NOTES

SEXUAL HARASSMENT IN THE WORKPLACE: EMPLOYER LIABILITY FOR A SEXUALLY HOSTILE ENVIRONMENT

I. INTRODUCTION

Sexual harassment is "unsolicited nonreciprocal . . . [sexually based] behavior that asserts a [worker's] sex role over [his or] her function as a worker."[1] Sexual harassment involves unwelcome advances, statements or conduct[2] that unreasonably interfere with an individual's work performance[3] and ability to pursue a career.[4] Because sexual harassment may arise in a variety of situations,[5] its judicial determination remains very fact specific.

This Note discusses the problem of sexual harassment in the workplace, with particular emphasis upon "hostile environment" harassment. First, this Note examines the development of the sexual harassment

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1. L. FARLEY, SEXUAL SHAKEDOWN 14-15 (1978). Sexual harassment is the most common problem facing working women. *Sexual Discrimination in the Workplace, 1981*; *Hearings Before Senate Comm. on Labor and Human Resources*, 97th Cong., 1st Sess. 518 (1981) (statement of Karen Sauvigne, Program Director of the Working Women's Institute).

The majority of cases brought under Title VII of the Civil Rights Act of 1964, §§ 701-08, 42 U.S.C. §§ 2000e - 2000e(17) (1976), involve harassment of a female employee by a male supervisor or co-worker. This cause of action is not limited to females and may be brought by male victims of sexual harassment. *See* Huebschen v. Health & Social Servs. Dep't., 547 F. Supp. 1168 (W.D. Wis. 1982), *rev'd and remanded*, 716 F.2d 1167 (7th Cir. 1983) (male employee may assert claim for sexual harassment by female supervisor). Acts of a homosexual supervisor may also lead to a finding of discrimination. *See* Wright v. Methodist Youth Servs., 511 F. Supp. 307 (N.D. Ill. 1981) (male employee may assert cause of action for harassment by homosexual supervisor). Because females are the most frequent victims of sexual harassment, however, this Note will use feminine gender in discussing the victim of sexual harassment.

2. Equal Employment Opportunity Comm. Guidelines, 29 C.F.R. § 1604.11(a) (1987) [hereinafter Guidelines]. *See* Note, *The Dehumanizing Puzzle of Sexual Harassment: A Survey of the Law Concerning Harassment of Women in the Workplace*, 24 WASHBURN L.J. 574, 577-80 (1985) [hereinafter Note, *Sexual Harassment*]. *See also* Linenberger, *What Behavior Constitutes Sexual Harassment?*, 34 LAB. L.J. 238 (1983).

3. Guidelines, *supra* note 2, § 1604.11(a)(3). The 1980 amendments substituted "unreasonably" for the word "substantially" in § 1604.11(a)(3) to more accurately reflect the Commission's intent. 45 FED. REG. 74,676 (1980) (codified at 29 C.F.R. § 1604).

4. *See* C. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION 9-23 (1979). *See also* L. FARLEY, *supra* note 1, at 45-51.

5. L. FARLEY, *supra* note 1, at 15.

cause of action under Title VII. Next, this Note considers the differing standards of employer liability under the Equal Employment Opportunity Commission guidelines, federal case law and principles of agency law. Finally, this Note recognizes the absence of a definite standard of employer liability and proposes strategies to aid employers in avoiding liability for sexual harassment.

II. DEVELOPMENT OF HOSTILE ENVIRONMENT SEXUAL HARASSMENT UNDER TITLE VII

Congress passed Title VII of the Civil Rights Act of 1964[6] to abolish artificial and discriminatory employment barriers[7] erected against individuals on the basis of race, color, religion, sex and national origin.[8] In an attempt to defeat its passage, the prohibition against gender discrimination was added in the bill's eleventh hour.[9] Congress adopted the amendment with no hearing and little debate.[10] Consequently, until the discussion of the 1972 amendments to Title VII,[11] scant legislative history addressing the intended scope of the sexual discrimination prohibition existed.[12]

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6. 42 U.S.C. § 2000e (1976) [hereinafter Title VII]. Title VII provides in pertinent part:

(a) It shall be an unlawful employment practice for an employer —

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.

§ 2000e-2(a). *See generally* Note *Sexual Harassment*, *supra* note 2, at 580.

7. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) *See also*, Comment, *Title VII: Legal Protection Against Sexual Harassment*, 53 WASH. L. REV. 123 (1977).

8. 42 U.S.C. § 2000e-2(a) (1982).

9. *See* 110 CONG. REC. 2577-84 (1964).

10. 110 CONG. REC. 2582, 2584 (1964). For a discussion of the legislative history of Title VII, see Kanowity, *Sex-based Discrimination in American Law III: Title VII and the Equal Pay Act of 1963*, 20 HASTINGS. L.J. 305, 310-13 (1968); Wells, *Sex Discrimination and Title VII*, 43 UMKC L. REV. 273, 274-76 (1975).

11. "[D]iscrimination against women is no less serious than other prohibited forms of discrimination, . . . it is to be accorded the same degree of concern given to any type of similarly unlawful conduct." S. REP. NO. 415, 92d Cong., 1st Sess. 7 (1971); "Such blatantly disparate treatment is particularly objectionable in view of the fact that Title VII has specifically prohibited sex discrimination since its enactment in 1964." H.R. REP. NO. 238, 92d Cong., 1st Sess. 4-5, *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 2137, 2140.

12. Barnes v. Costle, 561 F.2d 983, 986-87 (D.C. Cir. 1977). *See also* Miller, *Sex Discrimination and Title VII of the Civil Rights Act of 1964*, 51 MINN. L. REV. 877, 882-83 (1967).

The Civil Rights Act of 1964 created the Equal Employment Opportunity Commission (EEOC), the regulatory agency responsible for public enforcement of Title VII violations.[13] Although Title VII prohibits discrimination on the basis of sex,[14] it does not expressly define "sex discrimination."[15] As a result, courts permit the EEOC to formulate the elements of the sex discrimination cause of action.[16] The EEOC guidelines[17] specify that sexual harassment is a type of sex discrimination under Title VII.[18] Thus, sexual harassment is now a component of the Title VII prohibition against sex discrimination.[19]

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13. Civil Rights Act of 1964, § 706, 42 U.S.C. § 2000e (1976).

14. § 200e-2(a).

15. *See supra* note 6.

16. *See* Griggs v. Duke Power Co., 401 U.S. at 433-34.

17. 29 C.F.R. § 1604.1-.11 (1987).

18. 29 C.F.R. § 1604.11. "Harassment on the basis of sex is a violation of Sec. 703 of Title VII." § 1604.11(a). For a discussion of the EEOC's deliberation process, see 45 FED. REG. 74,676-77. *See generally*, Oneglia & Cornelius, *Sexual Harassment in the Workplace: The Equal Employment Opportunity Commission's New Guidelines*, 26 ST. LOUIS U.L.J. 39 (1982); Note, *New EEOC Guidelines on Discrimination Because of Sex: Employer Liability for Sexual Harassment Under Title VII*, 61 B.U.L. REV. 535 (1981) [hereinafter Note, *EEOC Guidelines*]. *See also* A. LARSON & L. LARSON, EMPLOYMENT DISCRIMINATION § 41.60 (1984).

19. *See, e.g.*, Williams v. Saxbe, 413 F. Supp. 654 (D.D.C. 1976), *remanded on other grounds, sub nom.*, Williams v. Bell, 587 F.2d 1240 (1978) (The first case to hold that sexual harassment violates Title VII); Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981) (Sexual harassment is sex discrimination).

A Title VII discrimination claim can proceed upon two different theories. The first, disparate impact, was addressed by the Supreme Court in Griggs v. Duke Power Co., 401 U.S. 424 (1971). *See generally* Friedman, *The Burger Court and the Prima Facie Case in Employment Discrimination: A Critique*, 65 CORNELL L. REV. 1 (1979); Blumrosen, *Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59 (1972). Disparate impact theory applies to discriminatory employment practices which adversely affect an entire protected class. B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1286 (1983) [hereinafter SCHLEI & GROSSMAN]. For a discussion of the burden of proof in a disparate impact case, see SCHLEI & GROSSMAN, *supra*, at 1324-31. The disparate impact cause of action focuses on the effect of the discriminatory policy. Note, *Sexual Harassment*, *supra* note 2, at 580-81. Most disparate impact cases have concerned either written test or height and weight requirements. *See, e.g.*, Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) (written test); *Griggs*, 401 U.S. 424 (1971) (written test and high school diploma); Dothard v. Rawlinson, 433 U.S. 321 (1977) *cert. denied, sub nom.* Contremos v. Los Angeles 455 U.S. 1021 (1982) (height and weight requirement).

The Supreme Court addressed the second theory, disparate treatment, in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). *See infra* note 23. "'Disparate treatment' . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin." International Board of Teamsters v. United States, 431 U.S. 324, 335 n. 15 (1977). This theory focuses upon an employer's acts which discriminate against a particular individual. SCHLEI & GROSSMAN, *supra*, at 1286. Because disparate treatment concerns individual discrimination, the plaintiff must prove discriminatory intent. *Id.* at 1292 n. 31. In contrast, the disparate impact plaintiff need show only that the particular

Courts have identified two distinct types of sexual harassment within the disparate treatment discrimination theory.[20] The first, quid pro quo sexual harassment,[21] occurs when an employer conditions continued employment upon an employee's submission to sexual demands.[22] The second, "hostile environment" sexual harassment,[23] occurs when sexual comments or propositions are so pervasive that they create a hostile, in-

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policy has a discriminatory effect. *Id.* at 1324. The disparate treatment approach, therefore, has the higher burden of proof.

20. Both types of sexual harassment fall within the disparate treatment framework because they involve discrimination against individuals.

21. C. MACKINNON, *supra* note 4, at 32-40 (discussion of quid pro quo harassment); Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV. L. REV. 1449, 1454 (1984) [hereinafter Note, *Abusive Work Environment*]. *See also* Attanasio, *Equal Justice Under Chaos: The Developing Law of Sexual Harassment*, 51 U. CIN. L. REV. 1, 6 (1982).

22. *See, e.g.*, Miller v. Bank of America, 600 F.2d 211 (9th Cir. 1979) (employee fired for refusing supervisor's sexual demands); Horn v. Duke Homes Div. of Windsor Mobil Homes, 755 F.2d 599, 602 (7th Cir. 1985) (employee transferred and later fired after refusing sexual advances).

Quid pro quo sexual harassment is structurally similar to other forms of Title VII discrimination because it raises barriers to employment. Note, *Abusive Work Environment*, *supra* note 21, at 1454. *See, e.g.*, Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981) (plaintiff must prove discriminatory reason for employment action). "[T]he plaintiff's supervisor created an artificial barrier to employment which was placed before one gender and not the other, despite the fact that both genders are similarly situated." Williams v. Saxbe, 413 F. Supp. 654, 657-58 (D.D.C. 1976) Because of the similarity between quid pro quo harassment and other forms of Title VII discrimination, the courts have analyzed quid pro quo harassment using the traditional disparate treatment discrimination framework of McDonnell Douglas v. Green, 411 U.S. 792 (1973). *See* Bryan, *Sexual Harassment as Unlawful Discrimination Under Title VII of The Civil Rights Act of 1964*, 14 LOY. L.A.L. REV. 25, 39 (1981). Establishing a prima facie case of disparate treatment requires proof of: (1) membership in a protected class; (2) application for a job for which the individual is qualified and for which the employer was accepting applications; (3) a rejection; and, finally (4) after rejection, the position remaining vacant and the employer continuing to accept applications from other similarly qualified applicants. *McDonnell Douglas*, 411 U.S. at 802. Although this test is flexible, the courts have required slight modification for its application to the quid pro quo cause of action. *Id.* at n. 13. *See, e.g.*, Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982) *cert. denied, sub. nom.* De Cinto v. Westchester County Medical Center 108 S.Ct. 455 and 108 S.Ct. 89 (1987); Tompkins v. Public Serv. Elec. & Gas Co., 568 F.2d 1044 (3d. Cir. 1977); Garber v. Saxon Business Prods., 552 F.2d 1032 (4th Cir. 1977).

The District of Columbia Circuit Court of Appeals, in Barnes v. Costle, held that the termination of a female employee because she rejected the sexual advances of her male supervisor constitutes unlawful sex discrimination in violation of Title VII. 561 F.2d 983, 985, 995 (D.C. Cir. 1977). Modifying the *McDonnell Douglas* test to better conform to the quid pro quo analysis, the *Barnes* court required proof that the plaintiff was a member of a protected class; the supervisor's conduct was unwelcome, undesired or offensive; the harassment was based on sex; and the harassment tangibly affected the employee's terms, compensation, condition or privileges of employment. 561 F.2d 93. Subsequent courts have not deviated from this standard of inquiry and these elements are no longer in dispute.

23. *See* Note, *Abusive Work Environment*, *supra* note 21, at 1455-56. *See infra* text accompanying notes 24-57.

timidating, or offensive working environment.[24]

A worker alleging hostile environment sexual harassment complains of sexually abusive working conditions, rather than claiming denial of a specific job benefit through sexual harassment.[25] Although courts recognized a cause of action under Title VII for ethnic, racial or religious environmental harassment,[26] they did not extend this cause of action to sexual environmental harassment claims until 1981.[27] In *Bundy v. Jackson*,[28] the Court of Appeals for the District of Columbia Circuit first recognized that a harassing work environment alone could constitute sex discrimination under Title VII.[29] The *Bundy* court said that continued supervisory harassment of the plaintiff resulted in harassment becoming the "standard operating procedure" in her department.[30] Relying upon

24. Guidelines, *supra* note 2, § 1604.11(a)(3). *See* C. MACKINNON, *supra* note 4, at 32-47; Montgomery, *Sexual Harassment in The Workplace: A Practitioner's Guide to Tort Actions*, 10 GOLDEN GATE U.L. REV. 879, 880 (1980).

25. Note, *Abusive Work Environment*, *supra* note 21, at 1455-56; Note, *Sexual Harassment*, *supra* note 2, at 584-86. Because the disparate treatment test focuses upon the relationship between specific illegal acts and some tangible job detriment, it is not easily adapted to a claim that the workplace environment is itself discriminatory. Note, *Abusive Work Environment*, *supra* note 21, at 1453-63 (analyzing the difficulty of adapting disparate treatment theory to the hostile environment cause of action).

26. Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972), was the first case to hold that a discriminatory work environment violated Title VII. In *Rogers*, the plaintiff successfully claimed that her employer's practice of providing discriminatory service to his Hispanic customers created an offensive work environment for Hispanic employees. *Id.* at 238. The *Rogers* court defined the phrase "term, conditions, or privileges of employment" (42 U.S.C. § 2000e-2(a)(1)) as "an expansive concept which sweeps within its protective ambit the practice of creating a work environment heavily charged with ethnic or racial discrimination. . . ." 545 F.2d at 238. The courts have extended this principle to include other types of harassment under Title VII. *See, e.g.*, Calcote v. Texas Educ. Found., 578 F.2d 95 (5th Cir. 1978) (racial harassment); Cariddi v. Kansas City Chiefs Football Club, 568 F.2d 87 (8th Cir. 1977) (national origin); Firefighters Institute for Racial Equality v. St. Louis, 549 F.2d 506 (8th Cir. 1977) (race) *cert. denied, sub nom.* Banta v. U.S. 434 U.S. 819, and City of St. Louis v. United States, 434 U.S. 819 (1977); Compston v. Borden, Inc., 424 F. Supp. 157 (S.D. Ohio 1976) (religion and national origin).

27. *See, e.g.*, Tompkins v. Public Serv. Elec. & Gas Co., 422 F. Supp 553 (D.N.J. 1976), *rev'd*, 568 F.2d 1044, 1046 (3rd Cir. 1977) (initially, the district court held sexual harassment did not constitute a cause of action under Title VII); Corne v.Bausche & Lomb, Inc., 390 F. Supp. 161 (D. Ariz. 1975), *vacated on procedural grounds*, 562 F.2d 55 (9th Cir. 1977) (no relief under Title VII); Garber v. Saxon Business Prods., Inc., 14 Empl. Prac. Dec. (CCH) 7586 (E.D. Va. 1976), *rev'd sub. nom.* Garber v. Saxon Business Prods., Inc., 552 F.2d 1032 (4th Cir. 1977) (district court dismissed plaintiff's complaint in which she claimed she had been discharged for refusing sexual advances of her supervisor).

28. 641 F.2d 934 (D.C. Cir. 1981).

29. *Id.* at 943-44.

30. *Id.* at 940. When Bundy complained to her harassers' supervisor, he summarily dismissed her complaint and responded by propositioning her himself. *Id.*

the Fifth Circuit's conclusion in *Rogers v. EEOC*[31] that a racially discriminating environment violated Title VII,[32] the court held that a sexually offensive environment also violated Title VII.[33]

In *Henson v. City of Dundee*,[34] the Eleventh Circuit extended *Bundy* and developed framework for analyzing environmental sexual harassment claims.[35] In *Henson*, a female police dispatcher was subjected to repeated sexual inquiries, vulgar language and persistent requests for sexual relations.[36] The court held that "under certain circumstances the creation of an offensive or hostile work environment due to sexual harassment can violate Title VII irrespective of whether the plaintiff suffers tangible job detriment."[37]

The *Henson* court modified the then-existing Title VII discrimination test[38] to reflect the differences inherent in hostile environmental discrimination.[39] The court *held*: the prima facie case for environmental sexual harassment requires proof of: (1) membership in a protected class;[40] (2) unwelcome sexual behavior;[41] (3) based on the employee's sex;[42] (4) re-

31. 545 F.2d 234. For a discussion of *Rogers*, see *supra* note 26.

32. *Rogers*, 454 F.2d at 238.

33. 641 F.2d at 945.

34. 682 F.2d 897 (11th Cir. 1982).

35. *See infra* text accompanying notes 40-44.

36. 682 F.2d at 899.

37. *Id.* at 901.

38. *See supra* note 22.

39. McDonnell Douglas Corp. v. Green, 411 U.S. at 802. *See* Note, *Abusive Work Environment*, *supra* note 21, at 1453-63.

40. 682 F.2d at 903. For a sex discrimination case, this merely requires that the employee claim to be either a male or female. *Id.*

41. *Id. See* Guidelines, *supra* note 2, § 1604.11(a). Only "unwelcome" sexual behavior violates Title VII. "Whether the advances are unwelcome . . . becomes an evidentiary question . . . for the court . . . to resolve." Note, *EEOC Guidelines*, *supra* note 18, at 561. For advances to be unwelcome, the plaintiff must show that she neither invited nor encouraged them, and regarded them as undesirable or offensive. Gan v. Kepro Circuit Systems, Inc., 28 Fair Empl. Prac. Cas. (BNA) 639 (E.D. Mo. 1982).

42. *Hensen*, 682 F.2d at 903. The plaintiff must show that but for her sex, the harassment would not have occurred. *Id.* at 904. This can easily be shown when an employer directs his abuse only at female employees and does not harass male employees. *Id.* This element will not be met, however, when a bisexual employer makes advances to or engages in conduct equally offensive to both male and female employees. *Id.*

Title VII prohibits discrimination based on gender, but does not apply to discrimination based on sexual preference. Jommers v. Budget Marketing, Inc., 667 F.2d 748 (8th Cir. 1982). Therefore, an employer's rule against hiring homosexuals does not violate Title VII. In addition, Title VII does not apply to discrimination against transsexuals (members of one sex who believe that they are really members of the opposite sex trapped in the wrong gender body). *See* Note, *Denial of Title VII Protection to Transsexuals: Ulane v. Eastern Airlines, Inc.*, 34 DEPAUL L. REV. 553 (1984).

sults affecting a "term, condition or privilege" of employment;[43] and, (5) respondeat superior.[44] Although courts uniformly apply the first four elements, the fifth, employer liability, is a source of disagreement among the courts and commentators.[45]

The Supreme Court first addressed hostile environment sexual harassment in *Meritor Saving Bank v. Vinson*.[46] In *Meritor*, the Court agreed that sexually hostile or abusive work environments violate Title VII.[47] The Court said that environmental sexual harassment occurs when "conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment."[48] The Court, however, realized that not all harassing conduct is severe enough to affect a "term, condition, or privilege" of employment.[49] Isolated incidents which merely offend an employee may not sufficiently alter the work environment to violate Title VII.[50] The conduct "must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.' "[51]

Additionally, the Court placed a burden on the plaintiff to show that her reaction to the harassment should have put her harasser on notice that she found his conduct offensive.[52] To the Court, uncompelled, voluntary participation does not lead to an inference that the employer's actions were welcome.[53] Instead, the focus of the inquiry is whether the victim's conduct demonstrated that the harassing acts were "unwel-

43. 682 F.2d at 904. Psychological welfare is included as a "term, condition or privilege" of employment. Rogers v. EEOC 454 F.2d at 238. The *Rogers* court also held, however, that the "mere utterance of an . . . epithet which engenders offensive feelings in an employee" does not significantly affect the employment environment. *Id.*

44. 682 F.2d at 905. This element requires that the plaintiff knew or should have known of the harassment and failed to take remedial action. *Id.* This element has produced the most extensive dispute and inconsistent application.

45. *See, e.g.*, Note, *Employment Discrimination — Defining an Employer's Liability Under Title VII for On-The-Job Sexual Harassment: Adoption of a Bifurcated Standard*, 62 N.C.L. REV. 795 (1984) [hereinafter Note, *Employment Discrimination*]. *See infra* text accompanying notes 58-130.

46. 477 U.S. 57 (1986).

47. *Id.* at 64. The Court extended the principles developed in earlier ethnic, racial, religious and national origin environmental harassment cases. *Id. See supra* note 26.

48. 477 U.S. at 65. 29 C.F.R. § 1604.11(a)(3).

49. 477 U.S. at 67.

50. *Id.* (citing Rogers v. EEOC, 454 F.2d at 238; Henson v. City of Dundee, 682 F.2d at 902).

51. 477 U.S. at 67, 106 S.Ct. at 2406 (quoting *Henson*, 682 F.2d at 904). Consequently, future cases will remain fact specific.

52. 477 U.S. at 68.

53. *Id.*

come."[54] While determining whether an act is "unwelcome" is very fact specific, this is consistent with the EEOC guidelines which emphasize that sexual harassment should be analyzed in light of "the record as a whole" and "the totality of circumstances."[55]

Meritor established that unwelcome sexual advances or conduct sufficiently pervasive to alter the victim's work environment will constitute sex discrimination under Title VII.[56] The Court, however, declined to determine a standard for employer liability in sexual harassment cases.[57]

III. EMPLOYER LIABILITY

A. Guidelines of the Equal Employment Opportunity Commission

The EEOC guidelines on employer liability distinguish among acts of supervisors,[58] nonsupervisors[59] and nonemployees.[60] The Commission determines the supervisory or agency relationship to the employer by examining the employee's job function in the specific situation.[61]

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54. *Id.*

55. 29 C.F.R. § 1604.11(b). In determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case-by-case basis. *Id.*

56. 477 U.S. 57, 67-69. *See supra* text accompanying notes 43-55.

57. 477 U.S. at 72. "We therefore decline . . . to issue a definitive rule on employer liability. . . ." *Id.*

58. 29 C.F.R. § 1604.11(c) (1986) provides in pertinent part:

> [a]n employer . . . is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence. The Commission will examine the circumstances of the particular employment relationship and the job functions performed by the individual in determining whether an individual acts in either a supervisory or agency capacity.

59. 29 C.F.R. § 1604.11(d) (1985) provides in pertinent part: "With respect to conduct between fellow employees, 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."

60. 29 C.F.R. § 1604.11(e) (1986) provides in pertinent part:

> An employer may also be responsible for the acts of non employees, with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing these cases the Commission will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees.

61. 29 C.F.R. § 1604.11(c).

1. Conduct of Supervisors.

Supervisory harassment is the most common type of sexual harassment. Although courts have not applied one specific standard to determine employer liability for supervisory harassment,[62] the EEOC guidelines recommend strict liability.[63] Under the guidelines, an employer is liable for any supervisory harassment regardless of policies forbidding such conduct, and regardless of whether the employer knew or should have known of the harassing conduct.[64]

2. Conduct of Non-Supervisory Employees

Under certain circumstances, an employer can be held liable for sexual harassment by coworkers.[65] Because a co-worker does not have substantial power over a fellow employee, the EEOC does not recommend strict liability for the acts of non-supervisory employees.[66] Rather, the employer will only be held liable for harassing acts of coworkers when the plaintiff proves that the employer knew or should have known of the conduct.[67] Furthermore, some courts allow the defendant to defeat liability by showing that he took immediate corrective measures upon learning of the harassment.[68]

3. Conduct of Non-Employees

An employer also may be held liable for sexual harassment from acts of non-employees.[69] Under the guidelines, the employer will be held liable for the sexual harassment when he knows or should have known of

62. *See infra* text accompanying notes 72-113.

63. Guidelines, *supra* note 2, § 1604.11(c). *See supra* note 58.

64. Guidelines, *supra* note 2, § 1604.11(c). *See also* FED. REG. at 74,676 (strict liability is the general standard of employer liability with respect to agents and supervisory employees).

65. *See* Allegretti, *Sexual Harassment of Female Employees by Nonsupervisory Co-Workers: A Theory of Liability*, 15 CREIGHTON L. REV. 437, 445-60 (1981). A victim of sexual harassment cannot sue a coworker under Title VII because a coworker is neither an "employer" or "agent of the employer" nor a "respondent" under Title VII. *See also* Note, *Sexual Harassment*, *supra* note 2, at 591-92, 595-603.

66. *See* Note, *Sexual Harassment*, *supra* note 2, at 590. Because the coworker is not acting as the employer's agent, the acts cannot be imputed to the employer through the principles of agency.

67. 29 C.F.R. § 1604.11(d). *See supra* note 59.

68. *Id. See, e.g.*, Dickerson v. United States Steel Corp., 439 F. Supp. 55 (E.D. Pa. 1977); Howard v. National Cash Register Co., 388 F. Supp. 603 (S.D. Ohio 1975); Fekete v. United States Steel Corp., 353 F. Supp. 1177 (W.D. Pa. 1973).

69. 29 C.F.R. § 1604.11(e). *See supra* note 60.

the abusive conduct and fails to take immediate corrective action.[70] Non-employee harassment claims are the least common claim.

B. Common Law Development of Employer Liability

Generally, courts have deferred to the EEOC guidelines concerning employer liability for sexual harassment by non-supervisory employees and non-employees.[71] The courts, however, have failed to settle on one specific standard of employer liability for sexual harassment by supervisory employees.[72] Instead, three distinct standards have developed in the lower federal courts.[73] The first standard imposes strict liability for the harassing acts of supervisors;[74] the second requires proof of actual or constructive knowledge;[75] and the third adopts a bifurcated standard which imposes strict liability for quid pro quo harassment and actual or constructive knowledge for environmental harassment.[76]

Although the courts afford great deference to the EEOC guidelines,[77] only one court has adopted the EEOC's strict liability standard for sexual harassment by supervisory personnel.[78] In *Miller v. Bank of America*,[79] the Ninth Circuit held the employer strictly liable for the sexual demands of a supervisor despite the bank's expressed policy

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70. *Id. See, e.g.*, EEOC v. Sage Realty, 507 F. Supp. 599 (S.D.N.Y. 1981). *See generally* Note, *Sexual Harassment*, *supra* note 2, at 592-93.

71. *See supra* text accompanying notes 65-70. *See also* Note, *Sexual Harassment*, *supra* note 2, at 589-93.

72. *See infra* text accompanying notes 73-114.

73. *See* Note, *Employment Discrimination*, *supra* note 45.

74. *See* Miller v. Bank of America, 600 F.2d 211, 213 (9th Cir. 1979). *See infra* text accompanying notes 77-82.

75. *See* Tompkins v. Public Serv. Elec. & Gas Co., 568 F.2d 1044, 1048-49 (3d Cir. 1977). *See infra* text accompanying notes 83-86.

76. *See* Katz v. Dole, 709 F.2d 251, 255 n. 6 (4th Cir. 1983) (strict liability for quid pro quo harassment but liability for environmental harassment only when the employer had actual or constructive knowledge and failed to take corrective action); Henson v. City of Dundee, 682 F.2d 897, 910-12 (11th Cir. 1982) (employer liable for quid pro quo harassment regardless of lack of knowledge while liability for environmental harassment requires knowledge plus lack of corrective response). *See infra* text accompanying notes 87-91.

77. *Griggs*, 401 U.S. 424, 433-34 (1971). The EEOC guidelines advocate a strict liability. In general, however, agency guidelines are "not entitled to great weight" for new policy unsupported by legislative history or prior judicial determination. Trans World Airlines v. Hardison, 432 U.S. 63, 76 n.11 (1977); General Elec. Co. v. Gilbert, 429 U.S. 125, 142-43 (1976).

78. Miller v. Bank of America, 600 F.2d 211 (9th Cir. 1979). *Miller* was decided before the guidelines. Although *Miller* is a quid pro quo case, the court addressed the general issue of sexual harassment. *See* Note, *Employment Discrimination*, *supra* note 45, at 799.

79. 600 F.2d at 211 (9th Cir. 1979).

against sexual harassment and the existence of a formal grievance procedure.[80] The court premised a finding of employer liability on the doctrine of respondeat superior,[81] even though it appears that the bank had no knowledge of the supervisor's harassing acts.[82]

Most federal courts, however, have rejected strict liability in favor of liability premised on proof of the employer's actual or constructive knowledge.[83] These courts indicate that actual knowledge exists when management has been informed of the acts or has participated in the harassing acts.[84] Constructive knowledge exists when the harassment is so pervasive that the employer can be presumed to be aware of the situation.[85] Commentators favoring this "knowledge standard" argue that sexual harassment substantially differs from other types of employment discrimination, and thus should be analyzed under a different standard of liability.[86]

The third standard of employer liability developed in response to recognition of hostile environment sexual harassment combines strict liability and knowledge tests to form a bifurcated standard.[87] When applying this bifurcated standard, courts distinguish between quid pro quo and

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80. *Id.* at 213.

81. 600 F.2d at 213. "We conclude that respondeat superior does apply here, where the action complained of was that of a supervisor, authorized to hire, fire, discipline or promote, or at least to participate in or recommend such actions, even though what the supervisor is said to have done violates company policy." *Id.*

82. The lack of employer knowledge is not stated in *Miller*, but subsequent courts assume that the Ninth Circuit found no such knowledge. *See* Note, *Employment Discrimination*, *supra* note 45, at 799 (citing *Barnes*, 561 F.2d at 993 n.72.).

83. *See* Tompkins v. Public Service Electric & Gas Co., 568 F.2d 1044 (3d Cir. 1977); Meyers v. ITT Diversified Credit Corp., 527 F. Supp. 1064, 1068 (E.D. Mo. 1981); Luddington v. Sambo's Restaurants, Inc., 474 F. Supp. 480 (E.D. Wisc. 1979); Heelan v. Johns-Manville, Inc., 451 F. Supp. 1382, 1389 (D. Colo. 1978); Munford v. James T. Barnes & Co., 441 F. Supp. 459, 466 (E.D. Mich. 1977).

84. *See* Note, *Employment Discrimination*, *supra* note 45, at 803.

85. *Id. See* Tompkins v. Public Service Electric & Gas Co., 568 F.2d at 1048-49. *See also* Barnes v. Costle, 561 F.2d at 995 (MacKinnon, J., concurring).

86. *See* Note, *Employment Discrimination*, *supra* note 45, at 803. The concurring opinion in *Barnes* supports use of a knowledge standard. This opinion lists three factors which theoretically distinguish sexual harassment from other forms of Title VII discrimination, thus supporting a different standard. *Barnes*, 561 F.2d at 998-1001 (MacKinnon, J., concurring). First, sexual harassment is detected more easily by the employee than by the employer. *Id.* at 999. Second, the knowledge standard effectively prohibits sexual harassment without encroaching upon its employees' private lives. *Id.* at 1000. Finally, racial and ethnic comments are never socially acceptable, whereas in most circumstances, sexual advances may constitute acceptable behavior. *Id.* at 1001.

87. Note, *supra* note 45, at 808. *See, e.g.*, Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982); Katz v. Dole, 709 F.2d 251 (4th Cir. 1983); Cummings v. Walsh Const. Co., 561 F. Supp. 872

hostile environment harassment[88]. Because recent decisions recognize the similarity of quid pro quo harassment to other forms of Title VII discrimination, these courts apply strict liability.[89] However, these courts apply the constructive knowledge standard to hostile environmental sexual harassment because of the perceived inapplicability of strict liability.[90] Commentators argue that the bifurcated standard more accurately tracks the realities of the two different forms of harassment and therefore provides the most effective and fair enforcement of Title VII.[91]

In *Meritor Savings Bank v. Vinson*,[92] the Supreme Court declined to determine a specific standard for employer liability.[93] The EEOC, in an amicus curiae brief, proposed that traditional principles of agency law should determine the employer liability standard.[94] When examining these agency principles, the EEOC concluded that in quid pro quo harassment, the supervisor's actions are "imputed to the employer whose delegation of authority empowered the supervisor to take them."[95] Thus, the EEOC recommends strict liability for quid pro quo sexual harassment.

On the other hand, the EEOC does not apply the agency doctrine of respondeat superior to acts creating a hostile work environment.[96] In environmental harassment cases, the EEOC prescribes an evaluation of the availability and responsiveness of internal grievance procedures.[97] If the employee fails to utilize her employer's complaint procedure, then the EEOC absolves the employer from liability, if the employer has not otherwise obtained actual knowledge of the harassment.[98] Thus, the EEOC holds employers liable for environmental harassment when they

(S.D. Ga. 1983); Ferguson v. E.I. duPont de Nemours & Co., 560 F. Supp. 1172 (D.Del. 1983); Conley v. Consolidated Rail Corp. 561 F. Supp. 645 (E.D. Mich. 1982).

88. *See supra* text accompanying notes 22-57. *See* Note, *Employment Discrimination*, *supra* note 45, at 808.

89. *See* 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); Katz v. Dole, 709 F.2d at 255 n. 6; Henson v. City of Dundee, 682 F.2d at 910; Miller v. Bank of America, 600 F.2d at 213.

90. *See supra* note 86 (sexual harassment differs from other forms of employment discrimination and should be analyzed under a different standard of liability).

91. *See* Note, *Employment Discrimination*, *supra* note 45, at 805-11.

92. 477 U.S. 57 (1986).

93. *Id.* at 72.

94. *Id.* at 70-71.

95. *Id.* at 70.

96. *Id.* at 69-71.

97. *Id.*

98. *Id.*

learn of the harassment or when the victim has no reasonably accessible process for lodging a complaint with appropriate management officials.[99] The EEOC distinguishes work environment harassment from quid pro quo harassment because the supervisor is not "exercising or threatening to exercise, actual or apparent authority to make personnel decisions affecting the victim."[100] The *Meritor* Court found the EEOC position inconsistent with EEOC guidelines which advocate strict liability for the acts of supervisors,[101] but reasoned that these guidelines require an examination of the circumstances particular to each individual case.[102]

The Court found that employers are not automatically liable for sexual harassment by their supervisors.[103] The Court stressed, however, that this does not mean than an employer's lack of knowledge will excuse him from liability.[104] Instead, the Court agreed with the EEOC's view that Congress intended the courts to apply agency principles when determining employer liability.[105]

Justice Marshall, addressed the employer liability standard issue in the concurrence.[106] Justice Marshall stated that environmental sexual harassment should be treated like all other causes of action under Title VII.[107] He therefore recommended that supervisory sexual harassment which creates an offensive work environment be imputed to the employer regardless of whether the employer had knowledge of the harassment.[108]

Justice Marshall supported this conclusion by relying upon the direct EEOC language in its 1980 amendment to the guidelines.[109] "[T]he Commission and the courts have held for years that an employer is liable if a supervisor or an agent violated Title VII, regardless of knowledge or any other mitigating factor."[110] Justice Marshall dismissed the Solicitor General's statement that the creation of a hostile work environment is

99. *Id.*

100. *Id.* at 71.

101. *Id. See* 29 C.F.R. § 1604.11(c), *supra* note 58.

102. 477 U.S. at 71. *See* C.F.R. § 1604.11(c), *supra* note 58.

103. 477 U.S. 73.

104. *Id.* In addition, an employee's failure to use an existing policy and procedure will not prevent employer liability. *Id.*

105. *Id.* at 72. This occurs because Title VII defines "employer" to include the employer's "agent". 42 U.S.C. § 2000e(b).

106. 477 U.S. at 74-78. Justice Marshall was joined by Justices Brennan, Blackmun and Stevens.

107. *Id.* at 78.

108. *Id.*

109. *Id.* at 74.

110. *Id.*, (quoting 45 FED. REG. 74,676 (1980)).

beyond the scope of the agency.[111] Instead, because the agent is charged with supervising and maintaining the work environment, the *creation* of the work environment is included within his duties.[112] Therefore, he said, abuse of the supervisor's power to maintain a productive work environment should be analyzed no differently than abuse of the supervisor's power to make personnel decisions.[113]

IV. EMPLOYER LIABILITY UNDER THE PRINCIPLES OF AGENCY

The *Meritor* majority indicated that future courts should look to agency principles for guidance in determining employer liability under Title VII.[114] At common law, a master is liable for the torts of his servants acting within the scope of their employment,[115] but is not liable for torts committed outside the scope of employment except in limited situations.[116] Generally, an employee is held to be a "servant" for the purposes of the Restatement of Agency.[117] The question of employer liability will, therefore, center upon determining whether sexual harassment falls within the "scope of employment."

The Restatement defines "scope of employment" in broad terms.[118]

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111. 477 U.S. at 76-77.

112. *Id.*

113. *Id. See also* Note, *Abusive Work Environment*, *supra* note 21, at 1461.

114. *See supra* note 105.

115. RESTATEMENT (SECOND) OF AGENCY § 219(1) (1957).

116. RESTATEMENT (SECOND) OF AGENCY § 219(2) (1957) provides:

(2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:
(a) the master intended the conduct or the consequences, or
(b) the master was negligent or reckless,or
(c) the conduct violated a non-delegable duty of the master, or
(d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

117. Section 220 of the Second Restatement of Agency defines a servant as "a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control." RESTATEMENT (SECOND) OF AGENCY, § 220 (1957). *See also* § 220 Comment (g) (In general, "employee" and "servant" are synonymous.).

118. RESTATEMENT (SECOND) OF AGENCY § 228 (1957) provides:

(1) Conduct of a servant is within the scope of employment if, but only if:
(a) it is of the kind he is employed to perform;
(b) it occurs substantially within the authorized time and space limits;
(c) it is actuated, at least in part, by a purpose to serve the master, and
(d) if force is intentionally used by the servant against another, the use of force is not expectable by the master.
(2) Conduct of a servant is not within the scope of employment if it is different in kind

Conduct must be similar to conduct authorized by the master in order to fall within the definition.[119] The fact than an employee's acts are forbidden or illegal will not prevent them from falling within the scope of employment.[120]

The determination of whether environmental sexual harassment falls within the "scope of employment," therefore, will depend upon an interpretation of the authority given the supervisor by his employer. Proponents of a "knowledge" standard of liability will argue that a supervisor is authorized only to make employment decisions, not to harass employees.[121] In contrast, courts favoring a "strict liability" standard will focus upon the supervisor's authority to maintain and promote a productive working environment.[122] Because most courts have already adopted the constructive knowledge requirement,[123] they are most likely to continue this analysis by adapting constructive knowledge to fit within the agency framework. Proponents of strict liability can counter this argument by contending that even if the supervisor's acts did not fall within the scope

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from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master.

RESTATEMENT (SECOND) OF AGENCY § 229 (1957) further defines conduct within the scope of agency as follows:

§ 229. Kind of Conduct within Scope of Employment

(1) To be within the scope of the employment, conduct must be of the same general nature as that authorized, or incidental to the conduct authorized.

(2) In determining whether or not the conduct, although not authorized, is nevertheless so similar to or incidental to the conduct authorizes as to be within the scope of employment, the following matters of fact are to be considered:

(a) whether or not the act is one commonly done by such servants;

(b) the time, place and purpose of the act;

(c) the previous relations between the master and the servant;

(d) the extent to which the business of the master is apportioned between different servants;

(e) whether or not the act is outside the enterprise of the master or, if within the enterprise, has not been entrusted to any servant;

(f) whether or not the master has reason to expect that such an act will be done;

(g) the similarity in quality of the act done to the act authorized;

(h) whether or not the instrumentality by which the harm is done has been furnished by the master to the servant;

(i) the extent of departure from the normal method of accomplishing an authorized result; and

(j) whether or not the act is seriously criminal.

119. RESTATMENT (SECOND) OF AGENCY § 229 (1957).

120. RESTATEMENT (SECOND) OF AGENCY §§ 230-31 (1957).

121. This conduct would then fall outside the scope of employment, freeing the employer from vicarious liability arising from the agency relationship.

122. Because the supervisor is authorized to maintain and promote a productive work environment, supervisory actions which impact on that environment are within the scope of agency.

123. *See supra* note 87 and accompanying text.

of employment, the employer still should be held liable under an exception contained in § 219 of the Restatement.[124] Under § 219, an employer would be held liable for acts outside the scope of employment if the employee "was aided in accomplishing the tort by the existence of the agency relation."[125] This exception recognizes that "but for" the supervisor's position as an agent, he could not harass the plaintiff.

Although most lower federal courts will probably continue to utilize an actual or constructive knowledge standard,[126] it is difficult to predict how the Supreme Court will eventually decide the employer liability issue. The *Meritor* holding was closely decided, with five Justices declining to reach the question[127] and four Justices advocating strict liability.[128] As the composition of the Court changes, this balance could shift[129] and, in any event, Justices joining in the majority opinion could follow the principles of agency to varying conclusions.[130]

V. EMPLOYER STRATEGY FOR AVOIDING LIABILITY

The absence of a definite standard of employer liability,[131] combined with the increased filing of charges of sexual harassment,[132] creates greater risk that an employer may face Title VII litigation. Therefore, careful employers will adopt protective measures to insulate themselves

124. RESTATEMENT (SECOND) OF AGENCY § 219 (1957).

125. RESTATEMENT (SECOND) OF AGENCY § 219(2)(d). *See supra* note 117. *See also* § 219 Comment (e) ("[T]he servant may be able to cause harm because of his position as agent, as where a telegraph operator sends false messages purporting to come form third persons . . . [or] the manager of a store operated by him for an undisclosed principal is enabled to cheat the customers because of his position.").

126. *See supra* note 87.

127. Chief Justice Burger, and Justices White, Powell, Rehnquist and O'Connor formed the majority.

128. Justices Brennan, Marshall, Blackmun and Stevens joined in the concurring opinion which advocated strict liability.

129. Chief Justice Burger and Justice Powell were among the Justices who declined to reach the issue. Now that they have retired, either of their successors could cast the deciding vote. Alternatively, any of the three remaining Justices who originally declined to reach the issue could decide in favor of strict liability.

130. The principles of agency can be interpreted to reach any conclusion falling within the range from actual knowledge to strict liability. *See supra* text accompanying notes 117-126.

131. *See supra* text accompanying notes 72-76.

132. "In 1985, 7,273 charges of discrimination alleging sexual harassment were filed with the Equal Employment Opportunity Commission — nearly double the number filed just four years earlier." Vander Waerdt, *Freeing Worker from Sexual Harassment*, St. Louis Post-Dispatch, Feb. 19, 1987, at 3B, col. 2.

from potential liability.[133]

Employers who wish to avoid liability should adopt a comprehensive policy prohibiting sexual harassment.[134] This approach includes notifying employees that sexual harassment is an intolerable prohibited employment practice.[135] The employer's nondiscrimination policy must address sexual harassment specifically, thereby alerting employees of the employer's intent to prevent this form of discrimination.[136] The policy must be communicated effectively to employees.

Numerous methods of notifying employees about the policy exist. One

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133. Hill & Behrens, *Love in the Office: A Guide for Dealing With Sexual Harassment Under Title VII of the Civil Rights Act of 1964*, 30 DEPAUL L. REV. 581, 615 (1981). *See* Siniscalco, *Sexual Harassment and Employer Liability: The Flirtation That Could Cost a Fortune*, 6 EMPLOYEE REL. L.J. 277, 289 (1980); Note, *Sexual Harassment*, *supra* note 2, at 609-14. The majority of commentators on sexual harassment have suggested preventive measures to reduce risk of employer liability. *See also* Martucci & Terry, *Sexual Harassment in the Workplace: A Legal Overview*, 42 J. MO. B. 313, 318-19 (July-Aug. 1986); Wyatt, *Avoiding Sexual Abuse Claims After Meritor*, Nat'l L.J., Oct. 27, 1986, at 15, col. 1.

134. "At a minimum, a good sexual harassment policy would (a) define and prohibit sexual harassment, and (b) invite employees who believe they have been the victims of sexual harassment to come forward and express their complaints to management." SCHLEI & GROSSMAN *supra* note 19, at 429 (footnote omitted).

Any adopted policy should be tailored to meet any peculiarities of state law and the particular needs of the employer. One representative policy from a California employer is as follows:

> REAFFIRMATION OF THE EQUAL EMPLOYMENT POLICY CONCERNING SEX DISCRIMINATION
>
> It is the policy of the Company that there be no discrimination against any employee or applicant on the basis of sex. In keeping with that policy, the Company will not tolerate sexual harassment by any of its employees.
>
> Sexual harassment is a violation of the Company's Rules of Conduct. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when:
>
> —Submission to the conduct is made either explicit or implicit condition of employment;
>
> —Submission to or rejection of the conduct is used as the basis for an employment decision affecting the harassed employee; or
>
> —The harassment substantially interferes with an employee's work performance or creates an intimidating, hostile, or offensive work environment.
>
> Any employee or applicant that feels he or she has been discriminated against due to his or her sex should report such incidents to his or her supervisor, Personnel, or any member of management, without fear of reprisal. Confidentiality will be maintained.
>
> In determining whether alleged conduct constitutes sexual harassment, the totality of the circumstances, the nature of the harassment, and the context in which the alleged incidents occurred will be investigated. The Personnel Department has the responsibility of investigating and resolving complaints of sexual harassment.
>
> The company considers sexual harassment to be a major offense which can result in the suspension or discharge of the offender.

Id. at 429, n. 265. *See also* S. SHAW & B. HARRISON, AVOIDING EMPLOYMENT DISCRIMINATION CHARGES, Form 2 (1986).

135. Hill & Behrens, *supra* note 133, at 617.

136. Meritor Savings Bank v. Vinson, 477 U.S. at 71.

method is posting notices that sexual harassment is a form of discrimination under Title VII.[137] Furthermore, an employer may publish its policy in an employee newsletter. Also, the employer should educate its supervisory personnel about sexual harassment through staff meetings or training programs.[138] In addition, an employer can incorporate the policy into existing operating procedures. One employer utilizes its employees' pay envelopes to distribute reminders that sexual harassment is illegal and employees have the right to complain.[139]

Another facet of the policy is institution of a grievance procedure to facilitate complaints about sexual harassment.[140] To maximize effectiveness, the procedure should designate an independent party other than the victim's supervisor as the first link in the complaint process. The availability of a third party will encourage victims of supervisory harassment to use the grievance procedure. In addition, because female employees are the most common victims of sexual harassment, the grievance procedure should allow women to register their complaints with another female employee.

Although a harassed employee need not exhaust the internal grievance procedure prior to bringing suit under Title VII,[141] a finding that the employee failed to follow a properly structured procedure may imply that the conduct was not "unwelcome." The existence of an effective grievance procedure and policy against discrimination, however, will not necessarily shield the employer from liability.[142] Instead, the courts will look to the totality of the circumstances,[143] including the employer's ap-

137. A statement that the courts have consistently declared that Title VII prohibits racial, ethnic, religious, or sexual harassment should suffice to put employees on notice. Hill & Behrens, *supra* note 133, at 618.

138. At staff meetings, the supervisory personnel should be informed that if they refrain from sexual harassment and if they can prevent sexual harassment by other employees, they will have effectively reduced the risk of employer liability. Waks & Starr, *Sexual Harassment in the Workplace: The Scope of Employer Liability*, 7 EMPLOYEE REL. L.J. 369, 385 (1981).

139. Lublin, *Resisting Advances*, Wall St. J., Apr. 24, 1981, at 1, col. 1 (discussing action by Chicago Transit Authority).

140. One procedure suggested by March Faucher and Kenneth McCulloch provides a separate grievance format for filing, investigating and resolving a sexual harassment case. Faucher & McCulloch, *Sexual Harassment in the Workplace — What Should the Employer Do?*, 5 EEO Today 38, 38-46 (1978), *reprinted in* Hill & Behrens, *supra* note 133, at 619 n.188.

141. *See* Miller v. Bank of America, 600 F.2d at 211, 214 (9th Cir. 1979).

142. Meritor Savings Bank v. Vinson, 477 U.S. 57, 71 (1986). The Court held that the employer's nondiscrimination policy did not address sexual harassment and the grievance procedure required the employee to direct her complaint to the supervisor responsible for the harassment.

143. 29 C.F.R. § 1604.11(b) (1987). *See* Tompkins v. Public Service Electric & Gas Co., 568

parent willingness to comply with Title VII. By adopting a comprehensive policy against sexual harassment employers decrease the risk of Title VII litigation and decrease the possibility of liability should litigation arise.

V. CONCLUSION

Sexual harassment is a pervasive form of discrimination which creates a severe detriment to working women and to our entire society. This societal barrier must be removed from the workplace so that all employees can compete effectively and productively. In the absence of a clear standard of employer liability, employers face uncertainty. By far, the best way for employers to avoid liability for sexual harassment is to prevent the harassment from occurring. Employers, therefore, should adopt stringent policies prohibiting sexual harassment. They should provide an effective grievance procedure which circumvents the victim's immediate supervisor and provides contact with a employer-liaison of the victim's own gender. Finally, the employer should actively enforce its nondiscrimination policy. An employer who follows the above course of action decreases the likelihood of liability, increases worker satisfaction and productivity, and protects employees from sexual harassment.

Lisa A. Blanchard

F.2d 1044, 1046-47 (3rd Cir. 1977); Munford v. James T. Barnes & Co., 441 F. Supp. 459, 466 (E.D. Mich. 1977).