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# WHO IS THE VICTIM HERE?: VICARIOUS SEXUAL HARASSMENT AFTER *LEIBOVITZ V.* *NEW YORK CITY TRANSIT AUTHORITY*

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## INTRODUCTION

On May 5, 1998, Judge Weinstein of the Eastern District of New York ruled, on an issue of apparent first impression, that an employee who has never personally been the victim of sexual harassment may nevertheless sue her<sup>1</sup> employer under Title VII of the Civil Rights Act of 1964 [hereinafter Title VII]<sup>2</sup> for failure to prevent a “hostile work environment.”<sup>3</sup> This decision expanded the concept of “hostile

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1. Although both men and women can be the victims of sexual harassment, empirical evidence shows that women are most often the targets of sexual harassment. See ALBA CONTE, *SEXUAL HARASSMENT IN THE WORKPLACE: LAW AND PRACTICE* 6 (1990). According to the Equal Employment Opportunity Commission (EEOC), in 1994 more than 14,400 women claimed they were sexually harassed at work, a number that has more than doubled since 1991. The Diversity Training Group, *Sexual Harassment Facts* (last modified 1998) <<http://www.diversitydtg.com/articles/shfacts.html>>. Complaints filed by men tripled from 481 to nearly 1,500 with ten percent of all such complaints being harassment by female supervisors. *Id.* Thus, for purposes of convenience this article will generally refer to the victim of sexual harassment with female pronouns and those accused of harassment with male pronouns.

2. 42 U.S.C. § 2000e (1994).

3. *Leibovitz v. New York City Transit Authority*, 4 F. Supp. 2d 144 (E.D.N.Y. 1998). There are two types of actionable sexual harassment under federal law, “quid pro quo” harassment and “hostile work environment.” “Quid pro quo” harassment involves cases where an individual is confronted with direct harassment such as: sexual advances, innuendo, or other unwelcome sexual behavior with the express or implicit message that submission to such acts or behavior will result in favorable job benefits and refusal will result in tangible job detriment. “Hostile work environment” arises when co-workers or supervisors engage in unwelcome and inappropriate sexually based behavior which creates an atmosphere of intimidation or hostility. See Barry S. Roberts & Richard A. Mann, *Sexual Harassment in the Workplace: A Primer*, 29 AKRON L. REV. 269, 274-75 (1996). These two forms of sexual harassment often occur simultaneously, such as when the failure to comply with sexual demands of an employer or co-worker may lead to the creation of a hostile or abusive environment in addition to a “quid pro

work environment” as a ground for a sexual harassment lawsuit, by holding that even if the plaintiff was not harassed herself, knowledge of the harassment of others at her workplace can create an environment which violates her Title VII rights.<sup>4</sup>

A “hostile work environment” involves a situation where a co-worker or supervisor creates an intimidating, hostile or threatening workplace by engaging in unwelcome or inappropriate sexually oriented behavior.<sup>5</sup> Prior to this ruling, it has been very difficult for a litigant to persuade a court that they were subject to a “hostile work environment” in violation of Title VII without showing that they were personally subject to discriminatory acts.<sup>6</sup> The argument accepted in *Leibovitz*, vicarious harassment, involves an individual claiming that they were harmed by discriminatory acts directed at

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quo” claim. Thus, as a practical matter, most complaints allege both types of harassment. See Bonnie B. Westman, *The Reasonable Woman Standard: Preventing Sexual Harassment in the Workplace*, 18 WM. MITCHELL L. REV. 795, 801 (1992). It is also possible, although much less common for an employer to be found liable for sexual harassment of or by non-employees. Kathleen Mulligan & Stacy Thomas, *Employer Liability for Sexual Harassment of and By Non-Employees*, in NEW FRONTIERS OF SEXUAL HARASSMENT LITIGATION 1995, at 61 (PLI Litig. & Admin. Practice Course Handbook Series No. 533, 1995).

4. *Leibovitz*, 4 F. Supp. 2d 144. See also Dingeman, Dancer & Christopherson, P.L.C., *Labor Law Update*, Vol. No. 2 (last modified Aug. 1998) <[http://www.dingemandancer.com/labor\\_1.htm](http://www.dingemandancer.com/labor_1.htm)>.

5. There is a split in authority in lower courts as to whether an employer must have knowledge of the actions of employees, which give rise to co-worker harassment. See SUSAN M. OMILIAN & JEAN P. KAMP, *SEXUAL BASED EMPLOYMENT DISCRIMINATION* §§ 11.08, 23.01, 23.05 (1990).

Unlike the cases involving harassment by co-workers, the EEOC guidelines impose strict liability on employers for sexual harassment by supervisory employees. See *Sexual Harassment*, 29 C.F.R. § 1604.11(c)-(d) (1991). See also Linda Meric, *Rulings Promote Workplace Fairness*, DENVER POST, Sept. 13, 1998, at 02.

See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 68 (1986) (holding that “the gravamen of any sexual harassment claim is that the alleged sexual advances were ‘unwelcome.’”). See also *Robinson v. Jacksonville Shipyards*, 760 F. Supp. 1486, 1522 (M.D. Fla. 1991). See generally Michael J. Phillips, *Employer Sexual Harassment Liability Under Agency Principles: A Second Look at Meritor Savings Bank, FSB v. Vinson*, 44 VAND. L. REV. 1229 (1991) (discussing the *Meritor* case and employer liability for sexual harassment under agency law principles).

See *Roberts & Mann*, *supra* note 3, at 276. The initial cases involving sexual harassment were almost always brought on “quid pro quo” grounds. However, the advent of the “hostile work environment” has given rise to an increased willingness on the part of the courts to grant relief for sexual harassment claims, thereby increasing not only the number of claims brought but also the resultant aggregate liability associated with such claims. *Id.*

6. Eric D. Randall, *Vicarious Harassment: A Nyper Roundup*, 1998 No. 5 AFFIRMATIVE ACTION/EEO PERSONNEL UPDATE 17 (1998).

others.<sup>7</sup>

Sexual harassment in the workplace is not a recent phenomenon, although the legal liability associated with this behavior is relatively new.<sup>8</sup> What used to be simply considered part of the normal interaction between genders within the workplace is now clearly actionable.<sup>9</sup> One of the primary reasons that commentators state consistently explains the continuing pervasiveness of sexual harassment in the workplace—many men regard certain types of conduct, including sexual innuendo and sexual demands, differently than do women.<sup>10</sup>

The legislation that Congress enacted to combat sexual harassment is found primarily in Title VII.<sup>11</sup> In an attempt to prevent

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7. Vicarious harassment should not be confused with vicarious liability of employers for sexual harassment committed by their employees or "respondeat superior" which is a well-settled principle of law. See generally Mark McLaughlin Hager, *Harassment as a Tort: Why Title VII Hostile Environment Liability Should be Curtailed*, 30 CONN. L. REV. 375 (1998) (discussing issues of employers' vicarious liability for direct sexual harassment).

8. See Roberts & Mann, *supra* note 3, at 270. See also B. Glenn George, *The Back Door: Legitimizing Sexual Harassment Claims*, 73 B.U. L. REV. 1 (1993).

9. In 2980 Equal Employment Opportunity Commission guidelines first made employers liable for harassment committed by their agents and supervisory employees and opened the possibility for potential employer liability for harassment between co-workers. See Hannah Katherine Vorweck, *The Forgotten Interest Group: Reforming Title VII to Address the Concerns of Workers While Eliminating Sexual Harassment*, 48 VAND. L. REV. 1019, 1019 (1995).

10. Westman, *supra* note 3, at 795-96.

Men and women respond to sex issues in the workplace to a degree that exceeds normal differences in other perceptual reactions between them. For example, research reveals a near flip-flop of attitudes when both men and women were asked what their response would be to being sexually approached in the workplace. Approximately two-thirds of the men responded that they would be flattered; only fifteen percent would feel insulted. For women the proportions are reversed.

*Id.* at n.93 (citing *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1505 (M.D. Fla. 1991) (testimony of plaintiff's expert witness)). See also Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1210 (1989) (arguing that courts have traditionally been more accepting of the male perspective in judging particular behavior). Perhaps this acceptance is because of the dominance of males in judicial positions. See, e.g., Joan S. Weiner, Note, *Understanding Unwelcomeness in Sexual Harassment Law: Its History and a Proposal for Reform*, 72 NOTRE DAME L. REV. 621, 630 (1997) (noted cases where courts have found such facts as a woman sharing meals with a man, visiting a man out of the workplace and other "harmless" actions as relevant to whether a woman has invited subsequent harassment).

11. 42 U.S.C. § 2000e (1994). Title VII applies only to employers. *Id.* Employer is defined as "a person engaged in an industry affecting commerce who has fifteen or more

further sexual harassment, Congress allowed for victims to recover damages, including punitive damages, under Title VII in 1991.<sup>12</sup> To bring a successful claim under Title VII, a plaintiff must be "aggrieved" by an unlawful employment practice.<sup>13</sup> This limitation requiring a plaintiff be "aggrieved" by an unlawful employment practice is designed to limit those who have standing to sue and to establish the required substantive elements in the statute.<sup>14</sup>

Part I of this Recent Development will discuss the history and evolution of Title VII, focusing on the concepts of "hostile work environment" and vicarious harassment and how they developed in *Leibovitz v. New York City Transit Authority*.<sup>15</sup> Part II will examine

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employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person . . . ." *Id.* The legislative history of Title VII indicates that the prohibition against sex discrimination was added as a last minute amendment, which some commentators have argued, was an attempt to defeat passage of the bill. See Ann C. Juliano, Note, *Did She Ask For It?: The "Unwelcome" Requirement in Sexual Harassment Cases*, 77 CORNELL L. REV. 1558, 1562 n.26 (1992).

12. Civil Rights Act of 1991 § 102, Pub. L. No. 102-166, 105 Stat. 1071, 1072, codified at 42 U.S.C. § 1981 (1988 & Supp. 1994). The ability for a plaintiff to recover such monetary damages, particularly punitive damages, indicates the significant impact that expansion of the potential plaintiffs under Title VII may have on employers. Vorweck, *supra* note 9, at 1020.

The notion that employers are the ones best suited to bear the costs of sexual harassment in the workplace, rather than the victim, is a progressive social statement that tells employers they must do the right thing and take proactive steps to limit and remove this problem from the workplace.

Robert D. Lipman & David A. Robins, *Court's Harassment Rulings Provide Ammunition for Both Sides*, N.Y. L.J., Oct. 1, 1998, at 1, 6. While the amendments were primarily designed to deter harassment through increased compensation, Congress also recognized the need to protect the interests of employers charged with harassment under Title VII through the procedural protections found in the statute. See Vorweck, *supra* note 9, at 1020.

13. 42 U.S.C. § 2000e-5(f)(1)(A).

14. See generally Hager, *supra* note 7. In Title VII, Congress explicitly recognized the need to protect the interests of employers as well as victims in the procedural rights granted to employers accused of harassment. Title VII requires the Equal Employment Opportunity Commission ("EEOC") to investigate charges of sexual harassment and, if the EEOC finds reasonable cause, to seek voluntary conciliation with the employer. 42 U.S.C. § 2000e-5(b). If there is not reconciliation between the parties, the EEOC or the accuser may then file suit against the employer. Even once a suit has been filed, Title VII guarantees the accused employer the right to litigate the charges being made against it in a federal court before incurring any penalty. Some argue that these procedural protections are an undue burden on the alleged victim by making them "jump through a series of hoops" in order to obtain relief. See Nancy Levit, *Preemption of Section 1983 by Title VII: An Unwarranted Deprivation of Remedies*, 15 HOFSTRA L. REV. 265, 294-295 (1987).

15. 4 F. Supp. 2d 144 (E.D.N.Y. 1998).

these developments. This section will question the potential ramification of the *Leibovitz* decision, not only the impact upon the victims of sexual harassment but also upon the employers faced with the substantial liability associated with Title VII claims.

Part III will argue that the extension of the "hostile work environment" theory in *Leibovitz* and other cases is inconsistent with Congressional intention in drafting Title VII. Additionally, the extension of such theory imposes an undue burden on employers while providing little, if any, additional protection to the victims of sexual harassment and does very little to help eliminate such harassment.

## I. HISTORY

The first Title VII sexual harassment case was decided in 1976.<sup>16</sup> However, the concept of sexual harassment and particularly the notion of "hostile work environment" harassment did not gain wide spread public attention until Anita Hill accused Supreme Court Justice nominee, Clarence Thomas, of sexual harassment.<sup>17</sup>

Since 1976, the courts have had many opportunities, unfortunately, to revisit the issue of sexual harassment.<sup>18</sup> Although

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16. *Williams v. Saxbe*, 413 F. Supp. 654 (D.D.C. 1976), *rev'd on other grounds sub nom. Williams v. Bell*, 587 F.2d 1240 (D.C. Cir. 1978).

17. Barry Willoughby, *Discrimination Law: Sexual Harassment After the Thomas Hearings*, 10 DEL. LAW. 18 (1992). Catharine MacKinnon, a practicing attorney and academician, is also responsible for the increased attention that sexual harassment has received in recent years. Ms. MacKinnon was involved in trying the case of *Meritor Savings Bank v. Vinson*, discussed *infra*, and has written numerous books and articles on sexual harassment. See Holly B. Fechner, Note, *Toward an Expanded Conception of Law Reform: Sexual Harassment Law and the Reconstruction of Facts*, 23 U. MICH. J.L. REFORM 475 (1990). In her book, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION*, MacKinnon based her theory of sexual harassment on the inequality of power between the sexes prevalent in modern society. She criticized the dominant theory of sex discrimination, the differences theory, which states that when men and women are similarly situated, they should be treated equally for failing to take account of the lack of power experienced by women. CATHARINE MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 106-07 (1979).

18. See Vorweck, *supra* note 9, at 1020-21. Over the years, feminist groups have spearheaded the campaign to bring issues of sexual harassment to light. However, sexual harassment should not be considered only a feminist issue. The feminist groups seeking increased liability for sexual harassment and expanded remedies for victims of sexual harassment were promoting behavioral norms that differed from existing workplace behavior.

the "quid pro quo" cases are relatively clear and easy to evaluate, courts have struggled with "hostile work environment" claims.<sup>19</sup> This confusion results from the fact that it is not entirely clear what conduct is prohibited by Title VII.<sup>20</sup> The statute does not explicitly prohibit any and all conduct of a sexual nature in the workplace, but rather only unwelcome conduct.<sup>21</sup> Title VII claims are found in all levels of employment, in all types of businesses, and among employees of all social, economic, and educational backgrounds.<sup>22</sup>

A separate but related issue that has developed in the area of "hostile work environment" harassment is the question of whether a plaintiff may recover only for sexual harassment actually aimed at her or whether sexually based conduct directed at other employees is sufficient to establish a claim of a "hostile work environment." This is known as vicarious harassment, and was the theory upon which the Court ruled in *Leibovitz v. New York City Transit Authority*.<sup>23</sup>

*Rogers v. EEOC*, one of the first cases to address vicarious harassment, although racial, was decided by the Fifth Circuit in 1971.<sup>24</sup> In that case, the court allowed an employee in an optometrist's office to raise a claim of discrimination based upon her employer treating patients differently based upon their ethnic backgrounds.<sup>25</sup> Similarly, in *Vinson v. Taylor*, the D.C. Circuit found that "[e]ven a woman who was never herself the object of harassment might have a Title VII claim if she were forced to work in an atmosphere in which such harassment was pervasive."<sup>26</sup>

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*Id.*

19. See *supra* note 3.

20. Hager, *supra* note 7, at 398-99. "Another problem with a duty so broadly and vaguely defined is that employers may be sorely stressed as to how to meet it. Into what safe harbor can they sail? Increasingly, courts tell them that refuge lies only in anti-harassment policies, programming, notification, and investigation procedures." *Id.*

21. "Title VII does not proscribe all conduct of a sexual nature in the workplace." Equal Opportunity Commission, Policy Guideline on Current Issues in Sexual Harassment, EEOC Notice No. N-915.050 (March 19, 1990), reprinted in 3 EEOC COMP. MAN. NO. 4031 (BNA). See *supra* note 5 and accompanying text.

22. See Pamela Kruger, *See No Evil*, WORKING WOMAN, June 1995, at 32-33; Ellyn E. Spragins, *The Cost of Sexual Harassment, INC.*, May 1, 1992, at 145.

23. 4 F. Supp. 2d 144 (E.D. N.Y. 1998).

24. *Rogers v. EEOC*, 454 F. 2d 434 (5th Cir. 1971).

25. *Id.*

26. *Vinson v. Taylor*, 753 F.2d 141 (D.C. Cir. 1985).

However, not all courts agree with this line of reasoning. In *Childress v. City of Richmond*, the Fourth Circuit held that white males may not allege constitutional violations based on a "hostile work environment" affecting only Black males.<sup>27</sup> Similarly, the Seventh Circuit, in *Drake v. Minn. Mining and Mfg. Co.*, recently denied the "hostile work environment" claims of non-minorities claiming that they were harassed due to their association with their minority co-workers.<sup>28</sup> The Seventh Circuit reasoned that because employment discrimination claims are available to employees of all races, the key inquiry must be whether the employee has been discriminated against and whether that discrimination was because of the employee's race.<sup>29</sup>

In *Kortan v. California*, a Caucasian female employee brought a Title VII action against her employer alleging racial and sexual harassment and retaliation.<sup>30</sup> The District Court ruled that sexually derogatory remarks allegedly made in the plaintiff's presence about other female employees were not sufficiently severe and pervasive that a rational juror could find the plaintiff was subjected to a "hostile work environment."<sup>31</sup> The court failed to address directly the question of whether such conduct could ever rise to the requisite level necessary to create an actionable "hostile work environment." Nonetheless, it appears from the court's discussion that at some point such conduct would create a "hostile work environment," however where that point lies is unclear.<sup>32</sup>

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27. *Childress v. City of Richmond*, 134 F.3d 1205 (4th Cir. 1998).

28. *Drake v. Minn. Mining and Mfg. Co.*, 134 F.3d 878, 885 (7th Cir. 1998).

29. *Id.* at 884. See also 42 U.S.C. § 2000e-2(a)(1).

30. *Kortan v. California*, 5 F. Supp. 2d 843 (C.D. Cal. 1998).

31. *Id.* The Court found that there was only competent evidence of sexual harassment in one conversation between the plaintiff and her supervisor and the most severe comments made regarding other women were "bitch," "regina," "madonna," and "histrionics." *Id.* at 850-51. See also *Culverhouse v. Cooke Ctr. for Learning and Dev., Inc.*, 675 N.Y.S.2d 776 (N.Y. Sup. Ct. 1998) (calling someone a "bitch" is not per se defamation as being called a derogatory name alone does not injure one in their trade or profession). The fact that courts are unwilling to treat some types of arguably sexually offensive behavior actionable under sexual harassment or other law seems to directly contradict expanding Title VII liability to include vicarious harassment. *Id.*

32. *Id.* It is interesting to note that the Kortan case decided by an United States District Court in California only two days after the Leibovitz case was decided by an United States District Court in New York.

The case focused on in this Recent Development is *Leibovitz v. New York City Transit Authority*.<sup>33</sup> The plaintiff, Diane Leibovitz, was a deputy superintendent for the Transit Authority.<sup>34</sup> In 1993, a female subordinate complained to Leibovitz accusing a male superintendent of sexual harassment.<sup>35</sup> Leibovitz performed an investigation of these claims, including interviewing other female employees, and found that other women had endured similar experiences within the Transit Authority.<sup>36</sup> The plaintiff conceded that very little of this harassment occurred in her presence and much of what she knew was second or even third hand information.<sup>37</sup> Leibovitz then contacted her superiors with this information and, according to her testimony, was told that her complaints could be detrimental to her career.<sup>38</sup> Leibovitz never claimed that she was directly discriminated against. Instead, she argued that the experience of the other women and the deliberate indifference displayed by the Transit Authority caused her severe emotional distress.<sup>39</sup>

The Transit Authority contended that Leibovitz was not entitled to recover under Title VII because she was not a "person . . . aggrieved" since she had not been personally harassed and there was no direct proof that the Transit Authority had been deliberately indifferent to a violation of her rights.<sup>40</sup> Additionally, the Transit Authority contended that it could not be liable for a "hostile work environment" because it had followed internal procedures for preventing and dealing with sexual harassment.<sup>41</sup>

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33. 4 F. Supp. 2d 144 (E.D.N.Y. 1998).

34. *Id.* at 146.

35. *Id.* For a concise description of the facts of the Leibovitz case, see also DeQuendre Neeley, *Sexual Harassment*, SECURITY MANAGEMENT, Sept. 1, 1998, at 179.

36. *Leibovitz*, 4 F. Supp. 2d at 146.

37. *Id.*

38. *Id.* at 147. The plaintiff also introduced evidence that showed that there was some delay in the Transit Authority's internal investigation after the plaintiff's complaints but that investigation did ultimately occur and the Transit Authority did make internal determinations as to the merits of the accusations. *Id.*

39. *Federal Cases*, LEGAL BRIEFS (Ga. Mun. Ass'n., City Attorney's Sec.) July, 1998. The plaintiff contended that her emotional distress manifested itself in the form of depression, sleeplessness, weight gain, and anxiety. See Neeley, *supra* note 35.

40. *Leibovitz*, 4 F. Supp. 2d at 147-48, 153-54; see also 42 U.S.C. § 2000e-5(f)(1)(1994).

41. *Id.* at 153; see also *NY Court Upholds Award for Employee Who Was Victim of Vicarious Harassment*, ANDREWS SEXUAL HARASSMENT LITIG. REP. June 1998, at 8, 9.

In denying the Transit Authority's motion to set aside the jury verdict in favor of the plaintiff, the court held that the plaintiff was an "aggrieved" person within the protections of Title VII, had a personal stake in the case sufficient to invoke jurisdiction, and had an injury that distinct and actual.<sup>42</sup> The fact that she was not personally the subject of the offensive behavior, according to the court, did not take her claim outside of the protection afforded by Title VII. The court also ruled that the plaintiff was "aggrieved" with respect to the substantive element of her claim.<sup>43</sup> To confine the concept of "hostile work environment" to only those who are the direct targets of harassment would make "quid pro quo" and "hostile work environment" virtually identical while unnecessarily restricting the layman's definition of environment.<sup>44</sup> In sum, the court held that "[p]ersonal harassment is not the gravamen of a hostile work environment claim."<sup>45</sup>

## II. ANALYSIS

### *A. Effects of Vicarious Harassment on Litigation and Our Society*

Some commentators believe that *Leibovitz* is likely to end up being heard by the Supreme Court because of its far reaching implications.<sup>46</sup> This case could potentially expose employers to significantly increased liability at a time when some are arguing that

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42. *Leibovitz*, 4 F. Supp. 2d 148, 151. "The jury found, in effect, that having to experience other women being harassed or knowing of the harassment in her own workplace caused plaintiff to become depressed, anxious, and emotionally distraught, because she felt demeaned as a member of the harassed class." *Id.* The jury rejected the plaintiff's claims that she had been personally harassed and for retaliation. The jury's sole basis for awarding the plaintiff a \$60,000 judgment was its finding that she had been discriminated against because of her employer's deliberate indifference to the sexual harassment of others in the workplace. Daniel Wise, *Vicarious Harassment Award is Sustained, Hostile Work Environment for Women Cited*, N.Y.L.J. May 6, 1998, at 1, 2.

43. *Id.* at 150.

44. *Id.* The author of this article must respectfully disagree with this particular reasoning on the part of Judge Weinstein. Whether harassment constitutes "quid pro quo" or "hostile work environment" harassment turns on the conduct of the individual committing the harassing behavior, not the identity of the victim of the harassment.

45. *Id.*

46. Neeley, *supra* note 35 (quoting sexual harassment expert and attorney Jay J. Levit).

“hostile work environment” liability should be curtailed.<sup>47</sup> Aside from the numerous individual plaintiffs that this ruling might bring forward, it also exposes employers to potential class action lawsuits where only one employee has actually been harassed. Mere knowledge of the harassment would allow other employees in the workplace to piggyback onto the claim of a “hostile work environment.”<sup>48</sup>

Furthermore, although the *Leibovitz* court did not decide whether a male employee could sue claiming a “hostile work environment” stemming from the sexual harassment of female co-workers, the opinion seems to indicate that such lawsuits would be possible.<sup>49</sup> This is so particularly in light of the Supreme Court’s recent decision recognizing men as a protected class and allowing them to sue under Title VII in same-sex discrimination suits.<sup>50</sup> Although the court in *Leibovitz* repeatedly mentioned the fact that the plaintiff was a member of the class being harassed, it never explicitly held such membership to be a requirement for recovery.<sup>51</sup>

Even though litigation may serve a valuable purpose in bringing attention to the very important issues related to sexual harassment and the public spectacle associated with such litigation arguably serves as a deterrent to others in similar situations, litigation is not

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47. *Id.* See generally, Hager, *supra* note 7 (arguing that discrimination law as an anti-harassment tool is morally and legally confused, doubtful at best in terms of its effectiveness and troubling in its many unintended consequences). “Broad Title VII harassment liability is unfair to employers. This is most acutely the case with co-worker harassment. Title VII liability saddles employers with a duty to protect its workers from the harmful acts of third parties, namely other workers.” *Id.* at 402.

48. See Neeley, *supra* note 35. See also Richard Block et al., *Can An Employer Be Liable to An Employee Who Wasn’t Harassed?*, BULLETIN (Winthrop, Stimson, Putnam & Roberts, New York, N.Y.), July 20, 1998, <<http://www.winstim.com/public/bulletin/bull9836.html>>.

49. *Leibovitz*, 4 F. Supp. 2d 144, 149 (E.D.N.Y. 1998). “It is not necessary at this time to address the question of whether a male worker would feel sufficiently disturbed by sexual abuse of females in his workplace to merit recovery.” *Id.*

50. *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998); see also Richard F. Storrow, *Same-Sex Sexual Harassment Claims After Oncale: Defining the Boundaries of Actionable Conduct*, 47 AM. U. L. REV. 677 (February 1998) (discussing same-sex sexual harassment claims after *Oncale*).

51. *Leibovitz*, 4 F. Supp. 2d 151. The judge used the plaintiff’s membership in the harassed class to distinguish *Leibovitz* from earlier cases such as *Childress v. City of Richmond*, 134 F.3d 1205 (4th Cir 1998) and *Drake v. Minn. Mining & Mfg.*, 134 F.3d 878 (7th Cir 1998). *Id.*

without its costs both to the defendants as well as the plaintiffs.<sup>52</sup> Furthermore, changes in behavior that are forced by judicial decree as opposed to common understanding and training voluntarily offered and advocated by the employer may produce resentment among both male and female workers. This may not only affect their receptivity to subsequent workers of the opposite sex but also their interactions with the opposite sex outside of the workplace.<sup>53</sup>

In this culture of sensitivity to sexual harassment the *Leibovitz* court went so far as to compare the experience of the plaintiff and other women faced with vicarious sexual harassment to the experiences of Jews who were granted privileges by the Nazis in concentration camps in exchange for their silence and keeping their eyes shut to the horrors around them.<sup>54</sup> Although the court did subsequently concede that the actual harassment at the New York City Transit Authority is not comparable to the suffering in the Nazi concentration camps, this is exactly the sort of emotional and inflammatory attitudes which have been injected into sexual harassment which are leading the courts away from the true spirit of Title VII.<sup>55</sup> Vicarious harassment only adds to this charged atmosphere.

### *B. Vicarious Harassment and Employers*

Employers currently face a significant exposure to liability resulting from Title VII claims in light of the recent Supreme Court decisions confirming the existence of vicarious liability for Title VII violations by certain types of employees.<sup>56</sup> The cost to American

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52. Abrams, *supra* note 10, at 1196. "A lawsuit may succeed in calling attention to a social wrong so entrenched that it has escaped notice. It can be a valuable trump card in cases in which persuasion fails or the pace of voluntary change is unacceptably slow." *Id.*

[L]itigation imposes enormous costs, in hostility and in ostracization on the women involved. Lingering resentments fostered by litigation can penalize women external to the suit itself. Litigation also can be too crude a tool for achieving the often-subtle changes in understanding that produce equal treatment or regard for women.

*Id.*

53. *Id.* at 1215-16.

54. *Leibovitz*, 4 F. Supp. 2d 152.

55. *Id.*

56. *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca*

business of losses resulting from liability in sexual harassment cases is already enormous, and the additional liability created by expansion of vicarious sexual harassment claims will serve only to magnify these costs.<sup>57</sup> Arguably, increased liability will encourage employers to strengthen their efforts to eliminate sexual harassment through further implementation of harassment policies and procedures, increased training and monitoring of employees, and appropriate remedial measures where necessary.<sup>58</sup> Nonetheless, prevention measures, however desirable, must be balanced against the cost in damages to the employers and to society as a whole in terms of increased litigation and clogging of the already overburdened court systems throughout this country.<sup>59</sup>

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Raton, 524 U.S. 775 (1998). In both of these cases, the Court held that an employer is subject to vicarious liability to an employee/victim for a "hostile work environment" created by a supervisor with immediate or higher authority over the employee. When no tangible employment action is taken a defending employer does have the opportunity to raise an affirmative defense comprising of two elements: (1) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior and (2) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer to otherwise avoid the resultant harm.

57. Hager, *supra* note 7, at 402.

Title VII liability saddles employers with a duty to protect their workers from the harmful acts of third parties, namely other workers. Breach of that duty entails major liability costs. Defending against alleged breaches also entails substantial costs. Compliance and prevention – including monitoring, anti-harassment programming, and detailed complaint investigations – can entail further serious costs and require focus on distracting matters quite removed from business objectives.

*Id.* See Ronni Sandoff, *Sexual Harassment in the Fortune 500*, WORKING WOMAN, Dec. 1988 at 68-73.

58. 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 (1992).

59. See Abrams, *supra* note 10, at 1216. Litigation is arguably a less than ideal tool for producing changes in workplace behavior. Judicial opinions provide only anecdotal notions of what behavior should be abolished and fail to direct employers as to how to mold their employees behavior to more acceptable standards. *Id.* See also Rachel E. Lutner, Note, *Employer Liability for Sexual Harassment: The Morass of Agency Principles and Respondeat Superior*, 1993 U. ILL. L. REV. 589, 590 (1993). "In a perfect world, employer liability standards would provide employers with incentives to prevent future incidents of sexual harassment and remedy current problems, but not to engage in unproductive or wasteful actions that inefficiently address workplace sexual harassment." *Id.* However, some scholars have argued that if prevention of sexual harassment is the purpose of Title VII then the statute is unnecessary. *E.g.*, Lloyd R. Cohen, *Sexual Harassment and the Law*, 28 SOC'Y 8, 13 (suggesting that sexual harassment law is wholly unnecessary because market forces will

The costs associated with the additional liability that employers will face because of vicarious sexual harassment claims will need to be recovered. Most likely, these costs will be recouped in the form of higher costs to consumers for the employer's goods and services or by reductions in the workforce.<sup>60</sup> Each of these is a loss to society, which may well outweigh any benefits that result from vicarious sexual harassment as a cause of action. Any type of remedial plan will experience diminishing marginal returns at some level and such a level may have been reached in the use of additional legal liability to prevent sexual harassment.<sup>61</sup> The additional ability of employers to prevent sexual harassment will not compensate for the costs associated with such liability thereby resulting in a net loss to society.

Additionally, it is not at all clear that Congress intended Title VII to reach so broadly when it enacted the legislation. In fact, some argue that it is a mistake to characterize sexual harassment as gender

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efficiently sort out men, women, and jobs so that those who approve of conduct, which would be classified as sexual harassment, will end up working together so that such behavior will not be deemed offensive). This author can not help but believe that Cohen's argument is at best short sighted logic and is confused as to where and what sort of jobs would be created where sexual harassment is not deemed offensive.

60. Hager, *supra* note 7, at 398. (discussing a broad interpretation of Title VII liability). "Plaintiffs' lawyers will see that even very weak suits may be worth money if filed. Efficiency, coherence, and integrity in the litigation process will erode. The public will pay for all this, as businesses pass their increased costs along to consumers." *Id.*

61. This is not to imply that the money currently being spent on sexual harassment prevention programs is not money well spent. In fact, these programs make good sense not only from a social policy standpoint but also from a business standpoint.

A 1990 survey was conducted by Working Woman magazine involving 3,300,000 employees at 160 corporations. Data reflected that in a typical Fortune 500 company with 23,750 employees, sexual harassment costs \$6,700,000 per year in absenteeism, low productivity and employee turnover. This, in turn, represents \$282.53 per employee. Findings did not include the indirect, hard-to-measure expenses of legal defense, time lost, and tarnished public image.

Diversity Training Group, *Sexual Harassment Facts*, <<http://www.diversitydtg.com/articles/shfacts.html>>.

A promising alternative to litigation as a tool to combat sexual harassment is voluntary compliance programs. Many organizations, particularly large corporations, are developing such programs with some success. Similar programs have been used by corporations in other areas of the law such as antitrust and regulatory compliance for years. *See* Brodley, Compliance, in ANTITRUST ADVISER 505, 517-518 (3d Ed. 1985). Additionally, many full service law firms are now offering their services to design and implement such compliance programs for their corporate clients. These programs often avoid many of the pitfalls involved with litigation as a tool for combating sexual harassment. *See supra* notes 52-53 and accompanying text.

discrimination at all and thus sexual harassment should not be dealt with under the gambit of Title VII.<sup>62</sup>

*C. A Step Down the "Slippery Slope" and the Trivialization of Sexual Harassment*

It seems quite possible that this decision could lead to a "slippery slope" in vicarious liability for all sorts of torts. For instance, if one sees strangers in a horrible fatal traffic accident caused by the intentional tort of one of the drivers and suffers emotional distress as a result, should she be entitled to recover from the tortfeasor for her emotional distress even though she was in no way involved in the accident other than as a witness.<sup>63</sup>

Perhaps even more important than the "slippery slope" problem is the potential that vicarious harassment claims will trivialize claims of harassment by those who were directly harassed.<sup>64</sup> Encouraging victims of harassment to report that behavior is a significant goal of Title VII. The increased volume of claims that will be brought under vicarious sexual harassment theories potentially will desensitize society to claims of sexual harassment. People may then think of these claims as trivial and unimportant and thereby actually reduce the number of victims who chose to report the offensive behavior out of fear of being ridiculed as part of the "litigation boom" that will almost surely result from such decisions.

*D. Vicarious Harassment and Employees*

Yet another potential problem resulting from the recognition of vicarious sexual harassment is the incentive to induce coworkers to file Title VII claims even where they do not feel harassed. To date, the cases have not held that employees must subjectively feel

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62. See generally, Hager, *supra* note 7.

63. Obviously, this may be an extreme example but one can see how the decision in *Leibovitz* could lead to such arguments being made about other torts. Further, what if a person did not hear the information second or third hand as did the plaintiff in *Leibovitz*, but rather simply heard rumors through the "company grapevine." Is this sufficient to create a "hostile work environment?"

64. Hager, *supra* note 7, at 397-98. "Cynicism or indifference towards more dubious claims overflows onto serious ones." *Id.* at 397.

harassed in order to be entitled to file a vicarious "hostile work environment" claim. Therefore, employees will have an incentive to feel "harassed" and may also try to convince coworkers that they have been harassed when, in fact, the coworker has not felt threatened or harassed.<sup>65</sup>

Finally, in expanding the potential grounds for claims of sexual harassment, we must also consider the impact on the employees who are accused of harassment.<sup>66</sup> While clearly actual harassment should not go unpunished, not all harassment is intentional or committed with malice.<sup>67</sup> Employers may fire common law at-will employees for good reasons, bad reasons, or no reason at all.<sup>68</sup> Certain Equal Employment Opportunity Commission guidelines provide certain insulation from liability to employers who take immediate and appropriate corrective action to known harassment.<sup>69</sup> Thus, it is often easier and less costly for an employer simply to terminate the employment of those accused with harassment rather than undertaking time and cost intensive investigations into the charges. Of course, these discharged employees will almost surely sue their employer for wrongful termination although their chances of prevailing in such litigation are small.<sup>70</sup> Allegations of sexual

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65. This also raises the practical question of how a vicarious harassment plaintiff would be able to satisfy the "unwelcomeness" requirement if coworkers do not make direct complaints. Perhaps, what is viewed from the outside as inappropriate behavior is actually welcome interplay between the direct parties.

66. Unfortunately, as important as the issue of sexual harassment is in modern society there are instances where false accusations are made for retaliatory or other reasons. For an admittedly one-sided description of a situation involving dubious charges, see Endeavor Forum Newsletter on the Internet No. 86, *A Modern Day Tragedy or Saved by a Hurricane* (May 1997) (commenting on an article in the Washington Times, K.L. Billingsley, *Commentary*, Washington Times, February 6, 1997 at A15). The author is in no way intending to endorse the Endeavor Forum or their beliefs but simply to provide varying viewpoints.

67. See *supra* note 10 and accompanying text. Although malice or even intent is not a required element for Title VII sexual harassment liability, it should be considered before expanding liability, which could have serious detrimental effects on the accused's reputation, even if never proved true. Hager, *supra* note 7, at 398.

68. Vorweck, *supra* note 9, at 1043.

69. 29 C.F.R. § 1604.11(d). Subsequent action will serve to insulate employers from liability for harassment among coworkers. Subsequent action will have no effect on liability for harassment committed by employee supervisors or the employer's agents. *Id.*

70. Kathleen Murray, *At work: A Backlash on Harassment Cases*, N.Y. TIMES, September 18, 1994 at 3-23 (describing the trend amongst at-will employees unjustly dismissed based on charges of sexual harassment to bring suit against their accusers and their employers in hopes of

harassment can result in serious repercussions in the alleged harasser's personal and professional life.<sup>71</sup> The aggregate costs of these additional lawsuits combined with the costs associated with the disruption in the workforce also weigh against unnecessarily expanding liability for sexual harassment.

### III. PROPOSAL

The benefits associated with the imposition of vicarious sexual harassment liability simply do not justify the costs imposed by such liability. This line of cases must be overturned. Vicarious sexual harassment exceeds the original scope and purpose of Title VII and the plaintiffs in vicarious harassment cases are not damaged in the way that Congress intended for Title VII to compensate.<sup>72</sup>

At the very least, the impacts of the *Leibovitz* and similar cases must be limited to whatever extent possible. For instance, the plaintiff should be required to be a member of the class being discriminated against. Additionally, the plaintiff should be required to have witnessed the offensive behavior or otherwise have concrete proof of such harassment rather than having obtained information second or third hand, as was the case in *Leibovitz*.

### CONCLUSION

It is quite understandable and even appreciated that courts and judges want to do everything possible to eliminate sexual harassment in the workplace. However, the imposition of vicarious sexual

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being able to clear their names). See also *In re King Soopers, Inc. and United Food and Commercial Workers Union*, 86 Labor Arb. (BNA) 254, 258 (1985) (noting that the charge may attach a social stigma that could be damaging to the accused's standing in the community); *Ashway v. Ferrellgas, Inc.*, 59 F.E.P. Cases (BNA) 375, 377 n.6 (1989) (noting that a charge can impair a person's ability to earn a livelihood and can harm his reputation).

71. There have even been several dramatic cases where alleged harassers have committed suicide out of despair over what they believed to be unfair charges. Vorweck, *supra* note 9, at 1052 (citing *Libby Lewi, Suit Blames Son's Suicide on AT&T*, Greensboro News & Record, July 24, 1994 at A1; *Teacher's Suicide Draws Sexual Harassment Concerns*, National Public Radio, Morning Edition (June 15, 1993)).

72. Hager, *supra* note 7, at 397. "To broaden anti-harassment law is to extend it beyond egregious misbehavior into zones where wrongfulness is less vivid, and even into controlling what some would deem matters of taste, not morality [nor legality]." *Id.*

harassment liability is not the way to accomplish this goal. The ability of employers to prevent such harassment is limited. Simply imposing further liability on the employers will not serve to move them beyond this limitation. Additionally, the net costs to society arising from such claims will likely significantly outweigh the net benefits from such claims.

Thus, *Leibovitz* must be overturned and Title VII returned to applying only to direct harassment, conforming to Congress' original intention in drafting the legislation.

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