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Employer Liability for Sexual Harassment: A Search for Standards in the Wake of *Harris v. Forklift Systems, Inc.*

Marren Roy

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EMPLOYER LIABILITY FOR SEXUAL HARASSMENT: A SEARCH FOR STANDARDS IN THE WAKE OF *HARRIS V. FORKLIFT SYSTEMS, INC.*

Marren Roy

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I. INTRODUCTION

SEXUAL harassment is a pervasive problem that undermines the work place by eating away at its victim's dignity, productivity, and eagerness to come to work.¹ Sexual harassment is analogous to a theft that robs not only the person but the company as well.² Studies show that over half of women³ in the workforce feel they have been the victims of workplace sexual harassment.⁴ Despite the magnitude of the problem, federal law governing sexual harassment is of relatively recent origin.⁵ The first case recognizing sexual harassment as a valid cause of action occurred in 1976 in *Williams v. Saxbe*,⁶ which is considered to have "laid the foundation for federal case law recognizing sexual harassment as a form of sex discrimination prohibited by Title VII."⁷

1. Scientific research indicates that the cost of workplace sexual harassment to both workers and employers is high. Amicus Curiae Brief of American Psychological Association in Support of Neither Party at n.10-14, *Harris v. Forklift Systems, Inc.*, 113 S. Ct. 1382 (1993) (No. 92-1168). Employees who are the victims of sexual harassment frequently change jobs, transfer, or refrain from efforts to obtain jobs in order to avoid harassment. In the process, they lose income, seniority, work alliances, references, established work reputation, and personal confidence. *Id.* Workers who remain and endure the harassment report adverse effects on their work performance, including loss of motivation, decreased feelings of competence and self esteem, distraction, and negative performance evaluations from harassers. *Id.* The magnitude of damage to sexual harassment victims translates into a loss that affects their employers. *Id.* A 1988 study by the United States Merit Systems Board found the cost of sexual harassment to the government (as employer) to be \$267 million in just a two-year period. *Id.*

Further, the cost to employers who tolerate workplace sexual harassment can be expected to increase with the recent passage of the Civil Rights Act of 1991. Under the Act, a prevailing Title VII plaintiff may now be entitled to both compensatory and punitive damages. 42 U.S.C. § 1981a (Supp. 1992). The amount of those damages, however, must not exceed \$50,000 for employers with more than 14 and less than 101 employees, \$100,000 for employers with more than 100 and fewer than 201 employees, \$200,000 for employers with more than 200 and fewer than 501 employees, and \$300,000 for employers with more than 500 employees. 42 U.S.C. 1981a(b) (Supp. 1992). (Previously, a prevailing Title VII plaintiff's recovery was limited to injunctive relief including reinstatement, back pay, interest, lost benefits, attorney's fees, and certain litigation costs. 42 U.S.C. § 2000e-5 (1988)).

2. Anne B. Fisher, *Sexual Harassment: What To Do*, FORTUNE, Aug. 23, 1993, at 84.

3. This comment will focus on workplace sexual harassment of women by men because of the overwhelming reported number of women, as opposed to men, who have been victimized by this form of harassment.

4. See CATHERINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 26-32 (1979) (estimating that 49% to 90% of working women, depending on their various occupations, have been the victim of sexual harassment).

5. EEOC COMPLIANCE MANUAL, § 615.5 (1982).

6. 413 F. Supp. 654 (D.D.C. 1976).

7. EEOC COMPLIANCE MANUAL, § 615.5 (1982).

A. WHAT IS SEXUAL HARASSMENT?

The Equal Employment Opportunity Commission⁸ guidelines provide the following definition of sexual harassment:

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term of an individual's employment, (2) submission or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.⁹

It is fairly well recognized that "[g]enerally, sexual harassment is any repeated and unwanted verbal, nonverbal, or physical advance of a sexual nature—looks, touches, jokes, gestures, innuendoes, epithets, or propositions—by someone in the workplace which impedes a woman's enjoyment of her work, her ability to do her work, or her employment opportunities."¹⁰

B. TWO BASIC FORMS OF SEXUAL HARASSMENT: QUID PRO QUO AND HOSTILE ENVIRONMENT

Sexual harassment under Title VII consists of two principal types: quid pro quo discrimination and hostile work environment harassment.¹¹ Quid pro quo is the more obvious form of sexual harassment insofar as it generally involves the offer of tangible employment benefits by a supervisor or employer in exchange for sexual favors from the subordinate employee.¹² Hostile environment sexual harassment, whether or not linked to the grant or denial of an economic quid pro quo, consists of conduct that has the purpose or effect of unreasonably interfering with an individual's work performance or that which creates an intimidating, hostile, or offensive working environment.¹³

C. TOO MUCH CONFUSION IN SEXUAL HARASSMENT LAW

Since the first federal court decisions in the mid 1970s, the law of sexual harassment has remained in a constant state of flux.¹⁴ Much of the

8. [hereinafter EEOC or Commission]

9. 29 C.F.R. § 1604.11(a) (1992).

10. Merrick T. Rossein, *Work Environment - Sexual Harassment*, C780 ALI-ABA 81, 88-89 (1993). Rossein further notes that "[s]exual harassment can take the form of a 'friendly' arm around the shoulder or 'accidental' brushes or touches" but that "[s]exual harassment does not include the isolated instance where one employee asks another for a date and, once rebuffed, leaves the matter alone." *Id.* at 89.

11. *Martin v. Nannie and the Newborns, Inc.*, 3 F.3d 1410, 1414 (10th Cir. 1993).

12. Jeffrey A. Gettle, *Sexual Harassment and the Reasonable Woman Standard: Is it a Viable Solution?*, 31 DUQ. L. REV. 841, 842 (1993).

13. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65 (1986).

14. Rossein, *supra* note 10, at 86.

litigation stems from issues arising in the hostile environment context.¹⁵ While most sexual harassment cases involve workplace harassment among either employees or supervisors of the particular company, federal courts are now recognizing that an employer may be held liable for the harassment of its employees by non-employees.¹⁶ The expansion of potential sexual harassment claims beyond the 'normal' workplace setting make the issue of employer liability of special importance because, without employer liability, sexual harassment law is reduced to a mere theory of workplace goals.¹⁷

This comment will explore the various standards governing employer liability that are applied in the quid pro quo and hostile environment sexual harassment settings. In doing so, this comment will first discuss the two Supreme Court decisions governing the law of sexual harassment, their effect on employer liability, and the inconsistency of the *Meritor* Court's ruling on employer liability for hostile environment sexual harassment by a supervisor. Next, it will examine the relationship between the quid pro quo and hostile environment causes of action where, arguably, the quid pro quo action is too often being overlooked in favor of the hostile environment alternative. This comment will then examine some of the judicial reasoning, or lack thereof, present in sexual harassment decisions, arguing that sexual harassment needs to be viewed in the context of societal realities and their implications to the subordination of women in the workplace. Lastly, this comment will address employer concerns of potential liability, recognizing that prudent employers need not be overly concerned, and will delve into what types of "prompt and appropriate" action can shield an employer from sexual harassment liability.

15. *Id.*

16. David W. Garland, *Employer Liability for Sexual Harassment of Employees by Non-Employees*, C780 ALI-ABA 177 (1993). Garland notes that:

[t]hese cases raise a number of questions that remain to be litigated. For example, did Congress, in enacting Title VII, intend that an employer should be held liable for the actions of non-employees? Should agency principles be used to determine an employer's liability for harassment by non-employees when such non-employees are generally not agents of the employer? How will it be determined when an employer has control over an alleged harasser and when it does not? Does an employer always have control if it can end the business relationship with the alleged harasser's enterprise? What should an employer do to investigate the activities of people beyond its control?

Id. at 183.

17. See Rachel E. Lutner, *Employer Liability for Sexual Harassment: The Morass of Agency Principles and Respondeat Superior*, 1993 U. ILL. L. REV. 589, 590 (1993). Lutner argues that:

neither current statutory nor judicial sexual harassment law is capable of providing clear, predictable, or relevant standards of employer liability. Without more guidance, employer liability for sexual harassment will continue to maintain a results-oriented approach where the standard applied matches the result the court wants to reach, and employer liability will continue to be imposed only in the most egregious cases.

Id.

II. THE SUPREME COURT SPEAKS TO THE ISSUE OF SEXUAL HARASSMENT

A. *MERITOR SAVINGS BANK V. VINSON*

The Supreme Court addressed the issue of employer liability for sexual harassment in the landmark case of *Meritor Savings Bank v. Vinson*¹⁸ yet declined to give any bright line ruling on the subject.¹⁹ *Meritor* involved a female bank employee, Mechelle Vinson, who brought an action against her supervisor, Sidney Taylor, and Meritor Savings Bank, claiming that she had constantly been subjected to sexual harassment by Taylor, in violation of Title VII, during the four years she worked for the bank. Vinson testified that Taylor made repeated demands upon her for sexual favors, usually at the office, both during and after business hours, which Vinson initially refused. Eventually, however, Vinson agreed out of what she described as fear of losing her job. Vinson estimated that over the years she had sex with Taylor some forty or fifty times. She further testified that Taylor exposed himself to her, fondled her in front of other employees, followed her into the employees' restroom when she went there alone, and forcibly raped her on several occasions. Lastly, Vinson testified that she never reported Taylor's harassment to any of his supervisors and never attempted to use the bank's complaint procedure because she was afraid of Taylor.²⁰

The district court denied relief, holding that if Vinson and Taylor did engage in a sexual relationship during the time of Vinson's employment, the relationship was a voluntary one, having nothing to do with her continued employment or advancement at the bank, and that she was not the victim of sexual harassment or discrimination.²¹ The district court further concluded, after noting the bank's express policy against discrimination, that the bank was without notice and could not be held liable for the alleged actions of Taylor.²² The court of appeals reversed and remanded the case for further proceedings, holding that Vinson's grievance was clearly that of hostile environment harassment and that the district court had not considered whether a violation of this type had occurred.²³ As to

18. 477 U.S. 57 (1989).

19. *Meritor*, 477 U.S. at 72. Justice Renquist, delivering the opinion of the court, explicitly stated: "We . . . decline the parties' invitation to issue a definitive rule on employer liability." *Id.*

20. Taylor denied Vinson's allegations claiming that he never fondled her, never made suggestive remarks to her, and never engaged in or asked her to have sexual intercourse with him. Instead, Taylor claimed that all of the accusations were made in response to a business related dispute. The bank supported Taylor's position and further asserted that any sexual harassment by Taylor was unknown to the bank and engaged in without its consent or approval.

21. *Meritor*, 477 U.S. at 61.

22. *Id.* at 62.

23. *Id.* The court also found that the district court's conclusion that the sexual relationship was a voluntary one did not create the need for remand because the court was uncertain as to precisely what the district court meant by this finding. *Id.* The court of appeals held that if the evidence showed that Taylor made Vinson's toleration of the harassment a condition of employment, her voluntariness had no materiality. *Id.* The court

the bank's liability, the court of appeals held that "an employer is absolutely liable for sexual harassment practiced by supervisory personnel, whether or not the employer knew or should have known about the misconduct."²⁴

The Supreme Court affirmed the court of appeals' judgment, but for different reasons.²⁵ Looking to the 1980 Equal Employment Opportunity Commission's Guidelines,²⁶ the Court, for the first time, held that a plaintiff may establish a Title VII violation by proving that discrimination based on sex has created a hostile or abusive work environment.²⁷ The Supreme Court ruled that because the district court appeared to have made its findings without ever considering the hostile environment theory of sexual harassment, the court of appeals was correct in remanding the case.²⁸ The Court further held that "[t]he gravamen of any sexual harassment claim is that the alleged advances were 'unwelcome'" and that the district court had erroneously focused on the voluntariness of Vinson's participation in the alleged sexual episodes.²⁹

The Supreme Court also commented on the issue of employer liability by discussing the standards enunciated by the interested parties in their respective briefs.³⁰ After discussing the various suggested alternatives,

conjured that the district court's finding of voluntariness might have been based on the extensive testimony regarding Vinson's dress and personal fantasies that the court of appeals felt had no place in the litigation of the case. *Id.* at 63. Note, however, that the Supreme Court ultimately disagreed on the issue of the victim's speech and dress and held that "[w]hile 'voluntariness' in the sense of consent is not a defense to such a claim, it does not follow that the complainant's sexually provocative speech or dress is irrelevant as a matter of law in determining whether he or she found particular sexual advances unwelcome." *Id.* at 68-69.

24. *Id.* at 63.

25. *Id.*

26. The court noted that "these Guidelines, 'while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'" *Meritor*, 477 U.S. at 65. (quoting *General Elec. Co. v. Gilbert*, 429 U.S. 125, 141-42 (1976)).

27. *Id.* Title VII makes it "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of the individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1) (1988).

The Court did, however, condition its holding on recognition that "not all workplace conduct that may be described as 'harassment' affects a 'term, condition, or privilege' of employment within the meaning of Title VII. . . . For sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" *Id.* at 67 (quoting *Henson v. Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)).

28. *Meritor*, 477 U.S. at 68.

29. *Id.*

30. The suggested standards are as follows: The district court advocated that there had to be some sort of notice for the employer to be held liable; the court of appeals and Respondent (Vinson) took the opposite view and advocated strict liability for the employer where a hostile environment is created by a supervisor's sexual advances, even though the employer neither knew nor should have known of the alleged misconduct; Petitioner (*Meritor Bank*) argued that Vinson's failure to use the bank's established grievance procedure or to otherwise put the bank on notice insulated the bank from liability; the EEOC, in its brief as *amicus curiae*, suggested that courts look to traditional agency principles when formulating employer liability rules and, more specifically, when a sexual harassment case

however, the Supreme Court stated that “[t]his debate over the appropriate standard for employer liability has a rather abstract quality about it given the state of the record in this case” and declined to issue a definitive rule as to employer liability.³¹ The Court did, however, agree with the EEOC insofar as Congress intended for courts to look to agency principles for guidance in this area.³² The Court reasoned that Congress’s decision to define “employer” in the context of Title VII to include any “agent” of an employer evidenced a congressional intent to place some limits on acts of employees for which employers should be held responsible.³³ The Court stated: “For this reason, we hold that the court of appeals erred in concluding that employers are always automatically liable for sexual harassment by their supervisors. For the same reason, absence of notice to an employer does not necessarily insulate that employer from liability.”³⁴

Finally, the Court rejected the bank’s view that the mere existence of a grievance procedure and a policy against discrimination, coupled with the plaintiff’s failure to invoke the procedure, must insulate the employer from liability.³⁵ The Court recognized that while those facts are relevant, they are not always dispositive.³⁶ Relying on the facts before it, the Court noted that Meritor’s general nondiscrimination policy did not specifically address sexual harassment and therefore did not alert employees to their employer’s interest in correcting that form of behavior. The Court further recognized that the bank’s grievance procedure required the employee to first complain to her supervisor who, in Mechelle Vinson’s case, was the alleged perpetrator, Sidney Taylor. Justice Renquist, writing for the court, observed that “[s]ince Taylor was the alleged perpe-

rests solely on a “hostile environment” theory. The EEOC felt that those same principles should lead to a rule that looks to whether the victim had a reasonably available avenue of complaint, and if utilized, whether that procedure was reasonably responsive, urging that if the victim fails to take advantage of that procedure, the employer should be shielded from liability absent actual knowledge. The EEOC Guidelines, however, advocate holding an employer liable for the acts of its agents without regard to notice and look to a determination of whether an individual acts in either a supervisory or agency capacity. *Id.* at 69-71.

31. *Id.* at 72.

32. *Meritor*, 477 U.S. at 72. Courts have looked to §§ 219-237 of the RESTATEMENT (SECOND) OF AGENCY (1958) for guidance in this area. *See, e.g.*, *Yates v. Avco Corp.*, 819 F.2d 630 (6th Cir. 1987) and *Hicks v. Gates Rubber Co.*, 833 F.2d 1406 (10th Cir. 1987), as examples of attempts to apply agency principles to determine employer liability.

As subsequent observers have noted, the court’s direction to look to agency principles for guidance in this area has added considerable confusion to the employer liability issue. *See, e.g.*, Michael J. Phillips, *Employer Sexual Harassment Liability Under Agency Principles: A Second Look at Meritor Savings Bank v. Vinson*, 44 VAND. L. REV. 1229, 1230 (1991). Phillips argues that “after nearly five years of judicial floundering with agency principles, it seems time for a change” and that “*Meritor’s* command to consult agency law was a bad ruling from almost every conceivable angle.” *Id.* at 1230-31; *see also* Lutner, *supra* note 17, at 602 (arguing that agency principles inject issues ill-suited to sexual harassment fact patterns that have the potential to distract the court from the real question of whether sexual harassment occurred and whether the employer should be held liable).

33. *Meritor*, 477 U.S. at 72.

34. *Id.* at 72.

35. *Id.*

36. *Id.*

trator, it is not altogether surprising that . . . [Vinson] failed to invoke the procedure and report her grievance to him."³⁷ Renquist added that the Bank's contention that it should be insulated from liability due to Vinson's failure to invoke the procedure "might be substantially stronger if its procedures were better calculated to encourage victims of harassment to come forward."³⁸

1. *Inadequate Guidance has Resulted in Confusion and Inconsistency*

Unfortunately, the Supreme Court's refusal to issue a definitive ruling on employer liability has caused much confusion and inconsistency in the lower courts. As one commentator stated: "The guidance offered by *Meritor* has proven inadequate, as appellate courts have interpreted it in various ways. Despite *Meritor*, disagreement persists among the circuits as to what should be the standard of employer liability for hostile environment sexual harassment."

Most courts have not recognized, nor do they even discuss, how sexual harassment contributes to the social inequality and subordination of women.³⁹ Decisions such as *Meritor* that are void of any reference to the social context and ramifications of sexual harassment, must cease. Courts need to recognize that workplace equality is an issue of dominance that gives men the power to systematically subordinate women.⁴⁰ As one commentator recognized, sex discrimination in the form of sexual harassment is "not the story of difference, [it is] the story of subordination."⁴¹

2. *Inconsistency in the Court's Holding Regarding Employer Liability for Hostile Environment Sexual Harassment by a Supervisor*

Sexual harassment should be viewed as an act of dominance by men over women that is very similar to the way racial harassment operates as an act of dominance by white persons over racial minorities.⁴² The development of sexual harassment law, however, has reflected a judicial short sightedness and has created numerous obstacles to victims' recoveries that are not seen in other analogous areas of the law.⁴³ The Supreme Court's refusal of strict liability to employers for sexual harassment carried out by a supervisor in *Meritor* is an example of such an obstacle.⁴⁴

Justice Marshall recognized that the refusal to grant strict liability was such a hurdle and disagreed with the Court regarding its holding on em-

37. *Id.* at 73.

38. *Id.*

39. Maria M. Carillo, *Hostile Environment Harassment by a Supervisor Under Title VII: Reassessment of Employer Liability in Light of the Civil Rights Act of 1991*, 24 COLUM. HUM. RTS. L. REV. 41, 50 (1992).

40. Jane L. Dolkart, *Hostile Environment Harassment: Equality, Objectivity, and the Shaping of Legal Standards*, 43 EMORY L.J. 151, 174 (1994).

41. *Id.*

42. Carillo, *supra* note 39.

43. *Id.* at 49.

44. *Id.*

ployer liability for sexual harassment by supervisors.⁴⁵ In his *Meritor* concurring opinion, Justice Marshall stated that he would adopt the standard set out by the EEOC Guidelines that make an employer liable if "a supervisor or an agent violates Title VII, regardless of knowledge or any other mitigating factor."⁴⁶ Regarding acts between fellow employees, Marshall and the EEOC endorsed the view that "an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action."⁴⁷ Marshall recognized that an employer acts through its employees and that discrimination is rarely carried out pursuant to the formal approval of a corporation's board of directors.⁴⁸ Marshall further recognized that Title VII law generally imputes liability to the employer for the act of a supervisory employee or agent and stated:

When a supervisor discriminatorily fires or refuses to promote a black employee, that act is, without more, considered the act of the employer. The courts do not stop to consider whether the employer otherwise had "notice" of the action, or even whether the supervisor had actual authority to act as he did.⁴⁹

Marshall also specifically rejected the Solicitor General's argument that the case of a supervisor creating a hostile environment is different because the supervisor is not exercising or threatening to exercise the authority to make personnel decisions affecting the victim of the harassment.⁵⁰ Marshall called the Solicitor General's position untenable and aptly recognized:

A supervisor's responsibilities do not begin and end with the power to hire, fire, and discipline employees, or with the power to recommend such actions. Rather, a supervisor is charged with the day-to-day supervision of the work environment and with ensuring a safe, productive workplace. There is no reason why abuse of the latter authority should have different consequences than abuse of the former. In both cases it is the authority vested in the supervisor by the employer that enables him to commit the wrong: it is precisely because the supervisor is understood to be clothed with the employer's authority that he is able to impose unwelcome sexual conduct on subordinates. There is therefore no justification for a special rule, to be applied only in "hostile environment" cases, that sexual harassment does not create employer liability until the employee suffering discrimination notifies other supervisors. No such requirement appears in the statute, and no such requirement can coherently be drawn from the law of agency.⁵¹

45. *Meritor*, 477 U.S. at 75.

46. *Id.*

47. *Id.* at 74 (quoting 29 C.F.R. §§ 1604.11(c), (d) (1985)).

48. *Id.* at 75.

49. *Id.*

50. *Meritor*, 477 U.S. at 76.

51. *Id.* at 76-77. Marshall did, however, concede that there may be certain instances where a limitation on employer liability for the acts of its supervisors is appropriate. *Id.* at

In rejecting strict employer liability for hostile environment sexual harassment by a supervisor, the Court inconsistently applied Title VII to the detriment of sexual harassment plaintiffs. Before sexual harassment was recognized as a cause of action, courts consistently held employers liable for discrimination carried out by their supervisors.⁵² Today, employers generally will not be held vicariously liable for the acts of a supervisor unless the woman bringing the claim of hostile environment sexual harassment can prove that the employer had either actual or constructive knowledge of the harassment and failed to take remedial action.⁵³ "The *Meritor* Court is primarily responsible for this divergence from vicarious employer liability for hostile work environment by a supervisor."⁵⁴ Thus, the employer liability standard being applied in most cases involving hostile work environment sexual harassment by a supervisor represents a clear divergence from all other types of discrimination law applicable to the acts of a supervisor.⁵⁵

B. THE SUPREME COURT SPEAKS AGAIN: *HARRIS V. FORKLIFT SYSTEMS, INC.*

The Supreme Court recently revisited the issue of sexual harassment in the case of *Harris v. Forklift Systems, Inc.*⁵⁶ In *Harris*, the Court examined the various requirements needed to constitute a hostile work environment under Title VII of the Civil Rights Act of 1964.⁵⁷ The case before the Court involved Teresa Harris, a manager at Forklift Systems, Inc., who was often insulted and made the target of unwanted sexual innuendoes by Forklift's president, Charles Hardy. Such comments, made in the presence of other employees, included the following: "You're a woman, what do you know?" and "We need a man as the rental manager."⁵⁸ Hardy also told Harris that she was a "dumb ass woman" and suggested that the two of them "go to the Holiday Inn to negotiate [Harris's] raise."⁵⁹ Hardy would also ask Harris and other female employees to retrieve coins from his front pants pockets and would throw objects on the ground, asking the women to pick up the objects.

Harris complained to Hardy about his conduct; Hardy replied that he was only joking, was surprised that Harris was offended, and promised to stop. Based on Hardy's promise, Harris stayed on the job. Hardy, how-

77. Marshall gave the example of a supervisor and employee working in two different parts of the employer's business and the supervisor has no authority over the employee as an instance where it may be improper to find "strict employer liability," but noted that those considerations do not require the creation of special "notice" rules. *Id.*

52. Carillo, *supra* note 39, at 53. See also *supra* note 49 and accompanying text for Justice Marshall's agreement on this point in his *Meritor* concurrence.

53. Carillo, *supra* note 39, at 57.

54. Marlissa Vinciguerra, *The Aftermath of Meritor: A Search for Standards in the Law of Sexual Harassment*, 98 YALE L.J. 1717, 1730 (1989).

55. Carillo, *supra* note 39, at 75.

56. 114 S. Ct. 367 (1993).

57. *Id.*

58. *Id.* at 369.

59. *Id.*

ever, did not keep his promise to end his harassing behavior. While Harris was arranging a deal with one of Forklift's customers, Hardy asked her, in front of other employees, "What did you do, promise the guy . . . some [sex] Saturday night?"⁶⁰ Harris thereafter quit her job at Forklift and sued claiming that Hardy's behavior created an abusive (hostile) work environment for her because of her gender.

The district court found that Hardy's conduct did not create a hostile environment because, while some of Hardy's comments offended Harris and would be offensive to the reasonable woman, they were not so severe as to have seriously affected Harris's psychological well-being. The Supreme Court noted that the district court, in focusing on the employee's psychological well-being, was following Sixth Circuit precedent.⁶¹ Given that the district court's ruling was consistent with circuit precedent, it is not surprising that the Court of Appeals for the Sixth Circuit affirmed the judgment in a brief unpublished opinion.

The Supreme Court granted certiorari to resolve the conflict among the various circuits as to whether conduct must seriously affect the psychological well-being of an employee or lead the employee to suffer injury to be actionable.⁶² The Court, in a unanimous decision written by Justice O'Connor, held that the appropriate standard "takes a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury."⁶³ The Court adopted an objective/subjective standard holding that discrimination occurs when conduct is severe or pervasive enough to create an objectively hostile work environment that the victim perceives to be abusive.⁶⁴ To be actionable, the Court stated that the conduct must be more than the mere utterance of an epithet that engenders offensive feelings in an employee, but that Title VII would come into play before the harassing conduct leads to a nervous breakdown.⁶⁵ According to the Court:

This is not, and by its nature cannot be, a mathematically precise test. . . . [W]e can say that whether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating; or a mere offensive utterance; and whether it unreasonably interferes with the employee's work performance.⁶⁶

The Court went on to hold that, while the effect on the employee's psychological well-being is relevant as to whether the employee actually found the environment abusive, psychological harm like any other factor may be taken into account, but is not required to state a cause of action

60. *Id.*

61. *Harris*, 114 S. Ct. 372.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Harris*, 114 S. Ct. at 371.

based on a hostile work environment under Title VII.⁶⁷ The Court found that the district court erred in focusing the fact finder's attention on whether the conduct seriously affected the plaintiff's psychological well-being or led her to suffer injury, holding that such injury is an element that Title VII does not require.⁶⁸ While the long term effects of the *Harris* decision remain to be seen due to its recent origin, the lack of guidance present in the decision indicates that the overall lack of predictability in sexual harassment law can be expected to continue. Additionally, recent cases decided under *Harris* indicate that plaintiffs can expect to face a significant hurdle in merely establishing that the sexual harassment endured was severe or pervasive enough to satisfy the dual objective/subjective standard.⁶⁹

The decision, while reaffirming the overall merit of a sexual harassment claim, failed to address the inconsistencies being applied to employer liability in the hostile environment context. It also failed to give any workable theory or context in which to apply the various standards. As Jane Dolkart aptly recognized in a recent law review article:

The Supreme Court failed in *Harris* to provide a more detailed structural and contextualized explanation of the ways in which sexual harassment works as a barrier to equal employment and harms women as a class. Such an account would tell the everyday stories of women struggling to survive and work in a world where sexualized abuse and violence is the background of their lives. It would explain the place of sexual harassment in the continuum of degradation and violence and the role it plays in women's workplace subordination. Such an

67. *Id.*

68. *Id.*

69. *See, e.g.,* *Kidwai v. McDonald's Corp.*, 21 F.3d 423 (4th Cir. 1994) (finding that supervisor's noticing plaintiff's new boyfriend, telephoning her at home, wanting to meet her mother, discussing vacation and leisure activities, asking her to cook dinner at her new home, driving rapidly while acting like a boor, using profanity, and a late night telephone call wherein he asked whether plaintiff was in bed with someone lacked the severity to make out a sexual harassment claim since an objective "reasonable person" would not find such conduct pervasive enough to create a hostile or abusive work environment); *Saxton v. American Tel. & Tel. Co.*, 10 F.3d 526, 534 (7th Cir. 1993) (holding that two instances of sexual misconduct coupled with a condescending, impatient, and mocking attitude toward plaintiff insufficient to meet the objective prong of pervasive harassment that has been deemed actionable); *Nishijima v. Morton Grove Park Dist.*, No. 9305193, 1994 WL 142967, at *4 (N.D. Ill. Apr. 15, 1994) (holding that conduct where supervisor told stories about strange sex, wild parties, and the women he had been with, made sexual remarks and innuendoes toward plaintiff, shoved the plaintiff in the lunch room after she refused to get him a fork, threatened to cut plaintiff's hours, and picked up plaintiff's decorative pumpkins and stabbed with pocket knife while she looked on as incapable of stating a hostile environment harassment claim because such conduct, according to the court, was incapable of satisfying the objective standard of creating a hostile environment in the eyes of a reasonable person); *Doe v. R.R. Donnelley & Sons*, 843 F. Supp. 1278, 1279 (S.D. Ind. 1994) (finding environment where, among numerous other allegations, supervisor commented on plaintiff's appearance repeatedly in a sexual manner, patted her rear end on two occasions after being told by plaintiff that such conduct was offensive, and where co-workers asked her out on dates (even though plaintiff was married), inquired if she tanned in the nude, questioned her about what she wore to bed, gave her obscene notes, commented on her breasts, sexually propositioned her, and where plaintiff was ultimately raped on the premises by an unknown assailant as not rising to the level of actionable sexual harassment).

understanding would aid judges and juries in the interpretation of facts and the construction of meanings given to those facts in evaluating when workplace conduct denies women equal employment opportunity.⁷⁰

Such a contextualized explanation would have potentially offered some guidance to the inconstancies plaguing sexual harassment law and its relation to the imposition of employer liability for such harassment. Unfortunately, the two Supreme Court decisions on sexual harassment offer little guidance to courts and employers as to the boundaries of employer liability for sexual harassment. Due, at least in part to this inadequacy, the overall state of confusion on these issues can be expected to continue.

III. QUID PRO QUO HARASSMENT: STRICT EMPLOYER LIABILITY

The EEOC takes the position that "[a]n employer will always be held responsible for 'quid pro quo' harassment."⁷¹ Courts endorse this view⁷² with the rationale for the imposition of automatic liability being that when a supervisor exercises the authority to make decisions affecting a subordinate's employment status, those actions are properly imputed to the employer, whose delegation of authority empowered the supervisor to take such actions.⁷³

A recent example of a quid pro quo harassment claim can be found in *Karibian v. Columbia University*.⁷⁴ Sharon Karibian worked in Columbia University's fundraising office which was administered by an independent contractor, Philanthropy Management Company (PMI), and was staffed by both Columbia and PMI employees. Karibian was an employee of

70. Dolkart, *supra* note 40, at 193.

71. EEOC POLICY GUIDANCE NO. N-915-050, CURRENT ISSUES OF SEXUAL HARASSMENT § (D)(1) (1990) [hereinafter EEOC POLICY GUIDANCE].

72. In fact, "[e]very court of appeals to address this issue in the quid pro quo context has held the employer absolutely liable for sexual harassment by a supervisor." Rossein, *supra* note 10, at 92-93.

For courts imposing this strict liability standard, see, e.g., *Karibian v. Columbia Univ.*, 14 F.3d 773, 779 (2d Cir.), *cert. denied*, 1994 WL 161790 (June 13, 1994); *Chamberlin v. 101 Realty, Inc.*, 915 F.2d 777, 785 (1st Cir. 1990); *Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311, 1316 (11th Cir. 1989); *McCollum v. Bolger*, 794 F.2d 602, 610 (11th Cir. 1986), *cert. denied sub nom. McCollum v. Tisch*, 479 U.S. 1034 (1987); *Highlander v. KFC Nat'l Management Co.*, 805 F.2d 644, 648 (6th Cir. 1986); *Horn v. Duke Homes, Inc.*, 755 F.2d 599, 604-06 (7th Cir. 1985); *Craig v. Y & Y Snacks, Inc.*, 721 F.2d 77, 80-81 (3d Cir. 1983); *Gilbert v. Little Rock, Ark.*, 722 F.2d 1390 (8th Cir. 1983); *Henson v. City of Dundee*, 682 F.2d 897, 910 (11th Cir. 1982); *Miller v. Bank of Am.*, 600 F.2d 211, 213 (9th Cir. 1979).

73. David D. Kadue, *Sexual Harassment at Work*, C742 ALI-ABA 465, 487 (1992); see also EEOC POLICY GUIDANCE, *supra* note 71, stating that:

Although the question of employer liability for "quid pro quo" harassment was not at issue in *Vinson*, the Court's decision noted with apparent approval the position taken by the Commission in its brief that: "where a supervisor exercises the authority actually delegated to him by his employer, by making or threatening to make decisions affecting the employment status of his subordinates, such actions are properly imputed to the employer whose delegation of authority empowered the supervisor to undertake them."

Id. § (D)(1).

74. 14 F.3d 773 (2d Cir. 1994).

Columbia and Mark Urban was appointed as her supervisor. Urban had the power to alter Karibian's work schedule and assignments, and to give her promotions and raises which were subject to approval. He also had at least the apparent authority to fire Karibian. Karibian alleged⁷⁵ that Urban pursued her by inviting her out to bars under the pretext of discussing work related matters, and on those occasions often asked Karibian back to his apartment. Initially, Karibian refused Urban's advances but later yielded to pressure from Urban. Karibian alleged that Urban coerced her into a violent sexual relationship by telling her that she owed him for all he was doing for her as her supervisor. She also claimed that her conditions of employment would vary depending on her responsiveness to Urban. Karibian believed that she would be fired if she did not yield to Urban's demands.

The court recognized that quid pro quo harassment occurs when "submission to or rejection of [unwelcome sexual] conduct by an individual is used as the basis for employment decisions affecting such individual."⁷⁶ The court then held that a plaintiff must present evidence that she was subject to unwelcome sexual conduct, and that her reaction to that conduct was then used as the basis for decisions affecting the compensation, terms, conditions, or privileges of her employment in order to establish a prima facie case of quid pro quo harassment.⁷⁷ According to the court, because the quid pro quo harasser, by definition, uses the employer's authority to alter the terms and conditions of employment, either actually or apparently, the law imposes strict liability.⁷⁸ The court further recognized that evidence of actual, as opposed to threatened, economic loss was not necessary to state a valid claim of quid pro quo harassment.⁷⁹ In this case, the court found that Karibian's allegations, if true, would constitute quid pro quo harassment because Urban made and threatened to make decisions affecting Karibian's employment based upon her submission to his sexual advances.⁸⁰

75. The case was on appeal from a summary judgment issued in favor of defendants, therefore, the discussion was limited to Karibian's version of events.

76. *Karibian*, 14 F.3d at 777 (quoting 29 C.F.R. § 1604.11(a)(2) (1993)).

77. *Id.*

78. *Id.* at 778.

79. *Id.*

80. *Id.* Regarding Karibian's hostile environment claim, the court recognized that "[w]hereas liability for quid pro quo harassment is always imputed to the employer, a plaintiff seeking to establish harassment under a hostile environment theory must demonstrate some specific basis to hold the employer liable for the misconduct of its employees" and that "[u]nfortunately, the 'specific basis' of employer liability for a hostile environment remains elusive." *Id.* at 779. Looking to agency law, the court enunciated the following standard:

We hold that an employer is liable for the discriminatorily abusive work environment created by a supervisor if the supervisor uses his actual or apparent authority to further the harassment, or if he was otherwise aided in accomplishing the harassment by the existence of the agency relationship.

Id. at 780. Under the circumstances of the case, the court found that Columbia would be liable for Urban's harassment regardless of the absence of notice or the reasonableness of Columbia's complaint procedure. The court recognized: "It would be a jarring anomaly to hold that conduct which always renders an employer liable under a quid pro quo theory

IV. THE RELATIONSHIP BETWEEN QUID PRO QUO AND HOSTILE ENVIRONMENT HARASSMENT

In a 1989 law review article, Marlissa Vinciguerra recognized that courts have consistently relied upon the hostile environment framework to the exclusion of the quid pro quo cause of action in cases involving certain forms of economic detriment, thus severely limiting the class of plaintiff's and types of behavior covered by quid pro quo harassment.⁸¹ Vinciguerra noted that "[m]isuse of the hostile environment claim as a catch all for sexual harassment complaints involving economic detriment limits quid pro quo analysis to the 'clear cut' . . . model, in which a supervisor verbally demands sexual submission, a woman refuses, and the supervisor immediately fires or demotes his recalcitrant victim."⁸² In many cases, the presence of hostile environment harassment during the period between the advances and adverse employment decisions "apparently blinded the courts to the facts giving rise to quid pro quo harassment."⁸³

Courts have been seemingly comfortable in denying a sexual harassment plaintiff her quid pro quo claim due to an availability of an alternative hostile environment claim and the fact that it is not a complete denial of her cause of action.⁸⁴ "For a court that is uncomfortable with the facts of a case or unreceptive to sexual harassment claims . . . [h]ostile environment harassment is a 'safe' alternative for a court that is concerned with shielding the employer from undue exposure to liability."⁸⁵ Thus, hostile environment sexual harassment becomes the overused vehicle for cases in which the harassment potentially falls into both categories.⁸⁶

does not result in liability to the employer when the same conduct becomes so severe and pervasive as to create a discriminatorily abusive work environment." *Id.*

81. Vinciguerra, *supra* note 54, at 1718. Vinciguerra argues that the "courts' failure to incorporate evolving forms of economic detriment into the quid pro quo model thwarts the remedial promise of Title VII." *Id.* at 1721.

82. *Id.* at 1718. Vinciguerra cites the cases of *Meritor v. Vinson*, 477 U.S. 57 (1986); *Hicks v. Yates Rubber Co.*, 833 F.2d 1406 (10th Cir. 1987); and *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981), as examples of cases where the plaintiffs endured non economic lewd behavior in addition to the threats or advances and were not immediately discharged or demoted following the threats or advances, thus shifting the courts' attention to the hostile environment cause of action, to the exclusion of a potential quid pro quo claim. Vinciguerra, *supra* note 54, at 1718.

For example, Vinciguerra attacks the *Meritor* decision for ignoring the potential quid pro quo claim and states:

By failing to analyze Vinson's claim as both hostile environment and quid pro quo harassment, the Court avoided resolving how a proven hostile environment violation affects a plaintiff's burden of proof for a quid pro claim. This omission is significant because nearly all sexual harassment plaintiffs allege both hostile environment and quid pro quo harassment.

Id. at 1729. Additionally, because courts have discretion to "label" sexual harassment claims, "[t]he different standards of employer liability for the two types of sexual harassment provide incentives for the courts to assign alleged harassment to one category as opposed to the other." Lutner, *supra* note 17, at 609.

83. Vinciguerra, *supra* note 54, at 1728.

84. Lutner, *supra* note 17, at 610.

85. *Id.*

86. *Id.*

This failure to consider the quid pro quo claim is important in its relation to employer liability because, as discussed, a finding of quid pro quo harassment leads to the imposition of employer liability.⁸⁷ Quid pro quo harassment was developed by courts to rectify economic loss suffered from sexual harassment.⁸⁸ Therefore, where threats and/or advances are followed by detrimental employment decisions affecting the sexual harassment plaintiff, the quid pro quo claim should not be summarily dismissed. Instead, courts need to recognize that while a harasser may not explicitly state, "sleep with me or else your job and the opportunities that go along with it will suffer," this is, in fact, the implicit quid pro quo of such behavior.

V. HOSTILE ENVIRONMENT HARASSMENT—CONFUSION BEFORE AND AFTER *MERITOR*

Courts have been fairly ineffective and inconsistent in adjudicating the hostile environment sexual harassment claim.⁸⁹ While the *Meritor* decision ended the debate as to the existence of a hostile environment claim under Title VII, the decision failed to address the question of what precise conduct would create a sexually hostile environment.⁹⁰ The lack of consistency in the circuit courts' decisions led one commentator to note that "[i]f any consistency did exist in the courts' decisions, it rested on the fact that few plaintiffs prevailed under a hostile environment sexual harassment theory."⁹¹ This ineffectiveness may result from the courts' unwillingness to understand the underlying intricacies and problems of the sexual harassment claim itself.⁹²

87. See *supra* notes 71-80 and accompanying text for a discussion of employer liability in the quid pro quo context.

88. Vinciguerra, *supra* note 54, at 1734.

89. See Gettle, *supra* note 12.

90. *Id.* at 846.

91. *Id.* at 847-48. Gettle notes that "in some cases the courts found lewd comments, inquiries, and jokes, the use of sexual epithets, and/or the prominent display of pornographic materials to constitute sexual harassment. By contrast, other courts confronted with the same conduct ruled that such conduct did not constitute sexual harassment." *Id.* at 847.

Another commentator, recognizing that the courts have not yet offered any bright line tests, noted that the courts seem to react to the "mix" of factors present in a given case. Peter M. Panken et al., *Sexual Harassment in the Workplace: Employer Liability for the Sins of the Wicked*, C669 ALI-ABA 221, 237 (1991). Such factors generally include the nature of the offensive conduct, pervasiveness of the conduct, relative position of the harasser and victim, employer good faith (this includes the presence or lack of an announced policy, effective enforcement mechanism, usable grievance procedure, speed of employer's reaction after employer learned of the harassment, reasonableness of the investigation of complaints, protection of the complainant from retaliation, punishment of the perpetrator, and whether the harassment ended), injury to the victim, and the reasonableness of the victim's reaction. *Id.* at 237-38.

92. Gettle, *supra* note 12, at 846. Gettle argues that part of this failure is a result of the judiciary's unwillingness to attempt to understand and take into account the female's perspective of sexual harassment. *Id.* But see *infra* notes 102-19 and accompanying text for a discussion of *Ellison v. Brady* and the methodology behind the Ninth Circuit's adoption of the reasonable woman standard in sexual harassment cases.

To establish a prima facie case of sexual harassment under the hostile environment theory, a plaintiff must show five things: (1) that she belongs to a protected group; (2) that she was subject to unwelcome sexual harassment; (3) that the harassment was based on sex; (4) that the harassment affected some term or condition or privilege of employment; and, if appropriate, (5) some ground to hold the employer liable.⁹³ A sampling of recent cases, however, led one author to conclude that, in the hostile work environment sexual harassment arena, the "proverbial gray area may be getting larger" due to the lack of any "bright lines" on the subject.⁹⁴ That same author notes:

One of the interesting problems in defining hostile work environment sexual harassment concerns the extent to which consideration should be given to the prevalent mores in society. Television, movies, magazines, and newspapers are filled with sexually oriented topics. Moreover, dating in the workplace is not an uncommon phenomenon. . . . In view of this backdrop, some courts have taken the position that it is unreasonable for employers, at the first instance, to have the responsibility to censor or monitor workplace behavior between the sexes.⁹⁵

This viewpoint of the courts, while seemingly prevalent, is not appropriate. Sexual harassment is supported by cultural myths and stereotypes that sanction male violence toward women and then trivialize its consequences.⁹⁶ These institutionalized societal views and stereotypes support female subordination and perpetuate male power in the workplace; "[s]exual harassment both reflects and supports women's inferior workplace position."⁹⁷ By ignoring the problem and rationalizing sexual harassment based on societal views of sexuality outside the workplace, courts are ignoring the Title VII mandate that employers provide a workplace free from sexually offensive behavior. As recognized in a recent decision: "The purpose of Title VII is not to import into the workplace the prejudices of the community, but through law to liberate the workplace from the demeaning influence of discrimination, and thereby to implement the goals of human dignity and economic equality in employment."⁹⁸

A. THE COURTS' RESPONSE REGARDING EMPLOYER LIABILITY FOR HOSTILE ENVIRONMENT SEXUAL HARASSMENT

There are few bright line rules for determining when the various courts will deem action taken by employers to have been "prompt and appropriate." Clearly, however, courts are more likely to find employer liability

93. *Collins v. Baptist Memorial Geriatric Ctr.*, 937 F.2d 190 (5th Cir. 1991).

94. Louis Pechman, *Emerging Issues in Hostile Work Environment Sexual Harassment*, 65 N.Y. St. B.J. 38 (1993).

95. *Id.* at 38-39.

96. Dolkart, *supra* note 40, at 185.

97. *Id.* at 182-83.

98. *King v. Hillen*, 21 F.3d 1572, 1582 (Fed. Cir. 1994).

where the employer lacks a workable policy against sexual harassment and, having actual or constructive knowledge, tolerates the hostile working environment by failing to take appropriate corrective action.⁹⁹ Surprisingly or perhaps not surprisingly, there are still many reported cases where the employer has no anti-discrimination policy or grievance procedure and has tolerated offensive sexual harassment by its employees and/or supervisors over a period of time.¹⁰⁰ Additionally, courts are more likely to find employer liability where supervisors have either condoned or participated in the behavior.¹⁰¹ The problem then becomes when employers do take some form of action, what type of action taken by employers will be deemed by the courts to be "prompt and appropriate"?

1. *Employer Liability for Co-Worker Sexual Harassment: What Remedial Actions Can Shield Employers from Liability?*

In the pivotal case of *Ellison v. Brady*,¹⁰² which established the "reasonable woman" standard for hostile environment sexual harassment cases,¹⁰³ the Ninth Circuit addressed the issue of what remedial actions

99. See, e.g., *EEOC v. Gurnee Inn Corp.*, 914 F.2d 815, 816-17 (7th Cir. 1990) (affirming injunctive relief against the employer where there was no real policy against sexual harassment and management was aware of the harassment but did nothing); *Baker v. Weyerhaeuser*, 903 F.2d 1342, 1345 (10th Cir. 1990) (holding that employer failed to take action in a timely fashion where pervasive sexual harassment had continued for over six months and employee had complained to her supervisor who did nothing in response even though the supervisor was required under a company policy to report such complaints); *Bohen v. City of East Chicago*, 799 F.2d 1180, 1187-88 (7th Cir. 1986) (holding employer liable where there was no written policy against sexual harassment and the employer knew about the situation but considered it to be the "female employees" problem and advised them not to socialize and to dress to cover themselves).

100. Hope A. Comisky, "Prompt and Effective Remedial Action?" *What Must an Employer Do to Avoid Liability for "Hostile Work Environment" Sexual Harassment*, 8 LAB. LAW. 181, 184 (1992).

101. For example, in *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991), the court found the employer liable, even though a policy against sexual harassment was enacted, because the supervisors permitted the employees to circulate sexually offensive materials and had a pattern of unsympathetic responses to employee complaints of sexual harassment. *Id.* at 1518-19. See also *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 907 (1st Cir. 1988) (holding that employer's failure to investigate plaintiff's allegations of sexual harassment could constitute gross negligence amounting to deliberate indifference); *Bennett v. Corroon & Black Corp.*, 845 F.2d 104, 106 (5th Cir. 1988), *cert. denied*, 489 U.S. 1020 (1989) (holding an employer liable who was aware of sexually explicit cartoons in the men's room and permitted them to remain).

102. 924 F.2d 872 (9th Cir. 1991).

103. The reasonable woman standard recognizes that "[c]onduct that many men consider unobjectionable may offend many women." *Id.* at 878. The court recognized:

Women who are victims of mild forms of sexual harassment may understandably worry whether a harasser's conduct is merely a prelude to violent sexual assault. Men, who are rarely victims of sexual assault, may view sexual conduct in a vacuum without a full appreciation of the social setting or the underlying threat of violence that a woman may perceive. . . . We adopt the perspective of the reasonable woman primarily because we believe that a sex-blind reasonable person standard tends to be male biased and tends to systematically ignore the experiences of women. . . . By acknowledging and not trivializing the effects of sexual harassment on reasonable women, courts can work towards ensuring that neither men nor women will have to "run the

can shield employers for co-worker sexual harassment.¹⁰⁴ Kerry Ellison met her eventual harasser, Sterling Gray, during her initial training as a revenue agent for the Internal Revenue Service (IRS). As co-workers, the two worked in the same office but never became friends nor did they ever work closely together. In June 1986, Gray asked Ellison to lunch when no one else was in the office; Ellison accepted and the two had lunch. According to Ellison, after the June lunch, Gray started to pester her by hanging around her desk and asking unnecessary questions. On October 9, 1986, Gray asked Ellison out for a drink after work and she refused, suggesting they have lunch the following week. Ellison did not want to be alone with Gray and tried to avoid the office during lunch time. One day during the following week, however, Gray again asked Ellison to lunch and she refused.

Gray then wrote Ellison a bizarre note which read: "I cried over you last night and I'm totally drained today. I have never been in such constant term oil [sic]. Thank you for talking with me. I could not stand to feel your hatred for another day."¹⁰⁵ The note frightened Ellison who later showed it to her supervisor but asked the supervisor not to do anything about it so Ellison could try first to handle it herself. Gray called in sick the next day and Ellison left for a four week training program in St. Louis, Missouri without having any contact with Gray. Gray then mailed her a card that stated, in part: "I know that you are worth knowing with or without sex. . . . I have enjoyed you so much over these past few months. Watching you. Experiencing you from O so far away."¹⁰⁶ Ellison immediately telephoned her supervisor and requested that either she or Gray be transferred because she would be uncomfortable working in the same office as him. Ellison's supervisor contacted her superior and discussed the problem. Ellison's supervisor met with Gray that same day informing him that he was entitled to union representation and ordered him to leave Ellison alone. Gray subsequently transferred to the San Francisco office and, after three weeks, filed union grievances requesting his return. The grievances were settled in Gray's favor allowing him to transfer back provided he spend four more months in San Francisco and promise not to bother Ellison. Ellison received a letter from her supervisor that indicated management had decided to resolve the problem with a

gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living."

Id. at 879-80 (quoting *Henson v. Dundee*, 682 F.2d 897, 902 (11th Cir. 1982)).

This "reasonable woman" standard can be compared with the alternative of a "reasonable person" standard. See *Rabidue v. Osceola Refining Co.*, 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987). See also Dolkart, *supra* note 40, at 154 (proposing that courts adopt a contextualized reasonableness standard that places the hypothetical reasonable person in the situation of the victim, with the experiences and perceptions of the victim).

104. *Ellison*, 924 F.2d at 873.

105. *Id.* at 874.

106. *Id.*

six-month separation, and that it would take additional action if the problem recurred.

Ellison then filed a formal complaint with the IRS who rejected the complaint, concluding that it did not describe a pattern or practice of sexual harassment.¹⁰⁷ After an appeal, the EEOC affirmed the decision on the ground that the agency took adequate action to prevent the repetition of Gray's offensive conduct.¹⁰⁸ Ellison then filed a complaint in federal district court wherein the court granted summary judgment in favor of the government, holding that Ellison had failed to state a prima facie case of hostile environment sexual harassment.¹⁰⁹ The court of appeals reversed the district court's decision and remanded the case for further proceedings.¹¹⁰

In its decision, the Court of Appeals for the Ninth Circuit demonstrated that employers can be held responsible for the acts of their employees, even in a situation where they arguably took prompt and appropriate action to remedy the harassment. While recognizing that not all harassment warrants dismissal, the court held that an employer's remedy should persuade harassers to discontinue unlawful conduct.¹¹¹ The court mandated that employers impose sufficient penalties, assessed proportionately to the seriousness of the offensive conduct, to assure a workplace free from sexual harassment.¹¹² The court stated:

In essence, then, we think that the reasonableness of an employer's remedy will depend on its ability to stop harassment by the person who engaged in harassment. In evaluating the adequacy of the remedy, the court may also take into account the remedy's ability to persuade potential harassers to refrain from unlawful conduct. Indeed,

107. *Id.* at 875.

108. *Id.*

109. *Ellison*, 924 F.2d at 875.

110. *Id.*

111. *Id.* at 882. This mandate is expected to broaden the spectrum of employer liability. As one commentator noted:

The standard the *Ellison* court sets forth is one of broader liability for employers than before. They have to take remedies "reasonably calculated to end the harassment," but measured from the reasonable woman's perspective. This can mean that harassers who regard their behavior as well-intentioned still may cause an employer to be liable when the employer knows (or should have known) of the conduct and failed to take appropriate action. The new standard will most likely mean that more women will prevail against employers who fail to adequately rectify the situation.

Angela Baker, *Employment Law — The "Reasonable Woman" Standard Under Ellison v. Brady: Implications For Assessing the Severity of Sexual Harassment and the Adequacy of Employer Response*, 17 J. CORP. L. 691, 712-13 (1992).

112. *Ellison*, 924 F.2d at 882. The court specifically rejected that the appropriate inquiry be what a reasonable employer would do to remedy the harassment since, although employers are required to provide a workplace free from sexual harassment, business reasons may make them reluctant to punish high ranking and highly productive employees and also runs the risk of reinforcing any prevailing level of discrimination. *Id.* at n.17. An excellent example highlighting the ramifications of this concern is *Kopp v. Samaritan Health Sys., Inc.*, 13 F.3d 264 (8th Cir. 1993), where a hospital did virtually nothing and allowed a doctor to sexually harass and abuse hospital employees because the doctor brought in millions of dollars of yearly revenue for the hospital.

meting out punishments that do not take into account the need to maintain a harassment-free working environment may subject the employer to suit by the EEOC.¹¹³

Regarding Ellison's situation, the court rejected the government's assertion that it complied with its statutory obligation by promptly investigating Ellison's allegation, and by granting her request for a temporary transfer to San Francisco.¹¹⁴ The court stated:

We strongly believe that the victim of sexual harassment should not be punished for the conduct of the harasser. We wholeheartedly agree with the EEOC that a victim of sexual harassment should not have to work in a less desirable location as a result of an employer's remedy for sexual harassment.¹¹⁵

Ellison argued that the government's remedy was insufficient because it failed to discipline Gray and allowed him to return to the San Mateo office after only six months of separation. The court, apparently agreeing with Ellison's contention, declined to view the government's response as reasonable.¹¹⁶ Instead, the court noted that Ellison's employer had not expressed strong disapproval of Gray's conduct, did not reprimand him or put him on any form of probation, and did not tell him that any further harassment would result in his dismissal or termination.¹¹⁷ According to the court, Title VII mandates more than a mere request to the alleged harasser to refrain from discriminatory conduct.¹¹⁸ Ultimately, the court held that "[i]f Ellison can prove on remand that Gray knew or should have known that his conduct was unlawful and that the government failed to take even the mildest form of disciplinary action, the district court should hold that the government's initial remedy was insufficient under Title VII."¹¹⁹

An interesting case by which to compare the judicial reasoning present in *Ellison* is *Rabidue v. Osceola Refining Co.*¹²⁰ In *Rabidue*, the plaintiff, Vivienne Rabidue, initially worked as a secretary and was later promoted to the position of administrative assistant. The court, focusing its attention on the plaintiff, stated that her supervisors and co-employees "found her to be an abrasive, rude, antagonistic, extremely willful, uncoopera-

113. *Ellison*, 924 F.2d at 882.

114. *Id.*

115. *Id.*

116. *Id.* at 882.

117. *Id.*

118. *Ellison*, 924 F.2d at 882. The rationale for this requirement is that by not disciplining employees for sexual harassment, employers send the wrong message to potential harassers. *Id.*

119. *Id.* Regarding the reasonableness of the separation, the court stated that the evidence did not make it clear as to whether the six month cooling off period was reasonably calculated to end the harassment or whether it was assessed proportionately to the seriousness of Gray's conduct and ordered the district court, on remand, to fully explore the facts concerning the government's decision to return Gray to San Mateo. *Id.* at 883.

120. 805 F.2d 611 (6th Cir. 1986). *Rabidue* is "[p]erhaps the most well-known example of a case where a court took a 'boys-will-be-boys' attitude regarding what constitutes actionable hostility in connection with merely verbally explicit sexual comments. . . ." Panken, *supra* note 91, at 254.

tive, and irascible personality.”¹²¹ The court further stated that Rabidue consistently argued with her co-workers, customers, and company management in such a manner that jeopardized business relationships with major oil companies and was an overall “troublesome employee.”¹²² Rabidue’s sexual harassment complaint arose out of her dealings with Douglas Henry, the supervisor of the company’s key punch and computer section. Neither he nor Rabidue had any supervisory authority over one another but worked together since part of Rabidue’s duties required her to coordinate with Henry’s department and personnel.

In characterizing Douglas Henry, the court stated: “Henry was an extremely vulgar and crude individual who customarily made obscene comments about women generally, and, on occasion, directed such obscenities to the plaintiff. Management was aware of Henry’s vulgarity, but had been unsuccessful in curbing his offensive personality traits during the time encompassed by this controversy.”¹²³ In addition to Henry’s vulgar comments, other offensive conduct in the workplace included pictures of nude or scantily clad women displayed in other male employees’ offices. Ultimately, Rabidue was discharged for a host of enunciated reasons allegedly irrespective of her sexual harassment complaint.¹²⁴

In rejecting Rabidue’s charge of sexual harassment, the court stated that assessing whether actions give rise to a hostile working environment required the trier to judge the facts based on a “totality of the circumstances” approach.¹²⁵ The court found such circumstances to include the background and experiences of the plaintiff, the totality of the physical environment of the plaintiff’s work area, and “the lexicon of obscenity that pervaded the environment of the workplace both before and after the plaintiff’s introduction into its environs.”¹²⁶ The court ruled that the presence of actionable hostile environment sexual harassment would be different depending upon the personality of the victim and the prevailing work environment.¹²⁷ The court went on to quote Judge Newblatt, the district court judge, who stated:

121. *Rabidue*, 805 F.2d at 615.

122. *Id.*

123. *Id.*

124. The reasons given for Rabidue’s termination were her irascible and opinionated personality, her inability to work with co-workers and customers, a heated argument with the company’s vice-president regarding the implementation of certain accounting practices and procedures, and a “vitriolic confrontation” with the vice-president of a major customer concerning pricing schedules. *Id.*

125. *Id.* at 620. The court also adopts the “reasonable person” standard and mandates that the circumstances be judged from the perspective of a reasonable person’s reaction to a similar environment under the given circumstances. *Id.* This standard can be compared to that of the “reasonable woman” standard enunciated in *Ellison*. See *supra* note 103.

126. *Rabidue*, 805 F.2d at 620. This approach is flawed insofar as it focuses on the victim of harassment; the background and experiences of a sexual harassment plaintiff are an improper arena in which to delve since, by doing so, the court not only violates that victim’s privacy, but also shifts the attention away from the proper focus, i.e., the alleged workplace harassment.

127. *Id.*

Indeed, it cannot seriously be disputed that in some work environments, humor and language are rough hewn and vulgar. Sexual jokes, sexual conversations, and girlie magazines may abound. Title VII was not meant to—or can—change this. It must never be forgotten that Title VII is the federal court mainstay in the struggle for equal employment opportunity for the female workers of America. But it is quite different to claim that Title VII was designed to bring about a magical transformation in the social mores of American workers.¹²⁸

The court further held that to prevail in a hostile working environment, the plaintiff must prove the existence of respondeat superior liability.¹²⁹ The court ultimately concluded that the record effectively disclosed that Henry's obscenities, "although annoying, were not so startling as to have affected seriously the psyches of the plaintiff or other female employees."¹³⁰ The court felt that the evidence did not demonstrate that this single employee's vulgarity substantially affected the totality of the workplace and that the sexually oriented poster displays had a de minimus effect on the plaintiff's work environment when considered in the context of a society that condones, publicly features, and commercially exploits such displays.¹³¹

The dissent disagreed with the views and steps taken in this case. In his dissent, Justice Kieth stated:

"Society" in this scenario must primarily refer to the unenlightened; I hardly believe reasonable women condone the pervasive degradation and exploitation of female sexuality perpetuated in American culture. . . . The presence of pin-ups and misogynous language in the workplace can only evoke and confirm the debilitating norms by which women are primarily and contemptuously valued as objects of male sexual fantasy.¹³²

Substantial social science research supports Justice Kieth's observations and indicates that gender has a strong effect on an individual's perception as to what constitutes sexual harassment, with women more likely to label such conduct as harassing or offensive.¹³³ Thus, "women experience sexualized conduct as part of a pattern of violence used as an instrument of control over their lives. As such, instances of sexualized behavior toward women in the workplace are experienced by women as inherently coercive and frightening even when such behavior is judged harmless by men."¹³⁴ Some courts, like the one in *Ellison*, have incorporated this realization into their analysis. Unfortunately, many courts, like the one in *Rabidue*, have either misconstrued such realities or have ignored them all together.

128. *Id.* at 620-21.

129. *Id.* at 621.

130. *Id.* at 622.

131. *Rabidue*, 805 F.2d at 622.

132. *Id.*

133. Dolkart, *supra* note 40, at 186.

134. *Id.*

So where does this leave the law governing employer liability for sexual harassment? The answer is extremely unclear. As illustrated by *Ellison v. Brady*, the employer's procedure of separating the parties may not satisfy this "prompt and appropriate remedial action" requirement¹³⁵ although it has been held to satisfy the requirement in certain factual settings.¹³⁶ It is also not altogether certain what other types of employer action, short of the termination¹³⁷ of the alleged harasser, will be deemed sufficient by the courts.¹³⁸ Recent decisions, however, illustrate a judicial willingness to exempt from liability employers who took some form of remedial action.¹³⁹

A recent example of actions taken by an employer deemed to have satisfied the "prompt and appropriate remedial action requirement" is the Fifth Circuit case of *Nash v. Electrospace System, Inc.*¹⁴⁰ In *Nash*, the court affirmed a summary judgment granted in favor of the employer on the plaintiff's sexual harassment charge due to the efficacy of the employer's procedures for responding to harassment.¹⁴¹ The court held that "[w]hen a company, once informed of allegations of sexual harassment, takes prompt remedial action to protect the claimant, the company may avoid Title VII liability."¹⁴²

Denise Nash initially worked for an affiliate of Electrospace System, Inc. (ESI) as a computer data entry operator and later transferred to ESI

135. See *infra* notes 140-59 and accompanying text. See also *Wheeler v. Southland Corp.*, 875 F.2d 1246, 1249-50 (6th Cir. 1989) (deeming employer response of temporarily transferring a new supervisor to location with no indication of whether it was a permanent change to be insufficient).

136. For example, in *Dornhecker v. Malibu Grand Prix Corp.*, 828 F.2d 307 (5th Cir. 1987), the court held that when an employee reported harassment to the president of the company and he told her she would not have to work with the alleged harasser after the presentations ended (a day and a half later), the president's, i.e., employer's, actions were appropriate. *Id.* at 309.

137. See *infra* notes 155-58 and accompanying text for a discussion of the potential employer liability issues that arise when the alleged harasser is terminated.

138. See, e.g., *Yates v. Avco Corp.*, 819 F.2d 630 (6th Cir. 1987); *Hirschfeld v. New Mexico Corrections Dept.*, 916 F.2d 572 (10th Cir. 1990); *Barret v. Omaha Nat'l Bank*, 726 F.2d 424 (8th Cir. 1984).

139. See, e.g., *Carmon v. Lubrizol*, 17 F.3d 791, 794 (5th Cir. 1994) (finding that company which investigated complaint the day it was brought to its attention and reprimanded alleged harasser in writing and transferred him to another shift and that promptly sent employees from its human resource department to investigate second complaint ultimately sending memorandum to all employees and holding meetings regarding what constitutes appropriate workplace behavior had taken prompt and remedial action); *Reed v. Delta Airlines, Inc.*, 19 F.3d 19 (6th Cir. 1994) (finding company that had a published policy against sexual harassment and fired supervisor for having engaged in sexual activity in the office but refused plaintiff's requested transfer due to alleged retaliation from other employees, as a response sufficient to relieve employer of liability); *Saxton v. American Tel. & Tel. Co.*, 10 F.3d 526, 536 (7th Cir. 1993) (finding company that investigated the complaint the day after it was brought and transferred alleged harasser to different department brought an end to any harassment and relieved it of any potential sexual harassment liability); see also *infra* notes 140-54 and accompanying text for an illustration of a separation deemed by the court to relieve the employer from sexual harassment liability.

140. 9 F.3d 401 (5th Cir. 1993).

141. *Id.* at 402.

142. *Id.*

where she began performing secretarial and research functions. Nash was later transferred to the accounting department and was assigned to work under the supervision of John Sharp, a tax attorney. While Sharp held the "first-line supervisory role," control of the terms and conditions of Nash's employment was deemed to be in the hands of Sharp's boss, accounting department manager, C. Edwin Wilson, in conjunction with the human relations department.

Nash alleged that during the fall of 1990, Sharp subjected her to a barrage of questions about her personal sex life that she found offensive.¹⁴³ Nash also received several sexually suggestive anonymous phone calls during this period at her home which she believed came from Sharp but never pursued this charge either directly with him or with the company. In January of 1991, Nash received a memorandum of particular errors she had made which she described as "constructive criticism." Sharp's personal questions continued, but Nash had ceased responding. In February of 1992, Nash approached the personnel department and was immediately called for an interview with Margaret Schafer, ESI's Director of Human Resources. During the next week, Schafer interviewed both Sharp and Nash's female co-workers to investigate the allegations and instructed Sharp not to converse with Nash during the investigation. Sharp contended that the conversations with Nash were voluntary and not calculated to be sexually hostile, inappropriate, or intimidating. The following Friday, Schafer transferred Nash to another position that had no effect on Nash's pay rate or benefits. In Nash's deposition, she was unable to articulate why she regarded this transfer as retaliatory and admitted that it was not an adverse employment decision.

The court held that to establish an actionable claim of sexual harassment, the plaintiff must demonstrate: (1) that plaintiff belongs to a protected class; (2) that plaintiff was subject to unwelcome sexual harassment; (3) that the harassment was based on sex; (4) that the harassment affected a term, condition or privilege of employment; and (5) that the employer either knew or should have known of the harassment and failed to take prompt remedial action.¹⁴⁴ The court then cited to the recent Supreme Court case of *Harris v. Forklift Systems, Inc.*¹⁴⁵ for the affirmation that the hostile environment sexual harassment claim can be determined only by looking at all of the circumstances in a given case.¹⁴⁶ The *Nash* court then stated: "*Harris* does not, however, support the proposition that in all such cases, an employer will be held liable for a violation of Title VII. An employer becomes liable for sexual harassment only if he knew or should have known of the harassment and failed to take remedial action."¹⁴⁷

143. *Id.* at 403. Nash acknowledged that Sharp did not engage in any quid pro quo harassment. *Id.*

144. *Id.*

145. See *supra* notes 56-70 and accompanying text for a discussion of *Harris*.

146. *Nash*, 9 F.3d at 403-04.

147. *Id.* at 404.

The court found Sharp, though in some ways a direct supervisor of Nash's work, was not responsible for the terms and conditions of her employment and that the summary judgment record did not establish that anyone within the company's hierarchy was aware of Nash's complaints until she went to the personnel department.¹⁴⁸ The court also found that the record contained no evidence that Sharp's conduct took place in public and thus concluded that "the company did not know nor should it have known" of Sharp's conduct toward Nash until she "complained to those with the authority to address the problem."¹⁴⁹

Therefore, the court focused on the actions taken by Shafer, ESI Director of Human Resources, when she was confronted with Nash's charges.¹⁵⁰ The court found that Shafer was unable to corroborate Nash's allegations because Sharp denied the harassment and since other co-workers had not experienced offensive behavior by him.¹⁵¹ The court concluded that the investigation and decision to transfer "reflected a prudent response to an unpleasant situation."¹⁵² The court commented that Nash's transfer was not retaliation but instead was an act that insulated her from further contact with Sharp that was successful because Nash soon qualified for a raise and because Nash got along well with her new boss.¹⁵³ The existence of a written policy against sexual harassment and the availability of a formal grievance procedure "counted strongly in ESI's favor," leading the court to conclude that "[t]he uncontested evidence demonstrates a model of prompt, sensitive employer handling of these very traumatic cases."¹⁵⁴

2. *The Potential of Employer Liability to the Alleged Harasser*

As discussed, an employer may insulate itself from liability for sexual harassment by taking prompt and effective remedial action. The employer may, however, in some instances be faced with an action filed against it by the alleged harasser.¹⁵⁵

It must be remembered that in sexual harassment cases, there often are three parties to be considered, the complaining employee, the employer, and the accused harasser. Furthermore, the accused harasser is usually another employee whose rights must be factored into the handling of any sexual harassment case during both the internal complaint and legal proceeding stages.¹⁵⁶

There are many different types of claims that can be brought and have

148. *Id.*

149. *Id.*

150. *Id.*

151. *Nash*, 9 F.3d at 404.

152. *Id.*

153. *Id.*

154. *Id.* at 404 n.2.

155. Panken, *supra* note 91, at 278.

156. *Id.*

been brought against the employer by the alleged harasser.¹⁵⁷ Nonetheless, employers can take comfort in the larger number of cases in which courts have recognized that a good faith investigation of the claims resulting in some form of discipline or termination will generally defeat claims brought by the alleged harasser.¹⁵⁸

B. A CLOSER LOOK AT EMPLOYER LIABILITY AND ITS RELATION TO SUPERVISORS: THE EEOC'S POSITION

The EEOC recognizes that “[w]hile the *Vinson* decision quoted the Commission’s brief at length, it neither endorsed nor rejected its position.”¹⁵⁹ The EEOC, therefore, interprets *Vinson* to require a careful examination into whether the supervisor in “hostile environment” cases was acting in an “agency capacity.”¹⁶⁰ The Commission concludes that appropriate factors to consider will include whether the employer had an appropriate and effective complaint procedure and whether the employee took advantage of such a procedure.¹⁶¹

The EEOC’s 1990 Policy Guidance states that the first inquiry into employer liability should be “whether the employer knew or should have known of the alleged harassment.”¹⁶² The Commission feels that direct liability is appropriate where actual or constructive notice exists and the employer failed to take immediate and appropriate corrective action.¹⁶³ Regarding imputed liability, the Commission advocates an investigation to determine whether the allegedly harassing supervisor was acting in an “agency capacity.”¹⁶⁴ This investigation requires a determination of whether the supervisor was acting within the scope of his employment or whether his actions can be imputed to the employer under some exception to the “scope of employment” rule.¹⁶⁵

157. See, e.g., *Valdez v. Church’s Fried Chicken, Inc.*, 683 F. Supp. 596, 627-29 (W.D. Tex. 1988) (holding that plaintiff had been discriminated against on the basis of his national origin and that the alleged sexual harassment was merely a pretext for his termination). But see *Williams v. Maremont Corp.*, 875 F.2d 1476, 1485 (10th Cir. 1989) (upholding the termination of foreman under a breach of contract action ruling that public policy favors a workplace free of offensive sexual harassment).

158. Panken, *supra* note 91, at 283.

159. EEOC POLICY GUIDANCE, *supra* note 71, § (D)(2)(a).

160. *Id.*

161. *Id.*

162. *Id.* § (D)(2)(b).

163. *Id.* The Commission notes that this is the same theory under which employers can be held liable for harassment by co-workers. *Id.*; see, e.g., *Brooms v. Regal Tube Co.*, 881 F.2d 412, 421 (7th Cir. 1989); *Paroline v. Unisys Corp.*, 879 F.2d 100, 106 (4th Cir. 1989), *aff’d & rev’d in part on different grounds*, 900 F.2d 27 (4th Cir. 1990); *Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311, 1316 (11th Cir. 1989).

The Commission also comments that “[m]ost commonly an employer acquires actual knowledge through first-hand observation, by the victim’s internal complaint to other supervisors or managers, or by a charge of discrimination.” EEOC POLICY GUIDANCE, *supra* note 71, at n.29.

164. *Id.* § (D)(2)(c).

165. *Id.*

With regard to the scope of employment, the Policy Guidance states that a supervisor's actions will generally be viewed as within his scope of employment if they represent the authority actually vested in him.¹⁶⁶ The Commission goes on to state that "[i]t will rarely be the case that an employer will have authorized a supervisor to engage in sexual harassment."¹⁶⁷ If, however, the employer becomes aware of the sexual harassment and does nothing to stop it, by acquiescing, the employer will be deemed to have brought the supervisor's actions within the scope of employment.¹⁶⁸

The Commission also recognizes that an employer can be held liable under the theory of "apparent authority" for the acts of its agents.¹⁶⁹ "An employer is also liable for a supervisor's actions if these actions represent the exercise of authority that third parties reasonably believe him to possess by virtue of his employer's conduct."¹⁷⁰ The Commission derives this standard from the general law of agency and believes that in the absence of a strong, widely disseminated, and consistently enforced policy against sexual harassment that includes an effective complaint procedure, an employee could reasonably conclude that a harassing supervisor's behavior will be ignored, tolerated, or even condoned by the employer.¹⁷¹ On the other hand, the Commission recognizes that, in the hostile environment setting,¹⁷² an employer can divest a supervisor of this apparent authority by implementing a strong policy against sexual harassment and maintaining an effective complaint procedure.¹⁷³

Agency by estoppel is also recognized by the Commission as a closely related theory of employer liability. Under this theory, an employer is liable if he intentionally or carelessly causes an employee to mistakenly believe that the supervisor is acting for the employer, or if the employer

166. *Id.* § (D)(2)(c)(1).

167. *Id.*

168. EEOC POLICY GUIDANCE, *supra* note 71, § (D)(2)(c)(1).

169. *Id.* § (D)(2)(c)(2).

170. *Id.*

171. *Id.* The Commission stated their rationale as follows:

This apparent authority of supervisors arises from their power over employees, including the power to make or substantially influence hiring, firing, promotion and compensation decisions. A supervisor's capacity to create a hostile environment is enhanced by the degree of authority conferred on him by the employer, and he may rely upon apparent authority to force an employee to endure a harassing environment for fear of retaliation. If the employer has not provided an effective avenue to complain, then the supervisor has unchecked, final control of the victim and it is reasonable to impute his abuse of this power to the employer.

Id.

172. The EEOC maintains its position that an employer is always liable for supervisory actions that affect the victim's employment status, such as hiring and promotion decisions, and cautioned that this discussion of apparent authority is limited to "hostile environment" cases. *Id.* at n.36.

173. EEOC POLICY GUIDANCE, *supra* note 71, § (D)(2)(c)(3). The Commission's rationale is that when employees are aware that recourse is available, they cannot reasonably believe that an employer condones or authorizes the harassing work environment. *Id.*

knows about the employee's mistaken belief and fails to correct it.¹⁷⁴ Another avenue of employer liability recognized by the Commission is imputed liability, where the employer is deemed as having been "negligent or reckless" in supervising the harassed employee. This negligent supervision is recognized by the Commission as being essentially the same as holding the employer directly liable for its failure to act.¹⁷⁵ Further, the EEOC states that "[a]n employer cannot avoid liability by delegating to another person a duty imposed by statute" and "[a]n employer who assigns the performance of a non-delegable duty to an employee remains liable for injuries resulting from the failure of the employee to carry out the duty."¹⁷⁶ Lastly, the Commission recognizes that an employer may also be held liable if the existence of the agency relation aided the supervisor in accomplishing the harassment.¹⁷⁷

C. CONCERN OVER DIFFERING STANDARDS FOR EMPLOYER LIABILITY

While the issue of employer liability was not squarely before the Supreme Court in the recent case of *Harris v. Forklift Systems, Inc.*,¹⁷⁸ the mere fact that the Supreme Court was revisiting the issue of sexual harassment caused employers concern over the murky area of employer liability in this arena. The Equal Employment Advisory Council¹⁷⁹ submitted a brief amicus curiae in support of the respondent arguing that:

Any standard enunciated by this Court for employer liability for sexual harassment should take into consideration anti-harassment policies and procedures established by employers in response to this Court's guidance in *Meritor*. Where an employer has adopted a strong company policy prohibiting workplace sexual harassment and has established an adequate procedure for addressing complaints, the employer cannot be held liable for a supervisor's or employee's creation of a hostile environment of which the employer had no actual or constructive knowledge if the alleged victim failed to take

174. *Id.* § (D)(2)(c)(3). This liability includes the situation in which an employer is aware of past incidents of sexual harassment and fails to respond appropriately thus causing its employees to reasonably believe that further incidents will be tolerated. *Id.*

175. *Id.* For courts applying a negligence type standard of employer liability, see *Guess v. Bethlehem Steel Corp.*, 913 F.2d 463, 465 (7th Cir. 1990); *EEOC v. Hacienda Hotel*, 821 F.2d 1504, 1515-16 (9th Cir. 1989); *Hall v. Gus Const. Co., Inc.*, 842 F.2d 1010, 1016 (8th Cir. 1988).

176. EEOC POLICY GUIDANCE, *supra* note 71, § (D)(2)(c)(3). The Policy Guidance states: "Title VII imposes on employers a duty to provide their employees with a workplace free of sexual harassment. An employer who entrusts that duty to an employee is liable for injuries caused by the employee's breach of the duty." *Id.*

177. *Id.*

178. *See supra* notes 56-70 and accompanying text for a discussion of *Harris*.

179. The Equal Employment Advisory Council (EEAC or Council) is a voluntary association of employers whose membership includes over 270 corporations, all subject to Title VII of the Civil Rights Act of 1964 as well as other equal employment statutes and regulations. The author includes their concerns and suggestions due to the importance of the employer in establishing workable sexual harassment requirements and mandates. The EEAC's brief amicus curiae provides some insight into the prudent employer's concerns surrounding sexual harassment in the workplace.

advantage of that procedure or if the employer took prompt and appropriate action.¹⁸⁰

The Council advocated that strict liability not apply in a hostile environment setting, arguing that when an employer has in place an adequate policy to remedy harassment, allowing recovery to a plaintiff who has failed to report the harassing conduct is, in essence, the same as strict liability.¹⁸¹ Similarly, the Council advocated that prompt and effective action by an employer who is aware of the harassing behavior should also obviate liability, pointing out that an employer who can show a thorough and bona fide investigation leading to a rational conclusion and appropriate action, should be credited for such efforts.¹⁸²

The Council also expressed concern regarding the issue of employer liability for action taken against the allegedly harassing employee and stated:

Indeed, if an anti-harassment policy and procedure are effective, potentially harassing conduct should surface and be dealt with before it reaches a truly critical level. Where an employer, after investigation, believes in good faith that inappropriate behavior has occurred, the employer must be able to take immediate action, including discipline or even discharge of the offender without facing legal action by the harasser.¹⁸³

The Council noted that prompt and remedial action is a key component to an effective anti-harassment procedure, but that such disciplinary action by the employer is "all too often" met with resistance, if not legal action, by the alleged harasser.¹⁸⁴

[T]he employer's only legitimate choice is to take effective action to halt the harassment, and let the chips fall where they may. Unfortunately, that employer's reward for its commendable behavior may be lengthy and costly litigation. Employees who have been disciplined for harassment may claim that the employer's reason is libelous,

180. Amicus Curiae Brief of the Equal Employment Advisory Council in Support of Respondent at summary of argument #2, *Harris v. Forklift Systems, Inc.*, 114 S. Ct. 367 (1993) (No. 92-1168).

181. *Id.* The Council argued:

A plaintiff's refusal to make use of an available recourse that could have remedied the situation must negate any employer liability. Even the most conscientious, enlightened employer cannot control every day-to-day action of every employee, and must know of harassing behavior before it can take action to halt it. Holding such an employer liable for the actions of an employee that violate an express company policy when the employer did not know, and did not have reason to know of the offensive conduct, unfairly makes that employer a "deep pocket" liable for a situation over which it had no control.

Id.

182. *Id.*

183. *Id.*

184. *Id.* That concern may be overblown. See *supra* notes 155-58 and accompanying text for a discussion of potential employer liability to the alleged harasser.

slanderous, defamatory, or a pretext for discrimination.¹⁸⁵

The Council advocates that an employer's good faith, i.e., reasonable belief that an employee engaged in sexual harassment, be sufficient to establish a legitimate reason for taking disciplinary action, and rebut the plaintiff's prima facie case of discrimination.¹⁸⁶

While the area of sexual harassment litigation and liability is indeed murky, a prudent employer should understand that prevention of sexual harassment and protection from sexual harassment liability is manageable.¹⁸⁷ As one commentator noted:

It must be remembered that to state a prima facie hostile environment case, a plaintiff must show that the employer knew, or should have known, of the harassment and failed to take remedial action. This element is the legal equivalent of a safety net for employers. Even if harassment occurs, liability may be avoided if the employer has an effective sexual harassment policy and appropriate action is taken.¹⁸⁸

To the contrary, it is the sexual harassment victim who needs to worry about her ability to obtain judicial relief under the current laws due to the difficulty of establishing an actionable sexual harassment claim.

VI. CONCLUSION

One way to combat sex discrimination is to take a more liberal stance towards employer liability.¹⁸⁹ Even with the recent passage of the Civil Rights Act of 1991 and its expansion of remedies,¹⁹⁰ relief is limited by caps on the compensatory and punitive damages awards.¹⁹¹ More importantly, the employer is the only entity that can be sued for sexual harassment under Title VII.¹⁹² This makes the imposition of employer liability a crucial component of providing sexual harassment victims with relief. The courts' current lack of uniform standards for employer liability "reduces Title VII's usefulness by further restricting the already limited relief for sexual harassment."¹⁹³ The void of judicial recognition and understanding as to the context and effects of sexual harassment in the lives of women must also change. This recognition would give judges and ju-

185. Amicus Curiae Brief of the Equal Employment Advisory Council in Support of Respondent at summary of argument #2, *Harris v. Forklift Systems, Inc.*, 114 S. Ct. 367 (1993) (No. 92-1168).

186. *Id.*

187. *See* Pechman, *supra* note 94.

188. *Id.* at n.30.

189. Kristin D. Sanko, *Employer Liability and Sexual Harassment Under Section 1983: A Comment on Starrett v. Wadley*, 67 DENV. U. L. REV. 571, 585 (1990). Sanko argues that this liberal stance would force employers to take precautions against sexual harassment in the workplace and convey to employees that such conduct will not be tolerated. *Id.*

190. *See supra* note 1 and accompanying text for a discussion of the various caps on Title VII relief for sexual harassment claims.

191. Lutner, *supra* note 17, at 593.

192. *Id.*

193. *Id.*

ries a better framework in which to evaluate these cases and would increase the level of predictability.

In the easy case of quid pro quo harassment, courts have correctly applied strict employer liability. In cases that are not as clear cut, however, courts need to examine a plaintiff's potential quid pro quo claim in more depth¹⁹⁴ and realize that, from the victim's perspective, many, if not most, of a supervisor's actions are perceived by the victim as being inexorably intertwined with the threat of economic detriment. Recognition of this interrelationship by the judiciary would give a greater number of sexual harassment victims a remedy by not automatically foreclosing their quid pro quo claim.

Sexual harassment plaintiffs are further hindered by the *Meritor* Court's rejection of strict employer liability for hostile environment harassment by supervisors. This holding is inconsistent with general Title VII law and needs to be reevaluated. Courts need to apply strict employer liability to hostile environment harassment by supervisors, thereby sending the message that sexual harassment is a serious violation of the law that will not be tolerated.

Lastly, the overall confusion and lack of consistency in hostile environment litigation hurts both employers and employees. In cases where the employer has a workable sexual harassment policy in place and can show that it took prompt and appropriate action, the prudent employer should be shielded from liability in cases involving non-supervisory personnel. Additionally, employers need to have sufficient latitude to investigate these claims without fear of retaliation by the alleged harasser. In cases where the employer does not have a workable sexual harassment policy and complaint procedure in place, however, courts should not exempt employers from liability.

As the EEOC states, "[p]revention is the best tool for the elimination of harassment."¹⁹⁵ Employers who are aware of and concerned with eliminating sexual harassment from their workplace deserve to limit their liability for potential sexual harassment claims. Those employers who tolerate or ignore sexual harassment in their workplace deserve to suffer the consequences. Victims of sexual harassment also deserve a remedy, and this must come from holding employers liable who fail to provide a workplace free of harassment.

194. Instead of automatically characterizing the claim as a potential hostile environment harassment claim, courts should look more closely at potential quid pro quo harassment claim.

195. 29 C.F.R. § 1609.2(d) (1993).

Articles

