PEPPERDINE UNIVERSITY

Pepperdine Law Review

Volume 9 | Issue 4 Article 5

5-15-1982

Bundy v. Jackson: Eliminating the Need to Prove Tangible Economic Job Loss in Sexual Harassment Claims Brought Under Title VII

Terence J. Bouressa

Bundy v. Jackson: Eliminating the Need to Prove Tangible Economic Job Loss In Sexual Harassment Claims Brought Under Title VII

In the case of Bundy v. Jackson, *the federal appellate court eliminated the need to prove tangible job loss in claims under Title VII relating to sexual harassment. The holding in* Bundy *thus promotes the viability of sexual harassment claims under Title VII and deters employers from engaging in subtle sexual harassment as "part of the job." The decision provides a model for the nation to follow in the pursuit of the worthy goal of eliminating sexual harassment in the workplace.*

I. INTRODUCTION

Title VII of the Civil Rights Act of 1964 (Title VII) makes it unlawful for employers to base employment decisions involving hiring, termination, and promotion on the sex of the employee.[1] To find a violation of Title VII, the discrimination suffered by the employee must be sufficiently related to the "terms, conditions, or privileges of employment."[2]

In *Bundy v. Jackson*,[3] a claim of sexual harassment[4] was

1. 42 U.S.C. § 2000e-2(a)(1) (1978), which reads as follows:

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

(emphasis added).

2. *Id.*

3. 641 F.2d 934 (D.C. Cir. 1981). Prior to appeal, the plaintiff's claim of sexual harassment was found to be unwarranted by the lower court. That court found that the sexual advances encountered by Ms. Bundy were "standard operating procedure, a fact of life, a normal condition of employment in the office." Bundy v. Jackson, 19 Fair Empl. Prac. Cas. (BNA) 828, 831 (1979), *rev'd and remanded*, 641 F.2d 934 (D.C. Cir. 1981).

4. Sexual harassment has been given the following definition:

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

brought under the sexual discrimination protection afforded by Title VII. The court, however, encountered a major obstacle: past cases pertaining to the "terms and conditions" requirement were far from uniform. One line of cases found that no "term or condition" of employment was affected without proof that the employee sustained a tangible economic job loss. The *Bundy* court rejected that viewpoint and held that a victim of sexual harassment need not prove tangible job loss in order to recover. The problem recognized by the court has been aptly stated:

> The vast majority of women in blue-collar and clerical jobs (many of whom are supporting families) cannot risk losing a job in retaliation for a complaint. Nor can they afford the time required to look for another job. Legal remedies often are available only *after* a woman has been fired or quits and few can afford the time or money required to seek redress.[5]

Acknowledging the demeaning and abusive nature of sexual harassment, the *Bundy* court determined that sexual harassment alone, without a showing of tangible job loss, was enough to prove that the discrimination suffered related to a "term or condition" of employment.[6] The *Bundy* judgment is one that this author believes should be imitated in all American jurisdictions.

II. Historical Background

Cases involving the issue of when discrimination violates a "term or condition" of employment within the meaning of Title VII[7] have been neither consistent nor reconcilable. Some courts

---

E.E.O.C. Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a) (1980). Consequently, when a person receives sexual advances through verbal or physical conduct (a request for sexual relations or a suggestive gesture) that is not welcomed, that conduct is considered sexual harassment.

5. Polansky, *Sexual Harassment at the Workplace*, 8 Hum. Rts. 14, 17 (1980) This article deals with the many problems of sexual harassment and the difficulties in seeking redress.

6. The court asked "whether the sexual harassment of the sort Bundy suffered amounted by itself to sex discrimination with respect to the 'terms, conditions, or privileges of employment.' " That question was answered by stating "we believe that an affirmative answer follows . . . ." 641 F.2d 934, 943 (D.C. Cir. 1981) (emphasis omitted).

7. Because sexual harassment is not specifically referred to in Title VII, sexual harassment had to be defined as a form of sex discrimination. *See, e.g.*, Barnes v. Costle, 561 F.2d 983, 990 (D.C. Cir. 1977). The *Barnes* court rested its decision on Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971), a per curiam decision in which Justice Marshall stated in his concurring opinion that a policy of hiring males with pre-school aged children, but not females in the same position, established a prima facie case of sex discrimination. Other cases have similarly held, consistent with *Barnes*, that sexual harassment is sex discrimination. *See, e.g.*, Garber v. Saxon Business Products, Inc., 552 F.2d 1032 (4th Cir. 1977) (when employer engages in practice where female employees are compelled to submit to sexual advances, that practice is violation of Title VII); Tomkins v. Public Serv. Elec. & Gas Co., 568 F.2d 1044 (3d Cir. 1977) (court emphasized that any sexual advances must result in direct employment consequences).

have liberally interpreted the phrase, while others have adopted a stricter approach.

Those cases advancing the strict viewpoint have required that sexual advances must result in direct employment consequences.[8] Thus, the employee must suffer an economic loss. One such court refused a harassment claim fearing that to do otherwise would open the floodgates to discrimination litigation.[9] These courts have feared that there "would be a potential federal lawsuit every time any employee made amorous or sexually oriented advances toward another,"[10] and have believed that the only sure way to prevent such sexual dilemmas in the workplace would be to hire asexual employees.[11]

It is clear that not all cases propounding the strict definition of "terms or conditions" deal with sexual discrimination. Most of these cases pertain to employment discrimination in general. Racial slurs and derogatory comments have been found insufficient, in and of themselves, to constitute a violation of a "term or condition" of employment.[12] Likewise, differing treatment of male and female physical education teachers was insufficient to give rise to a Title VII violation.[13] These two examples demonstrate that it is

8. *See, e.g.*, Tomkins v. Public Serv. Elec. & Gas Co., 568 F.2d 1044 (3d Cir. 1977). The court found that Title VII would be violated only if sexual advances were conditioned on an employee's "job-status evaluation, continued employment, promotion or other aspects of career development . . . ." *Id.* at 1049.

9. Corne v. Bausch & Lomb, Inc., 390 F. Supp. 161 (D. Ariz. 1975) (sexual harassment claim was denied because a supervisor's alleged conduct had no relationship to nature of employment).

10. *Id.* at 163.

11. *Id.* at 163-64.

12. Cariddi v. Kansas City Chiefs Football Club, Inc., 568 F.2d 87 (8th Cir. 1977). Supervisors of Cariddi, who was a ticket taker at Chief's football games, referred to him as a "dago" and to other Italian Americans as "Mafia." *Id.* at 87. When Cariddi brought an action based on national origin discrimination, it was denied by the lower court and affirmed on appeal. The court recognized that this type of abuse could rise to the level necessary to constitute a violation of Title VII, but did not so arise under the facts of the case. *Id.* at 88.

13. Harrington v. Vandalia-Butler Bd. of Educ., 585 F.2d 192 (6th Cir. 1978), *cert. denied*, 441 U.S. 932 (1979). In this case, a female physical education teacher alleged discrimination in the form of unequal treatment in regard to facilities available to her as opposed to those available to her male counterparts. Mrs. Harrington had a small, unsecure office, no private locker, and no toilet or shower facilities, all of which males in similar positions had. *Id.* at 193-94. The discrimination was established, but relief was unavailable because "Mrs. Harrington failed to establish her claim that she was constructively discharged or that she was discriminated against in the salary she received." *Id.* at 197. Here, the court placed emphasis on an economic condition, which is a very narrow requirement.

difficult to prove that such treatment violates a "term or condition" of employment even though an employee is subjected to differential treatment because of race or sex. The strict view, then, requires that the discrimination result in tangible job loss for the victim.

On the other side, some courts have struggled to bring certain forms of discrimination within the realm of the "terms and conditions" requirement. Under the liberal viewpoint, this requirement has been defined as an "expansive concept."[14] This line of cases gives recognition to the fact that the "environment" to which an employee is subjected is enough to constitute a "term or condition" of employment.[15] Demeaning an employee before his peers through the derogation of religious beliefs[16] or racial overtones present in the workplace[17] has been found to constitute a violation of the "terms or conditions" of employment. Although employees who can prove no economic or tangible job loss are left without a remedy under the strict view, their claims are still viable under the more expansive view. While the view requiring no economic, tangible job loss has been adhered to in other discrimi-

14. Rogers v. E.E.O.C., 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972) (racial discrimination).

15. *Id.* at 238. The *Rogers* court recognized that a discriminatory atmosphere or environment could be sufficient "to destroy completely the emotional and psychological stability of minority group workers." *Id.*

16. Compston v. Borden, 424 F. Supp. 157 (S.D. Ohio 1976). The plaintiff alleged that he was discharged as a result of his religious faith and ancestry. The court recognized the employee's right to be free from harassment, but awarded only nominal damages because the court found that the discharge did not result from religious considerations. *Id.* at 162.

17. Gray v. Greyhound Lines, East, 545 F.2d 169 (D.C. Cir. 1976). Black bus drivers brought suit alleging discrimination in hiring practices by their employer. The court found that "[i]nsofar as plaintiff's complain that Greyhound's hiring practices have resulted in their own subjection to discriminatory treatment in the workplace, they are asserting interests clearly within the scope of Title VII's protection against discrimination in the 'terms, conditions, or privileges of employment.'" *Id.* at 176. *See also*, United States v. City of Buffalo, 457 F. Supp. 612 (W.D.N.Y. 1978), *aff'd and modified on other grounds*, 633 F.2d 643 (1980). In this case, the hiring practices of the city's police and fire departments were challenged by the United States Attorney General. The court determined that economic benefits are no longer the only benefits that have to be abridged in order to violate Title VII. The court remarked that "intangibles, such as psychological impact upon minority employees from a work environment heavily charged with discrimination, fall within the protection of the expansive statutory language." *Id.* at 631. *See also* Firefighters Inst. for Racial Equality v. City of St. Louis, 549 F.2d 506 (8th Cir. 1977), *cert. denied*, 434 U.S. 819 (1977). St. Louis firehouses had established "supper clubs" which, in effect, promoted the exclusion of blacks in kitchen activities. Again, the court recognized that the city had a duty to provide a "nondiscriminatory work environment," that the "supper clubs" were "highly offensive" and therefore unacceptable conditions of employment (violating Title VII). *Id.* at 514-15.

nation contexts, it should be noted that this expansive view had not been followed in a sexual harassment case prior to *Bundy*.

Therefore, two lines of authority exist. One requires a definite showing of a tangible, economic job loss, and the other allows a discriminatory work environment to suffice for a Title VII violation. Regardless of which view is followed, questions arise. Will there be a lawsuit every time one employee receives differing treatment? Do some decisions promote subtle discrimination short of becoming a violation of employment conditions? The *Bundy* court was thus faced with these two opposing views.

III. FACTUAL BACKGROUND

Sandra G. Bundy was employed by the District of Columbia Department of Corrections in April of 1970, and thereafter received several promotions.[18] However, as time wore on, Ms. Bundy's promotions became less frequent. Claims of inadequate work performance were used to justify delays in her promotion.[19]

Ms. Bundy's initial encounters with sexual harassment occurred in May of 1972. Ms. Bundy was subjected to sexual harassment from her first line supervisor all the way up to her ultimate ranking supervisor.[20] These harassing activities continued, and Sandra Bundy consequently filed a series of complaints, the first

18. For an excellent factual chronology, *see* Bundy v. Jackson, 19 Fair Empl. Prac. (BNA) 828 (1979). In summary, Ms. Bundy received promotions in December of 1970 (eight months after being hired as Personnel Clerk), September of 1973, January of 1974, and July of 1976. *Id.* at 829-30.

19. *Id.* These claims of nonperformance stem from several instances described as follows: Bundy took sick leave in 1973 and 1974 because of major surgery; she took sick leave at various times between 1974 and 1976; she did not correctly compile statistics, file required reports, or make adequate field contacts, according to supervisors.

20. The chronology of sexual advances made toward Sandra Bundy is as follows: In May of 1972, Ms. Bundy began receiving phone calls at her home inviting her out for drinks from one of her fellow employees (who would later become her supervisor, and the defendant in this suit). Ms. Bundy informed the caller that she was not interested. Late in 1972, Ms. Bundy's highest ranking supervisor took her out for drinks but at that time made no improper sexual advances. In June of 1974, Ms. Bundy's second line supervisor, who made all recommendations in regard to hiring and firing, began making sexual advances toward her, by inviting her to view sexual literature with him at various places. Subsequently, Ms. Bundy's first line supervisor began harassing her through many methods (including an invitation to "lay up in a motel" as well as an offer of a trip to the Bahamas). Finally, in early 1975, when Ms. Bundy complained to a supervisor, she received a response in the form of an invitation to go to bed. All of these advances were promptly rejected. *Id.* at 830-31.

of which was initiated in April of 1975.[21] When the results of these administrative complaints met with obvious dissatisfaction, Ms. Bundy filed a complaint in the U.S. District Court for the District of Columbia alleging discrimination on the basis of sex.

The initial decision in the district court resulted in the following findings: the plaintiff had proved the existence of improper sexual advances;[22] plaintiff's promotional delays were due to inadequate work performance;[23] and defendant did not discriminate against plaintiff on the basis of sex in any "term or condition" of employment.[24] The court, therefore, awarded judgment for the defendant.[25]

IV. ANALYSIS

A. *The Terms, Conditions, and Privileges of Employment Requirement of Title VII*

After concluding that sexual harassment is a form of sexual discrimination maintainable under Title VII,[26] the *Bundy* court reached one other preliminary matter before addressing the critical issue of the case. It was determined that the discrimination suffered by Ms. Bundy was accomplished with the full knowledge of supervisory personnel.[27] This factor is important in establishing that discrimination flowed from those who had control over employment decisions; therefore, such discrimination could be viewed as a policy of the employer and not just an isolated incident.

The novel and critical question raised in *Bundy* was "whether the sexual harassment of the sort Bundy suffered amounted *by itself* to sex discrimination with respect to the *'terms, conditions, or*

21. Ms. Bundy made an informal complaint to an Equal Employment Opportunity (EEO) officer on or about April 14, 1975. On June 18, 1975, a formal complaint was filed with the Department of Corrections. Further, a formal complaint was filed with the District of Columbia Office of Human Rights in August of 1975. All claims alleged discrimination in employment based on sex. *Id.* at 832.

22. *Id.*

23. *Id.* (Conclusion of Law 3 found that promotion delays were not due to rejection of sexual advances).

24. *Id.* (Conclusion of Law 5 held that Ms. Bundy was promoted as quickly or even more quickly than males similarly situated).

25. *Id.*

26. 641 F.2d at 943. "We thus readily conclude that Bundy's employer discriminated against her on the basis of sex." *See also* note 7 *supra*, for other cases dealing with the definition of sexual harassment as a form of sex discrimination actionable under Title VII; Miller v. Bank of America, 600 F.2d 211 (9th Cir. 1979) (summary judgment for defendant reversed where black woman fired because she refused supervisor's demand for sexual favors from a "black chick").

27. "[O]fficials in the agency who had some control over employment and promotion decisions had full notice of harassment committed by agency supervisors and did virtually nothing to stop or even investigate the practice." 641 F.2d at 943.

privileges of employment.' "[28] The court answered this question affirmatively.[29] In a bold move, the court disposed of the need to prove tangible job loss in sexual harassment suits.

When an employee suffers a tangible job loss, as when he or she is fired, concrete examples of the discrimination can be pointed to in support of that employee's discrimination claim. Yet, when the discrimination produces no tangible job loss, evidence of this discrimination is more difficult to produce.[30] This is precisely the problem remedied by *Bundy*. The court believed that while sexual harassment is one of the most humiliating of all forms of discrimination,[31] it may be the most difficult to prove. By eliminating the need to prove that harassment is connected to job consequences, the *Bundy* court has provided for harassment itself to be remedied as well as its consequences.

A further important concern was recognized by the *Bundy* court. It is a concept which can be termed a vicious cycle.[32] An employee in an inferior employment position who resists advances by superiors can be forced into a position of career stagnation if required to quit her job to enforce her claim for sexual harassment. If the individual does quit, what is to prevent the same series of events from occurring in her next job? An employer would then be able to make the endurance of sexual intimidation a necessary element (term or condition) of her job.[33] Under *Bundy*, this is an inequity which can now be remedied through the viability of an action prior to the loss of a job.

Further, the court apparently determined that the fear of unmerited lawsuits must be weighed against the need to provide a sexually harassed employee with a forum in which to vent griev-

28. *Id.* (emphasis added). The court termed this issue a "novel question." *Id.*

29. Again, this position has not been held by any prior court. *Id.*

30. The court believed that "an employer could sexually harass a female employee with impunity by carefully stopping short of firing the employee or taking any other tangible action against her in response to her resistance . . . ." *Id.* at 945. By eliminating the need to establish an infringement of a condition of employment, the court avoided these difficulties in proof.

31. The court stated that sexual harassment "injects the most demeaning sexual stereotypes into the general work environment and . . . always represents an intentional assault on an individual's innermost privacy . . . ." *Id.*

32. This is referred to as a "trilemma." The employee can: (1) oppose the advances and suffer the attending consequences, (2) endure the harassment, or (3) leave her position, hoping not to encounter the same problems in her next job. *Id.* at 946.

33. *Id.*

ances.[34] Underlying this view is the idea that it is more equitable to allow a court to determine whether an employer's actions are a violation of a law, than to allow the employer to make such a determination. The trend prior to *Bundy* allowed no forum until the employer crossed the line and produced a tangible job loss for the employee.

In summary, *Bundy* changed the standard of proof required in sexual harassment claims. The pre-*Bundy* formula for relief in sexual harassment suits was: proof of sexual harassment *plus* loss of tangible job benefit equals a violation of a "term or condition" of employment and a violation of Title VII. *Bundy* has substantially altered the formula as follows: proof of sexual harassment *itself* equals a violation of a "term or condition" of employment and a violation of Title VII. *Bundy* represents a welcome change for the sexually harassed employee.

B. The Burden of Proof Under Title VII as Adapted to Sexual Harassment

The court in *Bundy* determined that it was necessary to change the typical set of elements[35] necessary to establish a prima facie case in actions alleging discrimination under Title VII.[36] This task was simplified by the fact that a prima facie case under Title VII had previously been held to be flexible.[37] The prima facie case

---

34. While this argument was not explicitly stated by the court, it underlies the decision and is evidenced by the court's recognition that women in the position of Ms. Bundy "have little recourse against harassment beyond the legal recourse Bundy seeks in this case." *Id.* at 945. In other words, without the *Bundy* holding, there is no remedy absent proof of tangible job loss.

35. In McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), the United States Supreme Court established the elements of a prima facie case (specifically pertaining to racial discrimination):

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

Id. at 802. The Court noted that these specifications will vary according to the factual situation. *Id.* at 802 n.13.

36. The *Bundy* court felt obligated to make this modification because *McDonnell, see* note 35 *supra*, related to hiring practices, and *Bundy* related to promotion; *McDonnell* dealt with discrimination based on the victim's membership in a disadvantaged group, whereas *Bundy* was not based on discrimination resulting from membership in a disadvantaged group (sex), but rather, discrimination based on refusal to submit to sexual advances; and finally, *McDonnell* recognized the need to adjust the prima facie case in different situations. *See* 641 F.2d at 951.

37. *See, e.g.*, Furnco Constr. Co. v. Waters, 438 U.S. 567, 577 (1978) (prima facie case standard was "never intended to be rigid, mechanized, or ritualistic"). *See also* Day v. Mathews, 530 F.2d 1083 (D.C. Cir. 1976) (broad language in support of employee, stringent burden on employer); Baxter v. Savannah Sugar Ref. Corp., 495 F.2d 437 (5th Cir. 1974), *cert. denied*, 419 U.S. 1033 (1974) (heavy burden placed

needed modification regarding sexual harassment, because without the need to prove tangible loss the burden of proof would be too difficult to meet.[38] Specifically, the *Bundy* court eliminated the need for a sexual harassment victim to prove particular employer reactions in regard to that victim's refusal to submit to sexual advances.[39] In other words, the sexual harassment victim can recover even though he or she has to prove less in reference to the employer's actions than the average discrimination employee under Title VII. Once the prima facie case was found to have been established and unsuccessfully rebutted in *Bundy*, the court granted injunctive relief in the form of a specific order directing an end to the discriminatory practices of Bundy's employers.[40]

V. IMPACT

A. The Narrow, Predictable Effect

Although *Bundy* has been cited in a substantial number of cases,[41] its full potential has not yet been tapped. In its narrow-

---

on employer in rebutting prima facie case with "clear and convincing evidence"). These cases establish the flexibility of the *McDonnell* standards, thereby supporting the modification in *Bundy*.

38. 641 F.2d at 952.

39. The prima facie case was adjusted as follows:

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

Id. at 953. Compare this with the *McDonnell* prima facie case, note 35 *supra*.

Once the prima facie case is proved, the employer must rebut the showing "by clear and convincing evidence, that he had legitimate nondiscriminatory reasons for denying the claimant the promotion." 641 F.2d at 953.

40. The real damage in a sexual harassment case is the harassment itself. At least this is true when one considers the *Bundy* holding that harassment itself, without proof of tangible jobs loss, is actionable (if proved). Therefore, injunctive relief is a proper means by which to prevent the harassment. The court in *Bundy* utilized guidelines promulgated by the Equal Employment Opportunity Commission (E.E.O.C.). *See id.* at 947-48. The *Bundy* court issued a very specific order which was to be implemented by the lower court in order to put an end to the discriminatory practices of Ms. Bundy's employers. *Id.* Back pay was not awarded to Bundy because the lower court misapplied the proper allocation of the burden of proof according to Title VII. *Id.* at 950.

41. *See* Daye v. Harris, 24 Fair Empl. Prac. Cas. (BNA) 1248, 1251 (1981). In *Daye*, a white female nurse sued under a claim of reverse discrimination on the basis of race. The lower court entered judgment for the defendant, and the appellate court reversed, stating that the lower court improperly allocated the burden of proof. *See also* McKenzie v. Saylor, 508 F. Supp. 641, 646 (D.D.C. 1981) (racial discrimination claim was brought as a class action); Metrocare v. WMATA, 25 Fair Empl. Prac. Cas. (BNA) 76, 82 (1981); Milton v. Weinberger, 645 F.2d 1070, 1077

est uses, *Bundy* should provide a springboard for sexual harassment claims to be brought prior to the realization of tangible job loss.

Those employees who are subtly and skillfully harassed in their employment environment can now have their cases heard without the need to quit their jobs in order to establish their cause of action under Title VII.[42] Courts can issue orders to stop the harassment before it reaches the point of affecting the work environment in the substantial way required under the strict view in pre-*Bundy* decisions.[43]

The *Bundy* result is one which is both logical and just. Employees should not be subjected to sexual game playing by superiors. Employees should not have to give up positions that have been worked for over the years in order to eliminate the unfair employment practices by their employer. Sexual harassment is a continuing form of discrimination that needs to be addressed and dealt with on the basis of what it is, not on the basis of what consequences may flow from it.

B. The Broad, Potential Effect

Bundy provides a good model for national uniformity among all "employment" discrimination cases. Since *Bundy* was, in its broadest sense, an "employment" discrimination claim, it can be used as a vehicle for the promotion of all employment discrimination cases as viable causes of action prior to a tangible job loss.[44]

(D.C. Cir. 1981); Ramirez v. Hidalgo, 25 Fair Empl. Prac. Cas. (BNA) 416, 419 (1981); Parker v. Baltimore & O. R.R., 25 Fair Empl. Prac. Cas. (BNA) 889, 893 (1981); Kapustka v. United Airlines, Inc., 25 Fair Empl. Prac. Cas. (BNA) 1283, 1285 n.6 (1981). All the above cases utilized *Bundy* to modify the burden of proof.

Other uses of the *Bundy* decision have been as follows: Wright v. Methodist Youth Serv., Inc., 511 F. Supp. 307 (N.D. Ill. 1981) (claim for homosexual harassment and reliance on *Bundy's* recognition of sexual harassment as sex discrimination); Taylor v. Jones, 26 Empl. Prac. Dec. (CCH) ¶ 21,137 (1981) (injunction aspect and *Bundy's* expansion of work atmosphere concept); Woerner v. Brzeczek, 26 Fair Empl. Prac. Cas. (BNA) 897, 898 (1981) (action brought under Equal Protection Clause, and *Bundy's* "terms and conditions" analysis recognized but not utilized due to nature of claim); Miles v. F.E.R.M. Enterprises, 29 Wash. App. 61, 627 P.2d 564 (1981) (for a racial discrimination claim in housing practices, court found no need to show pecuniary loss to constitute a Title VII action pursuant to *Bundy*).

See also KAY, CASES AND MATERIALS ON SEX BASED DISCRIMINATION 552-53 (2d ed. 1981).

42. This is true at least in the Circuit Court of Appeals for the District of Columbia. However, this author argues that every federal circuit court should adopt the *Bundy* rule that proof of tangible job loss is no longer required.

43. *See* note 40 *supra*.

44. *See* Taylor v. Jones, 26 Empl. Prac. Dec. (CCH) ¶ 21,137 (1981); Woerner v. Brzeczek, 26 Fair Empl. Prac. Cas. (BNA) 897 (1981); and Miles v. F.E.R.M. Enterprises, Inc., 29 Wash. App. 61, 627 P.2d 564 (1981), for such similar attempts.

It is therefore urged that the *Bundy* rule be adopted in all federal jurisdictions to insure that all sexually harassed employees are provided with a remedy.

Further, it is urged that *Bundy* be utilized in another capacity. As has been shown, a "term or condition" of employment means different things to different courts.[45] What an employer establishes as a standard is held acceptable in one context and unacceptable in another. The *Bundy* decision focuses on the discrimination itself as the real problem rather than just the consequences produced by the discrimination. *Bundy* can be viewed as contending that the discrimination itself is the wrong in need of correction. The actual sexual advancements are the problem and should therefore be actionable. In summary, *Bundy* represents an attempt to eliminate artificial barriers and reach the core of the problem.

VI. Conclusion

As a federal appellate decision, *Bundy v. Jackson* is not the rule of law in every jurisdiction.[46] *Bundy* does, however, represent a substantial step toward the very worthy goal of eliminating sexual harassment in employment. The *Bundy* court recognized the fact that an employee should not have to risk potential job loss in order to have a remedy available. The rule of *Bundy* should be advanced in other cases and adopted by other courts continuing the struggle against a most degrading form of discrimination, sexual harassment in the workplace.

Terence J. Bouressa

45. *See, e.g.*, notes 8-17 *supra* and accompanying text.

46. The *Bundy* decision, although an appellate decision, was in its final status with no potential for appeal, as was underlined by Barry A. Gottfried, one of the attorneys for Ms. Bundy, in a telephone conversation with this author on March 15, 1981.