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Using Agency Principles for Guidance in Finding Employer Liability for a Supervisor's Hostile Work Environment Sexual Harassment

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Using Agency Principles for Guidance in Finding Employer Liability For a Supervisor's Hostile Work Environment Sexual Harassment

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I. INTRODUCTION

Title VII of the Civil Rights Act of 1964, as amended "Title VII," prohibits sexual harassment in the workplace.¹ The courts have created two categories of sexual harassment.² The first, quid pro quo sexual harassment, occurs when a supervisor requires sexual consideration from an employee in exchange for job benefits.³ The second, hostile work environment sexual harassment, occurs when an employee is subjected to unwelcome sexual harassment that affects a term, condition, or privilege of employment.⁴ The victim must prove that the harassment is sufficiently severe or pervasive to alter the conditions of her⁵ employment and create an abusive working environment.⁶

1. 42 U.S.C. § 2000e-2(a) (1988) provides:

It shall be an unlawful employment practice for an employer—

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

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

See also the Equal Employment Opportunity Commission's Guidelines on Discrimination Because of Sex ("Guidelines"), 29 C.F.R. § 1604.11 (1994). These Guidelines provide:

Harassment on the basis of sex is a violation of Section 703 of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

29 C.F.R. § 1604.11(a) (citations omitted).

Courts often give substantial deference to these Guidelines. "As an 'administrative interpretation of the Act by the enforcing agency,' these Guidelines, 'while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'" *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986) (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971); *General Electric Co. v. Gilbert*, 429 U.S. 125, 141-42 (1976)) (citations omitted).

2. See, for example, *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1557, 1564 (11th Cir. 1987) (recognizing quid pro quo and hostile work environment sexual harassment); *Karibian v. Columbia University*, 14 F.3d 773, 777 (2d Cir. 1994) (same).

3. *Sparks*, 830 F.2d at 1564. Sexual harassment that results in a tangible job detriment has also been recognized as quid pro quo harassment. See, for example, *Henson v. City of Dundee*, 682 F.2d 897, 909 (11th Cir. 1982); *Karibian*, 14 F.3d at 778.

4. *Sparks*, 830 F.2d at 1557.

5. While the Author recognizes that Title VII proscribes sexual harassment directed by females against males, research suggests that women are most often the victims of such discrimination. See United States Merit Systems Protection Board, *Sexual Harassment in the*

Any victim of sexual harassment seeking redress for the wrong committed against her must establish that sexual harassment occurred.⁷ This showing, however, may not resolve the issue in the victim's favor. For the victim to receive full recovery, the court must hold the employer liable for the sexual harassment.⁸ If the court refuses to make this finding, the victim's relief may be substantially diminished or even eviscerated by the fact that individual supervisors are not as well-situated as are their employers to provide the make-whole relief contemplated by Title VII.⁹

Employer liability, thus, becomes the heart of a sexual harassment claim.¹⁰ In addressing the issue of employer liability, courts uniformly hold employers strictly liable for quid pro quo sexual

Federal Workplace: Is It a Problem? 2-3 (1981) (reporting that in a survey of 23,000 male and female federal employees, 42% of the women who responded reported experiencing some form of sexual harassment); Mary Joe Frug, *Women and the Law* 179 (1991) (reporting that sexual harassment is an issue that confronts every woman in the course of her career, either directly or through a friend's experience); Barbara A. Gutek, *Sex and the Workplace* 159-67 (Jossey-Bass, 1985) (arguing that unlike women, men consider a sexualized work environment part of the employment institution's background). Men are likely to consider sexual overtures and comments appropriate and believe that women will appreciate these overtures at work. Men seldom label sexual incidents as harassment. On the other hand, women feel the repercussions of sexual environments at work. *Id.* This Note, therefore, is written in the context of males sexually harassing females. The legal analysis suggested in this Note applies equally to cases in which men are the victims of sexual harassment.

6. *Sparks*, 830 F.2d at 1557 (quoting *Vinson*, 477 U.S. at 67).

7. In *Sparks*, the Tenth Circuit held that in order to establish a prima facie case of hostile work environment sexual harassment, the plaintiff must prove:

- (1) that the employee belongs to a protected group;
- (2) that the employee was subject to "unwelcome" sexual harassment;
- (3) that the harassment complained of was based on sex; and
- (4) that the harassment complained of affected a "term, condition, or privilege" of employment in that it was "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."

Id.

8. The district court in *Sparks* held for the employer on summary judgment because the employee failed to establish what it considered to be a necessary fifth element: the employer's liability for its supervisor's actions under the doctrine of respondeat superior. *Id.* But see Part III.B (discussing the court's misuse of the term "respondeat superior"). See also note 135 (explaining the difference between respondeat superior and agency principles). The Court of Appeals, however, recognized that if the supervisor acted as an agent of his employer when committing sexual harassment, the employer is directly liable if the plaintiff proves the other four elements of her prima facie case. *Id.* at 1558. See also note 7 (setting out the elements of a prima facie case of hostile work environment sexual harassment).

9. Brief for Respondent at 32-33, *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986) (No. 84-1979) ("Respondent's Brief").

10. In their brief, Patricia Barry and Catharine MacKinnon argued to the Supreme Court that employer liability "is the heart of the dispute. It is not an abstract contest over whether sexual harassment is sex discrimination, which is undisputed. It is a concrete conflict over whether sexual harassment will be treated *as if* it is sex discrimination: whether the employer will be responsible so that its victims receive relief." *Id.* at 26.

harassment.¹¹ The employer is directly liable and the plaintiff need not prove an agency relationship.¹² The rationale supporting this rule recognizes that when the employer gives its supervisors the authority to fire employees, it must also accept responsibility to remedy the harm caused by the supervisors' unlawful exercise of that authority.¹³

Hostile work environment sexual harassment is distinct from quid pro quo sexual harassment in that the perpetrator of the harassment need not be the victim's supervisor.¹⁴ A hostile work envi-

11. See, for example, *Horn v. Duke Homes, Div. of Windsor Mobile Homes, Inc.*, 755 F.2d 599, 604-06 (7th Cir. 1985) (adopting a rule of strict liability for employers' acts); *Craig v. Y & Y Snacks, Inc.*, 721 F.2d 77, 80-81 (3rd Cir. 1983) (finding liability where supervisor had "unbridled authority to retaliate"); *Katz v. Dole*, 709 F.2d 251, 255 n.6 (4th Cir. 1983) (noting that plaintiff met both strict liability in her quid pro quo claim and constructive notice in her condition of work claim); *Henson*, 682 F.2d at 910 (attaching strict liability in quid pro quo and tangible detriment claims); *Miller v. Bank of America*, 600 F.2d 211, 213 (9th Cir. 1979) (identifying the incongruous result if an employer is not liable for the discriminatory acts of an employee).

12. *Sparks*, 830 F.2d at 1564 n.22 (citing *Henson*, 682 F.2d at 909). See also 42 U.S.C. § 2000e(b) (1989) (defining "employer" to include agents); 29 C.F.R. § 1604.11(c) (holding the employer strictly liable for acts of its agents and supervisors).

13. *Henson*, 682 F.2d at 909. Since the modern corporation can exist only through the individuals who manage it, little progress would be made in eradicating employment discrimination if the corporate employer is not held liable for this individual misconduct. *Id.*

14. But see Barbara Verdonik, *Abolishing the Quid Pro Quo and Work Environment Distinctions in Sexual Harassment Cases Under the Civil Rights Act of 1964: Vinson v. Taylor*, 60 St. John's L. Rev. 177, 188-90 (1985) (arguing for the abolition of the distinction between quid pro quo and hostile work environment sexual harassment).

While it is beyond the scope of this Note, there is a strong argument for abolishing the distinction between quid pro quo and hostile work environment sexual harassment when the accused is a supervisor. First, on a practical level, many cases could be characterized interchangeably as hostile work environment or quid pro quo cases. *Henson*, 682 F.2d at 908 n.18. By creating a legal distinction where one does not exist, the courts merely engender greater confusion than necessary. This confusion is especially likely when an issue as important as the standard of employer liability hinges on the resolution of the distinction.

One claimed justification for the distinction between quid pro quo and hostile work environment harassment is that in a case of quid pro quo harassment the victim suffers a tangible job detriment, whereas in a hostile work environment case she does not. See *Sparks*, 830 F.2d at 1564 (stating that "a tangible job detriment" is the "essence" of a claim of quid pro quo harassment). This alleged distinction, however, ignores the fact that a woman who is victimized by a hostile work environment is merely given a choice between putting up with the harassment or leaving her job. If the victim chooses to leave her job, she clearly suffers a tangible job detriment. Similarly, being forced to work in a hostile environment is also a job detriment of grave seriousness, regardless of whether a court chooses to term the detriment "tangible."

The victim of a hostile work environment may also choose a third option, namely seeking remedial action from the employer or a court of law while the victim continues in her employment. In addition to reducing the pervasiveness of sexual harassment, Title VII jurisprudence should aim to make this third choice as realistic and attractive as possible to victims of sexual discrimination. This scenario is attractive because it minimizes the costs and damages incurred by both the employer and the employee as well as eliminating the harassment from the workplace.

ronment can be created by a victim's co-worker, or even someone outside of the victim's place of employment, such as a customer or a client.¹⁵ In non-supervisory hostile work environment sexual harassment cases, the employer is held liable if it knew or should have known of the conduct, unless it took immediate and appropriate corrective action.¹⁶

In cases in which supervisors create a hostile work environment, the standard of employer liability has not been clearly established. At one extreme, some courts have held employers strictly liable for a supervisor's hostile environment sexual harassment.¹⁷ Other courts have gravitated to the other extreme and have held employers liable only upon a showing of notice of the harassment and failure by the employer to take adequate remedial action.¹⁸

A second justification for the distinction between quid pro quo and hostile work environment sexual harassment claims is that an individual supervisor may lack any special ability to create a hostile work environment by virtue of his position of power. *Henson*, 682 F.2d at 910. This argument, however, is also flawed. See *Vinson*, 477 U.S. at 74-78 (Marshall, J., concurring) (arguing for imputation of liability for supervisors' hostile work environments). Many supervisors are "charged with the day-to-day supervision of the work environment and with ensuring a safe, productive workplace." *Id.* at 76. If a supervisor in this situation creates a hostile work environment, his ability to do so is clearly enhanced by the authority vested in him by his employer.

Some commentators argue that maintaining the distinction between quid pro quo and hostile work environment harassment provides an excuse for judges to engage in results-oriented decisionmaking. In other words, courts cling to the distinction so that judges can label a case quid pro quo or hostile work environment based on the result that they feel is appropriate in any given case. The result is that only "serious" cases of harassment are labeled "quid pro quo" (for example, cases men also find offensive). See generally Rachel E. Lutner, Note, *Employer Liability for Sexual Harassment: The Morass of Agency Principles and Respondeat Superior*, 1993 U. Ill. L. Rev. 589 (arguing that "reliance on agency law has not established a clear standard" for employer liability).

15. For examples of cases involving non-supervisory harassment, see *Ellison v. Brady*, 924 F.2d 872, 881 (9th Cir. 1991) (discussing corrective action); *Katz*, 709 F.2d at 256 (finding notice and absence of corrective action); *Barrett v. Omaha National Bank*, 726 F.2d 424, 427 (8th Cir. 1984) (stating consonance with *Katz*); *Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 621 (6th Cir. 1986) (stating that plaintiff has the burden of showing actual or constructive notice and failure to correct); *Brooms v. Regal Tube Co.*, 881 F.2d 412, 421 (7th Cir. 1989) (stating that plaintiff has the burden of showing actual or constructive notice and failure to correct).

The EEOC Guidelines provide: "With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action." 29 C.F.R. § 1604.11(d).

16. *Id.*

17. See, for example, *Vinson v. Taylor*, 753 F.2d 141, 149-50 (D.C. Cir. 1985) (charging an employer with the discriminatory acts of its supervisors); *Horn*, 755 F.2d at 605-06 (construing Title VII to demand strict liability).

18. See, for example, *Lipsett v. University of Puerto Rico* 864 F.2d 881, 901 (1st Cir. 1988) (requiring notice in order to hold an employer liable for a violation of Title IX); *Jones v. Flagship International*, 793 F.2d 714, 719-20 (5th Cir. 1986) (requiring the plaintiff to show "that the

The Supreme Court, in *Meritor Savings Bank, FSB v. Vinson*,¹⁹ declined to issue a definitive ruling on employer liability for hostile environment harassment committed by a supervisor, but suggested that lower courts should look to agency principles for guidance in this area.²⁰ The Court also rejected the two extreme approaches taken by the lower courts. First, it rejected strict liability by holding that employers are not always automatically liable for sexual harassment by their supervisors.²¹ Second, the court rejected the notice requirement imposed by a number of lower courts and held that an alleged victim's failure to invoke an existing grievance procedure would not necessarily insulate the employer from liability.²²

The Supreme Court's directive in *Meritor* has resulted in inconsistency and confusion in the lower courts. Some of the circuit courts have seemingly ignored the *Meritor* opinion and continue to apply their pre-*Meritor* test.²³ Other courts have attempted to apply agency principles with widely varying results.²⁴ The Supreme Court or Congress must clearly articulate what a proper application of agency principles entails. Such clarification would create certainty regarding an employer's potential liability, clarify for victims what their rights and available remedies are, and give lower courts a straightforward and consistent standard to apply.

Part II of this Note discusses the proceedings in the courts below that preceded the writ of certiorari in the *Meritor* case, including the district court's imposition of a notice requirement and the circuit court's reversal and subsequent imposition of strict liability. It then discusses the three opinions written in the *Meritor* case itself and concludes, as does Justice Stevens, that a proper analysis of agency principles will reconcile the facially conflicting opinions of Justices Rehnquist and Marshall. This approach results in employer liability in most cases of supervisory hostile environment harassment without imposing the absolute liability that the majority and concurrence explicitly reject.

employer knew or should have known of the harassment in question and failed to take prompt remedial action").

19. 477 U.S. 57 (1986).

20. *Id.* at 72.

21. *Id.*

22. *Id.*

23. See note 139 (discussing several cases that appear to have ignored *Meritor's* mandates).

24. See Part III.

Part III discusses which agency principles are relevant in the sexual harassment context, how the lower courts have applied those principles, and how a proper application of those principles should be achieved. This proper application of agency principles would result in employer liability whenever someone who has been delegated power abuses that power to create a hostile work environment for a subordinate. Part IV concludes by arguing that the foregoing result is sound, both for policy reasons and in keeping with the broad remedial scheme envisioned by the advocates of Title VII.

II. *MERITOR SAVINGS BANK, FSB V. VINSON*

A. *Proceedings Below*

In 1974, Mechelle Vinson was hired by Sidney Taylor, a vice president of Meritor Savings Bank and manager of one of its branch offices.²⁵ Vinson started working as a teller-trainee, and was later promoted to teller, head teller, and assistant branch manager as a result of merit.²⁶ In September, 1978, Vinson notified Taylor that she was taking sick leave for an indefinite period.²⁷ On November 1, 1978, the bank discharged her for excessive use of that leave.²⁸ Vinson brought an action against Taylor and the bank alleging that she had been subjected to sexual harassment by Taylor in violation of Title VII.²⁹ Vinson sought injunctive relief, compensatory and punitive damages against Taylor and the bank, and attorney's fees.³⁰

25. *Meritor*, 477 U.S. at 59.

26. *Id.* at 59-60.

27. *Id.* at 60.

28. *Id.*

29. Vinson alleged that shortly after her probationary period, Taylor "invited her out to dinner and, during the course of the meal, suggested that they go to a motel to have sexual relations." *Id.* at 61. Vinson claimed that she initially refused this advance, but out of "fear of losing her job," she ultimately agreed. *Id.* Taylor allegedly continued repeatedly to demand sexual favors from Vinson, usually at the bank, both during and after regular business hours. *Id.* Vinson claimed that over the course of her employment at the bank she had intercourse with Taylor 40 or 50 times. *Id.* Furthermore, Vinson testified that Taylor "fondled her in front of other employees, followed her into the women's restroom when she went there alone, exposed himself to her, and even forcibly raped her on several occasions." *Id.* Finally, Vinson testified that she was afraid of Taylor and, therefore, never reported Taylor's harassment to any of his supervisors and never used the bank's complaint procedure. *Id.* at 61.

30. *Id.* at 60.

Taylor denied Vinson's allegations and contended that they were made in response to a business related dispute.³¹ The bank also denied Vinson's allegations and contended that it should be absolved from liability, as any sexual harassment that might have occurred was unknown to the bank and engaged in without its consent or approval.³²

The district court³³ held that no sexual harassment occurred,³⁴ but went on to discuss the standard of employer liability in dicta. After pointing out that the bank had an express policy against discrimination and that no one had ever lodged a complaint alleging sexual harassment by Taylor, the court concluded that the bank's liability should turn on whether it had notice of Taylor's alleged misconduct.³⁵ Since the court found that the bank did not have such notice, it concluded that the bank could not be held liable for Taylor's alleged actions.³⁶

The district court did not explain the rationale behind its requirement of notice in a supervisory hostile environment sexual harassment case. It did, however, attempt to justify its finding that notice to Taylor, who was the plaintiff's supervisor, branch manager, and assistant vice president of the bank, did not constitute notice to the bank.³⁷ The court pointed out that while Taylor had the authority to make personnel recommendations, he did not have the authority to hire, fire, or promote.³⁸ The court, therefore, found that it would be unreasonable to hold employers liable when notice to the employer depends upon the perpetrator of the harassment and there are no other facts to place the employer on notice.³⁹

The Court of Appeals for the D.C. Circuit⁴⁰ reversed the holding of the District Court and remanded the case for the court to de-

31. *Id.* at 61.

32. *Id.*

33. *Vinson v. Taylor*, 23 FEP Cases (BNA) 37, 42 (D. D.C. 1980).

34. Rather than resolving the conflicting testimony regarding whether a sexual relationship between Vinson and Taylor had occurred, the district court found that "if [respondent] and Taylor did engage in an intimate or sexual relationship during the time of [respondent's] employment with [the bank], that relationship was a voluntary one having nothing to do with her continued employment at [the bank] or her advancement or promotions at that institution." *Id.* at 43.

35. *Id.* at 42.

36. *Id.*

37. *Id.* at 41.

38. *Id.* at 42.

39. *Id.*

40. *Vinson*, 753 F.2d at 141.

termine whether Taylor created a hostile work environment in violation of Title VII.⁴¹ The court also addressed the issue of whether Title VII imposes liability upon an employer that does not have specific notice of sexual harassment by supervisory personnel responsible for creating a hostile work environment.⁴² In answering that question affirmatively, the court relied on the statutory definition of "employer,"⁴³ the EEOC Guidelines,⁴⁴ precedent in Title VII jurisprudence,⁴⁵ and the remedial scheme embodied by Title VII.⁴⁶

41. The court pointed out that there are two separate avenues by which a plaintiff may demonstrate unlawful sex discrimination. *Id.* at 144. Abolition of the job of a female because she spurned her male superior's sexual advances constitutes one type of Title VII violation. *Id.* at 144-45 (citing *Barnes v. Costle*, 561 F.2d 893, 992 (D.C. Cir. 1977)). A violation also occurs when a woman employee is subjected to pervasive on-the-job sexual harassment by her supervisors. *Id.* at 145 (citing *Bundy v. Jackson*, 641 F.2d 934, 946 (D.C. Cir. 1981)). The court recognized that Vinson's allegations were of the latter type. *Id.* The district court, however, held that Vinson "was not required to grant Taylor or any other member of [the bank] sexual favors as a condition of either her employment or in order to obtain promotion." *Id.* at 144 (quoting *Vinson*, 23 F.E.P. Cases (BNA) at 42). The court of appeals pointed out that this finding was not conclusive because an infringement of Title VII is not necessarily dependent upon the victim's loss of employment or promotion. *Id.*

42. *Id.* at 147.

43. "'Employer' is defined as 'a person engaged in an industry affecting commerce' with a workforce of specified size, 'and any agent of such a person . . .'" *Id.* at 148 (quoting 42 U.S.C. § 2000e(b)). "Taken literally, then, Title VII as much outlaws sex discrimination by an 'agent' of an association as by the association itself." *Id.* The court went on to say that it is clear that Taylor was the bank's "agent" with respect to other employees of that branch, and, therefore, the sexual harassment charged to Taylor was forbidden sex discrimination. *Id.*

44. The EEOC Guidelines state:

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

29 C.F.R. § 1604.11(c).

45. The court pointed out that its own precedent established that sexual harassment is a violation of Title VII. *Vinson*, 753 F.2d at 149 (citing *Bundy v. Jackson*, 641 F.2d 934, 947 (D.C. Cir. 1981)). The court also saw no reason to treat hostile environment sexual harassment any differently from racial or religious discrimination. *Id.* The court stated that the case law in these areas established that "an employer is chargeable with Title VII violations occasioned by discriminatory practices of supervisory personnel." *Id.* (quoting *Barnes v. Costle*, 561 F.2d 983, 993 & n.71 (D.C. Cir. 1977)). See also *Bundy v. Jackson*, 641 F.2d 934, 943 (D.C. Cir. 1981) (holding that racial harassment by supervisor in course of duties is enough to support finding that supervisor's acts are "deliberate" acts of employer); *Calcote v. Texas Educ. Found., Inc.*, 578 F.2d 95, 98 (5th Cir. 1978) (same); *Young v. Southwestern Savings & Loan Association*, 509 F.2d 140, 144 n. 7 (5th Cir. 1975) (holding employer liable under Title VII for supervisor's religious discrimination although supervisor had no authority to fire and employer had no opportunity to correct problem); *Anderson v. Methodist Evangelical Hospital, Inc.*, 464 F.2d 723, 725 (6th Cir. 1972) (holding employer liable under Title VII for supervisor's racially discriminatory discharge of employee despite employer's "outstanding record in regard to fair and impartial treatment of

The court concluded that an employer may be held liable for sexual harassment by any supervisory employee with authority to hire, promote, or fire.⁴⁷ The court also held that vicarious liability should not be limited to the acts of supervisors with this quantum of authority. Rather, the existence or appearance of a significant degree of influence in vital job decisions gives any supervisor the opportunity to take advantage of subordinates.⁴⁸ According to the court, this opportunity arises in the supervisor's ability to direct subordinates in their work, evaluate their performances, and recommend personnel actions.⁴⁹ Hence, the court held that employers should be strictly liable for the sexual harassment of any subordinate by any supervising superior.⁵⁰

The court then justified its holding based on the policies underlying Title VII. It stated that requiring notice as a prerequisite to employer liability would encourage employers to ignore signs of discriminatory practice.⁵¹ A progressive interpretation of Title VII would create an incentive for employers to take a more active role in ensuring a working environment free from illegal sex discrimination.⁵²

the races"); *Flowers v. Crouch-Walker Corp.*, 552 F.2d 1277, 1282 (7th Cir. 1977) (holding employer liable under Title VII for any race-based violation occasioned by any person in authorized capacity as supervisor).

46. The court pointed out that in answering the question of employer liability for the hostile environment harassment of a supervisor, it was not resorting to the common-law doctrine of respondeat superior. *Vinson*, 753 F.2d at 150. The court felt that these principles were not suitable for resolving questions of Title VII law, noting:

Title VII is a mandate from Congress to cure a perceived evil—certain types of discrimination in employment—in a prescribed fashion. Rules of tort law, on the other hand, have evolved over centuries to meet diverse societal demands by allocating risks of harm and duties of care. Without clear congressional instruction, we think it unsafe in developing Title VII jurisprudence to rely uncritically on dogma thus begotten.

Id. at 150-51. The court went on to argue that applying common-law principles to Title VII would limit employer liability to situations in which a supervisor acted within the scope of his employment and could "lead to the ludicrous result that employers would become accountable only if they explicitly require or consciously allow their supervisors to molest women employees." *Id.* at 151.

47. *Id.* at 149-50. The court pointed out that an employer's delegation of such extensive authority gives the supervisor extreme power over the victimized employee. *Id.* at 150.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* The court recognized:

Prevention is the best tool for the elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned.

Id. at 151 n.80 (quoting 19 C.F.R. § 1604.11(f)).

The court noted that the employer was the only party in a position to halt discriminatory practices by supervisory personnel, as well as the only entity capable of providing the equitable relief contemplated by the act.⁵³ The court concluded that Title VII's goal of eliminating discrimination in employment will become an empty promise if victims of unlawful discrimination cannot secure a remedy from the only source capable of providing it.⁵⁴

The proceedings in the district court and the court of appeals represent the two extreme views of employer liability in supervisory hostile environment sexual harassment cases. The district court's notice requirement would substantially limit the remedies available to victims, while the strict liability standard adopted by the court of appeals would result in employer liability in every case, thereby rendering an inquiry into the facts of a particular case unnecessary.

B. *The Supreme Court's Directive*

Chief Justice Rehnquist's majority opinion⁵⁵ stated that the record in the case was not clear enough to issue a definitive rule on employer liability.⁵⁶ It did, however, suggest that Congress wanted courts to look to agency principles for guidance.⁵⁷ The Court noted that Congress's decision to define "employer" to include any "agent" of an employer⁵⁸ demonstrates an intent to place some limits on the acts of employees for which employers under Title VII are to be held liable.⁵⁹ The Court, therefore, concluded that the court of appeals was wrong to hold employers absolutely⁶⁰ liable for sexual harassment

53. *Id.* at 151.

54. *Id.*

55. The opinion began by recognizing for the first time that hostile environment sexual harassment is a form of sex discrimination that is actionable under Title VII. *Meritor*, 477 U.S. at 63-68. The opinion agreed with the court of appeals, finding that the correct inquiry is whether the plaintiff indicated that the alleged sexual advances were unwelcome, not whether her participation in them was voluntary. *Id.* at 68. See also *Harris v. Forklift Systems, Inc.*, 114 S. Ct. 367, 370 (1993) (reaffirming that hostile work environment sexual harassment violates Title VII). The *Harris* Court, however, did not address the issue of employer liability.

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

57. *Id.*

58. *Id.* (citing 42 U.S.C. § 2000e(b)).

59. *Id.*

60. Justice Rehnquist specifically stated that Congress' decision to define "employer" to include any "agent" of an employer, 42 U.S.C. §2000e(b), surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible. For this reason, we hold that the Court of Appeals erred in concluding that employers are *always automatically liable* for sexual harassment by their supervisors.

committed by their supervisors.⁶¹ The Court also held, in accordance with agency principles, that absence of notice to an employer would not always insulate that employer from liability.⁶² Finally, the Court held that the existence of a grievance procedure and a policy against discrimination that went unused would not necessarily shield an employer from liability.⁶³

While refusing to provide a clear answer to the question of employer liability for supervisory hostile environment sexual harassment, the majority opinion did establish three directives for lower courts to follow. First, the Court held that lower courts are to apply common-law agency principles in resolving this issue. Second, the Court rejected the absolute liability approach advocated by the court of appeals. Finally, the Court also rejected a strict notice requirement, as advocated by the district court. Justice Rehnquist's opinion, therefore, should be viewed as a compromise between the two polar extremes advocated in the proceedings below.

Justice Marshall addressed the issue of employer liability in a concurring opinion.⁶⁴ He relied on the EEOC Guidelines⁶⁵ in proposing that "an employer is liable if a supervisor or an agent violates the Title VII, regardless of knowledge or any other mitigating factor."⁶⁶ Justice Marshall pointed out that Title VII violations are

Id. (emphasis added).

While this language appears to reject the imposition of "strict liability" on employers for supervisory hostile work environment harassment, it is interesting to note that Justice Rehnquist did not use the legally significant terminology. Rather, the use of the words "always automatically liable" seems to indicate that even Justice Rehnquist recognized that employers will be liable for supervisory harassment in *most* cases. By not holding them "automatically liable," the majority simply indicated that courts need to look to the facts of the case to determine whether an agency relationship exists.

This interpretation of the majority's language is consistent with the application of agency principles advocated in this Note. See Part III. The terminology "always automatically liable," therefore, appears frequently throughout this Note in an effort to reflect faithfully the language used by the majority opinion.

61. Id. (citing Restatement (Second) of Agency §§ 219-237 (1958)).

62. Id.

63. Id. The Court pointed out that these facts are relevant, but not dispositive. Id. In the case at bar, the bank policy did not explicitly proscribe sexual harassment and it also required an employee to complain first to her direct supervisor, in this case Taylor. Id. at 72-73. The Court recognized that it was not surprising that Vinson did not invoke the bank's procedure in this case. Id. at 73. However, the Court left open the possibility that if an employer's procedures were "better calculated to encourage victims of harassment to come forward," the procedures may effectively shield the employer from liability. Id.

64. Id. at 74 (Marshall, J., concurring).

65. See 29 C.F.R. § 1604.11(c).

66. *Meritor*, 477 U.S. at 75 (citing Equal Employment Opportunity Commission, Adoption of Final Interpretive Guidelines, 45 Fed. Reg. 74676, 74677 (1980) (adopting 29 C.F.R. § 1604)).

committed by individuals. However, Title VII remedies of reinstatement and back pay generally can be awarded only against the employer as an entity.⁶⁷

Justice Marshall recognized that the courts have uniformly held employers liable, without notice, for the racial discrimination⁶⁸ and quid pro quo sexual harassment⁶⁹ of their supervisors. He found the Solicitor General's argument⁷⁰ that hostile environment sexual

This Note interprets Justice Marshall's opinion to mean that a plaintiff is not required to give notice to her employer of the supervisor's harassment to hold the employer liable. Furthermore, since an employer is liable "regardless . . . of any other mitigating factor," an employer's policy against sexual harassment and its response to the harassment should not necessarily shield it from liability. See Part III.E (arguing that the employer should be liable when a supervisor is "aided in the agency relation," regardless of any remedial action taken).

67. *Meritor*, 477 U.S. at 75. Justice Marshall also pointed out that the remedial provisions of Title VII were modeled after those provided by the National Labor Relations Act, *id.* at 75 n.1, and federal labor law provides that the act of a supervisor is imputed to the employer, *id.* at 75. He went on to argue that nothing would be gained by adopting a special rule of employer liability for hostile environment sexual harassment. *Id.* at 77. Justice Marshall pointed out that Title VII remedies provide for injunctive relief rather than money damages. Therefore, an employer whose internal grievance procedures would have addressed the violation could avoid this relief. *Id.* He also argued that when a victim seeks backpay stemming from a constructive termination, an employer's effective internal procedure might be a factor in determining the remedies available against it. *Id.* Hence, when a victim by-passed an effective grievance procedure without a good reason, the court may be reluctant to award reinstatement and back pay. *Id.* at 78.

The Civil Rights Act of 1991, however, amended Title VII to allow victims of intentional discrimination to recover compensatory and punitive damages, in addition to injunctive and other equitable relief. Pub. L. No. 102-166, 105 Stat. 1071 (1991). Hence, even if the majority of the Court had accepted Justice Marshall's rationale, an open question would still exist regarding when a victim of sexual harassment could recover these damages from her employer. Treatment of these issues is addressed in note 222 and Part IV.B.

68. *Meritor*, 477 U.S. at 75-76.

69. *Id.* at 76.

70. *Id.* The EEOC argued that a supervisor's hostile environment harassment differs from racial discrimination and quid pro quo sexual harassment because the supervisor exercises no actual or apparent authority in making personnel decisions regarding the victim. *Id.* (citing Brief for the United States and the EEOC as Amici Curiae at 24, *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986)). Hence, the EEOC concluded that in hostile environment harassment cases notice should be required. *Id.*

The Reagan administration supported a notice standard. In his amicus brief to the Supreme Court in *Meritor*, the Solicitor General, arguing on behalf of the EEOC, alleged that it would be unfair to impose liability on employers who could not have known of the hostile environment and who may have taken affirmative measures to prevent such harassment. *Id.* at 70-71 (citing Brief for United States and the EEOC as Amici Curiae at 24, *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986)). The Solicitor General argued that in hostile environment cases, the usual basis for finding an agency relationship will often not exist. A supervisor who creates a discriminatory work environment was said not to exercise or threaten to exercise actual or apparent authority in making his personnel decisions regarding the victim. Therefore, the Solicitor General argued for a rule that would shield an employer from liability if it had a reasonably available avenue of complaint that, if used, was reasonably responsive to that claim. The Solicitor General argued that if an employee did not exhaust the employer's established complaint procedure, the employer should be absolved from liability because it did not have

harassment should be treated differently untenable.⁷¹ By defining employer liability more broadly in the context of a supervisor who creates a hostile work environment, Justice Marshall aimed to treat sexual harassment claimants the same as other victims of Title VII discrimination.⁷²

Justice Marshall rejected the Solicitor General's position on the grounds that a supervisor's authority over his subordinates extends beyond the authority to hire and fire.⁷³ He claimed that a supervisor also directs the day-to-day operations of the work place.⁷⁴ Justice Marshall could conceive of no reason to treat abuse of the latter authority delegated by the employer any differently than abuse of the former.⁷⁵ He then noted that no such distinction appears in the statutory language of Title VII, and that no such requirement could be drawn from a proper application of agency law.⁷⁶ Therefore, Justice Marshall suggested that sexual harassment by a supervisor of a subordinate employee that creates a hostile work environment should be imputed to the employer for Title VII purposes, regardless of whether the victim gave notice of the harassment.⁷⁷

Justice Marshall's opinion is distinct from the strict liability approach of the court of appeals because Justice Marshall recognized that agency principles and the goals of Title VII render some limitations on employer liability for supervisory harassment appropriate.⁷⁸ Justice Marshall gave the example of a supervisor with no authority over an employee because the two work in completely different parts of the employer's business.⁷⁹ Justice Marshall noted,

notice of the alleged sexual harassment. In all other cases, the Solicitor General argued, the employer would be liable if it had actual knowledge of the harassment, or if the victim had no reasonable avenue of complaint to management officials. *Id.*

71. *Id.* at 76.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* Justice Marshall stated:

In both cases it is the authority vested in the supervisor by the employer that enables him to commit the wrong: it is precisely because the supervisor is understood to be clothed with the employer's authority that he is able to impose unwelcome sexual conduct on subordinates. There is therefore no justification for a special rule, to be applied *only* in 'hostile environment' cases, that sexual harassment does not create employer liability until the employee suffering the discrimination notifies other supervisors.

Id. at 76-77.

76. *Id.* at 77. See Part III of this Note for an explanation of how agency principles will lead to employer liability in most cases.

77. *Id.*

78. *Id.*

79. *Id.* (citing 29 CFR § 1604.11(c)).

however, that these potential exceptions do not justify a general notice requirement in hostile environment cases.⁸⁰

Justice Stevens filed a brief concurring opinion in which he joined both the majority opinion and Justice Marshall's opinion.⁸¹ Justice Stevens claimed that there was no inconsistency between the two opinions.⁸² He also agreed with Justice Marshall that the issue of employer liability was fairly presented by the record.⁸³

In effect, Justice Stevens's view was that a proper application of agency principles, as advocated by the majority, would lead to the result set forth by Justice Marshall. In other words, when a supervisor creates a hostile work environment for a subordinate, employer liability will follow in most cases, with the potential for some rare exceptions, depending upon the facts of the case. Justice Stevens's opinion follows from both the goals of Title VII and a close examination of agency principles. The following Section of this Note tests Justice Stevens's theory and concludes that a proper application of agency principles leads to employer liability in nearly every case.

III. A PROPER APPLICATION OF AGENCY PRINCIPLES IN THE SEXUAL HARASSMENT CONTEXT

Respondeat superior, the principle that holds a master liable for the misconduct of a servant, was formulated in the days when the servant was a member of the family or of the mercantile household.⁸⁴ This close relationship continues to distinguish a servant from a non-servant.⁸⁵ Employer liability arose from the idea that the master exercises control over the servant during the time of service.⁸⁶ Today, with the growth of the large enterprise, the law recognizes that it

80. *Id.* Justice Marshall also pointed out that a notice requirement would not create a beneficial result. Under such a requirement, an employer who did not have notice of harassment would not even be required to eliminate that harassment. Justice Marshall claimed that a better approach would hold that if the employer responded adequately upon receiving notice of the harassment through the formal complaint mechanisms of the EEOC, it might be able to mitigate its damages. However, the employer should still be responsible for injunctive relief, which would presumably be a part of its "adequate response." *Id.* See also note 222 (discussing the assessment of damages in hostile work environment harassment cases).

81. *Id.* at 73 (Stevens, J., concurring).

82. *Id.*

83. *Id.*

84. Restatement (Second) of Agency § 219, comment a (1958) ("Agency Restatement").

85. *Id.*

86. *Id.*

would be unjust to allow an employer to profit from the intelligent cooperation of employees without also being held responsible for their mistakes, errors in judgment, and frailties.⁸⁷ Courts, therefore, have formulated tests that are helpful in determining whether a relationship exists such that liability will be imposed upon the employer for the misconduct of the employee.⁸⁸

Courts have recognized Section 219 of the Restatement of Agency as the test of employer liability that governs in the sexual harassment context.⁸⁹ This Section delineates the framework for determining when a master is liable for the torts of his servants, and provides that:

- (1) A master is subject to liability for the torts of his servants committed while acting in the scope of their employment.
- (2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:
 - (a) the master intended the conduct or the consequences, or
 - (b) the master was negligent or reckless, or . . .
 - (d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.⁹⁰

While these common-law principles may not be transferable in all their particulars to Title VII,⁹¹ the framework of Section 219 provides adequate guidance in the supervisory sexual harassment context.⁹² Properly analyzed, each provision in this section provides plaintiffs with an independent avenue for imputing liability to an employer.⁹³ This Note, therefore, proceeds to analyze each potential avenue of employer liability in some detail.

87. *Id.*

88. *Id.*

89. See, for example, *Meritor*, 477 U.S. at 72 (citing Restatement (Second) of Agency §§ 219-237); *Bouton v. BMW of North America, Inc.*, 29 F.3d 103, 106 (3d Cir. 1994) (assessing employer liability for a supervisor's hostile work environment sexual harassment under Restatement (Second) of Agency § 219).

90. Agency Restatement § 219 (cited in note 84).

91. *Meritor*, 477 U.S. at 72. See also *Bundy*, 641 F.2d at 951 (recognizing that various agency doctrines may require some modification before they can be applied in sexual harassment cases).

92. See, for example, *Hirschfeld v. New Mexico Corrections Department*, 916 F.2d 572, 575 (10th Cir. 1990) (analyzing employer liability for hostile environment sexual harassment under Restatement (Second) of Agency § 219); *Bouton*, 29 F.3d at 106 (same).

93. Section 219(2)(d) actually provides two potential avenues of employer liability. A plaintiff may prevail on the issue of employer liability if the supervisor abused his apparent authority, see Part III.D, or if he was aided by the agency relation in committing the harassment. See Part III.E.

A. *Section 219(1): Scope of Employment*

Section 219(1) requires the court to determine whether the sexual harassment occurred within the course and scope of the perpetrator's employment and suggests a traditional respondeat superior analysis.⁹⁴ As this sub-Part explains, respondeat superior analysis is a poor vehicle for finding employer liability for a supervisor's hostile work environment sexual harassment.

The common-law rule provides that an assault on a third person is not ordinarily within the scope of a servant's authority,⁹⁵ as an assault is usually the expression of personal hostility and is not done with the intent of carrying out the employer's business.⁹⁶ When a servant commits an assault, he is acting for his own purposes and not for the employer.⁹⁷ Hence, the employee alone is accountable for his misconduct.⁹⁸ A number of courts, therefore, have held that the doctrine of respondeat superior is inapplicable in cases of harassment,⁹⁹ and that employers cannot be liable for such harassment under a scope of the employment analysis.¹⁰⁰

The most difficult respondeat superior cases arise when an employee, for purely personal reasons, assaults the plaintiff in a

94. The traditional doctrine of respondeat superior holds the employer liable for employee misconduct only when the tortfeasor employee thinks (however misguided) that he is doing the employer's business in committing the wrong. See, for example, *Hunter v. Allis-Chalmers Corporation, Engine Division*, 797 F.2d 1417, 1421-22 (7th Cir. 1986) (arguing that the doctrine of respondeat superior is inapplicable to racial harassment by a co-worker).

95. *Texas & Pacific Ry. Co. v. Hagenloh*, 151 Tex. 191, 247 S.W.2d 236, 239 (1952).

96. *Id.* See also *Kendall v. Whataburger, Inc.*, 759 S.W.2d 751 (Tex. App. 1988) (holding that, when an employee struck a complaining customer with hot grease and a french-fry basket, the assault could not possibly have been so connected with the employee's job so as to be within the course and scope of his employment).

97. *Texas & Pacific*, 247 S.W.2d at 241 (quoting *Galveston, H. & S. A. Ry. Co. v. Currie*, 100 Tex. 136, 96 S.W. 1073, 1074 (1906)).

98. Modern courts have been more willing to find tortious misconduct on the job within the course and scope of employment. *Vinson*, 753 F.2d at 151 (citing W. Page Keeton, et al., *Prosser and Keeton on Torts* § 70 at 505-07 (West, 5th ed. 1984)). Assaults may be deemed within the course and scope of employment when the nature of the employment requires the employee to guard the employer's property and protect it from trespassers. *Texas & Pacific*, 247 S.W.2d at 239. In such a case, the use of force may be required to further the employer's business. *Id.* The employer will be liable even when the guard uses more force than is reasonably necessary. *Id.*

99. See note 91.

100. See *Hunter*, 797 F.2d at 1422. See also *Salley v. Petrolane, Inc.*, 764 F. Supp. 61, 63 (W.D. N.C. 1991) (holding that if the alleged sexual harassment actually occurred, such acts were performed by the employee for his own licentious intent and purpose, thus constituting a departure from the scope of his employment and, hence, shielding the employer from liability).

quarrel that arose out of the employment.¹⁰¹ For example, if a pizza delivery person collides with a plaintiff and an altercation follows, the old rule, still in force in some jurisdictions, denies recovery.¹⁰² The modern trend, however, is to allow recovery on the ground that the employment has provided an opportunity and incentive for the loss of temper.¹⁰³

The Sixth Circuit Court of Appeals has followed this trend by holding that hostile environment sexual harassment may be committed within the course and scope of a supervisor's employment.¹⁰⁴ In *Yates v. Avco Corp.*, the court held that in order to determine whether a supervisor was acting within the course and scope of his employment in committing sexual harassment, it must look to "when the act took place, where it took place, and whether it was foreseeable."¹⁰⁵ The court noted that an act may be within the scope of employment even if it was forbidden by the employer.¹⁰⁶

In *Yates*, the court found that the harassment took place at the employer's premises during working hours, and was carried out by a supervisor with "authority to hire, fire, promote, and discipline" the victims.¹⁰⁷ The court held that the harassment was clearly foreseeable, pointing out that if it had not been, the company "would not

101. W. Page Keeton, et al, *Prosser and Keeton on Torts* § 70 at 507 (West, 5th ed. 1984) ("*Prosser and Keeton on Torts*"). At least one court has labeled this situation an exception to the scope of employment test of respondeat superior. *Barnes v. Costle*, 561 F.2d 983, 996 (D.C. Cir. 1977) (MacKinnon, J., concurring).

102. *Prosser and Keeton on Torts* § 70 at 507 (citing *Kuehn v. White*, 24 Wash. App. 274, 600 P.2d 679 (1979); *Sandman v. Hagan*, 261 Iowa 560, 154 N.W.2d 113 (1967); *Sheffield v. Central Freightlines, Inc.*, 435 S.W.2d 954 (Tex. App. 1968); *Sauter v. New York Tribune*, 305 N.Y. 442, 113 N.E.2d 790 (1953)).

103. *Id.* (citing *Johnson v. Weinberg*, 434 A.2d 404 (D.C. App. 1981); *Sage Club v. Hunt*, 638 P.2d 161 (Wyo. 1981) (imposing liability when bartender lost temper and injured person); *Scott v. Commercial Union Insurance Co.*, 415 S.2d 327 (La. App. 1982) (not imposing liability for employee's battery, committed during work, when it arose out of discussion of personal matter consented to by employer); *Prell Hotel Corp. v. Antonacci*, 86 Nev. 390, 469 P.2d 399 (1970) (imposing liability when casino employee, provoked by namecalling, struck patron); *Kent v. Bradley*, 480 S.W.2d 55 (Tex. App. 1972) (holding employer liable for dispute arising over lemonade); *Caldwell v. Farley*, 134 Cal. App. 2d 84, 285 P.2d 294 (1955) (finding that assault was committed within the scope of a union steward's employment)).

104. See *Yates v. Avco Corp.*, 819 F.2d 630, 636 (6th Cir. 1987) (discussing the responsibilities involved in the supervisory role); *Kauffman v. Allied Signal, Inc., Autolite Division*, 970 F.2d 178, 184 (6th Cir. 1992) (considering supervisory liability).

105. 819 F.2d at 636.

106. *Id.* (citing Restatement (Second) of Agency §§ 217-232).

107. *Id.*

have had a policy attempting to deal with it."¹⁰⁸ Therefore, agency factors indicated that the corporate defendant should incur liability.¹⁰⁹

In *Kauffman v. Allied Signal, Inc.* the Sixth Circuit articulated a two-part test for determining whether an employer is liable for the hostile environment sexual harassment of a supervisor.¹¹⁰ The court held that, while the supervisor's harassment was within the scope of his employment, the employer was not liable because its response to the harassment was "prompt and adequate."¹¹¹

As developed in *Yates* and *Kauffman*, the Sixth Circuit's approach to resolving the issue of employer liability for a supervisor's hostile environment sexual harassment is flawed in several respects. First, it extends the common-law doctrine of respondeat superior too far. The doctrine of respondeat superior creates employer liability only when an employee is acting in the furtherance of his employment.¹¹² It would be an unusual case in which sexual harassment could be thought by the perpetrator to further the employer's business.¹¹³ It is more accurate to view sexual harassment as an act performed by its perpetrator "for his own licentious intent and purpose, thus constituting a departure from the scope of [his] employment."¹¹⁴

Second, by allowing an employer to negate its liability by adequate and effective remedial action,¹¹⁵ the court strays further from a true application of respondeat superior. Under respondeat superior,

108. *Id.*

109. *Id.* While the court indicated that employer liability could be negated if the employer had an effective policy or responded adequately and effectively once it had notice of the harassment, it held that, in this case, Avco did not satisfy either criteria. *Id.*

110. Employer liability "depends on 1) whether [the supervisor's] harassing actions were foreseeable or fell within his scope of employment and 2) even if they were, whether [the employer] responded adequately and effectively to negate liability." *Kauffman*, 970 F.2d at 184.

111. *Id.* As soon as the plaintiff's union representative informed the Director of Employee Relations about the supervisor's harassment, the management immediately confronted the supervisor and fired him. *Id.* at 185.

112. *Hunter*, 797 F.2d at 1421. See also *Barnes*, 561 F.2d at 996 (MacKinnon, J., concurring) (stating that while an employer provided its supervisor with an opportunity to commit harassment by agency, this opportunity was no greater than would be afforded by any employment setting, and thus could not be said to create an "incentive" for such conduct).

113. *Hunter*, 797 F.2d at 1422.

114. *Salley*, 764 F. Supp. at 63. See notes 94-100 and accompanying text (describing a theory that assault does not fall within the scope of a servant's authority). While factors such as when sexual harassment took place, its location, and whether it was foreseeable are relevant in determining whether a supervisor was aided by the agency relation in creating a hostile work environment, this analysis is more properly characterized as an agency analysis. The Sixth Circuit, therefore, incorrectly describes this principle as an application of respondeat superior. See Part III.E.

115. *Kauffman*, 970 F.2d at 184.

an employer is liable for the misconduct of its servant even though the employer has not authorized, or has expressly prohibited such conduct.¹¹⁶ Hence, an employment policy prohibiting sexual harassment in the workplace would not shield the employer from liability. Remedial action by the employer upon notice of the harassment may be sufficient to mitigate damages under respondeat superior, but it should not entirely absolve the employer from liability for its servant's misconduct.¹¹⁷

On its face, the Sixth Circuit test includes a rather lenient standard for finding sexual harassment within the scope of employment. However, by allowing the employer to negate liability with an effective policy against harassment and an adequate response to the harassment, the court fails to apply the common-law doctrine of respondeat superior in its true sense. In a correct application of the doctrine, once it is determined that the supervisor's action was within the scope of his employment, the employer would be liable regardless of whether the conduct was forbidden (i.e., by a policy prohibiting harassment), and regardless of the employer's response upon notice. The court, therefore, really applied a negligence standard and determined whether the supervisor acted with apparent authority.¹¹⁸

Finally, the Sixth Circuit's approach fails to examine all of the potential avenues of employer liability available to the plaintiff under Section 219. The *Meritor* framework demands a proper analysis of each provision under Section 219 of the Restatement (Second) of Agency, and Section 219(2) specifically provides that an employer may be liable for its servant's actions even though the servant was not acting within the scope of his employment.¹¹⁹

By limiting employer liability to the misconduct of its supervisors committed within the scope of their employment, the Sixth Circuit ignores the agency principles embodied by Section 219(2). Furthermore, by allowing the employer to negate liability upon a showing of an effective policy against harassment or adequate remedial action, the Sixth Circuit's approach is not consistent with the common law doctrine of respondeat superior.¹²⁰

116. *Prosser and Keeton on Torts* § 70 at 506 (cited in note 101).

117. *Meritor*, 477 U.S. at 77-78 (Marshall, J., concurring).

118. See Parts III.C and D.

119. Agency Restatement § 219(2) (cited in note 84).

120. In fact, the Sixth Circuit's approach "could lead to the ludicrous result that employers would become accountable only if they explicitly require or consciously allow their supervisors to molest women employees." *Vinson*, 753 F.2d at 151 (citing Significant Development, *New*

*B. Section 219(2)(a): Master Intended the Conduct
or Its Consequences*

The misuse of terminology in assessing employer liability is a source of confusion in the appellate courts. A number of circuit courts have held that in order to establish a prima facie case of hostile work environment sexual harassment a plaintiff must prove respondeat superior.¹²¹ However, respondeat superior is a common-law doctrine that holds employers liable only when their servant is acting within the course and scope of his employment. Agency principles, on the other hand, are broader in scope because they hold employers liable, in certain circumstances, for an agent's misconduct that is committed outside the scope of employment.¹²² In following *Meritor's* mandate to use agency principles for guidance in determining when an employer should be liable for its supervisor's hostile work environment harassment,¹²³ lower courts should dispense with the element of respondeat superior, and instead look to the broader avenues of liability available under common-law agency principles.¹²⁴

In a proper application of agency principles, courts look beyond whether the supervisor acted within the course and scope of employment by focusing on Section 219(2).¹²⁵ Section 219(2)(a) is distinct from Section 219(1) in that it focuses on the conduct of the employer,¹²⁶ rather than on the mental state of the employee committing the misconduct. It provides that an employer is liable for the consequences of an employee's conduct that result from the employer's directions.¹²⁷

EEOC Guidelines on Discrimination Because of Sex: Employer Liability for Sexual Harassment Under Title VII, 61 B.U. L. Rev. 535, 539 (1981)).

121. *Henson*, 682 F.2d at 905.

122. Agency Restatement § 219(2) (cited in note 84).

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

124. See also note 135 (explaining the difference between respondeat superior and agency principles).

125. See Agency Restatement § 219, comment e (cited in note 84) (stating that Section 219(2) "enumerates the situations in which a master may be liable for torts of servants acting solely for their own purposes and hence not in the scope of employment").

126. Agency Restatement § 219 provides that the first three categories of subsection (2) articulate situations in which the employer is guilty of tortious conduct.

127. Agency Restatement § 212 provides:

A person is subject to liability for the consequences of another's conduct which results from his directions as he would be for his own personal conduct if, with knowledge of the conditions, he intends the conduct, or if he intends its consequences, unless the one directing or the one acting has a privilege or immunity not available to the other.

In the sexual harassment context, the inquiry under Section 219(2)(a) should focus on whether the employer directed the employee to commit the wrong,¹²⁸ or whether the employer subsequently ratified the conduct.¹²⁹ Independently, Section 219(2)(a) provides scant assistance in establishing employer liability for hostile environment sexual harassment. First, there are few situations in which a victim of harassment would be able to prove that the employer intended the sexual harassment to occur.¹³⁰ An employer's policy against sexual harassment in the workplace provides sufficient evidence to negate this possibility. Secondly, if a plaintiff is able to satisfy Section 219(2)(a), she will also be able to show either that the supervisor was acting within the course and scope of his employment,¹³¹ or that the employer was negligent.¹³² These showings, in themselves, are sufficient to confer liability to the employer.¹³³

C. Section 219(2)(b): Negligence

Under common-law principles of agency, a principal who conducts an activity through its employees is subject to liability for harm resulting from the employee's conduct if the employer is negligent or reckless.¹³⁴ All of the circuit courts have, explicitly or implicitly, ex-

128. See, for example, *Clemmons v. Life Insurance Company of Georgia*, 274 N.C. 416, 163 S.E.2d 761, 766 (1968) (holding employer liable if it expressly or implicitly authorizes the employee's misconduct); *Salley*, 764 F. Supp. at 63 (establishing employer liability "when the agent's act is expressly authorized by the principal").

129. See, for example, *Hogan v. Forsyth Country Club Co.*, 79 N.C. App. 483, 340 S.E.2d 116, 122 (1986) (holding that employer is liable for supervisor's sexual harassment if plaintiff is able to prove "that the employer had knowledge of all material facts and circumstances relative to the wrongful act, and that the employer, by words or conduct, shows an intention to ratify the act"); *Salley*, 764 F. Supp. at 63 (holding employers liable "when the agent's act is ratified by the principal").

130. See note 120 and accompanying text.

131. If an employer directs a supervisor to engage in sexual harassment and the supervisor obliges, he will be acting to further the employer's business. See Part III.A (discussing scope of the employment).

132. This will be the case when the employer ratifies the conduct, i.e., when the employer knew of the harassment and failed to adequately respond to it. See Part III.C.

133. See Part III.A (discussing scope of employment); Part III.C (discussing negligence).

134. Agency Restatement § 219(2)(b) (cited in note 84). The Agency Restatement § 213 provides:

A person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless: (a) in giving improper or ambiguous orders of [sic] in failing to make proper regulations; or (b) in the employment of improper persons or instrumentalities in work involving risk of harm to others; or (c) in the supervision of the activity; or (d) in permitting, or failing to prevent, negligent or other tortious conduct by persons, whether or not his servants or agents, upon premises or with instrumentalities under his control.

tended their employer liability analysis to Section 219(2)(b) by imposing liability on employers that knew or should have known of hostile work environment sexual harassment, but nonetheless failed to take appropriate action.¹³⁵ The *Meritor* Court referred to this standard as

The employer can be negligent in a variety of ways. First, it can be negligent in giving directions by not anticipating dangerous circumstances which are "likely to arise" in the workplace. *Id.*, comment c. Second, the employer may be negligent by failing to exercise due care in selecting an agent to perform its work. *Id.*, comment d. See *Quinonez on Behalf of Quinonez v. Anderson*, 144 Ariz. 193, 696 P.2d 1342, 1346 (App. 1984) (holding that the trial court erred in dismissing a negligent entrustment count merely because liability based on respondeat superior was admitted, and ruling that the jury should have considered the employer's alleged negligence in hiring an incompetent driver). Agency Restatement § 213, comment d also provides that "if a principal, without exercising due care in selection, employs a vicious person to do an act which necessarily brings him in contact with others while in the performance of a duty, he is subject to liability for harm caused by the vicious propensity."

Third, comment f explains that the negligence of an employer may consist of a failure to use due care in inspecting the premises upon which employees work, or a failure to supervise its employees' conduct. *Id.*, comment f. This comment further provides that "[an employer] is under a continuous duty of inspection and repair and is required to give such attention to the business, or to see that it is given, as will normally guard against injuries to third persons." *Id.* (citing §§ 492-520). See *Anderson v. Hall*, 755 F. Supp. 2, 5 (D. D.C. 1991) (holding that a client stated a cognizable legal claim when he sued the partners of a law firm for negligence, alleging that their failure to properly supervise an associate resulted in the dismissal of the client's tort claim).

An employer may also be negligent for failing to provide reasonably necessary regulations that prevent risk of harm from the conduct of those working under him. Agency Restatement § 213, comment g also provides: "One who engages in an enterprise is under a duty to anticipate and to guard against the human traits of his employees which unless regulated are likely to harm others."

Finally, an employer is subject to liability for acquiescing in, or ratifying tortious conduct. *Id.*, comment i. This section provides:

A master is subject to liability as the possessor of premises for conduct of a servant thereon, or in fact the conduct of anyone, to the continuance of which he consents after he knows or should know that such conduct contains an unreasonable risk of harm to licensees or those upon adjacent roads or premises If, however, being in control of the premises and of the persons acting by the fact that he is their principal or master, he does not object to dangerous conduct, his inaction may cause him to be liable to persons harmed by it.

See *Buchanan v. Stanships, Inc.*, 744 F.2d 1070, 1075-76 (5th Cir. 1984) (holding that if the owner or operator of a vessel failed to conform its employees' conduct to the company rules against rendering passage and that conduct amounted to a customary practice in which the owner or operator implicitly acquiesced, then it should be held liable for harm resulting from the dangerous conduct of its employees).

135. See, for example, *Lipsett*, 864 F.2d at 901 (holding that in a Title IX case, an educational institution is liable for the hostile environment sexual harassment of its supervisors if an official representing that institution knew, or in the exercise of reasonable care should have known, of the harassment's occurrence, unless that official took appropriate remedial action); *Bouton v. BMW of North America, Inc.*, 29 F.3d 103, 107 (3rd Cir. 1994) (noting that appellate courts readily accept the negligence concept of § 219(2)(b) if the harassment is reported to the employer, and the employer fails to take prompt and effective remedial action).

See also *Flagship*, 793 F.2d at 719-20 (holding that in order to establish a claim against an employer for a supervisor's hostile work environment sexual harassment, the plaintiff must show that the employer knew or should have known of the harassment in question and failed to

a notice requirement.¹³⁶ By failing to respond adequately to notice of harassment, an employer engages in negligent or reckless behavior.¹³⁷ In order to prevail under this standard, a plaintiff must establish two elements of her claim. First, she must establish that the employer had actual or constructive knowledge of the hostile work environment.¹³⁸ Second, she must establish that the employer did not adequately respond to notice of the harassment.¹³⁹

take prompt remedial action). The *Flagship* court erred by labeling its requirement of notice respondeat superior. At common law, respondeat superior was used to determine when a master was liable for the torts of his servant. This was limited to an inquiry regarding whether the servant was acting within the course and scope of employment. In contrast, agency principles were analyzed to determine when a principal should be liable for the torts of a servant, technically a broader inquiry. Therefore, when the Fifth Circuit directed lower courts to ask whether an employer responded adequately to notice of sexual harassment, it directed them to make a determination regarding whether the employer should be held vicariously liable as an agent, not whether the plaintiff has proven respondeat superior. See also Part III.B (discussing courts' confusion regarding the distinction between agency principles and respondeat superior); *Hunter*, 797 F.2d at 1421-22 (explaining the difference between derivative liability for respondeat superior and direct liability for negligence or recklessness); *Guess v. Bethlehem Steel Corp.*, 913 F.2d 463, 464-65 (7th Cir. 1990) (lamenting that "some of the cases have created potential confusion by calling the standard of employer liability that they endorse a form of respondeat superior" and recognizing that "the problem is merely a semantic one").

136. See *Meritor*, 477 U.S. at 70 (discussing petitioner's and Solicitor General's argument for a requirement of notice to the employer).

137. See, for example, *Bouton*, 29 F.3d at 107 (pointing out that appellate courts have readily accepted the negligence concept of § 219(2)(b) in hostile environment sexual harassment cases).

138. See note 134 and the accompanying text.

139. *Id.* Some circuit courts have read negligence principles narrowly to impose a strict notice requirement on plaintiffs seeking recovery for the hostile work environment harassment of a supervisor. In *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 900 (1st Cir. 1988), for example, the First Circuit determined that the "gist" of *Meritor's* holding was that a court should not apply strict agency principles, but rather should use them as "guidance." *Id.* Emphasizing *Meritor's* directive that employers are not always automatically liable, the court concluded that an employer would incur liability only if it had notice of the sexual harassment and failed to respond adequately. *Id.* at 900-01.

The First Circuit's strict notice requirement ignores the *Meritor* holding that "absence of notice to an employer does not necessarily insulate that employer from liability." *Meritor*, 477 U.S. at 72. See also *Flagship*, 793 F.2d at 719-20 (holding that in order to establish a claim against an employer for a hostile work environment, the plaintiff must show that the employer knew or should have known of the harassment in question and failed to take prompt remedial action). In keeping with the Court's directive in *Meritor*, those courts applying the common-law agency principle of negligence to hostile work environment sexual harassment by a supervisor can and should provide for a broader base of liability than that which would result from the application of a strict notice requirement. This sub-Part suggests several avenues by which courts may use the agency principles of negligence embodied by Section 219(2)(b) to achieve this broader base of liability.

1. Actual Knowledge

To establish actual knowledge, the plaintiff may show that she followed an established grievance procedure or that management knew of the hostile environment through informal channels.¹⁴⁰ In addition, at least one court has imputed knowledge of a hostile environment to the employer by virtue of the fact that the perpetrator of the harassment was positioned sufficiently high in the corporate hierarchy. In *Burns v. McGregor Electronic Industries, Inc.*,¹⁴¹ the Eighth Circuit applied the notice requirement¹⁴² and determined that the employer had actual knowledge of the hostile environment because the perpetrator of the harassment was the owner of the company.¹⁴³ While the *Burns* court recognized that harassment committed by someone high enough in the company hierarchy could constitute knowledge to the employer, it did not specify how far down the hierarchy this knowledge would extend. The *Burns* court thus left open the question of whether harassment committed by a supervisor would also constitute actual knowledge to the employer.¹⁴⁴

When a supervisor commits hostile environment sexual harassment, actual knowledge of the harassment should be imputed to the employer.¹⁴⁵ A contrary holding creates an anomalous situation. If, for example, a woman is sexually harassed by a co-worker, reports the harassment to her supervisor, and her supervisor fails to respond,

140. See, for example, *Kopp v. Samaritan Health System, Inc.*, 13 F.3d 264, 269-70 (8th Cir. 1993) (imputing knowledge to the employer when the alleged harasser's conduct was the frequent subject of discussion at management meetings, employees filed a report about his conduct and complained to their supervisors about it, and his conduct was "common knowledge" among members of the management team).

141. 955 F.2d 559 (8th Cir. 1992).

142. *Id.* at 564.

143. *Id.*

144. The district court in *Meritor* rejected the argument that sexual harassment committed by a supervisor constitutes actual knowledge to the employer. *Vinson*, 23 FEP Cases at 41-42. The court relied on the fact that Taylor did not have the authority to hire, fire, or promote and therefore did not occupy a sufficiently high position in the corporate hierarchy. *Id.* at 42. The district court's reasoning, however, is unpersuasive. Under Section 219(2)(b), an employer can be held liable for either a failure to supervise the conduct of individuals whom it employs or a failure to use due care in hiring an employee whom it puts in contact with others. See note 134 and accompanying text. These potential avenues of employer liability do not depend upon the employer granting the employee who commits the misconduct the authority to hire, fire, or promote.

145. But see *Kotcher v. Rosa and Sullivan Appliance Center, Inc.*, 957 F.2d 59, 64 (2nd Cir. 1992) (recognizing that at some point the actions of a supervisor at a sufficiently high level in the hierarchy would necessarily be imputed to the company, but holding that a case involving a manager's hostile environment harassment did not present such a situation).

the employer would be liable. If, however, the same supervisor is the perpetrator of the harassment, the employer would not be held liable, unless another supervisor knew or should have known of the harassment and failed to take adequate remedial action. It makes no sense to hold an employer liable for sexual harassment that a supervisor discovers, but not for the sexual harassment that the supervisor commits.

Title VII's definition of "employer" lends further support for imputing actual knowledge of a hostile work environment created by a supervisor to the employer.¹⁴⁶ This definition of employer, which includes supervisors by virtue of their status as agents, equates supervisor knowledge with employer knowledge, suggesting that employers should be directly liable for the misconduct of their supervisors.¹⁴⁷ This is essentially the position Justice Marshall took in rejecting a notice requirement in his concurring opinion in *Meritor*.¹⁴⁸

Such an interpretation of the actual knowledge requirement would create an incentive for employers to educate their supervisors about behavior that might constitute sexual harassment and would encourage employers to monitor the workforce more closely to ensure that a hostile environment did not exist. It would also remove the incentive for employers to look the other way when they suspect the existence of sexual harassment. Imputing the supervisor's knowledge to his employer would thus offer the greatest opportunity to prevent harassment from occurring in the first instance.

2. Constructive Knowledge

While no court has adopted the expansive theory of actual knowledge described above, some of the circuits have adopted a broader interpretation of the alternative requirement of constructive knowledge. In *EEOC v. Hacienda Hotel*,¹⁴⁹ the Ninth Circuit found that the employer had actual knowledge of the hostile environment

146. The Act defines the term "employer" as a "person engaged in an industry affecting commerce . . . and any agent of such a person. . ." 42 U.S.C. § 2000e(b).

147. The Tenth Circuit recognized that "[u]nder Title VII an 'employer' is directly liable for . . . sexual harassment of its employees." *Sparks*, 830 F.2d at 1557-58 (citing 42 U.S.C. § 2000e-2(a)(1); 29 C.F.R. § 1604.11(c)). "Thus, where the harasser is plaintiff's 'employer' . . . plaintiff need not establish that she gave anyone notice of the harassment." *Id.* at 1558.

148. 477 U.S. at 76-78 (Marshall, J., concurring). See also notes 64 to 80 and accompanying text.

149. 881 F.2d 1504 (9th Cir. 1989).

sexual harassment.¹⁵⁰ The court pointed out, however, that even absent this actual knowledge, the employer had constructive knowledge of the harassment because it was severe and pervasive and “seriously tainted” the plaintiff’s working environment.¹⁵¹ Since hostile environment sexual harassment is “severe or pervasive” by definition,¹⁵² a literal reading of the court’s language in *Hacienda* suggests that whenever a hostile environment exists, the employer should be charged with constructive knowledge.

Imputing constructive knowledge to an employer whose supervisor creates a hostile work environment results in a sound application of common-law negligence principles as embodied by Section 219(2)(b), as well as advancement of the public policies underlying Title VII. First, an employer that fails to discover harassment by its supervisor that is sufficiently severe or pervasive to create a hostile work environment violates its continuous duty to guard against injuries to third persons in the workplace.¹⁵³

Second, holding employers to constructive knowledge of a supervisor’s severe or pervasive harassment would also advance the goals of Title VII by encouraging employers to closely monitor the workplace for hostile work environments. If an employer knows that it will not incur liability unless the plaintiff proves actual knowledge, it has a strong incentive to look the other way when evidence of harassment arises. If employers know that they will be held to constructive knowledge of a hostile work environment in their workplace, however, they will make affirmative efforts to determine whether such harassment exists to provide a prompt remedy and thereby mitigate the damages that they might otherwise incur.

Third, it is fair to employers to hold them liable for constructive knowledge of a hostile work environment. The severe and pervasive standard constitutes a difficult burden for plaintiffs, who will therefore satisfy it only in cases of especially egregious harassment. In those cases, any employer that uses due care in monitoring its workplace for circumstances likely to cause injuries to third persons will have known or at least should have known of the harassment.¹⁵⁴

150. *Id.* at 1516.

151. *Id.*

152. *Sparks*, 830 F.2d at 1557.

153. Agency Restatement § 213, comment f (cited in note 84).

154. It is ironic that proponents of a strict notice requirement who worry about the equity of holding employers liable for harassment unless they had actual knowledge of the hostile work environment generally concede that employers should be strictly liable for quid pro quo harass-

A knowledge requirement would not necessarily eliminate Title VII liability, as has been suggested.¹⁵⁵ Plaintiffs may prove actual knowledge if the court imputes to employers the knowledge of a supervisor who creates a hostile environment. In addition, if the court imputes constructive knowledge to employers in cases of severe and pervasive supervisory harassment, a victim of harassment may show constructive knowledge whenever a hostile work environment exists.

While this analysis of the knowledge requirement will assure that an employer's knowledge of a supervisor's hostile work environment harassment is achieved in every case, it does not fall within the *Meritor* prohibition against holding employers always automatically liable in every case of supervisory harassment. Under strict liability, an employer would be liable for supervisory harassment regardless of any remedial action taken. Under the negligence avenue of liability provided by agency law, however, an employer may negate its liability, or at least mitigate its damages, by responding adequately and appropriately to the harassment.

3. Adequate Response

Under Section 219(2)(b) of the Restatement (Second) of Agency, once a plaintiff demonstrates actual or constructive knowledge of the employer, the court will then determine whether the employer's response to the harassment was reasonably prompt and responsive.¹⁵⁶ This issue constitutes a question of fact.¹⁵⁷ To qualify as an adequate response, the employer's remedial action must be "reasonably calculated to end the harassment."¹⁵⁸ This standard does not necessarily require the employer to discharge or demote the harasser in every case.¹⁵⁹ While egregious cases may demand such action,

ment. Intuitively, it seems far more likely that an employer would know about harassment that is so severe or pervasive as to create a hostile work environment than they would when quid pro quo harassment is committed by a supervisor who discretely tells a female employee that she will be fired for not sleeping with him, or promoted if she does.

155. Agency Restatement § 219(2)(b) (cited in note 84). See *Vinson*, 753 F.2d at 151-52.

156. *Paroline v. Unisys Corp.*, 879 F.2d 100, 106 (4th Cir. 1989), on rehearing rev'd in part, 900 F.2d 27 (4th Cir. 1990).

157. *Id.*

158. *Katz*, 709 F.2d at 256.

159. *Hirschfeld*, 916 F.2d at 578 n.6.

in less serious cases, a reprimand, brief suspension, or other remedial steps may be sufficient to remedy the situation.¹⁶⁰

If the employer's remedial action constitutes nothing more than a slap on the wrist or an outright sham, however, the court will find the response insufficient and will hold the employer liable under a negligence theory.¹⁶¹ For example, if the remedy imposed increases the victim's exposure to the harasser, or if previous remedies of a similar nature have failed to deter the harasser from striking again, such evidence will cast doubt on the adequacy of the remedies.¹⁶² Furthermore, if management personnel do not take allegations of harassment seriously, the employer will incur liability for negligence.¹⁶³ Finally, some courts have held that a plaintiff may provide evidence of negligence by showing that an employer failed to have in place well-publicized and enforced anti-harassment policies, effective formal and informal complaint structures, training, and monitoring mechanisms.¹⁶⁴

When a supervisor creates a hostile environment and is the only management-level employee with knowledge of the harassment, one could argue that it would be difficult for the employer to take prompt and adequate remedial steps to negate the liability.

160. *Id.* See also *Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311, 1316 (11th Cir. 1989) (holding that reprimand of harasser and assurance to employees that harassment would stop constituted prompt remedial action); *Swentek v. USAir Inc.*, 830 F.2d 552, 558 (4th Cir. 1987) (holding that a letter of warning, verbal reprimand, and threat that employee would be suspended if further complaints were filed constituted prompt and adequate remedial action).

161. *Paroline*, 879 F.2d at 107.

162. *Id.* at 106-07.

163. *Id.* at 107.

164. In *Lehmann v. Toys R' Us, Inc.*, 132 N.J. 587, 626 A.2d 445, 463 (1993), the Supreme Court of New Jersey held that under its state version of Title VII the presence of such mechanisms would not be outcome determinative of whether an employer incurred liability for negligence in a sexual harassment case. *Id.* However, the court then stated that it would accept effective preventive mechanisms as evidence of the exercise of due care by the employer. *Id.* It explained that evidence shows that the sincere and effective implementation of five elements is successful at surfacing sexual harassment claims before they escalate. These five elements include policies, formal and informal complaint structures, mandatory training, effective monitoring mechanisms, and finally, "an unequivocal commitment from the top that is not just in words but backed up by consistent practice." *Id.* (quoting The Civil Rights Act of 1991: Hearings on H.R. 1 before the House Committee on Education and Labor, 102nd Cong., 1st Sess. 168, 171 (1991) (statement of Dr. Freada Klein)). The *Lehman* court's framework for preventing sexual harassment is consistent with common-law principles of agency. See Agency Restatement § 213, comment g (cited in note 84), which provides:

A master is negligent if he fails to use care to provide such regulations as are reasonably necessary to prevent undue risk or harm to third persons or to other servants from the conduct of those working under him. . . . One who engages in an enterprise is under a duty to anticipate and to guard against the human traits of his employees which unless regulated are likely to harm others.

Ignorance of a supervisor's harassment, however, does not prevent an employer from establishing the aforementioned prevention mechanisms. Moreover, if management has acted reasonably and responsibly and harassment still occurs, the court can take this into account in determining the proper remedy.

In assessing a proper remedy, a court should impose injunctive relief upon a negligent employer. Such a remedy advances the purposes of Title VII by eliminating a specific instance of discrimination from a place of employment. An employer can avoid injunctive relief by employing remedial procedures after receiving notice of a complaint from the EEOC.¹⁶⁵ Likewise, when a victim of harassment without good reason bypasses an internal complaint procedure she knows to be effective, a court may refuse to award other remedies such as reinstatement, backpay, compensatory relief, and punitive damages.¹⁶⁶

Assessing damages under a negligence theory of employer liability thus gives courts flexibility in determining appropriate damages based on the facts of each case. By considering such factors as the employer's policies for dealing with sexual harassment, its past record in this regard, and any other preventive measures the company may have adopted,¹⁶⁷ courts encourage employers to do everything within their power to prevent harassment and remedy it as soon as possible.¹⁶⁸ Furthermore, this approach ensures that employers will take steps to eliminate any existing hostile environment and also ensures that victims of harassment will receive appropriate relief.

165. *Meritor*, 477 U.S. at 77 (Marshall, J., concurring).

166. *Id.*

167. The EEOC Guidelines emphasize that:

Prevention is the best tool for the elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned.

29 C.F.R. § 1604.11(f). See also, *Paroline*, 879 F.2d at 107 (holding that it would "impute liability to an employer who anticipated or reasonably should have anticipated that the plaintiff would become a victim of sexual harassment in the workplace and yet failed to take action reasonably calculated to prevent such harassment").

168. Catharine MacKinnon and Patricia Berry argued that preventive mechanisms work. "If procedures are viable and do not denigrate the victim, they will be used." Respondent's Brief at 38 (cited in note 9).

D. Section 219(2)(d)(cl. 1): Apparent Authority

While a negligence theory is one way in which employers may be liable for the hostile environment sexual harassment of its supervisors,¹⁶⁹ a proper application of agency principles requires a court to look beyond this potential avenue of liability to other sources provided by Section (219)(2)(d) of the Restatement (Second) of Agency. Under this provision, an employer is liable for conduct that is within the apparent authority of a servant.¹⁷⁰ In order to recover under this theory a plaintiff must show that the employer manifested in its agent the authority to act on its behalf,¹⁷¹ that such manifestation resulted in harm to the plaintiff,¹⁷² and that the plaintiff acted or relied on the apparent authority in some way.¹⁷³ An employee satisfying these elements may recover damages for harm caused by her reasonable reliance upon the representations of one acting within his apparent authority.¹⁷⁴ The motive of the employee acting within his apparent authority is generally irrelevant.¹⁷⁵

169. While application of the agency principle of negligence advocated in the preceding discussion, Part III.C, will lead to employer liability in a number of cases, limiting the employer liability analysis to this basis is insufficient. First, most circuit courts apply negligence principles in a more restrictive manner than is advocated here. See, for example, note 139 (citing examples of unduly restrictive applications of the negligence avenue of employer liability). Second, in many cases, under negligence principles, employers will be able to negate liability by showing that they responded adequately to knowledge of a hostile work environment. See Part III.C. Likewise, under an apparent authority analysis, an employer will be able to negate its liability upon a showing that it removed any reasonable inference that its supervisor could create a hostile work environment with impunity, i.e., by establishing a well-articulated policy against such harassment. Part III.D. If a supervisor is aided by the agency relation in committing the harassment, however, the employer will not be able to negate its liability by a showing of a policy against such harassment and an adequate response to such harassment once it becomes known. Nonetheless, such showings may be used by an employer to mitigate its damages. See Part III.E.

170. Agency Restatement § 219(2)(d) (cited in note 84). Agency Restatement § 265 sets forth the general rule regarding apparent authority:

(1) A master or other principal is subject to liability for torts which result from reliance upon, or belief in, statements or other conduct within an agent's apparent authority.

(2) Unless there has been reliance, the principal is not liable in tort for conduct of a servant or other agent merely because it is within his apparent authority or apparent scope of employment.

171. Agency Restatement § 265, comment a.

172. *Id.*

173. *Id.*, comment b.

174. Agency Restatement § 266 provides: "A purported master or other principal is subject to liability for physical harm caused to others or to their belongings by their reasonable reliance upon the tortious representations of one acting within his apparent authority or apparent scope of employment."

175. Agency Restatement § 265, comment a.

If a supervisor relies on his apparent authority to create the hostile work environment, his employer should be held liable under Section 219(2)(d). A supervisor's power extends beyond the ability to hire, fire, promote, or discipline employees.¹⁷⁶ Supervisors are also charged with authority over other important aspects of the workplace such as its day-to-day supervision and overall safety and productivity.¹⁷⁷ In other words, a supervisor is charged with monitoring and controlling the work environment. The understanding that the supervisor is granted authority from the employer enables him to impose unwelcome sexual conduct on his subordinates.¹⁷⁸ There is no reason why abuse of one type of authority should have different consequences than abuse of the other.¹⁷⁹ In both situations, the authority vested in the supervisor enables him to commit the harassment.

In *Watts v. New York City Police Dept.*,¹⁸⁰ the District Court for the Southern District of New York employed the doctrine of apparent authority to hold that an employee pleaded sufficient facts to state a hostile environment claim against her employer.¹⁸¹ The court recognized that a supervisor's sexual harassment of an employee, undertaken for the supervisor's own purposes, is likely to be outside the scope of employment.¹⁸² Nevertheless, it held that if the supervisor accomplishes this conduct through means furnished to him by his employer, for example, through influence or control over hiring, job performance evaluations, work assignments, or promotions, and the employer has not put in place strong policies and procedures that effectively eliminate the apparent authority, agency law will hold the employer liable as the source of the abused apparent authority.¹⁸³ This is true even if the employer is without notice.¹⁸⁴

Likewise, in *Bouton v. BMW of North America, Inc.*,¹⁸⁵ the Third Circuit recognized that a supervisor's position of power over the victim can aid him in his harassment, thereby constituting an abuse of apparent authority.¹⁸⁶ The court held, however, that the victim's

176. *Meritor*, 477 U.S. at 76 (Marshall, J., concurring).

177. *Id.*

178. See *id.* at 77 (stating that "it is precisely because the supervisor is clothed with the employer's authority that he is able to impose unwelcome sexual conduct on subordinates").

179. *Id.* at 76.

180. 724 F. Supp. 99 (S.D. N.Y. 1989).

181. *Id.* at 110.

182. *Id.* at 106 n.6.

183. *Id.*

184. *Id.*

185. 29 F.3d 103 (3d Cir. 1994).

186. *Id.* at 108.

belief in her supervisor's apparent authority must be reasonable before her employer would be held liable.¹⁸⁷ The court concluded that this particular victim did not believe that her supervisor's misconduct was company policy because she also believed that she could achieve a remedy by speaking to her harasser's boss.¹⁸⁸ The court also held that the absence of a formal written grievance policy regarding sexual harassment was not dispositive.¹⁸⁹

The *Watts* and *Bouton* courts properly applied agency principles to confer liability on an employer whose supervisor abused his apparent authority to create a hostile work environment. The cases properly held that liability should attach under the doctrine of apparent authority regardless of whether an employer had knowledge of the harassment and hence, even when the employer was not negligent. However, the plaintiff must also prove that the supervisor was acting on the employer's behalf, that his conduct resulted in harm to the plaintiff, and she reasonably acted or relied upon his apparent authority.¹⁹⁰

Whenever an employer vests its supervisor with the authority to control significant aspects of the work environment, the employer authorizes the supervisor to act on its behalf, thereby meeting the first requirement of the common-law doctrine of apparent authority. Showing that the victim suffered harm as a result of the supervisor's abuse of his apparent authority merely requires the victim to show that she was subject to unwelcome sexual harassment. The victim will meet this requirement whenever she is able to prove that a hostile work environment existed.

Of the three elements necessary to show apparent authority, the victim of harassment will have the greatest difficulty proving that she acted or relied on the apparent authority of her supervisor. The Third Circuit interpreted this element to require that the victim's belief in her supervisor's apparent authority be reasonable.¹⁹¹ While the Third Circuit properly required the victim to prove reliance on her supervisor's apparent authority, it erred in holding that the em-

187. *Id.* at 109.

188. *Id.* at 108.

189. *Id.* at 109.

190. See notes 171-75 and accompanying text.

191. *Bouton*, 29 F.3d at 109.

ployer's lack of a formal written grievance policy was not dispositive of that issue.¹⁹²

When an employer lacks a formal written grievance policy, a victim of sexual harassment will reasonably perceive her only available options to be silently acquiescing in the harassment or leaving her job. One of the goals of Title VII should be to ensure that the victim of discriminatory conduct is given a feasible third choice, namely enforcing an effective grievance procedure that outlaws sexual harassment while continuing in her employment.¹⁹³

This goal would be furthered by a rule providing that in order to shield itself from liability for a supervisor's abuse of his apparent authority, an employer must take firm steps to remove any possible inference that a supervisor has authority to sexually harass his subordinates.¹⁹⁴ As the Southern District of New York held, these steps should include a written policy prohibiting such harassment.¹⁹⁵ The policy should be publicized and effectively implemented so that each employee is made aware that such conduct will not be tolerated. An employer should not escape liability because of a procedure if that procedure proves inadequate.¹⁹⁶ This application of the apparent authority doctrine provides the best incentive mechanism to ensure that employers strip their supervisors of any perceived authority to create a hostile work environment, and will encourage employers to create, implement, and enforce effective policies outlawing discrimination in employment.

192. See note 167 (quoting the EEOC Guidelines that encourage prevention of harassment).

193. See note 14 (arguing that a victim of harassment who is forced to leave her job or put up with the harassment suffers a job detriment).

194. If the employer has not provided an effective avenue for complaint, then the supervisor

has unchecked, final control over the victim and it is reasonable to impute his abuse of his power to the employer. The Commission generally will find an employer liable for 'hostile environment' sexual harassment by a supervisor when the employer failed to establish an explicit policy against sexual harassment and did not have a reasonably available avenue by which victims of sexual harassment could complain to someone with authority to investigate and remedy the problem.

EEOC: Policy Guidance on Sexual Harassment, 8 Labor Rel. Rptr. (BNA) ¶ 405.6697 (1990) (citation omitted). In either of these situations, a reasonable inference could be drawn that the supervisor's illicit conduct was tacitly approved by management, thus creating liability under Agency Restatement § 219(2)(d) (cited in note 84). *Lehmann*, 626 A.2d at 464.

195. *Watts*, 724 F. Supp. at 106 n.6.

196. Respondent's Brief at 38 (cited in note 9).

E. Section 219(2)(d)(cl. 2): Supervisor Aided by the Agency Relation

Section 219(2)(d) of the Restatement of Agency recognizes that an employee's position as an agent may enable him to cause harm.¹⁹⁷ In the sexual harassment context, the second clause of Section 219(2)(d) suggests that if an employer delegates the authority to control the work environment to a supervisor who then abuses that delegated authority, employer liability will follow.¹⁹⁸ While also justified on the abused authority rationale, this inquiry should be distinct from the apparent authority analysis.¹⁹⁹ Even if an employer successfully negates any apparent authority the supervisor might have had to commit sexual harassment, a supervisor still holds actual power over his subordinates in the workplace. If the supervisor is able to misuse that power to create a hostile work environment, the employer will be liable for having placed him in the position to do so.²⁰⁰

197. Agency Restatement § 219, comment e (cited in note 84). Section 219(2)(d) recognizes that an employee may be able to cause harm because of his position as an agent. For example, at common law, an employer is liable when a telegraph operator sends false messages claiming to come from third persons. *Id.* Likewise, an employer is liable when the manager of its store is able to cheat customers because of his position. *Id.* While these examples are not exhaustive, they clearly support the proposition that an employer will be held liable for an employee's misconduct when the employer places the employee in a position that enables him to engage in the wrongful activity.

198. *Lehmann*, 626 A.2d at 462. See also Katherine S. Anderson, *Employer Liability Under Title VII for Sexual Harassment After Meritor Savings Bank v. Vinson*, 87 Colum. L. Rev. 1258, 1274 (1987) (suggesting vicarious liability may follow from agency principles when a supervisor acts as "employer's surrogate in the day-to-day management of his subordinates"); Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 Harv. L. Rev. 1449, 1461 (1984) (arguing that when the employer gives the supervisor the power to structure the work environment, the employer is vicariously liable for the supervisor's abuse of that authority to create the hostile work environment).

199. Compare *Barnes*, 561 F.2d at 995-96 (MacKinnon, J., concurring). Judge MacKinnon has recognized that "[i]n every case where vicarious liability is at issue, the agent will have been aided in some way in committing the tort by the position that he holds." *Id.* at 996. MacKinnon claims that this reading of the second clause of Section 219(2)(d) argues too much. *Id.* He supports this position by pointing out that, "[t]he examples provided in the *Restatement* commentary . . . indicate that a narrower concept is involved." *Id.* Since the opportunity provided by the agency relation is no more than would be provided in any employment setting and does not create an incentive for tortious conduct, Judge MacKinnon concludes that the avenue of employer liability provided by the second clause of Section 219(2)(d) does not apply in the sexual harassment context. *Id.*

200. To establish a prima facie case of hostile work environment sexual harassment, plaintiffs must prove some basis for employer liability. See note 8-10 and the accompanying text. To determine whether this element has been satisfied, a court has two options. First, it could embark on the somewhat lengthy and complicated analysis of agency principles presented in this Note, to determine whether employer liability should attach. See Part III. Second, by recognizing that the Section 219(2)(d) analysis is broad enough to subsume the other avenues of employer liability available under common-law agency principles, the court could simplify its

The Tenth Circuit applied this analysis in *Sauers v. Salt Lake County*.²⁰¹ The court held that when a supervisor wields significant control over the victim's hiring, firing, or conditions of employment, the supervisor operates as the alter ego of the employer.²⁰² The employer, therefore, could be held liable for its supervisor's misconduct.²⁰³ The court noted that liability would be imposed if the harasser was aided in accomplishing the harassment by his relationship to the employer.²⁰⁴ Consequently, the court held that a claim of hostile environment harassment against the individual defendant was a claim against the employer itself.²⁰⁵

While the employer would be liable in most cases for the supervisor's behavior under the second clause of Section 219(2)(d), courts have pointed out that rare exceptions are possible, and therefore the employer is not always automatically liable.²⁰⁶ Thus in *Hirschfeld v. New Mexico Corrections Dept.*,²⁰⁷ the Tenth Circuit refused to hold an employer liable when the plaintiff presented no evidence that the harasser had any supervisory authority over her whatsoever.²⁰⁸ The court reasoned that the only way the supervisor's agency relationship could aid him in the accomplishment of the harassment was that he would not have been in the workplace but for his job.²⁰⁹ Concluding that holding an employer liable in these circumstances would be too broad a reading of Section 219(2)(d), the court

inquiry by simply asking whether the supervisor was aided by the agency relation in committing the harassment. This inquiry can be further simplified by asking only whether the supervisor abused the authority entrusted to him by his employer in creating a hostile work environment. Thus, the employer liability prong of a plaintiff's prima facie case could be replaced simply by requiring proof that the harasser abused his supervisory authority in creating a hostile work environment. Part III.E.

201. 1 F.3d 1122 (10th Cir. 1993). The court first pointed out that "[t]he employer is not always liable for sexual harassment by its supervisors." *Id.* at 1125 n.3 (citing *Meritor*, 477 U.S. at 72). It went on to hold that under agency principles an employer could be liable if the agent acted within the course and scope of his employment, if the employer was negligent, or "if the harassers acted under apparent authority from the employer or were aided in accomplishing the harassment by their relationship to the employer." *Id.* (citing *Hirschfeld*, 916 F.2d at 576-79). See also *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1418 (10th Cir. 1987).

202. *Sauers*, 1 F.3d at 1125 (quoting *Paroline*, 879 F.2d at 104).

203. *Id.* (citing 29 C.F.R. 1604.11(c)).

204. *Id.* at 1125 n.3 (citing *Hirschfeld*, 916 F.2d at 576-79).

205. *Id.* at 1125.

206. As Justice Marshall pointed out in *Meritor*, when a supervisor has no authority over an employee because the two work in different parts of the employer's business, it may be improper to impose liability. While Justice Marshall is correct in principle, his specific example may not always hold true. See the text following note 214.

207. 916 F.2d at 572.

208. *Id.* at 579-80.

209. *Id.* at 579 (agreeing with the trial court).

recommended reading the second half of Section 219(2)(d) in the context of what precedes it.²¹⁰ The court did not elaborate further on what it meant by this cryptic statement. If it meant to imply that the apparent authority inquiry and the aided by the agency relation analysis are not distinct inquiries, this recommendation seems to contradict the plain language of the Restatement. However, if it meant only that an employer should not be liable for a supervisor's harassment when that supervisor did not use his position of authority to aid him in the harassment, the court's conclusion is defensible.

The proper inquiry of whether a supervisor was aided by the agency relation is a fact-based inquiry that depends on the circumstances of the case. The Supreme Court of New Jersey has held that to make this determination, the finder of fact must decide: (1) whether the employer delegated the authority to the supervisor to control the situation of which the plaintiff complains; (2) whether the supervisor exercised that authority; (3) whether the exercise of authority resulted in a violation of Title VII; and (4) whether the authority delegated by the employer to the supervisor aided the supervisor in injuring the plaintiff.²¹¹ If each of these four conditions is met, the employer is liable for the supervisor's harassment.²¹²

The New Jersey court pointed out that while this standard is distinct from strict liability, which would result in employer liability regardless of the facts of the case, its standard would often result in employers being held vicariously liable for such harassment.²¹³ However, the court felt that in some cases strict liability would be unjust. The court explained that when a supervisor rapes a subordinate in the workplace, for example, employer liability might not attach.²¹⁴

These courts failed to recognize, however, that even supervisors who lack direct authority over the victim of their harassment will often be aided by the agency relation when committing that harassment. One example is when the supervisor calls the victim into his office and sexually harasses her there.²¹⁵ If he did not occupy a

210. *Id.*

211. *Lehmann*, 626 A.2d at 462. See also Bruce Chandler Smith, *When Should an Employer Be Held Liable for the Sexual Harassment by a Supervisor Who Creates a Hostile Work Environment? A Proposed Theory of Liability*, 19 *Ariz. St. L. J.* 285, 321 (1987).

212. *Lehmann*, 626 A.2d at 462.

213. *Id.*

214. *Id.* at 464 (quoting the trial court, 255 N.J. Super. 616, 605 A.2d 1125, 1149 (1992) (Skillman, J., dissenting)).

215. This would include the situation of a supervisor raping his subordinate. But see *id.*

position of authority, he probably would not be able to direct the victim into his office. In fact, but for his supervisory status, he may not even have an office. Furthermore, supervisors are traditionally accorded more freedom to roam around the workplace unimpeded by close supervision. If the supervisor takes advantage of this freedom by going to other departments to commit harassment, he is taking advantage of that freedom and is thereby being aided by the existence of the agency relation.

Even supervisors who do not have direct supervisory authority over an individual subordinate employee do have power over that employee by virtue of the corporate hierarchy. One supervisor may take advantage of his position by threatening to exert influence over another supervisor who does have authority over his targeted victim. By using his position in the company hierarchy to create a hostile work environment for the victim, such a supervisor is aided by the agency relation regardless of whether he has direct authority over the victim.

The proper question for the court to ask, therefore, is whether under the circumstances of the case, the perpetrator of the harassment can more properly be considered a co-worker of the victim, or whether he is, in fact, a supervisor exercising direct or indirect authority over a subordinate.²¹⁶ If the harasser is acting in a supervisory capacity when he creates a hostile work environment, he will necessarily be aided by the agency relation, and liability should properly be imputed to his employer.²¹⁷

In *Karibian v. Columbia University*, the Second Circuit interpreted the second clause of § 219(2)(d) in precisely this manner.²¹⁸ The court recognized that when a supervisor creates a hostile work environment through the use of his delegated authority, agency principles suggest that the employer's liability is absolute.²¹⁹ The court held that an employer is liable for a supervisor's hostile work environment sexual harassment if the supervisor uses his authority to

216. See *Karibian v. Columbia University*, 14 F.3d 773, 780 (2d Cir. 1994) (recognizing that "where a low-level supervisor does not rely on his supervisory authority to carry out the harassment, the situation will generally be indistinguishable from cases in which the harassment is perpetrated by the plaintiff's co-workers").

217. See *id.* (recognizing that "[c]ommon law principles of agency suggest that in such circumstances the employer's liability is absolute").

218. *Id.* at 779-81.

219. *Id.* at 780.

further the harassment,²²⁰ or if he was aided in accomplishing the harassment by the agency relationship.²²¹

Applying this standard, the court held that the employer was liable for its supervisor's hostile work environment harassment regardless of the absence of notice or the reasonableness of its complaint procedures.²²² The court bolstered its conclusion by pointing out the "jarring anomaly" that would be created if it were to hold that conduct which always renders an employer liable under *quid pro quo* harassment does not result in liability when the same conduct becomes so severe and pervasive as to create a hostile work environment.²²³

Thus, an agency analysis will not lead to employer liability only in those rare circumstances in which the supervisor does not abuse his authority in such a way as to be aided by the agency relation and therefore more properly viewed as a co-worker of the victim for purposes of Title VII.²²⁴ In those cases, courts uniformly agree that employers should be liable under a negligence standard if they knew or should have known of the hostile work environment and failed to take prompt and adequate remedial action.²²⁵ In all other cases, when someone who has been delegated power abuses that

220. See Part III.D (discussing employer liability under the apparent authority analysis).

221. *Karibian*, 14 F.3d at 780 (citing Restatement (Second) of Agency § 219; 29 C.F.R. § 1604.11(c); *Hirschfeld*, 916 F.2d at 579; *Sparks*, 830 F.2d at 1559-60; *Watts*, 724 F. Supp. at 106 n.6).

222. *Id.* Holding employers absolutely liable under these circumstances would not create a disincentive for employers to establish policies against harassment, or to respond adequately to harassment of which they have knowledge. First, by establishing and then educating employees about the existence of such a policy, some sexual harassment that might otherwise occur will be prevented. See notes 164-68. Second, if an employer responds quickly and adequately to notice of a hostile work environment, a victim may be persuaded not to file a lawsuit. Finally, courts will properly take evidence of a policy against harassment and adequate remedial action into account in assessing damages. Injunctive relief merely requires an employer to eliminate the hostile work environment. Injunctive relief will therefore be unnecessary when the employer has already responded adequately to notice of the harassment. Reinstatement and backpay will generally be unnecessary under these circumstances because the victim will have remained in her job, or at least will have been absent for a short period of time. Furthermore, when the employer has done all it reasonably could have done to prevent harassment from occurring and promptly remedied it in those cases in which it has occurred, compensatory damages will be difficult for the plaintiff to prove, or should, at any rate, be minimal. Finally, punitive damages should not be assessed when an employer has an effective policy against harassment in place and has responded adequately to any harassment which has occurred. See generally *Lehmann*, 626 A.2d at 624-25 (discussing an assessment of damages under a strict application of agency principles); *Meritor*, 477 U.S. at 77-78 (Marshall, J., concurring) (discussing the relief sought by a plaintiff under Title VII).

223. *Karibian*, 14 F.3d at 781.

224. See note 216 and accompanying text.

225. See note 16 and accompanying text.

power to create a hostile work environment for a subordinate, the source of that power should be held accountable. Only in this way will the law assure that those with power wield it appropriately.²²⁶ From this principle follows Justice Stevens' observation that using agency principles for guidance²²⁷ will impute liability to the employer regardless of whether the employee gave notice of the offense.²²⁸

IV. A STRICT APPLICATION OF AGENCY PRINCIPLES IS APPROPRIATE AS A MATTER OF SOUND POLICY

A. *Consistency With Other Title VII Causes of Action*

Courts have held employers strictly liable for supervisory misconduct under every other cause of action available under Title VII, including quid pro quo sexual harassment.²²⁹ Those courts that have imposed a notice requirement on plaintiffs seeking to recover for hostile environment sexual harassment have failed to articulate legitimate reasons why this cause of action should be treated differently. The most articulate defense of the disparate treatment afforded the supervisory hostile work environment cause of action was set forth by Judge Bork in a dissenting opinion from the denial to

226. In these circumstances, the employer would be liable because the supervisor was "aided by the agency relation" in committing the harassment. The existence of a grievance procedure would not change this fact, and therefore, would not alleviate an employer's liability under Section 219(2)(d). In *Bouton*, 29 F.3d at 110, the court explicitly recognized that this choice is a policy decision based on the appropriate amount of deterrence. The court pointed out that "[i]f employers are liable whenever supervisors harass their subordinates, they have an economic incentive in the amount of the potential judgments to recruit, train, and supervise their managers to prevent hostile environments." *Id.* Nonetheless, the court argued that the "[m]arginal reduction in the incentive that occurs if employers can rely on an internal grievance procedure may be justified by the concomitant decrease in litigation." *Id.*

The problem with this approach is that the decrease in litigation comes at the expense of legitimate victims of sexual harassment who do not bring claims because there is no one from whom they can recover. On the other hand, decreasing the factual burden on a plaintiff by no longer requiring her to show employer knowledge or to litigate the merits of a grievance procedure would lead to decreased litigation costs: trials would be less prolonged, fewer appeals would be required, and fewer remands of cases improperly disposed of at summary judgment would occur. Not only would this lighter factual burden result in increased efficiency, but victims of sexual harassment would have greater incentive to come forward, since there would be a greater chance of relief.

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

228. *Id.* at 78 (Marshall, J., concurring).

229. See note 11 and accompanying text (citing cases of quid pro quo sexual harassment).

rehear *Vinson v. Taylor*²³⁰ en banc. Judge Bork claimed that the panel's decision to impose strict liability made the employer an insurer that all relationships between supervisors and employees were entirely asexual.²³¹ Judge Bork complained that even though the employer may have no way of preventing sexual relationships,²³² it must pay if they occur and are then characterized as harassment.²³³

Judge Bork then suggested that the D.C. Circuit should have reached the question of an employer's vicarious liability under Title VII for misconduct it knew nothing of and had done all it reasonably could to prevent.²³⁴ Bork suggested that in answering this question, the court should not import wholesale notions of liability that evolved in lower court cases involving racial discrimination. He suggested instead that some Title VII doctrines require modification before they can be applied in sexual harassment cases.²³⁵ He noted that vicarious liability is one such doctrine since it is unlikely that a supervisor would commit sexual harassment within the scope of his employment, and because supervisors engaging in such harassment would ordinarily know that their employer did not approve of their actions.²³⁶

There are several problems with Judge Bork's critique of the application of agency principles to hostile work environment sexual harassment cases. First, he argued that the employer in *Vinson* could not have done more to avoid liability without monitoring or policing its employees' voluntary sexual relationships.²³⁷ In *Meritor*, however, Justice Rehnquist explicitly pointed out the inadequacies of the bank's grievance procedure and noted that a plaintiff's failure to use a grievance procedure might insulate the employer from liability if such procedure was better calculated to encourage victims of harassment to come forward.²³⁸ It is clear, therefore, that Meritor Savings Bank could have taken action to avoid liability.²³⁹

230. 760 F.2d at 1330 (D.C. Cir. 1985) (Bork, J., dissenting).

231. *Id.* at 1331.

232. Judge Bork claimed that in the case at bar, the employer could not have done more to avoid liability without monitoring or policing its employees' voluntary sexual relationships. Such a policy would be both outrageous and expensive to enforce. *Id.* at 1331 & n.3.

233. *Id.* at 1331.

234. *Id.*

235. *Id.*

236. *Id.* at 1332.

237. *Id.* at 1331 & n.3. See note 232 and accompanying text.

238. *Meritor*, 477 U.S. at 72-73.

239. "If procedures are viable and do not denigrate the victim, they will be used. Typically, too, an administrative complaint precedes suit, which provides the defendant ample opportunity

Second, Judge Bork expressed concern about the employer's ability to police voluntary sexual relationships in the workplace and the desirability of doing so.²⁴⁰ Truly consensual sexual relationships, however, are not proscribed by Title VII. The gravamen of any sexual harassment claim is that the alleged sexual advances were unwelcome.²⁴¹ Judge Bork and other advocates of a notice standard are really concerned that a female participant in a consensual sexual relationship will bring a sexual harassment claim when that relationship sours.²⁴²

Concededly difficult factual issues revolve around whether sexual behavior was welcome. However, just because a difficult factual inquiry is necessary to resolve a sexual harassment claim does not mean that a more relaxed standard of employer liability is appropriate. Plaintiffs in sexual harassment cases already face significant burdens, including proving that the harassment was "severe or pervasive," and proving the existence of any psychological damages that they are claiming.²⁴³ In fact, some commentators argue that "the rules of credibility are stacked against women."²⁴⁴

Commentators have also recognized that the outcomes and reasoning of many sexual harassment cases reveal a general distrust of women.²⁴⁵ This distrust may result in courts failing to impose liability on harassers because they might be innocent.²⁴⁶ Thus employer liability attaches only when "the harasser's behavior is offensive enough, and the employment consequences serious enough, to elicit the sympathy of judges who [harbor] the attitudes and beliefs to which sexual harassment law" objects.²⁴⁷

to cure or settle short of liability. The available range of motion is far beyond the picture of virtual entrapment" Judge Bork portrays. Respondent's Brief at 38 (cited in note 9).

240. *Vinson*, 760 F.2d at 1331 & n.3.

241. *Meritor*, 477 U.S. at 68 (citing 29 CFR § 1604.11(a)).

242. See *Vinson*, 760 F.2d at 1331 (Bork, J., dissenting) (expressing concern that employers will have to pay if sexual relationships occur and harassment is later alleged).

243. Compare *Harris*, 114 S. Ct. at 371 (holding that a plaintiff states a cause of action for hostile work environment sexual harassment as long as the environment would reasonably be perceived, and is perceived, as hostile or abusive, without need to prove the conduct was also psychologically injurious).

244. Susan Estrich, *Sex at Work*, 43 Stan. L. Rev. 813, 853 (1991).

245. Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 Yale L. J. 1177, 1208 (1990).

246. Lutner, 1993 U. Ill. L. Rev. at 623 (cited in note 14).

247. Frug, *Women and the Law* at 182 (cited in note 5). Under this reasoning, it is irrelevant that a hostile environment case involves the same abuse of supervisory power as does a quid pro quo case.

Courts [hesitate] to impose liability for hostile environment sexual harassment because the claim encompasses behavior that men welcome and find unobjectionable. Courts

A third critique of Judge Bork's argument stems from the fact that while hostile environment sexual harassment is rarely engaged in within the scope of a supervisor's employment, and often is explicitly disapproved of by the employer, the same is true in cases of quid pro quo sexual harassment. Yet courts uniformly hold employers strictly liable for this cause of action. Outside of the explanation commentators provide as to why hostile work environment sexual harassment is treated differently from this cause of action, namely a general distrust of women and a belief that this cause of action is less serious,²⁴⁸ it is difficult to perceive of any valid reason why employer liability should not attach to claims of a supervisor's hostile environment harassment. The reason for holding an employer liable for supervisory harassment in other contexts—the supervisor's abuse of the power delegated to him by his employer—is equally compelling in the hostile environment sexual harassment context. Therefore courts should treat this cause of action the same way, by holding employers liable for the violations of Title VII perpetrated by supervisors who abuse their authority.

A fourth flaw with Judge Bork's argument is that a notice requirement is superfluous and contradictory. All courts would hold an employer liable for co-worker harassment if the victim reports the harassment to her supervisor who then fails to respond with adequate remedial measures.²⁴⁹ Yet a number of courts would not hold an employer liable for the hostile work environment created by the supervisor.²⁵⁰ This simply does not make sense. Knowledge of the supervisor who creates the hostile work environment should be viewed as knowledge of the employer, imputing liability to the employer for a supervisor's harassment, regardless of whether higher-level management personnel were made aware of it.

perceive hostile environment harassment as less serious than quid pro quo harassment, and the fear of imposing liability for 'acceptable' conduct or conduct perceived as beyond the employer's control gives courts a vested interest in maintaining a lesser standard of employer liability for the 'less serious' cause of action.

Lutner, 193 U. Ill. L. Rev. at 624. See also Gutek, *Sex and the Workplace* 159-64 (cited in note 5) (arguing that unlike women, men consider a sexualized work environment part of the employment institution's background and are more likely to consider sexual overtures and comments appropriate work behavior). Evidence indicates that a majority of men believe women appreciate sexual overtures at work, and that men seldom label such incidents as sexual harassment. *Id.*

248. See notes 5, 14, and 244-47 and accompanying text.

249. See notes 15-16 and accompanying text.

250. See notes 145-48 and accompanying text (arguing that supervisor knowledge should be imputed to the employer).

B. Policies Supporting a Strict Application of Agency Principles

1. EEOC Guidelines

The EEOC Guidelines support a strict standard of employer liability, as they provide for employer liability in cases of both quid pro quo and hostile environment sexual harassment.²⁵¹ The Supreme Court has traditionally accorded the Guidelines great deference,²⁵² in part because they are only adopted after a 60-day public comment period.²⁵³ The *Meritor* Court recognized that its holding was in some tension with these guidelines,²⁵⁴ but explained its conclusion by referring to the language in the Guidelines requiring a court to make a factual inquiry to determine whether the harasser acted as a supervisor.²⁵⁵ The Court wrongly interpreted this language to mean that a supervisor does not necessarily act within his supervisory functions when he creates a hostile work environment. The Court intimated that although the sexual harassment occurs on the job, the supervisor stops being an agent when he creates a hostile work environment.

However, as one commentator points out, this language refers to the process of determining whether an employee is in a supervisory position.²⁵⁶ Once the employee is deemed a supervisor, the Guidelines

251. EEOC Guidelines, 29 C.F.R. § 1604.11(c).

252. *Meritor*, 477 U.S. at 74 (Marshall, J., concurring) (citing *Griggs*, 401 U.S. at 433-34).

253. See 45 Fed. Reg. at 74676 (cited in note 65), which states that during the period available for public comment:

[t]he greatest number of comments, including many from employers, were those commending the Commission for publishing guidelines on the issue of sexual harassment, as well as for the content of the guidelines.

The second highest number of comments specifically referred to § 1604.11(c) which defines employer liability with respect to acts of supervisors and agents. Many commentators, especially employers, expressed the view that the liability of employers under this section is too broad and unsupported by case law. However, the strict liability imposed in § 1604.11(c) is in keeping with the general standard of employer liability with respect to agents and supervisory employees. Similarly, the Commission and the courts have held for years that an employer is liable if a supervisor or an agent violates the Title VII, regardless of knowledge or any other mitigating factor. . . . In keeping with this standard, the Commission, after full consideration of the comments and the accompanying concerns, will let §1604.11(c) stand as it is now worded.

254. *Meritor*, 477 U.S. at 71-72. The Guidelines advocate strict liability for supervisory harassment. 29 C.F.R. § 1604.11(c).

255. *Meritor*, 477 U.S. at 71.

256. Maria M. Carrillo, *Hostile Sexual Harassment by a Supervisor Under Title VII: Reassessment of Employer Liability in Light of the Civil Rights Act of 1991*, 24 Colum. Hum. Rts. L. Rev. 41, 75-76 (1992-93).

clearly state that an employer should be liable.²⁵⁷ The Court, therefore, was mistaken, not only in its interpretation of the EEOC Guidelines, but also in its belief that a supervisor is not performing his job duties when he creates a hostile work environment. One of the duties entrusted to supervisory personnel is the authority to supervise and control the work environment. When that authority is abused, the harasser acts in his supervisory capacity, and the employer should be held accountable for the abuse of that authority.

2. Employer Incentives

A strict standard of employer liability promotes the goals of Title VII by creating the strongest incentives for employers to establish preventive measures and provides the maximum opportunity for victims to recover.²⁵⁸ Holding employers liable for the hostile work environment created by its supervisory personnel encourages employers to establish effective preventive mechanisms, educate both supervisors and subordinates on what behavior will not be tolerated in the workplace, and discover and redress hostile work environments in existence.

3. Economic Arguments

Holding employers liable for the hostile work environment sexual harassment of its supervisory personnel is also appropriate for economic reasons. Professor Allan Q. Sykes argues that prospective employees of a company have little information about the probability and seriousness of workplace harassment prior to accepting a job.²⁵⁹ Once harassment become apparent, a victim might be able to quit and find a different job.²⁶⁰ The costs of doing so, however, including search costs and the costs of lost training, may outweigh the benefits.²⁶¹ Even if the victim does quit, she may have already incurred signifi-

257. Specifically, the Guidelines provide that "the Commission will examine the circumstances of the particular employment relation and the job functions [sic] performed by the individual in determining whether the individual acts in either a supervisory or agency capacity." 29 C.F.R. §1604.11(c) (quoted fully in note 44).

258. Carillo at 84. See also *Ford Motor Co. v. EEOC*, 458 U.S. 219, 230 (1982) (pointing out that "Title VII's primary goal, of course, is to end discrimination").

259. Alan Q. Sykes, *The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines*, 101 Harv. L. Rev. 563, 605-06 (1988).

260. *Id.* at 606.

261. *Id.*

cant and potentially unredressable injury. Moreover, it is doubtful that a market solution to the problem of sexual harassment will emerge because an employer could hire another employee at the same rate of pay. If a market solution does not occur, employers will not bear the costs of harassment caused by their business. Employers may also refuse to adopt cost-effective policies to discourage harassment, absent the imposition of liability.²⁶²

Employers often cannot observe acts of harassment and therefore, they cannot often intervene to prevent specific instances of harassment.²⁶³ They can, however, promulgate policies under which perpetrators of harassment are discharged or otherwise penalized.²⁶⁴ These incentives are likely to be effective for all supervisors who value long-term relationships with their employers.²⁶⁵ Whatever incentives employer liability might create for meritless suits, these incentives would be counter-balanced by existing disincentives for victims to raise meritorious suits.²⁶⁶ Therefore, defending sexual harassment lawsuits will cost employers less than the cost of the harassment imposed upon victims.²⁶⁷

Assuming some incentives would enable an employer to limit the amount of sexual harassment that occurs, and assuming that frivolous lawsuits are not a serious problem, Sykes concludes that employers should be liable for supervisory harassment.²⁶⁸ Sykes bolsters this conclusion by pointing out that the causal relationship between a supervisor's harassment and the employment relationship is strong, and that the market will not provide an efficient solution to the problem.²⁶⁹

262. *Id.* Sykes argues that if harassment is caused by an employer's enterprise, strict liability should be imposed. *Id.* He goes on to conclude that a strong argument can be made that supervisory harassment is caused by the employer's enterprise, whether or not it is of the quid pro quo variety. *Id.* This is so because "sexual harassment by supervisors is often facilitated by a position of authority. Absent the existence of [the supervisory authority], the supervisor would have no leverage over the subordinate, and the likelihood of sexual harassment would be significantly reduced." *Id.* at 606-07 (citation omitted). While Sykes felt that the argument for employer liability is strongest in the quid pro quo case, he also recognized that for the same reasons, the argument is "quite strong" for a supervisor's hostile environment harassment. *Id.* at 607.

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.* at 607-08.

269. *Id.* at 608.

In *Horn v. Duke Homes, Division of Windsor Mobile Homes, Inc.*,²⁷⁰ the Seventh Circuit used similar economic arguments to justify a finding of employer liability for supervisory sexual harassment. The Seventh Circuit pointed out that a company is a legal form that can only act through its appointed agents.²⁷¹ Explaining the reason behind the doctrine of respondeat superior, the court stated that the employer should bear the cost of the torts of its employees as a required cost of doing business because it is a more efficient risk bearer than the innocent plaintiff.²⁷² The court pointed out that sex discrimination can best be eliminated by enforcing a rule of liability that “ensures compensation for victims and creates an incentive for the employer to take the strongest possible affirmative measures to prevent the hiring and retention of sexist supervisors.”²⁷³

4. Fairness of Remedies

Not only would a strict application of agency principles lead to an economically efficient result, but it would also further the goals of Title VII. A strict application of agency principles advances Title VII's goals by providing redress to victims of discrimination without imposing an undue or unfair burden on employers.²⁷⁴ Providing injunctive relief merely requires an employer to rid its workplace of

270. 755 F.2d 599 (7th Cir. 1985).

271. *Id.* at 605.

272. *Id.* (citing *Ira S. Bushey & Sons, Inc. v. United States*, 398 F.2d 167 (2nd Cir. 1968); *Prosser and Keeton on Torts* § 69 at 459 (cited in note 101); Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 *Yale L. J.* 499, 543-45 (1961)).

273. *Id.* The existence of sexual discrimination and harassment also causes serious economic harms to employers. Hearings on H.R. 1 at 207-14 (cited in note 164). Dr. Freeda Klein, a researcher and consultant to large companies on sexual harassment, has estimated that the cost of sexual harassment for a typical Fortune 500 company of 23,784 employees is over \$6.7 million per year, not counting the costs of litigation, processing state or federal charges, and destructive behavior or sabotage. *Id.* The \$6.7 million figure comes from the costs of employee turnover, absenteeism, reduced productivity, and the use of internal complaint mechanisms. *Id.* at 210-14. That harm to the corporation necessarily harms the economy of the state and the welfare of its citizens. *Lehmann*, 626 A.2d at 456. It is in everyone's interest, therefore, to eliminate sexual harassment from the workplace. See also United States Merit Systems Protection Board, *Sexual Harassment in the Federal Government: An Update* 39 (1988) (reporting that, as a result of sexual harassment, the federal government lost \$267 million from May 1985 to May 1987 due to lost productivity, sick leave, and employee replacement costs).

274. See *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979) (recognizing Title VII's purpose of “the elimination of discrimination in the workplace”). See also *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975) (claiming that compensation for injuries caused by prohibited discrimination is another purpose of Title VII).

discrimination.²⁷⁵ By awarding other equitable remedies such as reinstatement, backpay, and compensatory damages, a court can ensure that victims receive make-whole relief. The provision of such damages would encourage employers to take preventive measures and would also encourage them to respond promptly and effectively to allegations of harassment in order to minimize their damages.²⁷⁶ Furthermore, by leaving open the possibility of punitive damages, courts can ensure that employers that refuse to implement preventive mechanisms or to respond adequately to known harassment understand that this behavior will no longer be tolerated in our society. Hence, a strict application of agency principles advances Title VII's two primary goals of eliminating discrimination from the American workplace, as well as providing appropriate remedies for its victims.

V. CONCLUSION

In *Meritor*, the majority opinion directed lower courts to use agency principles for guidance in determining when it is appropriate to hold employers liable for supervisory hostile work environment sexual harassment.²⁷⁷ In a concurring opinion, Justice Marshall opined that under Title VII, an employer is responsible for the acts of its supervisory employees.²⁷⁸ Justice Stevens, failing to ascertain any inconsistency between the opinions of his colleagues, joined in both opinions.²⁷⁹

This Note has embarked on a detailed examination of common-law agency principles in the sexual harassment context and concluded that Justice Stevens was correct. Under Section 219 of the Restatement (Second) of Agency, employer liability is appropriate whenever an employer delegates the authority to control the work environment to a supervisor who subsequently abuses that authority. This result is appropriate as a matter of sound policy. A strict application of agency principles also advances Title VII's twin goals of eliminating discrimination from the workplace and ensuring adequate

275. See note 222 (discussing assessment of damages against employer with policy against harassment who responds adequately to notice of the harassment).

276. *Id.*

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

278. *Id.* at 75 (Marshall, J., concurring).

279. *Id.* at 74 (Stevens, J., concurring).

remedies for victims of sexual harassment by holding employers responsible for the hostile work environments of their supervisors.

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