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Sexual Harassment in the Workplace: A Practitioner's Guide to Tort Actions

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SEXUAL HARASSMENT IN THE WORKPLACE: A PRACTITIONER'S GUIDE TO TORT ACTIONS

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Sexual harassment in the workplace has been a recurrent problem for women.[1] The full extent of its prevalence is still unknown[2] but all women are potential victims.[3] Sexual harassment takes many forms: it may consist of sexually suggestive language, comments about a woman worker's body, sexual slurs, or outright solicitation of sexual intercourse; it may involve unsolic-

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1. Men also may be the victims of sexual harassment and attorneys should seek legal redress for them. The goal is to eliminate sexual harassment in the workplace regardless of the sex of the victims or the perpetrators. This note discusses sexual harassment in the context of women as victims because "[t]o this point, the common denominator is that the perpetrators tend to be men, the victims women." C. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 28 (1979).

2. *Id.* at 26. It is known, however, that "[t]he sexual harassment of working women has been practiced by men since women first went to work for wages. It is a practice that until now has gone virtually unchallenged, largely as the result of a wide social acceptance of such behavior." L. FARLEY, SEXUAL SHAKEDOWN 12 (1978). In a 1975 survey of 155 women by Working Women United Institute, 70% of the women reported sexual harassment experiences. In a study of all United Nations women workers, 49% said sexual harassment currently existed on their jobs. Of 9,000 women who answered a questionnaire published in the November 1976 REDBOOK magazine, 90% reported personal incidents of sexual harassment. C. MACKINNON, *supra* note 1, at 25-26. *See also* L. FARLEY, *supra*, at 20-27. Further studies with better controls need to be made concerning the prevalence of sexual harassment. The lack of statistics in the sexual harassment area may be partially due to the fact that, as with rape, many women remain silent about the abuse out of feelings of shame and isolation. According to one source, rape is the most underreported of all serious crime. FBI, UNIFORM CRIME REPORTS 15 (1978). As with rape, only a small percentage of the actual number of sexual harassment incidents are reported. S. BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN, AND RAPE 175 (1975); L. FARLEY, *supra*, at 22. Unfortunately, "[u]ntil very recently issues analogous to sexual harassment, such as abortion, rape, and wife-beating existed at the level of an open secret in public consciousness, supporting the [equally untrue] inference that these events were infrequent as well as shameful, and branding the victim with the stigma of deviance." C. MACKINNON, *supra* note 1, at 28. "It is not surprising . . . that women would not complain of an experience for which there has been no name." *Id.* at 27.

3. Sexual harassment, "so far as is currently known, occurs across the lines of age, marital status, physical appearance, race, class, occupation, pay range, and any other factor that distinguishes women from each other." C. MACKINNON, *supra* note 1, at 28. Women attorneys are also victims. Meyers, *Behind Closed Doors*, STUDENT LAW., Nov. 1978, at 40-48.

ited touching of a woman's body or physical sexual assault. Whatever its form, almost all women report an emotional or physical reaction to the harassment. The most common emotions cited are anger and fear.[4] Many women feel guilty about and responsible for the acts of sexual harassment even though they did nothing to encourage the behavior.[5]

The individual who harasses the woman worker usually is in a position of power over her. The largest group of men who commit acts of sexual harassment is male supervisors and employers.[6] Male co-employees, however, also take part in such conduct.[7]

In the employment setting, sexual harassment takes two forms: 1) "sexual compliance [in] exchang[e] . . . for an employment opportunity;" and 2) "sexual harassment [as] a persistent *condition of work.*"[8] Supervisors and employers commit the first type of harassment when they condition job promotion, retention, and other employment benefits on the performance of sexual acts. Co-employees, as well as supervisors and employers, commit the latter type of sexual harassment when they repeatedly direct verbal comments and jokes with sexual connotations toward a woman worker or engage in the unsolicited touching of a woman worker's body. These acts inject a consistent pattern of sexual harassment into the work environment.

If the woman refuses sexual favors or attempts to stop the harassment, the man usually retaliates.[9] She may be fired or lose promotions, training opportunities, or other employment benefits. The harassment may become more severe. She may be sub-

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4. The Working Women United Institute study reveals that "[l]ike women who are raped, sexually harassed women feel humiliated, degraded, ashamed, embarrassed, and cheap, as well as angry . . . . 78% of the women reported feeling 'angry', 48% 'upset', 23% 'frightened', 7% 'indifferent', and an additional 27% mentioned feeling 'alienated', 'alone', 'helpless', or other." C. MACKINNON, *supra* note 1, at 47.

5. *Id.*

6. *Id.* at 28.

7. The Working Women United Institute study revealed that 40% [of the women who were sexual harassment victims] were harassed by a male superior, 22% by a coworker, 29% by a client, customer, or person who had no direct working relationship with them, 1% . . . were harassed by a subordinate and 8% by 'other'." *Id.*

8. *Id.* at 32.

9. *Id.* at 31-33.

jected to ridicule in front of other workers or given undesirable work assignments. Her supervisors may watch her for errors more closely than they do her co-employees.[10]

Many women eventually quit their jobs because they no longer can endure the work conditions.[11] Women who continue to work because of economic considerations, and women who are afraid to take action to stop the offensive behavior because they fear they will lose their jobs, are forced to tolerate the frequent assaults on their dignity and sense of self-worth.[12]

Despite the seriousness and pervasiveness of sexual harassment in the workplace, very few lawsuits have been initiated. In part, this is due to the silence of women who are subjected to sexual harassment.[13] The courts, also, have been slow to recognize sexual harassment as an injury entitled to legal protection except in the most aggravated situations.[14] Because the courts have recognized sexual harassment only recently, practitioners may be uncertain as to the best way to proceed when a client who has experienced sexual harassment wishes to take legal action. Tort actions appear to be an effective means for remedying the wrong, but they have not been utilized extensively. The purpose of this note is to provide legal practitioners a guide for initiating sexual harassment tort actions in California. The first part of this Note explores the basic principles of tort law which support the recognition of sexual harassment as a cause of action in tort. Intentional infliction of emotional distress, intentional interference with contractual relations, assault and battery, and fraud and deceit are discussed. These torts appear to be the ones that will be pleaded most commonly in a sexual harassment

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10. *Id.* at 35.

11. L. FARLEY, *supra* note 2, at 21-22.

12. C. MACKINNON, *supra* note 1, at 40.

13. *See* note 2 *supra.*

14. For a discussion of Title VII remedies for sexual harassment see Note, *Sexual Harassment and Title VII: The Foundation for the Elimination of Sexual Cooperation as an Employment Condition,* 76 MICH. L. REV. 1007 (1978); Comment, *Employment Discrimination-Sexual Harassment and Title VII-Female Employees' Claim Alleging Verbal and Physical Advances by a Male Supervisor Dismissed as Nonactionable—Corne v. Bausch & Lomb, Inc.,* 51 N.Y.U.L. REV. 148 (1976); Note, *Civil Rights: Sexual Advances by Male Supervisory Personnel as Actionable under Title VII of the Civil Rights Act of 1964: Corne v. Bausch & Lomb, Inc., Williams v. Saxbe,* 17 S. TEX. L.J. 409 (1976); Comment, *Title VII: Legal Protection Against Sexual Harassment,* 53 WASH. L. REV. 123 (1977).

case.

In California, the main obstacle to the commencement of a tort action is workers' compensation. If the conditions for workers' compensation are met, it is the exclusive remedy, and a tort action is not allowed. The second part of this note discusses California workers' compensation law. The discussion includes an exploration of technical ways to demonstrate that the workers' compensation requirements have not been met and that a tort action is permissible. The final section advances the argument that sexual harassment is a class of wrongs outside the contemplation of the workers' compensation system and that it is dealt with more appropriately in a tort action.

I. LEGAL ACTIONS FOR SEXUAL HARASSMENT

The courts have been slow in dealing with sexual harassment. A cause of action under Title VII of the Civil Rights Act[15] was first recognized in 1976.[16] Only a few tort and contract actions have been brought since then,[17] but sexual harassment as

15. 42 U.S.C. §§ 2000e to 2000e-17 (1976).

16. The first case to recognize a cause of action under Title VII for sexual harassment was Williams v. Saxbe, 413 F. Supp. 654 (D.D.C. 1976) *remanded on other grounds sub. nom.* Williams v. Bell, 587 F.2d 1240 (1978). Prior Title VII suits were unsuccessful in the lower courts. Tomkins v. Public Serv. Elec. & Gas Co., 422 F. Supp. 553 (C.D. Cal. 1976), *rev'd*, 568 F.2d 1044 (3d Cir. 1977); Miller v. Bank of America, 418 F. Supp. 233 (N.D. Cal. 1976) *rev'd*, 600 F.2d 211 (9th Cir. 1979); Corne v. Bausch & Lomb, Inc., 390 F. Supp. 161 (D. Ariz. 1975), *vacated* 562 F.2d 55 (9th Cir. 1977); Barnes v. Train, 13 Fair Empl. Prac. Cas. 123 (D.D.C. 1974), *rev'd sub. nom.* Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977).

17. Barnett v. Good Housekeeping Shop, No. 872876 (E.D. Mich., filed Nov. 9, 1978) (federal and state statutory violations, assault and battery, intentional infliction of emotional distress, and interference with contractual relationships); Morgheim v. Hiber & Midnight Sun Broadcasters, Inc., No. 75-9492 (Alaska Super. Ct., 3d Judicial Dist., filed Dec. 29, 1975) (breach of contract, negligence, intentional infliction of emotional distress, federal and state constitutional and statutory violations); Skousen v. Nidy, 90 Ariz. 215, 367 P.2d 248 (1962) (assault and battery); Doney v. Tambouratgis, 23 Cal. 3d 91, 587 P.2d 1160, 151 Cal. Rptr. 347 (1979) (assault and battery); Meyer v. Graphic Arts Int'l Union, 88 Cal. App. 3d 176, 151 Cal. Rptr. 597 (1979) (assault, battery, false imprisonment and rape); Gomez v. Construction & Gen. Laborers Union, Local 304, No. H-57772-6 (Cal. Super. Ct., Alameda County, filed Dec. 20, 1978) (assault, battery, intentional infliction of emotional distress, fraud and deceit, breach of contract, state statutory and constitutional violations); Monge v. Beebe Rubber, 114 N.H. 130, 316 A.2d 549 (1974) (breach of contract); Peter v. Aiken, No. L-13891-77 (N.J. Super. Ct., filed Dec. 8, 1977) (federal and state statutory violations, assault and battery, libel, and false imprisonment); Fuller v. Williames, No. A7703-04001 (Or. Cir. Ct., Multnomah County, filed Mar. 22, 1977) (tort action for intentional infliction of emotional distress, slander, and con-

"good cause" for terminating employment occasionally has been raised in the context of unemployment insurance cases.[18]

The Title VII action is the most common legal recourse for sexual harassment. The action, however, is not effective for all sexual harassment cases.[19] Title VII actions are recognized only

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tract action for breach of contract). The *Doney, Meyer,* and *Skousen* opinions did not specifically use the term sexual harassment, but the facts indicate they are sexual harassment cases. All three cases involved acts of sexual harassment committed by an employer against a woman employee in the workplace.

18. Nancy J. Fillhouer Case, No. 75-5225 (Cal. Unemp. Ins. App. Bd., May 12, 1975) (referee), *rev'd* No. 7505225 (Cal. Unemp. Ins. App. Bd., July 2, 1975); Carmita Wood Case, No. 75-92437 (N.Y. Dep't of Lab. Unemp. Ins. App. Bd., Mar. 7, 1975) (referee) *aff'd* No. 207, 958 (N.Y. Dept. of Lab., Unemp. Ins. App. Bd., Oct. 6, 1975); Hamilton v. Appleton Elec. Co., No. 7301025 (Wisc. Dep't of Indus., Lab. & Human Rel., Employee Rel. Div., Oct. 1, 1976).

19. The following Title VII sexual harassment actions have been brought: Miller v. Bank of America, 600 F.2d 211 (9th Cir. 1979) *rev'g.* 418 F. Supp. 233 (N.D. Cal. 1976); Williams v. Saxbe, 587 F.2d 1240 (D.C. Cir. 1977) *rev'g* 413 F. Supp. 654 (D.D.C. 1976); Tomkins v. Public Serv. Elec. & Gas Co., 568 F.2d 1044 (3d Cir. 1977) *rev'g* 422 F. Supp. 553 (D.N.J. 1976); Corne v. Bausch & Lomb, Inc., 562 F.2d 55 (9th Cir. 1977) *vacating* 390 F. Supp. 161 (D. Ariz. 1975); Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977) *rev'g* 183 App. D.C. 90 (D.D.C. 1977); Garber v. Saxon Bus. Prod., Inc., 552 F.2d 1032 (4th Cir. 1977); Heelan v. Johns-Manville Corp., 451 F. Supp. 1382 (D. Colo. 1978); Stringer v. Pennsylvania Dep't of Commercial Affairs, 446 F. Supp. 704 (M.D. Penn. 1978); Munford v. James T. Barnes & Co., 441 F. Supp. 459 (E.D. Mich. 1977); Elliott v. Emery Air Freight, No. C-C-75-76 (W.D.N.C. 1977).

To date the cases brought under Title VII demonstrate certain similarities which may define the limits of a cause of action under Title VII. The male employee accused of sexual harassment was the woman's superior, usually the employer or a direct supervisor. Tomkins v. Public Serv. Elec. & Gas Co., 568 F.2d at 1045; Barnes v. Costle, 561 F.2d at 989; Garber v. Saxon Bus. Prod., Inc., 552 F.2d at 1032; Heelan v. Johns-Manville Corp., 451 F. Supp. at 1390; Munford v. James T. Barnes & Co., 441 F. Supp. at 460; Miller v. Bank of America, 418 F. Supp. at 234; Williams v. Saxbe, 413 F. Supp. at 655; Corne v. Bausch & Lomb, Inc., 390 F. Supp. at 161. Usually there were repeated attempts by the woman's superior to exact sexual compliance. Barnes v. Costle, 561 F.2d at 985; Heelan v. Johns-Manville Corp., 451 F. Supp. at 1387; Munford v. James T. Barnes & Co., 441 F. Supp. at 460; Corne v. Bausch & Lomb, Inc., 390 F. Supp. at 162. Two cases involved a single incident of harassment, but the woman's rejection of the advance was followed by a series of employment repercussions. Tomkins v. Public Serv. Elec. & Gas Co., 422 F. Supp. at 555; Williams v. Saxbe, 413 F. Supp. at 655-56. The women were usually fired because of their refusal to engage in sexual favors. Tomkins v. Public Serv. Elec. & Gas Co., 568 F.2d at 1046; Barnes v. Costle, 561 F.2d at 985; Garber v. Saxon Bus. Prod., Inc., 552 F.2d at 1032; Heelan v. Johns-Manville Corp., 451 F. Supp. at 1387; Munford v. James T. Barnes & Co., 441 F. Supp. at 460; Miller v. Bank of America, 418 F. Supp. at 234; Williams v. Saxbe, 413 F. Supp. at 655. In *Corne,* the employees quit because the conditions became intolerable. 390 F. Supp. at 162. Retaliatory action seems to be a prerequisite to a Title VII cause of action. Whether a cause of action exists prior to a retaliatory action is unclear. In the successful cases, the woman usually attempted to complain about the harassment. Barnes v. Costle, 561 F.2d at 985; Heelan v. Johns-Manville Corp., 451 F. Supp. at 1389; Munford v. James T. Barnes & Co., 441 F. Supp.

when a woman is fired or loses a promotion or economic benefit that results in a wage loss.[20] A cause of action has not been recognized where the sexual harassment consists of a persistent work condition and no retaliatory action has occurred. Damages have been limited to back pay.[21] A woman, therefore, is not compensated for pain and suffering. The courts have refused to recognize a cause of action under Title VII in cases of bisexual sexual harassment.[22] Most likely the courts will not allow Title VII actions where homosexual sexual harassment has occurred.[23]

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at 460; Tomkins v. Public Serv. Elec. & Gas Co., 422 F. Supp. at 555. Many of the cases analyzed the circumstances to determine whether the acts complained of amounted to an employer policy of imposing a condition of sexual compliance on the woman worker, or the acts were merely isolated personal actions by the male harasser. Tomkins v. Public Serv. Elec. & Gas Co., 568 F.2d at 1048-49; Barnes v. Costle, 561 F.2d at 993; Garber v. Saxon Bus. Prod., Inc., 552 F.2d at 1032; Heelan v. Johns-Manville Corp., 451 F. Supp. at 1388; Williams v. Saxbe, 413 F. Supp. at 660; Corne v. Bausch & Lomb, Inc., 390 F. Supp. at 163. Recovery under Title VII was denied where the actions amounted to a personal, isolated, and unauthorized act of one employee. This is probably because Title VII holds only the employer liable. Actual or constructive knowledge of the misconduct by the employer is usually required. Tomkins v. Public Serv. Elec. & Gas Co., 568 F.2d at 1048-49; Barnes v. Costle, 561 F.2d at 993; Heelan v. Johns-Manville Corp., 451 F. Supp. at 1389. Several cases impose a duty on the employer to investigate and curtail sexual harassment. Tomkins v. Public Serv. Elec. & Gas Co., 568 F.2d at 1049; Heelan v. Johns-Manville Corp., 451 F. Supp. at 1389; Munford v. James T. Barnes & Co., 441 F. Supp. at 466.

20. *See* note 19 *supra*.

21. B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 678 (1976).

22. "In the case of the bisexual superior, the insistence upon sexual favors would not constitute gender discrimination because it would apply to male and female employees alike." Barnes v. Costle, 561 F.2d at 990 n.55.

One of the original rationales for concluding that sexual harassment was not actionable under Title VII was that sexual harassment could not be classified as sex discrimination because it was possible for an individual to harass both men and women. "It would be ludicrous to hold that the sort of activity involved here was contemplated by the Act because . . . if the conduct complained of was directed equally to males there would be no basis for suit." Corne v. Bausch & Lomb, Inc., 390 F. Supp. 161, 163 (D. Ariz. 1975) *vacated*, 562 F.2d 55 (9th Cir. 1977).

23. In the early sexual harassment cases, a cause of action under Title VII was denied because the courts found that sexual harassment was not sex discrimination. The sexual harassment was not sex-based because "gender lines might as easily have been reversed, or even not crossed at all." Tomkins v. Public Serv. Elec. & Gas Co., 422 F. Supp. 553, 556 (D.N.J. 1976) *rev'd* 568 F.2d 1044 (3d Cir. 1977). "[T]he EEOC and the courts . . . do not generally interpret sex discrimination under Title VII to prohibit loss of employment opportunities because a person is gay." C. MACKINNON, *supra* note 1, at 203-04. *See also* Norton v. Macy, 417 F.2d 1161 (D.C. Cir. 1969); Scott v. Macy, 402 F.2d 644 (D.C. Cir. 1968); Gayer v. Laird, 332 F. Supp. 169 (D.D.C. 1971); [1976] 2 EMPL. PRAC. GUIDE (CCH) ¶ 6493; Morrison v. State Bd. of Educ., 1 Cal. 3d 214, 461 P.2d 375, 92 Cal. Rptr. 175 (1969). The refusal of the courts in the above cases to recognize discrimination against homosexuals under Title VII suggests an even greater reluctance to provide legal redress for homosexual acts of sexual harassment.

In light of the inadequacies of the Title VII action, other legal remedies need to be developed to compensate the victim of sexual harassment. Tort actions appear to offer the most promise.[24] Tort law is particularly suited for sexual harassment cases, as it is a flexible and evolving doctrine: a court may allow a tort action even if the particular cause of action has not been recognized before.[25]

A basic theory of tort law is that a court is free to provide a remedy for behavior of individuals which offends public policy.[26] Thus, the courts will provide a remedy if a person commits an act which is "unreasonable, or socially harmful, from the point of view of the community."[27] A court can determine whether public policy has been violated by analyzing statutes which provide insight into community concerns.[28]

A number of California statutes indicate that sexual harassment of workers violates public policy. California Civil Code section 1708 states "[e]very person is bound, without contract, to abstain from injuring the person or property of another, or in-

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24. This is particularly true in California where actions under Title VII have not been recognized. In the two Ninth Circuit sexual harassment cases that have been brought, the district courts declined to recognize a cause of action under Title VII for sexual harassment. Miller v. Bank of America, 418 F. Supp. 233 (N.D. Cal. 1976) *rev'd*, 600 F.2d 211 (9th Cir. 1979); Corne v. Bausch & Lomb, Inc., 390 F. Supp. 161 (D. Ariz. 1975) *vacated*, 562 F.2d 55 (9th Cir. 1977). The district court opinion in *Corne* was vacated and remanded with no opinion by the court of appeals. The basis of the remand was apparently procedural. C. MACKINNON, *supra* note 1, at 256 n.10. The court of appeals in *Miller* did not address the issue of whether a cause of action existed under Title VII for sexual harassment because the issue was conceded by the employer on appeal. "The Bank's concession is supported by recent decisions . . . . We assume, but need not decide, that the concession is correct . . . . In light of the Bank's concession, we do not decide the question, but accept the concession as settling the question *for this case only*." 600 F.2d at 212-13 n.1 (emphasis added).

25. New and nameless torts are being recognized constantly, and the progress of the common law is marked by many cases of first impression, in which the court has struck out boldly to create a new cause of action, where none had been recognized before. . . . The law of torts is anything but static, and the limits of its development are never set. When it becomes clear that the plaintiff's interests are entitled to legal protection against the conduct of the defendant, the mere fact that the claim is novel will not of itself operate as a bar to the remedy.

W. PROSSER, LAW OF TORTS 3-4 (4th ed. 1971).

26. *Id.* at 3.

27. *Id.* at 7.

28. *Id.* at 190-91.

fringing upon any of his rights."[29] The California Fair Employment Practices Act is based on the public policy that all persons have "the right and opportunity . . . to seek, obtain, and hold employment without discrimination or abridgement on account of . . . sex."[30] The Title VII cases indicate that sexual harassment of working women is sex discrimination.[31] Sexual harassment, therefore, infringes on an employment right of working women. An employee should be hired and retained based upon her work performance and not upon factors that bear no connection to work capabilities. Sexual compliance as an employment condition is impermissible because it is not "genuinely and reasonably related to performance on the job."[32]

Some forms of sexual harassment are in reality acts of rape as defined by statute. The Model Penal Code, for example, says "[a] male who has sexual intercourse with a female . . . is guilty of rape if: . . . (b) he has substantially impaired her power to appraise or control her conduct by administering or employing . . . means for the purpose of preventing resistance."[33] Another Model Penal Code section states that "[a] person who subjects another . . . to any sexual contact is guilty of sexual assault, a misdemeanor, if: (1) he knows that the contact is offensive to the other person or . . . (5) he has substantially impaired the other person's power to appraise or control . . . her conduct by administering or employing . . . other means for the purpose of preventing resistance."[34] Sexual contact is defined as "any touching of the sexual or other intimate parts of the person of another for the purpose of arousing or gratifying sexual desire of either party."[35] Under the Michigan Criminal Sexual Conduct Statute a person commits a misdemeanor if he "engages in sexual contact with another person and . . . force or coercion is used to accomplish the sexual contact."[36] This definition of sexual contact is similar to the one found in the Model Penal

29. CAL. CIV. CODE § 1708 (West 1973).
30. CAL. LAB. CODE § 1411 (West Supp. 1980).
31. C. MACKINNON, *supra* note 1, at 4-7.
32. Barnes v. Costle, 561 F.2d 983, 990 (D.C. Cir. 1977).
33. MODEL PENAL CODE § 213.1 (Official Proposed Draft 1962).
34. *Id.* § 213.4.
35. *Id.*
36. MICH. COMP. LAWS ANN. § 750.520e (Supp. 1980).

Code.[37] In California, rape is defined as "an act of sexual intercourse, accomplished . . . [w]here a person resists, but the person's resistance is overcome by force or violence."[38] California's criminal rape statute sets forth a public policy statement that "[t]he essential guilt of rape consists in the outrage to the person and feelings of the victim of the rape."[39] Two California sexual harassment cases involved rape or attempted rape.[40] A supervisor or employer who uses his position of authority to coerce a woman worker to perform unwanted sexual acts has committed a kind of rape;[41] that his actions may not yet be recognized as rape in case law does not negate this conclusion.[42] Promises of job opportunities in exchange for sexual favors and threats of retaliation for noncompliance or for reporting the acts of sexual harassment may also involve forms of bribery and blackmail.[43]

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37. Sexual contact is defined as "intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification." *Id.*

38. CAL. PENAL CODE § 261 (West Supp. 1980).

39. *Id.* § 263.

40. Doney v. Tambouratgis, 23 Cal. 3d 91, 587 P.2d 1160, 151 Cal. Rptr. 347 (1979); Meyer v. Graphic Arts Int'l Union, Locals 63-A, 63-B, 88 Cal. App. 3d 176, 151 Cal. Rptr. 597 (1979).

41. As Susan Brownmiller explains,

> All rape is an exercise in power but some rapists have an edge that is more than physical. They operate within an institutionalized setting that works to their advantage and in which a victim has little chance to redress her grievance . . . . Rapists may also operate within an emotional setting or within a dependent relationship that provides a hierarchical, authoritarian structure of its own that weakens a victim's resistance, distorts her perspective and confounds her will.

S. BROWNMILLER, *supra* note 2, at 256. Sexual harassment may involve both of these aspects if the employer condones acts of sexual harassment by male employees and does not investigate a woman worker's complaints or attempt to curtail the man's conduct when the employer becomes aware of the harassment. Often the woman worker is in a dependent relationship with her immediate supervisor who has total control over employment decisions such as job promotion, assignments, or termination.

42. As one author notes,

> The man who jumps out of the alley or crawls through the window is the man who, if caught, will be called 'the rapist' by his fellow men. But the known man who presses his advantage, who uses his position of authority, who forces his attentions (fine Victorian phrase), who will not take 'No' for an answer, who assumes that sexual access is his right-of-way and physical aggression his right-on expression of masculinity, conquest and power is no less of a rapist.

Id. at 400.

43. C. MACKINNON, *supra* note 1, at 159.

Prostitution and pandering statutes make the exchange of sexual favors for money a crime.[44] Fostering an exchange of sexual favors for economic advantage in the employment setting is a form of solicitation for prostitution.[45]

As numerous civil and criminal statutes demonstrate, sexual harassment violates public policy, and therefore, a woman should be entitled to protection under tort law when she is the victim of sexual harassment.

II. TORT CAUSES OF ACTION FOR SEXUAL HARASSMENT

The attorney representing a client who wants to institute legal preceedings for sexual harassment must consider all possible legal theories on which to base the claim.[46] The purpose of this section is to acquaint practitioners with tort law as it relates to sexual harassment as an injury entitled to legal protection in California.

A. Intentional Infliction of Emotional Distress

The interest invaded when a woman is inflicted with emotional distress is her peace of mind.[47] This interest is invaded by conduct which "go[es] beyond all possible bounds of decency, and . . . [is] regarded as atrocious, and utterly intolerable in a civilized society."[48] The basic test for liability requires a plaintiff to demonstrate: "(1) outrageous conduct by the defendant; (2) the defendant's intention of causing or reckless disregard of the probability of causing emotional distress; (3) the plaintiff's suffering severe or extreme emotional distress; and (4) actual and proximate causation of the emotional distress by the defendant's outrageous conduct."[49]

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44. Cal. Penal Code §§ 266(a), (i) (West Supp. 1980).

45. *See* C. MacKinnon, *supra* note 1, at 159.

46. This is not an exhaustive survey. Other tort theories such as false imprisonment, slander, libel, and invasion of privacy also should be pursued depending on the particular fact situation. These torts are mentioned but not fully discussed.

47. W. Prosser, *supra* note 25, at 41.

48. Restatement (Second) of Torts § 46, Comment (d) (1977) [hereinafter cited as Restatement].

49. Fletcher v. Western Nat'l Life Ins. Co., 10 Cal. App. 3d 376, 394, 89 Cal. Rptr. 78, 88 (1970).

The courts have developed a sliding scale approach to the required severity of the injuries and distress suffered by the plaintiff and the outrageousness of the defendant's conduct. The requisite degree of injury and distress suffered by a plaintiff will be correspondingly less as the outrageousness of the defendant's conduct increases.[50] In California, a person can recover for emotional distress where there has been no physical injury as a result of the defendant's acts.[51] Where physical harm results from the acts of the defendant, a cause of action will be easier to establish. Physical harm includes the physical consequences of shock to the nervous system, bodily illness, and physical injury.[52] A woman who has been subjected to sexual harassment may or may not suffer physical effects from the harassment. Even though her injuries may consist of unpleasant emotional reactions to the conduct unaccompanied by physical manifestations, she may recover for the intentional infliction of emotional distress.[53] Emotional distress includes "fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, [and] worry."[54] Absent physical injury, a greater showing of outrageous behavior by the defendant is required.[55]

A frequently litigated question is whether words alone can be sufficiently outrageous to establish a cause of action for the intentional infliction of emotional distress. The basic rule is where physical injury results, words alone which cause emotional

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50. Perati v. Atkinson, 213 Cal. App. 2d 472, 474, 28 Cal. Rptr. 898, 899 (1963). *See also* RESTATEMENT, *supra* note 48, at § 46, comment (k).

51. Alcorn v. Anbro Eng'r, Inc., 2 Cal. 3d 493, 498, 468 P.2d 216, 218, 86 Cal. Rptr. 88, 90 (1970); State Rubbish Collectors Ass'n v. Siliznoff, 38 Cal. 2d 330, 338, 240 P.2d 282, 286 (1952); Renteria v. County of Orange, 82 Cal. App. 3d 833, 840, 147 Cal. Rptr. 447, 451 (1978).

52. In Alcorn v. Anbro Eng'r, Inc., 2 Cal. 3d 493, 498, 468 P.2d 216, 218, 86 Cal. Rptr. 88, 90 (1970), the injuries included "physical illness, shock, nausea and insomnia." The court concluded that these symptoms were sufficient to demonstrate a physical injury. These appear to be the most common physical symptoms pleaded in a cause of action for intentional infliction of emotional distress. *See also* CALIFORNIA JURY INSTRUCTIONS CIVIL No. 12.72 (6th ed. West) [hereinafter cited as BAJI].

53. Alcorn v. Anbro Eng'r, Inc., 2 Cal. 3d 493, 498, 468 P.2d 216, 218, 86 Cal. Rptr. 88, 90 (1970); State Rubbish Collectors Ass'n v. Siliznoff, 38 Cal. 2d 330, 338, 240 P.2d 282, 286 (1952); Renteria v. County of Orange, 82 Cal. App. 3d 833, 840, 147 Cal. Rptr. 447, 451 (1978).

54. RESTATEMENT, *supra* note 48, at § 46, Comment (j). *See also* Crisci v. Security Ins. Co., 66 Cal. 2d 425, 433, 426 P.2d 173, 178, 58 Cal. Rptr. 13, 18 (1967); Fletcher v. Western Nat'l Life Ins. Co., 10 Cal. App. 3d 376, 397, 89 Cal. Rptr. 78, 91 (1970).

55. Perati v. Atkinson, 213 Cal. App. 2d 472, 474, 28 Cal. Rptr. 898, 899 (1963). *See also* RESTATEMENT, *supra* note 48, at § 46, Comment (k).

distress are actionable.[56] Words alone without other outrageous conduct, however, may also be sufficient in certain circumstances to justify a cause of action for the intentional infliction of emotional distress. In *Alcorn v. Anbro Engineering, Inc.*,[57] a Black worker suffered physical injury as a result of verbal abuse and disparaging racial slurs made by a white male supervisor. The court, recognizing that racial slurs to a Black man are particularly outrageous,[58] held that the verbal acts were sufficient to support a cause of action for intentional infliction of emotional distress.[59] A California court of appeals followed this rule a year later and upheld a cause of action for the intentional infliction of emotional distress brought by a Mexican-American man against his employer and co-employees.[60] Unlike the plaintiff in *Alcorn*, the plaintiff suffered no physical injuries. The defendant's conduct consisted primarily of verbal abuse, but also included other conduct such as placing the employee under surveillance and conducting lengthy interrogations.[61]

If the sexual harassment is relatively "mild", a court may recognize a cause of action when the acts have continued for a substantial period of time.[62] The courts also have required a

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56. Bowden v. Spiegel, Inc., 96 Cal. App. 2d 793, 795, 216 P.2d 571, 572 (1950). *See also* Alcorn v. Anbro Eng'r, Inc., 2 Cal. 3d 493, 499, 468 P.2d 216, 218-19, 86 Cal. Rptr. 88, 90-91 (1970). The court stated "[a]lthough it may be that mere insulting language, without more, ordinarily would not constitute extreme outrage, the aggravated circumstances alleged by plaintiff seem sufficient . . . ." *Id.*

57. 2 Cal. 3d 499, 468 P.2d 216, 86 Cal. Rptr. 88 (1970).

58. Id. at 498-99 n.4, 86 Cal. Rptr. at 91 n.4, 468 P.2d at 219 n.4.

59. *Id.* at 496-97, 86 Cal. Rptr. at 89, 468 P.2d at 217.

60. Renteria v. County of Orange, 82 Cal. App. 3d 833, 147 Cal. Rptr. 447 (1978).

61. *Id.* at 840, 842, 147 Cal. Rptr. at 451, 452.

62. Fletcher v. Western Nat'l Life Ins. Co., 10 Cal. App. 3d 376, 398, 89 Cal. Rptr. 78, 91 (1970). In Murphy v. Allstate Ins. Co., 83 Cal. App. 3d 38, 147 Cal. Rptr. 565 (1978), plaintiffs sued the insurance company for the intentional infliction of emotional distress from delays in the repair of plaintiff's damaged property and the initiation of an interpleader action which resulted in the delay of award payments to the plaintiff. The emotional distress suffered by the plaintiffs encompassed a period of several years. The court noted that:

> Both the intensity and duration of the emotional distress suffered must be considered in determining its severity . . . . Whether the defendant's conduct was outrageous and whether the plaintiff's emotional distress was severe are generally questions of fact, and where, as here, the conduct complained of is continuing in nature encompassing a period of several years and the emotional distress alleged is also of a continuing nature, the point at which the defendant's conduct has become

lesser showing of severe emotional distress when a special relationship exists between the parties[63] or when there is an invasion of a property interest.[64] Employment has been considered such a property right.[65] The California Supreme Court stated that an employee has a unique status in the workplace which entitles her to greater protection from insult and outrage than a non-employee.[66]

Four pending sexual harassment tort actions have pleaded a cause of action for intentional infliction of emotional distress.[67] In *Fuller v. Williames*,[68] a woman employee sued two male superiors and the corporation that owned the camera store where she was employed.[69] The individual defendants' actions consisted of verbal statements[70] and offensive conduct.[71] The

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> sufficiently outrageous and the plaintiff's emotional distress sufficiently severe for the plaintiff to state a cause of action will be questions of fact.

Id. at 51, 147 Cal. Rptr. at 575-76. *See also* RESTATEMENT, *supra* note 48, at § 46, Comment (j).

63. RESTATEMENT, *supra* note 48, at § 46 states "where there is a special relation between the parties . . . there may be recovery for insults not amounting to extreme outrage . . . . The extreme and outrageous character of the conduct may arise from an abuse by the actor of a position, or a relation with the other, which gives him actual or apparent authority over the other, or power to affect his interests." *Id.* at Comment (d) & (e). *See also* Alcorn v. Anbro Eng'r, Inc., 2 Cal. 3d 493, 498-99 n.4, 468 P.2d 216, 219 n.4, 86 Cal. Rptr. 88, 91 n.4 (1970).

64. Lillie v. Thompson, 332 U.S. 459, 461-62 (1947); Gruenberg v. Aetna Ins. Co., 9 Cal. 3d 566, 580, 108 Cal. Rptr. 480, 489-90, 510 P.2d 1032, 1041-42 (1973).

65. Perry v. Sinderman, 408 U.S. 593, 601 (1972); Young v. International Tel. & Tel. Co., 438 F.2d 757, 760 (3d Cir. 1971); Waters v. Wisconsin Steel Works of Int'l Harvester Co., 427 F.2d 476, 483 (7th Cir. 1970).

66. Alcorn v. Anbro Eng'r, Inc., 2 Cal. 3d 493, 498 n.2, 468 P.2d 216, 218 n.2, 86 Cal. Rptr. 88, 90 n.2 (1970).

67. Emotional distress, in addition to being an independent tort, can also be an element of damages for the other torts mentioned in this section. State Rubbish Collectors Ass'n. v. Siliznoff, 38 Cal. 2d 330, 338, 240 P.2d 282, 286 (1952).

68. No. A7703-04001 (Or. Cir. Ct., Multnomah County, filed Mar. 22, 1977).

69. *Id.*, First Amended Complaint at 1. One of the individual defendants was the co-owner and manager of the store where the plaintiff was employed. The other defendant was a co-owner and manager of the store as well as the president of the corporation which owned the store. Both individuals committed acts of sexual harassment against the plaintiff.

70. The verbal statements were made in front of customers, other employees, and the plaintiff's photography students. The statements consisted of offensive remarks about the unsuitability of women, including plaintiff, as photographers and such remarks as "warning customers about plaintiff's alleged desire to 'get in his pants'; to 'watch out, she's very horney. She hasn't gotten any lately.' [Defendant also asked] 'Did you just have sex with your husband? What was it like?' 'Is that all you do is have sex with your husband?', 'Do you sleep naked with your husband?' 'Doesn't she have nice (or large)

harassment took place five days a week for two and a half months and three times a week for ten months from the beginning of her employment until she was discharged.[72]

In *Morgheim v. Midnight Sun, Inc.*,[73] the plaintiff sued the station manager and broadcast station where she was employed.[74] The sexual harassment consisted primarily of physical acts by the station manager.[75] The physical acts were accompanied by statements to the effect that "the only way a woman could succeed in broadcasting was to play the game, referring apparently to the sexual game that he had been unsuccessful in playing with the Plaintiff. . . ."[76] The plaintiff's employment with the station was thereafter terminated upon the station manager's recommendation.[77] The sexual harassment took place on numerous occasions over a one month period.[78]

In *Barnett v. Good Housekeeping Shop*,[79] a Black woman was subjected to physical and verbal acts of sexual harassment by her white male supervisor. She sued the store, the owner and vice president, and an employee of the shop.[80] As a result of her

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breasts?' " *Id.* at 4-5. Where the sexual harassment consists of verbal abuse, a cause of action for slander may also be appropriate. This cause of action was pleaded in *Fuller v. Williames*. *Id.* at 3-6.

71. The offensive conduct consisted of "peer[ing] down plaintiff's blouse from the upper level and stairways . . . of [the] store, assisted by binoculars or telephoto lenses, [and] encourag[ing] similar behavior by other male employees, which acts were apparent to customers and other employees in the store." *Id.* at 2.

72. *Id.* at 2,7.

73. No. 75-9492 (Alaska Super. Ct., 3d Judicial Dist., filed Dec. 29, 1975).

74. *Id.*, Complaint at 1-2.

75. The plaintiff alleged that the station manager "pushed her against a wall and proceeded to French kiss her . . . grab[bed] her when she least expected it and after he had a sufficient hold, commence[d] to rub her back, in what he thought was a passionate manner . . . ." *Id.* at 2.

76. *Id.*

77. *Id.* at 3.

78. *Id.* at 2-3.

79. No. 872876 (E.D. Mich., filed Nov. 9, 1978).

80. *Id.*, Complaint at 1-2. The plaintiff in this case, contrary to the other sexual harassment cases, made only a general allegation that the defendants "made repeated and unwanted verbal and physical sexual advances toward her, all of which she rejected." *Id.* at 4. The specific acts were not alleged. A practitioner might be advised to consult her client's feelings about how specifically the details of the sexual harassment should be pleaded. If there is a good possibility of settling the case prior to trial, the victim may prefer not to make public the specific details of the outrageous acts committed against her. Alleging these details in the complaint may cause her further embarrassment and humiliation. If the case goes to trial, however, she will probably have to testify

refusal to comply with her supervisor's sexual demands, she "suffered loss of employment opportunity with respect to promotions, desirable transfers, discharge, and hiring."[81] Her complaints to the shop owner failed to end the offensive conduct. As a result of the chronic sexual harassment which occurred over several years,[82] the plaintiff suffered physical injuries and was forced to take medical leaves. She was eventually discharged.[83]

In *Gomez v. AFL-CIO Construction and General Laborers Union*,[84] a woman worker sued her employer and supervisor. The harassment began verbally and culminated in a physical assault and battery.[85] The woman worker made repeated attempts to stop the harassment and complained unsuccessfully to officers of the union that employed her about her wrongful termination by the supervisor.[86]

Each of these cases has certain common elements which support a cause of action for the intentional infliction of emotional distress: 1) the acts were committed by male superiors in an employment setting which gave rise to the special relationship theory; 2) the actions of the male employees were outrageous; 3) the actions continued over a substantial period of time;

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about the acts in detail. Careful client preparation and sensitivity to the client's feelings on the part of the attorney is important. If it is unnecessary to allege in the complaint the specific details of the sexual harassment, the client should be consulted in making the decision about the specificity of the complaint. On the other hand, the client may wish to expose the outrageous acts of the defendants and specifically allege the details of the harassment.

81. *Id.* at 1-2.

82. The complaint is unclear about the duration of the harassment. Plaintiff was employed by the shop for twelve and a half years. *Id.* at 1. The male harasser had been her supervisor for approximately seven years. *Id.* at 1,4. It appears that the harassment took place for at least several years. *Id.* at 4-5.

83. *Id.* at 4.

84. No. H-57772-6, (Cal. Super. Ct., Alameda County, filed Dec. 20, 1978).

85. "Commencing on or about May 8, 1978, and many times thereafter, [her supervisor] made remarks laden with sexual innuendo directed at [her] while she was performing her duties as officeworker, including but not limited to repeated comments about the size of [her] breasts." *Id.*, Complaint at 3. The sexual harassment started with her first day of work. *Id.* Eighteen days later, "while seated at her desk at work, [she] inquired of [her supervisor] who was seated nearby at his desk, about the future course of her employment, to which he replied, rising and walking toward her: 'How bad do you want your job?' . . . . Without waiting for an answer, [her supervisor] walked to [her] desk, forcibly restrained her by placing his arm around her, grabbed her left breast with his free hand, and attempted to and did embrace and kiss [her] . . . ." *Id.* at 5.

86. *Id.* at 5,7.

and 4) the woman worker was terminated as a result of her refusal to accede to the sexual demands, resulting in the loss of a property right. In view of these elements, a cause of action for the intentional infliction of emotional distress should be established.

In the context of sexual harassment in the workplace, it can be argued that sexual harassment is outrageous per se. Just as racial slurs are particularly outrageous to a person of color, lewd remarks to a woman about her breasts or other parts of her anatomy are outrageous conduct. The woman worker pays a heavy price for working in an environment of continued harassment.[87] Sexual harassment also hurts employers because competent women workers will quit or they will be terminated needlessly in retaliation for their refusal to accede to a male supervisor's sexual demands.[88] Employment opportunities based upon the performance of sexual favors rather than job performance offend a society such as ours, which has shown a commitment to the elimination of sexual discrimination. Sexual harassment requires that the woman be viewed primarily as a sexual object rather than as a worker.[89] Sexual harassment in the workplace thereby serves to maintain undesirable sex-role stereotyping.[90] The offensiveness of sexual harassment, and the special

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87. 'The anxiety and strain, the tension and nervous exhaustion that accompany [sexual] harassment take a terrific toll on women workers. Nervous ticks of all kinds, aches and pains which can be minor and irritating or can be devastatingly painful often accompany the onset of sexual harassment. These pains and illnesses are the result of insoluble conflict, the inevitable backlash of the human body in response to intolerable stress which thousands of women must endure in order to survive.'

C. MACKINNON, *supra* note 1, at 52. One woman's method to avoid the sexual harassment of male co-workers was to " '[stay] at her work bench all day and [eat] in a small rest room at one end of her department.' " *Id.* Apparently, "[f]or many women, work . . . requires self-quarantine to avoid constant assault on sexual integrity." *Id.*

88. "[R]ather than the Company being benefited in any way by the conduct of [the male supervisor], it is obvious it can only be damaged by the very nature of the acts complained of." Corne v. Bausch & Lomb, Inc., 390 F. Supp. 161, 163 (D. Ariz. 1975) *vacated*, 562 F.2d 55 (9th Cir. 1977).

89. "Nowhere is woman treated according to the merit of her work, but rather as a sex. It is therefore almost inevitable that she should pay for her right to exist, to keep a position in whatever line with sex favors." E. GOLDMAN, *The Traffic of Women*, in RED EMMA SPEAKS: SELECTED WRITINGS AND SPEECHES 145 (1972).

90. One author uses the term "sexual slavery" to describe situations where women are "subjected to sexual violence and exploitation." K. BARRY, FEMALE SEXUAL SLAVERY

nature of the employment relationship, call for recognition of a cause of action for intentional infliction of emotional distress.

B. Intentional Interference With Contractual Relationships

A cause of action for intentional interference with contractual relationships is appropriate where employment consequences flow from the refusal of the woman to accede to the sexual demands that are placed upon her. Retaliation for her refusal may take the form of loss of promotion, firing, loss of training or educational opportunities, or demotion. This cause of action is appropriate where the man is a supervisor or co-worker and persuades the employer to institute the retaliatory action.

To establish the cause of action it is necessary to show: 1) there was a contract at the time of the harassment; 2) the defendant knew there was a contract; 3) the acts of the defendant induced the breach of the contract; 4) the act which induced the breach was intentional; and 5) a benefit or different non-adverse result would have occurred except for the interference of the third party.[91] This cause of action is appropriate only when a third person causes a breach of the contract between the em-

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33 (1979).

> One of the major cause[s] of sex slavery is the social-sexual objectification of women that permeates every patriarchal society in the world. Identifying women first as sexual beings who are responsible for the sexual services of men is the social base for gender-specific sexual slavery. As most women know, being sexually harassed while walking alone down a street, or sitting in a bar or restaurant without a man, is a poignant reminder of our definition as sexual objects. Spurning those advances and reacting against them are likely to draw indignant wrath from the perpetrator, suggesting the extent to which many men assume the sexual objectification of *any* woman as their right. Under such conditions, sexual slavery lurks at the corners of every woman's life.

Id. at 103. As one court points out, the "stereotype of the sexually-accommodating secretary is well documented in popular novels, magazine cartoons, and the theatre." Heelan v. Johns-Manville Corp., 451 F. Supp. 1382, 1390 (D. Colo. 1978). The *Heelan* court concluded that Title VII was intended to "strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes" and that sexual harassment was one of the forms of "disparate treatment" actionable under Title VII. *Id.*

91. Freed v. Manchester Serv., Inc., 165 Cal. App. 2d 186, 189, 331 P.2d 689, 691 (1958). *See also* Springer v. Singleton, 256 Cal. App. 2d 184, 187-88, 63 Cal. Rptr. 770, 772 (1967); Augustine v. Trucco, 124 Cal. App. 2d 229, 246, 268 P.2d 780, 792 (1954).

ployer and employee.[92] When the employer is also the party responsible for the acts of sexual harassment and retaliates against the woman for her refusal to engage in sexual favors, the appropriate action is breach of contract.[93]

Courts consider a number of factors in determining whether a cause of action for intentional interference with a contractual relationship will be allowed.[94] One of the factors concerns the means the third person uses to induce the breach.[95] When the third person interferes with the contractual relationship of the parties by illegal acts, such as libel, slander, fraud, or physical violence, a cause of action exists.[96] The use of moral, social or economic pressures, which are themselves lawful, may also be

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92. Dryden v. Tri-Valley Growers, 65 Cal. App. 3d 990, 998-99, 135 Cal. Rptr. 720, 726 (1977). A cause of action for intentional interference with contractual rights was pleaded in *Barnett v. Good Housekeeping Shop,* No. 872876, (E.D. Mich., filed Nov. 9, 1978). The plaintiff alleged that her supervisor interfered with the contractual relationship between her and the shop "when he interposed sexual compliance as a condition of employment" and when he "terminated her unjustly because of her earlier refusals of his demands for sexual consideration." *Id.* at 8.

93. *Id.* There is a disadvantage to filing a contract action rather than a tort action. In a contract action, the plaintiff cannot recover punitive damages or compensation for mental suffering. CAL. CIV. CODE § 3294 (West 1970). *See* Crogan v. Metz, 47 Cal. 2d 398, 405, 303 P.2d 1029, 1033 (1956); O'Neil v. Spillane, 45 Cal. App. 3d 147, 159, 119 Cal. Rptr. 245, 254 (1975). Four sexual harassment cases pleaded a cause of action for breach of contract. Morgheim v. Hiber & Midnight Sun Broadcasters, Inc., No. 75-9492 (Alaska Super. Ct., 3d Judicial Dist., filed Dec. 29, 1975); Gomez v. Construction & Gen. Laborers Union, No. H-57772-6 (Cal. Super. Ct., Alameda County, filed Dec. 20, 1978); Monge v. Beebe Rubber, 114 N.H. 130, 316 A.2d 549 (N.H. 1974); Fuller v. Williames, No. A7703-04001 (Or. Cir. Ct., Multnomah County, filed Mar. 22, 1977). In *Morgheim,* the station manager committed acts of sexual harassment and persuaded the broadcast company to fire the plaintiff when she refused to comply with his sexual demands. The plaintiff alleged that the company, by and through its agent, the station manager, breached its contract with the plaintiff. No. 75-9492, Complaint at 1-3.

94. RESTATEMENT, *supra* note 48, lists the following factors as relevant in determining whether a cause of action will be allowed:

> (a) the nature of the [man's] conduct, (b) the [man's] motive, (c) the interests of the [woman] with which the [man's] conduct interferes, (d) the interests sought to be advanced by the [man], (e) the social interests in protecting the freedom of action of the [man] and the contractual interests of the [woman], (f) the proximity or remoteness of the [man's] conduct to the interference and (g) the relations between the parties.

Id. § 767. *See also* Herron v. State Farm Mut. Ins. Co., 56 Cal. 2d 202, 206, 363 P.2d 310, 314, 14 Cal. Rptr. 294, 298 (1961).

95. RESTATEMENT, *supra* note 48, § 767(a).

96. Imperial Ice Co. v. Rossier, 18 Cal. 2d 33, 35, 112 P.631, 632 (1941).

improper and unjustifiable.[97] In the sexual harassment context, a supervisor, for example, may decide to convince the employer to fire a woman who has rejected his sexual advances. He may tell the employer that the woman is not performing her duties satisfactorily, that she is guilty of insubordination and refuses to follow his orders, or that she cannot get along with co-employees. If none of these statements is true and the employer fires the woman based on the supervisor's statements, a cause of action for intentional interference with a contractual relationship is established. In addition, if the supervisor's acts of sexual harassment create an intolerable work environment for the woman and cause her to terminate her employment, his actions have induced a breach of the employment contract. In the latter situation, the woman worker's job performance is rendered more burdensome by the supervisor's actions. This is sufficient to support a cause of action[98] even where the contract at issue is terminable at will by either party.[99]

Another frequently litigated issue in a cause of action for intentional interference with a contractual relationship is whether the third party's acts were justified, *i.e.* whether the person had a legitimate right to do what he did.[100] If a court determines the third party's actions were justified, the cause of action will be defeated. Justification, however, is an affirmative defense which must be pleaded and proved by the defendant.[101] Employers often rely upon supervisors for job evaluations and in many cases the supervisor will make hiring and termination decisions for the employer. A supervisor will take the position that his decision to terminate a woman worker or to deny her a job benefit was justified and that liability should not be imposed. Even though a supervisor's actions are normally justified, if in a particular situation he employs wrongful means to accomplish his purpose, his conduct is not justified.[102] If the individual "acts

97. *Id.*

98. Fifield Manor v. Finston, 54 Cal. 2d 632, 636, 354 P.2d 1073, 1075, 7 Cal. Rptr. 377, 379 (1960). *See generally* W. PROSSER, *supra* note 25, at 732-33.

99. Speegle v. Board of Fire Underwriters, 29 Cal. 2d 34, 39, 172 P.2d 867, 870 (1946).

100. Herron v. State Farm Mut. Ins. Co., 56 Cal. 2d 202, 207, 363 P.2d 310, 312, 14 Cal. Rptr. 294, 296 (1961).

101. *Id.*

102. Wise v. Southern Pac. Co., 223 Cal. App. 2d 50, 73, 35 Cal. Rptr. 652, 665 (1963).

for [his] advantage" rather than "to protect the welfare" or benefit of the employer, his conduct is not justified.[103] A supervisor who convinces an employer to fire a woman worker because she refused to acquiesce in his sexual demands is not acting to protect the welfare of the employer. If the woman worker is performing her job satisfactorily, the supervisor acts to the detriment of the employer, who will lose a valuable employee because of the supervisor's acts. If his actions are done solely as a retaliatory measure against the woman for refusing to accede to his sexual demands, he is acting for personal motives and his conduct, therefore, is unjustified.

C. Assault and Battery

Any time there is an unpermitted physical contact of the woman's body by the man, a cause of action for battery may arise.[104] Verbal acts of sexual harassment may constitute a cause of action for assault. The nature of sexual harassment is such that almost all cases involve both offenses.

Battery

When a battery is committed, the victim's "interest in freedom from intentional and unpermitted contacts with [her] person" is invaded.[105] It is the interest in maintaining one's personal integrity that is protected from invasion.[106] A cause of action for battery is established when it is shown that the man

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103. *Id.*

104. If the man's physical actions are such as to constitute a restraint of the woman's freedom of motion, a cause of action for false imprisonment may also be pleaded. In *Peter v. Aiken*, the defendant entered the room where the woman was, and closed and locked the door. He then proceeded to commit a battery upon her. This act was alleged to constitute false imprisonment. Peter v. Aiken, No. L-13891-77 (N.J. Super. Ct., filed Dec. 8, 1977), Amended and Supplemental Complaint at 3. This cause of action was also alleged in Meyer v. Graphic Arts Int'l Union, 88 Cal. App. 3d 176, 177, 151 Cal. Rptr. 597, 598 (1979). In order to establish a cause of action for false imprisonment,

> [a]ll that is necessary . . . is that the individual be restrained of [her] liberty without any sufficient complaint of authority therefore, and it may be accomplished by words or acts which such individual fears to disregard. Temporary detention is sufficient, and the use of actual physical force is not necessary. The essential thing in false imprisonment is the restraint of the person.

Ware v. Dunn, 80 Cal. App. 2d 936, 943, 183 P.2d 128, 133 (1947).

105. W. Prosser, *supra* note 25, at 34.

106. *Id.*

did some act "intending to cause a harmful or offensive contact or apprehension of a harmful or offensive contact"[107] and a "harmful contact . . . directly or indirectly results."[108] Contact with a woman's body which "offends a reasonable sense of personal dignity" is actionable.[109] The contact itself need not cause physical injury. If the contact results in injury to a woman's feelings, a cause of action for battery is established.[110] Actions such as grabbing a woman worker, attempting to kiss or embrace her, or touching parts of her body in a sexually suggestive manner constitute a battery.[111]

Assault

The interest protected in a cause of action for assault is the

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107. RESTATEMENT, *supra* note 48, § 13.

108. *Id.*

109. *Id.* § 19.

110. CAL. CIVIL CODE § 43 (West 1954) states "every person has . . . the right of protection from bodily restraint or harm. . . ." CAL. CIVIL CODE § 1708 (West 1973) states "[e]very person is bound, without contract, to abstain from injuring the person or property of another, or infringing upon any of his rights." These statutes, which define certain rights and responsibilities, provide the basis for a cause of action for assault and battery but do not define the elements of the causes of action. If the right is invaded, a cause of action will lie. Lowry v. Standard Oil Co., 63 Cal. App. 2d 1, 7, 146 P. 2d 57, 60 (1944). *See also* Rosefield v. Rosefield, 221 Cal. App. 2d 431, 435, 34 Cal. Rptr. 479, 482 (1963). Even if the defendant's acts do not "constitute a technical assault", a court will still allow recovery. State Rubbish Collectors Ass'n v. Siliznoff, 36 Cal. 2d 330, 336, 240 P. 2d 282, 285 (1952). "In order to establish a case of civil assault and battery all that is necessary is that the evidence show that plaintiff's injury was caused by defendant's violence, or that defendant acted with wanton, willful or reckless disregard of plaintiff's rights." Lopez v. Surchia, 112 Cal. App. 2d 314, 318, 246 P. 2d 111, 113 (1952).

111. Five sexual harassment suits alleged a cause of action for assault and battery. In Peter v. Aiken, No. L-13891-77 (N.J. Super. Ct., filed Dec. 8, 1977), the woman's supervisor committed the following acts: "grabbed plaintiff in [the supervisor's] office, pulled her towards him and kissed her," "put his hand on plaintiff's leg and attempted to reach under her skirt," "put his arms around plaintiff and his hands on her breasts". *Id.* Amended and Supplemental Complaint at 2-3. In Meyer v. Graphic Arts Int'l Union, Locals 63-A, 63-B, 88 Cal. App. 3d 176, 151 Cal. Rptr. 597 (1979), the female employee alleged that several employees and officers " 'attacked, beat, struck, [and] assaulted [her] . . . by approaching her and threatening to forcibly kiss and embrace her and forcibly kissing and embracing her.' " *Id.* at 177, 151 Cal. Rptr. at 598. In Barnett v. Good Housekeeping Shop, No. 872876 (E.D. Mich., filed Nov. 9, 1978), a cause of action for assault and battery was also alleged but it is unclear from the complaint of what the specific acts of the defendants consisted. In Skousen v. Nidy, 90 Ariz. 215, 367 P.2d 248 (Ariz. 1962), a cause of action for assault and battery was upheld. The plaintiff alleged that on several occasions over a one year period the defendant "with the use of force and violence placed his hands upon the private parts of the plaintiff herein, and made efforts to seduce and offend the dignity of the plaintiff." *Id.* at 216, 67 P.2d at 250. The plaintiff in Gomez v. Construction & Gen. Laborers Union, No. H-57772-6 (Cal. Super. Ct., Alameda County, filed Dec. 20, 1979) also pleaded a cause of action for assault and battery.

interest in freedom from apprehension of a harmful or offensive contact with the person.[112] The intent is the same for assault as it is for battery, the intent to cause a "harmful or offensive contact" or "imminent apprehension of such a contact".[113] In a battery, physical contact occurs. In an assault, no contact occurs, but the woman is "put in . . . imminent apprehension" of the contact.[114] The term "apprehension" is often misunderstood and confused with fear. "[A]pprehension is not the same thing as fear, and the plaintiff is not deprived of her action merely because [she] is too courageous to be frightened or intimidated."[115] Apprehension is analogous to the term, "expectation"; unless some intervening act takes place, the woman believes the contact is certain to occur.[116]

Even if a man engages in such conduct as a joke, he will be held liable if his intentional actions were offensive to the woman and they gave rise to apprehension of an offensive contact.[117] In addition, "[T]he mere fact that [she] can easily prevent the threatened contact by self-defensive measures" does not destroy the cause of action for assault.[118]

Whether a cause of action can be established for assault based only on verbal acts of sexual harassment is a close question. Words alone generally are insufficient to support a cause of action for assault.[119] Words, if combined with an overt act, such as a gesture or movement towards the woman, may be sufficient to support the cause of action.[120] In *Peter v. Aiken*,[121] the em-

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112. RESTATEMENT, *supra* note 48, § 21.
113. *Id.*
114. *Id.* § 27.
115. W. PROSSER, *supra* note 25, at 39.
116. RESTATEMENT, *supra* note 48, § 24.
117. *Id.* § 34, Comment.
118. *Id.* § 24, Comment.
119. *Id.* § 31. This conclusion, however, has been criticized:

> Even apart from such cases where the words indicate the intent of an act, there may be other situations in which the words themselves, without any accompanying gesture, are sufficient under the circumstances to arouse a reasonable apprehension of imminent bodily contact . . . and any rule which insists upon such a gesture as essential to liability is obviously quite artificial and unreasonable.

Id. § 31, Comment (d).
120. *Id.* § 31.

ployer made statements such as: "[T]his is going to be our year. I sincerely plan on going to bed with you so be thinking about when and where." He handed the woman worker notes such as a list of "the qualifications necessary for his secretary [including] the statement 'willing to go to bed with Supt.' "[122] These verbal statements may not constitute an assault because the words are directed toward a future event. A court may conclude the threat of harmful or offensive contact was not imminent. If these words are viewed in the context of the employment setting, however, the words may put the employee in imminent apprehension of offensive contact by the employer. This was the situation in *Gomez v. Construction and General Laborers Union.*[123] Prior to the assault, the supervisor had committed numerous acts of verbal sexual harassment. One day "he rose from his desk and walked across the room to Plaintiff's desk [where she was seated] uttering on the way, 'How bad do you want your job?' " He then "attempt[ed] to kiss [her] . . . while forcibly pinning her in her seat with one arm and fondling her breast with the other hand."[124] Based on his past acts of verbal harassment, his movement towards her in combination with his statement, "How bad do you want your job?", was enough to "place [her] in great fear and terror for her physical well-being, and particularly her sexual integrity in that she feared imminent molestation and rape."[125] If the employer has engaged in a consistent pattern of verbal abuse, if the harassment occurs in an isolated location, or if an employee or a group of employees are presently engaging in verbal sexual harassment, the woman worker may believe that the situation will escalate into physical acts of sexual harassment.[126] The woman cannot be certain when the harassment will occur or what form it will take. If a woman worker has witnessed batteries committed by male employees upon other women or has heard that such batteries took place, this knowledge, combined with verbal sexual harassment directed at her, may create an apprehension of physical contact.

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121. No. L-13891-77 (N.J. Super. Ct., filed Dec. 8, 1977).

122. *Id.*, Amended Complaint at 2.

123. No. H-57772-6 (Cal. Super. Ct., Alameda County, filed Dec. 20, 1978).

124. *Id.*, Complaint at 5.

125. *Id.* at 4.

126. RESTATEMENT, *supra* note 48, points out that "[i]f the actor intends merely to put the other in apprehension of a bodily contact, he is subject to liability for an assault to the other if the other, although realizing that the actor does not intend to inflict such a contact upon him, is put in apprehension of the contact." *Id.* § 28.

To date, the sexual harassment cases have involved physical as well as verbal acts by the male supervisors and employees. In this situation, the two torts are pleaded together as one cause of action. Assault and battery as torts are not confined to the definitions of the criminal statutes and are not defined by civil statutes.[127] Courts, therefore, are free to expand the definition of what constitutes an actionable tort in this area. Because verbal sexual harassment creates an apprehension of offensive physical contact in the woman worker, a cause of action for assault is appropriate even though the acts consist primarily of words in combination with conduct that in other situations would not arouse apprehension of physical contact.

D. Fraud and Deceit

To establish a cause of action for fraud and deceit,[128] it is necessary to allege: 1) a misrepresentation by the employer that takes the form of either false representation, concealment, or nondisclosure of a material fact; 2) the employer's knowledge of the falsity of the misrepresentation; 3) the employer's intent to induce reliance on the representation; 4) the employee's justifiable reliance on the representation; and 5) damage to the woman worker from such reliance.[129] A cause of action can arise "from a breach of duty by one in a confidential or fiduciary relationship to another which induces a justifiable reliance by the latter to [her] prejudice."[130]

There is an implied representation by the employer of fair

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127. Ware v. Dunn, 80 Cal. App. 2d 936, 942, 183 P.2d 128, 132 (1947).

128. Cal. Civ. Code § 1572(2) (West 1954) defines fraud as, "[t]he positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true." Deceit, which is also a type of fraud, is defined in Cal. Civ. Code § 1710(2) (West 1973) as, "[t]he assertion, as a fact, of that which is not true by one who does not believe it to be true." Deceit and fraud are separate causes of action. Perhaps because the elements are the same and because deceit is a form of fraud, the terms fraud and deceit are used interchangeably by the courts and practitioners. *See* Kozlowsky v. Westminister Nat'l Bank, 6 Cal. App. 3d 593, 597, 86 Cal. Rptr. 52, 54 (1970), in which the court indicates that deceit is a form of fraud. It is preferable in a tort action to use either the term "deceit" or "fraud and deceit."

129. Restatement, *supra* note 48, § 525. *See also* Gold v. Los Angeles Democratic League, 49 Cal. App. 3d 365, 374, 122 Cal. Rptr. 732, 738 (1975).

130. Gold v. Los Angeles Democratic League, 49 Cal. App. 3d 365, 373, 122 Cal. Rptr. 732, 736 (1975). *See also* Odorizzi v. Bloomfield School Dist., 246 Cal. App. 2d 123, 129, 54 Cal. Rptr. 533, 537 (1966); Cal. Civ. Code § 1573 (West 1954).

treatment and equal opportunity for all employees.[131] Included within this representation is the premise that an employee will be evaluated and retained on the basis of the quality of her work and factors relevant to her employment duties.[132] The employer also has a duty to make the workplace as safe as possible and to protect an employee from injuries if possible.[133] At the time of hiring, an employer may make representations to the woman that the company is committed to fair treatment and equal opportunity for women,[134] that the company offers women the chance for advancement, that there is no discrimination against women, or that he is sure the woman will find that this company is a good one to work for. These representations also may be found in company literature, employee handbooks, Fair Employment Practices or OSHA posters at the workplace, want ads, and other written documents such as letterhead stationary.

A cause of action for fraud may arise if an employer is aware that women are subjected to sexual harassment by supervisors or other workers and does not inform the woman of this fact at the time of hiring.[135] When the person doing the hiring has engaged in sexual harassment in the past and continues to do so, failure to disclose this fact may be actionable.[136] Once the

131. CAL. LAB. CODE §§ 1411-1420.15 (West Supp. 1980).

132. *See* Barnes v. Costle, 561 F.2d 983, 990 (D.C. Cir. 1977).

133. CAL. LAB. CODE § 6300 (West Supp. 1980).

134. B. SCHLEI & P. GROSSMAN, *supra* note 21, at 680.

135. A misrepresentation is fraudulent if the person making the representation (a) knows or believes that the matter is not as he represents it to be, (b) does not have the confidence in the accuracy of his representation that he states or implies, or (c) knows that he does not have the basis for his representation that he states or implies. RESTATEMENT, *supra* note 48, § 526.

136. [An individual who] fails to disclose to another a fact that he knows may justifiably induce the other to act or refrain from acting in a business transaction is subject to . . . liability . . . if he is under a duty to the other to exercise reasonable care to disclose the matter in question." RESTATEMENT, *supra* note 48, § 551(1).

> One party to a business transaction is under a duty to exercise reasonable care to disclose to the other before the transaction is consummated, (a) matters known to him that the other is entitled to know because of a fiduciary or other similar relation of trust and confidence between them; . . . and (e) facts basic to the transaction, if he knows that the other is about to enter into it under a mistake as to them, and that the other, because of the relationship between them . . . or other objective circumstances, would reasonably expect a disclosure of those facts.

Id. § 551 (2).

woman worker has been hired, the employer and employee have established a "confidential or fiduciary relationship".[137] This special relationship should impose a duty on the employer to disclose facts of sexual harassment to the woman worker. It can be argued that sexual harassment is a breach of the employer's duties to treat employees equally and to provide a safe workplace. As such it should be sufficient to support a cause of action for fraud and deceit. If an employer engages in sexual harassment by making sex a condition for obtaining employment opportunities, he has breached the implied representation of equal and fair treatment. If he engages in physical assault on the woman, he has breached the representation of a safe work environment.

A cause of action for deceit was pleaded in *Gomez v. Construction and General Laborers Union.*[138] The plaintiff alleged that 1) at the hiring interview the supervisor "failed to communicate to Plaintiff . . . and knowingly suppressed the fact that her tenure in said job depended upon her willingness to render and her actual rendition of sexual favors to Defendant," 2) the Defendant "intended to and did induce Plaintiff . . . to accept the job and commence performing the office worker tasks thereof in reliance on the fraudulent misrepresentation that the determining condition for retaining the job was satisfactory performance of the clerical and accounting duties which Defendant . . . had fraudulently represented to be the only duties of the job," 3) at the time she took the job she was ignorant of the facts which were suppressed, and 4) "if Plaintiff . . . had been aware of the existence of the facts not disclosed by Defendant . . . Plaintiff would not have commenced the performance of office worker duties for and on behalf of Defendant Union, reduced her public assistance support, purchased an automobile, and otherwise behaved as though she had acquired steady employment, sufficient to support her family."[139]

Fraud probably will be the most difficult cause of action to establish in the sexual harassment context. In the absence of actual misrepresentation, courts may be unwilling to conclude that

137. RESTATEMENT, *supra* note 48, § 551, Comment (f).
138. No. H-57772-6 (Cal. Super. Ct., Alameda County, filed Dec. 20, 1978).
139. *Id.*, Amended Complaint at 8-9 (filed Mar. 29, 1979).

any implied representation has been breached by acts of sexual harassment. This cause of action also may be more difficult to establish in terms of proof, particularly in the case of oral representations. The credibility of the woman may become the crucial issue if the employer denies knowledge of prior acts of sexual harassment.[140] The court or jury may be unwilling to conclude that an employer has a duty to inform women of past acts of sexual harassment. They may regard such a duty as anomalous. Because of the lack of general public information on the pervasiveness and seriousness of sexual harassment, juries may conclude that disclosure of this information is not warranted. This cause of action offers the most promise for drastically changing the work environment because it imposes a duty on all employers to eliminate sexual harassment in the workplace, to act on complaints of sexual harassment, and to fulfill their obligations to eliminate discrimination based on sex in the workplace. This tort imposes upon the employer the broadest obligation to eliminate sexual harassment.

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140. "Women are afraid to report sexual harassment for the same reason they are afraid to report rape. Women fear they won't be believed." . . . Outside redress is usually sought only after either having been fired or having to quit. Redress requires time (and savings) that are often needed for the search for a new job. In addition, women feel that their chances of winning are slight. Frequently, the sexually coercive behavior itself remains a matter between the woman and her harasser. It is her word against his. (Women fear other female witnesses will be viewed with suspicion, that male witnesses will not testify, and also discount factors such as their previously excellent work record.) Furthermore, even raising the issue will evoke the specter of slander and libel lawsuits against them. Not surprisingly, the majority of women do nothing.

L. FARLEY, *supra* note 2, at 26-27. This credibility issue even carries into physical attractiveness.

> As a practical matter for litigation, "attractiveness" will likely arise as an implicit credibility issue that cuts two ways—both against the women. A conventionally attractive woman will be more likely to be believed when she charges sexual harassment. But it will also be believed that she asked for it, since attractiveness in women so largely consists in the projection of sexual availability, although in veiled and denied ways. Conventionally unattractive women, who would be more credible in asserting that they did not ask for it, by the same token would be less credible in asserting, over a man's derogatory denial, that it happened at all.

C. MACKINNON, *supra* note 1, at 191.

III. WORKERS' COMPENSATION

A. LIMITATIONS OF A WORKERS' COMPENSATION REMEDY

The main barrier to a tort action for sexual harassment in the workplace is workers' compensation.[141] In California, workers' compensation is the exclusive remedy for most work-related injuries.[142] If the court decides workers' compensation is the ap-

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141. The basic standard for California workers' compensation is contained in CAL. LAB. CODE § 3600 (West Supp. 1980):

> Liability for the compensation provided by this division, in lieu of any other liability whatsoever to any person except as provided in Section 3706, shall, without regard to negligence, exist against an employer for any injury sustained by his employees arising out of and in the course of the employment and for the death of any employee if the injury proximately causes death, in those cases where the following conditions of compensation concur:
> (a) Where, at the time of the injury, both the employer and the employee are subject to the compensation provisions of this division.
> (b) Where, at the time of the injury, the employee is performing service growing out of and incidental to his employment and is acting within the course of his employment.
> (c) Where the injury is proximately caused by the employment, either with or without negligence.
> (d) Where the injury is not caused by the intoxication of the injured employee.
> (e) Where the injury is not intentionally self-afflicted.
> (f) Where the employee has not willfully and deliberately caused his own death.
> (g) Where the injury does not arise out of an altercation in which the injured employee is the initial physical aggressor.
> (h) Where the injury does not arise out of voluntary participation in any off-duty recreational, social, or athletic activity not constituting part of the employee's work-related duties, except where such activities are a reasonable expectancy of, or are expressly or impliedly required by, the employment. The administrative director shall promulgate reasonable rules and regulations requiring employers to post and keep posted in a conspicuous place or places a notice advising employees of the provisions of this subdivision. Failure of the employer to post such a notice shall not constitute an expression of intent to waive the provisions of this subdivision.

142. CAL. LAB. CODE § 3601(a) (West Supp. 1980) provides that "[w]here the conditions of compensation exist, the right to recover such compensation, pursuant to the provisions of this division is . . . the exclusive remedy for injury or death of an employee against the employer or against any other employee of the employer acting within the scope of his employment. . . ."

The term "scope of employment" is more restrictive than the general requirement under CAL. LAB. CODE § 3600 (West Supp. 1980) that the injury must "arise out of and

propriate remedy, the tort action is defeated.

Careful pleading and an early decision about which remedy to pursue will often determine whether the court will allow the tort action or workers' compensation defense. If the jurisdiction of both the Workers' Compensation Appeals Board and the superior court is invoked, the proceeding that first renders a final judgment is conclusive on the outcome of the other proceeding.[143] If a tort action is begun, rather than a workers' compensation claim, the court retains jurisdiction over the action unless the court decides workers' compensation rather than a tort action is the appropriate remedy.[144] Courts have allowed a tort remedy in cases where the worker initially invoked the jurisdiction of the superior court in a tort action.[145] If the complaint sets forth facts which bring the action within the workers' compensation system, the plaintiff must set forth additional facts which negate the applicability of workers' compensation in order

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occur in the course of employment." The scope of employment extends only to respondeat superior situations. Saala v. McFarland, 63 Cal. 2d 124, 130, 403 P.2d 400, 404, 45 Cal. Rptr. 144, 148 (1965). The factors a court considers in determining whether an employee is acting within the scope of his employment include:

> whether his conduct was authorized by his employer, either expressly or impliedly . . . whether his conduct occurred during the performance of services for the benefit of the employer, either directly or indirectly . . .; [or] whether his conduct, even though not expressly or impliedly authorized, was an incidental event connected with his assigned work.

McIvor v. Savage, 220 Cal. App. 2d 128, 136, 33 Cal. Rptr. 740, 745 (1963) (citations omitted). In the sexual harassment context, it should be relatively easy to show that a co-employee who sexually harasses a woman worker is not acting within the scope of his employment.

Where the co-employee physically assaults the woman worker, CAL. LAB. CODE § 3601(a)(1) (West Supp. 1980) expressly allows a civil suit: "[A]n employee . . . shall, in addition to the right to compensation against the employer, have a right to bring an action at law for damages against [any] other employee . . . : When the injury or death is proximately caused by the willful and unprovoked physical act of aggression of such other employee."

143. Douglas v. E. & J. Gallo Winery, 69 Cal. App. 3d 103, 112, 137 Cal. Rptr. 797, 802 (1977); Magliulo v. Superior Court, 47 Cal. App. 3d 760, 780-81, 121 Cal. Rptr. 621, 636 (1975).

144. Doney v. Tambouratgis, 23 Cal. 3d 91, 98, 151 Cal. Rptr. 347, 351, 587 P.2d 1160, 1164 (1979).

145. Meyer v. Graphic Arts Int'l Union, Locals 63-A, 63-B, 88 Cal. App. 3d 176, 178, 151 Cal. Rptr. 597, 599 (1979) (sexual harassment tort action for assault, battery, false imprisonment and rape); Renteria v. County of Orange, 82 Cal. App. 3d 833, 840-42, 147 Cal. Rptr. 447, 451-52 (1978) (action for intentional infliction of emotional distress based on racial discrimination); Magliulo v. Superior Court, 47 Cal. App. 3d 760, 781, 121 Cal. Rptr. 621, 636 (1975) (action for assault and battery).

to avoid a general demurrer.[146] If the complaint does not set forth facts which demonstrate the applicability of workers' compensation, the employer must affirmatively plead and prove that workers' compensation is the appropriate remedy.[147] In deciding which remedy to pursue, the practitioner must analyze what tort law and workers' compensation each offer a client in her particular situation. In the context of sexual harassment, a tort action may provide the preferable remedy.[148]

Tort law and workers' compensation differ in 1) underlying philosophy, 2) the basic test of liability, 3) the types of injuries compensated, and 4) the type and amount of damages awarded.[149] The underlying philosophy of tort law is to redress a wrong that has been inflicted upon an injured person.[150] Workers' compensation, on the other hand, is basically an economic insurance system.[151] The Workers' Compensation Act was created in response to increased work injuries resulting from industrialization and in reaction to difficult recovery through the prevailing tort law.[152] The Act was an attempt to offer the worker some protection when s/he was injured.[153] When an employee is unable to work because of an injury sustained on the job, workers' compensation provides a means of subsistence until the person can return to productive work.[154] The basic test for tort lia-

146. Doney v. Tambouratgis, 23 Cal. 3d 91, 97, 151 Cal. Rptr. 347, 350, 587 P.2d 1160, 1163-64 (1979).

147. *Id.* at 96, 151 Cal. Rptr. at 350, 587 P.2d at 1163, Popejoy v. Hannon, 37 Cal. 2d 159, 173, 231 P.2d 484, 493 (1951).

148. In most sexual harassment situations, a tort action appears to be the remedy a woman worker would want to pursue. If a woman worker suffers physical or mental illness that entitles her to a monetary award under workers' compensation, she may choose to file a workers' compensation claim rather than a tort action. She may decide that the period of time for the settlement or trial of a tort action is too long; she may feel embarrassed or frightened about testifying publicly about the sexual harassment; or she may decide she would rather receive at least some compensation than take the chance of no award if the tort action is unsuccessful.

149. A. LARSON, WORKMEN'S COMPENSATION LAW § 2.00 (1978).

150. W. PROSSER, *supra* note 25, at 2.

151. Azevedo v. Abel, 264 Cal. App. 2d 451, 459, 70 Cal. Rptr. 710, 715 (1968); A. LARSON, *supra* note 149, at § 2.70.

152. S. HERLICK, CALIFORNIA WORKERS' COMPENSATION LAW HANDBOOK § 1.1 (2d ed. 1978).

153. Williams v. State Comp. Ins. Fund, 50 Cal. App. 3d 116, 122, 123 Cal. Rptr. 812, 815 (1975). *See also* CAL. LAB. CODE § 3202 (West 1971).

154. The goal of workers' compensation "is to rehabilitate, not to indemnify; and its intent is limited to assuring the injured worker subsistence while he is unable to work and to effectuate his speedy rehabilitation and reentry into the labor market." Solari v.

bility is fault on the part of the individual who injures the woman worker.[155] In workers' compensation, the basic test for liability is work connection.[156] The personal fault of the employer or supervisor who inflicts injury on a woman worker is irrelevant in determining liability.[157]

The type of injury which is compensated and the nature of the compensation also differ in a tort action and a workers' compensation proceeding. Under workers' compensation, the only injuries compensated are those which result in a disability affecting the individual's earning capacity.[158] Tort damages, however, compensate an individual for all the consequences which flow from the injury, including pain and suffering, emotional distress, and other general damages.[159] Workers' compensation was designed in part to guarantee a worker at least some monetary award rather than the mere possibility of recovery in a tort action.[160] The actual amount of compensation is determined according to a set formula based on the worker's earning capacity at the time of injury.[161] The amount of the damage award in a tort action is based on what a jury believes will adequately compensate the injured person for the wrong committed.[162] If the

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Atlas-Universal Serv., Inc. 215 Cal. App. 2d 587, 600, 30 Cal. Rptr. 407, 414 (1963) citing W. HANNA, 2 CALIFORNIA LAW OF EMPLOYEE INJURIES AND WORKMEN'S COMPENSATION 15-16 (2d ed. 1953). *See also* S. HERLICK, *supra* note 152, at 8, 1.1.

The workers' compensation award does not cover all the losses or consequences of an injury. Workers' compensation, "unlike . . . tort . . ., does not pretend to restore to the claimant what he has lost; it gives him a sum which, added to his remaining earning ability, if any, will presumably enable him to exist without being a burden to others . . . . It was never intended that compensation payments should equal actual loss. . . ." A. LARSON, *supra* note 149, at § 2.50.

155. A. LARSON, *supra* note 149, at § 2.10.

156. *Id.*

157. *Id.*

158. S. HERLICK, *supra* note 152, at §§ 5.1, 7.1. *See also* A. LARSON, *supra* note 149, at § 2.40.

159. BAJI, *supra* note 52, Nos. 12.88, 1402, 14.13.

160. In California, the workers' compensation system reflects a legislative policy choice to "provide employees economic insurance against disability in exchange for the speculative possibility of general damages; to offer the augmented award for serious and willful misconduct in trade for the relatively rare award of punitive damages." Azevedo v. Abel, 264 Cal. App. 2d 451, 459-60, 70 Cal. Rptr. 710, 715 (1968) (footnote omitted).

161. S. HERLICK, *supra* note 152, at § 5.1. In California, "the weekly compensation rate is two thirds (66 ⅔%) of actual earnings subject to the minimum and maximum rates or limits in effect on the date of injury." *Id.* at § 5.17. The maximum and minimum rates range from $35 to $154 for temporary and permanent total disability and $30 to $70 per week for permanent partial disability. *Id.* at § 5.18.

162. BAJI *supra* note 52, No. 14.02.

employer injures a worker through intentional misconduct, punitive damages may be awarded. Under workers' compensation the amount of punitive damages is determined from the base award.[163] In addition, a maximum limit of compensation is set.[164] The individual personally responsible for causing the worker's injuries pays only that portion awarded for intentional misconduct.[165] Under tort law, punitive damages awarded by the jury usually reflect the outrageousness of the defendant's acts.[166]

Because workers' compensation fails to adequately compensate some workers, courts have expressed increasing dissatisfaction with the exclusivity of the remedy. In recent years, courts have carved out exceptions to allow tort actions where workers' compensation fails to adequately protect the worker; this is particularly true in cases of intentional torts.[167] One California

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163. CAL. LAB. CODE § 4553 (West Supp. 1980) provides for an increased compensation award as follows: "The amount of compensation otherwise recoverable shall be increased one-half where the employee is injured by reason of the serious and willful misconduct of . . . (a) [t]he employer, or his managing representative . . . ." The amount of the augmented award is based on the worker's base compensation award. A maximum limit of $10,000 is set by statute for the penalty provision amount. In addition, an injured worker can receive costs and expenses up to $250. *Id.*

164. *Id.*

165. The only portion of the compensation award which is noninsurable is the penalty portion. *Id;* CAL. INS. CODE § 11661 (West 1972). CAL. INS. CODE § 533 (West 1972) prohibits the payment of insurance for willful or intentional torts. The employer, therefore, is personally responsible for only that portion of the award granted under the penalty provisions for serious and willful misconduct.

166. W. PROSSER, *supra* note 25, at 9-10.

167. In Raden v. City of Azusa, 97 Cal. App. 3d 336, 158 Cal. Rptr. 689 (1979), the plaintiff was discharged in retaliation for filing a workers' compensation claim. The worker filed a civil suit for damages. The court allowed the worker to maintain the civil suit on the theory that workers' compensation did not "adequately protect" the worker. *Id.* at 345, 158 Cal. Rptr. at 694.

In Meyer v. Graphic Arts Int'l Union, Locals 63-A, 63-B, 88 Cal. App. 3d 176, 151 Cal. Rptr. 597 (1979), a woman worker filed a sexual harassment civil suit against her employer and certain agents of officers of her employer for assault, battery, false imprisonment, and rape. The court held that the exclusivity provisions of workers' compensation did not bar a civil suit against the employer for assaults committed by its agents. *Id.* at 178-79, 151 Cal. Rptr. at 599.

In Renteria v. County of Orange, 82 Cal. App. 3d 833, 147 Cal. Rptr. 447 (1978), a Mexican-American worker filed a tort action for the intentional infliction of emotional distress against his employer and co-employees based on racial discrimination. The court held that the exclusivity provisions of workers' compensation did not bar the civil suit. In reaching this conclusion the court noted

> While it is possible to believe that the Legislature intended that employees lose their right to compensation for certain forms of negligently or accidentally inflicted physical injuries

court stated that "in the absence of a controlling statute the courts are free to determine whether the employer loses his immunity from civil suit in the event he personally intentionally inflicts an injury on the person of his employee."[168]

The courts have used a public policy rationale to conclude that a worker may pursue a civil remedy.[169] The court will allow the employee to maintain a tort action if the workers' compensation award will not adequately compensate the injured worker,[170] the penalty provisions will not provide an effective deterrent to acts of misconduct by the employer,[171] or the employer is able to use the workers' compensation system as a shield from liability for his intentional acts.[172]

> in exchange for a system of workers' compensation featuring liability without fault, compulsory insurance, and prompt medical care, it is much more difficult to believe that the Legislature intended the employee to surrender all right to any form of compensation for mental suffering caused by extreme and outrageous misconduct by an employer. It would indeed be ironic if the Workers' Compensation Act, created to benefit employees, were to be interpreted to shield the employer from all liability for such conduct. We decline to interpret it in this fashion.

Id. at 841, 147 Cal. Rptr. at 452.

In Magliulo v. Superior Court, 47 Cal. App. 3d 760, 121 Cal. Rptr. 621 (1975), the court allowed a civil suit for an assault by an employer against an employee. The court concluded that the penalty and exclusivity provisions of workers' compensation were not intended by the legislature "to be a substitute for the relief which could be afforded for an intentional assault." *Id.* at 779, 121 Cal. Rptr. at 635.

168. Magliulo v. Superior Court, 47 Cal. App. 3d 760, 769, 121 Cal. Rptr. 621, 628 (1975).

169. In Raden v. City of Azusa, 97 Cal. App. 3d 336, 158 Cal. Rptr. 689 (1979), the court stated, "[W]e must . . . determine whether public policy factors weigh for or against the maintenance of a civil suit by . . . an employee." *Id.* at 343, 158 Cal. Rptr. at 692-93. *See also* Magliulo v. Superior Court, 47 Cal. App. 3d 760, 780, 121 Cal. Rptr. 621, 636 (1975).

170. Raden v. City of Azusa, 97 Cal. App. 3d 336, 345, 158 Cal. Rptr. 689, 694 (1979); Renteria v. County of Orange, 82 Cal. App. 3d 833, 841, 147 Cal. Rptr. 447, 452 (1978).

171. Raden v. City of Azusa, 97 Cal. App. 3d 336, 347, 158 Cal. Rptr. 689, 694 (1979); Renteria v. County of Orange, 82 Cal. App. 3d 833, 841, 147 Cal. Rptr. 447, 451-52 (1978).

172. Renteria v. County of Orange, 82 Cal. App. 3d 833, 841, 147 Cal. Rptr. 447, 452 (1978). *See also* Conway v. Clobin, 105 Cal. App. 2d 495, 498, 233 P.2d 612, 614 (1951).

B. Workers' Compensation as a Bar to a Tort Action for Sexual Harassment

The inadequacies of the workers' compensation system are particularly glaring in the sexual harassment context. The awards will be low in comparison to the amount a woman worker might receive in a tort action because many of her injuries will not be compensable under workers' compensation.[173] Workers' compensation is not an effective deterrent against the employer who sexually harasses women workers because the amount he will have to pay in damages is miniscule.[174]

For the purposes of this discussion, four possible bases are suggested for demonstrating to a court that a tort action rather than workers' compensation is the appropriate remedy in a sexual harassment case:[175] 1) the injury is not a compensable one; 2) the injury did not occur in the course of the employment; 3) the injury did not arise out of the employment; and 4) the nature of sexual harassment is such that injuries resulting from it are outside the contemplation of the workers' compensation system. The first three bases demonstrate that the statutory requirements for workers' compensation are not satisfied. The fourth basis relies on judicial willingness to carve an exception to the workers' compensation statute for acts of sexual harassment.

Sexual Harassment Is Not a Compensable Injury Under Workers' Compensation

An injury is noncompensable if it does not take the form of a physical or mental condition which results in an employment disability.[176] The issue of whether a noncompensable injury makes workers' compensation inapplicable was first considered

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173. *See* notes 161-63 *infra* and accompanying text.

174. *See* notes 161-65 *supra* and accompanying text.

175. Practitioners familiar with the general requirements of workers' compensation may conceive additional ways to circumvent the exclusivity provisions of the workers' compensation statutes. The bases listed in this section appear the most likely to succeed in sexual harassment cases.

176. Renteria v. County of Orange, 82 Cal. App. 3d 833, 840, 147 Cal. Rptr. 447, 451 (1978). The term "compensable injury" is frequently used by the courts as a legal conclusion that the requirements under workers' compensation have been met. This section uses the term to refer to one of the requirements under the workers' compensation statute, that an injury in fact is sustained by the plaintiff. *See* Cal. Lab. Code § 3600 (West Supp. 1980).

by a California court in *Williams v. State Compensation Insurance Fund.*[177] In *Williams,* an employee injured his genitals while operating a machine where he worked. The plaintiff's disability, "functional impairment of the genitalia," was not listed on the rating schedule used to fix the amount of the workers' compensation award. His physical injury did not interfere with his ability to work.[178] The plaintiff chose to file a tort action rather than a workers' compensation claim because he would not have received a monetary award under the workers' compensation system.[179] His civil action was dismissed by the trial court on the ground that workers' compensation was his exclusive remedy.[180] On appeal, the plaintiff argued that since "recognition is withheld from (his) handicap, he is outside the 'compensation provisions' . . . ."[181] The appellate court, relying on out-of-state decisions, held that the damage action was barred by workers' compensation.[182] The court concluded that: 1) the workers' compensation system envisioned only one remedy; 2) that remedy was available only through workers' compensation; 3) the enactment of the workers' compensation system withdrew from an employee "his common law right to elements of damage unrelated to earning capacity"; and 4) "a failure of the compensation law to include some element of damage recoverable at common law is a legislative and not a judicial problem."[183]

Later decisions allow a tort action for injuries not compensable under workers' compensation to prevent injustice to the injured worker.[184] In *Renteria v. County of Orange,*[185] the plaintiff filed a tort action against his employer and co-employees for intentional and negligent infliction of emotional distress based on racial discrimination.[186] The trial court sustained the defen-

177. 50 Cal. App. 3d 116, 123 Cal. Rptr. 812 (1975).
178. *Id.* at 122, 123 Cal. Rptr. at 815.
179. *Id.*
180. *Id.* at 119-20, 123 Cal. Rptr. at 813.
181. *Id.* at 122, 123 Cal. Rptr. at 815.
182. *Id.*
183. *Id.*
184. Raden v. City of Azusa, 97 Cal. App. 3d 336, 345, 158 Cal. Rptr. 689, 694 (1979); Renteria v. County of Orange, 82 Cal. App. 3d 833, 841; 147 Cal. Rptr. 447, 452 (1978).
185. 82 Cal. App. 3d 833, 147 Cal. Rptr. 447 (1978).
186. *Id.* at 840, 147 Cal. Rptr. at 447. The plaintiff alleged that "his employer and fellow employees, treated plaintiff in a rude and degrading manner, placed him under surveillance, subjected him to lengthy interrogations, and discriminated against plaintiff

dant's demurrer to the complaint on the ground that the Workers' Compensation Appeals Board had exclusive jurisdiction.[187] The court stated that where there are no allegations of "physical or mental illness, or that [the injury] resulted in any employment disability" the injury is noncompensable under the Workers' Compensation Act.[188] The effect of holding workers' compensation as a bar to the tort action was to leave the plaintiff with no monetary award. As this was an unjust result[189] and because the penalty provisions of the workers' compensation system would be an ineffective deterrent in this situation,[190] the court refused to hold workers' compensation a bar to the plaintiff's tort action. The court distinguished *Williams* on the ground that the tort action in *Williams* was not based on intentional acts of an employee or employer.[191]

In *Raden v. City of Azusa*,[192] the plaintiff filed a damage

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because of his Mexican-American descent, 'with the object and intent to force or cause plaintiff to suffer humiliation, mental anguish and emotional and physical distress, and to cause plaintiff to resign his position of employment or to be fired or dismissed therefrom.'" *Id.* at 835, 147 Cal. Rptr. at 447.

187. *Id.*

188. *Id.* at 840, 147 Cal. Rptr. at 451.

189. The court cited with approval a law review Note which stated

> '[t]here is a situation in which the denial of the right to sue in tort could work a hardship upon an employee. It is well settled that, to be compensable, an injury must be disabling. But what if the employer commits a work-related intentional tort that is not disabling? The workman cannot collect workmen's compensation benefits and because that is his exclusive remedy, he cannot maintain a tort act. Thus, if an employer slanders an employee, does not batter him seriously enough to cause a disabling injury, or defames him in front of his coworkers, then that employee—given that the tort is work-connected—has no remedy.'

Id. at 839, 147 Cal. Rptr. at 450, citing Note, *Azevedo v. Abel: Denial of Employee's Right to Sue His Employer for an Intentional Tort*, 21 HASTINGS L.J. 683, 695-96 (1970). In support of its holding the court also cited with approval A. LARSON, *supra* note 149, § 68.34, at 13-31, 13-32, " 'If the essence of the tort, in law, is non-physical, and if the injuries are of the usual non-physical sort, with physical injuries being at most added to the list of injuries as a make-weight, the suit should not be barred.'" Renteria v. County of Orange, 82 Cal. App. 3d 833, 842, 147 Cal. Rptr. 447, 452 (1978).

190. In discussing the penalty provisions of the workers' compensation system, the court stated, "the penalty takes the form of a 50 percent surcharge. When there is no compensable injury, 50 percent of nothing is still nothing, and Labor Code section 4553 cannot function as a deterrent." *Id.* at 841, 147 Cal. Rptr. at 452.

191. *Id.* at 841, 147 Cal. Rptr. 451 (1978).

192. 97 Cal. App. 3d 336, 158 Cal. Rptr. 689 (1979).

action for being discharged in retaliation for filing a workers' compensation claim. The court held that the injury suffered by a retaliatory discharge is not a compensable injury within the meaning of the statute and, therefore, not subject to the exclusive provisions of the Workers' Compensation Act.[193] The court allowed the plaintiff to maintain his tort action because the remedy afforded under workers' compensation did not "adequately protect"[194] the plaintiff.

In *Doney v. Tambouratgis*,[195] the plaintiff filed a tort action for assault and battery against her employer. The California Supreme Court held that the employer's workers' compensation defense plea was untimely, and the tort action was upheld.[196] The court noted that the woman worker's injuries did not have "any lingering adverse effect on her ability to work."[197] While the court did not address the issue of whether her injuries were thus noncompensable, this factor might be important in a court's determination of whether workers' compensation or a tort action is the appropriate remedy.[198]

The California appellate courts have developed a two-tier procedure for deciding the exclusivity question in cases involving a noncompensable injury. The first step is to determine whether the injury is compensable under workers' compensation. If determined to be a noncompensable injury, the second step is

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193. In reaching this conclusion the court stated,

> Clearly, the Legislature envisioned physical harm when it used the word 'injury'. "The [term] 'injury' . . . as used in the workmen's compensation acts, is ordinarily construed as meaning any lesion or change in the structure of the body, causing harm thereto and a lessened facility of its natural and normal use." Therefore, we hold that the harm occasioned an employee who is discharged in retaliation for filing a worker's compensation claim is not an 'injury' within the meaning of section 3601 and that the remedy granted under section 132a is not subject to the exclusivity provision of section 3601.

Id. at 343, 158 Cal. Rptr. at 692 (citations omitted).

194. *Id.* at 345, 158 Cal. Rptr. at 694.

195. 23 Cal. 3d 91, 587 P.2d 1160, 151 Cal. Rptr. 347 (1979).

196. *Id.* at 97-98, 587 P.2d at 1164, 151 Cal. Rptr. at 350-51.

197. *Id.* at 96, 587 P.2d at 1163, 151 Cal. Rptr. at 349.

198. The California Supreme Court in *Doney* did not decide specifically whether the workers' compensation defense would have been upheld if it had been pleaded in a timely fashion. The California Supreme Court has not decided whether workers' compensation is the exclusive remedy for injuries sustained as a result of the intentional acts of an employer.

to decide whether "public policy factors weigh for or against the maintenance of a civil suit by . . . an employee."[199] The reason for this approach is that "the existence of a noncompensable injury does not, by itself, abrogate the exclusive remedy provisions of the Workers' Compensation Act."[200]

The cases suggest that workers' compensation may not bar a woman worker's sexual harassment tort action. In assault and battery cases it can be argued that the injury is not compensable if there are no physical injuries or the injuries have not prevented the employee from continuing to work. The injuries sustained in a fraud and deceit action[201] or an action for interference with contractual relationships are analogous to those suffered from retaliatory discharge, as in *Raden,* so the argument that the injury is noncompensable also can be made for these two causes of action. This argument can be advanced in a case of intentional infliction of emotional distress where the injuries consist of an emotional reaction such as fright, humiliation, embarassment, or shame. In these situations, a court may conclude that workers' compensation is not the appropriate remedy. The danger exists that some courts may be unwilling to conclude that a tort action rather than workers' compensation is an appropriate remedy even though the injury is noncompensable. Therefore, the attorney representing a sexual harassment victim may have to rely on other factors.[202]

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199. Raden v. City of Azusa, 97 Cal. App. 3d 336, 343, 158 Cal. Rptr. 689, 692-93 (1979).

200. Renteria v. County of Orange, 82 Cal. App. 3d 833, 840, 147 Cal. Rptr. 447, 451 (1978).

201. Two courts of appeal have held that when an employer commits a fraud upon an employee the employee is not limited to her workers' compensation remedy. Douglas v. E. & J. Gallo Winery, 69 Cal. App. 3d 103, 112, 137 Cal. Rptr. 797, 802 (1977); Ramey v. General Petroleum Corp., 173 Cal. App. 2d 386, 402-03, 343 P.2d 787, 797 (1959). Another court of appeal case, however, distinguished these cases and held that workers' compensation is the exclusive remedy of an employee against her employer for fraud. Wright v. FMC Corp., 31 Cal. App. 3d 777, 779, 146 Cal. Rptr. 740, 740 (1978).

202. *See* notes 211 & 212 *infra* and accompanying text. Some California appellate courts are more willing than others to allow a worker to maintain a tort action. Gates v. Trans Video Corp., 93 Cal. App. 3d 196, 155 Cal. Rptr. 486 (1979) (2d Dist., Div. 5) (refusal to allow a tort action); Ankeny v. Lockheed Missiles & Space Co., 88 Cal. App. 3d 531, 151 Cal. Rptr. 828 (1979) (1st Dist., Div. 2) (refusal to allow a tort action); Meyer v. Graphic Arts Int'l Union, Local 63-A, 63-B, 88 Cal. App. 3d 176, 151 Cal. Rptr. 597 (1979) (2d Dist., Div. 4) (tort action allowed); Renteria v. County of Orange, 82 Cal. App. 3d 833, 147 Cal. Rptr. 447 (1978) (4th Dist., Div. 2) (tort action allowed); Magliulo v. Superior Court, 47 Cal. App. 3d 760, 121 Cal. Rptr. 621 (1975) (1st Dist., Div. 1) (tort

Sexual Harassment Does Not Occur in the Course of Employment

The course of employment requirement is concerned with the logistics of the event, the time and place where the injuries occurred and whether the employee was performing her duties at the time of the injury. The test for course of employment has been stated as follows, "for an injury to occur in the course of employment the employee must be engaged in the work [s]he has been hired to perform or some expectable personal act incidental thereto and the injury must occur within the period of [her] employment and at a place where [s]he may reasonably be for that purpose."[203] Injuries sustained off the employer's premises, before or after work hours, during rest period, or while performing acts other than an employee's assigned duties give rise to a question of whether the injury occurred during the course of employment.

The courts have used a number of rationales to allow workers' compensation coverage in situations that, at first glance, would not appear to meet a strict definition of the course of employment. For example, courts have held that injuries occurring while the employee is performing acts of personal convenience are compensable on the theory that the employee's act is one reasonably expected in the work setting.[204] Another theory is that certain activities are an implied part of the employment contract and injuries sustained during these activities are there-

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action allowed). The California Supreme Court has not decided when and under what circumstances a tort action is permissible.

203. Department of Water & Power v. Workmen's Comp. App. Bd. (Antrobus), 252 Cal. App. 2d 744, 746, 60 Cal. Rptr. 829, 830 (1967).

204. Lizama v. Workmen's Comp. App. Bd., 40 Cal. App. 3d 363, 368-69, 115 Cal. Rptr. 267, 271 (1974). Under this theory, recovery under workers' compensation is allowed for injuries sustained during the performance of

> [s]uch acts as are necessary to the life, comfort and convenience of the servant while at work, though strictly personal to himself . . . . The rule is broad enough to include the majority of an employee's acts upon the employer's premises, such as eating lunch, getting a drink of water, smoking tobacco where not forbidden by the employer, attending to the wants of nature, changing to or from working clothes, and many others.

Fireman's Fund Indemnity Co. v. Industrial Accident Comm'n 39 Cal. 2d 529, 532-33, 247 P.2d 707, 709 (1952) *citing* W. HANNA, INDUSTRIAL ACCIDENT COMMISSION, PRACTICE AND PROCEDURE 36 (1943).

fore compensable.[205] Courts also will uphold an award if they conclude that the employer received some benefit from the activity.[206] Injuries sustained during the performance of acts of common decency and humanity are compensable so as to encourage this behavior rather than punish it by denying recovery.[207] The courts have developed a rule of liberal construction of the course of employment requirement, resolving any question in favor of the employee so as to achieve a just result for the employee.[208] In the sexual harassment context, however, an un-

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205. Reinert v. Industrial Accident Comm'n, 46 Cal. 2d 349, 356, 294 P.2d 713, 717 (1956). The plaintiff, an assistant camp counselor, was told at her hiring interview that "part of the compensation for the work was the availability of recreational activities as a counselor which would not otherwise be available to her." *Id.* at 351, 294 P.2d at 714. After the camp closed and her duties were over, but before she left the camp, the plaintiff went horseback riding on one of the camp's horses and was injured. The court held that her employment contemplated such an activity and, therefore, an injury sustained from this activity was compensable. *Id.* at 356, 294 P.2d at 717. *See also* Dimmig v. Workmen's Comp. App. Bd., 6 Cal. 3d 860, 866, 495 P.2d 433, 437, 101 Cal. Rptr. 105, 109 (1972) (injury sustained by employee on his way home from an educational class for his job was compensable); Bramall v. Workers' Comp. App. Bd., 78 Cal. App. 3d 151, 158, 144 Cal. Rptr. 105, 109 (1978) (employee's injuries sustained while driving home were compensable because she had depositions in her car that she was taking home for translation); North American Rockwell Corp., Space Div. v. Workmen's Comp. App. Bd., 9 Cal. App. 3d 154, 157, 87 Cal. Rptr. 774, 776 (1970). In *Rockwell*, an employee was injured while helping a co-employee start his car in the employee parking lot. The court concluded that a "contract of employment which contemplates parking by employees on the premises must necessarily contemplate their entry and departure via the parking area and a reasonable interval of time and space for doing so." *Id.*, 87 Cal. Rptr. at 776.

206. Dimmig v. Workmen's Comp. App. Bd., 6 Cal. 3d 860, 866, 495 P.2d 433, 437, 101 Cal. Rptr. 105, 109 (1972). The court concluded that the employee's educational activities benefited the employer because the classes "improve(d) the employee's ability to perform his assigned tasks more effectively." *Id. See also* Scott v. Pacific Coast Borax Co., 140 Cal. App. 2d 173, 182, 294 P.2d 1039, 1045 (1956). The employee's injury was sustained after hours while assisting co-employee repair the employer's gas pump at the gas station. The injury was compensable on the theory that the activity benefited the employer "by keeping his equipment in effective operating condition." *Id.*

207. *See* Scott v. Pacific Coast Borax Co., 140 Cal. App. 2d 173, 181, 294 P.2d 1039, 1045 (1956). Another court said, "[C]ertain acts are, under the common standards of humanity, so normal, acceptable, and reasonably to be expected" that they must be compensable. North American Rockwell Corp. v. Workmen's Comp. App. Bd., 9 Cal. App. 3d 154, 158, 87 Cal. Rptr. 774, 776 (1970). The court went on to point out that "Whether a particular activity be classified by the term's response to an emergency, rescue . . . courtesy, or common decency, the point is that the activity was reasonably to be contemplated because of its general nature as a normal human response in a particular situation. . . ." *Id.* at 159, 87 Cal. Rptr. at 777.

208. Scott v. Pacific Coast Borax Co., 140 Cal. App. 2d 173, 181, 294 P.2d 1039, 1042-43 (1956). The basic rule is, "[a]ny reasonable doubt as to whether the act is contemplated by the employment, in view of this state's policy of liberal construction in favor of the employee, should be resolved in favor of the employee." Pacific Indem. Co. v. Industrial Accident Comm'n, 26 Cal. 2d 509, 514, 159 P.2d 625, 628 (1945).

just result is reached if workers' compensation is applied.

A strict construction of the course of employment requirement is more appropriate for sexual harassment cases, for none of the rationales described above apply to the sexual harassment situation. Acts of sexual harassment do not further work performance. The employer receives no benefit that should be condoned by the workers' compensation system. Sexual harassment is not an act of common decency or something which reasonably should be expected as part of the work environment or the employment contract.

The argument that the injuries were not sustained during the course of employment can be advanced anytime the sexual harassment occurs before or after working hours or off the employer's premises. In addition, if the woman worker is called into a supervisor's or employer's office, or the performance of her duties is otherwise halted for the purpose of harassment, her injuries should not be considered as occurring within the course of employment.

In *Doney v. Tambouratgis,*[209] a woman worker was assaulted after she had "performed her normal duties."[210] The owner told the other women workers to leave after the drinking establishment closed, but he asked the plaintiff to stay to discuss a customer complaint about her he had received earlier in the evening.[211] This reason appears to have been a subterfuge as the owner did not discuss a complaint with her but proceeded to physically attack her once inside his office.[212] The course of employment issue was not discussed in *Doney*. The facts, however, indicate that the course of employment requirement was not met. A strict construction of the course of employment test would result in a denial of workers' compensation because the assault took place after-hours and after the worker had finished the duties she was hired to perform. A liberal construction of the test would allow workers' compensation recovery because there is a minimum quantum of work connection.

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209. 23 Cal. 3d 91, 587 P.2d 1160, 151 Cal. Rptr. 347 (1979).
210. *Id.* at 95, 587 P.2d at 1162, 151 Cal. Rptr. at 349.
211. *Id.*
212. *Id.*

The assault occurred on the premises and the worker stayed because her employer said he wanted to discuss the work-related matter of a customer complaint. A court could conclude that at the time of the assault the worker was performing an act which was part of the employment contract; an employee is expected to meet with her employer to discuss matters such as customer complaints. If she thought this was the purpose for the meeting, she was performing her duties at the time of the assault. Such a construction, however, would provide an employer an easy way to evade civil liability for his intentional acts of violence. The only basis of the work connection is the employer's subterfuge in that he used a work-related matter as a means to accomplish an act of sexual aggression. To allow him to use this artificial work connection a second time to shield himself from civil liability is a double injustice to the woman.

If workers' compensation is the exclusive remedy in a situation such as that presented in *Doney*, the woman worker will not be compensated adequately for the harm done to her. In *Doney*, the woman worker filed a tort action rather than a workers' compensation claim. The jury awarded her $16,445; of this, $12,500 was punitive damages.[213] Her actual medical costs and lost work time were presumably minor.[214] Assuming a base award of $500, which is probably high in this fact situation, her maximum award under the workers' compensation act would be $750.[215] She therefore would have received $15,695 less than the amount to which the jury felt she was entitled.

In this situation the penalty provisions of the Workers' Compensation Act also fail to provide an effective deterrent to the employer's acts of physical aggression. Under workers' compensation, the employer would pay only $250, rather than the $16,445 required in the tort action.[216]

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213. *Id.* at 94, 587 P.2d at 348, 151 Cal. Rptr. at 1161.

214. The woman worker's injuries consisted of "bruises, muscle strains, and abrasions," none of which apparently "had any lingering adverse effect on her ability to work." *Id.* at 96, 587 P.2d at 1163, 151 Cal. Rptr. at 349.

215. The $750 figure includes $250 for serious and willful misconduct by an employer which is awarded under the penalty provisions of workers' compensation. For a discussion of the computation of the award under workers' compensation and the augmented award for serious and willful misconduct, *see* notes 159, 161-63 *supra* and accompanying text.

216. The employer is responsible for only that portion of the workers' compensation

In this situation it seems appropriate for the court to hold that the injury did not occur in the course of employment, or at least to give the employee a choice of remedies. A court usually looks to the employee's motivations and purposes in performing the act which resulted in injury to the employee.[217] This liberal construction may be motivated by a desire to assure some recovery to an injured worker.[218] In a sexual harassment context, however, it is also appropriate to consider the employer's motivations to determine whether an employee was performing her normal duties at the time of the injury. To refuse to consider the employer's motivations allows the male employer who harasses a woman worker to shield himself from liability behind the workers' compensation system. An unjust result to the woman worker occurs if only her motivations and purposes are considered.

Sexual Harassment Does Not Arise Out of the Employment

The term "arising out of" the employment refers to a "causal relationship between the injury and employment."[219] The injury must "occur by reason of a risk or condition incident to the employment."[220] The employment need only contribute to the injury; it need not be the sole cause.[221]

When the injury is caused by a physical fight which occurred for personal reasons unrelated to the employment or when forces outside the control of the employer cause the injury, the court may apply a "positional risk" test to reach a just result.[222] This test states that where the "employment brought the employee into what became a position of danger," the "arising out of the employment test" is met even though the employer

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which is awarded for serious and willful misconduct by an employer. *See* notes 161-63 *supra* and accompanying text.

217. Fireman's Fund Indemnity Co. v. Industrial Accident Comm'n, 39 Cal. 2d 529, 534, 247 P.2d 707, 710 (1952); City of Los Angeles v. Workers' Comp. App. Bd., 91 Cal. App. 3d 759, 764, 154 Cal. Rptr. 379, 382 (1979); Osbun v. Workers' Comp. App. Bd., 93 Cal. App. 3d 163, 168, 155 Cal. Rptr. 748, 751 (1979); Bramall v. Workers' Comp. App. Bd., 78 Cal. App. 3d 151, 158, 144 Cal. Rptr. 105, 109 (1978); McIvor v. Savage, 220 Cal. App. 2d 128, 136, 33 Cal. Rptr. 740, 745 (1963).

218. *See* note 208 *supra*.

219. McIvor v. Savage, 220 Cal. App. 2d 128, 135, 33 Cal. Rptr. 740, 744 (1963).

220. Pacific Employment Ins. Co. v. Industrial Accident Comm'n, 26 Cal. 2d 286, 290, 158 P.2d 9, 12 (1945).

221. Madin v. Industrial Accident Comm'n, 46 Cal. 2d 90, 92, 292 P.2d 892, 894 (1956).

222. *Id.* at 95, 292 P.2d at 895.

had no control over the individual who caused the injury and he could not have foreseen the risk to which the employee was exposed.[223]

The test typically is applied in assault cases. In *Transactron, Inc. v. Workers' Compensation Appeals Board*,[224] an employee was killed after a shooting incident involving a non-employee. The court identified the following factors in reaching the conclusion that the death did not arise out of the employment: 1) the nature of her duties did not place her in an "isolated position" but instead the nature of her duties would tend "to deter an assailant . . . for . . . fear of intervention by strangers and coworkers"; 2) "the nature of the [employee's] duties played [no] part in the assailant's . . . intent to assault her" but "merely provided a stage for the event"; and 3) the place of the employment played "[no] part [in the] scheme or plan [but] was merely a fact which provided a place for the assailant to do what he did."[225]

In most of the assault cases in which workers' compensation has been applied, the physical altercation related to the work setting or arose from a disagreement about job duties.[226] California courts have taken a liberal approach in finding sufficient nexus between an injury and the employment setting.[227] As a general rule, however, personal matters unrelated to employ-

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223. *Id.* at 95-96, 292 P.2d at 895.

224. 68 Cal. App. 3d 233, 137 Cal. Rptr. 142 (1977).

225. *Id.* at 237-38, 137 Cal. Rptr. at 145.

226. *Hodges v. Workers' Comp. App. Bd.*, 82 Cal. App. 3d 894, 901-02, 147 Cal. Rptr. 546, 550 (1978); Azevedo v. Industrial Accident Comm'n, 243 Cal. App. 2d 370, 372, 52 Cal. Rptr. 283, 284 (1966).

227. Courts often apply a "quantum theory of work-connection" which "merges the 'course of employment' and 'arising out of employment' tests, but does not dispense with a minimum 'quantum of work connection.'" Lizama v. Workmen's Comp. App. Bd., 40 Cal. App. 3d 363, 370, 115 Cal. Rptr. 267, 272 (1974). All that is required by this test is some connection with the employment and the injury. This test was developed because "[a]lthough the two elements must co-exist concurrently to sustain an award, they are nonetheless often so intertwined that no valid line of demarcation can be drawn. . . ." Scott v. Pacific Coast Borax Co., 140 Cal. App. 2d 173, 178-79, 294 P.2d 1039, 1043 (1956). The basic test is that an injury is compensable "when the employment has brought the employee to the place where the accident occurred and . . . at that time [s]he is engaged in some activity or conduct reasonably attributable to the employment or properly incidental thereto." *Id.* This test is used when a strict definition of the course of employment or arising out of employment tests are not met and compensation would be denied unjustly.

ment are not covered by workers' compensation.[228] The cases supporting this view can be used to argue that the injury is unrelated to the employment setting because the connection between the acts of sexual harassment and the employment is too attentuated.

The workplace does not create a special risk of sexual harassment or "zone of danger" in which the employee is subject to injury. Women are exposed to the risk of sexual harassment regardless of whether they are on the street, at home, or in the office. The workplace merely provides another setting for acts of sexual harassment. Sexual harassment typically occurs not because of the nature of a woman worker's duties or a dispute about a work-related matter, but because the worker is a woman[229] and the employer uses his position of authority to seek sexual favors. The employer's motivations are purely personal. To allow workers' compensation to bar a tort action because the sexual harassment took place in the work setting allows an employer to shield himself from liability for his intentional acts. Courts have used the liberal "positional risk" doctrine to allow recovery for the worker who seeks a workers' compensation remedy. It would be unfortunate if the doctrine were used to defeat a sexual harassment victim's tort claim when she would not receive just compensation for her injuries under the workers' compensation system.

The primary injury resulting from sexual harassment is the harassment itself. It might be argued that adverse employment consequences resulting from a woman worker's refusal to accede to sexual demands are a sufficient connection between the injury and the worker's employment to find that workers' compensation applies. While such consequences are related to the employment, they are not the primary injury for purposes of satisfying the "arising out of employment" requirement, and they should not be confused with the primary injury, the harassment itself. The "arising out of employment" test requires a connection between the sexual harassment and the employment rather than a

228. Liberty Mut. Ins. Co. v. Industrial Accident Comm'n, 39 Cal. 2d 512, 516, 247 P.2d 697, 700 (1952); Osbun v. Workers' Comp. App. Bd., 93 Cal. App. 3d 163, 168, 155 Cal. Rptr. 748, 751 (1979); Lizama v. Workmen's Comp. App. Bd., 40 Cal. App. 3d 363, 368-69, 115 Cal. Rptr. 267, 270-71 (1974).

229. C. MCKINNON, *supra* note 1, at 27.

connection between an adverse employment consequence and the employment. This connection is lacking in the typical sexual harassment situation.

Sexual Harassment is Outside the Contemplation of the Worker's Compensation System

The fourth basis for demonstration that workers' compensation is inapplicable is the policy argument that sexual harassment is outside the contemplation of the workers' compensation system. An employee subjected to acts of sexual harassment should have alternative or cumulative remedies under tort and workers' compensation. This argument is recognized by California courts in the context of racial discrimination on the job.[230] The full extent of the exception is unknown, but the same rationale appears applicable to sexual harassment on the job.

The special nature of racial discrimination was discussed in *Alcorn v. Anbro Engineering, Inc.*[231] The court upheld a Black man's tort action for the intentional infliction of emotional distress based on acts of racial discrimination at his workplace.[232] The California Supreme Court noted that racial slurs are "particularly abusive and insulting in light of recent developments in the civil rights' movement as it pertains to the American [black person]."[233] The court also pointed out that the right to freedom from racial discrimination in employment is a civil right in this state.[234] Workers' compensation was not raised by the employer or discussed by the court.

The exclusivity of workers' compensation was discussed by a California court of appeal in *Renteria v. County of Orange.*[235] A Chicano man filed a tort action based on acts of racial dis-

230. Renteria v. County of Orange, 82 Cal. App. 3d 833, 147 Cal. Rptr. 447 (1978).

231. 2 Cal. 3d 493, 86 Cal. Rptr. 88, 468 P.2d 216 (1970).

232. Plaintiff, a shop steward for a union, told his foreman that he had advised a co-employee not to drive a truck to the job site because the employee was not a union member. The foreman immediately "shouted at plaintiff in a rude, violent and insolent manner as follows: 'You goddam 'niggers' are not going to tell me about the rules. I don't want any 'niggers' working for me. I am getting rid of all the 'niggers'; go . . . get your pay check; you're fired.' " *Id.* at 496-97, 468 P.2d at 217, 86 Cal. Rptr. at 89. This incident was the basis of the employee's tort action.

233. *Id.* at 498 n.4, 468 P.2d at 219 n.4, 86 Cal. Rptr. at 91 n.4.

234. *Id.* at 498 n.2, 468 P.2d at 218 n.2, 86 Cal. Rptr. at 90 n.2.

235. 82 Cal. App. 3d 833, 147 Cal. Rptr. 447 (1978).

crimination that occurred at his place of employment. The employer demurred to the complaint on the ground that workers' compensation was the plaintiff's exclusive remedy.[236] The court of appeal held that there is an implied exception to the exclusivity provision of workers' compensation where intentional acts of racial discrimination support a cause of action for the intentional infliction of emotional distress.[237] The court concluded that acts of racial discrimination are "an entire class of civil wrongs outside the contemplation of workers' compensation" and, because this class of civil wrongs involves intentional injuries, the employee could maintain his tort action.[238] It is likely, however, that the special nature of racial discrimination contributed to the *Renteria* court's willingness to hold that workers' compensation was not the exclusive remedy.

The concept that certain acts are outside the contemplation of workers' compensation was applied to intentional assaults in *Magliulo v. Superior Court.*[239] The court held that a worker is not precluded from instituting a tort action by the exclusivity provisions of workers' compensation when the worker's injuries are sustained from an intentional assault by the employer.[240] The court noted that the penalty provisions of the Workers' Compensation Act for intentional assaults "are provided to insure that the employer provide a safe place of employment."[241] "[W]here there is an intentional assault it is of questionable relationship to general conditions of employment" and the exclusivity provisions are inapplicable.[242] The employee intentionally

236. *Id.* at 835, 147 Cal. Rptr. at 447-48.

237. *Id.* at 842, 147 Cal. Rptr. at 452.

238. *Id.* at 841, 147 Cal. Rptr. at 451.

239. 47 Cal. App. 3d 760, 121 Cal. Rptr. 621 (1975).

240. An employee is allowed to bring a civil action against "any person other than the employer." CAL. LAB. CODE §§ 3850, 3852 (West 1971). Courts have circumvented the exclusivity provisions of workers' compensation where the employer commits an intentional tort by adopting a dual personality theory. On at least one occasion the California Supreme Court has allowed an employee to maintain an action against an employer, as that term is defined in CAL. LAB. CODE § 3850 (West 1971), on the theory that when the person "committed intentional torts, [he] stepped out of [his] proper role . . . and became a 'person other than the employer.' " Unruh v. Truck Ins. Exchange, 7 Cal. 3d 616, 636, 498 P.2d 1063, 1077, 102 Cal. Rptr. 815, 829 (1972). In *Unruh*, the individuals committed the torts of assault and intentional infliction of emotional distress. The exact parameters of this exception to the employer's immunity from tort suit are unclear.

241. Magliulo v. Superior Court, 47 Cal. App. 3d 760, 779, 121 Cal. Rptr. 621, 635 (1975).

242. *Id.*

assaulted by an employer has the cumulative or at least alternative remedies of civil suit and workers' compensation claim.[243]

The analysis that certain acts are outside the contemplation of workers' compensation is equally applicable to acts of sexual harassment. Under *Renteria,* if the act that causes injury is intentional and the act involves a class of civil wrongs which is outside the contemplation of workers' conpensation, a tort action is allowed.[244] Both of these prerequisites are met for acts of sexual harassment. Acts of sexual harassment are outside the contemplation of the workers' compensation system because the use of workers' compensation as an exclusive remedy does not deter sexual harassment. Additionally, the individuals responsible for intentional acts of sexual harassment are not held personally liable,[245] so there is no incentive to eliminate sexual harassment from the workplace or to create a safe work environment.

The factors discussed by the courts in determining that acts of racial discrimination are outside the contemplation of workers' compensation also apply to acts of sexual harassment. Sexual harassment on the job is a continuing, pervasive problem.[246] The right to hold employment without discrimination based on sex is a civil right in California that affords the worker special protection against discrimination.[247] Acts of sexual harassment are a form of sex discrimination.[248] Sexual harassment of working women, like racial discrimination, is "particularly abusive and insulting" in light of the efforts of the women's movement to eliminate sexual discrimination.

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243. The court limited its holding: "We . . . hold that at least until an award of workmen's compensation benefits is made and satisfied . . . or until a judgment is recovered in the civil suit for damages . . . the remedies may be treated as cumulative or at least alternative." *Id.* at 780, 121 Cal. Rptr. at 636 (citations omitted).

244. 82 Cal. App. 3d 833, 840-41, 147 Cal. Rptr. 447, 451 (1978).

245. *See* notes 161-65 *supra* and accompanying text.

246. *See* note 2 *supra* and accompanying text.

247. CAL. LAB. CODE § 1412 (West Supp. 1980). *See* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) (1976).

248. The fact that "sexual harassment does occur to a large and diverse population of women supports an analysis that it occurs *because* of their group characteristic, that is sex. Such a showing supports an analysis of the abuse as . . . sex discrimination. . . ." C. MACKINNON, *supra* note 1, at 27.

Under the workers' compensation system, a victim of sexual harassment is not adequately compensated for the injuries suffered. In the usual workers' compensation case, the claimant suffers a psychological or physical injury that results in some form of disability.[249] The goal is to support the worker until s/he can return to work after the injury has been treated and subsides. Sexual harassment, however, may involve neither physical nor psychological injuries in the technical sense of the words. The humiliation, anger, outrage, and other emotions experienced by a woman subjected to sexual harassment may not result in a psychological or physical disability. Furthermore, in the sexual harassment context there is no question of waiting for the injuries to subside so that the woman worker can return to work. The injuries suffered will continue as long as the sexual harassment remains a condition of the employment setting. Tort law allows compensation in this situation; workers' compensation does not. This situation falls outside the type of injury workers' compensation was designed to redress.

Sexual harassment is not caused by a condition on the job, such as faulty equipment, poor working conditions that may cause altercations, or fights over promotion or training opportunities. The employment is incidental to the commission of the acts of sexual harassment. Many of the individuals at work will never engage in acts of sexual harassment. Others will abuse their positions of power and influence to harass women workers for personal reasons. The personality and character of the male supervisor or employer rather than a job condition is the cause of sexual harassment. The workers' compensation system was not designed to provide a remedy in such a situation.

IV. CONCLUSION

This Note has focused on legal remedies available to a woman faced with sexual harassment. Not all women will choose to use the court system to redress injuries suffered from acts of sexual harassment. A woman may choose to bring legal proceedings only when she is fired or suffers economic loss, or when conditions become so unbearable she will risk jeopardizing her chances for continued employment by filing a civil action. Even if only a few women file lawsuits, however, this may serve as an

249. *See* note 167 *supra* and accompanying text.

encouragement to other women to deal affirmatively with sexual harassment rather than to merely tolerate it.

Lawsuits can serve to teach employers and employees that our society will not tolerate sexual harassment on the job. Several years ago rapes were infrequently prosecuted.[250] Women were afraid to tell people they had been raped because they felt guilty and responsible for the assault.[251] The few women who were brave enough to speak out about sexual assault helped bring the issue of rape into the public consciousness.[252] As people are made aware of the issue, they become more sensitive to the problem of rape. Hopefully, they evaluate their behavior and learn how their attitudes and actions contribute to the problem. This learning process is needed in the area of sexual harassment as well. Involvement of the legal system in this problem is one step towards the elimination of sexual harassment in the workplace. Women will not be truly free from sexual discrimination until all vestiges of sexual harassment are eliminated.

250. LEGRAND & LEONARD, *Civil Suits for Sexual Assault: Compensating Rape Victims*, 8 GOLDEN GATE U.L. REV. 479, 480 (1979).

251. S. BROWNMILLER, *supra* note 2, at 396-98.

252. *Id.*