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EXTORTION IN THE WORKPLACE: USING CIVIL RICO TO COMBAT SEXUAL HARASSMENT IN EMPLOYMENT

INTRODUCTION

The Chief Executive Officer of a major New York advertising firm persists in flirting with one of his most senior Vice Presidents. After two or three months of being politely rebuffed, the C.E.O. becomes abusive. He regularly comments on her breast size in front of her staff, and rubs his erect penis against her. On several occasions, the C.E.O. summons the Vice President to his office for business meetings and demands that she massage his back while they talk. She repeatedly asks him to stop this behavior, but the C.E.O. refuses and explains that the only way she'll stop him is by sleeping with him. After six months of abuse, she quits and files a federal complaint under Title VII¹ and the Racketeer Influenced Corrupt Organizations Act (hereinafter "RICO").²

¹ Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991. 42 U.S.C. § 2000e.

² This hypothetical is based on several sexual harassment suits. Also pending to this claim would have been claims under New York State Executive Law § 296 and New York City Administrative Code § 8-107. New York State Executive Law, Art. 15 § 296 (1)(a) provides:

It shall be an unlawful discriminatory practice:

For an employer . . . because of the age, race, creed, color, national origin, sex, or disability, or marital status of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.

N.Y. EXEC. LAW § 296(1)(a) (McKinney 1993).

New York City Administrative Code § 8-107 (1)(a) similarly provides:

It shall be an unlawful discriminatory practice:

For an employer or an employee or agent thereof, because of the actual or perceived age, race, creed, color, national origin, gender, disability, marital status, sexual orientation or alienage or citizenship status of any person, to refuse to hire or employ or to bar or to discharge from employment such person or to discriminate against such person in compensation or in terms, conditions or privileges of employment.

Specifically, she charges that the C.E.O.'s sexual harassment formed a pattern of extortionate acts designed to deprive her of her property interest in her civil rights, and her business and property interests in her employment. She seeks compensatory damages under Title VII in the amount of three hundred thousand dollars, and under RICO in the amount of 1.5 million dollars.³

This Note will argue that certain sexual harassment claims fit RICO definitions and that the application of RICO in such situations is valid and appropriate. The few district courts that have addressed the issue have recognized that under certain circumstances sexual harassment in the workplace constitutes a pattern of extortion amounting to racketeering activity as defined by RICO.⁴ Section I briefly discusses sexual harassment suits and their evolution under Title VII. Section II examines the origins and development of the RICO statute. Section III presents some of the recent court decisions that have addressed the issue of whether sexual harassment claims may be brought under RICO. Section IV analyzes these cases and concludes that RICO should encompass sexual harassment claims. Finally, the Conclusion of this Note provides a brief sketch of how to frame a civil RICO sexual harassment claim.

I. GENDER DISCRIMINATION: SEXUAL HARASSMENT AND TITLE VII

In the early history of Title VII, courts did not interpret sexual harassment to be a form of sexual discrimination because they viewed harassment as "a personal attack, not a gender issue."⁵ They also feared a flood of litigation would ensue if Title VII took sexual harassment under its already burdened wings.⁶ Ultimately interpretations changed, as courts determined that "but for" a victim's gender the harasser

N.Y. CITY ADMIN. CODE § 8-107 (1)(a) (1991).

³ This amount is based on a \$500,000.00 annual salary, trebled under civil RICO's treble damages award provision. 18 U.S.C. § 1964(c) (1988).

⁴ 18 U.S.C. § 1961 (1988).

⁵ Michelle Ridgeway Peirce, Note, *Sexual Harassment and Title VII—A Better Solution*, 30 B.C. L. REV. 1071, 1080 (1989).

⁶ *Id.* at 1081.

would not solicit his or her participation in sexual activity.⁷ Courts now also apply the "but for" test to situations where a supervisor or coworker creates a hostile work environment for an employee on the basis of his or her gender.⁸

Women began entering the workforce during the 1970s and 1980s in increasingly greater numbers, as the women's movement advocated issues regarding "women's . . . subjection to men with ever greater vehemence."⁹ Sexual threats, reprisals, insults, innuendoes and sexual humor became issues to be dealt with head-on, not simply suffered with clenched teeth.¹⁰ Males grew even more resentful as women rose to positions of power and authority in the business world, particularly when women gained footholds in the blue-collar professions which were traditionally dominated by men.¹¹ As one scholar has noted, "[t]his resentment, coupled with the greater interaction with men and women in the workplace, has no doubt added to the incidence of sexual harassment."¹² Indeed, some commentators have estimated that half of all female workers will be sexually harassed during the course of their careers.¹³ Courts currently recognize two forms of sexual ha-

⁷ *Id.* at 1082.

⁸ See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986); *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987).

⁹ Ellen Frankel Paul, *Sexual Harassment as Sex Discrimination: A Defective Paradigm*, 8 YALE L. & POL'Y REV. 333 (1990).

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ Peirce, *supra* note 5, at 1071; see also BARBARA A. GUTER, SEX AND THE WORKPLACE 44 (1985). It should be noted, however, that women are not the only victims of sexual harassment in the workforce, and men are not the only perpetrators. The Bureau of National Affairs reports that companies receive complaints from men, albeit infrequently, alleging harassment by women. *Sexual Harassment: Employer Policies and Problems, Personnel Policies Forum Survey* (BNA) No. 144, at 16-17 (June 1987). Furthermore, plaintiffs have litigated sexual harassment suits under Title VII involving members of the same sex. *E.g.*, *Joyner v. AAA Cooper Transp.*, 597 F. Supp. 537, 541 (M.D. Ala. 1983), *aff'd*, 749 F.2d 732 (11th Cir. 1984) (mem.); *Wright v. Methodist Youth Servs.*, 511 F. Supp. 307, 310 (N.D. Ill. 1981); *Barlow v. Northwestern Memorial Hosp.*, 30 Fair Empl. Prac. Cas. (BNA) 223, 224 (N.D. Ill. 1980). Courts are split as to whether these cases differ from the more common "man on woman" variety of harassment. Some courts have disputed the validity of same-sex sexual harassment claims under Title VII. See, *e.g.*, *Garcia v. Elf Atochem N. Am.*, 28 F.3d 446 (5th Cir. 1994); *Goluszek v. Smith*, 697 F. Supp. 1452, 1456 (N.D. Ill. 1988). A recent trend of court decisions holds, however, that same-sex harassment falls within the purview of Title VII,

harassment: quid pro quo and hostile work environment.¹⁴

A. *Quid Pro Quo Harassment*

Quid pro quo sexual harassment occurs when a supervisor requires an employee to perform sexual favors in exchange for continued employment or job benefits.¹⁵ Under Title VII, supervisors are the only ones capable of quid pro quo sexual harassment because they alone hold the power to coerce and to blackmail;¹⁶ they alone control the terms of employment.¹⁷ As one commentator explains, "[c]oworkers, because they possess the same status and authority in the workplace as the

and finds that "but for" the victim's gender the harassment would not have taken place, regardless of the specific sexual identities of the participants (e.g., a gay man would not have chosen to sexually harass a female employee). *Hopkins v. Baltimore Gas and Electric Co.*, 1996 WL 93733 (4th Cir. 1996); *Ecklund v. Fuisz Technology, Ltd.*, 905 F. Supp. 335 (E.D. Va. 1995); *Sardinia v. Dellwood Foods, Inc.*, 1995 WL 640502 (S.D.N.Y. 1995); *Easton v. Crossland Mortgage Corp.*, 905 F. Supp. 1368 (C.D. Ca. 1995); *EEOC v. Walden Book Co., Inc.*, 885 F. Supp. 1100 (M.D. Tenn. 1995); *Pritchett v. Sizeler Real Estate Management Co., Inc.*, 1995 WL 241855 (E.D. La. 1995); *Goluszek*, 697 F. Supp. at 1456. For an interesting and informative argument against the inclusion of same-gender sexual harassment under Title VII, see Carolyn Grose, Note, *Same-Sex Sexual Harassment: Subverting the Heterosexual Paradigm of Title VII*, 7 YALE J.L. & FEMINISM 375 (1995); cf. Kara Gross, Note, *Same-Sex Sexual Harassment Is Sex Discrimination*, 62 BROOK. L. REV. (forthcoming 1996). There is some question as to whether a bisexual harasser could be found to have discriminated on the basis of gender. *E.g.*, *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 620 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987); *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982); *Bundy v. Jackson*, 641 F.2d 934, 942 n.7 (D.C. Cir. 1981); *Ryczek v. Guest Services, Inc.*, 877 F. Supp. 754 (D.D.C. 1995). *But see* *Chiapuzio v. BLT Operating Corp.*, 826 F. Supp. 1334, 1337 (D. Wy. 1993) ("the equal harassment of both genders does not escape the purview of Title VII"). Nonetheless, the vast majority of sexual harassment litigation deals with situations involving male harassers and female victims. For the purpose of clarity, when discussing sexual harassment in the workplace, this Note will use male pronouns when referring to the harasser and female pronouns when discussing the victim. The author, however, does not (mean to) ignore the multitude of circumstances where a variety of other combinations of pronouns would be appropriate.

¹⁴ Katherine S. Anderson, *Employer Liability Under Title VII for Sexual Harassment After Meritor Savings Bank v. Vinson*, 87 COLUM. L. REV. 1258, 1260 (1987).

¹⁵ *Miller v. Bank of America*, 600 F.2d 211 (9th Cir. 1979).

¹⁶ Black's Law Dictionary defines "blackmail" as an "unlawful demand of money or property under threat to do bodily harm, to injure property, to accuse of crime, or to expose disgraceful defects." BLACK'S LAW DICTIONARY, 170 (6th ed. 1990). This crime is commonly included under extortion or criminal coercion statutes.

¹⁷ Anderson, *supra* note 14, at 1260.

victim, are deemed legally incapable of applying the *direct extortionate pressure* necessary for quid pro quo sexual harassment.¹⁸

The employer is vicariously liable¹⁹ for quid pro quo harassment committed by its supervisor employee, whether or not the employer is aware of the harassment.²⁰ In *Miller v. Bank of America*,²¹ the Ninth Circuit held that a supervisor had acted within the scope of his employment when he sexually harassed a subordinate female employee. The court reasoned that "respondeat superior"²² does apply here [because] the action complained of was that of a supervisor, authorized to hire, fire, discipline or promote, or at least to participate in or recommend such actions, although what the supervisor is said to have done violates company policy."²³

The Ninth Circuit holding reveals that limited recourse is available to an employee who is sexually harassed by the very person she must turn to for help. The risks in attempting to communicate with her supervisor's supervisors are high indeed, and the benefits are questionable. Even if she is believed, there is no guarantee that any action will be taken on her behalf, and there is, in fact, a good possibility that her supervisor will retaliate against her with even greater harassment. The only way to clear this hurdle, and provide a viable cause of action for the victim, is to impose liability on the one who vested authority in the harasser in the first place: the employer.

¹⁸ Anderson, *supra* note 14, at 1260 (emphasis added).

¹⁹ "Vicarious liability" is "[t]he imposition of liability on one person for the actionable conduct of another, based solely on a relationship between the two persons . . . for example, the liability of an employer for the acts of an employee." BLACK'S LAW DICTIONARY, *supra* note 16, at 1566.

²⁰ See, e.g., *Horn v. Duke Homes*, 755 F.2d 599 (7th Cir. 1985).

²¹ 600 F.2d 211 (9th Cir. 1979).

²² "Respondeat superior" means, literally, "[l]et the master answer Under [this] doctrine an employer is liable for injury to person or property of another proximately resulting from acts of [an] employee done within the scope of his employment in the employer's service." BLACK'S LAW DICTIONARY, *supra* note 16, at 1311.

²³ *Miller*, 600 F.2d at 213.

B. Hostile Work Environment Harassment

In *Meritor Savings Bank v. Vinson*, the United States Supreme Court held that a plaintiff may pursue a sexual harassment claim against an employer under Title VII for a hostile work environment.²⁴ The *EEOC Guidelines on Discrimination Because of Sex*²⁵ define a sexually hostile work environment as one "unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."²⁶ This broad definition covers many varieties of behavior:

[A hostile work environment] can encompass anything from the verbal and pictorial (crude language, lewd pictures placed on co-workers' desks, sexual limericks inscribed on bathroom stalls, off-color jokes) to offensive physical acts (touching, brushing against, grabbing, indecent exposure).²⁷

Unlike a quid pro quo claim, either supervisors or coworkers can create a sexually hostile environment; the actor need not possess greater power than the victim in the workplace.²⁸ Courts generally agree that in order for an employer to incur liability for harassment by a victim's coworkers, the employer, through its agents or supervisory personnel, must have known of the alleged sexual harassment and must have failed to take "prompt and appropriate corrective action."²⁹

Courts are split, however, as to the appropriate standard of liability for an employer facing hostile environment claims against supervisors. One view is that courts should not impose vicarious liability upon the employer because the delegated power of a supervisor does not aid him or her in creating a sexually hostile work environment.³⁰ Courts espousing this

²⁴ *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986).

²⁵ *EEOC Guidelines on Discrimination Because of Sex*, 29 C.F.R. § 1604.11(a) (1980).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Anderson*, *supra* note 14, at 1261.

²⁹ *Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 621 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987).

³⁰ *See, e.g., Jones v. Flagship Int'l*, 793 F.2d 714 (5th Cir. 1986), *cert. denied*, 479 U.S. 1065 (1987); *Katz v. Dole*, 709 F.2d 251 (4th Cir. 1983); *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982).

"use of delegated power" approach argue that the supervisor, in such situations, engages in personal acts outside the scope of his authority. For example, the Eleventh Circuit reasoned that "[w]hen a supervisor gratuitously insults an employee, he generally does so for his reasons and by his own means. He thus acts outside the actual or apparent scope of the authority he possesses as a supervisor."³¹ Another view is that courts should direct their attention exclusively to the managerial level of the harasser.³² Courts adopting the "managerial level" approach find the employer to be vicariously liable for any conduct of a supervisor contributing to a sexually hostile work environment,³³ reasoning that the supervisor acts within the scope of his employment when he harasses a subordinate, and therefore, that his offense is attributable to the employer.³⁴ Both approaches comport with the EEOC's Guidelines.³⁵

II. THE RACKETEER INFLUENCED CORRUPT ORGANIZATIONS ACT

Congress passed RICO in 1970 as part of the Organized Crime Control Act (OCCA),³⁶ in order to pursue the "eradication of organized crime in the United States."³⁷ By passing the OCCA, Congress sought to respond to the public's rising concern with crime in America, particularly organized crime.³⁸

³¹ *Henson*, 682 F.2d at 910.

³² See *Karibian v. Columbia University*, 14 F.3d 773 (2d Cir. 1994); *Bohen v. City of East Chicago*, 799 F.2d 1180, 1189 (7th Cir. 1986); *Vinson v. Taylor*, 753 F.2d 141 (D.C. Cir. 1985) *aff'd sub nom.*, *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986); *Rimedio v. Revlon*, 528 F. Supp. 1380 (S.D. Ohio 1982).

³³ *Bohen*, 799 F.2d at 1189; *Vinson*, 753 F.2d at 149-50; *Rimedio*, 528 F. Supp. at 1388.

³⁴ *Id.*

³⁵ "[A]n employer . . . is responsible for [the acts] of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence." 29 C.F.R. § 1604.11(c) (1986).

³⁶ Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (codified as amended at 18 U.S.C. § 1961, *et seq.* (1988 & Supp. II 1990)).

³⁷ *Id.* at 923.

³⁸ Michael S. Kelley, "Something Beyond": The Unconstitutional Vagueness of RICO's Pattern Requirement, 40 CATH. U. L. REV. 331, 333 (1991). During heated debate over the bill's passage, Senator John L. McClellan (D-Ark.), one of the bill's original sponsors, made this plea:

Again, I insist that the crime situation in America today is such, and is progressing so rapidly, that it is imperative that this branch of Govern-

More specifically, it enacted RICO to deal with the peculiar threat of mob infiltration of legitimate business.³⁹ Congress originally conceived the OCCA to be a tool to punish those who invested criminal profit in legitimate "enterprise" and those who acquired or operated interests in legitimate enterprise through a "pattern of racketeering activity."⁴⁰

RICO, however, reaches well beyond organized crime to a myriad of areas in American life. The Supreme Court held, in *Sedima, S.P.R.L. v. Imrex Co.*,⁴¹ that RICO's application to both illegitimate and legitimate business is consistent with its original purpose. Justice White explained:

Instead of being used against mobsters and organized criminals, [RICO] has become a tool for everyday fraud cases brought against "respected and legitimate 'enterprises.'" Yet Congress wanted to reach both "legitimate" and "illegitimate" enterprises. The former enjoy neither an inherent incapacity for criminal activity nor immunity from its consequences. The fact that § 1964(c) is used against respected businesses allegedly engaged in a pattern of specifically identified criminal conduct is hardly a sufficient reason for assuming that the provision is being misconstrued . . . [T]he fact that RICO has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.⁴²

After *Sedima*, in *H.J. Inc. v. Northwestern Bell Telephone Co.*,⁴³ the Supreme Court dispensed with the notion that RICO should apply only to activities characteristic of organized crime, or to "an organized-crime-type perpetrator."⁴⁴ Such a notion, according to the Court, would lead to the conclusion that one must prove that the alleged racketeering activity was committed by a group or association, rather than an individu-

ment, at least, take every action, enact every law, fashion every tool it can possibly fashion within the framework of the Constitution, to enable our law enforcement agencies and officials to combat the growing menace of crime.

116 CONG. REC. 25,193 (1970).

³⁹ Gerard E. Lynch, *Symposium—Reforming RICO: If, Why, and How? A Conceptual, Practical, and Political Guide to RICO Reform*, 43 VAND. L. REV. 769, 770 (1990).

⁴⁰ *Id.* at 770.

⁴¹ 473 U.S. 479 (1985).

⁴² *Id.* at 499.

⁴³ 492 U.S. 229 (1989).

⁴⁴ *Id.* at 243. The Court defined an "organized-crime-type perpetrator" as "an association dedicated to the repeated commission of criminal offenses." *Id.*

al.⁴⁵ Neither the language of the statute nor its legislative history supports this interpretation. RICO imposes criminal and civil liability on "any person" who makes use of or invests finances earned from a "pattern of racketeering activity" to gain holdings or to run a business engaged in interstate commerce.⁴⁶ Had Congress truly desired to limit the statute's scope to organized crime, it would have tailored its language to fit that purpose.

Other sections of the OCCA are instructive on this point. Title V of the OCCA is one example of a narrowly tailored statute. It authorizes the Attorney General to provide witness protection for individuals participating "in an official proceeding concerning an *organized criminal activity*."⁴⁷ Similarly, Title VI of the OCCA allows, for the purpose of preserving testimony, the deposition of a witness testifying against "a person who is believed to have participated in an *organized criminal activity*."⁴⁸ That Congress specifically chose not to limit RICO in this way strongly indicates a desire to create a broader scope for the statute that encompasses more than merely organized crime.⁴⁹ Indeed, the Congressional Record abounds with support for RICO's broad application.⁵⁰ Senator John L. McClellan, the statute's principal sponsor, stated:

The danger posed by organized crime-type offenses to our society has, of course, provided the occasion for our examination of the working of our system of criminal justice. But should it follow . . . *that any proposals for action stemming from that examination be limited to organized crime? [T]his line of analysis . . . is seriously defective in several regards.* Initially, it confuses the occasion for reexamining an aspect of our system of criminal justice with the

⁴⁵ *Id.* at 244.

⁴⁶ 18 U.S.C. § 1962(a) (1988).

⁴⁷ 18 U.S.C. § 3521(a)(1) (1984) (emphasis added).

⁴⁸ 18 U.S.C. § 3503(a) (1970) (emphasis added).

⁴⁹ *Northwestern Bell*, 492 U.S. at 245.

⁵⁰ *E.g.*, 116 CONG. REC. 35,204 (1970) (comments by Rep. Richard Poff concerning difficulty in defining organized crime "precisely and definitively" and the dilemma of attempting to limit prohibitions to "a certain type of defendant"); 116 CONG. REC. 35,205 (1970) (statement of Rep. Abner Mikva indicating that "the salutary purposes for which this bill aimed at organized crime was intended, somehow never came to fruition"); 116 CONG. REC. 18,913-14 (1970) (statement of Sen. John L. McClellan supporting the notion that civil RICO extends its coverage to legitimate business); 116 CONG. REC. 35,204 (1970) (statement of Rep. Abner Mikva questioning the wisdom of limiting civil RICO "to organized crime").

proper scope of any new principle or lesson derived from that reexamination.⁵¹

Another RICO sponsor, Representative Richard Poff, stated:

It is true that there is no organized crime definition in many parts of the bill. This is, in part, because *it is probably impossible precisely and definitively to define organized crime*. But if it were possible, I ask my friend, would he not be the first to object that in criminal law we establish procedures which would be applicable only to a certain type of defendant?⁵²

Such statements clearly indicate that, although lawmakers may have initially intended to focus resources on the fight against organized crime, they never intended for RICO to address organized crime exclusively. Congress understood that it would be too difficult to construct an effective statute covering most commercial activities, without also including violations committed by legitimate enterprise.⁵³

A. *The Private Attorneys General: Civil RICO*

Section 1964 empowers private parties to pursue civil remedies under RICO if they can demonstrate that a pattern of racketeering activity injured them in either their business or property.⁵⁴ RICO permits any person alleging a section 1964 violation to bring suit in a federal court and to recover treble her damages, as well as litigation costs, including reasonable attorney's fees.⁵⁵ In addition, federal courts are empowered to issue divestiture orders, restrict a violator's future activities, and order the reorganization or liquidation of an enterprise.⁵⁶

The Supreme Court recognized that empowering private citizens to pursue civil actions against RICO violators "bring[s]

⁵¹ *Northwestern Bell*, 492 U.S. at 246 (emphasis added) (quoting 116 Cong. Rec. 18,913-18,914 (1970) (statement of Sen. John L. McClellan)).

⁵² *Id.* at 247 (citing 116 CONG. REC. 35,204 (1970)).

⁵³ *Id.* at 247 (citing 116 CONG. REC. 18,940) (1970) (statement of Sen. John L. McClellan)).

⁵⁴ 18 U.S.C. § 1964(b) (1988). The Attorney General of the United States may pursue civil claims against violators as well, so long as those proceedings commence before the final resolution of the private action. Kelley, *supra* note 38, at 339.

⁵⁵ 18 U.S.C. § 1964(c) (1988).

⁵⁶ Kelley, *supra* note 38, at 339.

... the pressure of 'private attorneys general' who can assist the government in prosecuting racketeering activity.⁵⁷ Indeed, by including civil remedies, Congress greatly increased the number of those who police RICO,⁵⁸ and thus expanded the overall effectiveness of the statute.

B. RICO Definitions

All civil RICO plaintiffs must prove injury to business or property due to a pattern of racketeering activity.⁵⁹ The plaintiff must show a nexus between the racketeering activity and the injury,⁶⁰ and the racketeering activity must constitute "enduring criminal conduct."⁶¹

1. Tangible and Intangible Property

Courts accept the general principle that RICO embraces both tangible and intangible property, and find that patterns of racketeering activity directed at intangible property interests constitute legitimate violations.⁶²

⁵⁷ Agency Holding Corp. v. Malley-Duff & Assocs., 483 U.S. 143, 151 (1987).

⁵⁸ Kelley, *supra* note 38, at 340.

⁵⁹ 18 U.S.C. § 1962 (1988).

⁶⁰ 18 U.S.C. § 1964(c) (1988).

⁶¹ Sharpe v. Kelley, 835 F. Supp. 33, 35 (D.Mass. 1993); see Feinstein v. Resolution Trust Corp., 942 F.2d 34 (1st Cir. 1991); Fleet Credit Corp. v. Sion, 893 F.2d 441 (1st Cir. 1990).

⁶² The term "tangible property" comprehends all physical items or possessions, including all financial interests an individual may hold. *United States v. Local 560, Int'l Bhd. of Teamsters*, 780 F.2d 267, 281 (3d Cir.), *cert. denied*, 476 U.S. 1140 (1986). "Intangible property" includes a claimant's legal rights, whether they be statutory or contractual; see *United States v. Zemek*, 634 F.2d 1159 (9th Cir. 1980), *cert. denied*, 450 U.S. 916 (1981) (intangible property interest in the right to solicit business accounts); *United States v. Santoni*, 585 F.2d 667 (4th Cir. 1978), *cert. denied*, 440 U.S. 910 (1979) (intangible property interest in the right to freely conduct business without wrongful external influence); *United States v. Nadaline*, 471 F.2d 340 (5th Cir.), *cert. denied*, 411 U.S. 951 (1973) (intangible property interest in the right to solicit business accounts); *United States v. Tropiano*, 418 F.2d 1069 (2d Cir. 1969), *cert. denied*, 397 U.S. 1021 (1970) (intangible property interest in the right to solicit business accounts). Courts frequently afford protection to statutory rights and entitlements as if they were property. See *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Perry v. Sinderman*, 408 U.S. 593 (1972); *Goldberg v. Kelley*, 397 U.S. 254 (1970). Indeed, the Supreme Court has held that "property" denotes a broad range of interests that are secured by 'existing rules or understandings.'" *Roth*, 408 U.S. at 571-72.

As the Third Circuit articulated in *United States v. Local 560 of the International Brotherhood of Teamsters*, the RICO statute utilizes the definition of extortion as interpreted under the Hobbs Act, criminal RICO and "the language of the Hobbs Act makes no distinction between tangible and intangible property."⁶³ Section 1951(b)(2) liberally defines extortion as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force . . ."⁶⁴ Furthermore, the circuit courts that have addressed this issue agree that it is appropriate to extend criminal RICO to protect intangible property.⁶⁵ Courts have reasoned that if criminal RICO protects intangible property, there is no clear reason to address civil RICO differently.⁶⁶

2. Racketeering Activity and the Pattern Requirement

RICO defines "racketeering activity" as including the specific federal offenses of obstruction of justice, embezzlement of pension funds, bankruptcy and securities fraud, drug activity,⁶⁷ and any act or threat chargeable under state law and punishable by over one year in prison that implicates murder, kidnapping, gambling, arson, robbery, bribery, extortion, the pornography trade, or the sale of narcotics and other dangerous drugs.⁶⁸ RICO requires that the racketeering activity occur in a "pattern," which is defined as the commission of at least two predicate acts within at least ten years of one another.⁶⁹

In *H.J. Inc. v. Northwestern Bell Telephone Co.*, the Supreme Court defined RICO's pattern requirement, concluding that Congress "had a fairly flexible concept of a pattern in mind."⁷⁰ The Court held that the legislative history indicated

⁶³ *Local 560*, 780 F.2d at 281.

⁶⁴ 18 U.S.C. § 1951(b)(2) (1988).

⁶⁵ *Local 560*, 780 F.2d at 281; see *supra* note 62.

⁶⁶ Kelley, *supra* note 38, at 336.

⁶⁷ Kelley, *supra* note 38, at 336.

⁶⁸ 18 U.S.C. § 1961(1)(A) (1988 & Supp. II 1990).

⁶⁹ 18 U.S.C. § 1961(5) (1988 & Supp. II 1990). At a minimum, one act must "occur[] after the effective date of this chapter [RICO] . . . within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity."

⁷⁰ 492 U.S. 229, 239 (1989).

that Congress intended "that to prove a pattern of racketeering activity a plaintiff or prosecutor must show that the racketeering predicates are related, and that they amount to or pose a threat of continued criminal activity."⁷¹ The two elements of the pattern requirement must be demonstrated separately in order to prevail on a RICO claim, although overlap is likely in many contexts.⁷²

Although no precise definition of relatedness exists in the statute, the Court looked to the definition of pattern found in Title X of the OCCA, the Dangerous Special Offender Sentencing Act.⁷³ Title X discusses its pattern requirement only in the context of the relatedness of the defendant's alleged criminal acts.⁷⁴ It states that "criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events."⁷⁵ The Court found no reason for which Congress would impose a more constrained notion of relatedness on RICO.⁷⁶

The Court concluded, however, that there was much in the legislative history to suggest that Congress intended to impose far more stringent requirements on RICO than Title X with respect to its pattern requirement generally.⁷⁷ The Court found relatedness of predicate acts alone to be insufficient to establish a pattern of racketeering under RICO.⁷⁸ Rather, according to the Court, "[t]o establish a RICO pattern it must also be shown that the predicates themselves amount to, or that they otherwise constitute a threat of, continuing racketeering activity."⁷⁹

The question of whether related predicate acts also pose a *threat* of continued racketeering activity rests on the facts of a particular case.⁸⁰ If the threat of continued racketeering activ-

⁷¹ *Id.*

⁷² *Id.*

⁷³ 18 U.S.C. § 3575(e) (1970) (partially repealed 1986).

⁷⁴ *Northwestern Bell*, 492 U.S. at 240.

⁷⁵ 18 U.S.C. § 3575(e) (1970).

⁷⁶ *Northwestern Bell*, 492 U.S. at 240.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 242.

ity is clear, whether that threat is implicit or explicit, a pattern under RICO surely will be found.⁸¹ Such a threat could take the form of a specific threat of indefinite future repetition,⁸² or could simply arise from the predicate acts being part of an organization's standard operating procedure.⁸³ The Court offered an example:

Suppose a hoodlum were to sell "insurance" to a neighborhood's storekeepers to cover them against breakage of their windows, telling his victims he would be reappearing each month to collect the "premium" that would continue their "coverage." Though the number of related predicates involved may be small and they may occur close together in time, the racketeering acts themselves include a specific threat of repetition extending indefinitely into the future, and thus supply the requisite threat of continuity. In other cases, the threat of continuity may be established by showing that the predicate acts or offenses are part of an ongoing entity's regular way of doing business.⁸⁴

The Court emphasized, nevertheless, that what constitutes a pattern can only be determined on a case-by-case basis, and must be viewed in light of the peculiar circumstances that each situation provides.⁸⁵

3. The Nexus Requirement

Section 1964(c) of the RICO Act permits a plaintiff to recover damages for any injury caused "by reason of" a pattern of racketeering activity.⁸⁶ Courts have interpreted this section's language to require proximity, or a nexus, between each injury and the alleged racketeering activity.⁸⁷ A nexus usually exists

⁸¹ *Id.* at 242.

⁸² *Northwestern Bell*, 492 U.S. at 242.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at 243.

⁸⁶ Section 1964(c) provides:

Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

18 U.S.C. § 1964(c) (1988).

⁸⁷ GREGORY P. JOSEPH, *CIVIL RICO: A DEFINITIVE GUIDE* 30 (1992); see *Pelletier v. Zweifel*, 921 F.2d 1465 (11th Cir. 1991); *Old Time Enters., Inc. v. International Coffee Corp.*, 862 F.2d 1213 (5th Cir. 1989); *Haraco, Inc. v. American Nat'l Bank & Trust Co.*, 747 F.2d 384 (7th Cir. 1984), *aff'd per curiam*, 473 U.S. 606 (1985).

if the racketeering activity played a substantial part in causing the injury. The Second Circuit explained in *Hecht v. Commerce Clearing House, Inc.*:⁸⁸

[T]he RICO pattern or acts proximately cause a plaintiff's injury if they are a substantial factor in the sequence of responsible causation, and if the injury is reasonably foreseeable or anticipated as a natural consequence.⁸⁹

The injury need not result directly from the racketeering activity, however, and courts regularly have recognized instances where injuries occur indirectly from the RICO violation.⁹⁰ The only requirement is that the injuries be proximately caused by the pattern of racketeering activity.⁹¹

C. Damages Under Civil RICO

1. Compensating Harm

Courts calculate damages under RICO by assessing the harm suffered by the plaintiff due to the predicate acts that constitute the racketeering activity.⁹² The courts then treble the assessed damages as a means of ensuring that the plaintiff receives a "complete recovery."⁹³ Courts will not, necessarily, use the "predicate-act measure of damages"⁹⁴ to assess the damages incurred by the plaintiff. RICO's principal goal is to ensure that prevailing plaintiffs are fully compensated,⁹⁵ and therefore courts will use an alternative measure of damages in instances where the "predicate-act measure of damages" is insufficient.⁹⁶

For example, courts may conclude that a "predicate-act measure of damages" is insufficient where each predicate act

⁸⁸ 897 F.2d 21 (2d Cir. 1990).

⁸⁹ *Id.* at 23.

⁹⁰ See *Zervas v. Faulkner*, 861 F.2d 823 (5th Cir. 1988).

⁹¹ See *Sperber v. Boesky*, 849 F.2d 60 (2d Cir. 1988); *Haraco*, 747 F.2d at 398.

⁹² JOSEPH, *supra* note 87, at 111.

⁹³ See *Carter v. Berger*, 777 F.2d 1173, 1176 (7th Cir. 1985). Some courts have held that RICO's treble award is provided for punitive purposes. See *infra* notes 105-113 and accompanying text.

⁹⁴ JOSEPH, *supra* note 87, at 112.

⁹⁵ *Berger*, 777 F.2d at 1176.

⁹⁶ See *Liquid Air Corp. v. Rogers*, 834 F.2d 1297 (7th Cir. 1987), *cert. denied*, 492 U.S. 917 (1989).

comprising the racketeering activity carries a different measure of damages.⁹⁷ The determination of which predicate to use for the assessment of damages and, thus, which to use for the purpose of trebling those damages, creates difficulties.⁹⁸ Furthermore, because RICO's predicate offenses are criminal in nature, many do not provide for damages at all, thereby making an assessment of a RICO award impossible under a "predicate-act measure of damages" analysis.⁹⁹ For these reasons, the courts have adhered to fully compensating plaintiffs by whatever calculus.¹⁰⁰

RICO limits damages to harm done only to "business or property."¹⁰¹ Typically, the courts compute these damages through either a "benefit-of-bargain" analysis (computing expectation damages)¹⁰² or an "out-of-pocket" analysis (computing the sunk cost).¹⁰³ The plaintiff can recover neither emotional nor physical injuries under the statute.¹⁰⁴ It is not clear, however, whether plaintiffs can recover punitive damages.

2. Punitive Damages: The Trouble with Trebles

Whether one can recover punitive damages under RICO rests on the justification for treble damages.¹⁰⁵ If the statute provides treble damages for punitive purposes, then permitting additional punitive damages allows for double recovery, which

⁹⁷ JOSEPH, *supra* note 87, at 112.

⁹⁸ JOSEPH, *supra* note 87, at 112.

⁹⁹ JOSEPH, *supra* note 87, at 113; see *City of New York v. Bower*, No. 89 Civ. 4179, 1991 U.S. Dist. LEXIS 1204 (S.D.N.Y. Jan. 31, 1991).

¹⁰⁰ JOSEPH, *supra* note 87, at 113.

¹⁰¹ JOSEPH, *supra* note 87, at 112.

¹⁰² According to Black's Law Dictionary a "benefit-of-bargain" analysis of damages, "gives [the] damaged party [the] equivalent of what the party would have received if the representations relied upon had been true." BLACK'S LAW DICTIONARY, *supra* note 16, at 158.

¹⁰³ BLACK'S LAW DICTIONARY, *supra* note 16, at 1102 (defining an "out-of-pocket" analysis of damages as "the difference between the value of what the purchaser parted with (i.e., the purchase price paid by him) and the value of what he has received (i.e., the actual market value of the goods)"). The decision whether to choose one analysis over the other rests on which one, given the facts of the case, will provide the more complete, but not excessive, recovery. JOSEPH, *supra* note 87, at 113.

¹⁰⁴ *Id.* See *Genty v. Resolution Trust Corp.*, 937 F.2d 899 (3rd Cir. 1991).

¹⁰⁵ JOSEPH, *supra* note 87, at 115.

is impermissible.¹⁰⁶ On the other hand, if the statute provides treble damages solely for the purpose of ensuring a full and complete recovery for the plaintiff, additional damages for punitive purposes may be permissible.¹⁰⁷ The courts are not in agreement on this issue.¹⁰⁸

Unfortunately, there is a dearth of legislative direction on this question. When courts attempt to decide

the appropriateness of cumulating punitive and treble damages [they focus] on a metaphysical question: whether punitive and treble damages are in some sense the same. A legitimate question of congressional intent lurks there, although it is unlikely—given the paucity of congressional attention to civil RICO—that Congress can meaningfully be said to have any intent at all on the issue.¹⁰⁹

Courts will nevertheless attempt to determine what Congress intended concerning treble damages. This sort of analysis is highly conjectural and, as one commentator states, “requires the courts to substitute their own policy judgments for those of Congress, in the necessary guise of divining unfocused congressional intent.”¹¹⁰ In any case, the courts have, thus far, failed to resolve the issue definitively.¹¹¹ What is clear is that even if RICO permits recovery of punitive damages beyond a treble damage award, plaintiffs may not recover punitives compensable under pendant claims.¹¹² Under such circumstances, courts typically reduce the amount of additional punitive damages from the RICO recovery.¹¹³

¹⁰⁶ JOSEPH, *supra* note 87, at 115. RICO follows the “single-satisfaction” rule, which provides that plaintiffs are only entitled to one recovery for each of their injuries. JOSEPH, *supra* note 87, at 114; see *Singer v. Olympia Brewing Co.*, 878 F.2d 596 (2d Cir. 1989), *cert. denied*, 493 U.S. 1024 (1990).

¹⁰⁷ JOSEPH, *supra* note 87, at 115.

¹⁰⁸ JOSEPH, *supra* note 87, at 116; see *Com-Tech Assocs. v. Computer Assocs. Int'l, Inc.*, 753 F. Supp. 1078 (S.D.N.Y. 1990), *aff'd on other grounds*, 938 F.2d 1574 (2d Cir. 1991); see also *Ross v. Jackie Fine Arts, Inc.*, No. 2:85-2425-1, 1991 U.S. Dist. LEXIS 13535 (D.S.C. Sept. 4, 1991). *But see In re VMS Secs. Litig.*, 752 F. Supp. 1373 (N.D. Ill. 1990); see also *Southwest Marine, Inc. v. Triple A Mach. Shop, Inc.*, 720 F. Supp. 805 (N.D. Cal. 1989).

¹⁰⁹ JOSEPH, *supra* note 87, at 116.

¹¹⁰ JOSEPH, *supra* note 87, at 116.

¹¹¹ JOSEPH, *supra* note 87, at 116.

¹¹² JOSEPH, *supra* note 87, at 117.

¹¹³ JOSEPH, *supra* note 87, at 118; see *Advanced Business Sys., Inc. v. Philips Information Sys. Co.*, 750 F. Supp. 774 (E.D. La. 1990). This becomes particularly important when this Note addresses the more direct question of the application of pending sexual harassment claims to RICO claims.

3. Equitable Relief

RICO also affords substantial equitable relief to private litigants.¹¹⁴ Injunctive relief may be the only significant form of equitable relief that is not available,¹¹⁵ although the courts have not yet resolved this issue.¹¹⁶ Its resolution, however, will, in most instances, prove irrelevant because private litigants may pursue injunctive relief under pendant claims.¹¹⁷ Furthermore, there is large support among the federal courts for permitting injunctive relief under RICO when it is used to protect recovery of damages.¹¹⁸

III. THE RICO SEXUAL HARASSMENT SUIT

It has been argued that federal judges and prosecutors have stretched RICO beyond the original intent of Congress.¹¹⁹ Congress's primary intent may have been to expel organized crime from the legitimate business world but, as mentioned earlier, this was not Congress's only goal.¹²⁰ If

¹¹⁴ Private litigants may pursue a wide range of equitable relief including rescission, restitution, reformation, specific performance and cancellation of a contract or instrument. JOSEPH, *supra* note 87, at 121.

¹¹⁵ Section 1964(b) states that "[t]he Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper." 18 U.S.C. § 1964(b) (1994). But § 1964(c) states, "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." 18 U.S.C. § 1964(c) (1994). There are many who read § 1964(c)'s silence on the issue of injunctive relief as barring injunctive relief for private litigants. JOSEPH, *supra* note 87, at 119.

¹¹⁶ See *In re Fredeman Litig.*, 843 F.2d 821 (5th Cir. 1988); *Religious Technology Ctr. v. Wollersheim*, 796 F.2d 1076 (9th Cir. 1986), *cert. denied*, 479 U.S. 1103 (1987); *Trane Co. v. O'Connor Secs.*, 718 F.2d 26 (2d Cir. 1983); *Dan River, Inc. v. Icahn*, 701 F.2d 278 (4th Cir. 1983). But see *Bennett v. Berg*, 685 F.2d 1053 (8th Cir. 1982), *cert. denied*, 464 U.S. 1008 (1983).

¹¹⁷ See *Northeast Women's Ctr., Inc. v. McMonagle*, 868 F.2d 1342 (3d Cir. 1989), *cert. denied*, 493 U.S. 901 (1989).

¹¹⁸ See *Hoxworth v. Blinder Robinson & Co., Inc.*, 903 F.2d 186 (3d Cir. 1990); *Teradyne, Inc. v. Mostek Corp.*, 797 F.2d 43 (1st Cir. 1986); But see *Fredeman*, 843 F.2d at 826.

¹¹⁹ *Fredeman*, 843 F.2d at 824.

¹²⁰ See *supra* notes 39-53 and accompanying text.

emasculating the mob had been Congress's sole purpose, it could have tailored the statute far more narrowly to achieve that end. RICO never mentions the Mafia, nor does it suggest that criminal behavior must be "organized" in any way to constitute a violation.¹²¹ Indeed, the only real connection between the Mafia and RICO is the list of "predicate" criminal acts defining "racketeering activity," that many consider to be "characteristic of organized crime."¹²² Even this link, however, is tenuous. The list of "predicate" acts encompasses virtually every serious crime in the criminal code.¹²³

Many criticize what they view as a distasteful expansion and a clear exploitation of RICO.¹²⁴ They argue that the original conception of civil RICO claims did not include many of the causes of action now pursued through the statute. The most recent, and most talked about, example is the application of RICO to the organized anti-abortion movement.¹²⁵ Not surprisingly, sexual harassment claims pursued through RICO confront similar criticism.¹²⁶

There are two questions at issue, and one should not be confused with the other. The first is whether or not Congress had originally anticipated the variety of claims RICO now encompasses. The second is whether or not the pursuit of those claims runs contrary to the scope of the statute. These issues are independent and efforts to link them muddy already cloudy waters. Clearly RICO's framers did not anticipate that RICO would be used to combat anti-abortion activists or, for that

¹²¹ Lynch, *supra* note 39, at 773. Lynch explains that "[a] single free-lance criminal entrepreneur could violate the statute by committing the required two crimes and investing the proceeds, or by forcibly or fraudulently acquiring an interest in an enterprise." *Id.*

¹²² Lynch, *supra* note 39, at 773.

¹²³ Lynch, *supra* note 39, at 773.

¹²⁴ See generally Committee on Labor and Employment Law, *Report on the Application of RICO to Labor-Management Relations*, 49 REC. A.B.N.Y. 871; Anne Melley, *The Stretching of Civil RICO: Pro-Life Demonstrators are Racketeers?*, 56 U. MO. KAN. CITY L. REV. 287.

¹²⁵ See generally Melley, *supra*, note 124 at 295-308; Michael R. Moretti, *Using Civil RICO to Battle Anti-Abortion Violence: Is the Last Weapon in the Arsenal a Sword of Damocles?*, 25 NEW ENG. L. REV. 1363 (1991).

¹²⁶ See Committee on Labor and Employment Law, *supra* note 124, at 885; *Fowler v. Burns Int'l Sec. Servs., Inc.*, 763 F. Supp. 862 (N.D. Miss. 1991), *aff'd* 979 F.2d 1534 (5th Cir. 1992); Anne L. Kirkpatrick, *Use of On-Going Sex Discrimination by Union Officials to Satisfy RICO "Pattern" Requirement: Hunt v. Weatherbee*, 28 B.C. L. REV. 80, 86 (1987).

matter, sexual harassment in the workplace. Congress did, however, intend to eradicate racketeering activity in all shapes and sizes. Realizing that it could not predict every conceivable qualifying mutation, Congress deliberately worded the statute broadly.

Courts that have entertained RICO sexual harassment suits have addressed the validity of the claim only with respect to whether it can survive a motion to dismiss or a motion for summary judgment.¹²⁷ Thus far, no court has tried the issue on the merits.¹²⁸ Courts have, however, outlined general characteristics that must be present in sexual harassment suits to qualify as valid RICO claims. As previously discussed, every RICO claim must have five major components. The plaintiff must show that (1) she has suffered injury to a *business or property interest*; (2) her injury was caused as a result of *racketeering activity*; (3) there is a sufficient *nexus* between the racketeering activity and her injury; (4) the defendant committed the racketeering activity as a *pattern and practice*; and (5) the pattern and practice of racketeering activity occurred over a *substantial period of time*. The following cases illustrate how sexual harassment cases often fit those parameters.

A. *Hunt v. Weatherbee*¹²⁹

In *Hunt v. Weatherbee*, the District Court for the District of Maine considered an action based on an alleged pattern and practice of discrimination and sexual harassment¹³⁰ against Rosa Elizabeth Hunt, a female apprentice with the United Brotherhood of Carpenters and Joiners of America, Local 40. In addition to other federal and state causes of action, Hunt brought her claim under RICO, charging that her employer, through a pattern of sexual harassment, engaged in a pattern

¹²⁷ See *Fowler*, 763 F. Supp. at 863 (granting defendants' motion for summary judgment); *Sharpe v. Kelley*, 835 F. Supp. 33 (D.Mass. 1993) (denying defendants' motion to dismiss); *McKinney v. Illinois*, 720 F. Supp. 706 (N.D. Ill. 1989) (granting defendants' motion to dismiss); *Hunt v. Weatherbee*, 626 F. Supp. 1097 (D. Mass. 1986) (denying defendants' motion to dismiss).

¹²⁸ See *supra* note 126.

¹²⁹ 626 F. Supp. 1097 (D. Mass. 1986).

¹³⁰ *Id.* at 1098.

of racketeering activity.¹³¹

For over two and one-half years, Hunt endured numerous incidents of sexual discrimination and harassment.¹³² Although Hunt complained to the union's business agent, Robert Weatherbee, he "condoned and ratified" the harassment and refused to take action, despite his "power and authority" to correct the problem.¹³³

The harassment rose to such a level that Hunt finally filed a criminal complaint against a fellow employee, William Freeman, when he physically assaulted her at a worksite.¹³⁴ After the filing of the complaint, several union officers called Hunt to a meeting, accused her of being responsible for the assault, "expressed sexually discriminatory animus toward her,"¹³⁵ and ordered her to withdraw the complaint. Fearful of reprisal, Hunt complied.¹³⁶ Almost two years later, the Union's shop steward, Joe Shaw, approached Hunt at another worksite and attempted to intimidate her into buying raffle tickets for the Local 40 Political Action Fund.¹³⁷ Shaw made "hostile and intimidating statements to Hunt, based upon sexually discriminatory animus, [and] . . . threat[ened] . . . personal injury"¹³⁸ if she refused to purchase the raffle tickets. She fled the worksite, knowing she might lose her job but terrified that she might suffer personal injury if she remained. She immediately contacted Weatherbee to ask for protection from Shaw, but Weatherbee refused to take action.¹³⁹

Subsequently, Hunt filed the civil RICO actions against Weatherbee and Robert Bryant,¹⁴⁰ asserting that predicate acts of racketeering activity were established by (1) coercing Hunt to withdraw a criminal complaint against her employer

¹³¹ *Id.* at 1104.

¹³² *Id.* at 1099.

¹³³ *Id.*

¹³⁴ *Weatherbee*, 626 F. Supp. at 1099.

¹³⁵ *Id.* The court did not elaborate further regarding what constituted the "sexually discriminatory animus." *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Weatherbee*, 626 F. Supp. at 1099.

¹⁴⁰ Robert Weatherbee, the Financial Secretary, and another defendant, Robert Bryant, the Assistant Business Agent of Local 40, were among the union officials present at the union meeting. *Id.* at 1099.

and (2) attempting to coerce Hunt into purchasing raffle tickets for the Local 40 Political Action Fund through Shaw, who acted as Weatherbee and Bryant's agent. These two acts, according to Hunt, established a pattern of racketeering activity, as defined under RICO.

Weatherbee and Bryant characterized Hunt's claim as "the wrong type of injury" to sustain a RICO claim. They argued that (1) she did not allege any "organized crime involvement" and (2) Hunt's claim actually amounted to an emotional distress action.¹⁴¹

The court found no merit in Weatherbee's and Bryant's argument that their conduct, even if proven, was not a RICO violation because it did not implicate organized crime involvement.¹⁴² The court noted that the Supreme Court, in *Sedima, S.P.R.L. v. Imrex Co.*,¹⁴³ held that civil RICO claims may be brought against both legitimate and illegitimate businesses. The district court held, therefore, that the plaintiff need only prove that the defendants engaged in a pattern of racketeering activity, whether or not their activities are linked to organized crime.¹⁴⁴

The *Weatherbee* court also quickly dispensed with the argument that Hunt's claim was merely based on emotional distress:

It is inaccurate to characterize Hunt's action as a claim for emotional distress. The thrust of her complaint is that the defendants engaged in willful acts of discrimination and harassment which "permanently disable[d her] from her trade as a carpenter," and she seeks damages for loss of wages. Although Hunt also seeks substantial damages for pain and suffering, she has not included a cause of action for infliction of emotional distress.¹⁴⁵

Although virtually every sexual harassment suit will include causes of action premised on emotional injuries, the RICO claims themselves must demonstrate injuries to "business or property,"¹⁴⁶ which would not include emotional

¹⁴¹ *Id.* at 1100.

¹⁴² *Id.* at 1100-01.

¹⁴³ 473 U.S. 479 (1985).

¹⁴⁴ *Id.* at 500.

¹⁴⁵ *Weatherbee*, 626 F. Supp. at 1100.

¹⁴⁶ 18 U.S.C. § 1964(c) (1994).

injuries.¹⁴⁷ Emotional injuries are not irrelevant, however, in that they can conceivably disrupt a victim's ability to seek employment once the victim quits or gets fired. The *Weatherbee* court found, for example, that the alleged sexual harassment suffered by Hunt caused sufficient injury to her business and property interests by disrupting her ability to pursue work as a carpenter in the future.¹⁴⁸ The court implied that Hunt's resulting emotional injuries were linked to her alleged inability to seek future employment as a carpenter.¹⁴⁹ This would be relevant when assessing whether Hunt made adequate attempts to mitigate her damages. Although plaintiffs are entitled to recover damages for lost wages during a reasonable period of time after being forced from their jobs, what is or is not reasonable would depend upon the circumstances surrounding termination.¹⁵⁰

The court also rejected *Weatherbee's* and Bryant's argument that Hunt was not entitled to lost wages under 18 U.S.C. Section 1964(c). This section states that a civil action may be brought by any person injured in his "*business or property*" through a pattern of racketeering activity.¹⁵¹ The court noted that in the context of antitrust suits, the federal judiciary commonly finds that "the loss of employment constitutes an injury to one's business or property."¹⁵² The court found no

¹⁴⁷ *Weatherbee*, 626 F. Supp. at 1100.

¹⁴⁸ *Id.* at 1101.

¹⁴⁹ *Id.* at 1100-01.

¹⁵⁰ Pursuant to 42 U.S.C. § 2000e-5(g), a Title VII plaintiff has an obligation to mitigate her damages with "reasonable diligence"; see *Booker v. Taylor Milk Co.*, 64 F.3d 860, 864-65 (3d Cir. 1995) (holding that the court must make a case-by-case factual inquiry as to whether an employee satisfies the "reasonable diligence" standard). The burden, however, is always on the employer to prove that the employee failed to properly mitigate her damages. *Id.* at 864.

¹⁵¹ *Weatherbee*, 626 F. Supp. at 1100-01.

¹⁵² *Id.* (quoting *McNulty v. Borden, Inc.*, 474 F. Supp. 1111, 1116 (E.D. Pa. 1979)); *Quinonez v. National Assoc. of Secs. Dealers, Inc.*, 540 F.2d 824, 829-30 (5th Cir. 1976). When interpreting the scope of "business or property" it is appropriate to follow those cases that have interpreted the same language found in § 4 of the Clayton Act. See *Sedima*, 473 U.S. at 484-87; *Weatherbee*, 626 F. Supp. at 1100. Section 4 of the Clayton Act provides that:

[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. § 15 (1994).

reason to hold any differently when a defendant's actions force a plaintiff out of her employment and prevent her from pursuing similar work in the future.¹⁵³ The court, therefore, concluded that Hunt claimed a valid injury to "business or property" under 18 U.S.C. Section 1964(c).

Weatherbee and Bryant also argued that even if they were guilty of threatening or coercing Hunt, such actions are completely unrelated to any relationship they had to the union and would not have benefitted the union.¹⁵⁴ The court again rejected their argument, stating:

The RICO statute does not require that the predicate acts be in furtherance of the enterprise in order to show that the affairs of the enterprise have been conducted "through" a pattern of racketeering activity within the meaning of § 1962(c). Instead, there is a sufficient nexus between the predicate offenses and the enterprise if the defendant (1) is enabled to commit the predicate offense solely by virtue of his position in the enterprise or his involvement in or control over its affairs, or (2) the predicate offenses are related to the activities of that enterprise.¹⁵⁵

According to the court, by coercing Hunt to withdraw her criminal complaint, and by ignoring Shaw's abusive behavior, the defendants sought to maintain order in the work environment, thereby sustaining a status quo of harassment and discrimination toward women.¹⁵⁶ Weatherbee's and Bryant's positions in Local 40 vested them with the power and authority to threaten Hunt, and it was because of their positions in the union that they were able to violate Hunt's apprenticeship

¹⁵³ *Weatherbee*, 626 F. Supp. at 1101; see also *Kubecka v. Avellino*, No. Civ. 94-3022, 1995 WL 500223 (E.D.N.Y., Aug. 16, 1995) (holding that where the murder of two corporate executives deprived those individuals of their business and property interests in their employment, such plaintiffs had standing under RICO).

¹⁵⁴ *Weatherbee*, 626 F. Supp. at 1102-03.

¹⁵⁵ *Id.* at 1102; see also *United States v. LeRoy*, 687 F.2d 610, 617 (2d Cir. 1982), cert. denied, 459 U.S. 1174 (1983).

¹⁵⁶ *Weatherbee*, 626 F. Supp. at 1102. Weatherbee and Bryant argued that the alleged coercion of Hunt to withdraw her complaint did not support Hunt's claim, brought under 18 U.S.C. § 1962(b), which states:

It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

18 U.S.C. § 1962(b) (1994). Hunt alleged that Weatherbee and Bryant controlled an interest in the union through a pattern of racketeering activity.

agreement and threaten injury to her employment.¹⁵⁷

Weatherbee and Bryant further argued that regardless of whether the alleged acts constituted "predicate acts" under 18 U.S.C. Section 1961(5),¹⁵⁸ the incidents did not constitute a pattern of racketeering activity. They contended that the two alleged acts occurred at isolated moments, three years apart, and bore no relationship to one another.¹⁵⁹

Hunt, however, argued that the two predicate acts served only as examples of an ongoing practice of sexual harassment, sexual discrimination and violations of her contractual rights committed over a three year period.¹⁶⁰ Hunt included in her complaint other specific allegations of sexual harassment, and further alleged that Weatherbee and Bryant "encouraged systematic discrimination against other female members of Local 40."¹⁶¹ The court considered these allegations sufficient to show a pattern of racketeering activity, and therefore denied Weatherbee's and Bryant's motion to dismiss the civil RICO claims.¹⁶²

B. Sharpe v. Kelley¹⁶³

Sharpe v. Kelley serves as another example of RICO's application to sexual harassment suits, specifically with regard to the substantial duration requirement. The plaintiff, Cheryl G. Sharpe alleged that the defendant, John H. Kelley, engaged in a pattern of racketeering activity through his operation of two corporations, Fidelis Group, Inc. and Cyborg Technology, Inc. Sharpe claimed that Kelley attempted to extort sexual favors from her by "threatening her financial prospects as an

¹⁵⁷ *Weatherbee*, 626 F. Supp. at 1102.

¹⁵⁸ Section 1961(5) reads: "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within 10 years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity.

18 U.S.C. § 1961(5) (1994).

¹⁵⁹ *Weatherbee*, 626 F. Supp. at 1103.

¹⁶⁰ *Id.* at 1104.

¹⁶¹ *Id.*

¹⁶² *Id.* For a helpful, but limited, analysis of *Weatherbee*, see Kirkpatrick, *supra* note 126.

¹⁶³ 835 F. Supp. 33 (D. Mass. 1993).

employee of Fidelis and as a principal of Cyborg."¹⁶⁴ In short, Kelley attempted to "control both the business and private aspects of her life."¹⁶⁵

The court held that the extortion of Sharpe's property interest in her civil rights, which included her contractual job rights and partnership rights in the two corporations, would constitute a RICO violation.¹⁶⁶ The court noted that the conception of property under RICO includes intangible property and thus an individual's civil rights are not "necessarily excluded by the Hobbs Act."¹⁶⁷ Accordingly, the *Sharpe* court held that because Kelley's alleged quid pro quo harassment of Sharpe threatened to deprive her of her employment and partnership rights, his actions could constitute extortion, one of RICO's predicate acts of racketeering.¹⁶⁸

Kelley next argued that because Sharpe only alleged one predicate act, RICO's "pattern" requirement was not satisfied.¹⁶⁹ Kelley argued that under RICO a plaintiff must suffer her injuries from at least two predicate acts in order to form a pattern of racketeering.¹⁷⁰ Sharpe alleged only one predicate act, extortion, which occurred on numerous occasions. The court observed, however, that Kelley's harassment of Sharpe had no definite endpoint and could have continued indefinitely into the future. The court held, therefore, that the repetition of the same predicate act—in this case, the extortion of sexual favors—satisfied RICO's requirement. The Court explained:

While Kelley's acts of harassment all share one common purpose—sex—his conduct would have been capable of endless repetition, at least in theory. One sexual favor would not have been enough. When the offending scheme is potentially open ended, and enduring because the object of the scheme is inexhaustible, it may be reasonable to view the constituent acts of the scheme as separate predicate acts

¹⁶⁴ *Id.* at 34.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* Kelley argued that the only conceivable "property" was the plaintiffs' sexual favors, which is not considered property within the meaning of RICO. The court rejected this, noting that the "[d]efendants . . . read the complaint too selectively." *Id.*

¹⁶⁷ *Id.* See *United States v. Local 560, Int'l Bhd. of Teamsters*, 780 F.2d 267, 281 (3d Cir. 1985). The "Hobbs Act," also referred to as criminal RICO, provides for criminal penalties for racketeering violations. 18 U.S.C. § 1951 (1994).

¹⁶⁸ *Sharpe*, 835 F. Supp. at 34.

¹⁶⁹ *Id.* at 35.

¹⁷⁰ *Id.* at 37.

under RICO.¹⁷¹

The court found that the predicates could also satisfy RICO's "continuity" requirement. Although Congress passed RICO under the assumption that criminal conduct would occur over a substantial period of time,¹⁷² the *Sharpe* court noted that the Supreme Court never set an absolute minimum duration.¹⁷³ Because the plaintiff alleged that Kelley harassed her over a five to six month period, the court refused to rule as a matter of law that that period failed to satisfy the continuity requirement.¹⁷⁴

C. *Two Courts Dissent*

1. *McKinney v. Illinois*¹⁷⁵

The plaintiff, Pamela L. McKinney, was employed by the Illinois Department of Employment Security ("IDES"), as the administrative assistant to the Manager of Field Services, Robert D. Plowright. Beginning in March 1985, Plowright made "unauthorized and unwarranted" sexual advances toward her¹⁷⁶ by regularly attempting to inappropriately touch her body.¹⁷⁷ McKinney transferred out of Plowright's department and supervision, but still encountered Plowright in the office where he directed "leers, lewd comments, and lascivious gestures" toward her.¹⁷⁸

¹⁷¹ *Id.*

¹⁷² *H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 242 (1989).

¹⁷³ *Sharpe*, 835 F. Supp. at 35.

¹⁷⁴ *Id.* The court held that this was particularly true, given that the plaintiff was alleging activity that was regular and frequent, rather than merely "sporadic." *Id.* Citing *Northwestern Bell*, the *Sharpe* court noted in a footnote that continuity could also be established if a plaintiff demonstrates that the related predicates "posed a threat of continued criminal activity." *Id.* at 35 n.2. The court found, however, that *Sharpe* was unable to properly allege such a threat because she was no longer associated with either the Cyborg or Fidelis enterprises. *Id.* The court intimated, however, that, although *Sharpe* did not expressly allege it, it might be inferred from her complaint that Kelley's sexual harassment was "part of an ongoing entity's regular way of doing business," thereby satisfying RICO's continuity requirement. *Id.*

¹⁷⁵ 720 F. Supp. 706 (N.D. Ill. 1989).

¹⁷⁶ *Id.* at 707.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

In May 1987, McKinney again began working under Plowright's supervision. Plowright immediately resumed harassing her with increasing frequency and severity. Despite McKinney's efforts to discourage Plowright's behavior, he persisted in "propositioning her, exposing himself to her, and forcing her into sexual contact with him."¹⁷⁹ McKinney later discovered that Plowright similarly "harassed other female employees at IDES."¹⁸⁰

In late November and early December 1987, McKinney reported Plowright to three IDES officials: Morton Friedman, the Deputy Director of IDES, as well as Daniel Flanagan and Mary Kennedy, attorneys for IDES.¹⁸¹ Around the same time, Juliette Hurtz, an IDES manager, also became aware of McKinney's sexual harassment charges.¹⁸² None of the IDES officials took any action to deter Plowright or to protect McKinney.¹⁸³ As a result, Plowright continued to harass her, and, in January 1988, offered to give McKinney higher performance ratings in exchange for sexual favors.¹⁸⁴ To avoid any further harassment, McKinney stopped going to work on February 23, 1988, and filed a sexual harassment charge with the Illinois Department of Human Rights on March 14, 1988.¹⁸⁵

McKinney used her accumulated sick leave and employee benefit time to remain on IDES's payroll until April 25, 1988, at which point she resigned. IDES claimed that McKinney was discharged for "fraudulently receiving unauthorized overtime payments during the course of her employment."¹⁸⁶ McKinney, in turn, claimed that the dismissal was fraudulent, that IDES falsified employment documents, and that IDES had conspired to impede the Illinois Department of Human Rights's investigation into her claim of sexual harassment.¹⁸⁷

McKinney filed three RICO claims in federal court,¹⁸⁸ alleging that IDES, through its representatives, violated sections

¹⁷⁹ *Id.*

¹⁸⁰ *McKinney*, 720 F. Supp. at 707.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *McKinney*, 720 F. Supp. at 707.

¹⁸⁶ *Id.* at 708.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

1962(b),¹⁸⁹ (c),¹⁹⁰ and (d).¹⁹¹ Specifically, she alleged that either Plowright, or any of the other named defendants "committed the state law crimes of public indecency, assault, aggravated assault, battery, aggravated battery, intimidation, ethnic intimidation, criminal sexual abuse, aggravated criminal sexual abuse, official misconduct, and compelling confession or information by force or threat."¹⁹² The court found, however, that none of the crimes allegedly committed by the defendants were enumerated predicate acts under Section 1961(1) of the RICO Act.¹⁹³

Under a *Weatherbee* or *Sharpe* analysis, McKinney's harassment may have constituted a viable claim under RICO. McKinney, however, never alleged extortion of her business and property interests in her employment, and therefore, the court never addressed that issue directly.¹⁹⁴ Another court, in *Fowler v. Burns International Security Services, Inc.*,¹⁹⁵ did address this issue more directly, and came to a very different conclusion from that of the *Weatherbee* and *Sharpe* courts.

2. *Fowler v. Burns International Security Services, Inc.*

The defendant Cletus Meek, hired the plaintiff, Lisa Fowler, as a security guard for Burns International Security

¹⁸⁹ Section 1962(b) states:

It shall be unlawful for any person through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

18 U.S.C. § 1962(b) (1988).

¹⁹⁰ Section 1962(c) states:

It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprises's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1962(c) (1988).

¹⁹¹ Section 1962(d) states that "[i]t shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section." 18 U.S.C. § 1962(d) (1988).

¹⁹² *McKinney*, 720 F. Supp. at 708.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ 763 F. Supp. 862 (N.D. Miss. 1991), *aff'd*, 979 F.2d 1534 (5th Cir. 1992).

Services ("Burns").¹⁹⁶ Soon after, Meek told Fowler that her work performance was unsatisfactory and that he would fire her unless she had sex with him.¹⁹⁷ Fowler explained to Meek that she needed her job to support her family. Meek insisted, however, and Fowler ultimately succumbed to his demands.¹⁹⁸ During a nine month period, Meek forced Fowler to perform various sexual acts, including oral sex, in order to keep her job. After those nine months, Meek fired her.¹⁹⁹

Fowler alleged that Meek violated three Mississippi statutes through extortion.²⁰⁰ The violations were (i) unnatural intercourse,²⁰¹ (ii) kidnapping by inveiglement²⁰² and (iii) rape.²⁰³ First, Fowler claimed that Meek's threats to fire her unless she sexually gratified him constituted extortion, defined as "compelling or coercing by any means which overcome one's power of resistance or gaining by wrongful methods."²⁰⁴ Second, Fowler claimed that Meek had committed extortion when he "tricked and deceived [plaintiff] into being involuntarily confined in his [motel] room . . . by means of extortionate threats and intimidation."²⁰⁵ Fowler's third claim alleged that Meek conditioned her future employment with the company upon continued sexual relations with him.

The court rejected these extortion claims, stating, "A plain reading of the statutes cited by the plaintiff leads this court to the conclusion that the crime chargeable under each has nothing whatsoever to do with extortion as it is generally defined."²⁰⁶ Furthermore, the Court asserted that even if it assumed that Fowler's extortion claims were valid, Fowler failed to demonstrate a pattern, as defined under RICO.²⁰⁷ Basing its decision on the Supreme Court's ruling in *Northwestern Bell*, the Court found that Meek's alleged criminal acts, taking

¹⁹⁶ *Id.* at 863.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Fowler*, 763 F. Supp. at 864.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Fowler*, 763 F. Supp. at 864.

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 865.

place over a nine month period, occurred over too short a period of time and did not constitute a threat of future criminal conduct.²⁰⁸

IV. THE RATIONALE FOR USING RICO IN SEXUAL HARASSMENT SUITS

RICO is a statute primed for the purpose of combatting sexual harassment in the workplace for several key reasons. First, sexual harassment in the workplace is extortion. That element of the harassment can only be adequately addressed through RICO. Second, RICO provides an important and viable source of relief for sexual harassment victims. Third, RICO's four-year statute of limitations allows those who do not file in a timely manner for other available causes of action, such as Title VII, to seek a remedy. And, finally, RICO permits employees of small businesses to seek remedies for sexual harassment.

A. *Sexual Harassment: Extortion in the Workplace*

Employment is self-empowering and self-defining. Besides providing one with financial security and independence, what we "do" reflects who we are; it is an indispensable conduit for experiencing a sense of purpose and significance. Courts and legislatures have recognized as much, and, therefore, have afforded substantial protection to the intangible concept of employment.²⁰⁹ Courts recognize that the loss of employment is an injury to one's property.²¹⁰ For example, the Seventh Circuit held, in *Nichols v. Spencer Int'l Press*, that "the interest

²⁰⁸ *Id.* at 864.

²⁰⁹ Employment is intangible because it is a contractual arrangement, comprehending the continuing exchange of services for financial compensation. But the intangible nature of employment makes it no less protectable, and certainly no less meaningful. See *Quinonez v. Nat'l Ass'n of Secs. Dealers, Inc.*, 540 F.2d 824, 829-30 (5th Cir. 1976); *Tugboat, Inc. v. Mobile Towing Co.*, 534 F.2d 1172, 1176 (5th Cir. 1976); *Dailey v. Quality Sch. Plan, Inc.*, 380 F.2d 484 (5th Cir. 1967); *Roseland v. Phister Mfg. Co.* 125 F.2d 417 (7th Cir. 1942); *McNulty v. Borden, Inc.*, 474 F. Supp. 1111, 1116 (E.D. Pa. 1979); *DeGregorio v. Segal*, 443 F. Supp. 1257, 1261 (E.D. Pa. 1978); *Drysdale v. Florida Team Tennis, Inc.*, 410 F. Supp. 843 (W.D. Pa. 1976).

²¹⁰ See *supra* note 209.

invaded by a wrongful act resulting in loss of employment is so closely akin to the interest invaded by impairment of one's business as to be indistinguishable²¹¹

When an employer sexually harasses his employee, he changes the terms and conditions of employment, thereby disrupting the employment contract.²¹² Employment, unlike other contractual arrangements, is so tied to identity and financial well being that one will often tolerate the most heinous behavior in order to keep a job. In fact, it is often precisely because the employer is aware of this that he engages in the sexually harassing behavior. Sexual harassment on the job is, in every sense of the word, extortion.²¹³

When one considers the term extortion, it is not unusual to envision the stereotypical "hood" paying a visit to a politician and demanding political favors in exchange for incriminating photographs. RICO, however, defines extortion as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force"²¹⁴ At its core, the term defines a very simple concept: the illegal coercion of action, whether that action takes the form of political favoritism, monetary gain or sexual gratification. Threatening to deprive an individual of her employment, either implicitly or explicitly, by forcing her sexual complicity, is blackmail. The employee is faced with a Hobson's choice: submit to the harassment, thereby forfeiting her statutory rights and incurring the inevitable emotional costs, or lose her job, thereby forfeiting an integral financial and emotional part of her life.²¹⁵

Consider the hypothetical described at the beginning of this Note. The senior Vice President of the advertising firm had probably worked her entire life to attain such a prestigious and coveted position. Deciding to quit and file suit, more likely than not, will make securing a comparable position difficult, if

²¹¹ *Nichols v. Spencer Int'l Press, Inc.*, 371 F.2d 332, 334 (7th Cir. 1967).

²¹² *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 78 (1986); *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1564 (11th Cir. 1987); *Henson v. City of Dundee*, 682 F.2d 897, 909 (11th Cir. 1982).

²¹³ See generally *Sharpe v. Kelley*, 835 F. Supp. 33 (D. Mass. 1993); *Hunt v. Weatherbee*, 626 F.Supp. 1097 (D. Mass. 1986).

²¹⁴ 18 U.S.C. § 1951(b)(2) (1988).

²¹⁵ For an excellent discussion of the extortionate character of sexual harassment in employment, see Carrie N. Baker, *Sexual Extortion: Criminalizing Quid Pro Quo Sexual Harassment*, 13 LAW & INEQ. J. 213 (1994).

not impossible, as other companies will irrationally fear that she is "litigation happy" and not wish to risk exposing themselves to similar claims. On the other hand, sleeping with the C.E.O., or tolerating his abuse, will unquestionably lead to an emotionally intolerable situation. It is illogical to recognize the extortionate character of the relationship between the "hood" and the politician, but not between the C.E.O. and the senior Vice President. Both the C.E.O. and the "hood" seek to coerce the behavior of others by illegal means. Recognizing the identical character of both situations leads to the conclusion that only RICO adequately addresses the extortionate character of sexual harassment in the workplace.

The current statutory options available to victims of sexual harassment do not address the extortion of an employee's business or property interests by an employer. They relate, rather, to the harassment itself. Title VII, for example, is concerned only with the inappropriate tampering by the employer with the "terms and conditions" of employment. The remedies available under Title VII, therefore, seek to make the employee whole through reinstatement, compensation of lost back pay, and compensation for emotional injuries.²¹⁶ Punitive damages are also compensable under Title VII, but, again, this remedy seeks to punish the employer for his outrageous sexual behavior and his efforts to change the "terms and conditions of employment," *not* to punish him for the extortionate character of his actions. RICO directly addresses the employer's extortionate activities, punishes him for it, and compensates the employee for her damages.²¹⁷

The extortionate nature of the employer's conduct deserves emphasis. Statutory protections do not exist solely to provide remedies for victims, but also to punish undesirable behavior. Some courts have held that RICO specifically provides for treble damages for this very reason.²¹⁸ If one views sexual

²¹⁶ Civil Rights Act of 1964, amended by 42 U.S.C. § 1981 (1938 & Supp. III 1991).

²¹⁷ 18 U.S.C. § 1962 (1988).

²¹⁸ See *Genty v. Resolution Trust Corp.*, 937 F.2d 899, 913 (3d Cir. 1991) (holding that the "treble damages [provision] is best characterized as 'penal in nature'" (citation omitted). There is, however, some question regarding this notion. See *Faircloth v. Finesod*, 938 F.2d 513, 518 (4th Cir. 1991) (holding that "the primary purpose of the private right of action created by RICO is remedial").

harassment not solely as the twisting and warping of the employment relationship, but also, in a broader sense, as an illegal coercion of the individual to surrender property interests, one soon concludes that sexual harassment is not adequately addressed by present employment statutes. The issue of extortion is separate and apart from the issue of employment discrimination. It is a separate wrong, deserving of separate attention. It is, therefore, not sufficient to concede that sexual exploitation alone is wrong and undesirable. Rather, one must recognize that the sexual harasser, in an employment relationship, puts a figurative gun to the employee's head and says "submit to my sexual demands or lose your job."

The major resistance to RICO's application to new arenas seems to spring from an inability to embrace a broader notion of "racketeering activity."²¹⁹ One opponent explains,

There is a pressing need for clarification of the proper uses of civil RICO and for a resulting limitation, preferably a legislative limitation, to ensure that the statute is used solely for the purposes for which it was enacted. Without such a limitation, civil RICO will continue to be applied in situations far beyond those intended by Congress, creating the risk that the statute may have to be abandoned as an abusive, harsh and overreaching provision.²²⁰

This sort of fear is unfounded and misplaced. Congress intended to eradicate racketeering activity in all forms. Moreover, it clearly supported a broad reading of RICO to achieve that purpose.²²¹ Most opponents reluctantly recognize the breadth of the statute's wording, which is why they call for Congress to amend RICO to include more limiting language.²²² The truth is, if Congress had wanted to limit the wording of the statute, it would have done so at its inception. As mentioned earlier, Congress knew how to limit the scope of other provisions in the OCCA, and did.²²³ It simply chose not to constrain RICO in the same manner.²²⁴

Opponents of a broad application of RICO also color what

²¹⁹ Melley, *supra* note 124, at 288.

²²⁰ Melley, *supra* note 124, at 288.

²²¹ See *supra* notes 41-53 and accompanying text.

²²² See Committee on Labor and Employment Law, *supra* note 124; see also, Melley, *supra* note 124, at 287-88; Kirkpatrick, *supra* note 126, at 86.

²²³ See *supra* notes 41-53 and accompanying text.

²²⁴ Committee on Labor and Employment Law, *supra* note 124, at 871.

they deem to be nontraditional RICO activities as illegitimately defined racketeering activity, and refer to the use of RICO in such situations as abusive.²²⁵ Ironically, those who criticize a broad interpretation of RICO also question the wisdom of the statute's broad language, calling for a refinement of its definitions to narrow its scope.²²⁶

Such criticisms are unpersuasive. If RICO defines racketeering activity to include extortion, it is not an abuse of the statute to bring a RICO action against those engaging in a pattern of extortionate behavior. What opponents conveniently refer to as a "stretching" of RICO,²²⁷ is not a stretch at all, but a clean fit. Their discomfort is not with the misapplication of RICO, but rather with RICO itself. The limited case law that discusses the subject supports this conclusion.²²⁸

The *Weatherbee* court, for example, concludes, quite logically, that continuous and merciless sexual abuse toward Hunt by the union and, more specifically, William Freeman and Joe Shaw, forced her out of her job, and therefore could constitute extortion.²²⁹ Hunt was clearly given an ultimatum: withdraw your criminal complaint, purchase union raffle tickets, and endure the abuse quietly, or face greater harassment or, worse, termination. The union's lulled acceptance or, more likely, its blatant encouragement of sexual abuse provided the necessary nexus between the predicate act, extortion, and the injury, Hunt's lost employment, lost back pay and future earnings.²³⁰

In *Weatherbee*, the alleged harassment occurred over a three year period. But as the *Sharpe* court points out, sexual harassment claims need not be held to a stringent standard of what constitutes "enduring criminal conduct." The Supreme

²²⁵ Committee on Labor and Employment Law, *supra* note 124, at 871; see also Melley, *supra* note 123, at 312.

²²⁶ Melley, *supra* note 124, at 287, 312; Committee on Labor and Employment Law, *supra* note 124, at 893-94.

²²⁷ Melley, *supra* note 124, at 287.

²²⁸ See *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985); *Northeast Women's Ctr., Inc. v. McMonagle*, 813 F.2d 53 (3d Cir. 1987), *on remand*, 665 F. Supp. 1147 (E.D. Pa. 1987), 670 F. Supp. 1300 (E.D. Pa. 1987), *cert. denied*, 493 U.S. 901 (1989).

²²⁹ *Weatherbee*, 626 F. Supp. at 1100.

²³⁰ *Id.* at 1102. As discussed earlier, direct benefit to the union is not essential, so long as those guilty of the racketeering behavior were empowered to commit the violation by virtue of their placement in the organization. See *supra* notes 154-157 and accompanying text.

Court, in *H.J., Inc. v. Northwestern Bell*, recognized that the continuity of racketeering activity can be demonstrated through a "threat of repetition extending indefinitely into the future [or] . . . as part of an ongoing entity's regular way of doing business."²³¹

Although the *Fowler* court held that under *Northwestern Bell*, a pattern of predicate acts occurring over a nine month period is insufficient to establish racketeering activity,²³² the Supreme Court made it very clear that a plaintiff must demonstrate that either the predicate acts themselves, or the threat of future repetition of those acts, constituted continuing racketeering activity.²³³ By permitting the threat of future acts to constitute "continuing racketeering activity," the Court clearly de-emphasized the importance of RICO's substantial duration requirement. Indeed, the Court indicated as much:

Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy [RICO's substantial-duration] requirement: Congress was concerned in RICO with long-term criminal conduct. Often a RICO action will be brought before continuity can be established in this way. In such cases, liability depends on whether the threat of continuity is demonstrated.²³⁴

Proving a "threat of continuity" typically will not be difficult in the sexual harassment context, where the behavior occurs in patterns that rarely suggest a limited time frame.²³⁵ Furthermore, the Supreme Court has not set a fixed minimum time frame for the predicates to occur before a RICO action will stand.²³⁶ It is, therefore, conceivable that the Court will recognize a pattern of racketeering activity even when predicate acts extend only over a few weeks or months, so long as there is a threat of future criminal conduct.²³⁷

In *Fowler's* case, Meek had sexually harassed her for a period of nine months, not an insignificant duration of time. But even if nine months were not sufficiently substantial, there is no question that Meek conditioned *Fowler's* employ-

²³¹ *Northwestern Bell*, 492 U.S. at 242.

²³² *Fowler*, 763 F. Supp. at 865.

²³³ *Northwestern Bell*, 492 U.S. at 240.

²³⁴ *Id.* at 242 (emphasis added).

²³⁵ *Id.* at 242-43.

²³⁶ *Sharpe*, 835 F. Supp. at 35.

²³⁷ *Id.* at 35 n.2.

ment upon her sexual submission and made threats to her indicating his intention to continue the harassment indefinitely. The *Fowler* court's conclusion, therefore, that the plaintiff offered no evidence suggesting the threat of future harassment seems misguided.²³⁸

In jurisdictions where RICO sexual harassment suits are recognized, RICO affords additional advantages over current employment statutes. RICO's generous statute of limitations period is, for example, a tremendous asset to Title VII plaintiffs, who ordinarily must report violations of the statute within one year of the alleged discriminatory acts.

B. *RICO: A Viable Source of Relief for Sexual Harassment Victims*

1. Statute of Limitations

Under Title VII, the complainant must file the discrimination charge within 180 days from the date when the sexual harassment occurs, or 300 days, depending upon the state in which she resides.²³⁹ Except for the limited circumstances in which she may request an extension to the filing date,²⁴⁰ the claimant must file within the applicable time period, or lose the opportunity to file the charge.²⁴¹ If the claimant fails to file the charge, she cannot pursue her claim in court because Title VII requires that a claimant exhaust all administrative remedies before pursuing a claim in federal court.²⁴²

RICO's statute of limitations offers many advantages over that of Title VII. First, civil RICO actions are subject to a four-

²³⁸ *Fowler*, 763 F. Supp. at 865.

²³⁹ 42 U.S.C. § 2000e-5(e)(1) (1988).

²⁴⁰ Some examples of extenuating circumstances are (1) if the claimant was misled regarding the real reason behind the discriminatory actions; (2) if the claimant was misled by her employer regarding her legal rights, after complaining to her employer; and (3) if, due to hardship, the claimant has a legitimate reason for being unable to file the charge. WILLIAM PETROCELLI & BARBARA KATE REPA, *SEXUAL HARASSMENT ON THE JOB*, 6/18-6/20 (1992). The time for filing an EEOC complaint is not extended merely because the employee attempts to resolve the issue through internal company procedures, although many states will add the time spent utilizing company grievance procedure to the total time one has to file with the EEOC. *Id.* at 6/20.

²⁴¹ 42 U.S.C. § 2000e-5(e)(1) (1988).

²⁴² *Id.*

year statute of limitations,²⁴³ which provides significantly more time for a sexual harassment victim to bring her claim than she would otherwise have under Title VII.²⁴⁴ There are varying interpretations of the statute, however, regarding the date from which the four year period accrues. As one court stated, the Courts of Appeals have applied "a smorgasbord of civil RICO accrual rules."²⁴⁵

The First, Second, Fourth and Ninth circuits have adopted the "injury discovery rule," or what is sometimes referred to as the "simple discovery rule."²⁴⁶ Under this rule, every time the claimant suffers an injury caused by a RICO violation, her cause of action for that injury accrues from "the time [s]he discover[s] or should have discovered the injury."²⁴⁷ If the claimant suffers from a later injury, she is again injured in her business or property, and her right to sue for her damages accrues from the time she discovers or should have discovered that injury. By this standard, each injury holds its own accrual date, and the claimant must sue before the statute of limitations ends on a particular injury, or she loses her right to a remedy.²⁴⁸

The Eighth, Tenth and Eleventh circuits, on the other hand, have refused to adopt this standard, recognizing that the "injury discovery rule" poses some problems.²⁴⁹ If the first

²⁴³ See *Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143 (1987). The Supreme Court applied a four year statute of limitations primarily because RICO was modeled after the Clayton Act, which provides for a four year statute of limitations. 15 U.S.C. § 15(b) (1994). The Court held that "[t]ogether with the similarities in purpose and structure between RICO and the Clayton Act, the clear legislative intent to pattern RICO's civil enforcement provision on the Clayton Act strongly counsels in favor of application of the four year statute of limitations used for Clayton Act claims." *Id.* at 152.

²⁴⁴ 42 U.S.C. § 2000e-5(e) (1988).

²⁴⁵ *Granite Falls Bank v. Henrikson*, 924 F.2d 150, 152 (8th Cir. 1991).

²⁴⁶ *JOSEPH*, *supra* note 87, at 143; See *Rodriguez v. Banco Cent.*, 917 F.2d 664 (1st Cir. 1990); *Beneficial Standard Life Ins. Co. v. Madariaga*, 851 F.2d 271 (9th Cir. 1988); *Pocahontas Supreme Coal Co., Inc. v. Bethlehem Steel Corp.*, 828 F.2d 211 (4th Cir. 1987).

²⁴⁷ *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1102 (2d Cir. 1988), *cert. denied*, 490 U.S. 1007 (1989).

²⁴⁸ *Id.* at 1103.

²⁴⁹ See *Granite Falls Bank v. Henrikson*, 924 F.2d 150 (8th Cir. 1991); *Bath v. Bushkin, Gaims, Gaines & Jonas*, 913 F.2d 817 (10th Cir. 1990); *Bivens Gardens Office Bldg., Inc. v. Barnett Bank of Fla., Inc.*, 906 F.2d 1546 (11th Cir. 1990), *cert. denied*, 500 U.S. 910 (1991).

predicate act causing an injury occurs four years before the second predicate act causes an injury, the statute of limitations on the first predicate will have expired before the RICO claim would have had time to mature. Those circuits therefore have adopted the "injury/pattern discovery rule,"²⁵⁰ under which the statute of limitations commences on a civil RICO action when the "plaintiff discovers, or reasonably should have discovered, both [the] existence and source of [his or her] injury and that [the] injury is part of [a] pattern."²⁵¹

The Third Circuit has adopted a slight variation on the "injury/pattern discovery rule." Under this circuit's "last predicate act rule," if the plaintiff suffers a later injury, or a later predicate act occurs, the accrual period begins when the plaintiff knew or should have known of her last injury or the last predicate act constituting the same pattern of racketeering.²⁵² Under this rule, if a plaintiff files her complaint within four years of the last injury she suffered or the last predicate act, the plaintiff can potentially recover for additional injuries caused by predicate acts which occurred in an earlier limitations period but that are nevertheless part of the same "pattern."²⁵³

Under any of the three rules articulated above, civil RICO provides the sexual harassment victim with a longer statute of limitations period than either Title VII or most state employment discrimination statutes. The "last predicate act rule" may be preferable to the other rules because it affords the claimant the longest period to file her claim. Even the "injury discovery rule," however, tolls the statute of limitations from the last injury; and the only injury one can claim in the sexual harassment context is the loss of employment,²⁵⁴ which occurs after the last predicate act of extortion.²⁵⁵ The only difficulty under

²⁵⁰ JOSEPH, *supra* note 87, at 143.

²⁵¹ *Bivens*, 906 F.2d at 1556-57.

²⁵² *Keystone Ins. Co. v. Houghton*, 863 F.2d 1125, 1130 (3d Cir. 1988).

²⁵³ *Id.* at 1130-31.

²⁵⁴ As indicated earlier, emotional injuries are not compensable under Civil RICO. See *supra* note 104 and accompanying text.

²⁵⁵ The harassed employee's injury is her lost employment. *Id.* The last predicate act of extortion (i.e., instance of sexual harassment) will occur before the employee is terminated or forced out. Sexual harassment that might occur after she separates from her employment would not constitute racketeering activity because the threat of termination, and therefore extortion, no longer exists.

the "injury discovery rule" arises when the predicate acts or injuries occur four years apart, and thereby fail to constitute racketeering activity. But, as with any RICO claim, if predicates are so remote to one another, it may serve the statute not to recognize them as constituting a pattern of racketeering activity.

2. Remedies Against Small Employers

Another limitation of Title VII is that it only applies to employers of fifteen employees or more.²⁵⁶ Without RICO, therefore, employees of small businesses who are victims of sexual harassment have no federal cause of action. RICO provides a viable cause of action for employees of small businesses because the statute, unlike Title VII, does not limit the availability of its remedies based on the size of the organization committing a racketeering violation.²⁵⁷ A RICO action, however, is subject to different organizational requirements than Title VII claims which may ultimately affect the standing of the claim.

Governmental agencies, for example, whether they be municipal,²⁵⁸ state²⁵⁹ or federal²⁶⁰ are not subject to civil liability under RICO, although those agencies may bring actions as plaintiffs under Section 1964(c) of the statute.²⁶¹ This differs greatly from Title VII, which provides a cause of action against both public and private organizations.²⁶² Under either Title VII or RICO, therefore, plaintiffs employed by public organizations of fewer than fifteen employees would still be left without a cause of action.

²⁵⁶ 42 U.S.C. § 2000e(b) (1988).

²⁵⁷ 18 U.S.C. § 1961(3) & (4) (1988); see *United States v. Turkette*, 452 U.S. 576, 583 (1981).

²⁵⁸ See *Lancaster Community Hosp. v. Antelope Valley Hosp. Dist.*, 940 F.2d 397 (9th Cir. 1991), *cert. denied*, 502 U.S. 1094 (1992); *Smallwood v. Jefferson Cty. Gov't*, 743 F. Supp. 502 (W.D. Ky. 1990); *Biondolillo v. City of Sunrise*, 736 F. Supp. 258 (S.D. Fla. 1990); *accord* *North Star Contracting Corp. v. Long Island R.R.*, 723 F. Supp. 902 (E.D.N.Y. 1989); *In re CitiSource, Inc. Secs. Litig.*, 694 F. Supp. 1069 (S.D.N.Y. 1988); *Massey v. Oklahoma City*, 643 F. Supp. 81 (W.D. Okla. 1986).

²⁵⁹ See *Genty v. Resolution Trust Corp.*, 937 F.2d 899 (3d Cir. 1991).

²⁶⁰ See *Berger v. Pierce*, 933 F.2d 393 (6th Cir. 1991).

²⁶¹ 18 U.S.C. § 1964(c) (1988).

²⁶² 42 U.S.C. § 2000e(b) (1988).

Although RICO does not cover public organizations, it is expansive in its applicability to private organizations. Unlike Title VII, which only applies to employers,²⁵³ RICO applies to any ongoing enterprise, formal or informal, that functions as a continuing unit.²⁵⁴ Courts define an enterprise under the statute as any "individual, partnership, corporation, association, or other legal entity."²⁵⁵ RICO, therefore, allows a wider variety of organizations to be open to suits by sexual harassment victims than does Title VII. A sense of the wider protection civil RICO provides becomes apparent upon consideration of the following hypothetical.

The Smiths, a young married couple, employ Margaret, a nanny, to care for their five-year-old son, and to assist them with various household chores. They do not pay social security taxes to the federal government for her, and Margaret does not report her income to the government. She is their only employee.

After a few weeks in the Smiths' employ, Mr. Smith begins taking long lunches and returns home during the day to get to know Margaret. He tells her he is very attracted to her and that from the moment he met her he has wanted to kiss her. Margaret graciously rebuffs his advances, reminding him that she is engaged and that she is not interested. Mr. Smith persists, and one afternoon forcibly kisses Margaret on the lips. Margaret pushes him away, and threatens to tell his wife.

Over the course of the next month, Mr. Smith continues to make his afternoon visits, and he becomes progressively more physical with Margaret, touching her breasts, kissing her neck and speaking lewdly to her. Quite distraught, Margaret reports Mr. Smith's behavior to Mrs. Smith, who tells Margaret that she does not care, that it is harmless flirtation and that Mr. Smith "can be a bit of a dog sometimes."

Over the course of the next six or seven months, Mr. Smith continues to make physical advances on Margaret and regularly refers to her around the house as "the bitch." One

²⁵³ This is not entirely true; Title VII also applies to labor unions. 42 U.S.C. § 2000e-2(c) (1988).

²⁵⁴ *United States v. Turkette*, 452 U.S. 576, 583 (1981).

²⁵⁵ *Id.* at 580. Such an enterprise is seen as something completely distinguishable from the "pattern of racketeering activity" that forms the violation. 18 U.S.C. § 1961(4) (1988).

evening, Mr. Smith comes into the kitchen while Margaret is doing the dishes, puts his hand on her buttocks, and whispers in her ear, "if you want to keep this job, you better start putting in more time with the boss." Margaret drops the dishes, retains an attorney, and files a RICO action against Mr. and Mrs. Smith for a pattern of extortion of her business and property interests in her employment. She also pends a state cause of action against Mr. Smith for intentional infliction of emotional distress.²⁶⁶

Without RICO, Margaret would have no cause of action under any other federal statute.²⁶⁷ Mr. and Mrs. Smith only employed Margaret, and therefore would not be subject to Title VII regulations, which require that the employer employ a minimum of fifteen employees. It is also unlikely she would have a cause of action under state or municipal law, since most local sexual harassment laws provide for a minimum number of employees.²⁶⁸ Under RICO, however, her property interests in her employment remain viable, and the extortion she is subjected to is no less egregious.

The fact that Mr. and Mrs. Smith failed to pay Social Security taxes, or that Margaret did not report her income to the government, will have no effect on her claim because, as mentioned earlier, civil RICO restricts the activities of legitimate as well as illegitimate business.²⁶⁹ Furthermore, Margaret's action against Mrs. Smith will stand because Mrs. Smith's failure to act, in light of her knowledge of Mr. Smith's behavior, implicated her as a co-conspirator to a pattern of extortion.²⁷⁰

²⁶⁶ This example is based on several sexual harassment suits. The state claim can be pursued in the same forum due to federal pendant jurisdiction.

²⁶⁷ See 42 U.S.C. § 2000e (1988); 18 U.S.C. § 1964 (1988).

²⁶⁸ Thirty of the fifty state sexual harassment laws limit their coverage to employers of at least two employees. Twenty-five of the fifty state sexual harassment laws do not permit actions against domestic employers. PETROCELLI & REPS, *supra* note 240, at 7, 16-36.

²⁶⁹ See *supra* notes 41-53.

²⁷⁰ See *Hunt v. Weatherbee*, 626 F. Supp. 1097, 1102 (D. Mass 1986).

CONCLUSION

There are three main elements which must be satisfied in order for any RICO action to succeed. First, RICO requires that an individual be injured in his *business or property*. Certain courts that have entertained RICO sexual harassment suits have interpreted this element broadly. They have found merit in extortion claims that implicate intangible property such as "contractual job rights and partnership rights."²⁷¹ The protection of intangible property interests has not necessarily been precluded from RICO actions,²⁷² and will be essential to any argument in favor of RICO sexual harassment claims.

Second, RICO requires that a plaintiff be deprived of a business or property interest through a *pattern of racketeering activity*. "Racketeering activity" is defined, statutorily, as "any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical . . . , which is chargeable under State law and punishable by imprisonment for more than one year."²⁷³ Extortion is the most prevalent charge brought under RICO in the context of sexual harassment.²⁷⁴ Although "sexual favors" do not necessarily constitute property, per se, the case law has viewed sexual harassment as a vehicle to extort from individuals a property interest in their employment.²⁷⁵

Third, a plaintiff must establish that related predicate acts "amount to . . . continued criminal activity" by "proving a series of related predicates extend[ed] over a substantial period of time."²⁷⁶ Congress was concerned, when enacting RICO, that the statute should only apply to enduring criminal con-

²⁷¹ Sharpe v. Kelley, 835 F. Supp. 33, 34 (D.Mass. 1993).

²⁷² See United States v. Local 560 of Int'l Bhd. of Teamsters, 780 F.2d 267, 281 (3d Cir. 1985) (holding Hobbs Act protects both intangible and tangible property).

²⁷³ 18 U.S.C. § 1961(1)(A) (1988 & Supp. II 1990).

²⁷⁴ See Sharpe, 835 F. Supp. 33; Weatherbee, 626 F. Supp. 1097.

²⁷⁵ See *id.*

²⁷⁶ Fleet Credit Corp. v. Sion, 893 F.2d 441, 445-46 (1st Cir. 1990) (citing H.J. Inc. v. Northwestern Bell, 492 U.S. 229, 241-42 (1989)).

duct.²⁷⁷ However, the Supreme Court has not decided what constitutes an absolute minimum duration for criminal activity under RICO.²⁷⁸ If a plaintiff demonstrates that racketeering activity poses a threat of "repetition extending indefinitely into the future [or] . . . [is] part of an ongoing entity's regular way of doing business," such activity falls under RICO.²⁷⁹ And, courts have held that if the acts of sexual harassment are not sporadic but multiple and regular in nature, a span of months may prove sufficient to make a RICO claim.²⁸⁰

If courts interpret statutes only by the limited foresight expressed by their sponsors, the limitations of human vision would too often be defeated by the spirit and inspiration of laws. It is the ability of law to shape with time, while holding true to the spirit of its original purpose, that makes good law. Laws are supposed to be predictable and consistent, but also breathe with, and adapt to, the development of human understanding.

The reluctance of critics to embrace broader notions of extortion demonstrates less prudence than it does prudery. Employment, although in some sense intangible, is, in every sense, a real and vital interest. When the employer uses his power over the employee to derive sexual pleasure, it is neither logical nor reasonable to conclude that his actions do not constitute extortion simply because they fall outside the traditional conception of the term. Critics will refer to the use of RICO in the context of sexual harassment as an abuse. It is,

²⁷⁷ *Sharpe*, 835 F. Supp. at 35.

²⁷⁸ *Id.*

²⁷⁹ *Id.* at 35 n.2.

²⁸⁰ *Id.* at 35.

however, RICO's broad wording which allows it to regulate racketeering in all forms, as its framers intended.

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