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Stop Harassing Her or We'll Both Sue: Bystander Injury Sexual Harassment

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STOP HARASSING HER OR WE'LL BOTH SUE: BYSTANDER INJURY SEXUAL HARASSMENT

"This is an unusual case of sexual harassment -- not in that it happened, but in that [the plaintiff] sued."[1]

INTRODUCTION

In the summer of 1998, a federal district court upheld a jury damage award of $60,000 to a co-worker of two New York City transit employees who were sexually harassed by their supervisors.[2] The Plaintiff, Diane Leibovitz, sued the New York City Transit Authority for sexual harassment and retaliation under Title VII of the Civil Rights Act of 1964[3] although *she* was never the target of the harassment. Leibovitz alleged severe emotional distress after learning that a female car cleaner accused a Deputy Superintendent of harassment and after a third woman had been transferred upon suffering from the same harassment.[4] When Leibovitz confronted the alleged harasser and other high-level supervisors with the situation, she was warned by a supervisor that her complaints could be detrimental to her career.[5] As a result, Leibovitz suffered from depression, the inability to sleep, weight gain, and anxiety.[6] After a jury trial and defense motions for a directed verdict and new trial, U.S. District Judge Jack Weinstein found that Leibovitz had standing to sue under Title VII, that a hostile work environment materially altered the conditions of her employ-

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[1] Brief of Respondent Mechelle Vinson at 44, Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986) (No. 84-1979).

[2] *See* Leibovitz v. New York City Transit Auth., 4 F. Supp.2d 144, 154 (E.D.N.Y. 1998).

[3] 42 U.S.C. § 2000e et. seq. (1994) [hereinafter "Title VII" or "the Act"].

[4] *See* Leibovitz, 4 F. Supp.2d at 146. Notably, most of the harassment did not occur in front of Leibovitz; she learned of the situation after speaking with co-workers. *See id.* According to Professor Merrick T. Rossein of CUNY Law School, who represented Leibovitz:

> Virtually every day . . . women come to her and say, 'I'm being sexually harassed,' and she shouldn't have to put a shield around herself and ignore the fact that there is sexual and gender-based harassment to women all around her, and that this abusive and hostile environment impacts on her ability to do her work.

Andy Newman, *Transit Manager's Sexism Suit to Be Tried*, N.Y. TIMES, Nov. 19, 1997, at B3.

[5] *See Leibovitz*, 4 F. Supp.2d at 147.

[6] *See id.* at 152.

ment, and that she suffered mental and emotional injuries as a result of the harassing conduct.[7] This seminal decision allowing a bystander claim of hostile environment sexual harassment is the basis for this examination of a plaintiff's cause of action under Title VII for "bystander injury" caused by a hostile work environment from sexual harassment directed at other employees.[8]

As *Leibovitz* is the first reported case where an employee not the target of sexual harassment has successfully sued under the hostile environment cause of action, this Note examines both existing Title VII theories of harassment and the *Leibovitz* decision. This Note first traces the legislative history behind the prohibition against sex discrimination under Title VII and the development of sexual harassment claims under the statute. The Note then analyzes the bystander injury cause of action against this framework to demonstrate that an employee may properly state a claim for bystander injury from hostile environment sexual harassment. The analysis also identifies and responds to the complications in litigating this form of sexual harassment. From here, the analysis shifts to suggest particular elements that courts should require plaintiffs to prove in a bystander injury claim, and identifies employer strategies for the prevention of bystander injury claims. In sum, this Note demonstrates that an employee suffering from emotional distress caused by severe or pervasive harassment that alters the conditions of her employment may state a claim of bystander injury under Title VII even when she is not the target of the harassment.[9]

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[7] *See id.* at 148-153.

[8] The theory of bystander injury, also referred to as "vicarious" or "indirect" harassment, is relatively novel under Title VII. Although there are a handful of cases involving third-party claims for sexual favoritism or obscene posters, graffiti, or cartoons, this Note focuses on overt sexual harassment of co-workers that causes similar psychological injuries to a bystander employee. For an argument focusing on one aspect of the bystander claim, male standing to sue for female harassment, see N. Morrison Torrey, *Indirect Discrimination Under Title VII: Expanding Male Standing to Sue for Injuries Received as a Result of Employer Discrimination Against Females*, 64 WASH. L. REV. 365 (1989).

[9] A bystander injury victim would not state a claim solely for retaliation under Title VII because the bystander injury plaintiff does not necessarily suffer from a tangible employment action for opposing a violation of Title VII. The Act provides:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because [the employee] has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a) (1994). Although Leibovitz alleged a violation under this section, the court did not hold for the plaintiff based on her retaliation claims.

Although this author has used the female sex in stating the conclusion here, it should be noted that the cause of action is also available to male plaintiffs. Despite the fact that the vast majority of reported sexual harassment decisions involve female victims, this Note will properly alternate between the sexes when referring to potential bystander injury plaintiffs.

I. BACKGROUND

Title VII of the Civil Rights Act of 1964 states that "[i]t shall be an unlawful employment practice for an employer to . . . discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[10] Noticeably absent, however, is any proscription against "sexual harassment" or a "hostile work environment." Consequently, the statute is also silent on liability for bystander injury sexual harassment. Although Title VII does not prohibit sexual harassment on its face, the Supreme Court first recognized the use of sex discrimination as a basis for sexual harassment litigation in 1986.[11] The interpretive decisions by the Supreme Court, however, make no reference to a "bystander injury" claim and few lower courts have addressed the viability of the claim. For these reasons, the hostile environment bystander injury theory remains a relatively untested new product of Title VII jurisprudence.

A. The Limits of Title VII Legislative History on Sex Discrimination

The prohibition of sex discrimination under Title VII has a profoundly limited legislative history which is largely due to the fact that the term "sex" was added to the string of protected classes "at the last minute on the floor of the House of Representatives."[12] There is substantial skepticism over the motive behind the amendment; shortly after the passage of the Act, many scholars reviewing the Congressional Record wrote that the addition of "sex" was a political attempt to defeat the entire Bill.[13]

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[10] 42 U.S.C. § 2000e-2(a)(1) (1994).

[11] *See* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 73 (1986) (holding that a claim of hostile environment sexual harassment is a form of sex discrimination that is actionable under Title VII).

[12] *Id.* at 63 (citing 110 CONG. REC. H2577-84 (daily ed. Feb. 8, 1964)). Virginia Congressman Howard Smith, Chairman of the House Rules Committee, proposed the amendment that would add "sex" to the protected classifications. A prior attempt to amend the bill was defeated in the Judiciary Committee. *See* Leo Kanowitz, *Sex-Based Discrimination in American Law III: Title VII of the 1964 Civil Rights Act and the Equal Pay Act of 1963*, 20 HASTINGS L.J. 305, 310 (1968); Robert Stevens Miller, Jr., *Sex Discrimination and Title VII of the Civil Rights Act of 1964*, 51 MINN. L. REV. 877, 880 (1967).

[13] *See, e.g.*, Kanowitz, *supra* note 12, at 311; Miller, *supra* note 12, at 880. Interestingly, however, Congressman Smith asserted that:

> Now, I am very serious about this amendment. It has been offered several times before, but it was offered at inappropriate places in the bill. Now, this is the appropriate place for this amendment to come in. I do not think it can do any harm to this legislation; maybe it can do some good. I think it will do some good for the minority sex.

U.S. EQUAL OPPORTUNITY EMPLOYMENT COMM'N, LEGISLATIVE HISTORY OF TITLES VII AND XI OF CIVIL RIGHTS ACT OF 1964 3213 (1978); *see also* Angela Onwauchi-Willig, *When Different Means the Same: Applying a Different Standard of Proof to White Plaintiffs Under the*

The author of the amendment, Congressman Howard Smith of Virginia, was generally opposed to the entire Act.[14] One scholar evaluating the history of the amendment concluded that, "[i]n the context of [the] debate and of the prevailing Congressional sentiment when the amendment was offered, it is abundantly clear that a principal motive in introducing it was to prevent passage of the basic legislation being considered by Congress, rather than solicitude for women's employment rights."[15] There was considerable opposition to the addition of sex to the protected classes in the bill, but most members of Congress were not necessarily opposed to the change and many simply asserted that it "ought to receive separate legislative treatment."[16] Both men and women rose in opposition to the amendment, most of whom were either suspicious of Congressman Smith's motives, or were in support of legislation prohibiting sex discrimination but believed it would be proper to leave the issue for subsequent consideration.[17]

The debate in the Congressional Record offers little guidance for interpretation, as the House Rules Committee debate on the amendment lasted only two hours[18] and the amendment passed in the House by a vote of 168-133.[19] The Senate debate on the entire Act lasted for several months, yet the discussion on sex discrimination was also very limited. This is in part because the Senate, in expediting the passage of the Act, did not challenge the addition of "sex" to the pro-

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McDonnell Douglas *Prima Facie Case Test*, 50 CASE W. RES. L. REV. 53, 67 (1999) (asserting that Title VII was "a ploy for defeating Title VII's prohibition on race discrimination"). *But see* Robert C. Bird, *More Than a Congressional Joke: A Fresh Look at the Legislative History of Sex Discrimination of the 1964 Civil Rights Act*, 3 WM. & MARY J. WOMEN & L. 137, 161 (1997) (arguing that there is "overwhelming evidence" that the addition of sex to the Act was not merely a joke, but a genuine effort to advance women's rights).

[14] *See* Kanowitz, *supra* note 12, at 310-11. Congresswoman Edith Green of Oregon asserted her surprise and suspicion that the amendment was offered in stating that "those gentlemen of the House who are most strong in their support of women's rights this afternoon, probably gave us the most opposition when we considered the bill which would grant equal pay for equal work just a very few months ago." U.S. EQUAL OPPORTUNITY EMPLOYMENT COMM'N, *supra* note 13, at 3221 (alluding to the passage of the Equal Pay Act of 1963).

[15] Kanowitz, *supra* note 12, at 311 (citations omitted).

[16] Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64 (citing 110 CONG. REC. H2577 (daily ed. 1964) (statement of Rep. Celler) (quoting letter from U.S. Department of Labor)).

[17] Congresswoman Green, a leading proponent of the Equal Pay Act passed one year earlier, stated that:

> As much as I hope the day will come when discrimination will be ended against women, I really and sincerely hope that this amendment will not be added to this bill. It will clutter up the bill and it may later—very well—be used to help destroy this section of the bill by some of those very people who today support it.

Miller, *supra* note 12, at 882 (quoting 110 CONG. REC. H2581 (daily ed. Feb 8, 1964)). Miller also points out that the ten members of Congress who voted against the amendment in committee voted for passage of the Act. *See id.*

[18] *See id.*

[19] *See id.* at 882 n.30.

tected classes.[20] Consequently, the courts have been constrained in using the legislative history to interpret the Act and, as a result, have broadly construed the protections for sex discrimination.

B. The Recognition of Sexual Harassment as Sex Discrimination

Since the passage of the Civil Rights Act of 1964, courts have been struggling to determine what conditions give rise to sex discrimination. In a landmark decision in 1986, the Supreme Court in *Meritor Savings Bank, FSB v. Vinson* held that a "hostile environment" created by sexual harassment may constitute sex discrimination under Title VII.[21] The Court recognized the theories of "quid pro quo" and "hostile environment" harassment espoused by scholars and women's rights groups.[22] Relying on lower court and Equal Employment Opportunity Commission ("EEOC") findings that sexual harassment has the effect of discriminating against women in employment, the Court stated that, "[f]or sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"[23]

This broad reading of Title VII can also be seen in subsequent Supreme Court decisions clarifying the sexual harassment cause of action. In 1993, the Court in *Harris v. Forklift Systems, Inc.*, affirmed the reasoning in *Meritor* while facing the narrow question of whether a plaintiff alleging sexual harassment must suffer from serious psychological injury to state a claim under Title VII.[24] In holding that a

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[20] *See id.* at 882-83.

[21] 477 U.S. 57, 73 (1986).

[22] *See, e.g.*, Brief of the Women's Bar Association of the State of New York as Amicus Curiae at 3, Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986) (No. 84-1979); Brief Amicus Curiae of the Women's Legal Defense Fund, et. al. at 4, Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986) (No. 84-1979); Brief for the American Federation of Labor and Congress of Industrial Organizations, The Coal Employment Project, The Coalition of Labor Union Women and the National Education Assocation as Amici Curiae at 19, Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986) (No. 84-1979). For a discussion of the contributions of women's rights advocates to judicial recognition of sexual harassment as sex discrimination, see Katherine M. Franke, *What's Wrong With Sexual Harassment?*, 49 STAN. L. REV. 691, 692-93 (1997) (discussing the contributions of Susan Estrich and Catherine MacKinnon).

[23] *Meritor*, 477 U.S. at 67 (quoting Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982)). The Court also draws on reasoning from the Fifth Circuit in Rogers v. Equal Employment Opportunity Comm'n, 454 F.2d 234 (5th Cir. 1971). *See id.* at 67. The *Rogers* court stated that:

> [T]he phrase "terms, conditions, or privileges of employment" . . . is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination . . . . One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers.

454 F.2d at 238.

[24] 510 U.S. 17, 20 (1993).

plaintiff-employee need not suffer severe emotional or psychological injury, the court reasoned that a plaintiff who has suffered distress or an adverse employment action may state a claim if the conduct was objectively severe or pervasive, and the victim subjectively perceived the environment to be abusive.[25] This determination requires courts to look at the totality of the circumstances giving rise to the claim.[26] Moreover, the Court reiterated the finding in *Meritor* that "'[t]he phrase 'terms, conditions, or privileges of employment' evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment,' which includes requiring people to work in a discriminatorily hostile or abusive environment."[27]

During the 1998 term, the Supreme Court handed down three sexual harassment decisions that create new procedures to resolve the differing Circuit Court approaches to employer liability for sexual harassment by supervisory personnel.[28] These decisions shed light on the interpretation of harassment claims under Title VII.

In *Burlington Industries, Inc. v. Ellerth*, the Court held that "[a]n employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee."[29] Furthermore, to incorporate the goals of Title VII and EEOC policy—preventing discrimination, promoting conciliation, and encouraging the development of grievance procedures—the court also held that when no tangible employment action has been taken against the victim, the employer has an affirmative defense to liability or damages.[30] The affirmative defense consists of two elements which must be shown by must be shown by the employer: "(a) that the

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[25] *See id.* at 21-22.

[26] *See id.* at 23. The Court clarified this point, stating that determining factors may include:

> the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. The effect on the employee's psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive. But while psychological harm, like any other relevant factor, may be taken into account, no single factor is required.

Id.

[27] *Id.* at 21 (citing *Meritor*, 477 U.S. at 64 (quoting Los Angeles Dep't. of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978) (some internal quotation marks omitted)).

[28] *See* Faragher v. City of Boca Raton, 524 U.S. 775 (1998); Burlington Indus. v. Ellerth, 524 U.S. 742 (1998); Oncale v. Sundowner Offshore Servs., 523 U.S. 75 (1998).

[29] *Ellerth*, 524 U.S. at 765. Presumably, in the case of non-supervisory harassment, employer liability is determined by the "knew or should have known" standard. *See* 29 C.F.R. § 1604.11(d) (1998) (establishing a negligence standard for co-worker to co-worker harassment).

[30] *See Ellerth*, 524 U.S. at 765. The affirmative defense is not available "when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment." *Id.*

must be shown by the employer: "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise."[31] If both elements of the affirmative defense are not shown, however, the employer may then be held vicariously liable for the actions of a supervisor.[32] An example of this defense was seen in *Faragher v. Boca Raton*, where the Court held that the city's failure to disseminate its sexual harassment grievance procedures constituted a lack of reasonable care to prevent harassing conduct.[33] The City of Boca Raton, therefore, was not able to successfully invoke the affirmative defense.[34]

In the third Title VII decision of 1998, the Supreme Court unanimously reversed a Fifth Circuit Court of Appeals holding that Title VII does not extend to "same-sex" harassment.[35] The Court, in *Oncale v. Sundowner Offshore Services, Inc.*, stated that if a plaintiff can show harassment was directed at his gender to which members of the other gender were not affected, a Title VII claim is available even if the harasser was the same sex as the victim.[36] The Court began its analysis by stating that same-sex harassment "was assuredly not the principal evil Congress was concerned with when it enacted Title VII."[37] Notwithstanding this finding, the Court reasoned that:

> statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed. Title VII prohibits "discrimination . . . because of . . . sex" in the "terms" or "conditions" of employment. Our holding that this includes sexual harassment *must extend to sexual harassment of any kind that meets the statutory requirements.*[38]

The Court also emphasized the importance of the context of harassment, asserting that "[t]he real social impact of workplace behavior

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[31] *Id.*

[32] *See id.*

[33] *See Faragher*, 524 U.S. at 804-06.

[34] *See id.* at 805-08.

[35] Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 75 (1998).

[36] *See id.* at 79. While same-sex harassment is often construed as "homosexual" harassment, the Court cautioned that sexual attraction is not the only basis for sexual harassment; a heterosexual harasser could be targeting members of his own gender because of general hostility toward men. *See id.* at 79-81.

[37] *Id.* at 79.

[38] *Id.* at 79-80 (emphasis added) (citations omitted).

often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed."[39]

C. EEOC Recognition of Bystander Injury Under Title VII

Title VII requires the EEOC to both develop guidelines for the investigation and conciliation of allegations of Title VII violations and to prosecute discrimination claims on behalf of the government.[40] While the EEOC Guidelines are not controlling in federal courts, they are often regarded as highly persuasive when determining policies and procedures for handling Title VII claims.[41] Current EEOC guidelines state that "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when . . . such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."[42]

The EEOC recognizes the theory of bystander injury under Title VII, including those cases involving sexual harassment claims. The agency has concluded that sexual harassment occurs under many different circumstances, and that "[t]he victim does not have to be the person harassed but *could be anyone affected* by the offensive conduct."[43] Moreover, this policy is consistent with the EEOC policy statement on liability for "sexual favoritism," a theory that also has been recognized under Title VII.[44] The EEOC has determined that

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[39] *Id.* at 81-82.

[40] *See* 42 U.S.C. § 2000e-5 (a) (1994).

[41] *See* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986) ("[T]hese guidelines, 'while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'") (quoting Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 141-42 (1976) (citation omitted)).

[42] 29 C.F.R. § 1604.11(a) (1998). The guidelines also track the Supreme Court's requirements in *Harris* in stating that "[i]n determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred." 29 C.F.R. § 1604.11(b) (1998).

[43] EEOC, *Facts About Sexual Harassment* (last modified Jan. 15, 1997) <http://www.eeoc.gov/facts/fs-sex.html> (emphasis added).

[44] *See* Broderick v. Ruder, 685 F. Supp. 1269, 1277 (D. D.C. 1988) (holding that preferential treatment to those who submitted to a supervisor's sexual advances may constitute hostile environment to other employees); *see also EEOC: Policy Guide on Employer Liability for Sexual Favoritism Under Title VII*, 8 Lab. Rel. Rep. (BNA) No. 694, 405:6817, 405:6819 (Jan 12, 1990) [hereinafter *EEOC Policy Guide*] (explaining that "sexual favoritism" might form a basis for implicit "quid pro quo" sexual harassment by "communicat[ing] a message that the way for a woman to get ahead in the workplace is by engaging in sexual conduct or that sexual solicitations are a prerequisite to their fair treatment"); Marian C. Haney, *Litigation of a Sexual Harassment Case After the Civil Rights Act of 1991*, 68 NOTRE DAME L. REV. 1037, 1041 (1993) (outlining sexual favoritism claims under Title VII).

widespread favoritism in the workplace may constitute hostile environment harassment and considers this conduct to be sex discrimination. The standing EEOC policy states that:

> If favoritism based upon the granting of sexual favors is widespread in a workplace, both male and female colleagues who do not welcome this conduct can establish a hostile work environment in violation of Title VII regardless of whether any objectionable conduct is directed at them and regardless of whether those who were granted favorable treatment willingly bestowed the sexual favors.[45]

This policy reflects the EEOC's determination that sexual favoritism in the workplace can give rise to hostile environment claims for "[b]oth men and women who find this offensive."[46]

D. The Emergence of "Bystander Injury" in Title VII Case Law

Amid the litany of sexual harassment claims and the EEOC's determination that bystander injury is actionable under the Act, the Supreme Court has never considered whether an employee may state a bystander injury claim under Title VII. The claim in *Leibovitz v. New York City Transit Authority* demonstrates that litigators are beginning to explore this fairly uncharted territory of bystander injury claims.

The *Leibovitz* court incorporated a three-step analysis for the bystander theory. The court was concerned with determining (a) whether the plaintiff was an "aggrieved party" under the law; (b) whether the plaintiff suffered injury to support a damage award; and (c) the extent of employer liability.[47] The court looked to the enforcement provisions of Title VII and the injuries Leibovitz allegedly suffered from the hostile work environment to determine that she met both the standing requirements and the substantive elements required by the statute.[48] Furthermore, in upholding the Transit Authority's

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[45] *EEOC Policy Guide, supra* note 44, at 405:6819. Notably, these guidelines were issued under then-Chairman Clarence Thomas.

[46] *Id.* at 405:6820; *see also* BARBARA LINDEMANN & DAVID D. KADUE, SEXUAL HARASSMENT IN EMPLOYMENT LAW 212 (1992) (stating that men and women who object to an "'atmosphere demeaning to women' can establish a violation if the conduct is sufficiently . . . pervasive to alter the conditions of their employment").

[47] Leibovitz v. New York City Transit Auth., 4 F. Supp.2d 144, 146 (E.D.N.Y. 1998) (examining whether emotional distress caused by the harassment of other women was enough to support a claim for hostile work environment).

[48] *See id.* at 148-53. The court approached the damages award pursuant to New York law, finding that Plaintiff's testimony about the resulting depression, sleeplessness, and anxiety, as well as the corroborating testimony of an expert witness psychiatrist, supported the award, which was found not to be excessive under federal or state law. *See id.* at 153. The court relied

liability in the case, the court stated that "the jury could find that the Authority's procedures for preventing harassment and for dealing with existing harassment were not reasonable."[49] As this decision was handed down prior to the Supreme Court's ruling in *Ellerth*, the court did not use the "tangible employment action" and affirmative defense analysis from that case.[50]

In support of its reasoning, the *Leibovitz* court relied upon case law that suggests support for a bystander injury theory. The court found that "[d]icta from other circuits support a broad prohibition of hostile work environments encompassing gender harassment that degrades the workplace, regardless of its initial direct targets."[51] In fact, only a few courts have wrestled with the concept of bystander injury and whether such claims should be recognized under Title VII.

The strongest support for a bystander injury claim is found in *Vinson v. Taylor*, where the D.C. Circuit stated 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."[52] The significance of the dictum in this case is readily apparent: on appeal with a new case name, the Supreme Court in *Meritor* affirmed the D.C. Circuit's reversal of the trial court's narrow view of what constitutes sex discrimination under Title VII.[53] The *Meritor* court did not make mention of the dictum, but instead affirmed the D.C. Circuit's ruling that the district court failed to consider the hostile environment theory, and further empha-

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on the "deviates materially from what would be reasonable compensation" standard in applying the state law controlling the review of jury awards. *Id.* at 153 (citing Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415 (1996)).

[49] *Id.* at 154.

[50] *See generally* Burlington Indus. v. Ellerth, 524 U.S. 742 (1998). Applying the rule in *Ellerth*, however, the Transit Authority would have the affirmative defense available because Leibovitz did not suffer from a tangible employment action. Although Judge Weinstein was not able to apply the rule subsequently announced in the *Ellerth* decision, his opinion essentially incorporates the affirmative defense analysis in concluding that the "jury could find that the Authority's procedures for preventing harassment and for dealing with existing harassment were not reasonable," *Leibovitz*, 4 F. Supp.2d at 154, which mirrors the "reasonable care to prevent and correct promptly any sexually harassing behavior" requirement in *Ellerth*. *Ellerth*, 524 U.S. at 765. Because this prong of the *Ellerth* defense was not shown, the affirmative defense would not have absolved the Transit Authority of vicarious liability and the conclusion in *Leibovitz* would not be affected.

[51] *Leibovitz*, 4 F. Supp.2d at 151 (citations omitted). However, it is important to note that all of these cases involved a plaintiff who had been the target of sexual harassment. At issue in most of these cases was the determination of what evidence was relevant to show the existence of a hostile work environment in which the plaintiff was a direct target of harassing conduct.

[52] 753 F.2d 141, 146 (D.C. Cir. 1985), *aff'd sub nom. on other grounds*, Meritor Sav. Bank, FSB. v. Vinson, 477 U.S. 57 (1986). The court also cited to EEOC Decision No. 71-909, Fair Empl. Prac. Cas. (BNA) at 269-70, which states that habitual racial insults against blacks creating a hostile working environment is a violation of white employees' rights under Title VII. *Id.* at n.41.

[53] *See Meritor*, 477 U.S. at 63.

sized that "[t]he gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome.'"[54]

The remaining cases cited by *Leibovitz* were primarily concerned with the type of evidence that may properly be considered in determining what constitutes a hostile work environment.[55] As in *Meritor*, the plaintiff in these cases was the target of the harassment. In *Hall v. Gus Constr. Co.*, three women working as traffic controllers at a road construction site claimed hostile environment sexual harassment.[56] The Eighth Circuit stated that Congress' "intention [was] to define discrimination in the broadest possible terms," and that "evidence of sexual harassment directed at employees other than the plaintiff is relevant to show a hostile work environment."[57] Additionally, the Tenth Circuit emphasized in *Hicks v. Gates Rubber Co.* that "one of the critical inquiries in a hostile environment claim must be the *environment*."[58] Several federal district courts confronted with the evidentiary question have also employed the same reasoning as the Eighth and Tenth Circuits.[59]

Outside of the federal courts, a California appeals court recognized the possibility of a bystander injury claim.[60] In *Fisher v. San Pedro Peninsula Hosp.*, the court found that although a bystander-

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[54] *Id.* at 68 (citing 29 C.F.R. § 1604.11(a) (1985)).

[55] The *Leibovitz* court also cited to *Henson v. City of Dundee*, 682 F.2d 897, 902 (11th Cir. 1982), where the Eleventh Circuit concluded that "a hostile or offensive atmosphere created by sexual harassment can, standing alone, constitute a violation of Title VII." The context of this dictum was the court's holding that a plaintiff need not show a tangible job detriment to state a claim under Title VII. *See id.*

[56] 842 F.2d 1010 (8th Cir. 1988). In this case, two of the three women were subjected to derogatory comments, "mooning," sexual propositions, and offensive physical contact by their male co-workers. *See id.* at 1011-12. The third woman was subjected to offensive incidents such as mooning, lewd comments, and men urinating in the gas tank of her car. *See id.*

[57] *Id.* at 1014-15.

[58] 833 F.2d 1406, 1415 (10th Cir. 1987) (emphasis in original). *But see* Jones v. Flagship Int'l, 793 F.2d 714, 720 (5th Cir. 1986) (suggesting that sexually harassing incidents reported by other employees is relevant only if the incidents affect the psychological well-being of the plaintiff).

[59] *See, e.g.*, Stockett v. Tolin, 791 F. Supp. 1536, 1553 (S.D. Fla. 1992) ("The requirement that the sexual harassment be pervasive both permits and may require the introduction of evidence of Tolin's similar harassment of other women."); Sims v. Montgomery County Comm'n, 766 F. Supp. 1052, 1074 (M.D. Ala. 1990) ("[T]he court has not limited its perspective and assessment to the effect of the harassment on the intended individuals, that is, the persons at whom it has been directed. A person may be a victim of sexual harassment without being its intended victim; the challenged conduct need not be directed at the complaining individual.") (citing Waltman v. Int'l Paper Co., 875 F.2d 468, 477 (5th Cir. 1989)); Shrout v. Black Clawson Co., 689 F. Supp. 774, 776 (S.D. Ohio 1988) (holding that evidence of other sexual harassment in company is admissible to show hostile environment); EEOC v. Gurnee Inn Corp., 48 FEP Cases 871 (N.D. Ill. 1988) ("Observance of sexual harassment of others can, and in this case I conclude did, create a 'hostile working environment.'"); Delgado v. Lehman, 665 F. Supp. 460, 468 (E.D. Va. 1987) (stating that evidence that a male perpetrator harassed women other than plaintiff is useful in establishing a hostile work environment).

[60] Fisher v. San Pedro Peninsula Hosp., 262 Cal. Rptr. 842, 852-55 (Cal. Ct. App. 1989).

type claim may be available, it would require a higher showing than a claim for direct harassment. In holding that the plaintiff did not state a claim for hostile environment sexual harassment, the court intimated that an employee could bring a bystander harassment claim if one could show that they "personally witnessed the harassing conduct and that it was in [the] immediate work environment."[61]

E. A Rejection of Third Party, or "Associational," Claims

Courts have rejected hostile environment claims that have been labeled "associational" injury under Title VII.[62] In *Childress v. City of Richmond*, the Fourth Circuit en banc affirmed a district court ruling that white male police officers did not have standing to bring an action for discrimination against female and black officers by the officers' supervisor.[63] The court rejected the notion that a "breakdown of *esprit de corps* that results from working in a racially or sexually polarized environment" was sufficient injury to invoke jurisdiction under Title VII.[64] Additionally, the Seventh Circuit has rendered two decisions rejecting third-party claims. In *Drake v. Minnesota Mining & Mfg.*, the court held that white employees did not show evidence of a hostile work environment or race discrimination as a result of their injured association with black co-workers subjected to race discrimination.[65] Similarly, in *Bermudez v. TRC Holdings, Inc.*, a white female manager at an employment agency sued the company for race and sex discrimination.[66] Although she was not the target of race or sex discrimination, she charged that her co-workers and the company engaged in discriminatory practices such as searching for white candidates for placement with certain clients.[67] The court rejected her Title VII claims, holding that she was not the target of discrimination

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[61] *Id.* at 853; *see also infra* Part II.C.2 (discussing the California Court of Appeals' decisions in *Fisher v. San Pedro Peninsula Hosp.*, 262 Cal. Rptr. 842 (Cal. Ct. App. 1989), and *Beyda v. City of Los Angeles*, 76 Cal. Rptr. 2d 547 (Cal. Ct. App. 1998)).

[62] *See, e.g.*, Leibovitz v. New York City Transit Auth., 4 F. Supp.2d 144, 151 (E.D.N.Y. 1998) (distinguishing a case where association with mistreated co-workers did not in and of itself establish a hostile work environment).

[63] 134 F.3d 1205, 1207 (4th Cir. 1998).

[64] *Id.* at 1208.

[65] 134 F.3d 878, 884-85 (7th Cir. 1998) (stating that recovery for hostile work environment harassment under Title VII requires the plaintiff to establish that he or she was subjected to a hostile work environment because of his or her membership in a protected class).

[66] 138 F.3d 1176 (7th Cir. 1998).

[67] *See id.* at 1180. The plaintiff alleged that one co-worker bragged over receiving gifts from an employer for whom she accommodated his preferences for white-only candidates and that another employee commented that he didn't want to send his son to school in Minneapolis because the people were "faggots" and feared that his son "would come home wearing dresses." *Id.*

and did not suffer from sex discrimination. Judge Easterbrook, writing for the court, stated that:

> [The plaintiff] is not entitled to enforce [the candidate's] rights and does not claim that she was retaliated against for sticking up for the rights of black co-workers or clients. Her claim is not that white women were harassed on account of *their* race or sex, but that persons of any race or sex who were opposed to discrimination felt uncomfortable. We have never recognized this as a valid theory of discrimination under Title VII.[68]

Similarly, a Magistrate Judge in Kansas rejected the proposed joinder of a male plaintiff in a hostile work environment action brought by female co-workers. The judge ruled that "[the plaintiff must] show that *he belongs to a protected group*; he was subject to unwelcome sexual harassment; and such harassment affected a term, condition, or privilege of employment."[69] The judge added that the plaintiff "[i]n piggyback fashion . . . would add a sort of bystander tort action to the statutory discrimination claims of others. The court finds no acceptable rationale for finding this kind of claim to be contemplated by Title VII."[70]

Although some courts remain uncertain as to the merits of the bystander theory, it is readily apparent from the Supreme Court sexual harassment cases and their progeny—as well as from the EEOC guidelines—that there is considerable support for a Title VII bystander injury claim. With little guidance from the Supreme Court or the Circuit Courts of Appeal, litigators are faced with the prospect of shaping the future of Title VII sexual harassment law.

II. BYSTANDER INJURY: A "PRISTINE HOSTILE WORK ENVIRONMENT" CLAIM[71]

Like a toxin released into a ventilation system, sexual harassment can poison the entire workplace environment. Clean lines cannot be drawn between the targets of harassment and those who ob-

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[68] *Id.* (citations omitted).

[69] Ramirez v. Bravo's Holding Co., 67 FEP Cases 733, 734 (D. Kan. 1995) (emphasis added).

[70] *Id.* at 735. *But see* Sims v. Montgomery County Comm'n, 766 F. Supp. 1052, 1074 (M.D. Ala. 1990) (finding that victims of sexual harassment targeted at women "include those male [employees] who harbor a respect and concern for all their fellow [employees], irrespective of their sex, and who find offensive to their conscience, and thus intolerable, an environment in which all [employees], regardless as to their sex, cannot share equally in the opportunities of employment").

[71] Leibovitz v. New York City Transit Auth., 4 F. Supp.2d 144, 146 (E.D.N.Y. 1998).

serve the physical and emotional abuse. This Note concludes that courts should recognize a bystander injury claim for sexual harassment and will show: (1) that Title VII must be read to protect employees not the target of words and actions that discriminate against other employees in the terms or conditions of their employment; (2) the elements a plaintiff must prove in a claim of bystander injury; and (3) how employers may prevent bystander injury harassment and litigation.

A. Bystander Injury Is Actionable Under Title VII

In concluding that the bystander injury sexual harassment claim is actionable under Title VII, this analysis will point to support from the legislative history behind the enactment of Title VII, Supreme Court cases interpreting the Act, EEOC guidelines, and the existence of other forms of indirect hostile environment sex discrimination.

1. The Legislative History of Title VII Supports the Bystander Injury Claim

As shown in Part I.A., the limited legislative history behind the inclusion of "sex" in Title VII provides little to no insight into the scope of the protections against sex discrimination.[72] The question then remains: To what extent did Congress intend to protect employees from discrimination based on their gender? One might conclude that because Congress so hastily added sex to the list of protected classifications (and perhaps only as a political blunder), courts should construe the protection as narrowly as possible.[73] More persuasive,

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[72] *See* Miller, *supra* note 12, at 882-83 (stating that "legislative history is little help to the Equal Employment Opportunity Commission in administering that part of Title VII forbidding sex discrimination").

[73] While it is beyond the scope of this writing to discuss the virtues and failings of utilizing congressional intent to develop Title VII jurisprudence, there is little merit to this argument. If one were to base the analysis on the allegedly malevolent intent of the amendment's sponsor, the conclusion would be that the prohibition of sex discrimination should not even be recognized, for the "intent" was to defeat the entire bill and not to extend protection against gender discrimination.

Although this conclusion may seem perfectly consistent, it should be remembered that "[i]t is easy enough to discover expressions of the views of Congress's subgroups and factions; it is far more difficult to discern the will of Congress as a collective body." Roger H. Davidson, *What Judges Ought to Know About Lawmaking in Congress*, *in* JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY 90, 115 (Robert A. Katzmann ed., 1988). That Congress was unable to resolve differences between members leaves the courts to properly determine the will of the Congress, not the motivations of those who author ambiguous or contradictory language. *See id.*

For a collection of arguments on the function and propriety of legislative history, see Robert A. Katzmann, *Summary of Proceedings*, *in* JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY 170-75 (Robert A. Katzmann ed., 1988) (basing his arguments on a

however, is the conclusion that it should be construed at least as broadly as the other enumerated classifications. One scholar writing on the inclusion of sex into the bill concluded that:

> [W]hen Congress adopts any legislation, especially a law with such important ramifications, one must infer a Congressional intention that such legislation be effective to carry out its underlying social policy—which in this case is to eradicate every instance of sex-based employment discrimination that is not founded upon a bona fide occupational qualification.[74]

There is also general agreement that, although the motives for including sex in Title VII are clearly mixed, there is subsequent evidence that Congress intended to provide as much protection against sex discrimination as the other enumerated classifications.[75] For example, the passage of the Equal Pay Act of 1963 clearly demonstrates that Congress intended to address the disparity between men and women in the workplace, and shows a general intent to eradicate discrimination based on sex.[76] Thus, while specific intent may not be available in the legislative history of Title VII, these considerations lead to the conclusion that the proscription against sex discrimination should be given full effect in the courts. Although not intended to sanitize the working environment from "genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex," Title VII was designed to rid the workplace of "behavior so objectively offensive as to alter the 'conditions' of the victim's employment."[77]

2. The Supreme Court Broadly Construes the Language of Title VII

Although the legislative history is not conclusive on the scope of protections against sex discrimination, the Supreme Court consis-

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colloquium including Justice Antonin Scalia, then-First Circuit Judge Stephen Breyer, Rep. Robert W. Kastenmeier, Judge Abner J. Mikva, and others).

[74] Kanowitz, *supra* note 12, at 312.

[75] *See* Kanowitz, *supra* note 12, at 311-12; Miller, *supra* note 12, at 884-85.

[76] *See* Miller, *supra* note 12, at 885 ("Accordingly, it would be a mistake to place too much emphasis on the particular circumstances in which the ban on sex discrimination was passed.").

[77] Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 81 (1998). There is, of course, considerable scholarship suggesting an expansion of what constitutes sexual harassment and the type of conduct that falls under the purview of Title VII. For a comprehensive review of the existing sexual harassment paradigm and the scope of Title VII, see generally Vicky Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683 (1998).

tently interprets the language in Title VII broadly.[78] In the context of sexual harassment, the Court in *Harris v. Forklift Systems, Inc.* opened the door to expanding the range of conduct falling within the scope of Title VII.[79] The *Harris* Court affirmed the finding in *Meritor* that "[t]he phrase 'terms, conditions, or privileges of employment' evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment,' which includes requiring people to work in a discriminatorily hostile or abusive environment."[80] Most notably, the *Harris* court cast the potential victims of sexual harassment as "people" in the work environment and establishes no specific requirement that plaintiffs be the intended victims of the harassing conduct.[81] In fact, Title VII is not even limited to actual employees; the Act extends protections to non-employees such as job applicants and union members.[82]

In the 1998 term, the Court provided perhaps the most revealing insight into the scope of sexual harassment under Title VII. Although the narrow holding in *Oncale* was based on a claim of same-sex harassment, the Court's analysis stated that same-sex harassment "was assuredly not the principal evil Congress was concerned with when it enacted Title VII."[83] Notwithstanding this finding, the Court reasoned that "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."[84] As this Note will later delineate,[85] the basis for the bystander injury claim can be viewed as a variation of

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[78] Prior to the *Meritor* decision, the Supreme Court had taken many opportunities to liberally construe the language in Title VII. *See, e.g.*, Franks v. Bowman Transp. Co., 424 U.S. 747, 763 (1976) ("Congress intended to prohibit all practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex, or national origin . . . ."); Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (finding that Congress' purposes were focused on "the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification").

[79] 510 U.S. 17 (1993).

[80] *Id.* at 21 (citing Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986) (quoting Los Angeles Dep't. of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978) (some internal quotation marks omitted)).

[81] *See id.* at 25 (Ginsburg, J., concurring) ("The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."); *see also* EEOC v. Shell Oil Co., 466 U.S. 54, 77 (1984) (stating that "the dominant purpose of [Title VII] . . . is to root out discrimination in employment").

[82] *See* 42 U.S.C. § 2000e-2(a)(1) (1998) (prohibiting discrimination by potential employers); 42 U.S.C. § 2000e-2(c) (prohibiting discrimination by labor organizations); 42 U.S.C. § 2000e-2(b) (prohibiting discrimination by employment agencies).

[83] *Oncale*, 523 U.S. at 79.

[84] *Id.* (emphasis added).

[85] *See infra* Part I.3.

the hostile work environment claim. Because bystander injury is a product of a hostile work environment and a comparable evil to the terms and conditions of employment, it is consistent to recognize a bystander injury claim under the logic in *Oncale*.

The *Oncale* decision also reminds that "Title VII prohibits "discriminat[ion] . . . because of . . . sex" in the "terms" or "conditions" of employment."[86] The Court, however, appears to extend the scope of the hostile environment theory by stating that: "Our holding [in *Meritor*] that this includes sexual harassment *must extend to sexual harassment of any kind that meets the statutory requirements.*"[87] The Court was, of course, addressing the issue of sexual harassment involving members of the same sex. Yet according to the broad and inclusive language of the *Oncale* decision, if a plaintiff can meet the requirements set forth in Title VII, sexual harassment directed toward other employees may be actionable as a bystander injury claim if the plaintiff can show discrimination "because of . . . sex."[88] The *Oncale* decision also reaffirms the *Meritor* and *Harris* requirements that for hostile environment harassment to be actionable, the plaintiff must prove that the harassment was unwelcome and severe or pervasive.[89] Therefore, *Oncale* strongly supports the conclusion that a bystander plaintiff who can show injury from a hostile work environment that is both unwelcome and objectively severe or pervasive may state a claim under Title VII.

3. *Bystander Injury is Embodied in Traditional Hostile Environment Theory*

a. Hostile Environment Case Law

Although *Leibovitz* was the first reported decision finding that an employee who was not the target of sexual harassment could state a claim under Title VII, it is important to note that the bystander injury theory is not necessarily a new creation. The theory, to a limited extent, was first recognized in 1971 in a Title VII ethnic discrimination case. The Fifth Circuit in *Rogers v. EEOC* stated that if employers segregate customers and only allow employees to assist customers of a certain ethnic origin, an employee would be "aggrieved" under the language in Title VII although the employee is not the direct target of the discriminatory animus.[90] In *Rogers*, the defendants argued that

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[86] *Oncale*, 523 U.S. at 79-80 (quoting 42 U.S.C. § 2000e-2(b) (1998)).
[87] *Id.* (emphasis added).
[88] 42 U.S.C. § 2000e-2(b) (1994).
[89] *See Oncale*, 523 U.S. at 78.
[90] 454 F.2d 234, 237 (5th Cir. 1971).

because their discriminatory actions were directed at customers and not employees, the employee could not state a claim under Title VII.[91] In rejecting this argument, the Fifth Circuit relied on the Supreme Court's interpretation of Title VII in *Griggs v. Duke Power Co.*[92] In *Griggs*, the Court held that an employer may be liable under Title VII even if no discriminatory intent motivated a particular company policy and the policy resulted in a disparate impact upon the protected class of employees.[93] The Fifth Circuit interpreted the *Griggs* holding to stand for the principle that "the thrust of Title VII's proscriptions is aimed at the consequences or effects of an employment practice and not at the employer's motivation."[94]

The Supreme Court in *Meritor* later embraced the Fifth Circuit's logic. The Court, in recognizing a claim for sex discrimination from workplace sexual harassment, quoted the broad language in *Rogers* that "'[o]ne can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority *group workers*.'"[95] The Court joined the lower courts in recognizing that discriminatory conduct can reach groups of people and not simply individual targets of the animus.

Given this history, the *Leibovitz* decision finds its roots in traditional hostile environment theory. Judge Weinstein first queried whether the law denies

> that an environment where a superior refers to co-workers in vulgar sexual terms, while studiously avoiding calling one favored female profane names, is demeaning, harassing, and incompatible with the dignity and well-being of all the women in that workplace? Benign neglect by an employer under such circumstances is not permitted.[96]

The court then reasoned that an employee, who is not the target of sexual harassment in the workplace, may obtain damages from hostile environment sex discrimination because Title VII and its case law "affords 'employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult.'"[97] Accordingly, the

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[91] *See id.* at 238.

[92] 401 U.S. 424 (1971).

[93] *See id.* at 431-32.

[94] *Rogers*, 454 F.2d at 239.

[95] Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 66 (1986) (quoting *Rogers*, 454 F.2d at 238) (emphasis added)).

[96] Leibovitz v. New York City Transit Auth., 4 F. Supp.2d. 144, 152 (E.D.N.Y. 1998).

[97] *Id.* at 152 (citing *Meritor*, 477 U.S. at 65). To further illustrate, the court drew upon the analogy of the "rare Jewish person in a Nazi concentration camp afforded privileged treatment

Leibovitz court relied on *Rogers* and *Meritor* analysis as preliminary support for the bystander injury claim in sexual harassment.[98]

b. The Distinction Between Quid Pro Quo and Hostile Environment

The *Leibovitz* decision asserted that Title VII case law suggests that "[p]ersonal harassment is not the gravamen of a hostile work environment claim."[99] In support, the *Leibovitz* court reasoned that if employees indirectly subjected to an hostile work environment were disallowed from stating a claim under Title VII, the Supreme Court's distinction between "quid pro quo" and "hostile environment" claims would be rendered virtually meaningless.[100] In other words, to deny a claim for bystander injury would so narrowly construe the hostile environment claim as to make it virtually indistinguishable from a "quid pro quo" claim, where an employee is targeted by a supervisor to exchange sexual contact or flirtation for a promotion or continued employment. Because quid pro quo harassment by definition involves a targeted employee, the law implicitly requires that a quid pro quo plaintiff must be a targeted victim.[101] In a hostile environment action, however, the plaintiff is not required to show that she is a targeted victim.[102] Thus, a rejection of the bystander injury claim would eliminate this important distinction between the two theories.

The Supreme Court recently commented on the distinctions between quid pro quo and hostile environment in the *Ellerth* decision. The Court stated that sexual harassment which has not culminated in a tangible employment action should be regarded as a hostile work environment claim.[103] The *Ellerth* Court stated that "[t]he terms *quid*

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while other Jews were being horribly persecuted." *Id.* Just as the law would recognize a claim for the trauma of witnessing the abuse, Judge Weinstein reasoned that Title VII allows an employee to obtain relief for the discriminatory actions of supervisors against their co-workers. *See id.*

[98] *See id.* at 150.

[99] *Id.*

[100] *See id.*

[101] When making a distinction between quid pro quo and hostile environment, it is obvious that in order to claim the former, the plaintiff must prove that he or she was the victim of such conduct. It is not possible to be subjected to quid pro quo harassment without being the targeted victim.

[102] *See infra* Part II.A.3.

[103] *See* Burlington Indus. v. Ellerth, 524 U.S. 742, 754 (1998). The Court commented further on the distinction:

> When a plaintiff proves that a tangible employment action resulted from a refusal to submit to a supervisor's sexual demands, he or she establishes that the employment decision itself constitutes a change in the terms and conditions of employment that is actionable under Title VII. For any sexual harassment preceding the employment decision to be actionable, however, the conduct must be severe or pervasive. Because Ellerth's claim involves only unfulfilled threats, it should be categorized as a hostile work environment claim which requires a showing of severe or pervasive conduct.

pro quo and hostile work environment are helpful, perhaps, in making a rough demarcation between cases in which threats are carried out and those where they are not or are absent altogether, but beyond this are of limited utility."[104] Although the Court downplays the significance of the labels for determining employer liability, the Court did not intend to eliminate the distinctions between the two theories. The Court explained its position by writing that:

> The principal significance of the distinction is to instruct that Title VII is violated by either explicit or constructive alterations in the terms or conditions of employment and to explain [that the hostile environment] must be severe or pervasive. The distinction was not discussed for its bearing upon an employer's liability for an employee's discrimination.[105]

Thus, it is apparent that the Court was *not* intimating that the distinctions are no longer relevant. Instead, the Court was clarifying its earlier decisions by explaining that the theories of sexual harassment were constructed to outline the framework for sexual harassment litigation and not for the determination of liability. Consequently, it is clear that the distinction between the actions in a quid pro quo and a hostile environment claim is still intact for the purposes of analyzing a potential claim such as bystander injury harassment. A rejection of the bystander injury theory will destroy the "rough demarcation" that exists between targeted employees stating a quid pro quo claim and employees who have suffered from a hostile environment.[106]

The fact that there is a significant distinction between a quid pro quo and hostile environment claim is not dispositive in determining whether courts should recognize the bystander injury claim. Although the Supreme Court has only reviewed cases where the plaintiff was directly involved in the hostile environment harassment, it is important to note that a plaintiff has never been required to prove that he or she was the intended target of the hostile environment harassment.

Id.

[104] *Id.* at 751.

[105] *Id.* Furthermore, the Court made it clear that the distinctions are to be maintained in sexual harassment litigation:

> We do not suggest the terms *quid pro quo* and hostile work environment are irrelevant to Title VII litigation. To the extent they illustrate the distinction between cases involving a threat which is carried out and offensive conduct in general, the terms are relevant when there is a threshold question whether a plaintiff can prove discrimination in violation of Title VII.

Id. at 753.

[106] *See id.* at 751 (stating that "[t]he terms *quid pro quo* and hostile work environment are helpful . . . in making a rough demarcation between cases in which threats are carried out and those where they are not or are absent altogether").

To state a claim of hostile environment sexual harassment under Title VII, a plaintiff must show that: (1) the conduct was unwelcome;[107] (2) the conduct was subjectively unreasonable and so severe or pervasive as to alter the conditions of employment and create an abusive work environment;[108] and (3) that the discrimination was because of sex.[109] Thus, the long-standing absence of a requirement that a plaintiff must prove she was an intended victim strongly suggests that an employee who is not the intended target of unwelcome severe or pervasive harassment is not barred from stating a claim under Title VII.[110]

4. *Indirect Sex Discrimination Cases Support the Bystander Injury Theory*

Additional support for the bystander injury claim consists of the two related lines of case law recognizing sexual favoritism and obscene picture discrimination. These cases focus on injuries suffered by employees who were not necessarily the target of sexually explicit conduct, yet suffer from a hostile work environment that affects the terms or conditions of their employment.

Courts finding that widespread and open favoritism given to employees who submit to fondling, sexual horseplay, crude jokes, and even sexual intercourse acknowledge that a hostile environment may injure those employees who were either not targeted by this behavior or who have not positively responded to the harassment.[111]

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[107] *See* Harris v. Forklift Sys., 510 U.S. 17, 21-22 (1993).

[108] *See id.*, 510 U.S. at 21; Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986).

[109] *See Harris*, at 21; *Meritor*, 477 U.S. at 67; *see also* Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 80 (1998).

[110] Interestingly, *Oncale* makes a seemingly innocuous reference to a particular victim of hostile environment harassment. The Court stated that "[i]n same-sex (as in all) harassment cases, [the reasonable person] inquiry requires careful consideration of the social context in which particular behavior occurs and is experienced *by its target*." 523 U.S. at 81 (emphasis added). Because this is the first and only instance where the Court makes a reference to a targeted victim, the Court was assuredly not intending to forestall a bystander injury claim.

[111] *See, e.g.*, Broderick v. Ruder, 685 F. Supp. 1269, 1277 (D. D.C. 1988) (stating 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'") (quoting Vinson v. Taylor, 753 F.2d 141, 146 (D.C. Cir. 1985); Drinkwater v. Union Carbide Corp., 904 F.2d 853, 860-62 (3d Cir. 1990) (indicating in dictum that a consensual sexual relationship may result in a hostile work environment for a third party); Priest v. Rotary, 634 F. Supp. 571, 581 (N.D. Cal. 1986) (holding that a consensual sexual relationship in workplace can create a hostile work environment); *see also* Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 832 (1991) ("[I]t is very difficult to argue that the underlying bargain -- sex for a job or promotion -- is worthy of protection, or does not constitute sex-based discrimination, when viewed one step away.").

Courts have rejected claims of sexual favoritism that do not involve the more egregious conduct seen in *Broderick*, discussed *supra* at notes 108-11 and accompanying text. *See, e.g.*, DeCintio v. Westchester County Med. Ctr., 807 F.2d 304, 302 (2d Cir. 1986) (rejecting Title

In *Broderick v. Ruder*, a leading sexual favoritism case, the female plaintiff alleged that her work environment was tainted by an atmosphere of pervasive sexual harassment as a result of "sexual favoritism."[112] Although the plaintiff was not directly faced with a quid pro quo situation, the conduct of her supervisors toward other women conveyed the impression that only those women who submitted to the sexual innuendoes and flirtations were promoted. The court held that "consensual sexual relations, in exchange for tangible employment benefits, while possibly not creating a cause of action for the recipient of such sexual advances who does not find them unwelcome, do, and in this case did, create and contribute to a sexually hostile working environment."[113] Furthermore, the court stated that:

> [I]t was the occurrence of numerous other incidents of which plaintiff early on became aware which, for her, created a sexually hostile or offensive working environment. This in turn poisoned any possibility of plaintiff's having the proper professional respect for her superiors and, without any question, affected her motivation and her performance of her job responsibilities.[114]

In support of its holding, the court made clear that the supervisors' conduct was common knowledge around the office.[115]

Not all courts have recognized a Title VII "paramour" claim in similar circumstances; those rejecting the theory indicate that "preferential treatment on the basis of a consensual romantic relationship between a supervisor and an employee is not gender-based discrimination."[116] The EEOC policy also recognizes that not all favoritism rises to the level of sex discrimination under Title VII:

VII claim where supervisor changed requirements for promotion which benefited the woman with whom he was romantically involved).

[112] *See Broderick*, 685 F. Supp. at 1278.

[113] *Id.* at 1280. This harassment included a supervisor approaching his administrative assistant commenting on her "'sexy, wide hips,'" a supervisor using foul language and telling crude jokes, a supervisor with an on-going sexual relationship with a secretary which created controversy when the secretary received three promotions and cash awards, and a supervisor who spent the night with his secretary in a hotel room on a business trip; the secretary subsequently climbed the salary rank rapidly. *See id.* at 1274; *see also* Spencer v. Gen. Elec. Co., 697 F. Supp. 204 (E.D. Va. 1988) (supporting in dictum a bystander injury claim where sexual horseplay was welcomed by co-workers), *aff'd.*, 894 F.2d 651 (4th Cir. 1990).

[114] *Broderick*, 685 F. Supp. at 1273 (footnotes omitted). *Cf.* Drinkwater v. Union Carbide Corp., 904 F.2d 853 (3d Cir. 1990) (holding that although plaintiff only showed an offensive environment and not a severe and hostile environment, evidence of a "sufficiently oppressive environment" could infer intentional discrimination).

[115] *See Broderick*, 685 F. Supp. at 1275.

[116] Miller v. Aluminum Co., 679 F. Supp. 495, 501 (W.D. Penn. 1988), *aff'd*, 856 F.2d 184 (3d Cir. 1989) (citing DeCintio v. Westchester County Med. Ctr., 807 F.2d 304 (2d Cir. 1986));

> It is the Commission's position that Title VII does not prohibit isolated instances of preferential treatment based upon consensual romantic relationships. An isolated instance of favoritism toward a "paramour" (or a spouse, or a friend) may be unfair, but it does not discriminate against women or men in violation of Title VII, since both are disadvantaged for reasons other than their genders [sic].[117]

The second subset of hostile environment theory resembling the bystander injury claim is the display of sexually explicit pictures or cartoons in the workplace.[118] Employees who object to the posting of materials that depict women in a subordinate or objective manner allege sexual harassment under the hostile environment theory. While courts are generally reticent to find that the display of sexual images is sufficient to state a cause of action under Title VII, many courts look to this conduct as evidence of a hostile work environment.[119]

In *Robinson v. Jacksonville Shipyards*, however, a federal district court found that displaying sexually explicit or obscene pictures is highly relevant to the hostile environment inquiry.[120] The *Robinson* court concluded that these types of displays in the workplace "'may communicate that women should be the objects of sexual aggression, that they are submissive slaves to male desires, or that their most salient and desirable attributes are sexual.'"[121] The court implicitly embraced the bystander injury theory in explaining that a hostile work environment may be perceived by "other persons of a plaintiff's protected class, even if that treatment is learned second-hand."[122] The court rejected the Defendant's argument that because the pictures were displayed before the plaintiff began working, there was not intent to discriminate.[123] While it remains unresolved whether sexually

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accord Autry v. North Carolina Dep't of Human Resources, 820 F.2d 1384, 1386-87 (4th Cir. 1987).

[117] *EEOC Policy Guide*, *supra* note 44, at 405:6817.

[118] *See, e.g.*, Waltman v. Int'l Paper Co., 875 F.2d 468, 477-82 (5th Cir. 1989) (reversing summary judgment for employer and remanding with instructions to consider evidence of sexually explicit graffiti, calendars, and "used" tampons hanging from lockers); Robinson v. Jacksonville Shipyards, 760 F. Supp. 1486, 1526 (M.D. Fla. 1991) (holding that sexually explicit material, although not intended to discriminate against observers, is relevant evidence of a hostile work environment).

[119] *See* LINDEMANN AND KADUE, *supra* note 46, at 217; *Waltman*, 875 F.2d at 477; *Robinson*, 760 F. Supp. at 1526. *But cf.* Rabidue v. Osceola Ref. Co., 805 F.2d 611, 622 (6th Cir. 1986) (holding that co-workers' vulgar language, in concert with posters of naked women, did not result in a hostile working environment).

[120] 760 F. Supp. at 1526.

[121] *Id.* at 1526 (quoting Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1212 n.118 (1989)).

[122] *Id.* at 1499.

[123] *See id.* at 1523; *see also* Franke, *supra* note 22, at 721 (discussing the *Robinson* court's findings).

explicit material alone may constitute a violation of Title VII, this form of bystander injury discrimination has long been recognized as relevant evidence of a hostile working environment.

5. *The Rejection of "Bystander Injury": Preventing Associational Injury Claims*

As indicated in Part I.E., federal courts have rejected claims that resemble the bystander injury cause of action. The Seventh Circuit in *Drake v. Minnesota Mining & Mfg.* held that white employees failed to show evidence of a hostile environment claim for race discrimination directed at their fellow black co-workers.[124] Similarly, in *Childress v. City of Richmond*, the Fourth Circuit affirmed a ruling that white male police officers did not have standing to sue under Title VII for discrimination against female and black officers.[125] These cases have one feature in common: the plaintiffs alleged that the injury they suffered was a sort of "quasi hostile environment" shared by the targeted victims of discrimination and the plaintiffs. The injuries, however, are not directly caused by the harassment, but a product of the changed social and work environment that altered the personal and working relationships among the co-workers. For these reasons, courts reject the claims because the plaintiffs fail to produce evidence that they were in fact discriminated against because of their membership in a class protected by Title VII.

The *Leibovitz* court distinguished these cases by indicating that the plaintiffs in both *Childress* and *Drake* were outside of the protected class that was the target of the discrimination and labeled the claims in these cases as "associational."[126] Although the *Leibovitz* court did not provide extensive analysis outlining the difference between a "bystander" claim and an "associational" claim, there is a clear distinction between the two theories. In a bystander injury claim, the plaintiff is not alleging injury to social and working relationships among workers. Instead, a bystander plaintiff alleges a personal injury from the discriminatory conduct and that the injury was a result of discrimination *against her as a woman,* not because of a chilling effect on the relationships between the targeted employees and the bystander employees. Stated more concretely, Leibovitz did not claim that she lost the associational benefits with her co-workers who were the target of the harassment. She alleged physical and

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[124] 134 F.3d 878, 884 (7th Cir. 1998); *see also* Childress v. City of Richmond, 134 F.3d 1205, 1207 (4th Cir. 1998) (holding that white officers could not bring a Title VII claim where supervisors disparaged women and black officers).

[125] 134 F.3d 1205, 1207 (4th Cir. 1998).

[126] *See* Leibovitz v. New York City Transit Auth., 4 F. Supp.2d 144, 151 (E.D.N.Y. 1998).

emotional harm personally suffered because of the hostile work environment.

It is also apparent that the sex of the victim is of critical importance in the distinction between associational and bystander claims. A bystander plaintiff outside of the gender class targeted by the harasser advances an associational claim in that the result of the harassing conduct was a hostile environment due to a loss of social and work related interaction with the victims. For example, a male bystander employee who alleges injury due to a hostile environment because of discrimination directed against female co-workers will not be able to prove discrimination "because of sex." In this situation, the male bystander is essentially arguing the associational claim that has been rejected by the Seventh and Fourth Circuits and not a discrimination claim based on *his* sex. Instead, he can only show that he lost the associational benefits of a positive working relationship with his female co-workers because of the discriminatory conduct against women.

Conversely, a female bystander who alleges injury from a hostile environment because of discriminatory conduct directed at her female co-workers may be able to show sex discrimination because she is a member of the class targeted by the harasser. The female bystander is not alleging a loss of social and work association with the targeted employees, but injury caused directly by the harassing conduct.[127] The associational-bystander distinction, then, is based on the gender of the plaintiff and the targeted victims. The distinction may also be viewed as differences in proving injury and causation. In a bystander claim, the injury is a direct and proximate result of the harassing conduct. In the associational claim, the injury is indirectly related to the harassing behavior and is actually tied to the way in which the targeted victims treat those who are not the target of the harassing conduct (the target's co-workers). Therefore, the associational claims rejected by the Seventh and Fourth Circuits can be distinguished from the bystander claim seen in *Leibovitz*. Indeed, Judge Weinstein noted that:

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[127] There is, of course, the possibility that the injury suffered by the bystander plaintiff may actually be associational and not caused directly by the discriminatory conduct. For example, a female plaintiff who was not subjected to the harassing conduct may fall into disfavor with the targeted female employees. If the injury is a result of getting the "cold shoulder" from the targeted employees because they are upset that she is not being subjected to the harassment, the injury may be associational in nature and not sex discrimination. Therefore, the injury would be identical to the injury suffered by the male employee who loses the associational benefits with his female co-workers. In this scenario, the cause of action is not bystander injury as seen in *Leibovitz*. *See supra* notes 2-6, 47-51 and accompanying text for a discussion of the *Leibovitz* case.

> [T]he jury . . . did not find for plaintiff on an associational discrimination claim. Rather, it 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.*[128]

Therefore, the conclusions drawn from the legislative history of the Act, the Supreme Court's expansive reading of sex discrimination to include sexual harassment, an interrelationship between the hostile environment and bystander injury theories, and existing indirect discrimination case law strongly support a claim for bystander sexual harassment injury under Title VII. While these conclusions establish the statutory component of the bystander injury claim, a plaintiff must still establish standing to sue in federal courts.

B. Bystander Injury Plaintiffs Have Standing to Sue

Parties alleging an injury and seeking redress through the federal courts must have the requisite standing in order to bring their case within the jurisdiction of the court. Because the bystander injury claim raises questions whether the injury suffered may be remedied by the federal courts, the *Leibovitz* court took careful steps to ensure that the plaintiff had standing to sue.[129] For these reasons, a careful analysis of the standing issue is critical to determining whether a bystander to sexual harassment may bring a claim under Title VII.[130]

First, it must be noted that Congress provides the means for a person to sue under the Act. The applicable language in Title VII states that "a person claiming to be aggrieved" has standing to file charges alleging discrimination in employment.[131] Under current standing doctrine, if a statute defines the right to sue, the Supreme Court requires a showing of "whether the . . . statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief."[132]

In considering this requirement, it is important to recognize the breadth of the enforcement language in the Act. Title VII does not

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[128] *Leibovitz*, 4 F. Supp.2d at 151 (emphasis added). The *Leibovitz* court expressly refused to determine whether a male worker would have standing for discrimination against females coworkers, thereby eschewing from the association analysis. *See id.* at 149.

[129] *See id.* at 148-50.

[130] For a comprehensive review of the standing issue in the context of male plaintiffs alleging a hostile environment based on discrimination against female employees, see generally Torrey, *supra* note 8.

[131] 42 U.S.C. § 2000e-5(b) (1994).

[132] Warth v. Seldin, 422 U.S. 490, 500 (1975).

attempt to define standards to determine who is "aggrieved" under the statute; anyone who feels they have suffered from an unlawful employment action under the language in the Act may file charges with the EEOC or relevant State agency.[133] This broad reading of the phrase "aggrieved person" is consistent with the Third Circuit's conclusion in *Hackett v. McGuire Bros.*, a Title VII race discrimination claim where the court stated that "[t]he use . . . of the language 'a person claiming to be aggrieved' shows a congressional intention to define standing as broadly as is permitted by Article III of the Constitution."[134] The Supreme Court adopted this broad approach one year later in a racial discrimination in housing claim under Title VIII of the Civil Rights Act of 1968, in *Trafficante v. Metropolitan Life Insurance Co.*[135] Although the Court's decision rested on an interpretation of Title VIII, *Trafficante* explicitly approved the conclusions reached by the *Hackett* court.[136] The Court articulated that the language of Title VIII—like Title VII—is "broad and inclusive," written to cover injuries claimed in fact from the discrimination.[137]

Not all courts have followed this approach to the "aggrieved person" language in the statute. In *Childress v. City of Richmond*,[138] the Fourth Circuit held that Title VII should not be broadly construed because the statute does not define the term "aggrieved person."[139] The court upheld a district court finding that a third-party plaintiff does not have standing under Title VII when the alleged injury was a loss of associational benefits and an unfriendly work environment.[140] Similarly, in the context of determining the composition of the class

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[133] A plaintiff is required to file a charge with the EEOC or similar State agency before receiving a "right to sue" letter, notifying the complainant of her right to file a claim in federal court. *See* 42 U.S.C. 2000e-5(b) - (c) (1994).

[134] 445 F.2d 442, 446 (3d Cir. 1971) (quoting 42 U.S.C. 2000e-5 (1964)).

[135] 409 U.S. 205 (1972). In this case, a white and black tenant claimed injury from discrimination against non-white applicants in that they had "lost the social benefits of living in an integrated community" and suffered other economic and emotional embarrassment from living in a "white ghetto." *Id.* at 208.

[136] *See id.* at 209 (citing Hackett v. McGuire Bros., 455 F.2d 442 (3d Cir. 1971) to establish that "[Title VIII] "is broad and inclusive"); *see also* Torrey, *supra* note 8, at 372.

[137] *Trafficante*, 409 U.S. at 209.

[138] *See supra* note 127 and accompanying text.

[139] 134 F.3d 1205, 1207 (4th Cir. 1998).

[140] Judge Luttig, concurring in the per curiam decision, explained that:

> In notable contrast to Title VIII, Title VII does not define the term "aggrieved person." Not only does the complete absence of a definition in Title VII imply that Congress chose to incorporate the "term of art" definition of "aggrieved person," which . . . includes prudential standing limitations; but the presence of a definition of the term in Title VIII . . . strongly evidences that Congress intended different meanings for the term "aggrieved person" across the two statutes, further reinforcing the conclusion that "aggrieved person" in Title VII must be interpreted to incorporate prudential standing limitations [against third-party standing].

Childress, 134 F.3d at 1210 (Luttig, J., concurring) (footnote omitted).

of plaintiffs for class action lawsuits, a handful of federal district courts have invoked a strict reading of standing requirements by dismissing members outside of the racial class that were not the direct targets of the harassment.[141]

A proper application of the Supreme Court's standing rules to the bystander injury claim finds that a bystander injury plaintiff will easily meet the standing requirements. Although the Supreme Court has not provided considerable analysis of the phrase "aggrieved persons" under Title VII, its approval of the Third Circuit's broad approach to standing strongly indicates that a limited view of standing for sexual harassment under Title VII is misplaced. Thus, a bystander injury plaintiff who claims to be "aggrieved" by unlawful practices under the Act has been given standing to sue by the broad enforcement language enacted by Congress.

Notwithstanding the statute's expansive standing language, a bystander injury plaintiff meets the traditional standing requirements set forth by the Supreme Court. In *Warth v. Seldin*, the Supreme Court set forth a two-component test for the standing analysis: a "constitutional requirement" and a "prudential limit."[142] The Constitutional requirement finds its basis in Article III, Section 2, which provides federal court jurisdiction only if it is a "case" or "controversy," which the Supreme Court considers a "bedrock requirement."[143] This clause has been interpreted to require the party to show "whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant *his* invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf."[144] The claim must also be capable of redressing injuries to that particular plaintiff and not solely for injuries sustained by others. This is referred to as the "prudential" limit to standing.[145] Here the Court states that "the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties."[146] The prudential limit is

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[141] *See, e.g.*, Torrey, *supra* note 8, at 381 n.85. Most of the claims alleged by these plaintiffs were "associational" injuries and are thus distinguishable from the type of claim seen in *Leibovitz*. *See supra* text accompanying notes 2-6, 47-51.

[142] 422 U.S. 490, 490 (1975). For a comprehensive review of the Court's recent decisions outlining the standing requirements, see *Raines v. Byrd*, 521 U.S. 811, 818-19 (1997).

[143] *See* Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 471 (1982).

[144] *Warth*, 422 U.S. at 498-99 (citing Baker v. Carr, 369 U.S. 186, 204 (1962)); *see also* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 n.1 (1992) (stating that the plaintiff must show that "the injury [affects] the plaintiff in a personal and individual way" to invoke federal jurisdiction).

[145] *See Warth*, 422 U.S. at 499-500.

[146] *Id.* at 499.

incorporated into legal standing provided in the Constitution or a particular federal statute by requiring the plaintiff to show "whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief."[147]

To assist in the determination of standing, the Supreme Court in *Allen v. Wright* enunciated particular factors that probe the essential elements of constitutional and prudential requirements.[148] The factors to be considered include: "Is the injury too abstract, or otherwise not appropriate, to be considered judicially cognizable? Is the line of causation between the illegal conduct and injury too attenuated? Is the prospect of obtaining relief from the injury as a result of a favorable ruling too speculative?"[149] The *Allen* court also indicated that "clear rules developed in prior cases" could be used to aid in determining standing.[150]

The *Leibovitz* court determined that the plaintiff in the bystander injury claim easily met the standing requirements set forth by the Supreme Court.[151] The court, relying on expert and lay person testimony, found that the plaintiff had a "distinct and actual" emotional injury from the hostile work environment.[152] Furthermore, the court found that this injury was "directly traceable to the sexually harassing environment in her workplace."[153] Following the *Allen* court's recommendation to rely on rules in previous cases, the *Leibovitz* court also relied on analogous Title VII and housing discrimination case law to establish that the prudential limit on standing is met by a bystander injury plaintiff.[154]

Moreover, a bystander plaintiff who works among targeted employees and is affected by the discriminatory conduct and attitude by supervisors meets the required "line of causation between the illegal conduct and injury,"[155] as long as the plaintiff is not too far removed from the discriminatory conduct.[156] First, Title VII has long recognized that sexual harassment is actionable by the victim under the statute. Second, sexual harassment plaintiffs have recovered on indirect discrimination claims analogous to the bystander injury theory;

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147 *Id.* at 500.
148 468 U.S. 737, 752 (1984).
149 *Id.* at 752.
150 *Id.*
151 Leibovitz v. New York City Transit Auth., 4 F. Supp.2d 144, 148 (E.D.N.Y. 1998).
152 *See id.*
153 *Id.* at 150.
154 *See supra* text accompanying notes 131-34.
155 *Allen*, 468 U.S. at 752.
156 *But cf. Leibovitz*, 4 F. Supp.2d at 146 (noting that plaintiff did not directly observe the harassing conduct); *see also infra* Part II.C.

the line of Title VII cases involving sexual favoritism and pornographic displays suggest that employees who were not necessarily the target of discriminatory harassment may successfully state a claim under the Act.[157] In this respect, "the prospect of obtaining relief from the injury as a result of a favorable ruling" is not "too speculative" for a bystander plaintiff.[158] Accordingly, the *Leibovitz* decision explained that the fact that she was not a targeted victim "does not take her claim . . . outside Article III."[159] Therefore, an application of the Supreme Court's standing rules to the bystander injury theory finds that a bystander victim can establish the requisite elements of standing to sue for hostile environment sex discrimination under Title VII.[160]

C Theoretical and Practical Complications of the Bystander Injury Claim

The analysis thus far has shown that a bystander injury plaintiff can meet both the substantive statutory and constitutional standing requirements to state a claim for hostile environment sexual harassment. The focus must now turn to the complications that arise under this theory of discrimination and how to reconcile these complications within the existing Title VII framework. The following issues have the potential to severely limit bystander injury sexual harassment claims:

1. Different Classes of Victims: Discrimination "Because of Sex"?

The sex of the bystander plaintiff vis-à-vis the sex of the *intended victim* is critical in the determination of which employees may state a claim for bystander injury.[161] This is because a bystander plaintiff who cannot prove that the harassment is based on his gender may not state a claim under Title VII. An "equal opportunity harasser" may not be in violation of Title VII because the harassment is not discriminating against one particular sex.[162] In these cases, "the sexual harassment would not be based on sex because men and

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[157] *See supra* notes 112-16, 119-24 and accompanying text.

[158] Allen v. Wright, 468 U.S. 737, 752 (1984).

[159] *Leibovitz*, 4 F. Supp.2d at 148

[160] There is one caveat to this conclusion: the bystander must be in the same class as the targeted employees. *See infra* Part III. *But see* Torrey, *supra* note 8, at 380 ("[I]njury deriving from a discriminatory work environment or a deprivation of association with protected classes satisfies standing" regardless of the sex of the parties).

[161] *See supra* Part II.A.4.

[162] This term probably originated from *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982) (explaining how conduct directed at both sexes is "equally offensive"), but was first brought to my attention by Professor Kathleen Engel.

women are accorded like treatment . . . [and] the plaintiff would have no remedy under Title VII."[163] As targeted victims are usually the opposite sex of the harasser in a traditional hostile environment claim, the requirement to prove gender-based discrimination from harassing conduct is not necessarily problematic. It is presumed that sexually-charged harassment between a male and female is motivated by the sex of the victim.[164] In a bystander injury claim, however, the plaintiff faces the additional burden of showing that the harassing conduct, though not directed at the plaintiff, had the same discriminatory effect because of the plaintiff's sex.

Although *Leibovitz* explicitly refused to determine whether the bystander must be in the same gender class of the targeted victims, existing case law clearly indicates that a male bystander of female-targeted harassment will not be able to prove discrimination "because of sex."[165] In holding that same-sex harassment is actionable under Title VII, the *Oncale* Court emphasized that the holding does not extend to harassment directed at both sexes:

> We have never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations. "The critical issue, Title VII's text indicates, is whether members of one sex are ex-

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[163] *Henson*, 682 F.2d at 904. *But see* Kimberly McCreight, Comment, *Call for Consistency: Title VII and Same-Sex Hostile Environment Sexual Harassment*, 1 U. PA. J. LAB. & EMP. L. 269, 293 (1998) (arguing that consistency in Title VII jurisprudence demands that courts should not look to the gender of the harasser and the victims; instead, the dispositive question must rest "on the sexual content and extremity of the harassment").

[164] *See* Oncale v. Sundowner Servs., 523 U.S. 75, 80 (1998) (noting that the chain of inferences is easily drawn in the traditional male-female claim and in homosexual same-sex harassment); *see also Henson*, 682 F.2d at 904 ("[P]laintiff must show that but for the fact of her sex, she would not have been the object of harassment.") (citing Bundy v. Jackson, 641 F.2d 934, 942 n.7 (D.C. Cir. 1981)).

[165] The court stated that:

> [T]here may be a legal difference between a male alleging that he is losing the associational benefits of female colleagues in the work environment because women were leaving due to harassment, and a woman alleging that the work environment was hostile to her personally because she was working in an environment where other women were being demoralized and abused on the basis of their gender. This further step in the law is not required to support plaintiff's claims . . . .

Leibovitz v. New York City Transit Auth., 4 F. Supp.2d 144, 151-52 (E.D.N.Y. 1998). This point, of course, is arguable. Leibovitz's attorney, Professor Merrick Rossein, argues that a man would have standing in a bystander injury suit involving women: "There's an injury in fact, because it's troublesome to a male worker to be in an environment where co-workers are being sexually harassed." Allison B. Bianchi, *Employee Collects $60,000 Because* Other *Women Were Sexually Harassed*, LAW. WKLY. USA, June 15, 1998, at 21.

> posed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."[166]

Read in the context of bystander injury, the Court's reasoning clearly indicates that an alleged harasser who targets discriminatory conduct toward female employees cannot, *a fortiori,* be discriminating against male employees. Additionally, Justice Thomas' concurring opinion in *Oncale*—consisting of a curious one sentence statement—emphasizes that "in every sexual harassment case, the plaintiff must plead and ultimately prove Title VII's statutory requirement that there be discrimination 'because of . . . sex.'"[167] Therefore, only those employees who are the same sex as the targeted victim may state a claim of bystander injury sexual harassment.[168]

2. *Proximity to the Harassing Conduct*

Although the *Leibovitz* court did not explicitly discuss the importance of the relationship between the bystander's work environment and the targeted victim's work environment, proximity matters in a bystander injury claim.[169] A bystander who only hears of sexual

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[166] *Oncale*, 523 U.S. at 80 (quoting Harris v. Forklift Sys., 510 U.S. 12, 25 (1993) (Ginsburg, J. concurring)).

[167] *Id.* at 82.

[168] This matrix represents the implications of this requirement:

Harasser	Targeted Victim	Bystander Victim	Result
Male	Female	Female	*Actionable*
Male	Male	Male	*Actionable*
Male	Female	Male	*Not Actionable*
Male	Male	Female	*Not Actionable*
Female	Male	Male	*Actionable*
Female	Female	Female	*Actionable*
Female	Male	Female	*Not Actionable*
Female	Female	Female	*Not Actionable*

[169] In common law torts, proximity is crucial in determining liability for emotional distress suffered by a bystander. The common law "impact" rule disallowed recovery for emotional distress unless the victim was physically impacted. *See* Mitchell v. Rochester Ry., 45 N.E. 354 (N.Y. 1896) (holding no recovery for fright without impact from horses corralled around pregnant woman). As the common law progressed, states adopted more lenient rules for recovery. One such rule, the "zone of danger" test, was first adopted by the Wisconsin Supreme Court and required the plaintiff to be within the zone of proximity where physical injury may have occurred. *See* Waube v. Warrington, 258 N.W. 497, 498-99 (Wis. 1935). In 1968, the California Supreme Court abrogated the zone of danger rule with a list of factors to determine the degree of forseeability that injury would occur, thereby eliminating the requirement that the plaintiff be in the path of the harm. *See* Dillon v. Legg, 441 P.2d 912, 919-20 (Cal. 1968); Howard H. Kestin, *The Bystander's Cause of Action for Emotional Injury: Reflections on the Relational Eligibility Standard*, 26 SETON HALL L. REV. 512, 516-18 (1996). In 1989, the California Supreme Court established a bright-line rule in the absence of impact, requiring the plaintiff to be (1) closely related to the victim; (2) present at the scene of the accident and aware of the injury to

harassment in the workplace will have a much more difficult task in showing injury from "severe" or "pervasive" harassment than one who works closely with the targeted employee or under the direction of the alleged harasser.[170] These issues were first addressed by the California Court of Appeal in *Fisher v. San Pedro Peninsula Hospital.*[171] In concluding that an employee does not have to be the target of sexual harassment to be a victim of a hostile work environment, the court stated that:

> Given the ease with which these claims can be made despite their serious nature, as a matter of fairness, a plaintiff should be required to plead sufficient facts to establish a nexus between the alleged sexual harassment of others, her observation of that conduct and the work context in which it occurred.[172]

The *Fisher* formulation, then, requires a plaintiff to "establish that she personally witnessed the harassing conduct and that it was in her immediate work environment."[173] The court seemed to have enunciated a standard that would reject a bystander injury claim unless the plaintiff could show that the harassing conduct was viewed first-hand and permeated the plaintiff's direct work environment.[174]

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the victim; (3) suffers severe emotional distress "beyond that which would be anticipated in a disinterested witness." Thing v. La Chusa, 771 P.2d 814, 829-30 (Cal. 1989).

While it may be apparent that few, if any, bystander sexual harassment victims could claim emotional distress under these rules, a traditional torts analysis is unnecessary and improper. *See* Vinson v. Taylor, 753 F.2d 141, 151 (D.C. Cir. 1985), *aff'd sub nom.* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986); *see also* Christopher P. Barton, Note, *Between the Boss and a Hard Place: A Consideration of* Meritor Savings Bank, FSB v. Vinson *and the Law of Sexual Harassment*, 67 B.U. L. REV. 445, 464 (1987) (arguing that Title VII abrogates reliance on traditional tort theories for recovery from sexual harassment). Therefore, this Note is not constrained by these rules and does not examine them further in light of the proximity issue.

[170] *But cf. Leibovitz*, 4 F. Supp.2d at 146 (stating that "much of the alleged harassment did not occur in plaintiff's immediate vicinity and much of what she knew about the situation was second- or third-hand").

[171] 262 Cal. Rptr. 842, 853 (Cal. Ct. App. 1989).

[172] *Id.* at 854-55. The Plaintiff, a nurse, alleged that a doctor-supervisor engaged in conduct that included:

> pulling nurses onto his lap, hugging and kissing them while wiggling, making offensive statements of a sexual nature, moving his hands in the direction of [a] woman's vaginal area, grabbing women from the back with his hands on their breasts or in the area of their breasts, picking up women and swinging them around, throwing a woman on a gurney, walking up closely behind a woman with movements of his pelvic area. [Ms. Fisher] saw him commit acts of sexual harassment against [three named] nurses. The acts were committed in hallways, the operating room, and the lunch room . . . from 1982 to 1986.

Id. at 854.

[173] *Id.* at 853.

[174] *See id.* Applying the *Fisher* court's rule, it is clear why the court dismissed a portion of the Plaintiff's complaint. Although the acts were sufficient to defeat summary judgment, Fisher

In 1998, the California Court of Appeals revisited these issues in *Beyda v. City of Los Angeles*.[175] In *Beyda*, the court followed the rationale in *Fisher*, but stated that "[t]o the degree that *Fisher* may be understood to require that a plaintiff *personally* witness any act relied upon to prove hostile environment, we respectfully disagree."[176] The court posited that an employee may be injured by a hostile work environment simply with the knowledge that other employees have been the targets of the harassment. The court intimated that a plaintiff with personal knowledge (as opposed to personal observation) of the harassment can establish the requisite nexus between the alleged conduct and injury.[177]

The *Leibovitz* court's failure to focus on the proximity issue is a significant weakness in the analysis of the bystander injury claim.[178] Under the *Fisher* formulation, Leibovitz's complaint would probably fail to state a claim because she did not directly observe the harassing conduct.[179] Instead of addressing the potential problem created by a plaintiff who is far removed from the harassing conduct, the court instead draws upon the analogy of "a rare Jewish person in a Nazi concentration camp afforded privileged treatment while other Jews were being horribly persecuted."[180] While the court admits the conditions are nowhere comparable to death camps, it states that "[t]he deterioration of the humanity, spirit, and dignity of a member of an abused class, granted personal immunity on her promise that she will

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did not specifically allege how the conduct affected *her* direct working environment. *See id.* at 854.

[175] 76 Cal. Rptr. 2d 547 (Cal. Ct. App. 1998).

[176] *Id.* at 552 (emphasis added).

[177] *See id.*

[178] The decision simply points to the evidence of "widespread gender-based harassment" which was repeatedly told to the plaintiff by other women. Leibovitz v. New York City Trans. Auth., 4 F. Supp.2d 144, 152 (E.D.N.Y. 1998).

[179] To the extent the *Fisher* court requires personal observation of the harassment, Leibovitz's claim would fail. While the *Leibovitz* complaint alleged specific injury from the harassment and that Leibovitz complained to management and was warned that her job may be in jeopardy if she continued to pursue the matter, she did not personally observe the harassing conduct. *See id.* at 146-47.

[180] *Id.* at 152. To complete the analogy, the court also quoted a compelling excerpt from a book on the Nazi camps:

> The ocean of pain, past and present, surrounded us, and its level rose from year to year until it almost submerged us. It was useless to close one's eyes or turn one's back to it because it was all around, in every direction, all the way to the horizon. It was not possible for us nor did we want to become islands; the just among us, neither more nor less numerous than in any other human group, felt remorse, shame, and pain for the misdeeds that others and not they had committed, and in which they felt involved, because they sensed that what had happened around them and in their presence, and in them, was irrevocable .... It is enough not to see, not to listen, not to act.

Id. (quoting PRIMO LEVI, THE DROWNED AND THE SAVED 86 (Raymond Rosenthal trans., Summit Books Ed.) (1988)).

remain silent—perhaps even that she will turn away and not see what is plain to see—is impermissible under fundamental ethics and law."[181]

While the court's analogy to Nazi death camps is powerful, it does not adequately address situations where the connection between the bystander employee and the harassing conduct is so weak that it may be unreasonable to conclude that a plaintiff suffered from severe or pervasive harassment.[182] For example, an employee who works on a different floor or section of a large building may not have been exposed to the level of discriminatory harassment Title VII intended to proscribe. In these cases, the courts will be faced with the task of determining the level of the harassment and the scope of its effect on the terms or conditions of employment. This may be especially troubling in close cases where the harassment occurred outside of the plaintiff's immediate work area, yet was common knowledge to employees and the plaintiff.

The rule in *Fisher*, however, is overly strict and unnecessarily excludes plaintiffs like Leibovitz who have not personally observed the harassing conduct but are close enough for the harassment to affect the terms and conditions of her employment. There are many ways an employee may perceive workplace discrimination besides the actual observation of harassment.[183] The *Oncale* court's emphasis on the importance of the context of harassment in same-sex cases is useful in answering the proximity problem in a bystander injury claim. The *Oncale* court stated that "[t]he real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed."[184] An understanding of the complexities of the workplace—the varying degree of social interaction in the work environment—strongly suggests that sexual harassment can be so severe or pervasive that it substantially alters working conditions even if an employee does not personally observe actual conduct.[185] To conclude that work environments are so individualistic and insulated that

[181] *Id.*

[182] This analogy may also lead to significant unfairness to the employer who makes reasonable attempts to correct sexual harassment. *See infra* Part III.D.

[183] *See, e.g.*, Beyda v. City of Los Angeles, 76 Cal. Rptr. 2d 547, 552 (Cal. Ct. App. 1998) (stating that "personal observation is not the only way that a person can perceive, and be affected by, harassing conduct in the workplace").

[184] Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 81-82 (1998). The Court identifies the distinction between the coach swatting a football player on the buttocks in the middle of a game and smacking his secretary (male or female) in the office. *See id.*

[185] For example, a plaintiff with frequent contact with the targeted employees and under the supervision of the harasser may well be affected by the harassment even if the actual physical proximity to the other employees is not close.

environments are so individualistic and insulated that harassment can only be severe or pervasive when it is personally observed is to completely misapprehend the true nature of the workplace.

Instead of the strict formulation applied in *Fisher*, courts should use California's *Beyda* rule in concert with the factors established by the *Oncale* court.[186] In analyzing the proximity question, courts should inquire whether the "surrounding circumstances, expectations, and relationships" reveal conduct which creates a hostile working environment for those employees with personal observation *or* knowledge of the discriminatory behavior within the surrounding work environment.[187] This may be true even if the affected employees do not work in the same area of the targeted victim, yet have frequent contact with the alleged harasser or victim. The proximity requirement, in this sense, includes both social and job-related interaction in employment; physical proximity to the conduct is not necessarily dispositive. A contrary position leads to absurd results; when the *Fisher* formulation is taken to the extreme, if a plaintiff is required to personally *observe* the harassing conduct, employees who are aware of a supervisor raping employees behind his office door may not state a claim under Title VII.

There is, however, a limit to the *Beyda* formulation of proximity. Not all knowledge of sexual harassment in the workplace can rise to a level of a hostile work environment. The court, then, is faced with determining both the extent and the substance of the knowledge, in addition to other relevant circumstances. As the *Beyda* court properly warns, "mere workplace gossip" is not sufficient to show proof of injury.[188]

3. *The Targeted Employee Welcomes the Harassing Conduct*

The final complication in the bystander injury claim is whether a bystander who does not welcome the sexual harassment may state a claim when the targeted employee welcomes the conduct. Courts may be tempted to summarily conclude that because the targeted employee welcomed the conduct, a bystander could not have suffered injury. A dismissal on this ground would be erroneous, because the dispositive question has always been whether the *plaintiff* welcomed

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[186] *See Oncale*, 523 U.S. at 81-82; *Beyda*, 76 Cal. Rptr. at 552.

[187] *Oncale*, 523 U.S. at 82.

[188] *See Beyda*, 76 Cal. Rptr. 2d at 552. It should be noted that in the *Leibovitz* case, the plaintiff did not rely solely on gossip. Leibovitz confronted the harasser and her supervisors, demanding that the conduct be stopped. The Transit Authority did not quickly respond to her complaints and one supervisor advised her that her complaints could hurt her career at the Authority. *See* Leibovitz v. New York Transit Auth., 4 F. Supp.2d 144, 146-47 (E.D.N.Y. 1998).

the harassment, not whether the target or other co-workers welcomed or returned the harassing conduct.

The Supreme Court case law and the existence of successful claims by third party plaintiffs under the sexual favoritism theory (where some women have welcomed the conduct to gain favor in the workplace) supports the conclusion that harassment does not have to be unwelcome by all employees for a plaintiff to state a claim under Title VII.[189] The EEOC policy statement on sexual harassment also lends considerable support: "Even if the targets of the humor 'play along' and in no way display that they object, co-workers of any race, national origin or sex can claim that this conduct, which communicates a bias against protected class members, creates a hostile work environment for them."[190] Moreover, the Act itself prohibits discrimination against an employee "because he has opposed any practice made an unlawful employment practice by this subchapter" and provides for a retaliation claim.[191] This provision protects employees even if other employees welcome the conduct and even if the complaining employee wrongly concludes that conduct is unlawful.[192] Therefore, a bystander employee whose terms and conditions of employment are affected by severe or pervasive discriminatory conduct may successfully state a claim under Title VII, regardless of whether the targeted employees welcomed the conduct.

III. AFTER *LEIBOVITZ*: A FRAMEWORK FOR THE BYSTANDER INJURY HARASSMENT CLAIM

As the *Leibovitz* decision and the preceding analysis indicate, the bystander injury theory—while still in its infancy—has the potential to become a powerful new tool in Title VII sexual harassment litigation. The plaintiff's success in the *Leibovitz* case will likely have a profound effect on the way plaintiffs' attorneys approach sexual harassment claims. With the potential for more bystander injury claims comes substantial concern over how courts should analyze a plaintiff's claim. Based on the preceding analysis of the Act, relevant case law, and EEOC guidelines, the federal courts should consider the

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[189] *See, e.g.*, Broderick v. Ruder, 685 F. Supp. 1269, 1277 (D. D.C. 1988) (stating that "Title VII is also violated when an employer affords preferential treatment to female employees who submit to sexual advances or other conduct of a sexual nature and such conduct is a matter of common knowledge").

[190] *EEOC Policy Guide*, *supra* note 44, at 405:6820.

[191] 42 U.S.C. § 2000e-3(a) (1994).

[192] *See, e.g.*, Payne v. McLemore's Wholesale & Retail Stores, 654 F.2d 1130 (5th Cir. 1981) (holding that a plaintiff establishes a prima facie case of retaliatory discharge if he has a reasonable belief that the employer was violating Title VII).

following framework in determining whether a plaintiff may state a claim for bystander injury under Title VII.

A. Utilize Existing Hostile Environment Burdens of Proof

Because the bystander injury claim can be viewed as a subset to the traditional hostile environment claims under *Meritor*, *Harris*, *Ellerth*, and *Oncale*, courts should treat a claim of bystander injury in the same manner as a traditional sexual harassment claim. As with the traditional claims, the plaintiff must show that: (1) the conduct was unwelcome;[193] (2) the conduct was subjectively unreasonable and so severe or pervasive as to alter the conditions of employment and create an abusive work environment;[194] and (3) that the discrimination was because of sex.[195] There is no readily-identifiable reason why the existing sexual harassment paradigm will not further the goals of Title VII in a bystander injury claim.

B. Dismiss Claims Involving Victims of Different Gender

A bystander injury plaintiff that is not the same sex of the targeted victim cannot prove sex discrimination and thus may not state a claim under the bystander injury theory. In rejecting an opposite-sex bystander claim, the court properly distinguishes between an "associational" injury and a "sex discrimination" claim. A bystander who is only offended at the treatment of co-workers or suffers from lost friendship with the co-workers has not been personally discriminated against because of sex. Title VII was not intended to create friendly work environments, only to prevent and correct sex-based discrimination.

Courts should be aware, however, that this rejection of an opposite-sex bystander injury claim is *not* a rejection of same-sex claims involving the *harasser* and the bystander victim. As the Supreme Court recently proclaimed in *Oncale*, Title VII does not preclude a claim of same-sex harassment.[196] Therefore, as long as the bystander plaintiff can show that the discriminatory conduct was effectuated because of the plaintiff's sex, a plaintiff who is outside the gender

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[193] *See* Harris v. Forklift Sys., 510 U.S. 17, 21-22 (1993).

[194] *See Harris*, 510 U.S. at 21; Meritor Sav. Bank, FSB v Vinson, 477 U.S. 57, 67 (1986).

[195] *Harris*, 510 U.S. at 21; *Meritor*, 477 U.S. at 67; *see also* Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 81 (1998) (stating that a plaintiff in a sexual harassment suit "must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted '*discrimination*... because of... sex'").

[196] *See supra* text accompanying note 36.

class of the targeted victims may state a claim under bystander injury.[197]

C. Evaluate Plaintiff's Proximity to the Harassing Conduct when Determining Injury

Courts should also pay close attention to the proximity between the conduct and the bystander victim, keeping in mind that a plaintiff must always prove that harassing conduct was subjectively unreasonable and severe or pervasive, altering the conditions of employment.[198] Courts must be wary of claims by employees who work in different departments of a workplace if the contact between the involved parties is minimal or non-existent.[199] This query is especially fact-sensitive because a plaintiff that does not personally observe the harassment but has knowledge of the conduct may establish that the harassment is part and parcel of an overall corporate environment of sex discrimination. Furthermore, the number and scope of the contacts between the parties may be significant notwithstanding the actual physical arrangement of the workplace. A workplace environment where employees have considerable freedom to move about and discuss personal or work-related issues may be sufficient to establish this element of the claim, even if the harasser and the targeted and bystander victims generally work in different areas of the office.

Related to the proximity issue is the determination of injury. The bystander plaintiff must allege an injury that is "distinct and palpable" to warrant a court remedy.[200] Expert witnesses will undoubtedly play a role in determining the plaintiff's injury and while psychological injury may be present, it is not required to state a claim under Title VII.[201] Courts should keep in mind, however, that any injury alleged by the plaintiff must be a result of sex discrimination, and not merely an "associational injury" or empathy for the targeted employees.

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[197] *See supra* note 171.

[198] *See Harris*, 510 U.S. at 21-22.

[199] Courts should also bear in mind that a bystander plaintiff may only have contact with the targeted victims and not with the alleged harasser. Although this may bear on whether the plaintiff can meet the burden of proof on injury, it should not be viewed as a bar to a Title VII claim.

[200] Warth v. Seldin, 422 U.S. 490, 501 (1975); *see also supra* Part III.B.

[201] *See Harris*, 510 U.S. at 22 (stating that "[s]o long as the environment would reasonably be perceived, and is perceived, as hostile or abusive . . . there is no need for it also to be psychologically injurious") (citation omitted).

D. Preventing, Correcting, and Containing the Hostile Environment: New Concerns for Employers

Mention the words "sexual harassment" and "bystander victims" to employers and watch their faces cringe. The prospect of adding another component to the already confusing and rapidly-changing sexual harassment law leaves many employers wondering what, if anything, they can do to prevent and effectively handle discriminatory conduct in the workplace. Because one of the primary purposes of Title VII was to prevent as well as remedy discrimination in the workplace, it is important to explore how employers should respond to situations that may culminate in a bystander injury claim. Wholesale changes to employer prevention and correction plans are not necessary. Employers must simply refine their methods to take bystander injury harassment into account. The relatively minor changes necessary to prevent and correct bystander injury are due to the close relationship between bystander injury and existing hostile environment law.

First, it is important to recognize the impact of the recent Supreme Court decisions in *Ellerth* and *Faragher*.[202] Employers must be cognizant of the elements and availability of the affirmative defense to liability in cases involving supervisor harassment that does not result in a tangible employment action. Employers must ensure that they "exercise[] reasonable care to prevent and correct promptly *any* sexually harassing behavior."[203] At a minimum, this means employers must prevent all potentially discriminatory conduct by its supervisors and employees, including overt harassment, supervisor-employee sexual relationships, sexually-explicit pictures or graffiti, and now, bystander injury harassment. In order to effectuate preven-

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[202] *See supra* notes 29-34 and accompanying text.

[203] Burlington Indus. v. Ellerth, 524 U.S. 742, 765 (1998) (emphasis added). The Court, however, does not provide insight into determining the reasonableness standard in this context. The Ninth Circuit, in *Ellison v. Brady*, suggested that "reasonableness of an employer's remedy will depend on its ability to stop harassment by the person who engaged in harassment. In evaluating the adequacy of the remedy, the court may also take into account the remedy's ability to persuade potential harassers to refrain from unlawful conduct." 924 F.2d 872, 882 (9th Cir. 1991) (footnote omitted).

Ironically, the City of Boca Raton is again under scrutiny for its response to allegations of sexual harassment. The Palm Beach Post reports that the city's human resources and fire department officials failed to investigate allegations that a city paramedic was date-raping women he met while on-duty. *See* Matt Mossman, *Boca under fire for inattention to claims of sex harassment*, THE PALM BEACH POST, March 8, 1999, at B1. The officials apparently issued a verbal reprimand and planned to "keep a closer watch on him." Interestingly, the officials felt that if the accusations were true, the victim should contact the police to resolve the problem. *Id.* at B1. The assistant fire chief allegedly told a firefighter who relayed allegations from a victim that, "[i]f she's going to press criminal charges let her call the police but, you know, don't even bother." *Id.*

tion, the employer must take reasonable steps such as implementing a clear non-discrimination employment policy and distributing the policy on the employee's first day at work. This policy must strongly forbid all forms of harassing conduct.[204] As of this writing, many employers are scrambling to ensure they have a policy in place—distributed to all employees—that provides an *effective* means for employees to report questionable conduct.[205] The employer should also institute an on-going review of the harassment policy through seminars, informational postings or memoranda, or performance review meetings.[206]

Management must also be positively concerned with correcting the harassing conduct once the employer is aware of the harassment or receives a complaint from an employee. This stage is likely the most significant change the bystander injury claim brings to the process by which employers deal with discriminatory conduct. When an employee approaches the employer with a complaint of harassment, the employer must use considerable caution in pursuing the proper course to handle the complaint.[207] An employer can no longer deal with only the complainant and the alleged harasser. The employer must consider the effect the conduct has on the workplace as a whole. This means that the more traditional response to complaints (dealing directly with the complainant to see what he or she feels is necessary to correct the problem) is insufficient. The employer must reach out to other employees, especially those employees who work closely with the complainant, to determine if the alleged conduct has affected

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[204] *See* MIKE DEBLIEUX, STOPPING SEXUAL HARASSMENT BEFORE IT STARTS: A BUSINESS AND LEGAL PERSPECTIVE 76 (2d ed. 1998) (stating that employers should "[s]end a strong message to every employee that sexual harassment is unacceptable"); *see also* ANNE C. LEVY & MICHELE A. PALUDI, WORKPLACE SEXUAL HARASSMENT 74-83 (1997) (discussing the key elements for an effective anti-sexual harassment polity including expressing strong disapproval of any such behavior); Wayne T. McGaw, *Investigating Sexual Harassment: A Practical Primer for the Corporate Lawyer*, 40 LOY. L. REV. 97, 104 (1994) (proposing sample anti-sexual harassment policy prohibiting "sexual harassment of the employee in any form").

[205] The emphasis on "effective" is critical; a sexual harassment policy that is not consistently enforced or provides a very narrow means of reporting harassment may not be sufficient to raise the affirmative defense. For example, a woman who is being harassed by the supervisor in charge of handling harassment complaints does not have a reasonable opportunity to report the conduct. The company should ensure that multiple reporting avenues are available to employees. *See, e.g.*, DEBLIEUX, *supra* note 204, at 93 (noting that an "effective . . . policy gives employees options for reporting their problems or concerns" and includes both men and women); JOSEPH M. PELLICCIOTTI, TITLE VII LIABILITY FOR SEXUAL HARASSMENT IN THE WORKPLACE 78-79 (3d ed. 1996) (explaining the need for a "meaningful grievance procedure" to meet the objective of "foster[ing] reporting"); *see also* LEVY & PALUDI, *supra* note 204, at 94 (recommending that employers establish a "team of investigators -- both a woman and a man").

[206] *See* DEBLIEUX, *supra* note 204, at 79-81.

[207] For a comprehensive summary of an effective complaint procedure, see LEVY & PALUDI, *supra* note 204, at 112-13; *see also* DONALD H. WEISS, FAIR, SQUARE, & LEGAL 182-84 (rev. ed. 1995).

the targeted victim's co-workers. During the initial stages of the complaint, the employer may ask both the complainant and the alleged harasser if there are any witnesses to the conduct.[208] In addition to their usefulness in the traditional investigation, these employees are a wise starting point for determining potential bystander injury victims.

The employer, in handling the complaint, should not take any significant action without first consulting the targeted victims. A brash decision to move the victims out of the department may erroneously signal to employees that they are being treated differently because of their sex or in retaliation for reporting or opposing the discriminatory conduct.[209] While it may ultimately be in the best interest to change the structure of the work environment to eliminate the harassment, it should be done with utmost care and clear communication with the affected employees. Moreover, both targeted and bystander victims should always be asked how they feel the situation should be handled.[210] Furthermore, a thorough documentation of the employees consulted and management's response is vital to show that the employer made a concerted effort to promptly correct the existing harassment and prevent a future reoccurrence.[211]

This alteration in handling complaints as a result of the bystander claim also brings additional concerns with respect to the alleged harasser. Prior to the recognition of a bystander claim, employers were cautioned to consider the rights of the alleged perpetrator during the investigation and handling of a complaint.[212] An employer who summarily discharges an alleged discriminator or engages in a pattern of activity that is defamatory in nature may face a lawsuit by the alleged harasser.[213] This problem is epitomized by the widely-reported case involving the wrongful discharge claim brought by an executive at the Miller Brewing Company in Wisconsin. The fired executive was awarded $26.6 million in damages from his summary dismissal

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[208] *See* JULIE M. TAMMINEN, SEXUAL HARASSMENT IN THE WORKPLACE 22-24 (Supp. 1996).

[209] *See* LEVY & PALUDI, *supra* note 204, at 83.

[210] In some cases, victims are simply looking for an apology and a promise it will not reoccur in the future. This open communication not only assists the investigator with determining the appropriate response, but may also provide additional protection from employee lawsuits by providing evidence of the reasonableness of the employer's prevention and correction of harassing conduct.

[211] *See* TAMMINEN, SEXUAL HARASSMENT IN THE WORKPLACE 145-47 (1994).

[212] *See* PELLICCIOTTI, *supra* note 205, at 81.

[213] *See, e.g.*, Babb v. Minder, 806 F.2d 749, 756 (7th Cir. 1986) (stating that manager "acted with reckless disregard of the truth or falsity of the defamatory statements"). *But cf.* Cotran v. Rollins Hudig Hall Int'l, Inc. 948 P.2d 412, 422 (Cal. 1998) (holding that employer must have reasonable grounds for believing that the misconduct occurred and otherwise act fairly).

based on a co-worker's sexual harassment claim that was subsequently dismissed.[214]

With the rise of the bystander injury theory, this scenario raises substantial concerns for the employer who attempts to effectively deal with harassment complaints. Because the employer will be faced with interviewing employees other than the targeted victim and known witnesses, there is an increased risk that the dissemination of allegations about the alleged harasser may become defamatory. It is important that employers stress the confidentiality of the matter in the early stages of the investigation and minimize the amount of information made available to the employees interviewed to prevent defamation claims brought by alleged harassers.[215] To uncover potential bystander injury, it may be preferable for employers to conceal the name of the complainant and the harasser in the early stages of the investigation and instead probe with more generality to determine the effect of the alleged conduct on the complainant's co-workers. This can be accomplished by first interviewing co-workers within the immediate work area of the complainant to determine the extent of the damage. All of these interviews should, of course, be documented.[216]

E. Bystander Injury Theory and the Future of Title VII Sexual Harassment Litigation

Supreme Court Justice Clarence Thomas recently remarked that, in light of the Supreme Court's Title VII decisions in 1998, "[t]here will be more and more litigation to clarify applicable legal rules in an area in which both practitioners and the courts have long been begging for guidance."[217] If this prediction proves true, these changes will present a significant burden on government agencies and courts, as well as raising the cost of legal expenses for business in the prevention and handling of bystander injury claims.

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[214] *See* Schultz, *supra* note 77, at 1790-91. The case is more popularly recognized as the "*Seinfeld* joke firing" where the Miller executive, Jerold Mackenzie, was fired for describing an episode of the TV sitcom *Seinfeld* to co-worker Patricia Best. The episode consisted of the show's protagonist, Jerry Seinfeld, attempting to remember the name of the woman he is dating, which rhymes with a part of the female anatomy. After wrongly guessing "Gipple" and "Mulva," Seinfeld suddenly remembers it was "Delores." After Best professed her ignorance of the punch line, Mackenzie photocopied the definition of "clitoris" from a dictionary and handed it to her. After Best's sexual harassment lawsuit was thrown out, Mackenzie collected $26.6 million in damages from the Miller Brewing Company for wrongful discharge. *See id.*

[215] At some point during the investigation, the employer will have to reveal the names of the complainant and the alleged harasser to interview witnesses and potential bystander victims. The goal is to stress to the complainant and alleged harasser that information will only be disclosed on a "need to know" basis. *See* TAMMINEN, *supra* note 211, at 23.

[216] *See id.*

[217] Burlington Indus. v. Ellerth, 524 U.S. 742, 774 (1998) (Thomas, J., dissenting).

It is not so plainly obvious, however, that increased recognition of the bystander injury claim discussed herein will result in substantially more litigation under Title VII. First, the existence of other third-party claims based on sexual favoritism and obscene pictures has not resulted in a flurry of litigation in those areas. While it is true that courts may be faced with both frivolous and non-frivolous claims of bystander injuries, its close relationship to existing hostile environment theory suggests that the actual number of employees willing to pursue a claim will probably not increase dramatically. There is one factor that may prove this prediction false: until courts establish the definitive limits to the scope of bystander injury as this Note recommends, the potential for litigation is great. As one defense attorney predicts, recognizing the bystander injury claim "could turn a single act of sexual harassment into a huge class action and [it's unclear] how an employer could protect itself."[218] If courts use the proposed framework for analyzing bystander claims and employers amend their procedures for preventing and correcting harassment to account for potential bystander victims, this argument seems greatly exaggerated.

IV. CONCLUSION

There is overwhelming legal support for the bystander injury theory. The Supreme Court's recognition of the hostile work environment claim in the *Meritor*, *Harris*, and *Oncale* decisions implicitly recognizes a bystander injury claim under Title VII. With the advent of the bystander injury theory, employers are now faced with the realization that when the air is poisoned with sexual harassment, it can travel quickly throughout the office infecting co-workers not intended to be the target of the harassment. In a hostile work environment, there are potentially many victims of sex discrimination; the bystander injury theory formally recognizes that co-workers that are indirectly subjected to severe or pervasive sexual harassment may suffer the same injuries as the targeted victims.

It is important to emphasize, however, that employer liability for bystander injury is not unlimited. As with all Title VII claims, the employee must still prove that the discrimination was based on their sex. Bystander employees that are not the same gender as targeted employees are not able to prove sex discrimination under the bystander injury theory. The statutory limitations and the proximity-to-harassment requirement will preclude many employees from bringing a successful claim under the bystander injury theory. Furthermore,

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[218] Bianchi, *supra* note 168.

because the bystander injury theory is closely aligned to traditional hostile environment claims, employers can effectively prevent bystander injury liability.

For these reasons, the sexual harassment claim brought by Diane Leibovitz is "unusual" only in that she held her employer accountable for her injuries from the hostile work environment.[219] As more bystander victims bring meritorious claims against their employers, the bystander injury sexual harassment theory may one day be as commonplace as the traditional hostile environment theory the Supreme Court embraced in the *Meritor* decision.

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[219] *See* Brief of Respondent Mechelle Vinson, *supra* note 1, at 44-45.

[†] With appreciation to Professor James W. McElhaney for his early guidance that uncovered the topic for this Note, and to Professors Kathleen Engel and Jonathan Gordon, who provided invaluable feedback throughout the research and writing process.