Shattering the Myth: Mediating Sexual Harassment Disputes in the Workplace

Carrie A. Bond
NOTES

SHATTERING THE MYTH: MEDIATING SEXUAL HARASSMENT DISPUTES IN THE WORKPLACE

Carrie A. Bond*

"The great enemy of truth is very often not the lie—deliberate, contrived, and dishonest—but the myth—persistent, persuasive and realistic. Too often we hold fast to the clichés of our forebears." 1

INTRODUCTION

Sexual harassment has infected the American workplace. Studies put the incidence of sexual harassment at fifty percent to eighty percent of all working women, 2 with five percent of men and fifteen percent of women suffering sexual harassment each year. 3 The Equal Employment Opportunity Commission ("EEOC"), the government agency responsible for ensuring equal employment in the workplace, 4

---

2. Susan R. Meredith, Using Fact Finders to Probe Workplace Claims of Sexual Harassment, 47 Arb. J. 61, 61 (1992). These are the more conservative figures; one of the earliest mainstream sexual harassment surveys, a Redbook poll cited by Meredith, shows that 90% of 9,000 women surveyed in 1976 reported being harassed at work. Claire Safran, What Men Do to Women on the Job: A Shocking Look at Sexual Harassment, Redbook, Nov. 1976, at 149, 217.
3. Mary P. Rowe, People Who Feel Harassed Need a Complaint System with Both Formal and Informal Options, 6 Negotiation J. 161, 162 (1990). Because in the majority of cases the victim of sexual harassment is female, this Note will refer to the victim as "she." This is not to discount the significant number of male victims of harassment who seek legal relief. See, e.g., Yeary v. Goodwill Indus.-Knoxville, Inc., No. 96-5145, 1997 WL 73312, at *7 (6th Cir. Feb. 24, 1997) (upholding male complainant's same-sex sexual harassment claim); Schrader v. E.G. & G., Inc., No. CIV.A.95-B-870, 1997 WL 61018, at *9 (D. Colo. Feb. 7, 1997) (dismissing male plaintiff's claim for sexual harassment by female supervisor). This Note also uses the terms "victim" and "complainant" interchangeably although a legal complaint has not necessarily been filed.
has a backlog of over 80,000 sexual harassment cases. This is especially remarkable given that the percentage of sexual harassment claims actually reported is traditionally very low.

Sexual harassment in the workplace has also been a frequent topic in the news over the last few years, as evidenced by the extensive national coverage of both the Anita Hill and Clarence Thomas hearings and the sexual harassment allegations against Baker & McKenzie, one of the country's largest law firms. Too often, employers consider their dispute resolution policies, or lack thereof, after an incident of sexual harassment, rather than designing policies as a preventative measure. Neither arbitration nor civil litigation, both costly in time and money, provide any solution to such a socially detrimental and pervasive problem. Disputants should not resort to litigation and arbitration simply because those are the methods that they have always employed.

This Note provides a contractual provision that proposes mediation as a method for resolving sexual harassment disputes. Mediation offers a potential plaintiff all of the remedies available in litigation, including cash settlements, in addition to other remedies that can be specifically tailored to the individual plaintiff's situation. Part I discusses the serious problem of sexual harassment in the workplace. Part II sets forth the two most common dispute resolution methods for sexual harassment claims, litigation and arbitration, and explains why both are ultimately ill-suited for resolving sexual harassment dis-
SEXUAL HARASSMENT DISPUTES

putes. Part III provides an introduction to mediation and explains why mediation is the preferable forum for resolving most sexual harassment disputes. Part IV offers a sample mediation provision appropriate for integration into an employment contract or handbook. Finally, part V carefully parses the contractual agreement proposed in part IV, offering justifications for each clause of the provision. This Note stresses the central role that mediation should play in an employer’s sexual harassment policy to minimize the effects of illegal conduct on workers and the workplace.

I. THE REALITY OF SEXUAL HARASSMENT

Any policy aimed at eradicating workplace sexual harassment must first face the “formidable task” of defining sexual harassment. Because the harassment occurs in the workplace, a highly social environment, a delineation must be made between illegal conduct and ordinary social interaction. Once harassment is identified, Title VII, the federal anti-discrimination statute, is the primary legal vehicle through which an employee can seek relief. Yet sexual harassment has only existed as a cause of action under Title VII for twenty years. Nevertheless, these twenty years have produced a wealth of


10. Cohen, supra note 9, at 681.


It shall be an unlawful employment practice for an employer—(1) to fail to refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin . . . .

Id.

12. Title VII, however, is not the only course of action for an injured sexual harassment plaintiff. See infra note 118 and accompanying text.

conflicting case law as courts struggle with the vexing task of identifying and remedying sexual harassment. A distillation of the case law is necessary so that both employers and employees will be able to discern what conduct is illegal under Title VII. After an alleged act of harassment, an understanding of sexual harassment law is imperative for the parties involved in a sexual harassment dispute so that they can evaluate the viability of their Title VII claim. This will both inform the parties and aid them in deciding whether they are interested in litigating the case in court. This part offers a general discussion of what constitutes Title VII sexual harassment, identifies the costs of harassment to society, and introduces the main actors in any sexual harassment dispute.

A. Sexual Harassment: What Is It?

Title VII sexual harassment is commonly defined as "unwelcome" conduct or requests of a sexual nature. There are two strands of sexual harassment actionable under Title VII: quid pro quo and hostile environment.

Quid pro quo harassment occurs when a harasser makes employment or employment benefits contingent upon submission to sexual requests. This type of harassment is both more established and more clearly defined than the hostile environment strand. To prove quid pro quo sexual harassment at trial, a plaintiff must establish:

1) that the employee was a member of a protected class; 2) that the employee was subjected to unwelcomed sexual harassment in the

Harassment on the basis of sex is a violation of Section 703 of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

Id. (footnote omitted).

15. See, e.g, Meritor, 477 U.S. at 62 (stating that a quid pro quo claim exists where the harassment "involves the conditioning of concrete employment benefits on sexual favors"); see also Karibian v. Columbia Univ., 14 F.3d 773, 776 (2d Cir.) (recognizing a claim for quid pro quo sexual harassment where the plaintiff claimed that her supervisor "coerced her into a sexual relationship by telling her she 'owed him' for all he was doing for her" and that "the conditions of her employment—including her raises, hours, autonomy and flexibility—varied from time to time, depending on her responsiveness to [her supervisor]"); cert. denied, 512 U.S. 1213 (1994).

16. The first federal court to uphold a hostile environment sexual harassment claim was the Court of Appeals for the D.C. Circuit in 1981. Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981). The Supreme Court later recognized this claim as actionable under Title VII in Meritor, 477 U.S. at 57.

17. Meritor, 477 U.S. at 62; Karibian, 14 F.3d at 778.

SEXUAL HARASSMENT DISPUTES

form of sexual advances or requests for sexual favors; 3) that the harassment complained of was based on sex; 4) that the employee's submission to the unwelcomed advances was an express or implied condition for receiving job benefits or that the employee's refusal to submit to the supervisor's sexual demands resulted in a tangible job detriment; and 5) the existence of respondeat superior liability.\(^{19}\)

The hostile environment strand shares many common burdens of proof with the quid pro quo strand.\(^{20}\) A hostile work environment constitutes sexual harassment when the complainant shows that:

1) she belongs to a protected group; 2) she was subject to unwelcome sexual harassment; 3) the harassment was based on sex; 4) the harassment affected a term, condition, or privilege of employment; and 5) [the employer] knew or should have known of the harassment and failed to take proper remedial action.\(^{21}\)

The line dividing quid pro quo harassment from hostile environment harassment is difficult to discern, as the two strands often occur together.\(^{22}\) Complaints under the hostile environment strand, however, are more common.\(^{23}\)

**B. Shared Elements of Quid Pro Quo and Hostile Environment Sexual Harassment Claims**

Establishing sexual harassment under either the quid pro quo or hostile environment strand places many of the same burdens of proof on the plaintiff. This section discusses those common elements, including the requirements of proving the plaintiff's membership in a protected class, the unwelcomeness of the activity, that the discrimination was based on sex, and employer liability.

1. **Protected Class**

Both quid pro quo and hostile environment sexual harassment claimants may be required to establish that they belong to a protected


\(^{20}\) Compare supra text accompanying note 19 (listing proof burdens on the quid pro quo plaintiff) with infra text accompanying note 21 (listing proof burdens on the hostile environment plaintiff).

\(^{21}\) Burns v. McGregor Elec. Indus., Inc., 989 F.2d 959, 964 (8th Cir. 1993); see also Meritor, 477 U.S. at 57 (finding claim for hostile environment sexual harassment); Conte, supra note 19, § 6.44, at 284-304.

\(^{22}\) EEOC Notice, March 3, 1990 Policy Guidance on Current Issues of Sexual Harassment, supra note 4, at D-1, D-3; see, e.g., Carrero v. New York City Hous. Auth., 890 F.2d 569 (2d Cir. 1989) (holding that the plaintiff had established both quid pro quo and hostile environment sexual harassment).

group. Not all courts, however, include this prong in their formulations of the legal standard. Even in jurisdictions that require proof of this element, the burden is essentially nonexistent. Because an employer could discriminate against any given employee, every employee is a member of the protected class, broadly defined as “workers.”

2. Unwelcomeness of the Alleged Harasser’s Conduct

Both strands of sexual harassment also require proof that the sexual harassment was, as a legal matter, unwelcome. Courts agree that the behavior must be objectively, and therefore reasonably, unwelcome. Requiring a reasonableness threshold releases employers from liability for claims where a plaintiff is “hypersensitive.” At this juncture, however, courts split between requiring that a plaintiff establish that the conduct would offend a “reasonable person,” and requiring proof that a “reasonable woman” would be offended.

Defenders of the reasonable woman standard argue that, in the context of sexual harassment, the reasonable person standard ignores the very real differences between what men and women find offensive in the workplace. Because men have historically been over-repre-

24. Compare supra text accompanying note 19 (requiring proof that quid pro quo plaintiff was in a “protected class”) with supra text accompanying note 21 (requiring proof that hostile environment plaintiff was in a “protected group”).
25. See, e.g., Ellison v. Brady, 924 F.2d 872, 875-76 (9th Cir. 1991) (explicating a three-prong hostile environment sexual harassment claim and not requiring proof that the victim was a member of a protected class); Andrews v. Philadelphia, 895 F.2d 1469, 1482 (3d Cir. 1990) (providing the elements of a hostile environment claim, and not requiring proof that victim was a member of a protected class).
26. Henson v. City of Dundee, 682 F.2d 897, 903 (11th Cir. 1982) (requiring “a simple stipulation that the employee is a man or woman”); Radtke v. Everett, 501 N.W.2d 155, 162 (Mich. 1993) (stating that the plaintiff must establish that she “belonged to a protected group”).
27. Compare supra note 19 (requiring “unwelcome sexual harassment”) with supra note 21 (same).
28. See, e.g., Radtke, 501 N.W.2d at 164 (applying a “reasonable person” standard); Ellison, 924 F.2d at 879 (applying a “reasonable woman” standard).
29. Lehmann v. Toys ‘R’ Us, Inc., 626 A.2d at 445, 458 (N.J. 1993). While these courts used an objective standard to determine whether the conduct was unwelcome, they did not ignore the victims’ subjective experiences. Courts utilize this information in evaluating the damages in the harassment claim. “[T]he subjective reaction of the plaintiff and her individual injuries [is] relevant to compensatory damages.” Id.
30. See, e.g., Radtke, 501 N.W.2d at 167 (applying a “reasonable person” standard).
31. See, e.g., Ellison, 924 F.2d at 879 (“[W]e believe that a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women.”). Of course, if the plaintiff were male, the standard would be that of a reasonable man; the vantage point is that of “a reasonable victim of the same sex as the plaintiff.” Id. at 880; see also Lehmann, 626 A.2d at 458 (“If the plaintiff is male, the perspective used shall be that of a reasonable man.”).
32. Lehmann, 626 A.2d at 459; see also Rosemarie Skaine, Power and Gender: Issues in Sexual Dominance and Harassment 178 (1996) (citing numerous studies finding a difference between how men and women perceive sexual harassment). “The variable that most consistently predicts variation in people’s definition of sexual har-
sentenced in positions of power in the workplace, their views are often considered normative. Therefore, use of the reasonable person standard runs the risk of validating the majority male perspective of acceptable on-the-job behavior.

Notably, courts opposing the reasonable woman standard also express concern about entrenching unfavorable gender stereotypes. These courts are reluctant to endorse a gender-specific standard because it reflects a view that women are weak and need the protection of a separate standard. Some scholars also take offense at the “essentialist” nature of the reasonable woman standard because it treats all women as if their response to sexual behavior is uniform and naturally predetermined.

Sexual harassment, therefore, is not defined by completely objective criteria; the key term is “unwelcome.” To prove that conduct was unwelcome, the victim must demonstrate that she did not solicit or

assent is the sex of the rater [evaluating the behavior]. Men label fewer behaviors at work as sexual harassment.” Id. While men and women can agree that certain egregious conduct should be considered harassment, men view more subtle sexual behavior directed toward them as flattering, while women view these same acts as insulting. Id.

33. See Kathryn Abrams, Gender Discrimination and the Transformation of Workplace Norms, 42 Vand. L. Rev. 1183, 1189 (1989) (“Men, who enjoy a hegemonic power over social meanings by virtue of their dominant status in society, label as ‘different’ all qualities, values, and practices characteristic of or associated with women.”).  

34. Ellison, 924 F.2d at 878; Lehmann, 626 A.2d at 459. 

35. Radtke v. Everett, 501 N.W.2d 155, 167 (Mich. 1993). The belief that women are entitled to a separate legal standard merely reinforces, and perhaps originates from, the stereotypic notion that first justified subordinating women in the workplace. Courts utilizing the reasonable woman standard pour into the standard stereotypic assumptions of women which infer women are sensitive, fragile, and in need of a more protective standard. Such paternalism degrades women . . . . 

Id.  

36. Martha Chamallas, Writing About Sexual Harassment: A Guide to the Literature, 4 UCLA Women’s L.J. 37, 50 (1993); see also Naomi R. Cahn, The Looseness of Legal Language: The Reasonable Woman Standard in Theory and in Practice, 77 Cornell L. Rev. 1398 (1992) (critiquing the reasonable woman standard). Any reasonableness standard is essentialist in the sense that the actions of a hypothetical person are dubbed normative in the eyes of the law. To the extent that a reasonableness standard insulates employers from oversensitive employees, it is desirable. See supra note 29 and accompanying text. Beyond this point, however, courts should refrain from further fracturing the standard. One scholar argues that a black woman, for example, may have a different view of harassment than a white woman as a result of her race. Abrams, supra note 33, at 1214. Socioeconomic position may also affect a woman’s perception of sexual harassment. Id. Applying a reasonable woman standard is a difficult task because it is defined in relation to a reasonable man standard, which is itself amorphous. It is not desirable or efficient to implement standards that are more plaintiff-specific. Otherwise innocuous behavior, for example, might be harassment if targeted at a Native American woman of limited economic means, but not at a middle-class, white female employee. Assessing one’s workplace conduct is challenging enough without muddying the waters by splintering the reasonable man or, if necessary, reasonable woman standard even further.
invite the behavior. The Supreme Court has said that the unwelcomeness determination turns on credibility and is largely a question for the trier of fact.

3. Discrimination Based on Gender

The plaintiff must establish that, but for her gender, she would not have been harassed. When the conduct is "sexual or sexist in nature, the but-for element will automatically be satisfied." An actionable claim, however, need not be clearly sexual. If, for example, a harasser targeted only women and subjected them to a particular physical but not overtly sexual encounter, this would meet the but-for requirement. Because in crafting Title VII Congress intended to protect against gender-specific discrimination, the plaintiff must establish that she suffered harassment because she was a woman.

Consequently, this but-for requirement has led courts to conclude that a bisexual employee may harass others without fear of Title VII liability. In this instance, a harasser would be according similar treatment to both men and women. As such, instances of harassment equally offensive to both genders do not support a sexual harassment claim.

38. Id. To refute a plaintiff's claim that the behavior was unwelcome, an employer might allege that the victim participated in the incident voluntarily. Because a plaintiff may consent out of fear, however, this argument cannot constitute a complete defense to allegations of sexual harassment. The focus is on whether the complainant indicated the conduct was unwelcome, not whether she participated in it. Id.
39. Compare supra text accompanying note 19 (requiring that quid pro quo sexual harassment be based on gender) with supra text accompanying note 21 (requiring that hostile environment sexual harassment be based on gender). Interestingly, the woman filing suit need not be the target of all, or even any, of the offensive conduct if it created a hostile working environment for her. Lehmann v. Toys 'R' Us, Inc., 626 A.2d 445, 457 (N.J. 1993).
40. Id. at 454.
41. Id.; Hall v. Gus Constr. Co., 842 F.2d 1010, 1014 (8th Cir. 1988) ("Intimidation and hostility toward women because they are women can obviously result from conduct other than explicit sexual advances.").
42. See Lehmann, 501 N.W.2d at 454.
43. Likewise, a male victim of harassment must establish that he was harassed because he was a man.
44. See, e.g., Rabidue v. Osceola Refining Co., 805 F.2d 611, 620 (6th Cir. 1986) ("[I]nstances of complained of conduct that prove equally offensive to male and female workers would not support a Title VII sexual harassment charge . . . ."), cert. denied, 481 U.S. 1041 (1987); Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982); see also Anja A. Chan, Women and Sexual Harassment: A Practical Guide to the Legal Protections of Title VII and the Hostile Environment Claim 9-10 (1994); Charles R. Calleros, The Meaning of "Sex": Homosexual and Bisexual Harassment Under Title VII, 20 Vt. L. Rev. 55, 79 (1995) ("[T]ruly bisexual harassment is not disparate treatment prohibited by Title VII."). The question of whether bisexual harassment should fall under Title VII is beyond the scope of this Note. For an argument suggesting that both bisexual and homosexual harassment should be actionable, see McFarland, supra note 13, at 541-42.
45. Rabidue, 805 F.2d at 620.
4. Employer Liability

The EEOC Guidelines on Discrimination Because of Sex\(^46\) delineate the level of employer liability appropriate where the harasser is a supervisor, another employee, and even a non-employee outside party.\(^47\) An employer is liable for harassment by an employee's supervisor or an agent of the employer regardless of whether the employer knew or should have known that the harassment was occurring.\(^48\) Supervisors "trigger strict liability in the sense that they have been cloaked with the employer's authority and act as its alter ego."\(^49\)

The same level of strict respondeat superior liability, however, does not extend to cases where another non-supervisory employee or a non-employee is the harasser. In those cases, an employer is liable for harassment by another employee or a non-employee only if it knew or should have known of the harassment.\(^50\) Courts will review the level of control that the employer had over the behavior of any non-employee to determine whether liability should be imputed to the employer.\(^51\) An employer can escape liability where either another non-supervisory employee or non-employee harasses an employee if the employer can show that it acted immediately to correct the situation.\(^52\)

C. Unique Elements of the Quid Pro Quo and Hostile Environment Claims

As demonstrated above, a quid pro quo plaintiff and a hostile environment plaintiff share four burdens of proof, including establishing that they are a member of a protected class, that the offensive conduct was unwelcome, that they were targeted because of their gender, and that their employer is liable for the harassment.\(^53\) At this point, however, the two strands diverge. Quid pro quo and hostile environment harassment differ in their formulations of what conduct constitutes harassment, and in what damages a plaintiff must prove to recover. This section examines the unique elements of both the quid pro quo and hostile environment sexual harassment strands.

---


\(^47\) EEOC Guidelines, supra note 46, § 1604.11(a)-(e).

\(^48\) Id. § 1604.11(c).


\(^50\) EEOC Guidelines, supra note 46, § 1604.11(d)-(e).

\(^51\) Id. § 1604.11(e).

\(^52\) Id. § 1604.11(d)-(e).

\(^53\) See supra part I.B.
1. Quid Pro Quo Claims

The central issue commonly litigated in quid pro quo claims is whether the harasser used the complainant's conduct as a basis for determining any element of her employment. It is sufficient for the plaintiff to show that the harasser made job benefits contingent on her acceptance or rejection of his advances. Traditionally, the plaintiff must also establish economic loss as a result of the harassment.

2. Hostile Environment Claims

To be actionable under the hostile environment strand, the harassment must affect a term or condition of employment, and not all harassment meets this requirement. The Supreme Court has held that the harassment must be so severe that it alters the plaintiff's employment, creating an abusive working environment. The damage caused to the plaintiff, however, need not be both economic and psychological for her to recover. For example, if the harassment detracts from her job performance, or interferes with a promotion, it is not necessary that the harassment also affect the plaintiff's psychological well-being.

The EEOC has advised courts to examine the "totality of the circumstances" when deciding whether an environment is legally hostile. The Supreme Court has delineated several factors that courts should consider in evaluating harassment, including the frequency and severity of the harassment, whether the behavior is of a threatening or humiliating nature, and the extent to which the conduct interferes

54. See, e.g., Karibian v. Columbia Univ., 14 F.3d 773, 777 (2d Cir. 1994) ("[T]o establish a prima facie case of quid pro quo harassment, a plaintiff must present evidence that she was subject to unwelcome sexual conduct, and that her reaction to that conduct was then used as the basis for decisions affecting the compensation, terms, conditions or privileges of her employment." (emphasis omitted)), cert. denied, 512 U.S. 1213 (1994).

55. Id. The plaintiff from whom the supervisor requests sexual favors, however, is not the only one who may sue. The EEOC Guidelines indicate that other employees who were qualified for, but denied, a benefit because it was conferred on another employee who was acquiescing to the harasser's requests may also sue the employer. EEOC Guidelines, supra note 46, § 1604.11(g); see, e.g., King v. Palmer, 778 F.2d 878, 882 (D.C. Cir. 1985) (finding a basis for a discrimination claim where an employee was passed over for promotion because of her supervisor's relationship with a fellow employee). This employee has a cause of action under Title VII because the harassment directly affects the passed-over employee's employment as well.

58. Id.

59. Id. at 64 ("[T]he language of Title VII is not limited to 'economic' or 'tangible' discrimination.").
61. EEOC Guidelines, supra note 46, § 1604.11(b).
SEXUAL HARASSMENT DISPUTES

62. Harris, 510 U.S. at 23. In some jurisdictions, a woman may show that other women have been harassed to demonstrate the severity of her working conditions. See, e.g., Lehmann v. Toys 'R' Us, Inc., 626 A.2d 445, 457 (N.J. 1993). Courts allowing such evidence indicate that it is directly relevant in establishing both the nature of the workplace and its effects on a particular plaintiff. Id.; see also Vinson v. Taylor, 753 F.2d 141, 146. (D.C. Cir. 1985). This is especially true because a woman could sue even if she was not the direct target of the conduct. See, e.g., EEOC Guidelines, supra note 46, § 1604.11(g) (indicating that when employment benefits are inappropriately granted to an employee because she accepted sexual favors, employees qualified for, but denied, those benefits also suffer sexual harassment); see also supra note 39 (indicating that a plaintiff may have a Title VII claim even if she is not the direct target of the harassment). Courts forbidding such testimony hold that, while it may be relevant in a class action, it is not revealing in an individual lawsuit on the question of how harassment has affected a particular plaintiff. Jones v. Flagship Int'l, 793 F.2d 714, 721 n.7 (5th Cir. 1986), cert. denied, 479 U.S. 1065 (1987).


64. Radtke v. Everett, 501 N.W.2d 155, 158-59 (Mich. 1993) (finding a prima facie claim for sexual harassment based on a hostile environment where a doctor-supervisor harassed a veterinary technician during a weekend shift while working alone with her).

65. Ross v. Double Diamond, Inc., 672 F. Supp. 261, 264-65 (N.D. Tex. 1987) (detailing pattern of harassment, including that plaintiff's boss asked within her first hour on the job whether she "fooled around," called her extension asking her to pant heavily, and that salesmen in her office placed a camera under plaintiff Ross and took a photograph up her dress).


67. Id. at 161 & n.15.

68. Id.

69. Id.
tives, one researcher estimated the cost of sexual harassment for a Fortune 500 company to be $6.7 million annually in the form of reduced productivity, absenteeism, employee turnover, and the use of internal complaint procedures. Remarkably, this figure did not consider litigation costs, including attorneys' fees or damages paid by a company to any successful claimants. These costly expenses of litigation would raise the estimate astronomically. This $6.7 million figure breaks down to a cost of $282.53 per employee per year for each Fortune 500 company. Minimal preventative efforts, on the other hand, cost merely $8.41 per employee.

Society also suffers as a consequence of sexual harassment; sexual harassment "results in the creation of a female job ghetto in which a large segment of the work force remains transient or abused in the job market." Society, like an employer, is also hurt economically when business productivity is undermined. The costs of sexual harassment are overwhelming to all parties involved. The next section provides an introduction to those parties who bear the significant costs of the harassment.

E. The Actors in a Sexual Harassment Incident and Their Interests in Resolving the Dispute

Any alleged incident of sexual harassment revolves around three primary actors: the employee, the employer, and the accused harasser. The alleged victim, or complainant, is likely to be a woman with low income and little power. Harassment disproportionately targets women working in predominantly male environments and women who have been employed for fifteen years or less. While women of limited means and, by inference, limited education are more likely to be harassed, women with higher educational levels are more likely to report the harassment.

71. See id.
72. Id. at 214.
73. Id.
75. Riger, supra note 6, at 198. When the victim is a member of a racial minority, several courts allow "evidence of racial hostility [to] be aggregated with evidence of sexual hostility in determining the extent to which the environment is hostile to the plaintiff." Stingley v. Arizona, 796 F. Supp. 424, 428 (D. Ariz. 1992); see also Hicks v. Gates Rubber Co., 833 F.2d 1406, 1416 (10th Cir. 1987) (allowing racial and sexual harassment to be considered together when evaluating hostile environment). One scholar laments that there have been too few attempts to determine whether a woman's race or ethnicity makes her a more likely target of harassment. Skaine, supra note 32, at 182.
76. Bornstein, supra note 9, at 1-50.
77. Skaine, supra note 32, at 180 (indicating that women with college degrees were overrepresented in the reporting rate, even though most victims "are in the lower positions of occupational and educational structure").
In the experience of one ombudsman involved with over 6000 sexual harassment victims, over seventy-five percent of victims express serious concern about some form of retaliatory or adverse consequences flowing from their complaint. They are often worried not only about disapproval from co-workers and supervisors, but also about the complaint straining their personal relationships at home. Over fifty percent of victims appear very distressed, and they are concerned about appearing oversensitive or even childish. Many victims even blame themselves for the harassment.

Further, victims are not eager to take cases to court. In fact, although uncomfortable about involving a third party, most victims feel that they are unable to rectify the situation on their own. A majority of victims make clear that they do not want to lose control over their complaint. It is very important to the complainants to "have the chance to custom-design an approach to their concerns." Most victims are primarily interested in ending the harassment, rather than punitive or disciplinary remedies. They want assurance that the conduct will not recur so they can quickly return to work. Some victims are also interested in a resolution that helps ensure that someone else will not suffer harassment within their workplace.

Employers’ foremost aim, in contrast, is to maintain a productive and harmonious workforce. Employers want to avoid negative publicity and desire a fast, inexpensive end to any complaint of sexual harassment. They want to provide their employees with, and be perceived by their employees as providing, a “credible forum” for resolving workplace disputes. Providing an appropriate dispute resolution process may also satisfy the employer’s legal responsibility to effectively and promptly respond to a complaint.

---

78. Rowe, supra note 3, at 164.
79. Id.
80. Id. at 165-66.
81. Howard Gadlin, Careful Maneuvers: Mediating Sexual Harassment, 7 Negotiation J. 139, 144 (1991). In this sense, unfortunately, they are not alone in placing the blame with themselves, as “[s]ociety has blamed women for letting [the harassment] happen.” Skaine, supra note 32, at 182.
82. See Rowe, supra note 3, at 165.
83. Id.
84. Id. at 162.
85. Id. at 165.
86. Gadlin, supra note 81, at 146.
87. Id. at 145.
88. Costello, supra note 4, at 16.
89. Id. at 16-17.
90. Id. at 17.
91. Andrea Williams, AAA’s Sexual Harassment Claims Resolution Process, 20 Colo. Law. 1217, 1217 (1993); see, e.g., Lehmann v. Toys ‘R’ Us, Inc., 626 A.2d 445, 463 (N.J. 1993) (“[T]he existence of effective preventative mechanisms provides some evidence of due care on the part of the employer.”).
The accused harasser/employee also has an interest in how the dispute will be resolved. Because sexual harassment primarily stems from relative power imbalances within the workplace, the accused harasser is overwhelmingly likely to be male. Specifically, men with low self-esteem and entrenched traditional values demonstrate a propensity to harass. The harasser needs to know what specific behavior caused offense and will likely appreciate the chance to explain his behavior to the victim. Because harassers may be unaware that their conduct was offensive, much less unlawful, some accused are interested in a forum where they can express remorse and will not be treated as stereotypical harassers.

Like the victim, the accused harasser would like to return to work as quickly as possible, after a confidential resolution. Confidentiality is important to the accused because he is concerned about his reputation and afraid of the possible repercussions on his relationships with others at work. Unlike the victim, however, the accused is not prone to self-blame. On the contrary, the accused is likely to blame the victim for his position in this dispute. Overall, the accused would like a voice in the resolution process.

A successful dispute resolution process, then, must reconcile the often conflicting interests of the complainant, the employer, and harasser. In addition, the fact-intensive nature of the typical sexual harassment complaint requires a flexible dispute resolution method capable of assessing the complexities of each unique case. The next part of this Note illustrates why litigation and arbitration do not meet the needs of the parties. Ultimately, mediation is offered as the solution that best reconciles the parties' concerns.

II. Litigation and Arbitration: Current Methods of Resolving Harassment Disputes

Litigation and arbitration are currently the most common fora for resolving harassment disputes. From 1986 through 1987, more than 10,000 employment discrimination cases were filed in federal and state
In fact, employee litigation had been characterized as "one of the 'growth industries' of the 1980s." The following part assesses the shortcomings of both litigation and arbitration as dispute resolution mechanisms for sexual harassment disputes.

A. Litigation

The Supreme Court of New Jersey has noted that "courtrooms are not the best place to prevent or remedy a hostile work environment." Even if the plaintiff is successful at trial, the damage caused to her relationships with her co-workers cannot be repaired. Male workers may resent changes in behavior required in the workplace that are a result of a judicial order rather than being initiated by the employer.

Furthermore, a court judgment lacks instructive value for employers, and ultimately only succeeds in labeling as sexual harassment the particular incident in question in the litigation. Court opinions fail to direct employers to specific changes that they should make in the workplace; the opinions neither guide employers toward legally sound determinations of acceptable conduct, nor do they instruct employers how to educate employees about corporate antidiscrimination policies. In addition, these court judgments do not involve the employer in effectuating change in the workplace.

While courts may provide somewhat primitive justice, they are adjudicating claims increasingly more often. Moreover, while the average nationwide award for sexual harassment is $38,500, the amounts of the high-end awards are rising. In 1988, for example, the largest settlement in a corporate sexual harassment suit was $200,000. By 1991, it was more than $500,000.

Furthermore, the

103. Id.
105. Id. (citing Abrams, supra note 33, at 1215).
106. Id. (citing Abrams, supra note 33, at 1216).
107. "Judgments—and even opinions—in sexual harassment cases give employers only an anecdotal notion of what behavior is unacceptable, and otherwise fail to direct employers toward more satisfactory behavior." Abrams, supra note 33, at 1216.
108. Id.
109. Id.
110. See supra note 103 and accompanying text.
113. Id.
Civil Rights Act of 1991 increased potential jury awards for both compensatory and punitive damages.\textsuperscript{114}

What a judgment offers a harassment plaintiff is simple: money. Courts may award a successful plaintiff compensatory damages, punitive damages, and equitable relief in the form of reinstatement, back pay, or attorney fees.\textsuperscript{115} Thus, litigation attempts to convert the feelings of complainants into dollars.\textsuperscript{116} A judgment, however, is unlikely to compensate the plaintiff for the economic investment, psychological stress, and notoriety she incurs during the course of trial.\textsuperscript{117}

Indeed, these awards may be adequate for some Title VII sexual harassment claims. A sexual harassment plaintiff, however, may have a significant number of other legal grounds on which to bring suit. A plaintiff may have grounds to bring claims for racial harassment, constructive discharge, retaliatory discharge, wrongful termination in violation of public policy, negligent supervision, breach of covenant of good faith and fair dealing, intentional or negligent infliction of emotional distress, defamation, assault, battery, or rape, among other bases.\textsuperscript{118}

Once a plaintiff has chosen to file a Title VII suit, she will find that the trial process is very difficult for harassment victims. The employee is, in some sense, “on trial to determine if he or she ‘deserved’ to be harassed.”\textsuperscript{119} Being harassed is emotionally distressing, but replaying it in front of a judge or jury in public may be even more traumatizing.\textsuperscript{120} Discovery often compels a victim to reveal “raw” emotional wounds that are “close to the surface.”\textsuperscript{121} Further, a victim may be forced to reveal private and personal information during the course of a litigation.\textsuperscript{122} The Supreme Court held in \textit{Meritor Savings Bank v. Vinson}\textsuperscript{123} that courts may consider an alleged victim’s past sexual behavior, including her dress and sexual fantasies, in making a determin-

\textsuperscript{115} Chan, \textit{supra} note 44, at 25-26.
\textsuperscript{117} Riger, \textit{supra} note 6, at 208.
\textsuperscript{118} Chan, \textit{supra} note 44, at 30-31.
\textsuperscript{119} Cohen, \textit{supra} note 9, at 687. While this may help the court draw the line between acceptable personal relationships and unlawful behavior, \textit{see supra} text accompanying notes 9-10, it could be “an invitation to attempt to discredit genuine victims of sexual harassment.” Cohen, \textit{supra} note 9, at 687.
\textsuperscript{120} Margaret J. Grover, \textit{Mediation of Sexual Harassment Claims}, in ABA Tort and Insurance Practice Section Practice Tips 55, 55 (1995), \textit{available in WESTLAW, 24-SPG Brief} 55.
\textsuperscript{121} Winograd, \textit{supra} note 114, at 41.
\textsuperscript{122} \textit{See} Grover, \textit{supra} note 120, at 55.
\textsuperscript{123} 477 U.S. 57 (1986).
nation of sexual harassment. There is no rape shield law that would prevent a lawyer from asking about these issues at trial. Defense lawyers have asked prior sexual harassment complainants about their past sexual experiences, incidences of childhood molestations, abortions, and venereal disease. In one case, a reporter in New Mexico filed a sexual harassment complaint and, at trial, opposing counsel produced gynecological records from her university and evidence of discussions with her therapist. These discussions detailed many of her early sexual experiences, including the fact that she had been raped as a teenager.

Even in cases where the litigation is confined to the incident of the alleged harassment itself, sexual harassment claims often come down to the word of the complainant against the word of the alleged harasser. In all likelihood, no witnesses were present during the alleged incident of harassment. If both the complainant and the accused are equally credible, judges and arbitrators will find for the harasser. Further, the trial process tends to lend more credibility to a more aggressive, articulate speaker; a male harasser is more likely than a female complainant to speak in this style. While plaintiffs

---

124. *Id.* at 69.
125. *Id.* at 69.
129. Stephen M. Crow & Clifford M. Koen, *Sexual Harassment: New Challenge for Labor Arbitrators?*, Arb. J., June 1992, at 6, 8. Precisely because the unique situation of sexual harassment leaves a plaintiff without other extrinsic evidence of the events, she will often find it nearly impossible to prove that the harassment occurred. “[T]he difficulties associated with proving one’s claim probably have a chilling effect on the willingness of a sexual harassment victim to file a grievance.” *Id.*

Many women have a “powerless” speaking style that makes them less credible as witnesses than those using a “powerful” style. Research shows that the “powerless” use “hedges” (like “I think”), “hesitation forms” (words like
traditionally have an advantage over an employer in a jury trial, the litigation process is in some ways unfavorable toward a complainant.

The traditional plaintiff, the direct object of the harassment, is not necessarily the only employee with a cause of action for sexual harassment. Because employees other than those at whom the conduct is directed may sue, a sufficiently offensive environment could invite suits from every woman in the workplace. In these cases, litigation may not be an attractive option to the employer because the chances for success are low. If an employer will almost certainly be held liable after trial, it is in the employer's best interest to settle early rather than investing in litigation.

Even when an employer chooses to litigate, he can never be sure that a sexual harassment claim has been completely resolved. Because the employees may be able to bring subsequent claims on various legal bases, some uncertainty surrounds the final resolution of any sexual harassment dispute. After a plaintiff has unsuccessfully sued under Title VII, for instance, she may still bring a viable claim, if not barred by the statute of limitations, for battery or negligence. If dismissed, the harasser might also have a cause of action challenging the dismissal. Federal employees, for example, may appeal adverse employment decisions, such as dismissals as a result of sexual harassment, to the Merit Systems Protection Board. Ultimately, decisions of the Merit Systems Protection Board may also be appealed in fed-

---

"um"), "polite forms" (such as "sir"), and "question intonation" (declaring something with "rising intonation so as to convey uncertainty.") The research study showed:

[W]itnesses of low social status—the poor and uneducated—were most likely to use this style of testimony. Female witnesses used the style more frequently than men. . . . Those witnesses in the taped trials whose social status in court was higher—for example, well-educated, white collar men and expert witnesses of both sexes—tended to use a style that exhibited relatively few features of the powerless style.

Id. (quoting John M. Conley et al., The Power of Language: Presentations Style in the Courtroom, 1978 Duke L.J. 1375, 1380-81, 1386). But see Deborah Tannen, You Just Don't Understand: Women and Men in Conversation 225 (1990) ("If a linguistic strategy is used by a woman, it is seen as powerless; if it is done by a man, it is seen as powerful. Often, the labeling of 'women's language' as 'powerless language' reflects the view of women's behavior through the lens of men's.").

131. See infra note 187 and accompanying text.

132. For example, in a quid pro quo case, a qualified woman who was denied benefits because they were conferred on someone in a sexual relationship with the boss could sue. See supra note 55 and accompanying text. Similarly, in a hostile environment case, a plaintiff need not be the direct target of the illegal conduct to be afforded a legal remedy. See supra note 39.

133. Cohen, supra note 9, at 685.

134. See supra note 118 and accompanying text.

135. 5 U.S.C. § 7701(a) (1994) ("An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation.").
eral court.\textsuperscript{136} Many collective bargaining agreements also grant similar challenge power to employees.\textsuperscript{137} If an employer dismisses a harasser employee, that employee could challenge the termination. If the employer takes no action, the victim could sue under Title VII or file another related claim. Thus, an employer may be vulnerable to additional legal suits filed by either the victimized employee or the alleged harasser, even after the first litigation is completed.

In most cases, litigation is an unattractive choice for the victim, the harasser, and the employer. While the victim does have an advantage at trial, to capitalize on her advantage she must endure a psychologically grueling trial where her personal affairs will become a matter of public record. The harasser will suffer damage to relationships with his coworkers as a result of the public proceedings in which he was not necessarily permitted to participate. Whether the employer pays a handsome award or wins at trial, he can never be sure that he will not be summoned to appear in court again to defend a claim based on the very same incident. As a result, litigation is largely ineffective at resolving sexual harassment disputes.

B. Arbitration

Alternative Dispute Resolution, or “ADR,” as it is commonly known, refers to alternatives to trial. Arbitration is one of the most common ADR methods. ADR has been endorsed by numerous legislative provisions, including the Civil Justice Reform Act of 1990\textsuperscript{138} and the now-expired Administrative Dispute Resolution Act of 1990.\textsuperscript{139} Indeed, the Federal Rules of Civil Procedure empower judges to promote alternatives to trial during pretrial conferences.\textsuperscript{140}

ADR options within the workplace can be either “internal” or “external.”\textsuperscript{141} Common external procedures in the employment context include negotiation,\textsuperscript{142} mediation,\textsuperscript{143} arbitration,\textsuperscript{144} and mini-trial.\textsuperscript{145}

\textsuperscript{136} Id. § 7703(a)(1) (“Any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision.”).

\textsuperscript{137} Cohen, \textit{supra} note 9, at 686.


\textsuperscript{139} 5 U.S.C. §§ 571-583 (1994).

\textsuperscript{140} Fed. R. Civ. P. 16(c)(9).

\textsuperscript{141} Charles P. O’Connor & Anita W. Coupe, \textit{Employment ADR: There Is More Than Meets the Eye}, Metropolitan Corp. Couns., Aug. 1995, at 10. External procedures traditionally involve third parties, such as arbitrators or mediators, while internal procedures happen within the company without the assistance of a third party. \textit{See id.}

\textsuperscript{142} Negotiation has been characterized as “the mainstay of dispute resolution.” Containing Legal Costs: ADR Strategies for Corporations, Law Firms, and Government 10 (Erika S. Fine ed., 1988) [hereinafter Containing Legal Costs].

\textsuperscript{143} \textit{See infra} note 168 and accompanying text.

\textsuperscript{144} \textit{See infra} note 147 and accompanying text.

\textsuperscript{145} The mini-trial is defined as an “abbreviated case presentation[ ] made by counsel to principals from each side and, if desired, a neutral advisor of the parties’ choos-
The internal procedures available include fact finding,\textsuperscript{146} negotiation, and peer review.

Arbitration is a dispute resolution method where “a neutral third party (arbitrator) renders a decision after a hearing at which both parties have an opportunity to be heard.”\textsuperscript{147} Binding arbitration comprises a part of almost every collective bargaining agreement that unions negotiate,\textsuperscript{148} and is instrumental in the resolution of many types of workplace disputes. The use of arbitration in the workplace is increasingly more popular because of its ability to “present viable solutions for dealing with problems which are peculiar to the workplace.”\textsuperscript{149} Arbitration is useful in cases where employment strife in the form of imminent labor strikes can be averted without lengthy litigation.

However, because all arbitration awards can be reviewed by courts, arbitration is not final or binding.\textsuperscript{150} Historically, mandatory arbitration clauses in workplace manuals produced a wealth of litigation as to their enforceability.\textsuperscript{151} The Court in \textit{Gilmer v. Interstate/Johnson Lane Corp.},\textsuperscript{152} however, upheld the enforceability of a mandatory arbitration clause, which foreclosed the plaintiff from filing an age discrimination suit.\textsuperscript{153} Presumably, the same outcome would result in a Title VII sexual harassment case, so long as the plaintiff was not duped into signing the contract.\textsuperscript{154} Interestingly, the EEOC cautions against mandatory arbitration clauses in Title VII cases, advising that arbitrating . . . Afterwards, the [parties] meet on their own to negotiate settlement.”

\textsuperscript{146} In fact-finding, a neutral third party with expertise in the substantive legal area (i.e., sexual harassment) reviews the case and evaluates dispute facts. \textit{Id.} at 9-10.

\textsuperscript{147} Black’s Law Dictionary 70 (abr. 6th ed. 1991). Arbitration is “the most rigid and often the least satisfactory method[] of conflict resolution for the participants.” Jay Folberg & Alison Taylor, \textit{Mediation} 26 (1984).


\textsuperscript{150} See Vern E. Hauck, \textit{Introduction to Arbitrating Sexual Harassment Cases} 1-1, 1-3 (Vern E. Hauck ed., 1995).


\textsuperscript{153} \textit{Id.} at 33.

\textsuperscript{154} The Ninth Circuit refused to compel arbitration in a sexual harassment case, however, where the plaintiff was not given enough information about the arbitration clause of the contract. Prudential Ins. Co. of Am. v. Lai, 42 F.3d 1299, 1305 (9th Cir. 1994), \textit{cert. denied}, 115 S. Ct. 61 (1995). “[A] Title VII plaintiff may only be forced to forego her statutory remedies and arbitrate her claims if she has knowingly agreed to submit such disputes to arbitration.” \textit{Id.}
 tion should only be appropriate when the parties agreed to arbitrate after the claim arose.\textsuperscript{155}

The process of arbitration weighs in favor of the employer.\textsuperscript{156} First, claims against supervisors are unlikely to fall within a mandatory arbitration clause in the labor context because supervisors are not normally part of the bargaining unit.\textsuperscript{157} Even if arbitration is offered under a given collective bargaining agreement, therefore, a plaintiff who is harassed by her supervisor will be unable to avail herself of the arbitration option. In addition, the arbitrator pool is largely lacking in any gender or racial diversity; the panel of arbitrators that is likely available for a sexual harassment claim is ninety-seven percent white, with eighty-nine percent of the panel comprised of highly educated males with an average age of over sixty years old.\textsuperscript{158} Finally, because a minimal number of arbitration decisions are published,\textsuperscript{159} it is difficult for employers with mandatory arbitration clauses to discern illegal conduct.\textsuperscript{160}

The employer is often interested in retaining a working relationship with the accused harasser; if internal policy forces the employer to discharge an employee, and the discharge is later upheld in arbitration, the relationship between the harasser and the employer will be severed. Harassers, however, are not always discharged by arbitrators. In fact, arbitrators often prefer a corrective discipline, somewhere short of discharge,\textsuperscript{161} in the hopes that the relationships between the parties could continue. "Unfortunately, corrective discipline is not always successful. Arbitral awards that are unsuccessful in rehabilitating sexual harassers thwart the public policy against sexual harassment by placing an employee in the workplace who will continue to sexually harass others."\textsuperscript{162}

\begin{footnotes}
\item 155. Panken et al., \textit{supra} note 148, at 80.
\item 156. \textit{See infra} note 187 and accompanying text.
\item 157. Hauck, \textit{supra} note 150, at 1-21.
\item 159. Hauck, \textit{supra} note 150, at 1-21 ("Published labor arbitration awards represent a small portion of the total number of grievances dealing with sexual harassment arbitrated each year . . . ").
\item 160. Some generalizations about sexual harassment in the arbitration context can be drawn, and this information is useful in helping parties to a harassment dispute evaluate the viability of the claim. For instance, arbitrators consistently uphold discharges of harassers where there has been physical touching of any kind, including a kiss on the cheek. William A. Nowlin, \textit{Sexual Harassment in the Workplace: How Arbitrators Rule}, 43 Arb. J. 31, 38 (1988). In general, the harasser will be discharged by an arbitrator when the harassment was excessive, when it occurred without remorse, when it affected the working environment, or when it tarnished the company's public image. Hauck, \textit{supra} note 130, at 1-22.
\item 162. \textit{Id.} at 1383.
\end{footnotes}
Once an arbitrator has issued an award, parties may still end up in court. Courts can review arbitration awards, and those who do must balance two competing policies: the public policy against sexual harassment, and the judicial policy favoring the finality of arbitration awards. Any weighing of public policy invites challenges by parties unhappy with the arbitrator’s decision. As one commentator notes, “[t]he longer a labor relations dispute is allowed to go on, the greater the risk of hostility, mistrust, and disaffection.” Arbitration is ill-suited for sexual harassment disputes because it lacks both the flexibility of negotiation and the safeguards of litigation. The next part offers mediation as the most effective and efficient forum for resolving most sexual harassment disputes.

III. THE PROCESS OF MEDIATION

Mediation may be the best choice for resolving most sexual harassment disputes. To be effective, a resolution system must ultimately meet the majority of the concerns of all parties. Mediation is able to reconcile the widely differing concerns of the actors in a case of sexual harassment. The next section begins by introducing mediation, and then explains why it is uniquely suited for the sexual harassment arena.

A. Definition of Mediation

Mediation, defined as “the use of a third-party neutral to intervene between two parties who are in conflict,” is a highly flexible dispute
resolution method. Mediation seeks to reach an agreement about future conduct, not to place blame with one party or the other.\textsuperscript{169} Mediation explores the legal and non-legal issues and, more importantly, the options for resolving them.\textsuperscript{170} Although the process of mediation is flexible and can be modified at any time prior to, or even during, the mediation session, the following is a representative sampling of the various procedural aspects of the mediation session.

The mediator\textsuperscript{171} traditionally begins with an initial joint session, where all parties are present, during which the mediator introduces both himself and the process.\textsuperscript{172} The parties then give opening statements without interruption by the other parties to give the mediator an overview of the dispute.\textsuperscript{173} The mediator proceeds to meet with each party separately. During these meetings or “caucuses,” the mediator works with the parties to define the central issues through the use of open-ended questions.\textsuperscript{174} The mediator focuses on developing the trust of the parties during these caucus sessions.\textsuperscript{175} Once the issues are identified, the primary goal is to generate options for resolving the dispute.\textsuperscript{176} These proposed resolutions become the focus of the mediation as the parties, through the mediator, evaluate those options and negotiate an acceptable solution.\textsuperscript{177} Traditionally, the mediator or a party then drafts the solution into a written contract signed by both parties, which is the culmination of a successful mediation.\textsuperscript{178}

B. Mediation Is the Most Appropriate Method for Resolving Most Sexual Harassment Disputes

The primary reason to choose mediation is because, put simply, it works. In general, mediation resolves the conflict in question an esti-
mated eighty-five percent of the time. Countless attorneys have endorsed mediation as particularly appropriate in sexual harassment cases. The EEOC itself instituted a pilot ADR program in 1992 employing voluntary mediation as a means to resolve various discrimination disputes. The program had an ultimate success rate of more than fifty percent, with ninety-two percent of the parties rating the mediation process as "very fair" or "fair." The remedies varied from cash settlement and changes in employment status to apologies.

Because of its flexibility, mediation works especially well when sensitivity to emotional issues is required, as in cases of sexual harassment. Mediation, because it is ultimately guided by the concerns of the parties, is responsive to the factual pattern in any given case. As such, mediation is appropriate for resolving disputes involving either quid pro quo or hostile environment sexual harassment.


181. Id. at 1150.

182. Id. at 1151.

183. Id.


185. The adversarial approach of traditional litigation, on the other hand, is "uniquely unsuited to resolving these claims . . . [because it] has difficulty in appreciating the gradations along the sexual harassment continuum." Williams, supra note 116, at 68.
The choice of the forum for a sexual harassment case can be absolutely critical to its outcome. While the employer typically has an edge over the victim in arbitration, the victim tends to be more successful in a trial where she can present her case to a jury. Mediation, in contrast to either of these options, is a forum without a predisposition to either party. Ultimately, the use of mediation results in less resentment between the parties, as well as less emotional and financial involvement.

The actual process of mediation also makes it a more desirable dispute resolver than arbitration for sexual harassment plaintiffs. In a recent study, 77% of the claimants who mediated their disputes were satisfied with the process, compared with only 45% of those whose disputes went to arbitration. This greater satisfaction is not surprising in light of the amount of control that complainants are able to exercise over the mediation process compared to the much lesser degree of control they have in an arbitration. For these reasons, complainants should be eager to exercise their right to mediation.

Allowing the mediator flexibility in guiding the process of the mediation session enables him to help the parties reach a resolution. The mediator may offer himself as a scapegoat during a joint session, for example, by suggesting a ridiculous resolution to the controversy. In response, the parties can begin a fruitful pattern of agreement by uniting to reject the mediator's proposal. The mediator may also find it useful to give the parties control over certain elements of the mediation procedures, such as the timing, that are not crucial to the mediation but are points on which the parties can begin to agree. The timing of a mediation session, for example, is an unlikely source of conflict between the parties, because the entire mediation process is often completed in a day or less. In fact, the rapid resolution of mediation makes it particularly appealing when compared to the often time-consuming choices of arbitration and litigation.

In addition to the ability to control the mediation process, parties have a greater opportunity to exercise control over the solution to

186. Sedmak, supra note 151, at C-3.
187. Id.
190. See infra part V.D. While the mediator has discretion in structuring a mediation, there is no preset course that the mediation must take. As such, parties are in the position to make procedural requests of the mediator.
193. Grover, supra note 120, at 56.
their own dispute in mediation than in any other dispute resolution method.\textsuperscript{194} In both arbitration and litigation, an arbitrator or judge has the final and only say over the resolution of the dispute.\textsuperscript{195} Mediation is a distinctly different process of dispute resolution from litigation and arbitration; it is not a compressed, informal trial. The primary goal in mediation is to reach an agreement about the future conduct or relationships between the parties, not to assign blame for the alleged incident of harassment.\textsuperscript{196}

This focus on the future cannot be overemphasized in cases of sexual harassment. Both the complainant and the alleged harasser may be interested in continuing their employment, and the employer is likely to be interested in a continuing relationship with one or both of the employees. In these circumstances, mediation is the best dispute resolution method because the financial costs are shared by the parties, giving them a greater personal stake in the process and its outcome.\textsuperscript{197}

Further, mediation may preserve the quality of any continuing relationship because the parties are centrally involved in crafting the final agreement. Each party to a mediation, in contrast to parties of other dispute resolution methods, is more likely to perceive the ultimate outcome as "fair."\textsuperscript{198} As a result, if and when the parties return to the workplace, the workplace relationships have suffered less damage than if a "winner" and a "loser" had been declared, as in an arbitration or at trial.

Within the workplace, employers have an interest in encouraging the reporting of incidents of sexual harassment, out of concern for both their employees and the productivity of the company, and because it is their legal obligation to maintain a workplace free from discrimination.\textsuperscript{199} Internal grievance procedures, and particularly the mediation procedure detailed below,\textsuperscript{200} can help shield employers from legal liability when an employee sues on a sexual harassment

\begin{footnotes}
\begin{enumerate}
\item[195.] Because both judges and arbitrators render decisions the parties are bound by law or contract to accept, the parties have no influence over the specific terms of the remedy granted.
\item[196.] Folberg & Taylor, \textit{supra} note 147, at 8 ("Mediation is more concerned with how the parties will resolve the conflict and create a plan than with personal histories.").
\item[197.] Grover, \textit{supra} note 120, at 55-56.
\item[198.] Conti, \textit{supra} note 168, at 302. Additionally, mediation should be preferred because even if an employee would otherwise have wanted to remain in the workplace, the acrimonious nature of litigation and arbitration may sever the relationship between the parties, making continued employment impossible.
\item[199.] See \textit{supra} note 91 and accompanying text.
\item[200.] See \textit{infra} part IV.B.
\end{enumerate}
\end{footnotes}
claim.\textsuperscript{201} This is especially true in cases where the employee chooses not to utilize the internal procedures that the employer offered.\textsuperscript{202}

Of the available internal options, mediation is the better choice for a complainant, as it will provide a greater opportunity for her to be heard. Mediation is also highly flexible as to timing, scope, and format. The mediator should structure the mediation in such a way that the parties feel they have a chance to tell their side of the story.\textsuperscript{203} This allows parties to "vent" about the emotional issues that are common in sexual harassment disputes\textsuperscript{204} in a way that is not possible within the rigid confines of litigation. Because both parties are interested in telling their version of the events—regardless of whether their story is legally relevant—mediation is often very effective at defusing volatile situations.\textsuperscript{205} In contrast, a trial rarely allows the parties an opportunity to be heard without being rushed by their counsel or opposing counsel.\textsuperscript{206}

While one writer expressed hesitation in endorsing mediation in cases of sexual harassment, noting the potential discrepancies in power between the complainant employee and the employer,\textsuperscript{207} at least one feminist legal scholar has indicated that there is no evidence that a litigator, in comparison to a mediator, can better help a woman overcome any power imbalance.\textsuperscript{208} The mediator can structure the mediation to account for any power imbalances between the parties. This is, in fact, the mediator's job—to neutralize power imbalances.\textsuperscript{209} The mediator may choose, for example, to suspend the initial joint meeting so that the parties are not forced to meet face-to-face at the outset of the mediation. In fact, the mediator may not require that the

\begin{itemize}
\item\textsuperscript{201} Amy Holzman, Note, Denial of Attorney's Fees for Claims of Sexual Harassment Resolved Through Informal Dispute Resolution: A Shield for Employers, A Sword Against Women, 63 Fordham L. Rev. 245, 248-50 (1994). "[A] company can do much to . . . avoid liability for hostile environment sexual harassment if it can show that . . . it has promulgated a company policy against sexual harassment that encourages employees to notify the company of any such claim . . . ." John L. Valentino, An Effective Employer Response to Complaints of Sexual Harassment, N.Y. St. B.J., Mar.-Apr. 1996, at 36, 37-38. Having a dispute resolution process in place can also help an employer avoid suits by the accused "claiming damages arising from the charges made against [him]." Williams, supra note 26, at 1218; see also Lehmann v. Toys 'R' Us, Inc., 626 A.2d 445, 463 (N.J. 1993) (holding that preventative measures can be evidence of "due care").
\item\textsuperscript{202} Holzman, supra note 201, at 250.
\item\textsuperscript{203} See Grover, supra note 120, at 56.
\item\textsuperscript{204} See id.; Hoenig, supra note 184, at 53.
\item\textsuperscript{205} See Ettingoff & Powell, supra note 179, at 1160.
\item\textsuperscript{206} Aswad, supra note 5, at A-9.
\item\textsuperscript{207} See Irvine, supra note 23, at 50.
\item\textsuperscript{208} Janet Rifkin, Mediation from a Feminist Perspective: Promise and Problems, 2 J.L. & Inequality 21, 30 (1984).
\item\textsuperscript{209} Mediation Can Work Well Adjudicating Sex Harassment Claims, ABA Panel Says, supra note 180, at D-9. ("Mediation seeks to neutralize the power that one party has over the other and to put both parties in a position to negotiate.").
\end{itemize}
parties ever negotiate face-to-face because of the sensitivity of issues in a sexual harassment dispute.210

The same critic of mediation has argued that victims should avoid mediation because it "risks trivializing the seriousness of sexual harassment."211 Under this view, mediation does not do enough to set appropriate standards for workplace conduct because the level of public discipline that harassers receive is somehow a "reflection" of women's progress in the workplace.212 Mediation, however, does no more damage than pre-trial settlements or arbitrations with unpublished decisions. In addition, the court opinions that result from litigation are similarly criticized because they often fail to set real standards for employers.213 This argument also implies that an individual victim desiring a private resolution of her complaint should choose litigation to preserve the uniformity of sexual harassment law. No one would advocate litigation for a tort plaintiff who wanted to settle, however, and there is no compelling reason why a sexual harassment complainant should be treated any differently.214

Mediation expands the potential for alternative resolutions for complainants seeking relief that is not solely monetary.215 The outcomes in mediation can range from an agreed-upon cash settlement amount to more individualized solutions. Indeed, "[i]n mediation, the remedies are limited only by the imagination and willingness of the parties, their counsel, and the mediator."216 Arbitrators, like judges, are unlikely to offer such nontraditional remedies.217 In mediating sexual harassment claims, the parties can explore solutions such as the fol-

210. See Gadlin, supra note 81, at 149; Grover, supra note 120, at 55; Thomas F. Levak, Sexual Harassment in the Workplace: The Alternative Dispute Resolution (ADR) Option, 12 LERC Monograph Ser. 33, 35 (1993), available in WESTLAW, 12 LERCMS 33.
211. Irvine, supra note 23, at 28.
212. Id.
213. See supra notes 107-09 and accompanying text.
214. While sexual harassment is indeed a different cause of action than a garden variety tort action, neither potential plaintiff should be forced to litigate. Sexual harassment plaintiffs have already been victimized because of their gender, and complainants should not be forced to subordinate their choice of an alternative dispute resolution method to contribute to a body of sexual harassment law. This is particularly so in light of court opinions' failure to educate the workplace and its inhabitants about what conduct is illegal. See supra notes 107-09 and accompanying text. Ironically, the author advancing the argument against mediation quotes the following in support of the proposition that women should litigate: "'[F]orcing unwilling women to take part in a process which involves much personal exposure sends a powerful social message: it is permissible to discount the real experience of women in the service of someone else's idea of what will be good for them . . . or good for the system.'" Irvine, supra note 23, at 50 (quoting Trina Grillo, The Mediation Alternative: Process Dangers for Women, 100 Yale L.J. 1545, 1607 (1991)). This is, however, precisely why women should not be forced to litigate their sexual harassment claims.
215. See infra part V.H.
216. Costello, supra note 4, at 21.
217. Levak, supra note 210, at 34.
lowing: education rather than punishment;\textsuperscript{218} transfers, retraining, counseling, back pay;\textsuperscript{219} disciplining of the offender, separation of offender and victim, office-wide training, updated complaint processes;\textsuperscript{220} letters of reference, or job modifications.\textsuperscript{221}

A personal apology can also function as a remedy in a sexual harassment case. An acknowledgment of the offensiveness of the harasser’s conduct from the harasser himself\textsuperscript{222} helps relieve the victim of her feelings of self-doubt.\textsuperscript{223} The harasser also benefits from the opportunity mediation provides to truly understand the position of the person he has offended, and to offer a sincere apology.\textsuperscript{224} Apologizing can often go a long way in defusing the difficult emotional issues in a sexual harassment case so that the parties can focus on the future relationships. Litigation and arbitration never offer this opportunity to the parties.

Unlike mediation, litigation focuses too much on what a claim is worth, reducing every claim to a dollar amount.\textsuperscript{225} The solutions reached in mediation, in contrast to those imposed by judges in a litigation setting, are more likely to endure and be respected by the parties.\textsuperscript{226} This is certainly a result of the input the parties had in shaping the resolution to best fit their needs. Consider, for example, an employer who agrees through mediation to pay a complainant employee $X in damages and to revise the complaint procedure in the workplace. The employer is unlikely to resent the terms of the agreement he helped design. The complainant employee is also more likely to view the employer as willing to remedy the situation, rather than simply accepting the determination forced upon him by the court.

The employer also benefits from mediation’s remedy scheme, especially when the alternative is litigation. Litigation is often unsatisfactory to the employer because it is an “all or nothing” dispute resolution method.\textsuperscript{227} Methods of alternative dispute resolution, such

\textsuperscript{218} Gadlin, \textit{supra} note 81, at 145-46.
\textsuperscript{219} Levak, \textit{supra} note 210, at 34-35.
\textsuperscript{220} Grover, \textit{supra} note 120, at 57.
\textsuperscript{221} Williams, \textit{supra} note 91, at 1219.
\textsuperscript{222} Winograd, \textit{supra} note 114, at 41 (“For some victims, the need to hear an acknowledgment that conduct was offensive, coupled with an apology for the uninvited action, will be a necessary precondition for the negotiation and acceptance of more traditional forms of relief.”); \textit{see also} Williams, \textit{supra} note 116, at 73 (suggesting “letters of apology” as a creative remedy in sexual harassment mediations).
\textsuperscript{223} Winograd, \textit{supra} note 114, at 43.
\textsuperscript{224} \textit{See} Hoenig, \textit{supra} note 184, at 51.
\textsuperscript{225} Grover, \textit{supra} note 120, at 57. This is not to imply that women should not be financially compensated for any injuries they suffer as a result of workplace sexual harassment, but merely that money may not be the only, or perhaps even the foremost, remedy in which employees are interested.
\textsuperscript{226} \textit{Id.} at 56-57.
\textsuperscript{227} Levak, \textit{supra} note 210, at 33.
as mediation, eliminate the possibility of a highly inflated jury verdict.\textsuperscript{228}

Overall, mediation is an excellent dispute resolver for a company put off by the exorbitant legal costs of taking every incident of alleged sexual harassment to trial.\textsuperscript{229} The number of employment claims is skyrocketing\textsuperscript{230} and, along with it, the number of women in the workplace is rising as well. Women are projected to comprise nearly half the workforce by the year 2000.\textsuperscript{231} Timely mediation can save over 80\% of the court and counsel costs of litigation.\textsuperscript{232} Mediation is the least expensive and the least disruptive dispute resolution method available.\textsuperscript{233} The fast resolution improves employee relationships and guarantees fewer lost employee hours.\textsuperscript{234} In addition, in house counsel, rather than outside counsel, can handle the employer's case, reducing expenses for attorney's fees.\textsuperscript{235}

The complainant employee also saves money by choosing mediation. She will often get a settlement before she can accrue much in attorney's fees.\textsuperscript{236} Further, she avoids the trouble of securing representation to litigate. For a blue-collar worker, a $2500 or $5000 retainer essentially constitutes a bar to any representation.\textsuperscript{237} Many attorneys will not take a plaintiff's sexual harassment case in any event, and certainly not on a contingency basis.\textsuperscript{238} Plaintiffs' attorneys know the case will require an inordinate time commitment to compete with what will likely be a higher-financed defense by the employer.\textsuperscript{239}

Mediation is a cost-effective, time-efficient solution that allows all the parties to participate in the formulation of an acceptable result to the conflict. Unlike the options of arbitration and litigation, mediation allows the parties to exercise greater control over the remedy of the dispute. For these reasons, employers should integrate mediation into their dispute resolution policies and encourage employees to mediate any sexual harassment disputes that arise. The next part offers a

\begin{thebibliography}{99}
\bibitem{229} \textit{See} Meredith, \textit{supra} note 2, at 62.
\bibitem{233} Grover, \textit{supra} note 120, at 55-56.
\bibitem{234} \textit{Id.} at 56.
\bibitem{235} Jeanne C. Miller, \textit{ADR in Employment Matters, in How to Use Alternative Dispute Resolution to Your Advantage}, \textit{supra} note 188, at 163.
\bibitem{236} \textit{Id.}
\bibitem{237} Howard, \textit{supra} note 158, at 289.
\bibitem{238} Costello, \textit{supra} note 4, at 19; Howard, \textit{supra} note 158, at 288.
\bibitem{239} Costello, \textit{supra} note 4, at 19.
\end{thebibliography}
sample mediation provision that should be part of an employer’s dispute resolution policy.

IV. Contractual Mediation for Sexual Harassment Claims

Evaluating dispute resolution procedures after a dispute has arisen is not effective for an employer. As the EEOC guides, “[p]revention is the best tool for the elimination of sexual harassment.”240 This part outlines a general sexual harassment policy and focuses on the role of mediation within that policy by offering a sample mediation clause for inclusion in an employment contract or employee handbook.

A. Sexual Harassment Policy, Generally

Every company’s larger policy targeting sexual harassment should provide for mediation of any disputes that arise. To be successful, a corporation’s policy should “increas[e] the reporting rate and decreas[e] the actual incidence [of sexual harassment].”241 For the policy to be effective, it should: (a) be in writing; (b) be given to all employees; (c) make clear that sexual harassment of any kind will absolutely not be tolerated; (d) provide a clear definition of sexual harassment, complete with examples of behavior that would be unacceptable under the regulations; (e) provide for education and training programs; (f) indicate the appropriate procedure for filing a complaint; (g) indicate procedures for resolving the complaint, including any appeals procedures open to employees; (h) reassure that complainants will not be retaliated against for filing such a complaint; (i) indicate that all claims will be investigated; and (j) note that all meritorious claims will be appropriately remedied.242 A mediation clause would comprise only a small part of a company’s complete sexual harassment policy, falling here under part (g), the appropriate procedures for resolution of the complaint. While mediation would be but one element of such a policy, it is a crucial one. Once a dispute has arisen, in spite of the educative elements of the policy, the dispute resolution choice is of paramount importance.

The EEOC has indicated that an effective ADR program, such as a mediation clause, must focus on voluntariness, confidentiality, and neutrality.243 What follows is a suggested sample mediation provi-

---

240. EEOC Guidelines, supra note 46, § 1604.11(f).
sion, addressing these central considerations, as well as the mediation's structure, costs, and settlement options.244

B. Proposed Contractual Provision for Mediation

I. Proposal of Mediation

1. Any party to an alleged incident of sexual harassment may initiate mediation at such time the party becomes aware there is an alleged incident of sexual harassment. A party is defined for purposes of this provision as a complainant employee, an alleged harasser, or the employer. The party initiating the mediation must give written notice to all parties to the mediation, including the alleged victim, the alleged harasser, and the employer.

2. This notice must indicate that a response, either accepting or declining mediation, must be given within 14 days. Any party wishing not to mediate must waive, in writing, his or her right to mediation. Any party filing an EEOC complaint or Title VII suit will have, by filing, constructively waived their right to mediate.

3. Neither this document nor an agreement to mediate waives any substantive legal right or responsibility of any party. By choosing to mediate, no party is at any time waiving his or her right to file suit in court, go to arbitration, or file an EEOC complaint.

II. The Mediation Process

1. The mediation sessions will aim to reach an agreement about the future conduct and relationship of the parties. The mediator's role is to facilitate agreement; the mediator is not a judge or an arbitrator and does not "rule" on the merits of this case. The power to resolve the dispute resides solely with the parties, not the mediator. Before beginning the mediation session, all parties must read the description of the mediation process accompanying this policy,245 and must acknowledge in writing that they have read the description.

244. Several authorities were used as guidance in the drafting of this provision, including: Model Standards of Conduct for Mediators §§ 1, 2, 4, 5 (American Arbitration Association et al., 1994); Containing Legal Costs, supra note 142, at 51; A Drafter's Guide to Alternative Dispute Resolution 72-73 (Bruce E. Meyerson & Corinne Cooper, eds., 1991); Resolving Employment Disputes: A Manual on Drafting Procedures, 2, 10 (American Arbitration Association, 1993); Howard J. Aibel & George H. Friedman, Drafting Dispute Resolution Clauses in Complex Business Transactions, Disp. Resol. J., Jan.-Mar. 1996, at 17; Levak, supra note 210, at 34-35; Anthony J. Mercorella, Alternative Dispute Resolution—Expediting Cost Efficient Resolution of Claims, in How to Use Alternative Dispute Resolution to Your Advantage, supra note 188, at 17-19; David M. Shacter, To Litigate or Not?—Time for A.D.R., 28 Beverly Hills B.J. 30, 33 (1994).

245. The description would define mediation, explain the logistics of the process, and would largely mirror the discussion in supra part III.A.
2. The mediator has complete control over the procedures used during the sessions, including, but not limited to, the frequency and duration of caucusing, the use of the initial joint session, and the scheduling of the sessions.

3. The choice to participate in mediation is voluntary. Any party may terminate the mediation at any time for any reason, by giving written notice of the termination to the mediator and to each of the other parties to the mediation. Filing an EEOC complaint or Title VII suit will be considered termination for purposes of this policy.

4. The mediation sessions are confidential. Neither the mediator nor any party to the mediation may disclose to anyone any information about or from the mediation process. Each party and the mediator shall sign a confidentiality agreement prior to the commencement of the first mediation session.

5. All parties shall attend the mediation sessions and make a good faith effort to mediate.

6. At least one of the individuals present on behalf of each party must have the authority to settle the dispute.

7. Each party to the mediation is both allowed and encouraged to bring counsel to the mediation sessions. Counsel shall function, however, as advisors rather than advocates.

8. The parties’ remedies are not limited to cash settlements. The exploration of other potential remedies is strongly encouraged.

III. Selection of a Mediator

1. The mediator must be:
   (a) neutral and impartial;
   (b) knowledgeable in the area of sexual harassment; and
   (c) certified by an organization that requires:
       (i) supervised training in the mediation process; and
       (ii) adherence of the mediator to standards of conduct.246

2. The mediator shall immediately disclose any potential conflict of interest to all parties.

3. An organization qualified to certify mediators as per III.1(c) shall provide a list of three suggested mediators who meet the qualifications in Section III.1 above. If the parties agree on any of the suggested mediators, that person will be the mediator. Alternatively, any party to the mediation may suggest another

246. See, e.g., Model Standards of Conduct for Mediators, supra note 244. These standards were drafted by representatives from the American Arbitration Association, the American Bar Association, and the Society of Professionals in Dispute Resolution. Id. “The model standards of conduct for mediators are intended to perform three major functions: to serve as a guide for the conduct of mediators; to inform the mediating parties; and to promote public confidence in mediation as a process for resolving disputes.” Id. at 1.
mediator who meets the qualifications in Section III.1., but all
the other parties must agree to that person being the mediator.

4. If the parties cannot agree on a mediator within 14 days after
mediation has been initiated, the organization supplying the
mediator will suggest one appropriate mediator. No party may
then object to the suggested mediator unless the mediator has a
conflict of interest.

5. The mediation shall commence within 21 days from the date on
which the mediator was chosen.

IV. Costs

1. The cost of the mediator will be split as follows: The employer
is responsible for 90% of the mediator's fees, and the complain-
ant employee is responsible for 10%. Inability of the employee
to pay the 10% will not, however, prevent a complainant em-
ployee from pursuing mediation. In such cases, the employer
shall pay the full amount and make arrangements with the com-
plainant employee for him or her to repay some amount, up to
the 10%, on a reasonable repayment schedule. The amount to
be paid and the repayment schedule shall be set by the Human
Resources Personnel Office, or similar office of the
employer.247

2. Further, the employer shall pay the cost of counsel for the com-
plainant employee, up to and including the cost of 25 billable
hours or $3000, whichever is less. The complainant employee
shall choose his or her counsel. This counsel, if he or she is to
be paid by the employer, must be present at the mediation.

V. Settlement

1. Any settlement reached by the parties must contain a liquidated
damages clause, providing a set amount that shall be paid
should a party breach the contractual agreement.

2. Once a settlement has been reached, the mediator or counsel
for one of the parties shall draft a written settlement document
incorporating the terms of the settlement.

3. If the mediator does not draft the settlement agreement, the
mediator shall review the agreement before it is given to the
parties for signature.

4. This draft shall be given to all parties, reviewed, changed if ap-
propriate, and executed.

247. The amount and schedule of payments should: (a) be set on a sliding scale,
where the amount and schedule of payments are based on the employee's income and
(b) apply on a company-wide basis to all mediations. The scale should be determined
in advance of any dispute.
V. COMMENTARY ON THE PROPOSED MEDIATION PROVISION

The following part discusses each section of the proposed mediation provision, offering explanation of how and why the sections are effective in mediating sexual harassment disputes. Understanding the provision is crucial so that employers can make any necessary modifications to respond to the unique contours of sexual harassment problems in their workplaces.

A. Proposal of Mediation (Sections I.1, I.2, I.3)

The first section of the contractual provision gives the right to mediation to the parties involved in a sexual harassment dispute. Policies that do not offer informal dispute resolution options like mediation will likely discourage complaints. The control over the dispute that mediation offers encourages a high reporting rate for sexual harassment.

Some employers, such as large law firms, have complained they fear that too many employees will lodge sexual harassment complaints if the process is user-friendly, and may be reluctant to adopt a provision such as the one suggested here. Employers who have actually implemented such programs, however, have not experienced a flood of complaints. In addition, a low reporting level caused by an inaccessible dispute resolution system simply belies the detrimental effects that sexual harassment has on an employer's business.

Any party wishing to mediate can initiate the process by notifying the parties in writing. The other parties have two weeks after receiving the notice within which to respond. The notice requirement ensures that no party can be forced to make an immediate decision about whether to mediate. It gives parties time to evaluate the legal and factual sufficiency of the allegations and decide on a dispute resolution method.

Any party may waive its right to mediate if it does so in writing. Filing an EEOC complaint or Title VII lawsuit will also be considered a waiver of the party’s mediation rights. The provision does not absolutely require the parties to mediate because voluntary participation is crucial to the mediation’s success. In addition, because the enforce-

248. See Rowe, supra note 3, at 171.
249. Id. at 170. “[A]n employer must choose between a very high degree of complainant choice, in dealing with concerns of harassment—and having a high reporting rate—or, on the other hand, insisting on mandatory reporting to an Equal Opportunity-type office and having a lower reporting rate.” Id. at 171.
252. The explication of the legal framework for quid pro quo and hostile environment provided in parts I.A-C will aid in this determination.
253. See infra notes 263-64 and accompanying text.
ability of agreements in advance of arbitration has been the subject of considerable litigation, a provision requiring mediation would be similarly problematic. The proposed provision offers a compromise. While not requiring mediation, it does require an affirmative act by the parties to waive their mediation option. This will encourage some reflection by the parties before relinquishing their mediation rights in writing.

The provision also indicates that, by pursuing mediation, the parties to the complaint of sexual harassment do not forfeit any other rights or responsibilities. A complainant, for example, does not waive her right to pursue a formal EEOC complaint by agreeing to attempt mediation under the company's internal policy. All parties must be aware that an agreement to mediate will not preempt them from exercising any of their remaining options for resolving the dispute, such as arbitration or the filing of a formal Title VII suit. Although the high success rate of mediation makes it unlikely that the parties' conflict will ultimately require litigation or arbitration, this policy does not foreclose that option.

B. Purpose of Mediation, Generally (Section II.1)

It is imperative that the parties to a mediation understand both the ultimate goal of mediation and the role of the parties in achieving that goal. The contractual provision carefully differentiates between mediation and arbitration or litigation, which serves both to educate the parties and to focus the mediation session itself on the future rather than the past. The policy allays the parties' fears about loss of control over the resolution of the dispute. Parties ultimately retain control through the settlement they reach. The mediator has no authority to force a settlement on the parties.

Because some or all of the parties might be fundamentally unfamiliar with mediation, the policy also requires all parties to read a description of the mediation process itself. As mediation is quite

254. See Sedmak, supra note 151, at C-3.
255. See supra note 179 and accompanying text.
256. See supra note 169 and accompanying text. This is not to discount the role that discussion of past events will play in a mediation. The focus, however, should be on the resolution of those events.
257. See supra note 84 and accompanying text.
258. See, e.g., American Arbitration Association, National Rules for Resolution of Employment Disputes: Arbitration and Mediation Rules Rule 10, at 36 (1996) (hereinafter National Rules) ("The mediator does not have the authority to impose a settlement on the parties but will attempt to help them reach a satisfactory resolution of their dispute.").
259. It is in the employer's best interest to provide the best possible information about the mediation process to potential aggrieved employees, as this will likely increase the number of employees willing to mediate their claims. The provision requires that the employer provide the employee with, at a minimum, a written description of mediation. This should not discourage employers from investing in
different from litigation and arbitration, the employer must have a statement prepared defining mediation to prepare parties for the process. While the mediator may depart from the generally accepted elements of the mediation, parties should be conversant with the basic concepts.

C. Process and Timing of Mediation (Section II.2)

While the parties have absolute power over the final agreement arising out of the mediation, the mediator retains control over the process of mediation itself. The mediator cannot force a particular settlement on the parties but for the mediation to be successful the mediator must direct the procedural elements of the mediation as provided by the contractual provision. For example, under this policy, the mediator may terminate a mediation session if the parties are at an impasse. The mediator, as a neutral party, is in the best position to determine which procedures are most appropriate, fair, and likely to result in an amicable resolution.

D. Voluntariness and Control (Section II.3)

The contract reminds the parties that mediation is voluntary, and provides for a method for withdrawing from the mediation. Compelling participation undermines the benefits of a party's participation in the mediation’s outcome. Maintaining this balance of voluntariness and control over the outcome is essential for the mediation process to be most successful.

It is important to note, however, that “voluntary,” for purposes of the provision, does not mean strictly voluntary.

To say that there may be strong pressures to cooperate is not to say that there is no voluntariness. We all make choices that are not autonomous but that we are free to reject. It is in this sense that mediation is voluntary; it relies both on coercive external pressures and on an individual’s decision to participate.

For the purposes of the contract, therefore, voluntary means “not mandatory.” The provision also allows for a mechanism permitting parties to withdraw from the mediation. This gives meaning to the voluntariness language by allowing withdrawal provided it is commu-

---

260. See supra note 210 and accompanying text.
261. See supra note 258 and accompanying text.
262. See, e.g., National Rules, supra note 258, Rule 10, at 37. ("The mediator is authorized to end the mediation whenever, in the judgment of the mediator, further efforts at mediation would not contribute to a resolution of the dispute between the parties.").
263. See Conti, supra note 168, at 298 & n.19.
nicated to the other parties in writing. Filing an EEOC complaint or a Title VII lawsuit will also be considered a termination for purposes of the contract. Thus, the provision does not compel participation by an uninterested party.

One limited instance where one of the parties may want to refuse its right to mediate or withdraw from the mediation occurs when it becomes clear that the other side's case is completely without merit and a motion in court could dispose of the complaint.\textsuperscript{265} This is one of the rare instances where litigation, because it would be so truncated, might be more economically efficient than mediation.\textsuperscript{266} In these rare instances, the policy allows the parties to terminate the mediation.

\section*{E. Confidentiality and Privacy (Section II.4)}

All parties to the mediation, including the mediator, are required to sign a confidentiality agreement stipulating that the mediation sessions are entirely confidential. The EEOC advises that any dispute resolution method chosen for sexual harassment cases should encourage confidentiality.\textsuperscript{267} "There is general agreement that the success of mediation is dependent upon an expectation of privacy and confidentiality."\textsuperscript{268} All parties to the mediation, including the employer, the complainant employee, and the alleged harasser, will have privacy concerns surrounding the mediation. The employer, for instance, will likely be worried about the negative publicity,\textsuperscript{269} while the employees will be concerned about their reputations, both at the office and in the community at large.\textsuperscript{270} For this reason, mediation is an especially appropriate forum when "there is some possibility that each party may have engaged in less than ideal behavior."\textsuperscript{271}

This confidentiality requirement not only protects the public reputation of the parties, but also shields them from improper use of the mediation discussions in a future litigation, if the case were to go to trial.\textsuperscript{272} Often, the parties discuss incriminating or sensitive informa-

\textsuperscript{265} Mercorella, \textit{supra} note 244, at 18.
\textsuperscript{266} If the case were truly meritless, there would be no reason to negotiate because the party defending against a meritless position would, as expected, have no reason to bargain.
\textsuperscript{267} Sex Discrimination, \textit{supra} note 4, at D-29.
\textsuperscript{268} Folberg & Taylor, \textit{supra} note 147, at 264.
\textsuperscript{269} Grover, \textit{supra} note 120, at 55; Ettingoff & Powell, \textit{supra} note 179, at 1142-43 (discussing the negative publicity for Baker & McKenzie flowing from the firm's loss of a multi-million dollar sexual harassment case); \textit{supra} note 89 and accompanying text.
\textsuperscript{270} \textit{See supra} notes 79 & 98 and accompanying text.
\textsuperscript{271} Ettingoff & Powell, \textit{supra} note 179, at 1160.
\textsuperscript{272} Folberg & Taylor, \textit{supra} note 147, at 271 ("A court would not necessarily be bound to honor this private contract, though it may be persuaded by public policy considerations to do so."). One court has gone so far in support of confidentiality, however, as to imply an unwritten confidentiality provision into a mediation. \textit{See} NLRB v. Macaluso, 104 L.R.R.M. (BNA) 2097, 2099-100 (9th Cir. 1980).
tion in the mediation sessions in the hopes of reaching a final agree-
ment. Without a confidentiality clause, the parties would be less likely
to offer potentially helpful information during the course of the med-
iation because the other party could use it against them in subsequent
litigation or arbitration.273

F. Good Faith Efforts to Negotiate (Sections II.5, II.6)

Sections II.5, II.6, and II.7 reinforce the role of the parties in the
mediation process. The dispute is unlikely to be resolved unless the
parties make a commitment to mediate in good faith.274 The pres-
ence of a representative capable of settling for each party at the medi-
atation is also required to ensure that the parties do not negotiate in
vain.275 For the employee parties, including the alleged harasser and
the victim of harassment, they will have the authority to settle these
claims. Section II.6 ensures that the representative sent on behalf of
the employer has the requisite authority to settle the claim when the
parties arrive at a resolution. These stipulations help ensure that
there are no barriers to the mediation, either psychological or logisti-
cal, that would frustrate its purpose.

G. Function of Counsel (Section II.7)

If the employee is represented by counsel, the power imbalances
inherent in a conflict between an employer and employee, such as
those present in a sexual harassment dispute, can begin to be re-
dressed.276 Further, employers will almost always have counsel pres-
et at the mediation,277 and the presence of counsel for the employee
helps to bolster the employee’s bargaining power and begins to bring
her into parity with the employer.278 The contractual provision en-
courages all parties to bring representation to the mediation.

An imbalance of power can also exist between the complainant em-
ployee and the accused harasser. This disparity may be based on a
combination of “personality, strategic position, tactical position, and
gender.”279 The harasser is unlikely to be disadvantaged during the

274. “It is . . . essential that all parties approach the mediation with open minds and
good faith. To begin with, the employee should be sincere in asserting the grievance.”
Conti, supra note 168, at 297. This provision is also meant to protect against situa-
tions where one party is agreeing to mediate as a pretext for siphoning information
from the other party that could influence litigation strategies. Conduct like this would
violate the contract.
275. Shacter, supra note 244, at 33. “There is nothing more frustrating than spend-
ing several hours at the table helping the parties to embrace a more realistic view of
their case that will allow them to settle, only to find that the person with authority
either is not there or has to leave.” Id.
276. Holzman, supra note 201, at 255.
277. Id.
278. Id.
279. Irvine, supra note 23, at 37.
mediation because the goal of both the harasser and the employer, who is represented by counsel, is largely the same: to avoid liability for the alleged harassment. The power imbalances of the employer and harasser combine to create an especially disadvantageous situation for an unrepresented victim.

These potential disparities in power make counsel for the victim a practical necessity. Victim's counsel can help the accused harasser understand the harassment situation from the victim's point of view. Counsel for the victim, as well as for the employer, however, must act in an advisory, not adversarial capacity. An adversarial approach to the mediation on behalf of counsel for one of the parties can destroy the spirit of compromise that characterizes a successful mediation. Attorneys should advise their client as to the viability of the claim, and review any proposed settlements. Although the attorneys will not be acting in their traditional, adversarial role, their presence is important "[b]ecause an informed and educated client has a much higher success rate in mediation."

Although it might be argued that presence of counsel cannot help overcome these power imbalances sufficiently in a mediation session, there is no evidence that litigation helps to better overcome the imbalance of power. In fact, at least one scholar argues that, even without counsel, there is no reason that a litigator can better "help" a client transcend the power imbalance than a mediator. Representation of the victim by counsel will help even the playing field for all parties so that they can reach a successful resolution.

H. Remedies (Section II.8)

The policy invites the parties to consider non-monetary settlements, or combinations of monetary and injunctive relief. Part of what makes mediation an attractive alternative to litigation or arbitration is the spectrum of settlements open for consideration, and this provision directs parties to avail themselves of this benefit.

---

280. See Ross, supra note 128, at 1454.
281. See Gadlin, supra note 81, at 149-50.
282. Id. at 149.
283. Elaine A. Wohlner & John A. Rymers, Civil Mediation: Where, When and Why It Is Effective, 24 Colo. Law. 2161, 2162 (1995). "The mediation process is successful only when controlled by the parties and not by the mediator or legal counsel." Id.
284. Id.
285. Id.
286. Gadlin, supra note 81, at 151.
287. Rifkin, supra note 208, at 30. In addition, a survey of women in past sexual harassment mediations indicates that many women have felt that the mediation process itself altered the power aspects of the controversy in their favor. Deborah G. Goolsby, Note, Using Mediation in Cases of Simple Rape, 47 Wash. & Lee L. Rev. 1183, 1212 (1990).
288. See supra notes 215-26 and accompanying text.
I. Selection of a Mediator (Section III)

The choice of the mediator is of paramount importance in the mediation, often serving as the decisive factor to the mediation's success. As such, the contractual provision devotes significant attention to the selection of the mediator. The contract requires first that the mediator be "neutral and impartial." While all mediators will bring internal biases to the mediation, an effective mediator works toward impartiality, avoiding any conduct indicative of partiality. A good mediator is inclusive, and can communicate with a wide variety of individuals regardless of their gender, economic status, race, or other characteristics. Overcoming internal biases to build the trust of the parties in a sexual harassment dispute can be a serious challenge for the mediator, as "mediators must seek to build trust—and more trust—in an environment customarily viewed as male-dominated and formalistic." As such, it is often a good idea to select a mediator with significant experience dealing with situations involving an abuse of power, which is a key element of a sexual harassment dispute. Overall, the goal of the mediator is to level the playing field so that even the un-represented or under-represented claimant can participate in the mediation and reach a fair agreement.

It is also important that the mediator be familiar with the substantive law in the area of sexual harassment. Ultimately, mediators "ought to value intrinsic merits above advocacy skills." The mediator may be able to facilitate an agreement by conveying potential bad news about the possibilities of success in court to one or both parties. Some working knowledge of sexual harassment law will be necessary for the mediator to make such a judgment call. In this way, too, the parties can get something from mediation that they cannot get from a jury trial: a mediator/expert, who is more qualified to evaluate the legal sufficiency of a harassment claim than is a lay jury.

289. Shacter, supra note 244, at 31.
290. Rifkin, supra note 208, at 26. “[T]he mediator inevitably brings to the process, deliberately or not, certain ideas, knowledge, and assumptions.” Id.
291. Model Standards of Conduct for Mediators, supra note 244, § II cmt. 1 (“A mediator shall avoid conduct that gives the appearance of partiality toward one of the parties. The quality of the mediation process is enhanced when the parties have confidence in the impartiality of the mediator.”).
293. Winograd, supra note 114, at 40.
295. Id.
296. The earlier the parties can determine the merits of their respective cases, the more likely a settlement will be reached, and “this process is accelerated through the use of a mediator.” Aswad, supra note 5, at A-9.
297. Ettingoff & Powell, supra note 179, at 1143-44.
The third mediator qualification requires certification by some ADR organization. This certification is necessary to ensure that an organized body is reviewing the conduct of the chosen mediator. Furthermore, the organization will provide that the mediator is formally trained. Such an organization must require that the mediator agree to abide by a code of ethics, such as the Model Standards of Conduct for Mediators.

The contract requires the ADR organization who certifies the mediators to make a list of appropriate mediators available for review by the parties. If the parties can agree on one of the mediators on this list, that person will mediate the dispute. Otherwise, any party can then make alternative suggestions, provided the proposed mediator meets the qualifications in the provisions. The other parties must then agree on the suggested mediator. Because one of the principal benefits of mediation is its ability to save time, the parties have fourteen days to agree on the mediator. After that time, the organization from which they are drawing the mediator will suggest an appropriate candidate, and the parties can only strike the suggestion for bias.

Absent from the suggested contractual provision is a designation of the mediator’s gender. Similarly, the American Arbitration Association does not require the mediator of a sexual harassment dispute to be of a particular gender. Although there have been arguments made against allowing men to mediate sexual harassment cases, this position is largely based on a gender stereotype, namely that men are incapable of understanding what a “reasonable woman” would find offensive in the workplace. Any mediator must maintain gender neutrality in much the same way he might be required to maintain racial neutrality in a mediation regarding racial discrimination. Just as a male judge can be an appropriate adjudicator in sexual harassment litigation, a man can be an effective mediator in such a case.

298. Wohlner & Rymers, supra note 283, at 2164 n.16.
299. Model Standards of Conduct for Mediators, supra note 244.
300. A Model Sexual Harassment Claim Resolution Process § V(B) (American Arbitration Association 1994) (providing that the mediator may be of either gender).
301. For example:
   In some instances, male mediators may find themselves at a loss for words, if not understanding, in dealing with the passions that have brought the disputants into conflict. In other instances, men may wonder if they, too, have offended others, perhaps unintentionally, thereby jeopardizing or questioning their own neutrality.
Winograd, supra note 114, at 40.
302. Indeed, one might well argue that if gender standards like the “reasonable woman” standard run the risk of entrenching negative gender stereotypes, see supra note 35 and accompanying text, so too does a refusal to allow men to mediate sexual harassment cases. In addition, it is curious that special criticism is reserved for male mediators, who cannot force a settlement on the parties, but critics make no mention of male arbitrators or judges, whose rulings—presumably also reflecting their internal biases—are final and binding.
303. Winograd, supra note 114, at 41.
In response to the argument against men mediating sexual harassment cases, some scholars have suggested the use of a two-person, bi-gender mediation team.\textsuperscript{304} This co-mediation solution, however, also has its drawbacks. Most importantly, the presence of two mediators can alter the dynamics of the mediation sessions.\textsuperscript{305} If the mediators are unaccustomed to working together, the division of labor may be unclear to both the mediators and the parties.\textsuperscript{306} Further, both the harasser and the employee, usually being of different sexes, might feel prejudiced by a mediator of the opposite sex when two mediators are present.\textsuperscript{307} If accurate, this suggests that each party in a mediation presided over by a bi-gender panel would somehow feel a connection with the mediator of their gender. Rather than focusing on reaching agreement with the other party, the parties might focus their energy on convincing the "partial," same-sex audience of the merits in their position. This would create an awkward triangulation where each party seeks to "win" one mediator. Further, co-mediation has the added shortcoming of doubling the cost of the mediation session, when reduced expense is one of the reasons mediation is so desirable as a dispute resolver. For these reasons, the gender of the mediator is unspecified by the provisions.

J. Costs (Sections IV.1, IV.2)

The contractual provisions attempt to balance the economic concerns of the employer and employee. They require that the employer and employee divide the cost of mediation.\textsuperscript{308} Otherwise, if the employer pays the entire cost, it seems the mediation is "owned" by the employer.\textsuperscript{309} On the other hand, if the mediation option was free, no victim could claim that money kept her from pursuing the mediation course to resolve her dispute. As such, the provision provides for a payment plan if the victim is unable to pay the 10% up front. If both

\textsuperscript{304} Id.; Grover, supra note 120, at 55; Levak, supra note 210, at 35.

\textsuperscript{305} Folberg & Taylor, supra note 147, at 144-46.

\textsuperscript{306} This lack of control on behalf of the mediators is problematic. Politeness or deference may create a hesitancy to intercede or to cover a point that appears to be in the other mediator's territory. Important points may slip through the mediation team like a tennis ball landing between new doubles partners. One mediator may fail to read the other's clues. The other, failing to see where the discussion is heading, may interrupt or divert the mediation.

\textsuperscript{307} Levak, supra note 210, at 34. Indeed, the requirement of a bi-gender panel implies that a single mediator of either gender would be incapable of mediating sexual harassment cases. If the parties did not feel a prejudice prior to the mediation, the very fact that both genders must be represented on the mediation panel might well give parties needless cause for alarm.

\textsuperscript{308} See Prototype Agreement on Job Bias Dispute Resolution, 91 Daily Lab. Rep. (BNA) E-12 (May 11, 1995) ("Impartiality is best assured by the parties sharing the fees and expenses of the mediator and arbitrator.").

\textsuperscript{309} Denenberg & Denenberg, supra note 294, at 50.
parties contribute something to the mediation process, both feel as if they have invested something in it, thus increasing its likelihood of success.\textsuperscript{310} In the end, the most each party has risked is the cost of the mediation session and some nominal attorney’s fees.\textsuperscript{311}

The second provision in Section IV requires that the employer provide the employee with counsel. In a litigation, the employer would be responsible for the attorney’s fees of a successful claimant employee.\textsuperscript{312} Because the presence of counsel for the victim goes so far in compensating for the inherent power imbalances in a sexual harassment dispute\textsuperscript{313} and facilitates a better agreement, it is in the employer’s best interest to provide counsel to its employees. The contract allows the employee to choose the counsel, allowing her further latitude in sculpting the mediation process. Although this does require a further cost to the employer, the cost is greatly outweighed by the eventual savings that can result from a successful mediation.

K. Settlement (Sections V.1, V.2, V.3, V.4)

The contract requires that any settlement agreement upon which the parties agree must contain a liquidated damages clause. The aim in mediating the sexual harassment dispute is to avoid unnecessary litigation. Thus, agreeing on a liquidated damages amount reduces the possibility that the parties will enter into litigation regarding the settlement agreement itself. Settlement agreements should also explain the remedies as specifically as possible, so that there is no confusion over the responsibilities of each party under the contract.

Once the parties have reached an agreement, either the mediator or one of the parties will be designated to memorialize the agreement. If a party other than the mediator drafts the agreement, the mediator must review the draft to ensure that it comports with what the parties agreed upon during the mediation. A written draft should be circulated to all the parties, reviewed, changed if necessary, and executed. The provision provides that the draft can be amended if, for whatever reason, the draft does not accurately reflect the settlement agreed upon during the mediation. The executed settlement agreement is binding on all parties.

Conclusion

When sexual harassment pervades a workplace, no one wins; the employer loses money in employee hours and may be exposed to legal liability, and the victim suffers the harassment and often a long, ex-

\textsuperscript{310} Grover, \textit{supra} note 120, at 55-56.

\textsuperscript{311} See Miller, \textit{supra} note 235, at 163.

\textsuperscript{312} Under Title VII § 706(k), a successful sexual harassment plaintiff can recover her attorney’s fees. \textit{See generally} Holzman, \textit{supra} note 201, at 246 (exploring informal dispute resolution and subsequent recovery of attorney’s fees under Title VII).

\textsuperscript{313} \textit{See supra} part V.G.
pensive battle to obtain a remedy. Employers should integrate mediation, a partial solution to the sexual harassment problem, into their sexual harassment policies. The best time for employers to form such a policy, including a reconsideration of their workplace dispute resolution methods, is before complaints are filed.

After an incident of harassment occurs, mediation provides maximum benefits to the parties involved. All parties save time, money, and damage to their reputations. The employer is able to meet its legal obligations by providing a dispute resolution system for employees. Mediation allows the alleged harasser access to one of the few forums where he has the opportunity to respond directly to the allegations, and perhaps offer an apology. Mediation empowers the victim, with remedies available that litigation could never hope to provide.

In the end, the parties risk very little by choosing to mediate, and gain a quick and relatively amicable resolution to their conflict. This peaceful resolution is essential for sexual harassment claims where some, if not all, of the parties to the complaint will want to continue their relationship after the conflict is resolved. Mediation allows the parties to jointly fashion a remedy responsive to the unique contours of their dispute, vesting ultimate control in the parties, without barring them from pursuing other alternatives if the mediation is not successful. While mediation is not a panacea, it is the most promising and effective alternative to litigation for resolving sexual harassment disputes.