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Employment Discrimination -- Defining an Employer's Liability Under Title VII for On-the-Job Sexual Harassment: Adoption of a Bifurcated Standard

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NOTES

Employment Discrimination—Defining an Employer's Liability Under Title VII for On-the-Job Sexual Harassment: Adoption of a Bifurcated Standard

Sexual harassment has been characterized as the "most widespread problem women face in the workforce."[1] Such harassment constitutes a real economic barrier to career advancement by women,[2] especially in nontraditional jobs.[3] Moreover, it can inflict significant emotional and psychological injury upon the victim.[4] In response to this growing problem,[5] federal courts uniformly recognize a cause of action against the employer for sexual harassment[6] under Title VII of the Civil Rights Act of 1964.[7] The courts have failed, however, to agree on the appropriate standard of employer liability for acts of harassment by supervisory personnel and instead have employed three distinct standards.[8] One standard imposes strict liability on the employer for all acts of harassment by a supervisor;[9] the second imposes liability only after a show-

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1. *Sex Discrimination in the Workplace, 1981: Hearings Before the 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) [hereinafter cited as *Hearings*].

2. The vast majority of reported sexual harassment cases under Title VII of the Civil Rights Act of 1964 involve the harassment of a female employee by a male supervisor or coworker. A male employee subject to sexual harassment, however, might enjoy the same Title VII protections. Rasnic, *The Evolvement of an Action for Sexual Harassment Under Title VII*, 26 ST. LOUIS U.L.J. 875, 876 (1982). *See also* Wright v. Methodist Youth Servs., 511 F. Supp. 307 (N.D. Ill. 1981) (male employee terminated for refusing advances of homosexual male supervisor has Title VII claim against employer).

The economic consequences are readily apparent when an employee is fired, demoted, or denied promotion for refusing the advances of a supervisor. Less-apparent economic loss is caused by the diminished productivity of the victim. *Hearings*, *supra* note 1, at 523-24 (statement of Karen Sauvigne).

3. Almost 75% of working women fill jobs in service-oriented positions historically associated with female employees. C. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION 10 (1979). Such "traditional" jobs include secretarial, teaching, nursing, and retail sales positions. "Nontraditional" jobs include high status managerial and professional positions and blue collar positions in heavy industry, positions historically filled by male employees. *Id.* at 10-11.

4. The psychological and emotional injury occasioned by sexual harassment is manifested largely in the form of increased stress, but also may include intense "feelings of powerlessness, fear, anger, nervousness, decreased job satisfaction and diminished ambition." *Hearings*, *supra* note 1, at 524 (statement of Karen Sauvigne).

5. Two commentators estimate that 50 to 80% of all working women have been subject to some form of on-the-job sexual harassment. *See* 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, 581-82 (1981) (citing a comprehensive review of recent surveys of D. NEUGARTEN & J. SHAFRITY, SEXUALITY IN ORGANIZATIONS (1980)).

6. *See, e.g.*, Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982); Miller v. Bank of Am., 600 F.2d 211 (9th Cir. 1979); Tompkins v. Public Serv. Elec. & Gas Co., 568 F.2d 1044 (3d Cir. 1977); Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977); Garber v. Saxon Business Prods., Inc., 552 F.2d 1032 (4th Cir. 1977).

7. 42 U.S.C. §§ 2000e to 2000e-17 (1976 & Supp. V 1981).

8. C. MACKINNON, *supra* note 3, at 58.

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

ing that the employer had actual or constructive knowledge of the harassment and failed to remedy the situation;[10] the third, recently adopted by the Fourth Circuit Court of Appeals, is a bifurcated standard that imposes strict liability for forms of harassment involving some official action by the supervisor, but uses the knowledge standard when official action is lacking.[11] This note analyzes each standard and concludes that the bifurcated standard offers the most realistic and effective means to combat on-the-job sexual harassment.

Sexual harassment is "the unwanted imposition of sexual requirements in the context of a relationship of unequal power."[12] In an employment situation, it concerns an unwelcome and offensive advance, statement, or other action of a sexual nature that interferes with an employee's ability to perform a job and pursue a career.[13]

The cases and commentary have devoted little discussion to establishing criteria for defining acts that constitute actionable sexual harassment, largely because the litigated incidents involve only the most blatant harassment.[14] Moreover, because of the subjective analysis of harassment employed by the courts,[15] future cases necessarily will remain fact sensitive and are unlikely to provide any concrete definitions.[16] One commentator, however, has presented ten elements to consider in determining whether particular behavior is unlawful sexual harassment: the severity of the conduct; the number and frequency of the encounters; the relationship between the parties; any provocation by the victim; the response of the victim to the conduct; the apparent reaction of the victim; the general working environment; the location of the conduct (in a public or private place); and the male-female ratio in the workplace.[17]

However defined, sexual harassment now is recognized as a form of sex

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10. *See* Tompkins v. Public Serv. Elec. & Gas Co., 568 F.2d 1044 (3d Cir. 1977).

11. *See* Katz v. Dole, 709 F.2d 251 (4th Cir. 1983); Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982).

12. C. MACKINNON, *supra* note 3, at 1.

13. The Equal Employment Opportunity Commission defined "sexual harassment" as:

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

29 C.F.R. § 1604.11(a) (1983). This definition has been criticized as too broad to provide any effective guidance to employers dealing with alleged acts of sexual harassment. *See* Linenberger, *What Behavior Constitutes Sexual Harassment?*, 34 LAB. L.J. 238, 242-43 (1983).

14. Linenberger, *supra* note 13, at 238.

15. An act is deemed offensive based on the subjective perceptions of the victim, if reasonable, rather than on any objective standard. *See* Linenberger, *supra* note 13, at 242; Comment, *Sexual Harassment and Title VII—Female Employees' Claim Alleging Verbal and Physical Advances by a Male Supervisor Dismissed as Nonactionable*—Corne v. Bausch & Lomb, Inc., 51 N.Y.U. L. REV. 148, 162 (1976).

16. Linenberger, *supra* note 13, at 238.

17. *Id.* at 246-47.

discrimination prohibited by Title VII.[18] Title VII does not contain an express provision concerning sexual harassment, and its prohibition of sex discrimination was added by Congress, with little debate,[19] just prior to enactment.[20] Without legislative history for guidance, federal courts initially disagreed whether Title VII provided a cause of action for on-the-job sexual harassment. The first case considering the issue, *Corne v. Bausch & Lomb, Inc.*,[21] concluded that sexual harassment was a mere "personal proclivity, peculiarity or mannerism"[22] of the supervisor and did not create liability for the employer under Title VII. Until 1977, this analysis prevailed in the district courts.[23]

Prior to 1977, only one district court had ruled that sexual harassment was actionable under Title VII. In *Williams v. Saxbe*[24] the District Court for the District of Columbia considered the Title VII claim of a female employee discharged from the Justice Department[25] for refusing to submit to the advances of her supervisor. The court ruled that sexual harassment is "an artificial bar-

18. Section 703(a) of Title VII provides:

> 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.

42 U.S.C. § 2000e-2(a) (1976).

19. The prohibition against sex discrimination was added by a floor amendment submitted by Rep. Smith on February 8, 1964. 110 CONG. REC. 2577 (1964). Rep. Smith was an opponent of Title VII and his amendment was considered an attempt to confuse the purpose of Title VII as a means to defeat the bill. *See id.* at 2581 (remarks of Rep. Green). The House of Representatives adopted the amendment without a hearing and with little debate. *Id.* at 2582, 2804.

20. Title VII, Pub. L. No. 88-352, 78 Stat. 255 (1964).

21. 390 F. Supp. 161 (D. Ariz. 1975), *vacated mem.*, 562 F.2d 55 (9th Cir. 1977).

22. *Corne*, 390 F. Supp. at 163.

23. *See, e.g.*, Tompkins v. Public Serv. Elec. & Gas Co., 422 F. Supp. 553 (D.N.J. 1976), *rev'd*, 568 F.2d 1044 (3d Cir. 1977); Miller v. Bank of Am., 418 F. Supp. 233 (N.D. Cal. 1976), *rev'd*, 600 F.2d 211 (9th Cir. 1979).

24. 413 F. Supp. 654 (D.D.C. 1976), *rev'd sub nom.* Williams v. Bell, 587 F.2d 1240 (D.C. Cir. 1978). The reversal was on the procedural grounds that the district court considered only the administrative record in reaching a judgment, rather than conducting a new trial as mandated by Chandler v. Roudebush, 425 U.S. 840 (1976).

25. Although federal employees initially were excluded from Title VII, coverage was provided by a 1972 amendment:

> (a) All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments, . . . in executive agencies, . . . in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 11(a), 86 Stat. 111 (1972) (codified at 42 U.S.C. § 2000e-16(a) (1976 & Supp. V 1981)). This amendment provides private and federal employees with identical Title VII protection. Barnes v. Costle, 561 F.2d 983, 988 (D.C. Cir. 1977) ("It is beyond cavil that Congress legislated for federal employees essentially the same guarantees against sex discrimination that previously it had afforded private employees.").

rier to employment which was placed before one gender and not the other."[26] This barrier qualified as a condition of employment and, because imposed only on one gender, violated Title VII.[27]

Three federal courts of appeals adopted the *Williams* analysis in 1977. Each of the cases, *Barnes v. Costle*,[28] *Tompkins v. Public Service Electric & Gas Co.*,[29] and *Garber v. Saxon Business Products, Inc.*,[30] involved a female employee fired for refusing her supervisor's sexual advances. In each case the courts found that submission to sexual advances was a condition of employment imposed on the employee because of her sex. Title VII clearly prohibits such a condition. Since 1977, two more courts of appeals have recognized this cause of action: the Ninth Circuit in *Miller v. Bank of America*[31] and the Eleventh Circuit in *Henson v. City of Dundee*.[32] No circuit has refused to recognize the cause of action.[33]

The *Henson* court clearly enumerated the elements of a Title VII sexual harassment claim. To establish a claim, plaintiff must show: (1) "[t]he employee belongs to a protected group";[34] (2) "the employee was subject to unwelcome sexual harassment";[35] (3) "[t]he harassment complained of was based upon sex";[36] (4) "[t]he harassment complained of affected a term, condition, or privilege of employment";[37] and (5) a basis to impose liability on the employer under some theory of *respondeat superior*.[38] The federal courts are in full agreement on the first four elements of the claim. It is on the fifth that the courts disagree; three different standards of *respondeat superior* are currently in use. Such a conflict prevents uniform and effective enforcement of Title VII against on-the-job sexual harassment and must be resolved.

The Court of Appeals for the Ninth Circuit imposed the most rigid standard of employer liability: strict liability for all acts of harassment by a supervisor. In *Miller v. Bank of America*[39] a female employee claimed that she had been fired for refusing the sexual demands of her male supervisor.[40] The bank had a long-standing policy against sexual harassment and an effective grievance procedure for reporting violations of this policy. Because the employee

26. *Williams*, 413 F. Supp. at 657-58.
27. *Id.* at 659, 661.
28. 561 F.2d 983 (D.C. Cir. 1977).
29. 568 F.2d 1044 (3d Cir. 1977).
30. 552 F.2d 1032 (4th Cir. 1977) (per curiam).
31. 600 F.2d 211 (9th Cir. 1979).
32. 682 F.2d 897 (11th Cir. 1982).
33. In Fisher v. Flynn, 598 F.2d 663 (1st Cir. 1979), plaintiff alleged a Title VII sexual harassment claim. Plaintiff claimed she was fired from her college teaching position because she had refused the romantic advances of her department chairman. The court dismissed the claim because of pleading defects in the complaint.
34. *Henson*, 682 F.2d at 903.
35. *Id.*
36. *Id.*
37. *Id.* at 904.
38. *Id.* at 905.
39. 600 F.2d 211 (9th Cir. 1979).
40. *Id.* at 212.

failed to use this grievence procedure, the bank argued that she had waived any claims she might have had.[41] The court of appeals reversed the district court's dismissal[42] of the employee's Title VII claim, ruling that Title VII provides a cause of action to the employee. The court then established its standard of employer liability for sexual harassment:

> We conclude that respondeat superior does apply here, where the action complained of was that of a supervisor, authorized to hire, fire, discipline and promote, or at least to participate in or recommend such actions, even though what the supervisor is said to have done violates company policy.[43]

Thus, the bank was liable for the supervisor's harassing behavior even though it arguably did not have any knowledge of the behavior.[44]

To date, the *Miller* rule has not been explicitly adopted by any other court. The Equal Employment Opportunity Commission (EEOC), however, did adopt strict liability in its 1980 guidelines on sexual harassment, ruling that an employer is liable "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."[45] These guidelines carry no legal authority; they are merely advisory.[46] They do, however, represent the official opinion of the agency charged with enforcing Title VII[47] and can significantly influence the courts.[48]

The Office of Federal Contract Compliance Programs (OFCCP) has attempted to incorporate the EEOC guidelines and the EEOC's strict liability

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41. *Id.* at 213.

42. *Miller*, 600 F.2d 211 (9th Cir. 1979), *rev'g* 418 F. Supp. 233 (N.D. Cal. 1976).

43. *Miller*, 600 F.2d at 213.

44. While the opinion in *Miller* does not mention whether plaintiff's failure to use the bank's grievance procedure left the bank unaware of the supervisor's behavior, subsequent cases have assumed that the bank was unaware of this conduct. *See, e.g.*, Barnes v. Costle, 561 F.2d 983, 993 n.72 (D.C. Cir. 1977) ("official policy of bank to discourage sexual conduct, and bank not advised of behavior by filing of grievance with Employee Relations Department").

45. 29 C.F.R. § 1604.11(c) (1983).

46. Albemarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975).

47. 42 U.S.C. § 2000e-4 (1976).

48. The Supreme Court has observed that the EEOC employment guidelines generally are "entitled to great deference" by the courts. Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971). The guidelines, however, are "not entitled to great weight" when they reflect a new policy unsupported by legislative history or prior judicial construction. 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).

The guidelines on sexual harassment have received mixed reviews from commentators. Those advocating the strict liability theory strongly support the guidelines. *See* Attanasio, *Equal Justice Under Chaos: The Developing Law of Sexual Harassment,* 51 U. CIN. L. REV. 1 (1982); Comment, *New EEOC Guidelines on Discrimination Because of Sex: Employer Liability for Sexual Harassment Under Title VII*, 61 B.U.L. REV. 535 (1981); Note, *Sexual Harassment of Employees Creates Discriminatory Work Environment in Violation of Title VII*, 15 SUFFOLK U.L. REV. 1385 (1981). Other commentators have found the guidelines overly broad and unsupported by judicial precedent. *See* Bryan, *Sexual Harassment as Unlawful Discrimination Under Title VII of the Civil Rights Act of 1964*, 14 LOY. L.A.L. REV. 25, 55 (1981); Linenberger, *supra* note 13, at 242-43; McLain, *The EEOC Sexual Harassment Guidelines: Welcome Advances Under Title VII?*, 10 U. BALT. L. REV. 275, 322-24 (1981).

theory into its own regulations governing federal contracts.[49] These regulations would impose contractual obligations to prevent and remedy sexual harassment on all businesses holding federal contracts or working on federally funded construction sites.[50] The implementation of these regulations, however, was suspended in 1981 pending further action.[51]

The Court of Appeals for the District of Columbia Circuit apparently has adopted the strict liability theory as well, although in a modified form. In *Barnes v. Costle*[52] the court recognized a cause of action against the Environmental Protection Agency under Title VII for discharging an employee who refused the sexual advances of her supervisor. The court observed that in sexual harassment cases "an employer is chargeable with Title VII violations occasioned by discriminatory practices of supervisory personnel."[53] The court recognized, however, that the employer may be relieved of liability if the supervisor acted contrary to the employer's policies and without the employer's knowledge and the "consequences are rectified when discovered."[54] The burden of proof is on the employer to establish these grounds for relief from liability.[55]

The District of Columbia Circuit rule, however, still may be in a state of flux. A recent district court opinion rejected strict liability and adopted the knowledge standard for sexual harassment claims.[56] This court found for the employer because it lacked knowledge of the alleged harassment.[57]

The proponents of the strict liability theory have advanced three arguments in its favor. The strongest is that the language of Title VII itself mandates strict liability.[58] Title VII prohibits sex discrimination, which includes sexual harassment, by any "employer."[59] Title VII defines the term "employer" as "a person engaged in an industry affecting commerce . . . *and any*

49. 41 C.F.R. § 60-20.8 (1981). These regulations were suspended indefinitely in 1981 by the Reagan administration. 46 Fed. Reg. 42,865 (1981).

50. 45 Fed. Reg. 86,249 (1980).

51. *See supra* note 49.

52. 561 F.2d 983 (D.C. Cir. 1977).

53. *Id.* at 993.

54. *Id.*

55. *Id.* The *Barnes* standard was repeated in Bundy v. Jackson, 641 F.2d 934, 943 (D.C. Cir. 1981). *See infra* notes 99-102 and accompanying text.

56. Vinson v. Taylor, 23 Fair Empl. Prac. Cas. (BNA) 37, 42 (D.D.C. 1980). In *Vinson* an employee of a savings and loan association charged her employer with violating Title VII by requiring her to submit to her branch manager's sexual demands and by firing her after she refused to continue meeting these demands. The court ruled for the employer because the employee had never reported the alleged sexual demands to senior management and the employer demonstrated a nondiscriminatory reason for firing the employee, her excessive sick leave. *Vinson* is in accord with most federal district court opinions on sexual harassment, *see infra* notes 80-82 and accompanying text.

57. *Vinson*, 23 Fair Empl. Prac. Cas. at 41.

58. *See* Miller v. Bank of Am., 600 F.2d 211, 213 (9th Cir. 1979); Attanasio, *supra* note 48, at 32 ("The plain language of the Act imposes liability for discrimination by any agent."); Hill & Behrens, *supra* note 5, at 613 ("Title VII includes in its definition of 'employer' any agent of one who otherwise qualifies as a defendant.").

59. 42 U.S.C. § 2000e-2(a) (1976).

agent of such a person."[60] Because a supervisor is the agent of his employer, his discriminatory acts are covered by Title VII.

Second, as courts consistently have applied strict liability to employers for a supervisor's acts of racial, ethnic, and religious harassment,[61] some courts and commentators reason that this standard similarly should apply to a supervisor's acts of sexual harassment.[62] Sex discrimination is prohibited in the same section of Title VII as these other forms of discrimination and Congress has indicated that it should be combatted with equal vigor.[63] To give effect to congressional intent, it is argued that the same standard of liability should apply to sexual harassment as is applied to racial, ethnic, or religious harassment.

Unfortunately, the cases considering racial, ethnic, or religious harassment have devoted little discussion to the policy rationale for imposing strict liability.[64] Nonetheless, proponents argue that strict liability would create uniformity under Title VII and provide employees with the same protection against sexual harassment as is provided against other forms of harassment.

The final argument for strict liability is that it would provide the victim of sexual harassment with maximum legal protection. Strict liability is considered essential to ensure that employers do not ignore the problem by hiding behind their ignorance of particular incidents.[65] Moreover, the employer controls the general employment situation and the particular supervisor; therefore, the employer is in the best position to prevent the occurrence of harassment.[66] Strict liability is deemed an essential incentive to compel employers to prevent such harassment.

Strict liability also is considered fair to the employer since it imposes no undue burden. Even if totally unaware of the harassment, the employer is unlikely to suffer an adverse judgment if it acts promptly to remedy the situa-

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60. *Id.* § 2000e(b) (emphasis added).

61. *See, e.g.*, Calcote v. Texas Educ. Found., 578 F.2d 95 (5th Cir. 1978) (racial harassment); Cariddi v. Kansas City Chiefs Football Club, Inc., 568 F.2d 87 (8th Cir. 1977) (ethnic harassment); Young v. Southwestern Sav. & Loan Ass'n, 509 F.2d 140 (5th Cir. 1975) (religious harassment); Lucero v. Beth Isr. Hosp. & Geriatric Center, 479 F. Supp. 452 (D. Colo. 1979) (racial harassment); Compston v. Borden, Inc., 424 F. Supp. 157 (S.D. Ohio 1976) (religious harassment).

62. *See* Barnes v. Costle, 561 F.2d 983, 992-93 (D.C. Cir. 1977); *Hearings*, *supra* note 1, at 350-51 (statement of J. Clay Smith, Jr., Acting EEOC Chairman); C. MACKINNON, *supra* note 3, at 93-94; Bryan, *supra* note 48, at 45-47.

63. "Discrimination against women is no less serious than other forms of prohibited discriminatory practices and is to be accorded the same degree of social concern given to any type of unlawful discrimination." H.R. REP. No. 238, 92d Cong., 1st Sess. 5, *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 2137, 2141.

64. One court concluded that the statutory language of Title VII required strict liability for racially motivated harassment of white hospital employees by their black supervisor, *see* Lucero v. Beth Isr. Hosp. & Geriatric Center, 479 F. Supp. 453, 455 (D. Colo. 1979) (citing Miller v. Bank of Am., 600 F.2d 211, 213 (9th Cir. 1979)). Another court adopted strict liability on policy grounds. *See* Compston v. Borden, Inc., 424 F. Supp. 157 (S.D. Ohio 1976). In *Compston* an employer was held strictly liable for the antisemitic comments of a supervisor: "When a person vested with managerial responsibilities embarks upon a course of conduct calculated to demean an employee before his fellows because of the employee's professed religious views, such activity will necessarily have the effect of altering the conditions of his employment." *Id.* at 160-61.

65. C. MACKINNON, *supra* note 3, at 211.

66. *Id.* at 93.

tion because the EEOC has stated that it will not pursue a case if the employer provides a suitable remedy on its own initiative.[67] The employee may be willing to accept the remedial action as a settlement and abandon his or her individual case.[68] Should the case go to trial, the employer may obtain a dismissal due to mootness, as the relief sought already had been provided, or suffer only a nominal judgment because it had mitigated the employee's damages.[69]

Furthermore, the strict liability standard will not subject the employer to Title VII liability for every ill-timed pass or flirtation by a supervisor, as some courts have claimed.[70] Such behavior is purely personal to the supervisor and is beyond the coverage of Title VII.[71] The employer is liable under Title VII only when the supervisor uses "his power as a supervisor to affect the subordinate's employment status in an effort to obtain compliance with his sexual advance,"[72] or when his behavior is sufficiently offensive and pervasive to constitute an offensive work environment.[73] Until the behavior reaches one of these levels, Title VII liability cannot exist.

The second standard for employer liability, the actual or constructive knowledge standard, was promulgated in *Tompkins v. Public Service Electric & Gas Co.*,[74] one of the first appellate court decisions considering sexual harassment. The supervisor in *Tompkins* informed a female employee during a job performance review session that she must accede to his sexual demands if they were to maintain a "satisfactory working relationship."[75] The employee reported these demands to senior management and requested a transfer to another department. After promising her a transfer to a similar job, management personnel assigned her to an inferior position and later fired her.[76]

The Court of Appeals for the Third Circuit, in reversing the dismissal of the employee's complaint by the district court,[77] established the actual or constructive knowledge test:

> [W]e conclude that Title VII is violated when a supervisor, *with the actual or constructive knowledge of the employer*, makes sexual ad-

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67. This means where an employer knows of acts of sexual harassment which have been committed by a supervisor or an agent and rectifies the actual results of those actions, a further remedy under Title VII would be unlikely in the administrative process. Clearly, the Commission would not sue for a remedy which has already been granted.
Hearings, *supra* note 1, at 351 (statement of J. Clay Smith, Jr., Acting EEOC Chairman).

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

69. Attanasio, *supra* note 48, at 34-36.

70. *See, e.g.*, Corne v. Bausch & Lomb, Inc., 390 F. Supp. 161, 163 (D. Ariz. 1975) ("[A]n outgrowth of holding such activity to be actionable under Title VII would be a potential federal lawsuit every time any employee made amorous or sexually oriented advances toward another."), *vacated*, 562 F.2d 55 (9th Cir. 1977).

71. Bryan, *supra* note 48, at 46-47.

72. *Id.* at 47.

73. *See infra* notes 98-102 and accompanying text.

74. 568 F.2d 1044 (3d Cir. 1977).

75. *Id.* at 1045.

76. *Id.* at 1046.

77. Tompkins v. Public Serv. Elec. & Gas. Co., 568 F.2d 1044 (3d Cir. 1977), *rev'g* 422 F. Supp. 553 (D.N.J. 1976).

> vances or demands toward a subordinate employee and conditions that employee's job status—evaluation, continued employment, promotion, or other aspects of career development—on a favorable response to those advances or demands, and the employer does not take prompt and appropriate remedial action after acquiring such knowledge.[78]

The employer acquires actual knowledge when management personnel are informed of the harassment through employee complaints or other forms of intra-office communication. Participation by management in the harassment itself also may create actual knowledge. Constructive knowledge will be inferred if the harassment is so open and pervasive that the employer can be presumed to know of it.[79]

The knowledge standard has been favored by most district courts considering sexual harassment cases.[80] In *Meyers v. I.T.T. Diversified Credit Corp.*,[81] for example, a Missouri federal district court concluded that "in order to impose liability on an employer for the discriminatory acts of its supervisor, the plaintiff must make the additional showing that the employer had actual or constructive knowledge of the discriminatory acts of its supervisor and did nothing to rectify the situation."[82]

The knowledge standard of liability is unique to sexual harassment cases; all other forms of Title VII discrimination by supervisory personnel have been adjudicated under the strict liability theory.[83] Proponents of the knowledge standard argue that sexual harassment is a unique form of discrimination and, therefore, is entitled to its own standard of liability.

The arguments favoring the knowledge standard, based largely on policy considerations, are articulated clearly in Judge MacKinnon's concurring opinion in *Barnes v. Costle*.[84] Although Judge MacKinnon agreed that the *Barnes* employer should be held liable, he rejected the majority's views on strict liability[85] and presented his analysis favoring the knowledge standard. Judge MacKinnon asserted that strict liability has been applied to Title VII cases for three reasons: (1) the employer is in the best position to explain the discriminatory behavior; (2) the employer, as master of the workplace, is in the best position to control and eliminate the discrimination; and (3) "the type of conduct

78. *Tompkins*, 568 F.2d at 1048-49 (emphasis added).

79. *Id.*

80. *See, e.g.*, Meyers v. I.T.T. Diversified Credit Corp., 527 F. Supp. 1064, 1068 (E.D. Mo. 1981); Vinson v. Taylor, 23 Fair Empl. Prac. Cas. (BNA) 37, 42 (D.D.C. 1980); Ludington v. Sambo's Restaurants, Inc., 474 F. Supp. 480 (E.D. Wisc. 1979); Neidhardt v. D.H. Holmes Co., 21 Fair Empl. Prac. Cas. (BNA) 452, 468 (E.D. La. 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).

81. 527 F. Supp. 1064 (E.D. Mo. 1981) (employer liable under Title VII for firing employee who had complained of supervisory sexual harassment and for failing to investigate those complaints).

82. *Id.* at 1068.

83. *See supra* notes 61-64 and accompanying text.

84. 561 F.2d 983, 995 (D.C. Cir. 1977) (MacKinnon, J., concurring).

85. *See supra* notes 53-55 and accompanying text.

at issue is questionable at best, and it is not undesirable to induce careful employers to err on the side of avoiding possible violative conduct."[86] He then argued that none of these rationales apply in the sexual harassment situation.

First, the employer is not in a position to know of, much less explain, cases of sexual harassment. Such harassment is "seldom a public matter"[87] and easily can occur outside the work place.[88] Sexual harassment, because of its private nature, does not have to be performed publicly to be effective. Moreover, certain forms of sexual harassment, such as sexual advances, are more effective when performed privately. As such, it is the employee, rather than the employer, who is most able to detect, report, and explain acts of sexual harassment. While racial, ethnic, and religious harassment also can be performed privately, they generally are more humiliating to the victim when performed publicly.

For similar reasons, the employer is often in no position to control the harassment as it occurs.[89] Again, most harassment occurs privately and, as such, is difficult to monitor and control. Judge MacKinnon did note that the employer can act to control harassment to some degree by voicing a strong policy against harassment, providing an effective and anonymous grievance procedure for reporting violations of this policy, and acting promptly to discipline the offending supervisor upon receipt of a valid complaint.[90] Even with such a procedure, however, the first step of reporting the harassment remains with the employee.

Finally, Judge MacKinnon argued that sexual harassment, unlike other forms of harassment, does not involve behavior that is "intrinsically offensive."[91] While all racial, ethnic, and religious harassment is offensive, all sexual advances are not. In cases of sexual advances, "it is the abuse of the practice, rather than the practice itself," that creates grounds for objection and forms the basis for a Title VII claim.[92]

For these reasons, Judge MacKinnon concluded that sexual harassment should be treated differently than other forms of discrimination under Title VII and is entitled to a distinct standard of liability. He considered the knowledge standard to be the fairest to the employer and to the employee. The employer is not liable for conduct of which it is unaware and over which it can exert little prior control.[93] Once informed, it can act promptly to rectify the

86. *Barnes*, 561 F.2d at 998 (MacKinnon, J., concurring).

87. *Id.* at 999 (MacKinnon, J., concurring).

88. This was the case in *Tompkins*; the supervisor made his demands while talking to the employee in a restaurant. Tompkins v. Public Serv. Elec. & Gas Co., 568 F.2d 1044, 1045 (3d Cir. 1977).

89. *See Barnes*, 561 F.2d at 1000 (MacKinnon, J., concurring).

90. *Id.* at 1000-01 (MacKinnon, J., concurring).

91. *Id.* at 1001 (MacKinnon, J., concurring).

92. *Id.* (MacKinnon, J., concurring). The EEOC has echoed this position: "[T]he same actions which, under one set of circumstances, would constitute sexual harassment, might under another set of circumstances, constitute acceptable social behavior." *Hearings*, *supra* note 1, at 348-49 (statement of J. Clay Smith, Jr., Acting Director of the EEOC).

93. *See* Conte & Gregory, *Sexual Harassment in Employment—Some Proposals Toward More Realistic Standards of Liability,* 32 DRAKE L. REV. 402, 411 n.18 (1982-83).

employee's injury and avoid liability. If it fails to act in this manner, liability will be imposed. No undue burden is placed on the employee, who can easily notify the employer of the harassment through a grievance procedure or any other form of communication to management.[94]

One commentator has suggested that this standard will combat sexual harassment more effectively than the strict liability standard.[95] The knowledge standard provides the employer with a real incentive to rectify acts of harassment immediately after notification to avoid subsequent liability. Under the strict liability standard, liability is imposed when the harassing act occurs; subsequent remedial action by the employer will not extinguish this liability. Hence, the employer lacks the incentive to provide a remedy on its own initiative. Moreover, the employer actually may be reluctant, even unwilling, to remedy the harassment because this might be viewed as an admission of guilt in subsequent litigation.[96] By this analysis, the knowledge standard, not the strict liability standard, provides the more effective tool to combat harassment.

These arguments in favor of the knowledge standard, however, are based on policy considerations alone and largely ignore the language of Title VII. Nonetheless, such an approach may be justifiable because of the limited legislative history on sex discrimination in general and the absence of legislative history on sexual harassment.[97] Because the courts, not Congress, recognized sexual harassment as actionable under Title VII, the courts have claimed the right to define the parameters of that cause of action.

The bifurcated standard of liability recognizes that sexual harassment exists in two forms. The early sexual harassment cases concerned only *quid pro quo* harassment in which the supervisor demanded sexual favors in exchange for continued employment and advancement. Recently, however, courts have recognized that a supervisor can perform harassment without demanding a *quid pro quo* from the employee. For example, the supervisor could make repeated derogatory or suggestive comments about the employee's sex or sexuality, which creates an offensive work environment for the employee.[98] This type of harassment was recognized as a distinct form of prohibited sexual harassment in *Bundy v. Jackson.*[99] In *Bundy* plaintiff was never fired, demoted, or denied promotion by the employer for refusing her supervisor's repeated sexual demands; she still was fully employed when suit was brought.[100] Nevertheless, the Court of Appeals for the District of Columbia Circuit found that

94. *Id.* at 412 n.18.

95. *See* Bryan, *supra* note 48, at 52.

96. *Id. See also Hearings*, *supra* note 1, at 568-72 (statement of Kenneth McCulloch, attorney, Townley & Updike) (knowledge standard encourages resolution of harassment through internal grievance procedures rather than through costly litigation).

97. *See supra* notes 18-20 and accompanying text.

98. This concept of *quid pro quo* and hostile work environment harassment was first articulated by Catherine MacKinnon. MacKinnon strongly supported the strict liability theory for all acts of sexual harassment by a supervisor and argued that the two forms of harassment should not be subject to separate theories of liability. *See* C. MACKINNON, *supra* note 3, at 211, 237.

99. 641 F.2d 934 (D.C. Cir. 1981).

100. *Id.* at 940-41.

sexual harassment as a regular condition of the plaintiff's employment violated Title VII.[101] The court remanded the case for determination of appropriate injunctive relief.[102]

The post-*Bundy* courts of appeals decisions on sexual harassment have recognized the distinction between *quid pro quo* and offensive work environment harassment and have adopted separate standards of employer liability for each. In the first of these cases, *Henson v. City of Dundee*,[103] the employee, a female radio dispatcher for a municipal police department, alleged that she had been subjected to repeated sexual demands by the chief of police and also had been denied admission to the police academy by the chief for refusing these demands.[104]

The Court of Appeals for the Eleventh Circuit, relying on *Bundy*, found that the repeated sexual advances had created an offensive work environment in violation of Title VII.[105] The court held that the actual or constructive knowledge standard of employer liability applied to this type of harassment: "Where, as here, the plaintiff seeks to hold the employer responsible for the hostile work environment created by the plaintiff's supervisor or coworker, she must show that the employer knew or should have known of the harassment in question and failed to take prompt remedial action."[106]

After resolving the offensive work environment claim, the court addressed the second charge. The court found that Henson had been barred from attending the police academy by the police chief for refusing his sexual demands and that this action was *quid pro quo* harassment.[107] The City was held strictly liable for this form of harassment: "We hold that an employer is strictly liable for the actions of its supervisors that amount to sexual harassment resulting in tangible job detriment to the subordinate employee."[108]

To justify this bifurcated standard, the court analyzed the differences between the two forms of harassment. The supervisor does not use his authority as supervisor to create an offensive work environment. His actions are identical to those of a coworker and should be subject to the same standard of employer liability used in coworker harassment cases, the actual or constructive knowledge standard.[109]

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101. *Id.* at 943-44. The *Bundy* court relied heavily upon Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972), which held that an employer violated Title VII by creating a racially discriminatory work atmosphere which caused psychological, but not economic, injury to the employee. *Bundy* has been much praised by commentators. *See* Note, *Expanding Title VII to Prohibit a Sexually Harassing Work Environment,* 70 GEO. L.J. 345 (1981); Note, *Eliminating the Need to Prove Tangible Economic Job Loss in Sexual Harassment Claims Brought Under Title VII,* 9 PEPPERDINE L. REV. 907 (1982); Note, *supra* note 48.

102. *Bundy*, 641 F.2d at 950.

103. 682 F.2d 897 (11th Cir. 1982).

104. *Id.* at 899-900.

105. *Id.* at 902.

106. *Id.* at 905.

107. *Id.* at 911-12.

108. *Id.* at 910.

109. *Id.* Federal courts are in agreement that the knowledge standard applies in cases in which an employee is sexually harassed by a coworker. *See, e.g.*, Katz v. Dole, 709 F.2d 251 (4th

When the supervisor conditions continued employment and promotion on submission to sexual demands, however, he is acting in an official capacity.[110] Because the employer clothed the supervisor with the authority to make *quid pro quo* harassment possible, the employer is strictly liable for abuses of that authority. As the court noted, "Because the supervisor is acting within at least the apparent scope of the authority entrusted to him by the employer when he makes employment decisions, his conduct can fairly be imputed to the source of his authority."[111]

This bifurcated standard was recently adopted by the Court of Appeals for the Fourth Circuit in *Katz v. Dole.*[112] Katz was an air traffic controller for the Federal Aviation Administration (FAA). The only female employee on her particular work shift, Katz was subjected to continual sexual harassment by her coworkers and her supervisor.[113] She complained about the harassment to the supervisior, but his response was further harassment.[114] Her complaints to higher level management were ignored.[115] She requested a transfer to another shift, but was informed by the supervisor of that shift that the transfer could be arranged only in exchange for sexual favors.[116] Katz was fired in 1981 for participating in the air traffic controllers strike against the FAA.[117]

The *Katz* court, reversing the district court, held that an offensive work environment existed in the FAA control room.[118] Relying on *Henson*, the court treated the offensive conduct by Katz's coworkers and supervisor under the knowledge standard of liability: "We believe that in a 'condition of work case' the plaintiff must demonstrate that the employer had actual or constructive knowledge of the existence of a sexually hostile working environment and took no prompt and adequate remedial action."[119]

Again relying on *Henson*, the court also held that "[w]here the plaintiff's complaint is of *quid pro quo* harassment by supervisory personnel, the em-

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Cir. 1983); Kyriaza v. Western Elec. Co., 461 F. Supp. 894 (D.N.J. 1978), *aff'd,* 647 F.2d 388 (3d Cir. 1981); Smith v. Rust Eng'g Co., 20 Fair Empl. Prac. Cas. (BNA) 1172 (N.D. Ala. 1978). This standard is also used to determine employer liability for coworkers' acts of racial and ethnic harassment. *See, e.g.*, DeGrace v. Rumsfeld, 614 F.2d 796 (1st Cir. 1980); Friend v. Leidinger, 588 F.2d 61 (4th Cir. 1978).

110. *Henson*, 682 F.2d at 910.

111. *Id.*

112. 709 F.2d 251 (4th Cir. 1983). Three federal district courts also have adopted the *Henson* standard. *See* Cummings v. Walsh Const. Co., 561 F. Supp. 872 (S.D. Ga. 1983) (complaint stated cause of action under *Henson* by alleging employer was aware of an offensive work environment but failed to provide a remedy); Ferguson v. E.I. duPont de Nemours & Co., 560 F. Supp. 1172 (D. Del. 1983) (company not liable, under both *Henson* and *Tompkins*, for an offensive work environment created by a supervisor because senior management promptly investigated and ended the harassment); Conley v. Consolidated Rail Corp., 561 F. Supp. 645 (E.D. Mich. 1982) (court expressly adopted *Henson* and rejected the EEOC guidelines in finding an employer liable for failing to correct offensive work environment after receiving notice).

113. *Katz*, 709 F.2d at 253.

114. *Id.*

115. *Id.*

116. *Id.* at 255 n.6.

117. *Id.* at 253.

118. *Id.* at 256.

119. *Id.* at 255.

ployer is strictly liable."[120] The court found that Katz had stated a claim for *quid pro quo* harassment by alleging that a supervisor had demanded sexual favors in exchange for a transfer to his shift. The court declined to adjudicate this claim, however, because Katz had stated a sufficient claim for condition of work harassment and would prevail on that claim.[121]

Katz is the most recent addition to the appellate case law concerning an employer's Title VII liability for on-the-job sexual harassment. The court adopted the *Henson* bifurcated standard, but did not present any arguments for doing so. The court simply articulated the standard and cited *Henson* and *Bundy* as authority.[122] It did not discuss the different standards adopted in *Miller* and *Tompkins*, nor were these cases cited in the opinion. The *Katz* court viewed *Henson* as the correct trend in Title VII sexual harassment cases and perceived no need to consider the two older standards.[123]

The underlying assumptions of the bifurcated standard are that supervisory harassment exists in two distinct forms, *quid pro quo* harassment and offensive work condition harassment, and that the fairest and most effective standard of liability must be assigned to each form, even at the expense of uniformity.[124] This distinction between these two forms must be valid for the bifurcated standard to have merit.

A careful analysis of the two types of sexual harassment reveals that this distinction between *quid pro quo* and offensive work environment harassment is justified. In *quid pro quo* harassment the supervisor is using his authority as supervisor to secure submission to his demands.[125] Without this express use of authority, the *quid pro quo* would be meaningless. A nonsupervisory employee would be unable to effect harassment of this type because he lacks the supervisor's ability to retaliate if his demands are not met. In contrast, a nonsupervisory employee is fully capable of creating an offensive work environment. In this type of harassment, the ability to harass is a function of the proximity of the victim to the harasser.[126] Supervisory authority plays no role; the supervisor and the coworker are equally capable of effecting such harassment.

It has been argued that the employee-victim may feel compelled to tolerate an offensive work environment created by a supervisor to a greater extent than one imposed by a coworker.[127] The employee may decline to complain about the offensive behavior, either to the supervisor directly or to higher management, because of intimidation or fear of reprisal by the supervisor. If so, the supervisor may be more successful with offensive work environment

120. *Id.* at 255 n.6.
121. *Id.*
122. *Id.* at 255.
123. *Id.*
124. *See supra* text accompanying notes 109-11.
125. *E.g.*, Henson v. City of Dundee, 682 F.2d 897, 910 (11th Cir. 1982).
126. *E.g.*, *id.* at 905.
127. Comment, *supra* note 48, at 544.

harassment than a coworker could.[128] The supervisor, however, is creating the hostile environment without express use of his power as supervisor. His ability to harass still depends on his proximity to the victim, rather than on his status in the work place. Furthermore, if the supervisor actually threatens reprisal, the situation is no longer limited to an offensive work environment, but has evolved into *quid pro quo* harassment.[129] An offensive work environment, by itself, lacks the threatened use of authority and offical action found in *quid pro quo* harassment.

This basic difference between the two forms of harassment warrants analyzing each form separately to determine the appropriate standards of liability. Such analysis establishes that, for policy reasons, *quid pro quo* harassment justifies imposing strict liability, while offensive work environment harassment should be subject to the knowledge standard.

The first policy rationale relates to the nature of the threat posed by each type of harassment. *Quid pro quo* harassment confronts the victim with the more serious threat: the risk of employment sanctions, such as termination, demotion, or denial of promotion. This immediate threat is absent in an offensive work environment; although such an environment is certainly unpleasant, the employee's employment continues uninterrupted and unthreatened.[130] Because *quid pro quo* harassment poses a more serious threat, the victim needs the stronger protection of strict liability.

Strict liability for *quid pro quo* harassment is further justified because the employer creates the supervisory authority that makes such harassment possible. *Quid pro quo* harassment involves an official act by the supervisor when deciding to fire, demote, or deny promotion to the victim. The employer vested the supervisor with the authority to perform this official act and, consequently, should be liable for misuse of that authority.[131]

Finally, strict liability would help prevent acts of *quid pro quo* harassment from occurring. Because the authority to effect *quid pro quo* harassment is derived from the employer, the employer is also in a stronger position to prevent such harassment by prudent regulation of that authority. The employer can detect and correct any retaliatory employment decision made by a supervisor as part of a *quid pro quo* harassment scheme by requiring documentation of the supervisor's rationale and by subjecting the decision to review by higher-level management. Strict liability would give the employee the requisite incentive to create these safeguards. Faced with the imposition of liability

128. *Id.*

129. *See, e.g.*, Cummings v. Walsh Const. Co., 561 F. Supp. 872, 878-79 (S.D. Ga. 1983) (supervisor created a *quid pro quo* by retaliating against an employee who reported to higher management supervisor's sexual advances). *See also* Tomkins v. Public Serv. Elec. & Gas Co., 568 F.2d 1044, 1045 (3d Cir. 1977).

130. In *Bundy*, for example, the employee still was fully employed at the time she brought suit. Bundy v. Jackson, 641 F.2d 934, 939 (D.C. Cir. 1981).

131. Under traditional agency law, a master is liable for the unauthorized torts of the servant when the agency relationship assists the servant in the commission of the tort. RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (1958).

upon occurrence of the *quid pro quo*, the employer would have a strong self-interest to ensure it never occurs.

These policies supporting strict liability are inapplicable to offensive work environment harassment. No official action is involved in creating an offensive work environment and the employer lacks the opportunities to create internal safeguards. At best, the employer can articulate a vigorous policy against sexual harassment and provide an effective procedure to report and resolve any violations.[132] The initiative to report such violations, however, remains with the employee; any procedure, however well designed, will remain ineffective unless the employee chooses to use it. Because an employer depends on notification by the employee before it can remedy an offensive work environment, strict liability for such harassment would place an undue burden on the employer. Unlike the *quid pro quo* situation, strict liability would subject the employer to liabilities for events over which it can exert little prior control. The knowledge standard avoids this undue burden since liability is not imposed unless the employer has notice of the harassment and subsequently refuses to provide a remedy.

Under this policy analysis, strict liability emerges as the appropriate standard of liability for supervisory *quid pro quo*, while the knowledge standard is better suited for offensive work environment harassment. Although this bifurcated standard is not consistent with other Title VII causes of action, sexual harassment is a unique form of discrimination and warrants this separate analysis and treatment.

This unique treatment of sexual harassment can be reconciled with the language of Title VII.[133] The bifurcated standard imposes liability on the employer for the discriminatory acts of its agents, as required by Title VII,[134] when that agent is acting in the course of his agency. If the supervisor uses the power of his agency to effect the harassment, the bifurcated standard imposes strict liability on the employer. When the supervisor makes no such use of this power, however, as in an offensive work environment, he is no longer acting as an agent and strict liability is not required.

The bifurcated test applied in *Henson* and *Katz* is derived from sound analysis of on-the-job sexual harassment and represents the better rule. In cases of *quid pro quo* harassment, strict liability clearly is warranted. The employer created the supervisory authority and, hence, is held liable for its misuse. Strict liability would not impose an undue burden on the employer because the employer itself possesses the means to control incidents of *quid pro quo* harassment through appropriate safeguards. Strict liability, moreover, would encourage employers to create such safeguards, and would give employees needed protection from this form of sexual harassment.

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132. *See supra* text accompanying notes 89-90.

133. One argument advanced against this unique approach is that the language in Title VII mandates strict liability in all cases of supervisory harassment. *See supra* text accompanying notes 58-60.

134. 42 U.S.C. § 2000e(b) (1976).

In cases of offensive work environment harassment, however, strict liability would not serve any policy or enforcement objective. No official action is involved in such harassment, eliminating the possibility of prior internal review by the employer. Thus, the employer is entitled to notice so that he can correct the situation. The knowledge standard provides such notice.

The bifurcated approach allows a reasoned analysis of each incident of sexual harassment and responds effectively, while avoiding the inequities that can occur under the pure strict liability and pure knowledge standards. Because a national standard of liability is essential for effective protection against supervisory sexual harassment, courts should follow the Eleventh and Fourth Circuits by adopting the bifurcated standard.

DAVID J. BURGE