate some of this problem. Also, clients are becoming more sophisticated about choosing the most appropriate attorneys for given situations. Finally, effective mediators can sometimes work around the "gunslinger" attorney. While attorneys pose a problem for successful mediation of sexual harassment cases, it is a problem for which solutions are available.

215. Some of these potential difficulties can be ameliorated. EPLI insurance audits may encourage participating employers to adhere to practices which will reduce the incidence of discrimination. Also, insurance attorneys with no experience in employment law can readily acquire training and over time will gain the pertinent experience. But other difficulties may prove intractable. For instance, interference with the victim-employer dialogue can hardly be avoided.

C. Mediators

The mediation profession itself may pose a problem in resolving employee sexual harassment disputes. Although there is a respectable body of opinion favoring purely facilitative mediation (where grounding in a particular area of the law is not regarded as advantageous),[216] the intricacies of liability and remedy issues in sexual harassment cases argue for a mediator with specific experience in the employment discrimination field. Moreover, both victims and employers often look to the mediator for some evaluation of the claims and defenses, particularly in comparison to information a seasoned mediator may have from reported decisions, public settlements, and the mediator's own work as an attorney and a neutral. To the extent that the facilitative model predominates in the field of mediation, parties may find negotiations more difficult to pursue. At the other end of the spectrum, an evaluation-oriented mediator with a focus on the claims and defenses in the case will miss the central advantage of mediating sexual harassment cases—namely, the opportunity to facilitate productive communication between the disputants about their needs and interests.[217] The concern about unsatisfactory mediators can probably be ameliorated by having sexual harassment cases mediated by women and men who have some practical knowledge of employment discrimination law, who have training or experience in both facilitative and evaluative mediation, and who are able to apply both facilitative and evaluative techniques with appropriate discernment and discretion.

D. Work Force Changes

Changes in our nation's work force make uncertain the impact mediation will have in the employment discrimination area. Our nation is already witnessing some shift to a contingent work force[218] which portends other changes in the way women are victimized. Indeed, the alienation felt by contingent workers and the absence of a bond between employer and employee makes workers more vulnerable to many types of exploitation.[219] There is little reason to believe that sex discrimination will not flourish in these circumstances. Neither mediation, nor other ADR devices nor even full-blown litigation itself may be up to the task of addressing this problem absent federal or state legislation.

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216. *See generally*, Baruch Bush, *supra* note 190 (analyzing a mediator's unique role in mediation).

217. *See id.* at 273 (defining the mediator's role as "guarantee[ing] the parties the fullest opportunity for self-determination and mutual acknowledgment").

218. *See* Barbara J. Fick, *The Changing Face of the American Workplace*, 12 NOTRE DAME J.L. ETHICS & PUB. POL'Y 1, 1 (1998).

219. *See* Jean McAllister, *Life Under the Snail Head*, WORKING USA, July-Aug. 1997, at 73, 74.

The advent of a non-hierarchical work force in some companies (quality teams, work circles, and the like) draws into question an employer's liability for harassment by team members who would otherwise occupy a superior position to a victim. Of course, if this "team" approach works as it should, the likelihood of sexual harassment would be reduced by peer disapproval of abusive conduct. Human nature being what it is, however, the incidence of sexual harassment in a mixed gender workplace is not likely to approach zero. The courts will ultimately deal with this problem, but in the meantime, non-adjudicatory ADR techniques such as mediation may be less suitable for handling such cases.

Finally, if technology continues to make work at the office less necessary, harassment cases may assume a different form altogether. Working via a computer network from one's home or elsewhere outside the normal office environment reduces the prospect of face-to-face harassment but may increase the opportunity for verbal harassment through e-mail, facsimile, or other communications devices. Questions abound in this uncharted area, ranging from what is actionable to what may be constitutionally protected.[220]

CONCLUSION

Current regard for ADR generally and mediation in particular as alternatives to litigation of employment disputes is coinciding with heightened public interest in workplace sexual harassment and with more certain employer liability for that harassment. Mediation now appears to be the least controversial and possibly the most effective dispute resolution technique for handling the increasing number of sexual harassment controversies. The advantages of mediation in dealing with the singular problems of sexual harassment disputes appear to outweigh its disadvantages, although little organized data exist to prove or disprove mediation's efficacy from the standpoint of party satisfaction, docket control, or consistency with Title VII. The advent of employer liability insurance and a number of lesser problems affecting the way cases are mediated could, however, impede what appears to be a worthy experiment in resolving sexual harassment disputes. Hopefully, the courts will ensure that this method of dispute resolution has a fair chance to prove whether or not it is an appropriate means for handling sexual harassment cases in a manner consistent with Title VII's purposes.

This moment, indeed, is a propitious one. Mediation offers victims of workplace sexual harassment and their employers alike an opportunity to confront meaningfully their interests and needs in-

220. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 390 (1992) (stating that sexually derogatory "fighting words" may produce a violation of Title VII's prohibition against sex discrimination).

stead of dwelling unproductively on their legal positions and their differences. The impact of ADR generally and mediation in particular on sexual harassment disputes, however, remains uncertain in light of the many problems discussed in this Essay. Whether the judiciary, the bar, and the parties themselves will embrace mediation and permit it to work will undoubtedly affect whether women and men will occupy their rightful places in our nation's work force.