MEMORANDUM OF LAW:
POSSIBLE DEFENSES TO ANTICIPATED
ALLEGATIONS OF SEXUAL HARASSMENT
AND SEX DISCRIMINATION

Presenters:

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MEMORANDUM OF LAW

Privileged and Confidential Attorney/Client Communication

TO: Howard Bell, Chief Personnel Officer, Alma Mater University

FROM: Elsa Kircher Cole, University General Counsel
      Thomas P. Hustoles, Miller, Canfield, Paddock and Stone,
      Special Counsel to the University¹

SUBJECT: Mary Worker

DATE: January 5, 1996

You have requested us to review the decision to terminate Mary Worker
and advise you of the defensibility of that decision. Specifically, you asked us
to review it to determine the validity of anticipated allegations of sexual
harassment and sex discrimination and possible defenses to them.

I. SEXUAL HARASSMENT

After reviewing the facts and case law precedent, it is our opinion that
there is a good probability that the University could successfully defend itself
against an allegation that Ms. Worker’s supervisor, George Cleansweep,
sexually harassed her. Additionally, we are of the opinion that the University’s
actions in promptly and appropriately responding to her allegations of sexual
harassment make it more likely than not that the University’s liability, if sexual
harassment were found, would be minimal.

¹ The authors would like to acknowledge the excellent research assistance
provided by Louise B. Wright, an Associate at Miller, Canfield, Paddock and Stone, in the
preparation of this paper.
There are two possible types of sexual harassment that might be alleged here, hostile environment and quid pro quo harassment. We will address each in turn.

A. Hostile Environment Sexual Harassment

1. Definition

You are already familiar with the seminal case on hostile work environment sexual harassment, Meritor Savings Bank v Vinson, 477 US 57, 106 S Ct 2399, 91 LEd2d 49 (1986) and the U.S. Supreme Court’s most recent case on this subject, Harris v Forklift System, ___ US ___, 114 S Ct 367, 126 LEd2d 295 (1993). Basically, these decisions embrace the EEOC’s definition of hostile work environment sexual harassment as unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile or offensive working environment.

Additionally, these decisions also say that, to be actionable, the conduct must be sufficiently severe or pervasive to alter the conditions of the individual’s employment and create an abusive environment. There is no precise test to determine when this occurs, the Court says, but rather the circumstances to be examined would include the frequency of the conduct, its severity, whether it was physically threatening or humiliating and whether it unreasonably interferes with the employee’s work performance. The court was
clear that to be actionable the conduct must be more than the mere utterance of an epithet.

2. **Elements of a Prima Facie Case**

In order to establish a prima facie case of sexual harassment based upon hostile work environment, the complainant must demonstrate: (1) that she is a member of a protected group; (2) that she was the subject of unwelcome advances; (3) that the harassment was based upon her sex; and (4) that the harassment affected a term, condition or privilege of employment. *DeAngelis v El Paso Municipal Police Officers Assoc*, 51 F3d 591 (5th Cir 1995); *Cram v Lamson & Sessions Co*, 49 F3d 466 (8th Cir 1995); *Nichols v Frank*, 42 F3d 503 (9th Cir 1994); *Virgo v Riviera Beach Assocs Ltd*, 30 F3d 1350 (11th Cir 1994); *Cosgrove v Sears Roebuck & Co*, 9 F2d 1033 (2d Cir 1993). In addition, the plaintiff must demonstrate that the supervisor’s or co-worker’s actions should be imputed to the employer, or that the employer knew or should have known of the harassment and failed to take any remedial action. *Cosgrove, supra; Harley v Dalton*, 896 F Supp 29 (DCCir 1995); *Robertson v Alabama Dept of Economic & Community Affairs*, 902 F Supp 1473 (MD Ala 1995); *Humphreys v Medical Towers, Ltd*, 893 F Supp 672 (SD Tex 1995).

3. **Employer’s Liability for Employee’s Actions**

As the Court held in *Meritor Savings Bank*, an employer’s liability for hostile environment sexual harassment is based on principles of agency. In *Gary v Long*, 59 F3d 1391 (DCCir 1995), *cert den*, 64 USLW 3397 (1995),
the court rejected the argument that liability should be imposed on an employer, regardless of whether the employer knew or should have known of the harassment, where a supervisor invokes his power as a supervisor to create a hostile work environment. The court held that an employer is not liable if it can establish that it had adopted policies and implemented measures putting the victimized employee on notice that the employer did not tolerate harassment and that she could report it to the employer without fear of adverse consequences. Compare Valadez v Uncle Julio’s of Illinois, 895 F Supp 1008 (ND Ill 1995) (where an employer has implemented no sexual harassment policy or grievance procedure, an employer is liable if any management-level employees knew or should have known of the conduct and failed to take appropriate remedial action).

4. The First Incident

The first instance of conduct that might be labeled hostile work environment sexual harassment by Ms. Worker is Mr. Cleansweep’s showing Ms. Worker the model in a mesh swimsuit in the Sports Illustrated annual swimsuit issue and his commenting that it was helping his “creative juices” flow and that Ms. Worker would look very inviting in the swimsuit. Although his “creative juices” comment might have had a sexual meaning and his comment regarding Ms. Worker wearing the suit might also have had a sexual connotation, we believe we can make a good case that the remarks were non-
sexual in nature—just a comment about needing a work break and a poorly considered compliment.

Also, *Sports Illustrated* is not a "girlie" type magazine that is more clearly inappropriate in the workplace. We note that, even if it were, at least one court has held that the quiet possession, reading and sharing of *Playboy*, *Penthouse*, and similar magazines in a public place of employment is protected by the First Amendment. *Johnson v County of Los Angeles Fire Dept.*, 865 F Supp 1430 (CD Cal 1994). It is curious, however, that Mr. Cleansweep was looking at an issue of *Sports Illustrated* that comes out in the winter in the summer.

This incident, standing alone, clearly does not meet the U.S. Supreme Court's standard of actionable hostile work environment sexual harassment articulated above. Additionally, you took prompt corrective action to address the situation by immediately responding to Ms. Worker's complaint by confronting Mr. Cleansweep about it, admonishing him and having him apologize to Ms. Worker. Further, there is no allegation of any further comments of this nature to Ms. Worker.

5. **The Second Incident**

The second incident that Ms. Worker might allege as evidence of hostile work environment sexual harassment is Mr. Cleansweep’s telling of sexual jokes and his sexually explicit language. However, we believe this claim should fail. First, there is no allegation that Ms. Worker ever heard any of
these jokes or language. Mr. Cleansweep claims that he only told the jokes to men. Second, when notified by his secretary that women workers could hear jokes through his open door, there is no evidence that he continued that practice. For these reasons, there is no continuing pattern of behavior by Mr. Cleansweep against Ms. Worker such that her conditions of employment were altered, even if those of others were affected.

6. **The Third Incident**

The third incident that might be used to support an allegation of hostile work environment sexual harassment is Mr. Cleansweep’s suggestion that he see Ms. Worker socially. However, when examining the circumstances surrounding that statement, we believe we have a very strong argument that Mr. Cleansweep would think that suggestion was welcome: Ms. Worker had accepted a ride home with him, suggested they develop a more comfortable relationship, invited him in for coffee, discussed her personal life, including her recent divorce, with him, and, in a setting where the information discussed might be shared with Mr. Cleansweep, Ms. Worker had previously discussed with her co-workers how much she was enjoying her current sex life.

This later conversation arguably presents evidence that a dating relationship, or more, would not be unwelcome to Ms. Worker. We would note that Ms. Worker may attempt to keep that information from coming out in discovery or at trial, citing *Longmire v Alabama State University*, 151 FRD 414, 418 (MDAla 1992). In that case, the court said that a court needs to be
particularly vigilant in a sexual harassment case in protecting a plaintiff from an invasive, irrelevant inquiry into her past sex life which is irrelevant for discovery purposes, citing Priest v Rotary, 98 FRD 755, 761 (NDCal 1983).

The Longmire court said that prior sexual activity remote in time or place to the working environment is wholly irrelevant and unlikely to lead to admissible evidence. The court said it would only be admissible under Rule 404(b) of the Federal Rules of Evidence if it proved motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident, but it could not be used to prove the character of the person in order to show action in conformity therewith.

However, it is arguable that Rule 404(b) should not bar admissibility in this case as Ms. Worker’s conversations about her sex life would not be offered by the University to prove her character. Rather, we would seek to introduce them to show that having been told of them, Mr. Cleansweep was justified in believing his attentions would be welcome.

We believe it is quite significant on the issue of whether Mr. Cleansweep’s attentions to Ms. Worker were unwelcome that, while Ms. Worker immediately complained to you about the swimsuit remark, she delayed months in coming to see you over Mr. Cleansweep’s requests to date her, arguably a much more serious incident of alleged harassment. It seems an unlikely explanation for her delay that she went from no fear to fear of retaliation from Mr. Cleansweep.
The delay in coming forward strengthens our argument that Mr. Cleansweep’s conduct was not unwelcome. When an employee does not complain for several weeks after an incident, it makes it more likely that she does not perceive her work environment to be abusive. *Balletti v Sun-Sentinel Co.*, No. 93-6091-CIV-ROETTGER, 1995 US Dist LEXIS 15288 (SD Fla September 15, 1995).

At this point we would note that while it is always a situation fraught with danger for a supervisor to commence a consensual relationship with a subordinate, it is not illegal. Mr. Cleansweep arguably was just captivated by, in his words, Ms. Worker’s being "attractive, intelligent and generally stimulating." While that last adjective might have a sexual connotation, it could just as easily have an innocent one given the rest of his statement.

In her initial conversation with Mr. Cleansweep about dating, Ms. Worker did tell him that it would not be appropriate and would put her in an awkward position vis-à-vis her co-workers. His persistence in pursuing the matter by telling her "that she should think it over" might be used by her to try to change this into a quid pro quo sexual harassment situation, which we shall address later in this memorandum. However, we can argue it was just as easily an expression of his ardor and admiration in the same way that the next incident, his kiss at the door, was a spontaneous and exuberant expression of his admiration and thanks to her for her hard work on the project that night.
7. **The Fourth Incident**

That kiss and the accompanying embrace is the fourth incident that might be used by Ms. Worker to build a case of hostile work environment sexual harassment. It is not known at this time if this was a quick hug and kiss on the cheek, or a total body embrace and kiss on the lips. Obviously, if it were the latter, it would affect our view of this incident. However, as currently described, it appears to have been the former as it is alleged to have occurred as Mr. Cleansweep was exiting Ms. Worker’s apartment, and therefore does not appear to be a calculated prelude to lovemaking attempts by Mr. Cleansweep, and was neither physically threatening or humiliating.

We note that this is the only allegation that involves the physical touching of Ms. Worker. That helps support our argument that this was a totally isolated, one time event and not severe enough to constitute sexual harassment. Kissing one’s subordinates is, of course, conduct also fraught with danger, but again it is not illegal, and it does occur in the workplace between supervisors and subordinates as an expression of extreme emotion at times of success and accomplishment. From the scenario of events described, we believe the kiss and embrace, while always questionable conduct, fits into that category.

8. **The Fifth Incident**

The fifth incident that Ms. Worker might claim constitutes hostile work environment sexual harassment is Mr. Cleansweep’s telephoning Ms.
worker at home, asking her out to dinner and a movie. This, and the additional three times he asked her out at work the following week, in our opinion, present Ms. Worker's strongest argument that Mr. Cleansweep was harassing her.

We believe, however, that we can make a strong case that this was not sexual harassment. Calling Ms. Worker at home can be explained as a direct follow up to the events of the night before, when Ms. Worker sent mixed messages about her interest in seeing Mr. Cleansweep socially. Additionally, in none of Ms. Worker's responses to his requests for a date did Ms. Worker communicate clearly to Mr. Cleansweep that she did not want to go out with him. While she did express reservations about dating him when he called her, she then sent a confusing, counter message saying she wanted time to think about things. When asked out at work the next three times, she merely smiled at Mr. Cleansweep and did not respond. More importantly to our defense, Mr. Cleansweep appears to have gotten the message rather rapidly that she was not interested in dating him as he quit asking her out after that one week period.

9. **No Unreasonable Interference With Job Performance**

Finally, Ms. Worker may allege that these five incidents, even if isolated or sporadic, together unreasonably interfered with her job performance. She may point to her need to see a psychotherapist after these incidents and to take a two week vacation. However, the success of that argument appears
unlikely due to Ms. Worker’s own admission that she believed her negative attitude towards her work was due to increased responsibilities, which we can clearly articulate were externally created by new federal and state laws needing her clarification, and her recent divorce.

Even if each of these five incidents were not separately explainable, they are too isolated and sporadic and not severe and pervasive enough to be hostile work environment sexual harassment. In reaching this opinion we have relied on several cases decided since Harris for guidance. In particular, we believe this case is on all fours with Ballou v University of Kansas Medical Center, 871 F Supp 1384 (DC Kan 1994).

In Ballou, the court found that the conduct of a supervisor to an employee was neither pervasive nor severe enough to constitute sexual harassment although the supervisor indicated to the employee on one occasion that he was interested in a relationship with her and on another occasion asked her to kiss him on her birthday, when, in each instance, he did not pursue the matter after being rebuffed. We believe only pursuing a dating relationship for a week would be sufficient to put this situation within the Ballou framework.

10. Post-Harris Courts Have Dismissed Cases That Alleged More Egregious Conduct Than Is Present Here

Even when a fairly high incidence of egregious conduct has occurred, federal courts do not necessarily find actionable hostile work environment sexual harassment has occurred. An example is Saxton v American Tel. & Tel. Co., 10 F3d 526 (7th Cir 1993). There a supervisor was
alleged to have met the plaintiff at a nightclub to discuss her dissatisfaction with her job. He made several advances towards her, including placing his hand on her leg above the knee several times, rubbing his hand along her upper thigh, and pulling her into a doorway to kiss her for two or three seconds. She rebuffed each of his advances, and told him not to do it again. Three weeks later, she accepted a ride from him after lunch and, midway back, he stopped at a park and started to take a walk. When she started to take her own walk, he suddenly lurched at her. Again she told him to stop.

Subsequently, the supervisor became more uncommunicative and condescending to the plaintiff, although her work assignments were more rewarding. Months later, when the plaintiff complained of sexual harassment, the investigation was inconclusive, although the supervisor was considered to have exercised poor judgement and was moved. The plaintiff, who had been allowed to work at home during the investigation, never returned to work and sued instead.

The Seventh Circuit affirmed the trial court’s finding of summary judgement in favor of the employer in which it said that, although the supervisor’s advances were undoubtedly inappropriate, as Mr. Cleansweep’s arguably were, they were not so severe or pervasive as to create an objectively hostile work environment. While the supervisor’s subsequent snubbing and condescension might have made the plaintiff’s life at work subjectively unpleasant, the court said nothing indicated that his behavior was not, in the
words of Harris, "merely offensive." We would note that our situation is less egregious and there was no subsequent snubbing or condescension, but rather just the reasonable expectation that Ms. Worker would perform what were clearly her job responsibilities.

Another case, Doe v R.R. Donnelley & Sons, 843 FSupp 1278 (SD Ind 1994), aff'd, 42 F3d 439 (7th Cir 1994) also illustrates the egregious level of behavior that must exist before actionable hostile work environment sexual harassment is found. In that case, a supervisor allegedly often made comments about the plaintiff’s appearance and clothing, such as telling her he thought she would look nice in a body suit and asking her what she wore at the gym or at home, and how she looked in it. He had also allegedly patted her on the rear on two occasions. The lower court found this insufficient to constitute actionable sexual harassment. On review, the Court of Appeals was of the view that the nature of the conduct was similar to that which had been held not actionable under Title VII, but the court had reservations whether summary judgment was appropriate because the conduct had persisted over a lengthy period of time. In the end, though, the court found that plaintiff’s claim was not actionable because it was not timely filed. As Mr. Cleansweep only once made a comment about how Ms. Worker might look in a swimsuit, under the Doe court’s standard, that would be insufficient to constitute actionable sexual harassment.
Similarly, in *Baskerville v Culligan International Co.*, 50 F3d 428 (7th Cir 1995) the court overturned a jury verdict and concluded that there was no sexual harassment even though the plaintiff complained that from August 1991 to February 1992 there were nine instances of sexual harassment which included: she was called a "pretty girl" and heard approving grunts from her supervisor when she wore a leather skirt; her boss said his office was hot after she came in; and he said he was lonely in his hotel room while looking at his hand, which she understood to suggest masturbation. The Seventh Circuit concluded that the supervisor never said anything to her that could not be repeated on prime-time television, and that a handful of comments spread over months is unlikely to have the same emotional impact as a concentrated or incessant barrage.

11. **Post-Harris Courts Find Liability When Management Fails to Act**

The conduct alleged by Mr. Cleansweep in no way amounts to that permitted by management in *Carr v Allison Gas Turbine Div., General Motors Corp.*, 32 F3d 1007 (7th Cir 1994). There, over a four year period, a company had allowed such things to occur as a co-worker exposing himself to the plaintiff twice, co-workers urinating in her presence, sexual comments, and sex related jokes, such as cutting the seat out of the plaintiff’s overalls, despite the plaintiff’s repeated complaints to her supervisor, who merely chuckled at the behavior. In determining if sexual harassment occurred, the Seventh Circuit found that her conditions of employment were adversely affected and that the
discrimination to which she was subjected was sufficiently serious to cause a reasonable person to quit. No similar level of conduct is alleged to have been permitted here.

In a different Seventh Circuit post-Harris case, Chambers v American Trans Air, Inc., 17 F3d 998, reh'g en banc, denied ___ F3d ___ (7th Cir 1994), the court found that the allegation that female employees and managers were routinely referred to in vulgar, sexist and patently offensive language in their absence by the highest levels of management was probably enough under Harris to survive a motion for summary judgement. We note, however that the facts are entirely different in this matter. As soon as you were notified of Ms. Worker's concerns about the swimsuit remark, you took action and it stopped. Likewise, there is no record of Mr. Cleansweep telling sexual jokes after he was advised it offended female workers. Finally, this situation can be distinguished from that in Chambers because there is absolutely no evidence that any other male manager used sexist or offensive language.

Likewise, there is nothing in this matter that makes it similar to the situation in Spain v Gallegos, 26 F3d 439 (3rd Cir 1994). There the Third Circuit found the plaintiff had established a prima facie case of hostile work environment sexual harassment through her allegations that management failed to address false rumors that she was involved in a sexual relationship with her supervisor. The rumors allegedly strained her relationships with co-workers and
cost her a promotion because she was perceived to lack integrity. There is no evidence here of any similar decline in Ms. Worker’s co-workers’ perception of her or management’s due to Mr. Cleansweep’s attentions.

12. The Protection of Prompt, Corrective Action

Finally, even if Mr. Cleansweep’s actions were considered hostile environment harassment, the prompt, corrective action taken by you each time Ms. Worker complained to you should be sufficient to protect the University from any liability. Remedial efforts that are both timely and reasonably likely to prevent the conduct from recurring help protect an employer. See, for example, Saxton, supra, at 535-536 and Nash v Electrospace System, 9 F3d 401 (5th Cir 1993).

In Nash, the plaintiff alleged that her supervisor continually asked her intrusive questions about her sex life and that she believed he made anonymous, sexually suggestive phone calls to her at home. (Note how this differs from the situation before us where Ms. Worker was the one to initiate with co-workers details about her sex life.) Upon complaining about this, an immediate investigation was done, and the plaintiff was transferred to another, equivalent position. While the Fifth Circuit said that, if sufficiently severe and pervasive, the supervisor’s questioning could theoretically interfere with the plaintiff’s ability to perform her work and provide the basis for an actionable claim of hostile work environment sexual harassment, the employer’s prompt
action to remedy the situation affected its liability. For this reason, we believe your actions have protected the University from liability.

We should be able to distinguish this situation from that in *Hammill v Albemarle County School Board*, 65 Empl. Prac. Dec. ¶ 43, 222 (WD Va 1994). There a motion for summary judgment in favor of the employer in a hostile work environment sexual harassment case was denied. The employer had argued that, in response to the plaintiff’s complaints, it had sent letters to the offending employee, required his attendance at a sexual harassment seminar and relocated him to a school away from the plaintiff. However, the employer had not acted on the plaintiff’s complaints for several years before it took those actions. Here, your responses to Ms. Worker’s complaints were always immediate.

Finally, the University had a grievance procedure, of which Ms. Worker was informed, as evidenced by her contacting you. The presence of the grievance procedures demonstrates that the University does not tolerate sexual harassment and provides a mechanism for reporting harassment without fear of reprisal. See *Gray*, discussed *supra*.

**B. Quid Pro Quo Sexual Harassment**

We have also examined the facts you have presented to us to determine if quid pro quo sexual harassment occurred. In our opinion, it has not.
1. **Definition**

Quid pro quo sexual harassment, as defined by the EEOC, encompasses unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when submission to such conduct is made either explicitly or implicitly a term of an individual’s employment, or submission or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual. This definition was adopted by the U.S. Supreme Court in *Meritort Savings Bank*, with which you are already familiar.

2. **Elements of a Prima Facie Case**

In order to establish a prima facie case of quid pro quo sexual harassment, a complainant must show that (1) she was a member of a protected class; (2) she was subjected to unwelcome sexual harassment in the form of sexual advance or requests for sexual favors; (3) the harassment was based on sex; and (4) her submission to the unwelcome advances was an express or implied condition for receiving job benefits or her refusal to submit resulted in a tangible job detriment. *Cram v Lamson & Sessions Co*, 49 F3d 466 (8th Cir 1995). See also *Heyne v Caruso*, 69 F3d 1475 (9th Cir 1995).

3. **Employer’s Liability for Employee’s Actions**

Where there has been quid pro quo sexual harassment and a job benefit was denied or a job detriment was suffered, the employer will be held strictly liable for its employee’s actions. *Virgo v Riviera Beach Assocs*, 30 F3d
1350 (11th Cir 1994); Splunge v Shoney's, 874 F Supp 1258 (MD Ala 1994). However, where the victim has not actually been subjected to adverse job consequences as a result of her refusal to submit to sexual advances, liability may not be imposed. Gary v Long, 59 F3d 1391 (DCCir 1995); but see Nichols v Frank, 42 F3d 503 (9th Cir 1994) ("[A] supervisor's intertwining of a request for the performance of sexual favors with a discussion of actual or potential job benefits or detriments in a single conversation constitutes quid pro quo harassment.")

There are three actions taken by Mr. Cleansweep towards Ms. Worker that might be argued by her to be evidence of quid pro quo sexual harassment. They all arguably occurred as a result of Ms. Worker refusing Mr. Cleansweep's requests to date her. We have previously explained why we believe Mr. Cleansweep reasonably would have thought his attentions to Ms. Worker were welcome. However, we note that even if they had been welcome, if Mr. Cleansweep then used Ms. Worker's rejection of them as the basis for employment decisions affecting her, he would have committed unlawful quid pro quo sexual harassment for which the University would be held to be strictly liable. Karibian v Columbia University, 14 F3d 773 (2nd Cir 1994), cert den, ___ US ___ 114, S Ct 2693, 129 LEd2d 824 (1994).

4. The First Action

The first action that Ms. Worker may allege to be quid pro quo harassment was the increase in responsibilities that occurred in the weeks
immediately following her failure to respond to Mr. Cleansweep's overtures. We should be able to defend this increase based on her need as Assistant Director of Human Resources to master newly enacted federal and state laws and produce policy guidelines for the campus.

5. The Second Action

The second action that Ms. Worker may allege to be quid pro quo harassment is the special evaluation of her performance that occurred out of the regular schedule for such. She may say Mr. Cleansweep put pressure on her by threatening to terminate her if she did not improve her performance within an arbitrarily short period of time, 30 days, relative to her almost 10 years of service to the University, only because she had refused his advances.

Mr. Cleansweep's response will be a difficult one for us to present to a trier of fact. He has told us that he accelerated this review in order to have an opening for Joe Gudolboy, his college roommate, because the University desperately needs someone of this caliber in this position. We will have to focus our argument defending Mr. Cleansweep's action on the skills that Mr. Gudolboy had, not that it was Mr. Gudolboy who had them.

In other words, we will have to emphasize how critical it was to the University to have someone of great skill and knowledge as Assistant Director of Human Resources and the potential liability the University could face if incorrect information were shared with the campus about the new laws even in the few months that would elapse until the normal time for evaluations to
occur, which apparently is at the end of calendar year. Our position should be that the need to have someone performing better than Ms. Worker in this key position was the deciding factor, not Ms. Worker’s rejection of Mr. Cleansweep.

6. **The Third Action**

This also should be our position regarding the third action Ms. Worker will assert as quid pro quo sexual harassment, her termination. The same argument made above will be the best one for the University to present as justification for Mr. Cleansweep’s actions.

II. **SEX DISCRIMINATION**

Besides her allegations of sexual harassment, you have asked us to review Ms. Worker’s possibility of success on claims of sex discrimination in her terms and conditions of employment and in her termination. After reviewing the facts alleged in this matter, we believe that no sex discrimination has occurred.

A. **Elements of a Prima Facie Case**

To present a *prima facie* disparate treatment case of discriminatory treatment or discharge on the basis of sex under Title VII of the Civil Rights Act of 1964, under the four-part burden of proof test first enunciated in *McDonnell Douglas Corp. v Green*, 411 US 792, 98 S Ct 1817, 36 LEd2d 668 (1973), Ms. Worker will have to show:
1. membership in a group protected by the Act;
2. satisfactory performance in her position;
3. adverse change in working conditions/termination of employment despite satisfactory performance; and
4. that the employer treated similarly situated male employees better/attempted to replace her with a male with no better qualifications.

B. Burden of Proof v. Burden of Production

Ms. Worker will also have to prove discriminatory animus. Texas Department of Community Affairs v. Burdine, 450 US 248, 256, 101 S Ct 1089, 67 LEd2d 207 (1981); Clemons v. Hardee County School Bd., 848 FSupp 1535, 1538 (MDFla 1994). She carries the ultimate burden of persuading the trier of fact that the University intentionally discriminated against her. St. Mary’s Honor Center v. Hicks, __US __, 113 S Ct 2742, 125 LEd2d 407 (1993); Green v. School Bd. of Hillsborough County, Fla., 25 F3rd 974 (11th Cir. 1994); Kobrin v. University of Minnesota, 34 F3d 698 (8th Cir 1994).

Once she meets this threshold of establishing a prima facie case, the burden shifts to the University to produce credible evidence of a legitimate, nondiscriminatory reason for her different treatment/termination, Burdine, at 253; Kobrin; Clemons, at 1538, which, if believed by a trier of fact, would
support a finding that unlawful sex discrimination did not cause the University’s actions. St. Mary’s Honor Center, supra.

The University is not required to prove the truth of the nondiscriminatory reason but must simply give a clear and specific explanation for its conduct. Redgate v Fairfield University, 862 FSupp 724 (DConn 1994); Luxemburg v Texas A & M University Sys., 863 FSupp 412 (SDTex 1994), aff’d, 59 F3d 1240 (1995). The University is not required to prove that it was actually motivated by the proffered reasons. Bina v Providence College, 844 FSupp 77 (DRI 1994), aff’d, 39 F3d 21 (1st Cir 1994).

If the University carries this burden of production and shows such a nondiscriminatory reason, the prima facie case is rebutted. Ms. Worker then has the opportunity to demonstrate by a preponderance of the evidence either that the offered reason is mere pretext and that sex more likely motivated the University or by indirectly showing that the proffered explanation is unworthy of credence. St. Mary’s Honor Center, supra; Burdine, at 256; Clemons, at 1538; Kobrin, supra.

C. Application of Prima Facie Case Elements to Facts Here

To present the first factor of a prima facie case, membership in a protected group, Ms. Worker must show that her adverse working conditions/discharge must be based at least in part on her sex -- that is that sex was a factor in the decision. Watson v Magee Women’s Hospital, 472 FSupp 325 (WDPa 1979).
To present the second factor of a *prima facie* case, satisfactory performance, Ms. Worker only has to show that she was doing her job well enough to rule out the possibility that she was treated adversely/fired for inadequate job performance. *Gill v Reorganized School Dist.*, 32 F3d 376, 378 (8th Cir 1994), *reh’g den, en banc*, 1994 US App LEXIS 28228 (8th Cir Oct. 7, 1994). She need not show perfect performance or even average performance, but only that her performance was of sufficient quality to merit continued employment, thereby raising an inference that some other factor was involved in the University’s decision. *Powell v Syracuse University*, 580 F2d 1150 (1978), *cert den*, 439 US 984, 99 S Ct 576, 58 LEd2d 656 (1978).

Regarding the fourth factor in a discriminatory discharge *prima facie* case, that Mr. Cleansweep hired a male replacement, or at least attempted to do so, note that not all courts require this. For example, one said that although proof of replacement by a person outside the employee’s protected class will satisfy the fourth element of a *prima facie* case, such proof is not required. *Davenport v Riverview Gardens School Dist.*, 30 F3d 940 (8th Cir 1994). It may be enough that the University had a continuing need for someone to perform the same work after Ms. Worker was discharged.

**D. Why There Is No Prima Facie Case of Discriminatory Treatment**

Looking first at a possible allegation of discriminatory treatment in the terms and conditions of her work, Ms. Worker may allege that Mr. Cleansweep treated her more harshly than her former boss, Jay Oldtime, and was more
demanding, setting impossibly short deadlines for her to achieve, merely because she was a woman. However, her proofs on this fourth factor of a *prima facie* case should fail as she will have to acknowledge that the evidence shows Mr. Cleansweep was equally demanding on his male employees and himself.

Additionally, it should be difficult for Ms. Worker to establish the second element of a *prima facie* case, satisfactory job performance. Her most recent job performance rating, 2.75, done about a year ago by her former boss, not Mr. Cleansweep, means she was not meeting all requirements of the job in a fully capable manner and needed to improve in certain areas even before Mr. Cleansweep arrived. Mr. Oldtime can also testify that she appeared to be suffering from "burn-out" before Mr. Cleansweep became her supervisor.

E. Why There Is No Prima Facie Case of Discriminatory Discharge

In regard to the elements of a *prima facie* discriminatory discharge case, Ms. Worker probably can produce sufficient evidence to present the first, third and fourth elements of a such a *prima facie* case. However, for the reasons stated above, it is the second factor, satisfactory performance, that she should have difficulty in establishing.

F. Non-Discriminatory Reasons For The University’s Actions

Assuming that Ms. Worker can establish a *prima facie* case of disparate treatment in the terms and conditions of employment/discharge, the burden of
production then shifts to the University to introduce legitimate, non-discriminatory reasons for Mr. Cleansweep’s actions. This it can do.

The increased work load and demands placed on Ms. Worker were due to an external force, recently passed federal and state legislation. It was a legitimate job expectation for her to master these and present them to the University community. Additionally it is clear that Mr. Cleansweep tried to help her achieve that goal by sending her to seminars on these subjects.

The ultimate decision to terminate Ms. Worker likewise can be explained by a legitimate, non-discriminatory reason, her failure to accomplish the specific work performance goals established for her. You yourself can testify that you believed Mr. Cleansweep’s criticism of Ms. Worker’s performance to be justified. The University’s potential liability as a result of her failure to bring University policy into line with emerging federal laws is also a legitimate reason to terminate her.

G. Why The University’s Reasons Are Not Pretexts

The University having met its burden of production, Ms. Worker will be given an opportunity to demonstrate that these reasons were pretexts, and the real reason she was fired was because of her sex. Through discovery it is likely that she will learn that Mr. Cleansweep intended to hire his college roommate, Joe Gudolboy, into her position. Although we will try to respect Mr. Cleansweep’s desire to keep Mr. Gudolboy out of this matter by focusing on the deficiencies in Ms. Worker’s performance, if asked if he accelerated his
evaluation of Ms. Worker in order to hire someone else into the position, Mr. Cleansweep will be compelled to answer truthfully "yes."

This fact, while troublesome, does not mean Ms. Worker will prevail. There is no evidence that if Ms. Worker were male, Mr. Cleansweep would not have taken the identical action. In this regard, we will argue that it is not sex discrimination to favor a candidate because of past friendship.

For example, some courts have found no sex discrimination when a supervisor hires his woman friend into a position rather than otherwise qualified males or females. DeCintio v Westchester County Medical Center, 807 F2d 304 (2d Cir 1986) cert den, 484 US 825, 108 S Ct 89, 98 LEd2d 50 (1987); Miller v Aluminum Company of America, 679 FSupp 495 (WDPa 1988), aff'd, 856 F2d 184 (3d Cir 1988). Note, however, that other courts have allowed recovery under Title VII if a supervisor gives a woman friend preferential treatment over another employee. See discussion in Ellert v University of Texas, at Dallas, 52 F3d 543 (5th Cir 1995).

The University should therefore also argue Mr. Gudolboy’s superior qualifications, a DBA compared to Ms. Worker’s bachelor’s degree, made him more qualified to perform her job. At this point, however, we do not know Mr. Gudolboy’s work experience. Hopefully, this too will compare favorably to Ms. Worker’s. This is, perhaps, the most difficult issue in this case.
III. CONCLUSION

We will need to know more facts before we can definitively determine if sexual harassment or sex discrimination occurred. However, we believe that on the basis of the facts presented to us to date that this matter is capable of defense.

Please advise us of any questions you may have regarding this matter. We look forward to meeting with you and discussing this further.