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# Harassing Women with Power: The Case for Including Contra-power Harassment within Title VII

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Ann Carey Juliano\*

For DeAngelis, the price of success as the police  
department's first woman sergeant included transitory  
ribbing by [an anonymous harasser].<sup>1</sup>

A subordinate propositions his store manager for sex and grabs her breasts.<sup>2</sup> A female production supervisor is threatened by electricians she supervises.<sup>3</sup> A female supervisor is called a bitch and a whore and has a paperweight thrown at her.<sup>4</sup>

In each of these instances, and in many others, the person subject to the harassment is a supervisor – a woman (generally) who, at least formally, possesses power over those who are harassing her. Traditionally, sexual harassment was considered an abuse of power in the workplace. If this is true, how can female supervisors be harassed? Or are they harassed, but not within the meaning of employment discrimination law? Is such behavior simply the “price of success”? In this article, I examine the phenomenon of subordinates harassing supervisors and argue that the law must consider different concepts of power so that these claims fall within the protection of Title VII of the Civil Rights Act of 1964.<sup>5</sup>

As hard as it is to believe, in the early days after the enactment of Title VII, what would now be considered the most obvious case of harassment - a supervisor demanding sexual favors from a subordinate - did not violate the prohibition on discrimination “because of sex.” Rather, courts brushed aside such claims as simply difficult interpersonal relationships between supervisors and employees. When advocates for women in the workplace first began to bring claims of sexual harassment, they had to articulate why sexual harassment is “discrimination because of sex” such that the employer should be liable. Advocates struggled hard to show that sexual harassment is not about sex but rather about the misuse of power in the workplace. Supervisors were misusing their power in order to extract sexual behavior from women. Courts eventually accepted these claims as cognizable under Title VII.<sup>6</sup>

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<sup>1</sup> DeAngelis v. El Paso Mun. Police Officers Ass'n, 51 F.3d 591, 597 (5th Cir. 1995).

<sup>2</sup> Lewis v. Sugar Creek Stores, Inc., No. 96-CV-0100E(H), 1996 WL 685730, at \*1 (W.D.N.Y. Nov. 25, 1996).

<sup>3</sup> Mattson v. Caterpillar, Inc., 359 F.3d 885, 887 (7th Cir. 2004).

<sup>4</sup> Humphreys v. Med. Towers, Ltd., 893 F. Supp. 672, 678 (S.D. Tex. 1995).

<sup>5</sup> Civil Rights Act of 1964, 42 U.S.C. § 2000e (2006).

<sup>6</sup> See Civil Rights Act of 1964 § 703(a)(1), 42 U.S.C. § 2000e-2(a)(1) (2006) (stating it is unlawful employment practice for employer to “fail or refuse to hire or to discharge any individual, or otherwise 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”).

These early sexual harassment claims were known as quid pro quo claims - where a supervisor demanded sexual favors in exchange for the award of or retention of tangible job benefits. However, women subject to environments filled with sexual innuendo, sexualized physical contact and sexist comments were left without a remedy. Once again, advocates sought to explain why such behavior, even in the absence of tangible employment actions, constituted discrimination because of sex.

Originally recognized in a race discrimination claim, courts eventually held that “hostile environments” based on sex violated Title VII.<sup>7</sup> Under Title VII, behavior that alters the “terms or conditions” of employment “because of sex” is prohibited.<sup>8</sup> Further, courts accepted that an employer may be liable under Title VII when this hostile environment is created by co-workers.<sup>9</sup> In such a situation, the employer is liable not due to the occurrence of the harassment but due to the employer’s lack of response to the hostile environment.<sup>10</sup> These hostile environment claims sought to address the norms of the workplace which operate to exclude and ostracize women.<sup>11</sup>

More recently, the rise of complaints brought wherein the harasser and the victim are of the same sex (known as same-sex harassment) engendered much discussion in the literature as to why same-sex harassment should be covered by Title VII. How can harassment by a man against another man be discrimination “because of sex?”

The circuit courts were split until the Supreme Court, in an opinion authored by Justice Scalia, held that Title VII does cover same-sex harassment.<sup>12</sup> He emphasized that a plaintiff must prove that the behavior occurred “because of” the sex of the victim.<sup>13</sup> In emphasizing the plain language of the statute, the *Oncale v. Sundowner Offshore Refining Services, Inc.* decision allowed same-sex harassment claims for hostile environments created by both supervisors and co-workers.<sup>14</sup> It may seem that the Court has allowed claims based on every possible permutation to be actionable under Title VII.<sup>15</sup>

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<sup>7</sup> See *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1972) (interpreting §703(a)(1) of Title VII liberally so as to prohibit existence of pervasive discrimination in work environments, presence of which leads to complete destruction of emotional and psychological stability of minority group workers). See also *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1986) (recognizing further that hostile environment sexual discrimination violates Title VII).

<sup>8</sup> Although Title VII does not expressly prohibit sexual harassment, the Supreme Court has held that such behavior is discrimination on the basis of sex with respect to the terms, conditions or privileges of employment and therefore violates Title VII. See *Meritor*, 477 U.S. at 64.

<sup>9</sup> See, e.g., *Williams v. Gen. Motors Corp.*, 187 F.3d 553 (6th Cir. 1999); *Andrews v. Phila.*, 895 F.2d 1469 (3d Cir. 1990); *Barrett v. Omaha Nat’l Bank*, 726 F.2d 424 (8th Cir. 1984); *Katz v. Dole*, 709 F.2d 251 (4th Cir. 1983).

<sup>10</sup> See *Williams*, 187 F.3d at 561; *Andrews*, 895 F.2d at 1486; *Barrett*, 726 F.2d at 427; *Katz*, 709 F.2d at 255.

<sup>11</sup> See Kathryn Abrams, *Gender Discrimination and the Transformation of Gender Norms*, 42 VAND. L. REV. 1183, 1198-1202 (1989).

<sup>12</sup> *Oncale v. Sundowner Offshore Ref. Servs., Inc.*, 523 U.S. 75, 82 (1998).

<sup>13</sup> *Id.* at 80. For a further discussion of the “because of sex” requirement, see *infra* Part IVC.

<sup>14</sup> See *Oncale*, 523 U.S. at 78-80 (explaining that there is no justification in statutory language of Title VII or in Court’s precedents for absolute rule excluding same-sex harassment claims “because of sex” merely because parties involved are of same sex).

<sup>15</sup> Indeed, many commentators have argued that sexual harassment litigation is out of control. See David E. Bernstein, *Sex Discrimination Laws Versus Civil Liberties*, 1999 U. CHI. LEGAL F. 133, 136-48 (1999); Michael S. Greve, *Sexual Harassment: Telling the Other Victims’ Story*, 23 N. KY. L. REV. 523, 529-41 (1993); Mark McLaughlin Hager, *Harassment As a Tort: Why Title VII Hostile Environment Liability Should Be Curtailed*, 30 CONN. L. REV. 375, 393-99 (1998). Others have argued courts are unnecessarily taking steps to restrict the claim. See Theresa M. Beiner, *The Misuse of Summary Judgment in Hostile Environment Cases*, 34 WAKE FOREST L. REV. 71, 119-33 (1999); Joanna L. Grossman, *The First Bite is Free: Employer Liability for Sexual Harassment*, 61 U. PITT. L. REV. 671, 719-35 (2000); Judith J. Johnson, *License to Harass Women: Requiring Hostile Environment*

However, there is one remaining fact pattern that has not been addressed by the Court. This scenario encompasses a set of circumstances outside of the norm, much like the same-sex harassment cases. It involves the harassment of supervisors by subordinates and has been termed “contra-power” harassment.<sup>16</sup> Social science research shows that contra-power harassment is a problem,<sup>17</sup> but such fact patterns rarely reach the courts.<sup>18</sup> Similarly, legal academia has not considered the issue in any depth.<sup>19</sup>

In this article, I examine the judiciary’s treatment of contra-power harassment cases and whether contra-power harassment should be an actionable claim under Title VII. Determining whether contra-power harassment should be a cognizable claim requires considering the underlying theory as to why sexual harassment is a violation of Title VII. If sexual harassment is, as feminist legal theorists have argued, an abuse of power to keep women in their traditional roles as passive, sexual beings, why should contra-power harassment be actionable? When women have organizational power, how can they be harassed and why should the law protect them if they do not protect themselves? The answers to these questions necessitate the consideration of differing conceptions of power and the expectations for the exercise of such power.<sup>20</sup> Accepting contra-power harassment as an actionable claim requires courts to conceive of “power” in a different manner than a hierarchical/organizational power.

I argue in this article that courts should conceive of power in a sociocultural manner and accept contra-power harassment claims. Considering claims of contra-power harassment is the next step in securing workplace equality for women. Women who reach management status leave in higher percentages than men who are managers.<sup>21</sup> Women find that after they fight their way to the top (or close to the top or even the middle), the fight continues. That is, women still face behavior designed to remind them that they are unwelcome in workplaces. In fact, most

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*Sexual Harassment To Be “Severe or Pervasive” Discriminates Among “Terms and Conditions” of Employment*, 62 MD. L. REV. 85, 134-42 (2003); Vivien Toomey Montz, *Shifting Parameters: An Examination of Recent Changes in the Baseline of Actionable Conduct for Hostile Working Environment Sexual Harassment*, 3 GEO. J. GENDER & L. 809, 832-36 (2002).

<sup>16</sup> Although the use of this term necessarily buys into the concept of power as only an organizational, hierarchical concept, I will use the term over other options such as “subordinate initiated harassment,” see Keirsten Stewart Moore, *Perceptions of Sexual Harassment in Organizational Settings: The Case of Subordinate-Initiated Harassment* (1995) (unpublished Ph.D. dissertation, Ohio State University) (on file with author), or “bottom-up harassment,” see Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1767 n.444 (1998). Contra-power harassment appears to be the accepted term in social science research. See, e.g., Elizabeth Grauerholz, *Sexual Harassment of Women Professors by Students: Exploring the Dynamics of Power, Authority, and Gender in a University Setting*, 21 SEX ROLES 789 (1989); Jim Matchen & Eros DeSouza, *The Sexual Harassment of Faculty Members by Students*, 42 SEX ROLES 295 (2000); Kathleen McKinney, *Sexual Harassment of University Faculty by Colleagues and Students*, 23 SEX ROLES 421 (1990); Kathleen M. Rospenda, Judith A. Richman & Stephanie J. Nawyn, *Doing Power: The Confluence of Gender, Race, and Class in Contra-power Sexual Harassment*, 12 GENDER & SOC’Y 40 (1998); Margaret Schneider & Susan P. Phillips, *A Qualitative Study of Sexual Harassment of Female Doctors by Patients*, 45 SOC. SCI. MED. 669 (1997); Julie Holliday Wayne, *Disentangling the Power Bases of Sexual Harassment: Comparing Gender, Age and Position Power*, 57 J. VOCATIONAL BEHAV. 301 (2000).

<sup>17</sup> See *infra* Part IA.

<sup>18</sup> See *infra* Part III.

<sup>19</sup> For a further discussion of the limited extent to which legal scholars have addressed contra-power harassment, see *infra* note 110 and accompanying text.

<sup>20</sup> For a discussion of the different conceptions of power and a comparative assessment of each, see *infra* Part IIA.

<sup>21</sup> See Hazel M. Rosin & Karen Korabik, *Workplace Variables, Affective Responses, and Intention to Leave Among Women Managers*, 64 J. OCCUPATIONAL PSYCHOL. 317, 317, 327-28 (1991).

women plateau at the middle management level.<sup>22</sup> These middle managers must negotiate the roles of supervisor, subordinate and woman in the workplace. The women in lower organization levels of the work force need female managers and supervisors as role models.<sup>23</sup> To deny Title VII protection to contra-power claims is to cede victory to the unequal workplace. Further, to the extent that contra-power cases are “novel,” these cases provide an opportunity to examine the common assumptions underlying sexual harassment law.<sup>23a</sup>

A contra-power harassment claim is limited to a hostile environment claim in that subordinates do not have the power to grant or deny tangible employment benefits.<sup>24</sup> Two of the elements of a hostile environment claim require special consideration. First, a plaintiff must prove that the behavior at issue is sufficiently severe or pervasive so as to affect a term, condition, or privilege of employment.<sup>25</sup> An analysis of the case law shows that courts are downplaying the severity of behavior when the victim of the harassment is a supervisor.<sup>26</sup> I argue that courts should not consider the organizational relationship of the target and the harasser when deciding if the workplace has been rendered hostile.<sup>27</sup> By doing so, the courts are ignoring the importance of sociocultural power which allows lower-status men to harass women at work.<sup>27a</sup> By exercising their societal power, men are able to harass their supervisors and to affect the terms or conditions of women’s employment.

However, the organizational relationship is important for determining employer liability. The standard to hold the employer liable for harassment by its employees turns on the organizational status of the harasser and the employer’s response to the harassment. Briefly, an employer is vicariously liable for a hostile environment created by a supervisor but maintains the ability to prove an affirmative defense.<sup>28</sup> If co-workers have created the hostile environment, the

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<sup>22</sup> Diane M. Martin, *Humor in Middle Management: Women Negotiating the Paradoxes of Organizational Life*, 32 J. APPLIED COMM. RES. 147, 148-49 (2004).

<sup>23</sup> One social science article indicates that a higher presence of female supervisors and managers decreases the incidence of sexual harassment. See Myrtle P. Bell, Mary E. McLaughlin & Jennifer M. Sequeira, *Discrimination, Harassment, and the Glass Ceiling: Women Executives as Change Agents*, 37 J. BUS. ETHICS 65, 69 (2002). See also James E. Gruber & Lars Bjorn, *Women’s Responses to Sexual Harassment: An Analysis of Sociocultural, Organizational, and Personal Resource Models*, 67 SOC. SCI. Q. 814, 824 (1986) (noting that more integrated, less sexualized work environments would encourage more assertive responses to sexual harassment).

<sup>23a</sup> See Pat K. Chew and Robert E. Kelley, *Unwrapping Racial Harassment Law*, 49 BERKELEY J. EMP. & LAB. L. 49, 71 (2006) (discussing “novel” fact patterns, including contra-power, in racial harassment cases).

<sup>24</sup> The five elements of a hostile environment claim have generally been accepted as: (1) the employee belongs to a protected group; (2) the employee was subject to unwelcome sexual harassment; (3) the harassment complained of was based upon sex; (4) the harassment complained of affected a “term, condition, or privilege” of employment; and (5) respondeat superior: the employer knew or should have known of the harassment in question and failed to take prompt remedial action. *Henson v. City of Dundee*, 682 F.2d 897, 903-05 (11th Cir. 1982). See also EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a) (2006).

<sup>25</sup> *Henson*, 682 F.2d at 904.

<sup>26</sup> See *infra* notes 203-216 and accompanying text (discussing cases where courts recognized presence of sexually explicit behavior or comments, yet determined conduct was not sufficiently severe or pervasive).

<sup>27</sup> For a further discussion of the organization power model proposed by social science researchers to explain sexual harassment and its inadequacies, see *infra* notes 85-93 and accompanying text.

<sup>27a</sup> Other commentators have called upon the courts to consider the informal power dynamics of the workplace. Susan Carle’s recent piece argues that courts have argued these informal power dynamics to classify more harassers as co-workers than should be rightly so considered. See Susan D. Carle, *Acknowledging Informal Power Dynamics in the Workplace: A Proposal for Further Development of the Vicarious Liability Doctrine in Hostile Environment Sexual Harassment Cases*, 13 DUKE J. GENDER L. & POL’Y 85 (Spring 2006).

<sup>28</sup> *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998); *Burlington Indus., Inc., v. Ellerth*, 524 U.S. 742, 765 (1998). See *infra* Part V for an in-depth discussion of the employer liability standard.

employer is liable under a negligence standard, i.e., the employer is liable for failure to take prompt remedial action to correct that behavior of which it has knowledge.<sup>29</sup> I argue that a negligence standard is the appropriate standard for contra-power harassment claims. In applying this standard, courts should not presume that women who have risen to the rank of supervisors are incapable of choosing to exercise their power simply by virtue of their status as women. However, courts should not require the supervisor-target to exercise discipline preemptively. Other targets of sexual harassment are not required to engage in self-help remedies. In other cases of sexual harassment, a complaint of sexual harassment puts the employer on notice. There is no compelling reason to create a different rule here. Supervisors should be penalized for failing to exercise power only when the employer explicitly authorizes the exercise of such power.

This article proceeds accordingly. In Part I, I describe the social science research into contra-power harassment. Part IA discusses the prevalence of contra-power harassment, Part IB describes the behaviors which make up contra-power harassment, and Part IC sets forth the responses by victims of sexual harassment, both traditional and contra-power. With the empirical evidence in place, I then turn to the theoretical constructs of contra-power harassment. In Part IIA, I set forth the four models of power that give rise to sexual harassment: organizational; social-cultural; sex-role spillover and natural/biological. In Part IIB, I review the legal scholarship defining harassment as discrimination “because of sex.” Part III describes contra-power harassment cases that have reached the courts.

Next, I discuss the creation of the contra-power harassment claim. Part IV deals with the first four elements of a contra-power harassment claim. Part IVA addresses “protected class.” Part IVB deals with the unwelcome requirement. Part IVC takes on the “because of sex” requirement. Part IVD addresses the severe or pervasive requirement. Part V addresses the difficult question of employer liability. Each part considers the courts’ current holdings on these elements and makes suggested changes. A brief conclusion follows.

## **I. The Social Science of Contra-power Harassment**

In the social science arena, Katherine Benson is generally credited with coining the term “contra-power harassment.”<sup>30</sup> Responding to an article describing university definitions of sexual harassment, Benson criticized definitions that refused to label behavior as harassing unless the victim had less formal power than the abuser.<sup>31</sup> She discussed contra-power harassment as occurring when the victim has formal power over the abuser.<sup>32</sup> She argued that the power relation that is essential to sexual harassment is not the formal, organizational power relationship but rather the relation that exists between men and women in society.<sup>33</sup> In doing so, she set into motion a multitude of social science research studies.

### A. The Prevalence of Contra-power Harassment

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<sup>29</sup> *Faragher*, 524 U.S. at 799; *Ellerth*, 524 U.S. at 759.

<sup>30</sup> See Katherine A. Benson, *Comment on Crocker’s “An Analysis of University Definitions of Sexual Harassment,”* 9 SIGNS: J. WOMEN CULTURE & SOC’Y 516, 517 (1984).

<sup>31</sup> *Id.* at 519.

<sup>32</sup> *Id.* at 517.

<sup>33</sup> *Id.* at 518.

It has become common knowledge that sexual harassment is a widespread problem. The Equal Employment Opportunity Commission (“EEOC”) receives more than 13,000 formal complaints each year.<sup>34</sup> The number of formal charges is up five-fold from the late 1980s.<sup>35</sup> One study of federal employees found 44% of women and 19% of men experienced harassing behavior in the previous two years.<sup>36</sup> The National Association for Female Executives found that 53% of its membership was sexually harassed or knew someone who was.<sup>37</sup> Over 60% of *Working Woman’s* magazine readers reported having been sexually harassed at work and more than one third of those readers knew a co-worker who was harassed.<sup>38</sup>

The least common form of harassment reported is contra-power harassment. According to the U.S. Merit Systems Protection Board, 10-16% of men and 2-4% of women who report being harassed report being harassed by subordinates.<sup>39</sup> Another study reported that women experienced harassment from subordinates in 8% of the harassment incidents.<sup>40</sup> It bears noting that one explanation for the low number of reported incidences of contra-power harassment of women is that women do not occupy supervisory positions in the same magnitude as men. According to a recent report by the EEOC, women represent 48% of the workforce but represent only 36% of officials and managers.<sup>41</sup> In addition, women are more likely than men to have an opposite-sex supervisor.<sup>42</sup> Further, women with higher education levels are the most vulnerable to contra-power harassment, in part because more men comprise their subordinates, but also because “their gender was also likely to be particularly salient under such circumstances.”<sup>43</sup>

Despite low reporting rates, contra-power harassment is prevalent across professions and job categories. One female executive noted that “the higher up you climb, the worse the harassment gets.”<sup>44</sup> In one study, 77% of female family physicians reported having been sexually harassed by patients.<sup>45</sup> Three studies indicated that between 34% and 39% of all female

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<sup>34</sup> EEOC, *Sexual Harassment Charges*, <http://eeoc.gov/stats/harass.html> (last visited Aug. 5, 2006).

<sup>35</sup> See Bell et al., *supra* note 23, at 67; McKinney, *supra* note 16, at 424.

<sup>36</sup> U.S. MERIT SYS. PROT. BD. (USMSPB), REPORT ON SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: TRENDS, PROGRESS, CONTINUING CHALLENGES 13 (1995).

<sup>37</sup> Michele Galen, Joseph Weber & Alice Z. Cuneo, *Sexual Harassment: Out of the Shadows*, BUS. WK., Oct. 28, 1991, at 30, 31.

<sup>38</sup> Ronni Sandroff, *Sexual Harassment: The Inside Story*, WORKING WOMAN, Jun. 1992, at 47, 48.

<sup>39</sup> USMSPB, SEXUAL HARASSMENT IN THE FEDERAL GOVERNMENT: UPDATE 20 (1988). See also USMSPB, *supra* note 36, at 19.

<sup>40</sup> Cathy L. Z. DuBois, Deborah E. Knapp, Robert H. Faley & Gary A. Kustis, *An Empirical Examination of Same- and Other-Gender Sexual Harassment in the Workplace*, 39 SEX ROLES 731, 739 (1998) (Women were most often harassed by someone with greater organizational power (51%) followed by co-worker (41%) and rarely by subordinate (8%). Further, men were most often harassed by co-workers (56%) followed by subordinate (31%) and least often by someone at higher level (14%)). A study of racial harassment cases found contra-power cases to account for 3.1% of the cases studied. See Chew and Kelley, *supra* note 23a, at 72.

<sup>41</sup> EEOC, *Glass Ceilings: The Status of Women as Officials and Managers in the Private Sector*, <http://www.eeoc.gov/stats/reports/glassceiling/index.html> (last visited Aug. 5, 2006). See also Bell et al., *supra* note 6, at 65 (women occupy only 30% of all salaried manager positions, 20% of middle manager positions and about 5% of executive level positions); Barbara A. Gutek & Bruce Morasch, *Sex-Ratios, Sex-Role Spillover, and Sexual Harassment of Women at Work*, 38 J. SOC. ISSUES 55, 57 (1982) (41% of women in study reported that they supervised others as compared to 61% of men).

<sup>42</sup> Gutek & Morasch, *supra* note 41, at 57.

<sup>43</sup> Colleen O’Connell & Karen Korabik, *Sexual Harassment: The Relationship of Personal Vulnerability, Work Context, Perpetrator Status, and Type of Harassment to Outcomes*, 56 J. VOCATIONAL BEHAV. 299, 320 (2000).

<sup>44</sup> Bell et al., *supra* note 23, at 70.

<sup>45</sup> Schneider & Phillips, *supra* note 16, at 669.

attorneys reported being sexually harassed by a client in the last five years.<sup>46</sup> A study of academia found that 30% of male faculty and 24% of female faculty were targets of uninvited sexual comments from students as often as four times per month.<sup>47</sup> Another study of workplace aggression found that 20% of the “instigators” of bullying are of lower institutional status than the targets.<sup>47a</sup>

As with other forms of harassment, contra-power harassment is most likely to occur when the employer has created a workplace in which the harassers feel free to harass. Two of the strongest risk factors for harassment are an unprofessional atmosphere and the existence of sexist attitudes.<sup>48</sup>

## B. Behaviors

So what type of behavior constitutes contra-power harassment? The most common forms of contra-power harassment, according to one study, are unwanted sexual teasing, jokes, remarks or questions.<sup>49</sup> One study of female physicians revealed that 77% of female doctors have been harassed by a patient, 26% reported feeling frightened by the sexual behavior of their male patients,<sup>50</sup> and they commonly experienced sexist comments and sexualized interactions.<sup>51</sup> In addition, female physicians are groped, asked to do unnecessary genital exams, sent sex-related letters and objects, and some are assaulted.<sup>52</sup>

In the academic setting, female professors reported experiencing undue attention, verbal sexist comments, written sexual comments, physical advances, explicit sexual propositions, sexual bribery, sexual assault and obscene phone calls.<sup>53</sup> In addition, students possess some power in that they evaluate faculty. The evaluations are anonymous, creating the perfect vehicle for a harasser to undermine a professor, possibly affecting her career, with comments about her body and sexuality without facing consequences.<sup>54</sup> Students may draw explicit pictures or write comments on the evaluation that could be considered sexually harassing.<sup>55</sup>

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<sup>46</sup> Frank Clancy, *When Customer Service Crosses the Line*, WORKING WOMAN, Dec. 1994, at 36, 38.

There is an interesting question here as to whether harassment by a client should be considered contra-power harassment. Although the general perception may be that the attorney is able to “fire” the client and thus holds the power, in many situations the client may hold the greater power. Imagine the situation of a newly hired female associate and the long-established client of a firm, or the solo practitioner trying to establish her practice. In some instances the label of contra-power harassment will not fit the facts of harassment from clients.

<sup>47</sup> Matchen & DeSouza, *supra* note 16, at 297; McKinney, *supra* note 16, at 425.

<sup>47a</sup> David C. Yamada, *The Phenomenon of “Workplace Bullying” and the Need for Status-Blind Hostile Environment Protection*, 88 GEORGETOWN L. J. 475, 481 (March 2000) (citing Christine M. Pearson, *Incivility and Aggression at Work: Executive Summary* (July 1998) (on file with David Yamada)).

<sup>48</sup> Elizabeth O’Hare & William O’Donohue, *Sexual Harassment: Identifying Risk Factors*, 27 ARCHIVES SEXUAL BEHAV. 561, 576 (1998).

<sup>49</sup> Sandra S. Tangri, Martha R. Burt & Leonor B. Johnson, *Sexual Harassment at Work: Three Explanatory Models*, 38 J. SOC. ISSUES 33, 46 (1982). This is true regardless of the sex of the victim or the status of the harasser. See also USMSPB, *supra* note 36, at 14 (noting most commonly reported form of sexual harassment is “unwanted sexual teasing, jokes, remarks or questions”).

<sup>50</sup> Susan P. Phillips & Margaret Schneider, *Sexual Harassment of Female Doctors by Patients*, 329 NEW ENG. J. MED. 1936 (1993).

<sup>51</sup> Schneider & Phillips, *supra* note 16, at 670.

<sup>52</sup> *Id.*

<sup>53</sup> Grauerholz, *supra* note 16, at 793.

<sup>54</sup> *Id.* at 790.

<sup>55</sup> *Id.*



Women faculty can be harassed in subtler or more indirect ways that may “punish” the instructor for acting outside of her traditional gender role.<sup>56</sup> Students spread rumors, intimidate women professors, and make sexist or sexual comments, physical advances and obscene phone calls that request sex or mention the professor’s sexual attractiveness.<sup>57</sup> Typically, the harasser is a male student.<sup>58</sup> This type of sexual harassment is rarely reported and is frequently attributed to ignorance, stupidity or awkwardness, which allows students to get by with direct and obvious behaviors.<sup>59</sup>

### C. Responses to Contra-power Harassment

Sexual harassment has a wide variety of impacts on the workplace and the individuals involved. In addition to the emotional effects of sexual harassment, women find that their careers are interrupted.<sup>60</sup> “Women may . . . experience lower productivity, less job satisfaction, reduced self-confidence, and a loss of motivation and commitment to their work and their employer.”<sup>61</sup>

Despite the prevalence of sexual harassment, most victims of sexual harassment do not formally report the harassment.<sup>62</sup> Only 26% of the *Working Woman* readers who admitted being harassed formally reported it.<sup>63</sup> Social scientists believe victims do not report what happened to them because they fear repercussions, are embarrassed to report the incident, feel shameful about what happened, or do not believe that what they experienced qualifies as sexual harassment.<sup>64</sup> Instead, common responses to sexual harassment are to ignore the behavior or to engage in denial.<sup>65</sup> In addition, many women will quit rather than face the harassment.<sup>66</sup> Although sexual harassment has received increased attention, report rates appear to remain low. Initial

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<sup>56</sup> *Id.* at 799. See also Jeanette N. Cleveland & Melinda E. Kerst, *Sexual Harassment and Perceptions of Power: An Under-Articulated Relationship*, 42 J. VOCATIONAL BEHAV. 49, 58 (1993) (“The goal of the abuser in contra-power harassment is often to devalue the woman by highlighting the traditional gender stereotype (i.e., helplessness, incompetence, passivity) over her work role.”); Kathleen McKinney, *supra* note 16, at 423 (“[I]t is argued . . . that due to the status inconsistency (i.e., female and college faculty), offenders may not view a woman faculty member’s achieved status as legitimate or important.”); Matchen & DeSouza, *supra* note 16, at 296 (“[I]n the patriarchal U.S. society, contra-power sexual harassment may function to reinforce the gender status of female faculty and to increase the power of organizational subordinates (male students), who often go unpunished.”).

<sup>57</sup> McKinney, *supra* note 16, at 431-32. See also Grauerholz, *supra* note 16, at 799.

<sup>58</sup> Grauerholz, *supra* note 16, at 795-96.

<sup>59</sup> *Id.* at 799.

<sup>60</sup> Barbara A. Gutek, *Understanding Sexual Harassment at Work*, in *SEXUAL HARASSMENT: ISSUES & ANSWERS* 50, 56 (Linda LeMoncheck & James P. Sterba eds., 2001).

<sup>61</sup> *Id.*

<sup>62</sup> See Bell et al., *supra* note 23, at 67 (noting that “most sexual harassment targets do not file formal charges”); McKinney, *supra* note 16, at 424 (noting that “most harassment is not reported to formal social control agents”); Louise F. Fitzgerald, Suzanne Swan & Karla Fischer, *Why Didn’t She Just Report Him? The Psychological and Legal Implications of Women’s Responses to Sexual Harassment*, 51 J. SOCIAL ISSUES 117, 121 (1995).

<sup>63</sup> Sandroff, *supra* note 38, at 47.

<sup>64</sup> Eric L. Dey, Jessica S. Korn & Linda J. Sax, *Betrayed by the Academy: The Sexual Harassment of Women College Faculty*, 67 J. HIGHER EDUC. 149, 150 (1996); Fitzgerald et al., *supra* note 62, at 122 (noting that most common reason for non-reporting is fear).

<sup>65</sup> Cleveland & Kerst, *supra* note 56, at 59 (“Two of the most common reactions that women have to sexual harassment are denial and to ignore the incident.”).

<sup>66</sup> O’Connell & Korabik, *supra* note 43, at 304 (citing studies); Barbara A. Gutek, *Understanding Sexual Harassment at Work* in *SEXUAL HARASSMENT: ISSUES and ANSWERS* 50, 56 (LeMoncheck & Sterba eds. 2001) (“Up to ten percent of women have quit a job because of sexual harassment).

information suggested that report rates were on the rise in the early to mid-1990s.<sup>67</sup> For example, the National Association of Working Women hotline received triple the usual number of calls in a week in 1991<sup>68</sup> and the number of charges filed with the EEOC increased five-fold from the late 1980s to the mid-1990s.<sup>69</sup> However, after this initial jump in EEOC charges, the rate leveled off and has begun to decline in recent years.<sup>70</sup> Moreover, social science studies continue to find low report rates. A 1995 study of Navy officers and enlisted members found that only 8% of enlisted women and 6% of women officers filed grievances.<sup>71</sup> Even when the informal practice of reporting behavior to an authority (as opposed to filing a formal grievance) is considered, fewer than 25% of women who had been harassed reported the behavior.<sup>72</sup> More recent social science studies have attempted to investigate determinants and precursors of reporting, as well as classify how targets respond to sexual harassment, in order to better understand why targets do not report sexual harassment.<sup>73</sup>

As harassing behaviors are not always clearly sexual harassment, some victims may be hesitant to report the behaviors because they are not sure if what they experienced is indeed sexual harassment. Men and women interpret behaviors differently.<sup>74</sup> In one study, men believed that women harassed by persons of lower status would be more upset than men harassed by such persons.<sup>75</sup> However, women believed that both men and women would be equally upset. “[W]omen see harassing behaviors negatively.”<sup>76</sup> Although the most commonly experienced harassing behaviors reported were unwanted sexual teasing, jokes, remarks or questions,<sup>77</sup> a victim may feel as if she is over-reacting if she reports it and may choose to suffer in silence instead. In some studies, the hierarchical level of the harasser significantly influenced perceptions of “less severe” forms of harassment such as gender harassment and seductive behavior but had no impact on perceptions of sexual bribery, coercion or assault.<sup>78</sup> In fact, the higher the organizational status of the harasser, the more likely the target is to acknowledge being harassed.<sup>79</sup> Targets of contra-power harassment, then, would be the least likely to acknowledge being harassed.

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<sup>67</sup> See, e.g., Bell et al., *supra* note 23, at 67; Sandroff, *supra* note 38, at 49.

<sup>68</sup> Galen, *supra* note 37, at 31.

<sup>69</sup> Bell et al., *supra* note 23, at 67.

<sup>70</sup> EEOC, *supra* note 34.

<sup>71</sup> Carol E. Newell, Paul Rosenfeld & Amy L. Culbertson, *Sexual Harassment Experiences and Equal Opportunity Perceptions of Navy Women*, 32 SEX ROLES 159, 161 (1995).

<sup>72</sup> Sandy Welsh & James E. Gruber, *Not Taking It Any More: Women Who Report or File Complaints of Sexual Harassment*, 36 CANADIAN REV. SOC. & ANTHROPOLOGY 559 (1999) (summarizing studies of report rates).

<sup>73</sup> See, e.g., Caren B. Goldberg, *The Impact of the Proportion of Women in One's Workgroup, Profession, and Friendship Circle on Males' and Females' Responses to Sexual Harassment*, 45 SEX ROLES 359 (2001); Deborah Erdos Knapp, Robert H. Faley, Steven E. Ekeberg & Cathy L. Z. Dubois, *Determinants of Target Responses to Sexual Harassment: A Conceptual Framework*, 22 ACAD. MGMT. REV. 687 (1997); Amy J. Marin & Rosanna E. Guadagno, *Perceptions of Sexual Harassment Victims as a Function of Labeling and Reporting*, 41 SEX ROLES 921 (1999).

<sup>74</sup> Grauerholz, *supra* note 16, at 798 (“Women’s perception and awareness of sexual harassment, even by male students, also reflect women’s experience in a culture in which coercive sexuality is wide spread.”).

<sup>75</sup> Kathleen McKinney, *Contrapower Sexual Harassment: The Effects of Student Sex and Type of Behavior of Faculty Perceptions*, 27 SEX ROLES 627, 640 (1992).

<sup>76</sup> Bell et al., *supra* note 23, at 70.

<sup>77</sup> USMSPB, *supra* note 36, at 14.

<sup>78</sup> Moore, *supra* note 16, at 18-19.

<sup>79</sup> Theresa M. Beiner, *GENDER MYTHS V. WORKING REALITIES: USING SOCIAL SCIENCE TO REFORMULATE SEXUAL HARASSMENT LAW* 161 (2005).

The dynamics of contra-power harassment make the fears associated with reporting the incidents different from sexual harassment initiated by a supervisor or co-worker. Supervisors face different repercussions than subordinates in reporting sexual harassment. Supervisors' ability to successfully manage their subordinates may be called into question.<sup>80</sup> Some female supervisors have suggested, in conversations with their colleagues, they do not want to be perceived as a bitch and want to be considered "one of the guys."<sup>81</sup> For male supervisors, reporting sexual harassment carries the added disincentives of fear of public exposure and perceived weakness as a superior or as a man, and the threat of being perceived as, or accused of, being the initiator of the harassment.<sup>82</sup>

## II. Background of Contra-power

### A. Models of Power

Sexual harassment is traditionally defined as an abuse of power made possible by the power inequalities between men and women.<sup>83</sup> In the workplace, men historically have power over women by a result of their higher organizational positions and, thus, are able to abuse that power to harass women. This traditional definition does not account for harassment by co-workers or for contra-power harassment. To understand how and why contra-power harassment occurs, it is useful to explain the various models of power proposed by social science researchers.<sup>84</sup>

The first model is the organizational power model.<sup>85</sup> Many researchers suggest that the legal system's definition of sexual harassment is premised upon this model.<sup>86</sup> Under this model, harassment is most likely to occur when the harasser has a higher place in the workplace hierarchy than the victim.<sup>87</sup> "[S]exual harassment is the result of certain opportunity structures

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<sup>80</sup> Moore, *supra* note 16, at 7, 42 (stating that superiors may be hesitant to sanction behavior because "the use of formal sanctions to bring about cooperation is perceived as poor leadership"). See also *infra* Part VD(1) (suggesting that female supervisor's hesitancy in reporting contra-power harassment stems from desire to maintain appearance of effective managerial control).

<sup>81</sup> Martin, *supra* note 22, at 158.

<sup>82</sup> Moore, *supra* note 16, at 42-43.

<sup>83</sup> See Susanne Baer, *Dignity or Equality? Responses to Workplace Harassment in European, German, and U.S. Law*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 582, 590 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004); Gutek & Morasch, *supra* note 41, at 56.

<sup>84</sup> Social science has not come to a consensus on the number of models used to explain sexual harassment. See, e.g., Tangri et al., *supra* note 49, at 34 (describing three "broad models" as natural or biological, organizational, and sociocultural); Greetje Timmerman, *Sexual Harassment of Adolescents Perpetrated by Teachers and by Peers: An Exploration of the Dynamics of Power, Culture, and Gender in Secondary Schools*, 48 SEX ROLES 231, 232 (2003) (discussing harassment in secondary schools and describing "a number of theories"); Gary L. Whaley & Shirley H. Tucker, *A Theoretical Integration of Sexual Harassment Models*, 17 EQUAL OPPORTUNITIES INT'L 21, 21-22 (1998) (describing four models: sociocultural, organizational, individual differences, and nature/biology). For a more in-depth account of the social science behind these various models, see Beiner, *supra* note 79, 114-125 (describing four models).

<sup>85</sup> See Cleveland & Kerst, *supra* note 56, at 50-52; Gutek & Morasch, *supra* note 41, at 56-57; Rospenda et al., *supra* note 16, at 41-44; Tangri et al., *supra* note 49, at 37-40; Timmerman, *supra* note 84, at 232-33; Wayne, *supra* note 16, at 303-10; Whaley & Tucker, *supra* note 84, at 21.

<sup>86</sup> See, e.g., Rospenda et al., *supra* note 16, at 41.

<sup>87</sup> Wayne, *supra* note 16, at 302.

created by organizational climate, hierarchy, and specific authority relations.”<sup>88</sup> Under the organizational model, women may harass men who are lower on the flowchart.<sup>89</sup> Some research has provided a more nuanced view of the organizational power model by examining certain structural aspects of the workplace.<sup>90</sup> For example, the ratio of men to women in the workplace, as well as the hierarchical positions of men, is a relevant factor to determine whether harassment will occur.<sup>91</sup> Regardless of what nuances are added to the model, it is dependent upon the concept of organizational hierarchy.<sup>92</sup> Thus, this model cannot account for the widespread occurrences of co-worker harassment or for contra-power harassment. In my review of the social science literature, I found few researchers who supported the organizational model.<sup>93</sup>

A second model is the sociocultural model. This model explains sexual harassment as the result of “societal norms or cultural patterns that promote superiority of some groups (e.g., . . . males) over other groups (e.g., . . . women).”<sup>94</sup> The patriarchal system privileges men and provides them with the power to harass women in the workplace.<sup>95</sup> Thus, sexual harassment is more likely to occur when someone has societal power over another person and “reflects the larger society’s differential distribution of power and status between the sexes.”<sup>96</sup> This model explains any type of harassment in which men harass women including co-worker and contra-power but fails to explain women harassing men.<sup>97</sup>

A third model integrates the previous models. The sex-role spillover model explains sexual harassment as the result of sex roles being asserted over work roles.<sup>98</sup> In addition, another set of social science researchers added a consideration of interpersonal power to the sociocultural power and organizational power. By doing this, they attempt to address the importance of sources of power within the workplace that derive from sources other than hierarchical position,

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<sup>88</sup> Tangri et al., *supra* note 49, at 34.

<sup>89</sup> However, under the organizational model, men are still the more likely harassers because of the positions they hold: in one study, 41% of women supervised others as opposed to 61% of men; moreover 43% of women had an opposite-sex supervisor whereas 7% of men had an opposite-sex supervisor. Gutek & Morasch, *supra* note 41, at 56.

<sup>90</sup> See Tangri et al., *supra* note 49, at 43-49; Wayne, *supra* note 16, at 303-10.

<sup>91</sup> Tangri et al., *supra* note 49, at 37. The difference in hierarchical positions is one factor leading to harassment. Research has also examined the sex ratio of the workplace, the sex ratio of the occupation, occupational norms, job function and availability of grievance procedures and job alternatives. See Rospenda et al., *supra* note 16, at 42 (collecting studies).

<sup>92</sup> Rospenda et al., *supra* note 16, at 43 (“Organizational models underestimate the importance of gender and other social characteristics in structuring access to organizational power.”).

<sup>93</sup> See, e.g., Gutek & Morasch, *supra* note 41, at 57 (“[O]ur data does not provide much support for [this] perspective.”); Rospenda et al., *supra* note 16, at 43 (stating that organizational models assume that organizations are gender neutral and “underestimate the importance of gender . . . in structuring access to [] power.”).

<sup>94</sup> Wayne, *supra* note 16, at 303. The sociocultural model is also called the societal power model. See Cleveland & Kerst, *supra* note 56, at 50.

<sup>95</sup> Tangri et al., *supra* note 49, at 40.

<sup>96</sup> *Id.* at 34. See also Rospenda et al., *supra* note 16, at 41 (“[S]exual harassment emanates from power differences between men and women at the sociocultural level and functions to maintain those differences at the organizational level.”).

<sup>97</sup> Rospenda et al. suggest that the sociocultural model is limited in its ability to account for female-on-male harassment as well as same-sex harassment. These non-traditional forms of harassment are not explained under this theory because the model does not account for the confluence of gender, race and class. However, it may explain same-sex harassment to the extent that the victim of the harassment is someone perceived to have less social power, such as a gay or lesbian employee. See Rospenda et al., *supra* note 16, at 43-44.

<sup>98</sup> See Gutek & Morasch, *supra* note 41, at 58.

such as access to resources.<sup>99</sup> This model specifically addresses contra-power harassment and argues that male subordinates harass women supervisors to counteract or equalize power differentials with women supervisors.<sup>100</sup> Thus, acts of contra-power harassment reinforce the inferior gender status of women by negating their higher organizational status.<sup>101</sup> Deborah Tannen has described contra-power harassment as a “frequent form of insubordination perpetrated against those above them in a hierarchy.”<sup>101a</sup>

The final model is the natural/biological model which explains sexual harassment as a natural outcome of the difference in sexual drives between men and women.<sup>102</sup> Termed “somewhat simplistic” by one social science article,<sup>103</sup> this model asserts that sexual harassment is a “natural expression of sexual attraction and that men and women are naturally attracted to each other.”<sup>104</sup> Further, this model rests on the inner drive of men to be sexually aggressive and therefore places no blame or bad intent on the harasser.<sup>105</sup> Men are simply seeking to maximize reproductive sex.<sup>106</sup> This model, of course, does not explain women harassing men (unless the women are seeking the security of male economic support for their offspring) and does not explain same-sex harassment.<sup>107</sup>

Of the four models described, two - the sociocultural and the integrated models - provide an excellent account for the occurrence of contra-power harassment. Women with power may be seen as a threat to men either economically or to their self-esteem.<sup>108</sup> The goal of the harasser is to devalue the higher organizational status of women “by highlighting the traditional gender stereotype . . . over her work role.”<sup>109</sup> It is a tactic to gain power - social power - over female supervisors. Women who deviate from their ascribed roles by obtaining power are then punished with harassing behavior.

## B. Conceptions of Harassment as Discrimination

If social science provides the theoretical basis of the “why,” “how” and “to whom” of contra-power harassment, how have legal scholars addressed the issue? The short answer is: they have not. Apart from a few references acknowledging the existence of contra-power harassment, it is not discussed in legal literature.<sup>110</sup> Despite ignoring contra-power harassment,

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<sup>99</sup> Cleveland & Kerst, *supra* note 56, at 52-53.

<sup>100</sup> *Id.* at 58.

<sup>101</sup> *Id.*

<sup>101a</sup> Deborah Tannen, *What's Sex Got to Do With It?* In *SEXUAL HARASSMENT: ISSUES AND ANSWERS* 85, 86 (LeMoncheck & Sterba eds. 2001).

<sup>102</sup> Some social science researchers who take great pains to explain the other three models do not mention the natural/biological model. See, e.g., Cleveland & Kerst, *supra* note 56, at 50-54; Gutek & Morasch, *supra* note 41; Rospenda et al., *supra* note 16, at 41-44; Wayne, *supra* note 16, at 303-12.

<sup>103</sup> Whaley & Tucker, *supra* note 84, at 22.

<sup>104</sup> *Id.*

<sup>105</sup> This model tends to “trivialise [sic] sexual harassment as normal and harmless and as the result of the behavior of a few ‘sick’ proclivities of a minority of men.” *Id.*

<sup>106</sup> Beiner, *supra* note 79, at 122.

<sup>107</sup> For a compelling dissection of the support for the natural/biological model, see Beiner, *supra* note 79, at 121-125.

<sup>108</sup> See Whaley & Tucker, *supra* note 84, at 26.

<sup>109</sup> Cleveland & Kerst, *supra* note 56, at 58.

<sup>110</sup> Contra-power harassment is mentioned or discussed in eleven law review articles. Only Vicki Schultz has discussed the concept in more than passing, and her discussion consists of only a few sentences. See Schultz, *supra* note 16, at 1767 & n.444 (“[W]omen higher-ups also confront challenges to their power and efforts to subvert their performance by male subordinates.”). Professor Schultz discusses contra-power harassment, which she refers to as “bottom-up harassment,” in the context of her theory to reconceptualize sexual harassment as behavior that seeks to

legal scholars have addressed the question of why sexual harassment should be considered discrimination because of sex. Although these theories were not designed to encompass contra-power harassment, each supports the argument that Title VII should protect against the harassment of supervisors by subordinates.

In the late 1990s, the rise of same-sex harassment cases catalyzed scholars to return to the fundamental question of “what’s wrong with sexual harassment?”<sup>111</sup> How can “because of sex” be interpreted in a principled way so as to prohibit harassment against women while also protecting men from same-sex harassment?<sup>112</sup> A fascinating dialogue developed within legal

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undermine women’s competence in the workplace. *Id.* Her theory would encompass claims of contra-power harassment. *See infra* notes 138-148 and accompanying text. Six other articles briefly mention contra-power harassment in passing. *See* Pat K. Chew & Robert E. Kelley, *Unwrapping Racial Harassment Law*, 27 BERKELEY J. EMP. & LAB. L. 49, 72 (2006) (reviewing findings of empirical study on racial harassment cases and describing “contra-power harassment” as “novel fact pattern” appearing where “power status of the parties is reversed”); Anna-Maria Marshall, *Idle Rights: Employees’ Rights Consciousness and the Construction of Sexual Harassment Policies*, 39 LAW & SOC’Y REV. 83, 102-03 (2005) (noting that one common management practice which creates obstacles for women seeking protection under grievance procedures is interpretation of procedures to exempt certain categories of harassment, with one such category being “same-sex contra-power harassment”); Ramona L. Paetzold & Rafael Gely, *Through the Looking Glass: Can Title VII Help Women and Minorities Shatter the Glass Ceiling?*, 31 HOUS. L. REV. 1517, 1544 & n.142 (1995) (noting that harassment “may occur at all levels within an organization, so that women and minorities in managerial level positions may become targets of harassment by superiors and subordinates alike” and citing social science article identifying such behavior as “contra-power harassment”); Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2146 n.349 (2003) (discussing contra-power harassment in footnote); Rachel L. Toker, Note, *Multiple Masculinities: A New Vision for Same-Sex Harassment Law*, 34 HARV. C.R.-C.L. L. REV. 577, 588-89 (1999) (discussing Professor Schultz’s theory of sexual harassment and its encompassing of contra-power harassment); Rachel Mead Zweighaft, Comment, *What’s the Harm? The Legal Accommodation of Hostile Environment Sexual Harassment*, 18 COMP. LAB. L.J. 434, 437 n.12 (1997) (“[F]emale supervisors sometimes are harassed by men in lower positions. This phenomenon is called ‘contra-power harassment.’”). The remaining four articles merely cite to a social science article that has the term in the title. *See* Theresa M. Beiner, *Sex, Science and Social Knowledge: The Implications of Social Science Research on Imputing Liability to Employers for Sexual Harassment*, 7 WM. & MARY J. WOMEN & L. 273, 294 n.133 (2001) (citing social science article with “contra-power” in title for proposition that there is limited research examining “interaction of sexual harassment with race, ethnicity and socio-economic status”); Tanya Kateri Hernandez, *A Critical Race Feminism Empirical Research Project: Sexual Harassment & the Internal Complaints Black Box*, 39 U.C. DAVIS L. REV. 1235, 1242 n.24 (2006) (citing social science article with “contra-power” in title for proposition concerning responses to sexual harassment); Tanya Kateri Hernandez, *Sexual Harassment and Racial Disparity: The Mutual Construction of Gender and Race*, 4 J. GENDER RACE & JUST. 183, 192 n.45 (2001) (citing social science article with “contra-power” in title for proposition concerning responses to sexual harassment); Richard L. Wiener & Linda E. Hurt, *Social Sexual Conduct at Work: How Do Workers Know When It Is Sexual Harassment and When It Is Not?*, 34 CAL. W. L. REV. 53, 66 n.74 (1997) (citing social science article with “contra-power” in title in string cite of articles for assertion that men and women workers differ in their views of what behavior constitutes sexual harassment).

<sup>111</sup> *See* Katherine M. Franke, *What’s Wrong With Sexual Harassment?*, 49 STAN. L. REV. 691, 691-98 (1997).

Franke argues that because of the increasing severity and doctrinal complexity of the sexual harassment problem, the time has come to readdress the question of why sexual harassment is a form of sex discrimination. *Id.* at 691.

Franke explains that neither the Supreme Court nor the principal theoretical arguments advanced by feminist scholars sufficiently answer the question of why workplace sexual harassment justifies a Title VII cause of action for discrimination “on the basis of sex.” *Id.* at 693. The three fundamental feminist rationales she rejects are that sexual harassment is (1) conduct that would not have occurred but for the plaintiff’s sex, *id.* at 705-14; (2) conduct that violates Title VII specifically because it is sexual in nature, *id.* at 714-25; and (3) conduct that sexually subordinates women to men, *id.* at 725-29.

<sup>112</sup> Same-sex harassment disproportionately affects men. *See* USMSPB, *supra* note 36. The report’s main informational source is a survey questionnaire sent in April 1994 to almost 13,200 federal employees, to which over 61% (8000 people) responded voluntarily and anonymously. *Id.* at 1-2. The study states that from among those

academia over how to interpret Title VII.<sup>113</sup> Each voice in the discussion critiqued the current approaches utilized by the courts. For example, courts had employed a “but for” test under which courts sought to determine whether the complained of behavior would have occurred “but for” the victim’s sex.<sup>114</sup> In addition, some courts have focused primarily on the sexualized nature of the behavior, thereby finding behavior that is not overtly sexual to be irrelevant.<sup>115</sup>

Theorists agree that sexual harassment causes harm but have approached the wrong of sexual harassment with different foci. Some theorists wish to keep the focus on harassment against women at work while bringing claims of same-sex harassment in on the margins.<sup>116</sup> Others view the wrong of harassment as equally impacting men and women.<sup>117</sup> A summary of these theories follows and includes a description of how contra-power harassment fits within each.<sup>118</sup>

### 1. Bernstein’s Respectful Person Standard

Anita Bernstein places sexual harassment as a wrong somewhere between a Title VII violation and a workplace tort.<sup>119</sup> She argues that hostile environment sexual harassment is a type of disrespect.<sup>120</sup> A hostile environment plaintiff must prove both that she subjectively perceived her environment to be hostile and that the environment was objectively hostile or abusive.<sup>121</sup> Bernstein takes issue with the reasonableness test employed by courts to determine the objective element - whether it is a reasonable person, reasonable woman or any other formulation.<sup>122</sup> She advocates the adoption of the “respectful person” standard because sexual

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who had experienced unwanted sexual attention (44% of women and 19% of men responding to the survey), only 1% of female victims said they were sexually harassed by another woman or women, while 21% of male victims reported being harassed by another man or men. *Id.* at 18.

<sup>113</sup> For a useful summary of this discussion, see Jaimie Leaser, Note, *The Causal Role of Sex in Sexual Harassment*, 88 CORNELL L. REV. 1750, 1772-78 (2003).

<sup>114</sup> See Franke, *supra* note 111, at 730-47. Franke critiques the “but for” test, contending that “[i]n both the same- and different-sex contexts, this account fails to address why sexual harassment is a kind of sex discrimination.” *Id.* at 730. Franke further explains the “‘but for’ [approach] is an evidentiary short cut that Title VII plaintiffs may use in order to prove sex discrimination,” with its error arising “when the evidentiary methodology stands for, or worse, is understood to constitute the underlying wrong it is designed to prove.” *Id.* at 730-31. See *infra* Part IVC for a discussion of the decision in *Oncala v. Sundowner Offshore Servs., Inc.* requiring comparative evidence for the “but for” test.

<sup>115</sup> See Schultz, *supra* note 16, at 1762-69 (describing various forms of such “less sexual” behavior in workplace and its weakening effect on both women’s work competence and sense of self-confidence as employee).

<sup>116</sup> See, e.g., Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 CORNELL L. REV. 1169, 1225-29 (1998).

<sup>117</sup> See, e.g., Franke, *supra* note 111, at 762-63 (“[T]he net effect of this kind of [harassing] conduct extends beyond any particular case in that it solidifies what ‘real men’ and ‘real women’ should be. This dynamic affects all of us . . .”).

<sup>118</sup> The articles I discuss below are deeply interesting and thought-provoking. Due to page constraints and because my focus is different than an overarching theoretical perspective, these articles are unfortunately given short shrift here. I encourage those who have not already done so to read the pieces in full.

<sup>119</sup> See Anita Bernstein, *Treating Sexual Harassment With Respect*, 111 HARV. L. REV. 445, 448 (1997).

<sup>120</sup> See *id.* at 450-52 (explaining that term “respect” best illustrates what is wrong with creation and continuation of hostile working environment).

<sup>121</sup> *Id.* at 452-53.

<sup>122</sup> See *id.* at 464-82. Bernstein explains that the reasonable person standard “provides neither gender neutrality nor meaningful content.” *Id.* at 471. In addition, the “failure of ‘reasonable women’ to improve on ‘reasonable person,’ the futility of continuing to tinker ad absurdum, and the perils of abandoning objectivity add up to a strong condemnation of any standard based on reasonableness.” *Id.* Thus, Bernstein concludes, it is the standard’s adjective, rather than the noun, that needs to be replaced. *Id.*

harassment “betrays the ideal of recognition respect,” which is a sense of recognition of a person’s inherent worth that is owed to all persons.<sup>123</sup> Under this standard, an employer has a “non-delegable duty to maintain an attitude of responsiveness and attention.”<sup>124</sup> By focusing on the employer’s duty, Bernstein examines the behavior of the harasser as opposed to the harassed. Instead of asking whether the plaintiff welcomed such behavior, the respectful standard asks whether “the defendant behave[d] as a respectful person?”<sup>125</sup>

Much of the behavior that constitutes contra-power harassment violates the duty of a respectful person. Instinctively, a supervisor is accorded some measure of respect due to her position. Bernstein refers to this as appraisal respect and defines it in part as “high or special regard: deferential regard as from a servant to his master: esteem.”<sup>126</sup> Bernstein carefully grounds her theory of the respectful person not in appraisal respect but rather in recognition respect. Under Kantian principles, recognition respect is owed to all persons as persons.<sup>127</sup> Conversely, appraisal respect is not owed to all, only to those to deserving of admiration.<sup>128</sup> Thus, Bernstein creates a theory where all persons should be treated with respect, not just those the majority of society has deemed worthy of respect. Although one could argue that not all supervisors are deserving of appraisal respect, society expects supervisors to be treated with deference.<sup>129</sup> In a sense, contra-power harassment violates both recognition respect by denying the inherent worth as a person and appraisal respect by denying the deferential regard arguably owed to all supervisors.

## 2. Franke’s Technology of Sexism

Katherine Franke describes sexual harassment as a “technology of sexism” in which sexual harassment of a woman by a man “embodies fundamental gender stereotypes: men as sexual conquerors and women as sexually conquered.”<sup>130</sup> Therefore, sexual harassment “is a form of sex discrimination when it reflects or perpetuates gender stereotypes in the workplace.”<sup>131</sup> Sexual harassment of women perpetuates women’s roles as sexual objects and, therefore, it is discrimination “because of sex.”<sup>132</sup> Franke seeks to provide a theoretical context

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<sup>123</sup> *Id.* at 452. Bernstein further explains that the ethical duty to render respect postulated in the concept of “recognition respect” is negative in nature. *Id.* at 487. This negative duty to “refrain from unjustified or cruel manifestations of disrespect” has three applications in the context of sexual harassment: recognition respects requires refraining from (1) treating another only as a means of achieving one’s own ends, (2) humiliating another, and (3) engaging in conduct that rejects or denies the personhood and self-conception of another. *Id.*

<sup>124</sup> *See id.* at 495 (arguing that in order for respect to thrive in workplace, “respectful employer” must be seen as both agent and principal; thus, these responsibilities arise from employer’s own obligations not to promote or condone hostile workplace).

<sup>125</sup> *Id.* at 501 (“That is, did the defendant regard the complainant as a person, self-propelled and unique, with a range of potential reactions to sex-based conduct in the workplace?”).

<sup>126</sup> *Id.* at 484 (quoting WEBSTER’S THIRD NEW INT’L DICTIONARY 1934 (3d ed. 1981)).

<sup>127</sup> *See id.* at 483-84.

<sup>128</sup> *See id.* at 484.

<sup>129</sup> For an argument that the distinction between these two types of respect is not easy to maintain, see Abrams, *supra* note 116, at 1179.

<sup>130</sup> *See* Franke, *supra* note 111, at 693 (arguing that as “technology of sexism,” sexual harassment works as “disciplinary practice that inscribes, enforces, and polices the identities of both the harasser and victim according to a system of gender norms,” which effectively delineates women as “feminine sexual objects” and men as “masculine sexual subjects”).

<sup>131</sup> *Id.* at 696.

<sup>132</sup> *See id.* at 764-65 (noting that by reducing women subordinates in workplace to sex objects, sexual harassment effectively renders them “less competent and more sexual”).



from which to draw this inference.<sup>133</sup> She focuses on the policing role of sexual harassment where harassment serves to keep gender non-conformists in line.<sup>134</sup> Harassment discourages the woman who works in the shipyard, the man who will not play along with crude, vulgar horseplay or the man who is not considered “masculine enough.”<sup>135</sup> Further, Franke notes that sexual harassment harms the harasser as well as the harassee by making the man a sexual aggressor.<sup>136</sup>

Franke’s theory supports a claim for contra-power harassment. Women deviate from their assigned gender roles when they enter non-traditional workplaces and when they seek to supervise other workers. By holding power over workers, particularly over men, women have violated the societal norm of being passive, sexualized objects and thus must be brought back into line. Harassment is the means utilized to return women to their rightful roles. However, the harassment is not always in the form of sexualized behavior. As Franke points out, not all offensive behavior directed at women is sexist behavior because not all is “because of sex.”<sup>137</sup> This may pose a particular evidentiary problem for contra-power harassment cases. Workers often dislike their supervisors and engage in spiteful conduct. The question for a court is whether the offensive conduct occurs “because of sex.” Courts must remain vigilant to the hostility aimed at women supervisors and must consider whether that non-sexualized behavior is a means of gender regulation.

### 3. Schultz’s Competence-Centered Account

Vicki Schultz criticizes current sexual harassment theory for placing sexuality - “more specifically, male-female sexual advances” - at the core of the problem.<sup>138</sup> She argues that this desire-dominance paradigm “has served to exclude from legal understanding many of the most common and debilitating forms of harassment faced by women (and many men) at work each day.”<sup>139</sup> In this way, the paradigm is underinclusive. Schultz asserts that, in actuality, many of the most common forms of harassment seek to maintain work in general and, in particular, high prestige/highly compensated lines of work as “bastions of masculine competence and authority.”<sup>140</sup> As examples of the types of non-sexualized behaviors that undermine women at work each day, she offers denigrating women’s performance, denying women the perks or privileges required for success, and deliberate work sabotage.<sup>141</sup> Further, Schultz suggests that

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<sup>133</sup> See *id.* at 762-66. Franke builds her reconceptualization of sexual harassment as gender harassment on the theory of sexual harassment as a form of sexual subordination. *Id.* at 762-63. Extending the subordination analysis to address the effect the concept’s underlying ideology has upon men, Franke argues that the wrong of gender-based subordination lies in its power as a regulatory agent with the dual goals of feminizing women and masculinizing men. *Id.* at 763. Sexual harassment successfully achieves these “hetero-patriarchal objectives,” either by way of perpetuating gender norms (as in the traditional cases of men harassing female subordinates in the workplace) or by “punishing gender non-conformists.” *Id.* at 763-66.

<sup>134</sup> See *id.* at 765-66 (explaining how sexual harassment disciplines gender deviants by enforcing “law of gender” that “insists that femininity is the only acceptable expression of femaleness, and that masculinity is the only acceptable expression of maleness”).

<sup>135</sup> *Id.* at 696.

<sup>136</sup> *Id.* at 763.

<sup>137</sup> See *id.* at 769.

<sup>138</sup> Schultz, *supra* note 16, at 1686.

<sup>139</sup> See *id.* at 1686-87 (noting that great deal “of the gender-based hostility and abuse” endured by women as well as men is “neither driven by the desire for sexual relations nor even sexual in content”).

<sup>140</sup> *Id.* at 1687 (arguing that harassment must be viewed in context of job segregation).

<sup>141</sup> See *id.* Schultz offers various other examples of non-sexualized harassment including withholding training, information, or opportunities for women to learn to execute their jobs well, engaging in pranks and taunting, and the isolation of women from the “social networks that confer a sense of belonging.” *Id.* While Schultz concedes that

the prevailing paradigm emphasizes “protection of women’s sexual selves” over their empowerment as workers.<sup>142</sup> In this way, the paradigm is overinclusive. Not all sexual expression should be considered sexual harassment. Rather, according to Schultz, the focus “should be on conduct that consigns people to gendered work roles that do not further their own aspirations or advantage.”<sup>143</sup>

Schultz, similar to Franke, argues that harassment performs a “gender-guarding, competence-undermining function: By subverting women’s capacity to perform favored lines of work, harassment polices the boundaries of the work and protects its idealized masculine image--as well as the identity of those who do it.”<sup>144</sup> Thus, Schultz offers a competence-centered account of sexual harassment.

Schultz incorporates same-sex harassment plaintiffs into her conception of sexual harassment by arguing that these plaintiffs are harassed because they “detract” from the workplace as an idealized masculine environment.<sup>145</sup> Further, her theory is a means to “understand some less conventional forms of harassment, such as harassment of female supervisors by their male subordinates.”<sup>146</sup>

Contra-power harassment is the quintessential example of Schultz’s reconceptualization of harassment because the presence of women as supervisors directly threatens the maintenance of the masculinity of the workplace.<sup>147</sup> Any behavior directed at women seeking to undermine their competency as workers and supervisors should be actionable under Title VII.<sup>148</sup> Thus, contra-power conduct that is not overtly sexual may or may not constitute actionable harassment. If discussions of sexual matters with a supervisor seek to undermine women and to secure the workplace for men, then Schultz’s theory would support the contra-power harassment claim.

#### 4. Abrams’s Focus on Subordination

Kathryn Abrams responds to the above theories with a call to retain the focus on the institutionalization of the subordination of women in the workplace.<sup>149</sup> She argues that sexual harassment should be characterized “as a phenomenon that serves to preserve male control and entrench masculine norms in the workplace . . . .”<sup>150</sup> Thus, the subordination of women should remain at the center of sexual harassment analyses. Abrams describes the harms of sexual

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making a woman the target of sexual attention can undermine her image and self-confidence as a worker, she alleges that often harassment occurs in a manner that has “little or nothing to do with sexuality but everything to do with gender.” *Id.*

<sup>142</sup> *See id.* at 1689 (arguing that doing so allows companies to interpret law as proscribing certain forms of “sexual expression that do not promote gender hierarchy at work”).

<sup>143</sup> *Id.*

<sup>144</sup> *See id.* at 1691. “By protecting their jobs from incursion by women, or by incorporating women only on inferior terms, men sustain the impression that their work requires uniquely masculine skills. Maintaining their jobs as repositories of masculine mastery, in turn, assures men a sense of identity (even superiority) as men.” *Id.*

<sup>145</sup> *See id.* (explaining that similar to male workers who seek to protect their jobs from encroachment by women, “so too may male workers seek to denigrate and drive away other men who detract from the perception of their jobs as the embodiment of an idealized manly competence”).

<sup>146</sup> *Id.* at 1755.

<sup>147</sup> *See id.* at 1767 (noting that as response to such threat, male subordinates may confront “women higher-ups” with challenges to their power and efforts to sabotage their performance, as “many men have particular difficulty submitting to the authority of a female boss”).

<sup>148</sup> *Id.* at 1762.

<sup>149</sup> *See Abrams, supra* note 116, at 1171.

<sup>150</sup> *Id.* at 1172.

harassment as an interference with human agency.<sup>151</sup> She brings many same-sex harassment claims within her account by discussing the “traditionally male prerogative for initiating sex in a range of contexts and without particular reference to the desires of the target.”<sup>152</sup> Thus, the unilateral imposition of desire makes conduct actionable without regard to the sex of the victim and the harasser.

Abrams critiques both Franke and Bernstein for departing from the focus on the subordination of women and Franke for explicitly rejecting the subordination-centered account of sexual harassment.<sup>153</sup> Abrams faults Bernstein’s respectful person standard as obscuring the “gendered context and meaning of the conduct.”<sup>154</sup> Abrams argues that Bernstein has “depoliticized” and “neutered” the wrong of sexual harassment by failing to conceptualize sexual harassment as a wrong that occurs in the workplace.<sup>155</sup> According to Abrams, Bernstein has diminished the completeness of her account of sexual harassment.<sup>156</sup> Further, Bernstein does not center her conceptualization of sexual harassment in the gender hierarchy of the workplace.<sup>157</sup> Abrams argues that it is of central importance that sexual harassment is perpetrated by the more powerful members of the hierarchy on the less powerful.<sup>158</sup> By individualizing the harm,

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<sup>151</sup> See *id.* at 1217-20. Abrams argues that the ultimate harm of sexual harassment “relates both to the workplace as an institution” and to the workers within it. *Id.* at 1219. Further, Abrams claims that sexual harassment works to maintain the workplace as a “site of male control, where gender hierarchy is the order of the day and masculine norms structure the working environment.” *Id.* What she alleges to be of such grave concern is not merely that sexual harassment fortifies sex and gender hierarchy in any institution, but that it does so “in an institution that has held particular promise for many women, thus compromising the potential opportunities implicit in work, such as greater economic self-sufficiency and the exploration of new roles and new conceptions of the self not linked to stereotyped expectations.” *Id.* at 1219-20. “Indeed, for both women and nonconforming men, sexual harassment undermines the primary form of agency we retain as complex subjects in a world of multiple social influences: the capacity to put together the disparate elements of self -- biological being, gendered subject, worker, sexual actor -- to create a particular, contingent whole in a particular context.” *Id.* at 1220.

<sup>152</sup> *Id.* at 1211. See also *id.* at 1225-29 (explaining what proposed account means for same-sex harassment cases, and doing so to great degree by comparison to Franke’s theoretical focus on “process of gendering”).

<sup>153</sup> For the response from Bernstein and Franke to this critique, see Anita Bernstein, *An Old Jurisprudence: Respect in Retrospect*, 83 CORNELL L. REV. 1231 (1998); Katherine M. Franke, *Gender, Sex, Agency and Discrimination: A Reply to Professor Abrams*, 83 CORNELL L. REV. 1245 (1998). Conversely, Abrams asserts that Vicki Schultz’s theory “shares many of the assumptions in common with the analysis of sexual harassment I propose here.” Abrams, *supra* note 116, at 1171 n.7. However, Abrams differentiates herself from Schultz mainly in her concern that Schultz’s “‘competence-claiming’ model runs a higher risk of replacing one unitary theory of sexual harassment with another.” *Id.* at 1215.

<sup>154</sup> Abrams, *supra* note 116, at 1172.

<sup>155</sup> *Id.* at 1185. Abrams states that Bernstein does comment on the meaning of being humiliated at work, but does so in passing while arguing that “respect should entail an appreciation of the community that connects the harasser and the target.” *Id.* Further, Abrams notes that the “indignity that she defines as harassment’s central harm could occur anywhere—on the street, in a social institution, in one’s home.” *Id.* By doing so, Abrams argues, Bernstein neglects important aspects of the injury that can be “specifically attributable to the fact that it occurs in the workplace.” *Id.*

<sup>156</sup> *Id.* Abrams contends Bernstein’s theory is weakened by lack of these “work-specific dimensions,” partly because the humiliation of sexual harassment occurs in a location where it has potential to hinder the “earning of one’s livelihood and to prevent the achievement of one’s professional fulfillment or self-definition.” *Id.* Further, Abrams argues that sexual harassment also takes place “in a setting where women have historically been marginalized or relegated to distinct and limited roles and where they continue to face hostility and systematic obstacles to professional progress.” *Id.*

<sup>157</sup> *Id.* at 1185.

<sup>158</sup> See *id.* at 1185-87 (noting that this hierarchy “shapes not only the workplace but also a range of institutions and attributes of our social and cultural life,” and that “if we do not appreciate that this dignitary injury is a function of, and connected to, other injuries within an unequal, hierarchical relationship, we miss much of what is morally and politically significant about the wrong”).

Bernstein glosses over the systemic nature of sexual harassment and reduces the need and ability to prevent it.<sup>159</sup>

Abrams argues that Franke's theory fails to focus on the dynamics of the workplace and of the particular harm caused by sexual harassment in the workplace.<sup>160</sup> Although Franke discusses sexual harassment as a workplace wrong, her theory does not focus on what sexual harassment means for women in the workplace.<sup>161</sup> Abrams criticizes Franke's choice to reject a workplace focus and posits that it is part of Franke's overall rejection of a subordination-based account of sexual harassment.<sup>162</sup>

The flaws identified in the subordination-based account of sexual harassment are not inevitable, according to Abrams.<sup>163</sup> She argues a return to the original conception of sexual harassment as a form of discrimination with the subordination of women at its center.<sup>164</sup> She argues, similar to Schultz, that sexual harassment should be understood as "a means of establishing male control and expressing or perpetuating masculine norms in the workplace."<sup>165</sup> Where women have entered traditionally male fields, thereby challenging male control, they have faced particularly flagrant and abusive harassment.<sup>166</sup> Other subtler forms of harassment, such as treating women in a manner that highlights their sexuality or reminding them to act feminine, send the message to women workers that they are not equal in influence or control.<sup>167</sup> As Abrams states, "these forms of harassment suggest that whatever professional goals women pursue, they will continue to be viewed and judged by reference to more traditional female roles and whatever careers they enter, they will still occupy subordinate roles."<sup>168</sup>

Abrams's account, then, encompasses certain contra-power harassment situations. As she discussed in a footnote, the sexualization of a female worker "may be more likely to disconcert or disenable the target because the conduct seems to be a violat[ion] of the rules of the

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<sup>159</sup> *Id.* at 1187.

<sup>160</sup> *See id.* at 1193. For a further discussion of the particular harm that Abrams argues is caused by sexual harassment in the workplace, see *supra* note 151 and accompanying text.

<sup>161</sup> *See id.* at 1193-94. Abrams argues that while Franke situates sexual harassment within several "society-wide dynamics of gender subordination," she does not adequately address its relation "within the salient dynamics of the workplace." *Id.* at 1193. Abrams states that sexual harassment is unquestionably a form of sex discrimination and is additionally linked to alternative forms of discrimination taking place outside the workplace. *Id.* at 1194. Yet Abrams claims that sexual harassment is also understood under a statute that prohibits employment discrimination on the basis of sex, while exhibiting "crucial connections to other forms of discrimination that occur in that context." *Id.* Thus, we must examine the particular sex-based dynamics of the workplace to comprehend the practice and meaning of sexual harassment itself. *Id.*

<sup>162</sup> *Id.* at 1199-1202. Abrams is convinced Franke's reason for "de-emphasizing sex based struggles in the workplace" is her concern for the potential conflict a theory of sex-based subordination would create for the theory of "gendering" she aims to advance. *Id.* at 1199. Abrams further argues Franke rejects a subordination-based account of sexual harassment on three grounds: (1) the theory's "tendency to biologize the phenomenon;" (2) the "transitive" logic of the theory which effectively "obscures the multidirectional force of social construction;" and (3) the theory's conception of sex as always and already sexist. *Id.* at 1200-01. *But see* Franke, *supra* note 153, at 1250-54 (responding to Abrams's assessment and explaining that in actuality Abrams and herself "agree more than we disagree about the normative priority of women's subordination in a theory of sexual harassment").

<sup>163</sup> Abrams, *supra* note 116, at 1172.

<sup>164</sup> *Id.* at 1171-72.

<sup>165</sup> *Id.* at 1205.

<sup>166</sup> *See id.* at 1206 (noting such types of harassment as including "physical or sexual aggression," and "persistent, targeted verbal abuse so severe as to serve unequivocal notice that women are not welcome").

<sup>167</sup> *Id.* at 1207-08.

<sup>168</sup> *Id.* at 1208.

game, in that she expected to be treated as a worker.”<sup>169</sup> Contra-power harassment is a particularly egregious violation of the rules of the game. After working her way up, the female supervisor is then subjected to equal (if not greater) conduct reminding her that she is not the boss; she is just a girl.

## 5. Conclusions

Under all of these conceptualizations of the wrong of sexual harassment, contra-power harassment is actionable sex discrimination. It is discrimination “because of sex.”<sup>170</sup> Harassing a female supervisor inherently smacks of the desire to drive her from her job so as to retain the workplace for men and to remind her of her rightful place lower in the hierarchy. Female supervisors may have organizational power but they may be powerless in terms of societal power and organizational dynamics.<sup>171</sup> Although I am primarily focused on the harassment of female supervisors, the question of harassment of male supervisors impacts the existence and viability of the contra-power claim. The sex-role spillover and sociocultural models of sexual harassment do not explain the harassment of a male supervisor unless the male supervisor is perceived as not masculine enough. Bernstein would provide a claim to any employee harassed by non-respectful behavior. Abrams, Franke and Schultz, from slightly different angles, would provide a claim regardless of the sex of the harasser when the harassment either retains the workplace as a bastion of male control or enforces traditional gender roles. Certainly, any number of fact patterns, including the following, may fall into those categories: an effeminate male supervisor is harassed for not being sufficiently masculine; a male supervisor is harassed for not playing along with the sexual banter because it makes him uncomfortable or he is harassed because he is not sexually aggressive enough. These scenarios should be actionable discrimination under Title VII because each seeks to enforce traditional gender roles and reinstate male norms.

But there is at least one scenario left unanswered. Should the masculine male supervisor harassed in a sexualized manner by a female subordinate have a claim? Abrams would argue “yes” because the unilateral imposition of desire on another person is the entrenching of traditional gender dynamic in the workplace.<sup>172</sup> However, this scenario does not fit within Schultz’s competence-undermining paradigm or Franke’s gendering of workers. By turning the male supervisor into the sexually pursued, there is an inversion of traditional gender dynamics.<sup>173</sup> Thus, under many theories, there is no actionable claim. The male supervisor, who possesses both organizational and sociocultural power, arguably needs less protection. However, a focus on the male supervisor’s status as a supervisor will serve to undermine female supervisors’ claims. Because a female worker may be harassed regardless of her organizational power and some male supervisors have claims that go to the heart of Title VII, all supervisors who are

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<sup>169</sup> *Id.* at 1216 n.240 (explaining various ways in which sexualization of women in workplace “cast[s] aspersions on their work competence”).

<sup>170</sup> For a discussion of when courts should draw inferences that certain types of harassment are discrimination “because of sex,” see *infra* Part IVC.

<sup>171</sup> Martin, *supra* note 22, at 157.

<sup>172</sup> See Abrams, *supra* note 116, at 1228.

<sup>173</sup> Strangely, the masculine male supervisor who is harassed by a female subordinate has his best argument in the “but for” test that is so soundly rejected by the above theorists. See *supra* note 114 and accompanying text. If the male supervisor can prove that the behavior would not have taken place “but for” his sex, then he has a claim under the “but for” test. For a more in-depth discussion of the “but for” test, see *infra* Part IVC. I agree with the critiques of the “but for” test in that the test screens out too many legitimate claims and does not adequately protect women from harassment in the workplace. Perhaps the “but for” test should be considered as one method to prove discrimination “because of sex,” rather than the only method.

harassed “because of sex” should fall within the protection of the statute. This is both logically consistent and provides less opportunity for the courts to dismiss meritorious claims based simply on the organizational status of the harasser. The rubber hits the road, of course, when the evidence is weighed against the specific elements for proving the claim. I turn now to the cases themselves.

### III. Contra-power Cases

Before turning to the elements of a contra-power claim, I will provide a general description of the contra-power cases that have reached the federal courts. After a particularly spectacular effort, my research assistants located twenty-four federal court decisions<sup>174</sup> involving claims of sexual harassment<sup>175</sup> in contra-power situations. Of these decisions, eighteen involved female plaintiffs<sup>176</sup> and six involved male plaintiffs;<sup>177</sup> six of the decisions involved a “win” for the plaintiff while the remaining eighteen were losses.<sup>178</sup> The intersection of these two factors

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<sup>174</sup> Although there are twenty-four reported decisions, there are twenty-two cases. One case with a male plaintiff produced two decisions: one at the motion to dismiss stage, *see* Jones v. U.S. Gypsum, No. C99-3047-MWB, 2000 WL 196616 (N.D. Iowa Jan. 21, 2000), and one at the summary judgment stage, *see* Jones v. U.S. Gypsum, 126 F. Supp. 2d 1172 (N.D. Iowa 2000) (granting summary judgment for employer due to employer’s prompt remedial action in response to allegations of sexual harassment). One case with a female plaintiff has a published district court opinion, *see* Wilson v. Univ. of Texas Health Ctr., 773 F. Supp. 958 (E.D. Tex. 1991) (entering judgment for defendants after bench trial), and an appellate decision, *see* Wilson v. Univ. of Texas Health Ctr., 973 F.2d 1263 (5th Cir. 1992) (affirming judgment on sexual harassment claims for defendants). In addition, there are a few state court cases with contra-power facts. *See, e.g.*, Hanlon v. Chambers, 464 S.E.2d 741 (W.Va. 1995) (hearing female office supervisor’s sexual harassment complaint based on conduct by male subordinate).

<sup>175</sup> We also uncovered a number of claims of racial or national origin harassment in a contra-power situation. *See, e.g.*, Starks v. New Par, 181 F.3d 103 (6th Cir. 1999); Erebia v. Chrysler Plastic Prods., 772 F.2d 1250 (6th Cir. 1985); Callahan v. Consol. Edison Co. of N.Y., Inc., 187 F. Supp. 2d 132 (S.D.N.Y. 2002); Peries v. N.Y. City Bd. of Educ., No. 97-CV-7109(Arr), 2001 WL 1328921 (E.D.N.Y. Aug. 6, 2001); Underwood v. Northport Health Servs., Inc., 57 F. Supp. 2d 1289 (M.D. Ala. 1999); Kincade v. Firestone Tire & Rubber Co., 694 F. Supp. 368 (M.D. Tenn. 1987); Nieto v. United Auto Workers, 672 F. Supp. 987 (E.D. Mich. 1987); Moffett v. Gene B. Glick Co., 621 F. Supp. 244 (N.D. Ind. 1985). These claims raise the same issues of societal power versus organizational power and are worthy of study. However, I have focused this article on contra-power sexual harassment.

<sup>176</sup> *See* Pfahl v. Synthes (USA), 13 F. App’x 832 (10th Cir. 2001); Ward v. Bechtel, 102 F.3d 199 (5th Cir. 1997); DeAngelis v. El Paso Mun. Police Officers Ass’n, 51 F.3d 591 (5th Cir. 1995); Wilson v. Univ. of Texas Health Ctr., 973 F.2d 1263 (5th Cir. 1992); Hill v. K-Mart Corp., 699 F.2d 776 (5th Cir. 1983); Mingo v. Roadway Express, Inc., 135 F. Supp. 2d 884 (N.D. Ill. 2001); Cleveland v. Int’l Paper Co., No. 96CV1068(RSP/DNH), 1998 WL 690915 (N.D.N.Y. Sept. 30, 1998); Malladi v. Brown, 987 F. Supp. 893 (M.D. Ala. 1997); Lewis v. Sugar Creek Stores, Inc., No. 96-CV-0100E(H), 1996 WL 685730 (W.D.N.Y. Nov. 25, 1996); Johnson v. Prof’l Servs. Group, No. 4-93-1197, 1996 WL 33324813 (D. Minn. Apr. 17, 1996); Humphreys v. Med. Towers, Ltd., 893 F. Supp. 672 (S.D. Tex. 1995); Ott v. Perk Dev. Corp., 846 F. Supp. 266 (W.D.N.Y. 1994); Cronin v. United Serv. Stations, Inc., 809 F. Supp. 922 (M.D. Ala. 1992); Wilson v. Univ. of Texas Health Ctr., 773 F. Supp. 958 (E.D. Tex. 1991); Reynolds v. Atlantic City Convention Ctr. Auth., Civ. A. No. 88-4232, 1990 WL 267417 (D.N.J. 1990); Kirkland v. Brinias, 741 F. Supp. 692 (E.D. Tenn. 1989), *aff’d*, 944 F.2d 905 (6th Cir. 1991); Perkins v. Gen. Motors Corp., 709 F. Supp. 1487 (W.D. Mo. 1989); Otterstedt v. U.S. Postal Serv., 96 M.S.P.R. 688 (M.S.P.B. 2004).

<sup>177</sup> *See* Davis v. Coastal Int’l Sec., Inc., 275 F.3d 1119 (D.C. Cir. 2002); Garcia v. V. Suarez & Co., 288 F. Supp. 2d 148 (D.P.R. 2003); Needham v. BI, Inc., No. 00 C 1550, 2001 WL 558144 (N.D. Ill. May 21, 2001); Jones v. U.S. Gypsum, No. C99-3047-MWB, 2000 WL 196616 (N.D. Iowa Jan. 21, 2000); Jones v. U.S. Gypsum, 126 F. Supp. 2d 1172 (N.D. Iowa 2000); Odom v. St. Louis Cmty. Coll., 36 F. Supp. 2d 897 (E.D. Mo. 1999), *aff’d*, 205 F.3d 1347 (8th Cir. 2000).

<sup>178</sup> I counted a decision as a “win” if the plaintiff secured final judgment in her or his favor or survived a motion to dismiss or for summary judgment. *See* Ann Juliano & Stewart J. Schwab, *The Sweep of Sexual Harassment Cases*, 86 CORNELL L. REV. 548, 569 (2001) (defining win rates).

produces thirteen cases in which female plaintiffs lost and five in which they won; five losses for male plaintiffs and one win.<sup>179</sup>

A few courts have explicitly discussed whether a contra-power claim is viable. The court in *Moffett v. Gene B. Glick Co.* referred to the organizational status of the parties as a “red herring.”<sup>180</sup> The court stated that the “capacity of any persons to create a hostile or offensive work environment is not necessarily enhanced or diminished by any degree of authority which the employer confers on that individual.”<sup>181</sup> *Moffett* added that the hierarchical relationship of the parties has relevance only in determining the standard of employer liability.<sup>182</sup> The status of the alleged harassers as subordinates did not automatically preclude their creation of a hostile work environment.<sup>183</sup> The opinion in *Cronin v. United Service Stations, Inc.* echoed similar sentiments.<sup>184</sup> The defendants in *Cronin* tried to avoid liability by emphasizing that Cronin was harassed by a subordinate.<sup>185</sup> The court recognized the relevance of the contra-power facts (although without using the term “contra-power harassment”) but said that the existence of contra-power facts alone does not preclude a claim of sexual harassment.<sup>186</sup> The court noted that a hostile environment can be created by a subordinate just the same as by a supervisor.<sup>187</sup> Similarly, in *Kirkland v. Brinias*, the court recognized that “unlike the situation in the typical harassment case, the unwelcome behavior came from a subordinate, not a supervisor.”<sup>188</sup> Further, the court opined that the behavior in question would create a hostile working environment for a reasonable person.<sup>189</sup>

Some courts relied upon the organizational power relationship between the harasser and the victim to hold that there was no actionable claim. In *Odom v. St. Louis Community College*, where the claimant was male, the court found that the “respective positions” of the parties was the most important factor.<sup>190</sup> “[A] subordinate employee could not have created an environment so pervasively hostile or abusive that it would have affected a term or condition of a reasonable supervisor’s employment.”<sup>191</sup> Although the court expressed doubt about the claim, the doubt

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<sup>179</sup> This produces an overall win rate of 25% for these cases, both trial and appellate. This is a significantly lower win rate than found in a previous study of sexual harassment cases. See *id.* at 576 (finding 51% win rate in district courts and 39% in appellate courts). Male plaintiffs won 17% of the time (one case) and the female plaintiffs 27% of the time (five cases). Six cases were heard by appellate courts (one male plaintiff and five female plaintiffs), and in each case the court found for the defendant.

<sup>180</sup> *Moffett*, 621 F. Supp. at 272. See also *Mingo*, 135 F. Supp. 2d at 895 (“Although Mingo was a supervisor, ‘plaintiff’s status as supervisor of those harassing [her] . . . is a non-issue’ . . . .”); *Lewis*, 1996 WL 685730, at \*2 (discussing that several courts have rejected argument that, as matter of law, supervisor cannot bring hostile environment claim if environment is created by subordinates).

<sup>181</sup> *Moffett*, 621 F. Supp. at 272.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Cronin v. United Serv. Stations, Inc.*, 809 F. Supp. 922 (M.D. Ala. 1992) (finding that male subordinate created hostile work environment for female supervisor and co-workers).

<sup>185</sup> *Id.* at 931.

<sup>186</sup> *Id.* at 931-32 (distinguishing hostile environment harassment from quid pro quo harassment).

<sup>187</sup> *Id.* at 932.

<sup>188</sup> *Kirkland v. Brinias*, 741 F. Supp. 692, 698 (M.D. Tenn. 1989).

<sup>189</sup> *Id.* The court went on to find that the plaintiffs had not suffered any harmful psychological effects. *Id.* This decision was issued several years before the Supreme Court’s decision in *Harris v. Forklift Sys., Inc.*, wherein the Court held that actual psychological harm is not required to prove a hostile environment claim. See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 17 (1993). See also *infra* notes 302-04 and accompanying text (examining make-up of hypothetical “reasonable person”).

<sup>190</sup> *Odom v. St. Louis Cmty. Coll.*, 36 F. Supp. 2d 897, 903 (E.D. Mo. 1999).

<sup>191</sup> *Id.* (noting that plaintiff was not just supervising, but in sole charge at time of incident).

was couched in an analysis of the severe or pervasive requirement.<sup>192</sup> Many courts simply do not discuss the viability of the contra-power claim.

On a factual level, all but one of the cases in which the plaintiff won involved sexually explicit comments directed at the plaintiff. For example, in *Cleveland v. International Paper Co.*, the plaintiff's subordinates teased her about sexual matters, inquired into her sex life and occasionally made lewd references to her breasts.<sup>193</sup> In *Mingo v. Roadway Express, Inc.*, the plaintiff was a female dock supervisor who was subjected to continual vulgar conduct by her male subordinates.<sup>194</sup> Several subordinates requested sexual relations with Mingo and one caressed her arm.<sup>195</sup> In *Lewis v. Sugar Creek Stores, Inc.*, a female store manager was consistently harassed by a male subordinate.<sup>196</sup> The subordinate talked about her breasts, asked to see them, propositioned her for sex, grabbed her breasts and brushed her genital region.<sup>197</sup> Similarly, in *Cronin*, the plaintiff was harassed by an African-American subordinate who called her a "dumb, old stupid woman," asked her if she "liked black dick," touched her on her neck and shoulder, asked her to have a "good time" with him, and once grabbed her, stating that he wanted a "good feel."<sup>198</sup> The final winning case for a female plaintiff involved gender harassment in which the subordinate threw a paperweight at the plaintiff while calling her a bitch and a whore and remained abusive to the plaintiff throughout her employment.<sup>199</sup>

In the sole case in which a male plaintiff was successful, a male supervisor alleged that he was struck in the groin by a female subordinate.<sup>200</sup> He further alleged that the employee had struck other men at the workplace in the groin and the employer had taken no action against her.<sup>201</sup> Against an argument by the employer that a single incident could not constitute a hostile environment, the court denied the employer's motion to dismiss.<sup>202</sup>

In the unsuccessful claims, the factual scenarios also involved sexually explicit comments or behavior, but the courts found the allegations did not rise to the level of severe or pervasive. For example, in *Johnson v. Professional Services Group, Inc.*, the plaintiff alleged that a hostile work environment was created when male subordinates at a recycling center removed pornographic magazines from the trash and read them at work.<sup>203</sup> The court found this behavior "not severe enough to impose liability."<sup>204</sup> In *Kirkland v. Brinias*, two female waitresses alleged that a male busboy had subjected them to sexual advances, propositions, threats and physical

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<sup>192</sup> For a further discussion of the severe or pervasive requirement, see *infra* Part IVD.

<sup>193</sup> *Cleveland v. Int'l Paper Co.*, No. 96CV1068(RSP/DNH), 1998 WL 690915, at \*2 (N.D.N.Y. Sept. 30, 1998).

<sup>194</sup> *Mingo v. Roadway Express, Inc.*, 135 F. Supp. 2d 884, 890 (N.D. Ill. 2001) (listing ten specific incidents of sexually charged comments by subordinates against plaintiff).

<sup>195</sup> *Id.*

<sup>196</sup> *Lewis v. Sugar Creek Stores, Inc.*, No. 96-CV-0100E(H), 1996 WL 685730, at \*1 (W.D.N.Y. Nov. 25, 1996).

<sup>197</sup> *Id.* (recounting numerous events that occurred over four months, culminating with plaintiff's resignation).

<sup>198</sup> *Cronin v. United Serv. Stations, Inc.*, 809 F. Supp. 922, 925 (M.D. Ala. 1992).

<sup>199</sup> *Humphreys v. Med. Towers, Ltd.*, 893 F. Supp. 672, 678 (S.D. Tex. 1995).

<sup>200</sup> *Jones v. U.S. Gypsum*, No. C99-3047-MWB, 2000 WL 196616 (N.D. Iowa Jan. 21, 2000).

<sup>201</sup> *See id.* (allowing plaintiff to argue that female employee targeted only men with this activity).

<sup>202</sup> *See id.* (noting that this single incident was in fact sufficiently severe to create actionable hostile work environment). Ultimately, plaintiff Jones was not successful. *See Jones v. U.S. Gypsum*, 126 F. Supp. 2d 1172 (2000) (entitling summary judgment for defendants on Jones' hostile work environment claim).

<sup>203</sup> *Johnson v. Prof'l Servs. Group, Inc.*, No. 4-93-1197, 1996 WL 33324813, at \*1 (D. Minn. Apr. 17, 1996).

<sup>204</sup> *Id.* at \*6. The infamous *Rabidue v. Osceola Ref. Co.* decision from the Sixth Circuit also addressed pornography in the workplace. *See Rabidue v. Osceola Ref. Co.*, 805 F.2d 611 (6th Cir. 1986). The plaintiff's complaint hinged primarily on the behavior of one co-worker. However, plaintiff also made allegations concerning the display of pornography in the workplace. Because the court did not clearly identify the organizational status of the men who posted the pornography, I did not include this case.



contact.<sup>205</sup> The court held that neither plaintiff suffered any harmful psychological effects.<sup>206</sup> In *Ott v. Perk Development Corp.*, the only explicit sexual incident occurred when the subordinate placed a pornographic magazine in his female supervisor's notebook.<sup>207</sup> The court stated that this incident, when combined with other instances of non-sexually based disparate treatment, was enough to meet the plaintiff's prima facie case.<sup>208</sup> Nevertheless, the court held that the plaintiff did not show that the defendant intentionally engaged in a course of sexually harassing conduct and accordingly granted summary judgment for the employer.<sup>209</sup> Likewise, in *DeAngelis v. El Paso Municipal Police Officers Ass'n*, the court found that six derogatory gender-based articles in the local police station paper over the course of two years were not enough to create a hostile environment.<sup>210</sup> In other claims alleging unwelcome sexual remarks or threats and physical assault by a subordinate, the court found that the employer could not be held liable because the plaintiff had requested that the employer not take any action,<sup>211</sup> the employer had responded promptly<sup>212</sup> or that the behavior of subordinates could not be attributed to the employer.<sup>213</sup> Other contra-power facts presented include a subordinate attempting to kiss his supervisor,<sup>214</sup> sexual touching, comments, propositions<sup>215</sup> and general insubordination.<sup>216</sup>

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<sup>205</sup> *Kirkland v. Brinias*, 741 F. Supp. 692, 693 (M.D. Tenn. 1989). Note that this decision was issued prior to the Supreme Court's decision in *Harris*. See *supra* note 189.

<sup>206</sup> *Id.* at 698 (finding no psychological damage despite presence of hostile and intimidating work environment).

<sup>207</sup> *Ott v. Perk Dev. Corp.*, 846 F. Supp. 266, 270 (W.D.N.Y. 1994).

<sup>208</sup> *Id.* at 273 (noting that court must consider totality of circumstances to determine whether plaintiff has met minimum burden to show unwelcome gender-based harassment).

<sup>209</sup> *Id.* at 275 (dismissing plaintiff's work shift statistics as insufficient to create genuine issue of fact regarding plaintiff's performance evaluations).

<sup>210</sup> *DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591, 597 (5th Cir. 1995). See also *Reynolds v. Atlantic City Convention Ctr. Auth.*, Civ. A. No. 88-4232, 1990 WL 267417 (D.N.J. 1990). In *Reynolds*, the court rejected the contra-power fact evidence. *Id.* at \*26. The plaintiff alleged, among other things, that her male co-workers resisted her supervision to the point of refusal and quitting rather than working for her. *Id.* at \*5. The court categorized this evidence as "other harassment" and rejected its usefulness in determining a hostile environment. *Id.* at \*19. The refusal to work for the plaintiff "is not 'verbal or physical conduct of a sexual nature' and so does not figure into the calculus of a sexually offensive working environment." *Id.* Because the court found that only three sexually explicit or obscene comments had been made in her presence, the harassment was not sufficiently severe or pervasive to amount to a hostile working environment. *Id.* at \*18. See also *Pfahl v. Synthes (USA)*, 13 F. App'x 832, 835 (10th Cir. 2001) (holding that, over course of ten years, derogatory language, instance of hugging, and items twice being left on plaintiff's desk did not create hostile work environment).

<sup>211</sup> See, e.g., *Torres v. Pisano*, 116 F.3d 625, 638-39 (2d Cir. 1997) (finding employer not liable despite actual knowledge because plaintiff asked her supervisor to keep conversation confidential).

<sup>212</sup> See *Ward v. Bechtel Corp.*, 102 F.3d 199, 202-03 (5th Cir. 1997) (establishing that employer investigated plaintiff's allegations and disciplined and reassigned abuser).

<sup>213</sup> See *Malladi v. Brown*, 987 F. Supp. 893, 909 (M.D. Ala. 1997). In a case which can only be referred to as a "kitchen sink" approach to litigation, the plaintiff alleged that her subordinates made inaccurate comments concerning her workload and interpersonal skills to the Equal Employment Opportunity counselor investigating her "ninth" EEO charge. *Id.* at 900. The plaintiff alleged that these comments had the effect of changing her work environment and leading to her reassignment. *Id.* at 909. The court held that the subordinates could not impact the terms or conditions of plaintiff's employment. *Id.*

<sup>214</sup> See *Wilson v. Univ. of Tex. Health Ctr.*, 773 F. Supp. 958, 960 (E.D. Texas 1991), *aff'd*, 973 F.2d 1263 (5th Cir. 1992) (citing subordinate employee's attempt to kiss plaintiff on neck as element of sexual harassment claim).

<sup>215</sup> See *Perkins v. Gen. Motors Corp.*, 709 F. Supp. 1487, 1497 (W.D. Mo. 1989). The court found the plaintiff not credible in general. *Id.* at 1498. In regard to the contra-power allegations, the court found that the plaintiff had the supervisory authority to stop the conduct and punish the offender. *Id.* at 1500-01.

<sup>216</sup> See *Hill v. K-Mart Corp.*, 699 F.2d 776, 777 (5th Cir. 1983). The court rejected the plaintiff's argument that her authority had been undermined by her subordinates' behavior which included refusing to listen to her and making

The complaints by men were similarly treated. In *Jones v. United States Gypsum*, the plaintiff alleged he was physically assaulted by a female subordinate who grabbed him in the groin area.<sup>217</sup> The plaintiff in *Garcia v. V. Suarez & Co.* alleged repeated sexual touching by employees of each other's buttocks, sexually explicit comments, exposure, and an attempt at oral sex by a subordinate.<sup>218</sup> In *Davis v. Coastal International Security, Inc.*, the plaintiff alleged that his male co-workers engaged in a campaign of harassment against him, including slashing his tires and making vulgar comments and obscene gestures.<sup>219</sup> In *Needham v. BI, Inc.*, the plaintiff alleged that he was harassed by a female subordinate who rubbed against him, called him at home to discuss her personal life and generally asked the plaintiff to be responsible for the subordinate's personal life.<sup>220</sup>

In *Odom v. St. Louis Community College*, the plaintiff alleged he was subject to a hostile work environment created by a female subordinate.<sup>221</sup> Specifically, he alleged that the subordinate made sexually explicit comments such as suggesting that the plaintiff could put Vaseline on his crotch, noting the size of plaintiff's thumbs and remarking that she was glad that he was not her gynecologist, and sticking a doughnut between her legs, indicating that the doughnut had been there earlier.<sup>222</sup> The most explicit incident occurred when the subordinate followed the plaintiff to his office, rubbed her genital area while commenting that she was "hot and horny" and that someone would need to get a mop to "clean up the puddle she had just left on the floor."<sup>223</sup> The court found that the behavior was not aimed at altering the conditions of the plaintiff's employment.<sup>224</sup>

In sum, the facts alleged in contra-power cases are not dissimilar from the "typical" co-worker or supervisor harassment case. Courts do seem to give less credence to claims by male supervisors that their female subordinates have harassed them. Further, many courts look askance on female supervisors complaining about their subordinates. But if the facts are not overtly dissimilar from the conventional harassment claim, does the contra-power claim itself need to change?

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racial remarks. *Id.* at 779. "We are convinced that [the plaintiff] stood above the remarks and her position or authority suffered nothing because of them." *Id.* at 778.

<sup>217</sup> *Jones v. U.S. Gypsum*, 126 F. Supp. 2d 1172, 1174 (N.D. Iowa 2000). The court found that the employer had acted appropriately in response to the complaints of harassment. *Id.* at 1179.

<sup>218</sup> *Garcia v. V. Suarez & Co.*, 288 F. Supp. 2d 148, 153 (D.P.R. 2003). The court found that the employer acted appropriately in response to the sexual encounter by investigating and dismissing the harasser. *Id.* at 159. Further, the plaintiff was not exposed to any disadvantageous conditions to which female co-worker would not be exposed. *Id.* at 160.

<sup>219</sup> *Davis v. Coastal Int'l Sec., Inc.*, 275 F.3d 1119, 1121-22 (D.C. Cir. 2002). The court found no evidence that the harassment was because of the sex of the plaintiff as opposed to a workplace grudge. *Id.* at 1125-26.

<sup>220</sup> *Needham v. BI, Inc.*, No. 00 C 1550, 2001 WL 558144, at \*4-5 (N.D. Ill. May 21, 2001). In this case, the plaintiff was fired because the employer believed he had sexually harassed a subordinate. *Id.* at \*1. The plaintiff alleged that the subordinate had harassed him. *Id.* at \*3. Because the female subordinate was not dismissed, plaintiff argued that his dismissal was discrimination on the basis of sex. *Id.* at \*6. The court granted summary judgment to the employer on the grounds that plaintiff had no evidence that his firing was based on sex. *Id.* at \*8.

<sup>221</sup> *Odom v. St. Louis Cmty. Coll.*, 36 F. Supp. 2d 897, 899 (E.D. Mo. 1999).

<sup>222</sup> *Id.* at 900-01 (recounting instances of subordinate's inappropriate and sexually-charged exchanges with plaintiff).

<sup>223</sup> *Id.* at 901. Another co-worker also witnessed the subordinate's actions and told the subordinate that these actions were "offensive." *Id.*

<sup>224</sup> *Id.* at 903 (noting that actions of individual subordinate did not meet severity or pervasive requirements to sufficiently affect plaintiff's terms or conditions of employment).

#### IV. Creating the Claim

As is evident from the above descriptions of contra-power cases, the behavior complained of in a contra-power case is often no different than that complained of in a “standard” hostile environment case. The question then is whether the regular elements of a hostile environment claim may be applied to a contra-power case or whether the requirements must be adjusted to fit the atypical fact pattern. I address the first four elements of a hostile environment case in this Part and turn to the question of employer liability in Part V.

A hostile environment claim arises when an employee must endure verbal or physical abuse based on a protected characteristic as part of the “terms [or] conditions” of employment but does not suffer a tangible job detriment.<sup>225</sup> These claims were first recognized in the early 1980s.<sup>226</sup> From these cases, a five-part test emerged for a hostile environment claim based on sex. The plaintiff must show: (1) that the employee is a member of a protected class; (2) that the employee was subject to unwelcome sexual harassment, including sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature;<sup>227</sup> (3) that the harassment complained of was because of sex; (4) that the harassment complained of was severe or pervasive enough to affect a term, condition or privilege of employment; and (5) employer liability for the behavior and failure to take prompt remedial action.<sup>228</sup>

Although more than twenty years old, these five elements essentially remain today.<sup>229</sup> Each element has been further interpreted by the courts. Below I consider each element, how it is applied in a “standard” hostile environment case, how courts are applying it in contra-power cases, and what modifications, if any, should be made for the contra-power claim.

##### A. A Member of the Protected Class

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<sup>225</sup> *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971). This type of hostile environment claim was originally recognized in *Rogers* as a national origin claim under Title VII. *See id.* at 237.

<sup>226</sup> *See, e.g., Henson v. City of Dundee*, 682 F.2d 897, 901 (11th Cir. 1982) (agreeing that offensive or hostile work environment can violate Title VII irrespective of whether plaintiff suffers tangible job detriment); *Bundy v. Jackson*, 641 F.2d 934, 943-44 (D.C. Cir. 1981) (finding sex discrimination where employer created or condoned substantially discriminatory work environment regardless of whether complaining employees lost any tangible job benefits as result of discrimination).

<sup>227</sup> *See Henson*, 682 F.2d at 901. Although the *Henson* court formulated the test as requiring sexualized conduct, some courts have acknowledged claims of a hostile environment based on non-sexualized behavior. *See, e.g., Andrews v. City of Phila.*, 895 F.2d 1469, 1485 (3d Cir. 1990) (finding overt sexual harassment not necessary to establish sexually hostile environment); *Hall v. Gus Contrs. Co.*, 842 F.2d 1010, 1014 (8th Cir. 1988) (“Intimidation and hostility toward women because they are women can obviously result from conduct other than explicit sexual advances.”); *Ott v. Perk Dev. Corp.*, 846 F. Supp. 266, 273 (W.D.N.Y. 1994) (“However, the conduct underlying a sexual harassment claim need not be sexual in nature as long as the conduct is directed at the employee because of his or her sex.”).

<sup>228</sup> *See Henson*, 682 F.2d at 903-05.

<sup>229</sup> Some courts no longer explicitly require the plaintiff to prove that the conduct was “unwelcome” when making a hostile environment claim based on sex. *See, e.g., Petrosino v. Bell Atl.*, 385 F.3d 210, 221 (2d Cir. 2004) (requiring only that (1) sufficiently severe and pervasive discriminatory intimidation permeated and altered conditions of work environment, and (2) specific basis exists to impute employer liability); *Buffa v. N.J. State Dep’t of Judiciary*, 56 F. App’x 571, 575 (3d Cir. 2003) (requiring only that plaintiff prove (1) discrimination because of her [disability], and (2) this conduct was sufficiently severe and pervasive to create hostile environment for reasonable person).

The court in *Henson v. City of Dundee* described this element as requiring “a simple stipulation that the employee is a man or a woman.”<sup>230</sup> Not all courts require this element of the claim.<sup>231</sup> Arguably, proving the plaintiff is a member of the protected class is an absolute, albeit formal, requirement. Without establishing this element, the protections of Title VII are not triggered. For example, a male employee who alleges that he is harassed because he is gay has not shown he is within the protected class and thus has no cognizable claim.

However, these theoretical issues are considered in the context of the “because of sex” requirement, which is language taken directly from Title VII.<sup>232</sup> Under this requirement, as discussed below, the plaintiff must prove that she or he was harassed due to her or his sex. Thus, as Professor Beiner has aptly stated, “this element adds nothing to the claim, given that the plaintiff must already prove that she was harassed based on her sex.”<sup>233</sup> As could then be expected, contra-power cases do not present any distinct issues for this element.

### B. Subject to Unwelcome Harassment

The *Henson* court described the element of unwelcomeness as requiring the plaintiff to prove that she did not solicit or “incite” the behavior and that she found it undesirable or offensive.<sup>234</sup> The Supreme Court, in its first ruling recognizing a hostile environment claim, held that “the gravamen of any sexual harassment claim is that the alleged sexual advances were ‘unwelcome.’”<sup>235</sup> The Court then allowed the possibility that a plaintiff’s sexually provocative speech or dress is relevant to determine whether certain sexual advances were unwelcome.<sup>236</sup>

The unwelcome requirement has been much criticized for placing the plaintiff on trial and for requiring the plaintiff to assume the burden of proving what should be a defense.<sup>237</sup> I have previously called for its abolishment or, barring that, for a restriction on the type of evidence that may be considered to prove, or more importantly, to disprove the

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<sup>230</sup> *Henson*, 682 F.2d at 903.

<sup>231</sup> The Second, Third, Fourth and Seventh Circuits do not appear to require the plaintiff to prove that she is a member of the protected class as a formal element of the claim. *See, e.g.*, *Clegg v. Falcon Plastics, Inc.*, No. 05-1826, 2006 WL 887937, at \*4 (3d Cir. 2006); *Whittaker v. N. Ill. Univ.*, 424 F.3d 640, 645 (7th Cir. 2005); *Bhella v. England*, 91 F. App’x 835, 846 (4th Cir. 2004); *Gregory v. Daly*, 243 F.3d 687, 691-92 (2d Cir. 2001). Although some decisions in the Tenth Circuit do not list this element as a requirement, *see Smith v. EEOC*, No. 05-2049, 2006 WL 1230680, slip op. at \*3 (10th Cir. 2006), others do. *See Dick v. Phone Directories Co.*, 397 F.3d 1256, 1263 (10th Cir. 2005).

<sup>232</sup> *See* Civil Rights Act of 1964, 42 U.S.C.A. § 2000e(k) (1964) (defining terms “because of sex” and “on the basis of sex”).

<sup>233</sup> Beiner, *supra* note 79, at 9.

<sup>234</sup> *See Henson*, 682 F.2d at 903 (citing *Gan v. Kepro Circuit Sys., Inc.*, No. 81-268 C(5), 1982 WL 166 (E.D. Mo. 1982); *Vinson v. Taylor*, No. 78-1793, 1980 WL 100 (D.D.C. 1980); 29 C.F.R. § 1604.11(a) (1980)).

<sup>235</sup> *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 68 (1986).

<sup>236</sup> *See id.* at 69. The Court ruled that the Court of Appeals for the District of Columbia Circuit was erroneous in its decision that testimony admitted into evidence by the District Court and given about the respondent’s “dress and personal fantasies” had no place in the litigation. *Id.* The Court explained further that the “evidence is obviously relevant” as the “EEOC guidelines emphasize that the trier of fact must determine the existence of sexual harassment in light of ‘the record as a whole’ and ‘the totality of circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred.’” *Id.*

<sup>237</sup> *See, e.g.*, Mary F. Radford, *By Invitation Only: The Proof of Welcomeness in Sexual Harassment Cases*, 72 N.C. L. REV. 499 (1994) (questioning validity of current model of proof as to unwelcome requirement and proposing alternative method which would require proof of welcomeness rather than unwelcomeness in sexual harassment cases).

“unwelcomeness” of the behavior.<sup>238</sup> Some circuits have responded to the critiques by not requiring a showing of “unwelcomeness,”<sup>239</sup> though many still maintain the requirement.<sup>240</sup>

Although fewer cases are thrown out for failure to meet this requirement than any other element,<sup>241</sup> the unwelcome requirement continues to garner interest in the scholarly community.<sup>242</sup> In recent years, some feminist scholars have argued strongly and convincingly that the unwelcome requirement should be retained.<sup>243</sup> These arguments are often cast in terms of women’s agency. Women’s agency refers to the ability of women to define the role-relations they wish to engage in at work through their performance. Professor Franke has argued that removing the requirement casts doubt on women’s ability to consent to or reject sexual advances.<sup>244</sup> The unwelcome requirement “clearly presupposes a degree of female agency in these contexts.”<sup>245</sup> Again, women may wish to engage in certain conduct or discussions with some co-workers but not others.

Professor Abrams also seeks to recognize and support female agency while protecting women from sexual harassment. She proposes moderating the unwelcome requirement by contextualizing the type of behavior alleged to have created the hostile environment.<sup>246</sup> She argues that for sexual propositions, touchings and nonsexual forms of harassment, a showing of unwelcomeness should not be required.<sup>247</sup> Rather, the plaintiff should show that “the conduct was unilateral or disregarding her desires.”<sup>248</sup> However, Abrams argues that in regard to

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<sup>238</sup> Ann C. Juliano, Note, *Did She Ask For It?: The “Unwelcome” Requirement in Sexual Harassment Cases*, 77 CORNELL L. REV. 1558, 1587-92 (1992) (arguing that only evidence of specific interactions between employee victim and harasser should be admissible at trial).

<sup>239</sup> See, e.g., *Petrosino v. Bell Atl.*, 385 F.3d 210, 221 (2d Cir. 2004); *Buffa v. N.J. State Dep’t of Judiciary*, 56 F. App’x 571, 576 (3d Cir. 2003).

<sup>240</sup> See, e.g., *Harris-Childs v. Medco Health Solutions Inc.*, 169 F. App’x 913, 917 (5th Cir. 2006); *Kelly v. Senior Ctrs., Inc.*, 169 F. App’x 423, 428 (6th Cir. 2006); *Parker v. Atlanta Newspapers Name Holding Corp.*, No. 05-15722, 2006 WL 1594427, at \*2 (11th Cir. June 12, 2006); *Noviello v. City of Boston*, 398 F.3d 76, 92 (1st Cir. 2005); *Whittaker v. N. Ill. Univ.*, 424 F.3d 640, 645 (7th Cir. 2005); *Gilooly v. Mo. Dep’t of Health and Senior Servs.*, 421 F.3d 734, 738 (8th Cir. 2005); *Dick v. Phone Directories Co.*, 397 F.3d 1256, 1263 (10th Cir. 2005); *Bhella v. England*, 91 F. App’x 835, 845 (4th Cir. 2004); *Vasquez v. County of L.A.*, 349 F.3d 634, 642 (9th Cir. 2003).

<sup>241</sup> See *Beiner*, *supra* note 79, at 90.

<sup>242</sup> See, e.g., *Janine Benedet, Hostile Environment Sexual Harassment Claims and the Unwelcome Influence of Rape Law*, 3 MICH. J. GENDER & L. 125 (1995); *Henry L. Chambers, Jr., (Un)Welcome Conduct and the Sexually Hostile Environment*, 53 ALA. L. REV. 733 (2002); *Susan Estrich, Sex at Work*, 43 STAN. L. REV. 813, 826-34 (1991); *Juliano, supra* note 238; *Elsie Mata, Note, Title VII Quid Pro Quo and Hostile Environment Claims: Changing the Legal Framework Courts Use to Determine Whether Challenged Conduct is Unwelcome*, 34 U. MICH. J.L. REFORM 791 (2001); *Miranda Oshige, Note, What’s Sex Got to Do with It?*, 47 STAN. L. REV. 565 (1995); *Radford, supra* note 237; *Joan S. Weiner, Note, Understanding Unwelcomeness in Sexual Harassment Law: Its History and a Proposal for Reform*, 72 NOTRE DAME L. REV. 621 (1997); *Casey J. Wood, “Inviting Sexual Harassment”: The Absurdity of the Welcomeness Requirement in Sexual Harassment Law*, 38 BRANDEIS L.J. 423 (2000).

<sup>243</sup> See *Franke, supra* note 111, at 746-47 (arguing in favor of retaining unwelcome requirement and against alternative of presuming that all sexual conduct in workplace is unwelcome).

<sup>244</sup> *Id.* at 746.

<sup>245</sup> *Id.* at 746-47.

<sup>246</sup> *Abrams, supra* note 116, at 1221.

<sup>247</sup> See *id.* (explaining that with nonsexual forms of harassment such as “derogation of opportunity, failure to train, or sabotage of equipment unwelcomeness should be assumed,” and that cases involving “sexual propositions or touchings entail a substantial risk of a trial of the victim, in which a range of stereotypes hostile to women’s sexuality may be mobilized”).

<sup>248</sup> See *id.* at 1222. *Abrams* argues this is a better approach, as unwelcomeness is the wrong standard in such a context. *Id.* She contends that the standard used “should not focus triers’ attention on the nature of the target’s

sexualized talk or representations, the courts should not presume that such behavior is unacceptable.<sup>249</sup> Abrams argues that the unwelcome requirement in such cases recognizes women's agency.<sup>250</sup> She cautions that courts should be flexible in the type of evidence that may show unwelcomeness, such as leaving the room or changing the subject.<sup>251</sup> Similarly, Professor Schultz reaches the same end as Abrams, although by different means. Recall that her focus is on competence-undermining activity, much of it non-sexual. She argues that once courts reconceptualize sexual harassment as an assault on competence, "the unwelcomeness inquiry makes no sense. Although some people may welcome expressions of sexual interest, few employees invite conduct that attacks their work performance in the name of gender conformity."<sup>252</sup>

Only three of the contra-power cases discuss the unwelcome requirement in more than passing.<sup>253</sup> None of the courts in these cases hinge their analysis on the nature of the contra-power facts. In *Cronin v. United Serv. Stations, Inc.*, the court simply noted that it credited the plaintiff's testimony that she had indicated to the harasser that his advances were not welcome.<sup>254</sup> Further, the court found that the harasser knew his advances were unwelcome.<sup>255</sup> The plaintiff refused to go out with the harasser and repeatedly asked him not to touch her.<sup>256</sup> When the harasser tried to strike her, she fired him.<sup>257</sup> The court also rejected a particularly irrelevant and offensive argument of the defendant. The employer argued that the plaintiff was abused at home and therefore could not have viewed the behavior at work as unwelcome.<sup>258</sup> The court soundly rejected this line of attack.<sup>259</sup> In *Humphreys v. Medical Towers, Ltd.*, defendants argued that the plaintiff had invited the harasser's behavior because she and the harasser fought with each other on a regular basis.<sup>260</sup> The court found that the plaintiff had presented sufficient evidence that the plaintiff neither made derogatory statements about the harasser nor provoked or invited hostile behavior.<sup>261</sup> Thus, the court denied summary judgment.<sup>262</sup> In *Perkins v. General Motors Corp.*, one of the many reasons that the plaintiff was unsuccessful in her claim was the

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response but on the nature of the perpetrator's act." *Id.* Thus, the question to ask is "not whether sexual advances in the workplace are presumptively acceptable but whether the coercive imposition of sex is forbidden." *Id.*

<sup>249</sup> See *id.* "In the case of sexualized talk or representations, a showing of unwelcomeness may be more appropriate because the plaintiff's response is less likely to be assimilated to stigmatizing stereotypes." *Id.*

<sup>250</sup> See *id.*

<sup>251</sup> See *id.* (explaining courts should not require all plaintiffs to prove unwelcomeness by "contemporaneous verbal objection to the perpetrator," yet should accept evidence of unwelcomeness through more standard responses that "reflect the constraints under which many sexual harassment victims operate").

<sup>252</sup> Schultz, *supra* note 16, at 1802.

<sup>253</sup> See *Humphreys v. Med. Towers, Ltd.*, 893 F. Supp. 672 (S.D. Tex. 1995); *Cronin v. United Serv. Stations, Inc.*, 809 F. Supp. 922 (M.D. Ala. 1992); *Perkins v. Gen. Motors Corp.*, 709 F. Supp. 1487 (W.D. Mo. 1989).

<sup>254</sup> See *Cronin*, 809 F. Supp. at 929 (M.D. Ala. 1992) (noting that court was "convinced that Cronin indicated to Webster that his advances were not welcome" and that "evidence indicates that Cronin 'did not solicit or incite' Webster's conduct and that she 'regarded the conduct as undesirable or offensive'").

<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

<sup>257</sup> *Id.*

<sup>258</sup> *Id.* at 932.

<sup>259</sup> See *id.* (stating argument lacked merit and fact that Cronin "may have been abused at home in no way means that Cronin deserved abuse at work, that she 'welcomed' Webster's abuse, or that she could not possibly be affected by Webster's actions because she was used to such abuse").

<sup>260</sup> *Humphreys v. Med. Towers, Ltd.*, 893 F. Supp. 672, 683 (S.D. Tex. 1995).

<sup>261</sup> *Id.*

<sup>262</sup> *Id.* at 684.

unwelcome requirement.<sup>263</sup> The court found the plaintiff was an “active, encouraging participant in sexually explicit conversations and actions” by co-workers and subordinates.<sup>264</sup> Further, the court found that in the “few” circumstances where the conduct went too far, the plaintiff had the “ability to take care of the situation and to stop that conduct.”<sup>265</sup>

In sum, the contra-power case law does not suggest a need for a change in the unwelcome requirement specific to contra-power cases. However, I argue for a modification to the requirement. Courts should adopt Schultz and Abrams’s argument that sexual propositions and touchings, as well as non-sexual harassing behavior, are inherently not welcome. I would go the next step and argue that the courts should presume that sexualized behavior is unwelcome when directed at a supervisor from a subordinate. I realize that this modification implicates women’s agency. The focus on women’s agency is one which I fully support. Women should not be held to Victorian ideals nor be required to remove any sexually based conversations from their workplace in order to remain as “acceptable” plaintiffs. In fact, the importance of recognizing and supporting women’s agency forms the basis for my recommendations on employer liability. However, social science research supports my proposed modification for the unwelcome requirement. Women have indicated that contra-power harassment is more likely to be considered unwelcome than co-worker harassment.<sup>266</sup> Further, because female supervisors are already acting outside of prescribed gender roles, they often face a heightened effort by male subordinates attempting to reinforce traditional norms. The arguments against the unwelcome requirement are especially relevant to claims of contra-power harassment. Therefore, courts should presume that harassing behavior directed at a supervisor from a subordinate is unwelcome.

### C. Because of Sex

Title VII prohibits discrimination “because of . . . sex.” As described above in Part IIB, proving that sexual harassment is discrimination “because of sex” was one of the initial hurdles for the claim.<sup>267</sup> Once the concept of the claim was accepted, the premise was not questioned for many years. The issue of same-sex harassment raised the fundamental questions anew. Scholars proposed a number of fascinating theoretical constructs to provide an actionable claim for same-sex harassment.<sup>268</sup> The Supreme Court provided guidance and sowed the seeds of confusion in its *Oncale v. Sundowner Offshore Services, Inc.* decision.<sup>269</sup>

In a decision authored by Justice Scalia, the Court held that Title VII prohibits same-sex harassment.<sup>270</sup> Mr. Oncale worked on an offshore oil platform with seven other men. A co-worker and two supervisors threatened to rape him, sexually assaulted him and subjected him to

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<sup>263</sup> See *Perkins v. Gen. Motors Corp.*, 709 F. Supp. 1487, 1500 (W.D. Mo. 1989). In regard to the plaintiff’s sexually hostile work environment claim, the court noted that Perkins failed to satisfy her burden of proving that the unwelcome incidents that did occur “reasonably affected a term, condition or privilege of her employment.” *Id.* at 1501. Further, the court claimed Perkins failed to prove that her employer knew or should have known of the harassment that she complained of and failed to take proper remedial action. *Id.*

<sup>264</sup> *Id.* at 1500.

<sup>265</sup> *Id.* at 1500-01.

<sup>266</sup> Wayne, *supra* note 16, at 319.

<sup>267</sup> See *supra* Part IIB.

<sup>268</sup> Or at least most forms of it. See Franke, *supra* note 111, at 766-67 (arguing that requests for sexual favors by gay supervisors or male employees should not be actionable as sexual harassment but rather as disparate treatment sex discrimination claims).

<sup>269</sup> *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998).

<sup>270</sup> *Id.* at 82.

other humiliating actions.<sup>271</sup> The district court and the Fifth Circuit dismissed the claim, holding that same-sex harassment was not actionable under Title VII.<sup>272</sup>

The Supreme Court reversed, without resort to grand theory.<sup>273</sup> Rather, Justice Scalia relied on the plain language of the statute and held that Title VII prohibits discrimination because of sex.<sup>274</sup> Thus, a victim must simply show that the conduct was directed at the plaintiff because of her sex.<sup>275</sup> In other words, she has suffered treatment that members of the other sex do not.<sup>276</sup> Same-sex harassment is therefore prohibited regardless of whether the harasser or the victim is homosexual.<sup>277</sup> The Court specifically discussed a showing of “direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace.”<sup>278</sup> In addition, the Court instructed lower courts to determine whether a hostile environment exists “from the perspective of the reasonable person in the plaintiff’s position, considering ‘all the circumstances.’”<sup>279</sup> The Court then offered an example of such circumstances: whether the football coach smacks the butt of his secretary in the office or one of his players on the field.<sup>280</sup> The Court then remanded for further proceedings.<sup>281</sup>

This simple statutory interpretation has created a great deal of confusion. First, the Court’s focus on the statutory language reinvigorates the “but for” test of sexual harassment. Some courts have strictly construed the “but for” test.<sup>282</sup> Unless a plaintiff can prove she was targeted for harassment because she is a woman, she cannot prove the “because of sex” requirement.<sup>283</sup> For example, if a workplace is rife with sexually derogatory language and sexually explicit comments and all employees are subject to this environment, the plaintiff will not be able to show that she experiences disadvantageous conditions that male employees do not experience.<sup>284</sup>

Second, in order to meet the “but for” test under the *Oncale* opinion, a plaintiff will need some sort of comparator group. That is, the plaintiff must show that she or he was treated differently than workers of the opposite sex. So plaintiffs like Mr. Oncale, who worked only with men, will be without a viable means to meet the test.

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<sup>271</sup> *Id.* at 77.

<sup>272</sup> *Id.*

<sup>273</sup> *Id.* at 75.

<sup>274</sup> *Id.* at 79-80.

<sup>275</sup> *Id.* at 81.

<sup>276</sup> *Id.* at 80.

<sup>277</sup> *Id.*

<sup>278</sup> *Id.* at 80-81.

<sup>279</sup> *Id.* at 81.

<sup>280</sup> *Id.*

<sup>281</sup> *Id.* at 82.

<sup>282</sup> See, e.g., *Berry v. Delta Airlines, Inc.*, 260 F.3d 803, 809 (7th Cir. 2001); *Holman v. Ind.*, 211 F.3d 399, 404 (7th Cir. 2000). See also *Leeser*, *supra* note 113, at 1752 (arguing that the “but-for” test has left plaintiffs in environments with a high level of harassment without a federal remedy).

<sup>283</sup> *Oncale*, 523 U.S. at 81.

<sup>284</sup> See *Ocheltree v. Scollo Prods., Inc.*, 308 F.3d 351, 356 (4th Cir. 2002), *vacated*, 335 F.3d 325 (4th Cir. 2003).

Although the full court eventually vacated the decision, the panel held that the vast majority of the conduct complained of occurred in the course of the male workers’ “daily bantering toward one another” and was simply overheard by the plaintiff. *Id.* at 357. Moreover, the men’s behavior did “not begin or change as of the date [the plaintiff] began working” for the employer. *Id.* Thus, she was not subject to any treatment that male workers were spared. *Id.* at 356. Of the three “arguably gender-related” incidents directed to the plaintiff, the court found that they did not rise to the level of severe or pervasive. *Id.* at 359.



For contra-power claims, *Oncale* provides the theoretical underpinnings of an actionable claim. As long as the victim-supervisor proves that she was the target of the conduct because of her sex, she has an actionable claim. In fact, Justice Scalia's emphasis on the statutory language makes various factual scenarios actionable under Title VII, including a same-sex, contra-power claim. Anticipating the criticism that Title VII will cease to be meaningful if any and all fact patterns fall within it, I have two responses. First, this is the import of Justice Scalia's decision. As long as the evidentiary standard is met for "because of sex," no claim is ruled out. Second, in practice, the claim will not be stretched beyond all meaning because the evidentiary issues will limit the successful claims.

Meeting the evidentiary burden in practice is difficult. In *Davis v. Coastal International Security, Inc.*, the plaintiff alleged that he was harassed by two subordinates who slashed his tires and made obscene verbal comments and gestures.<sup>285</sup> Noting that the plaintiff had disciplined the alleged harassers, the court found that "there is simply no evidence that they were harassing Mr. Davis because of their gender or because of his gender."<sup>286</sup> Thus, even though the plaintiff's claim was based at least in part on obscene comments and gestures, the court rejected any finding of "because of sex."<sup>287</sup> Similarly, in *Garcia v. V. Suarez & Co.*, the plaintiff alleged a hostile environment created by "salesmen touching each other's buttocks at work [and] making sexually explicit statements," culminating in a sexual encounter with a male subordinate in a hotel.<sup>288</sup> With respect to the generalized behavior, the court found that the plaintiff's claim foundered on the "because of sex" requirement.<sup>289</sup> "The [c]ourt's main concern is that the behavior complained of does not display any discrimination based on sex. It does not appear that Plaintiff was exposed to any disadvantageous condition of employment [to] which a female co-worker would not be exposed."<sup>290</sup> Although the court labeled the environment "inappropriate and explicit," it was not discriminatory on the basis of sex.<sup>291</sup> These decisions are both post-*Oncale* and are examples in practice of the criticisms against the opinion.<sup>292</sup>

Although these decisions seem to suggest that courts invoke the "because of sex" requirement to dismiss a claim by the plaintiff, there is one contra-power case which holds, in favor of the plaintiff, that the actions were "because of sex."<sup>293</sup> This final contra-power case discussing "because of sex" involves a woman harassed by a male subordinate.<sup>294</sup> The court found that the harasser's comments and behavior were "derogatory and insulting to women generally, and overtly demeaning to [the plaintiff] personally."<sup>295</sup> Further, his behavior "reflects an attitude that women are to be viewed as only objects of ridicule, abuse, or sexual pleasure."<sup>296</sup> The court adopted the "but for" test: "but for the fact that Cronin was a woman, she would not

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<sup>285</sup> *Davis v. Coastal Int'l Sec., Inc.*, 275 F.3d 1119, 1121-22 (D.C. Cir. 2002).

<sup>286</sup> *Id.* at 1122.

<sup>287</sup> *Id.* at 1123-25.

<sup>288</sup> *Garcia v. V. Suarez & Co.*, 288 F. Supp. 2d 148, 159 (D.P.R. 2003).

<sup>289</sup> *Id.* at 160.

<sup>290</sup> *Id.*

<sup>291</sup> *Id.*

<sup>292</sup> There is one pre-*Oncale* opinion involving a female plaintiff wherein the court parsed the evidence and found that hostility to a change in office protocol was the basis of some of the challenged behavior. *See Johnson v. Prof'l Servs. Group, Inc.*, No. 4-93-1197, 1996 WL 33324813, at \*7 (D. Minn. April 17, 1996).

<sup>293</sup> *Cronin v. United Serv. Stations*, 809 F. Supp. 922 (M.D. Ala. 1992).

<sup>294</sup> *Id.* at 925.

<sup>295</sup> *Id.* at 929.

<sup>296</sup> *Id.*

have been subject to such harassment.”<sup>297</sup> Therefore, the court found the “because of sex” requirement met.

What are the evidentiary issues for a contra-power case? Social science research hypothesizes that those lower in organizational status will harass to re-establish societal power. Men will harass when the supervisor is not “one of the guys” – either because this is literally true, in the case of a female supervisor, or because the supervisor is gay or perceived as gay.<sup>298</sup> A particular evidentiary problem for contra-power harassment is the very nature of the claim – the boss is being harassed. It is not unheard of to give the boss a difficult time. This, of course, begs the question. If the subordinates dislike the female supervisor because she is a female supervisor, then an actionable claim is present. It is the intersection of sex and power that causes the subordinates to react with harassing behavior. By singling out the female supervisors, the subordinates have chosen to harass “because of sex.” The fact that female co-workers are not harassed has no evidentiary bearing on whether the female supervisor has been singled out because of her sex. If this is the intersection between sex and power, the presence of “sex” in the calculation is enough to trigger liability under the statute.<sup>299</sup> Even if male supervisors are harassed as well as the female supervisors, a female supervisor may still be able to prove her claim, depending on the form the harassment takes. Take, for example, pornography. Deborah Tannen has argued that the use of pornography to harass women is different from the hazing male subordinates may give a new male boss.<sup>299a</sup> The mere existence of a woman with power is a challenge to masculine control of the workplace.

Thus, when a female supervisor is harassed by a subordinate and the harassment takes the form of sexualized, gender-role-enforcing behavior, a court should draw the inference that harassment is because of sex without requiring additional evidence.<sup>299b</sup> Although I agree with other commentators that courts should not focus exclusively on sexualized behavior, this behavior carries a sufficient sting such that courts may properly presume the behavior is “because of sex.” Conduct that seeks to remind a female supervisor that she does not deserve the position because she is a woman is behavior because of sex. Therefore, conduct aimed at undermining the authority and power of a female supervisor should carry evidentiary weight that the conduct is motivated “because of” the sex of the supervisor.

#### D. Severe or Pervasive to Alter the Terms or Conditions of Employment

In order to bring sexual harassment without a loss of an employment benefit within the purview of the statute, the conduct must effect a “term or condition” of employment.<sup>300</sup> Thus, the fourth element of a hostile environment claim is that the conduct at issue was sufficiently

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<sup>297</sup> *Id.*

<sup>298</sup> Again, the social science theories of harassment fail to provide an explanation for women harassing higher-status men, unless the higher-status men are of color or effeminate. *See, e.g.,* Rospenda et al., *supra* note 16, at 43-44, 50-52; Craig R. Waldo, Jennifer L. Berdahl & Louise F. Fitzgerald, *Are Men Sexually Harassed? If So, by Whom?*, 22 *LAW & HUM. BEHAV.* 59, 72-73 (1998).

<sup>299</sup> *See* Civil Rights Act of 1964 § 703(m), 42 U.S.C. § 2000e-2(m) (2006) (unlawful employment action present where sex is motivating factor).

<sup>299a</sup> Tannen, *supra* note 101a, at 87. “[Pornography, or any reference to sex, reminds the new manager that she is a woman . . . and that sex can be used as a format for physical attack.” *Id.*

<sup>299b</sup> Drawing this inference should serve to counteract difficulties caused by *Oncale*’s interpretation of “because of” sex. *See* Leaser, *supra* note 113, at 1767.

<sup>300</sup> *See* 42 U.S.C. § 2000e (2006).

severe or pervasive to alter the terms or conditions of the plaintiff's employment.<sup>301</sup> In *Harris v. Forklift Systems, Inc.*, the Supreme Court explained that this fourth element has both an objective and subjective component.<sup>302</sup> To prove this element, a plaintiff must establish that a reasonable person would find the conduct at issue sufficiently offensive to alter the terms or conditions of plaintiff's employment.<sup>303</sup> In addition, the plaintiff must establish she was subjectively offended.<sup>304</sup>

In *Harris*, the Supreme Court held that a plaintiff need not suffer actual psychological harm to bring a claim.<sup>305</sup> Rather, the Court stated that a fact finder must consider the "totality of the circumstances" to determine whether the conduct at issue was sufficiently severe or pervasive to alter the terms or conditions of the plaintiff's employment.<sup>306</sup> The Court offered a non-exhaustive list of factors for the fact finder to consider, including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance;" whether the conduct "unreasonably interferes with an employee's work performance;" and the "effect [of the conduct] on the employee's psychological well-being."<sup>307</sup> The Court added to this list in the *Oncale v. Sundowner Offshore Services Inc.* decision.<sup>308</sup> In discussing "all the circumstances" to be considered under the objective part of the severe or pervasive requirement, the Court noted the importance of the social context "in which particular behavior occurs and is experienced by the target."<sup>309</sup>

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<sup>301</sup> Every circuit requires a version of the "severe or pervasive" element. *See, e.g.*, *Pomales v. Celulares Telefonica, Inc.*, 447 F.3d 79, 83 (1st Cir. 2006); *Schiano v. Quality Payroll Sys.*, 445 F.3d 597, 603 (2d Cir. 2006); *Clegg v. Falcon Plastics, Inc.*, 174 F. App'x 18 at \*24 (3d Cir. 2006); *Howard v. Winter*, 446 F.3d 559, 565 (4th Cir. 2006); *McKinnis v. Crescent Guardian, Inc.*, No. 05-30728, 2006 WL 1880364, at \*2 (5th Cir. July 7, 2006); *Randolph v. Ohio Dep't of Youth Servs.*, 453 F.3d 724, 733 (6th Cir. 2006); *Valentine v. City of Chi.*, 452 F.3d 670, 681-82 (7th Cir. 2006); *Nitsche v. CEO of Osage Valley Elec. Coop.*, 446 F.3d 841, 845 (8th Cir. 2006); *Walpole v. City of Mesa*, 162 F App'x 715, 716 (9th Cir. 2006); *Fye v. Okla. Corp. Comm'n*, 175 F. App'x 207, 210 (10th Cir. 2006); *Mitchell v. Pope*, No. 05-14927, 2006 WL 1976011, at \*1 (11th Cir. July 14, 2006); *Lutkewitte v. Gonzales*, 436 F.3d 248, 258 (D.C. Cir. 2006); *Pope v. U.S. Postal Serv.*, 114 F.3d 1144, 1147 (Fed. Cir. 1997).

<sup>302</sup> *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-22 (1993).

<sup>303</sup> *Id.* at 21. The make-up of the hypothetical "reasonable person" in a hostile environment case has been the subject of much scholarly debate. *See, e.g.*, Saba Ashraf, Note, *The Reasonableness of the "Reasonable Woman" Standard: An Evaluation of Its Use in Hostile Environment Sexual Harassment Claims Under Title VII of the Civil Rights Act*, 21 HOFSTRA L. REV. 483, 496-504 (1992); Bernstein, *supra* note 119; Jolynn Childers, Note, *Is There a Place for a Reasonable Woman in the Law? A Discussion of Recent Developments in Hostile Environment Sexual Harassment*, 42 DUKE L.J. 854 (1993); Franke, *supra* note 111, at 747-52; Elizabeth L. Schoenfelt et al., *Reasonable Person Versus Reasonable Woman: Does It Matter?*, 10 AM. U. J. GENDER SOC. POL'Y & L. 633 (2002). For some time in the 1990s, there was a trend among some courts to adopt the reasonable woman test. *See* *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991) (beginning reasonable woman trend whereby plaintiffs were required to prove hostile environment claims by showing "conduct which a reasonable woman would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment"). When the Supreme Court handed down the *Harris* decision, it avoided any explicit discussion of this question. Rather, the Court discussed the "reasonable person" in its articulation of the severe or pervasive requirement without overtly rejecting the "reasonable woman" test. *See Harris*, 510 U.S. at 25.

<sup>304</sup> *Harris*, 510 U.S. at 22.

<sup>305</sup> *Id.*

<sup>306</sup> *Id.* at 23.

<sup>307</sup> *Id.*

<sup>308</sup> *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81-82 (1998).

<sup>309</sup> *Id.* The Court explained that the actual social impact of behavior in the workplace is dependent on several "surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed." *Id.* Thus, both common sense and the appropriate degree of responsiveness to social context will allow the courts and juries to "distinguish between simple teasing or

Similar to the other elements of the hostile environment claim, the severe or pervasive standard has received its fair share of criticism. First, because of the objective standard embedded in this requirement, the debate over the make-up of “reasonable person” applies to this fourth element.<sup>310</sup> Second, the severe or pervasive standard places a significant amount of harassing conduct beyond the reach of the law.<sup>311</sup> Third, this standard invites courts to substitute their own judgment for that of the community. Professor Beiner notes that courts often declare that no reasonable person could find the behavior sufficiently severe or pervasive, thereby taking the cases away from the jury.<sup>312</sup> By removing cases from the jury, “judges are impeding the development of a community standard” of what is unacceptable sexual harassment.<sup>313</sup> Finally, the inclusion by the *Oncale* court of the “social context” as one of the circumstances to be considered engendered much criticism.<sup>314</sup>

The question then for a contra-power harassment case is whether the organizational status of the harasser vis-a-vis the victim is a “circumstance” which should be considered. Although

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roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff’s position would find severely hostile or abusive.” *Id.* at 82.

<sup>310</sup> See, e.g., Abrams, *supra* note 116, at 1223-24. Abrams advocates retaining the method of assessing the sufficiency of the pervasive requirement from the standpoint of a reasonable person. *Id.* at 1223. Yet Abrams proposes that the reasonable person standard should be subject to an “elaboration,” where the term “reasonable” should be understood as characterizing a “person with a solid base of political knowledge regarding sexual harassment.” *Id.* at 1224. Abrams explains, “such knowledge includes understanding the ways in which sexism has operated on women in the workplace,” and also “understanding the ways in which a sex and gender hierarchy impinges on nonconforming women and men.” *Id.* The effects of sex-based struggles in the workplace and the use of sexual harassment “as a means of male control and masculine normative entrenchment encapsulates many of the understandings that this reasonable person should have.” *Id.* See also Franke, *supra* note 111, at 752. Franke argues that while Abrams’s proposed standard has merit, it should be taken one step further. *Id.* The reasonable person must be informed on the “underlying causes of women’s inequality, including the sexual harassment of men who deviate from a hetero-patriarchal script.” *Id.* Thus, Franke argues that the “reasonable person be educated in and sensitive to the ways in which sexism can and does limit workplace options for all persons, male or female.” *Id.*

<sup>311</sup> See Johnson, *supra* note 15, at 134-42 (arguing that continued use of “severe or pervasive” requirement by Supreme Court has encouraged lower courts to continue demanding high level of offensive conduct from hostile environment plaintiffs, effectively tolerating high degree of opprobrious conduct); e. christi cunningham, *Preserving Normal Heterosexual Male Fantasy: The “Severe or Pervasive” Missed-Interpretation of Sexual Harassment in the Absence of a Tangible Job Consequence*, 1999 U. CHI. LEGAL F. 199, 228-30 (1999) (arguing that while “nothing in Title VII legitimates limiting individuals to a certain degree of equality and no more,” severe or pervasive requirement protects “fantasy of normal male sexuality” by excluding from reach of Title VII conduct which propagates inequality yet is considered “normal” by male heterosexuality standards); Heather L. Kleinschmidt, Note, *Reconsidering Severe or Pervasive: Aligning the Standard in Sexual Harassment and Racial Harassment Causes of Action*, 80 IND. L.J. 1119, 1123-29 (2005) (comparing practical application of “severe or pervasive” requirement in racial versus sexual harassment cases, and arguing that in latter claims courts, particularly Seventh Circuit, have developed more stringent “severe and pervasive” standard making it more difficult for plaintiffs to establish hostile working environment).

<sup>312</sup> Beiner, *supra* note 79, at 21.

<sup>313</sup> *Id.* at 30.

<sup>314</sup> Many commentators have soundly criticized the “social context” portion of the *Oncale* decision. See, e.g., Michael J. Frank, *The Social Context Variable in Hostile Environment Litigation*, 77 NOTRE DAME L. REV. 437, 515-30 (2002); Melissa K. Hughes, Note, *Through the Looking Glass: Racial Jokes, Social Context, and the Reasonable Person in Hostile Work Environment Analysis*, 76 S. CAL. L. REV. 1437, 1456-82 (2003); Rebecca K. Lee, *Pink, White and Blue: Class Assumptions in the Judicial Interpretations of Title VII Hostile Environment Sexual Harassment*, 70 BROOKLYN L. REV. 677, 685-88 (2005). Some courts have managed to interpret *Oncale* so as not to require a differentiation between workplaces. See, e.g., *Dawson v. County of Westchester*, 373 F.3d 265 (2d Cir. 2004); *Williams v. Gen. Motors Corp.*, 187 F.3d 553 (6th Cir. 1999); *Smith v. Sheahan*, 189 F.3d 529 (7th Cir. 1999).

some of the contra-power decisions simply recite the allegations and hold that the conduct either was or was not severe or pervasive enough,<sup>315</sup> other courts explicitly discuss the contra-power nature of the harassment.<sup>316</sup> These courts expressed doubts about the intimidating nature of the working environment given the contra-power nature of the facts. For example, in *Kirkland v. Brinias*, the court found that the plaintiffs were “subjected to sexual harassment on the job.”<sup>317</sup> However, the court diminished the import of the harassment. “[U]nlike the situation in the typical harassment case, the unwelcome behavior came from a subordinate, not a supervisor.”<sup>318</sup> The contra-power relationship was the “most important” fact to the court in *Odom v. St. Louis*

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<sup>315</sup> For decisions finding that the requirement is met, see *Jones v. U.S. Gypsum*, No. C99-3047-MWB, 2000 WL 196616, at \*3 (N.D. Iowa Jan. 21, 2000) (holding that after considering all circumstances, “complaint contains sufficient allegations of a single episode severe enough to create an actionable hostile work environment”); *Lewis v. Sugar Creek Stores, Inc.*, No. 96-CV-0100E(H), 1996 WL 685730, at \*5 (W.D.N.Y. Nov. 25, 1996) (noting that if harassment complained of is proven, which involved “continuing pattern of degrading remarks, requests for sex or sexual contact and attempted and actual contact in the most intimate areas,” would be both “sufficiently pervasive and severe to constitute a hostile environment”); *Humphreys v. Med. Towers, Ltd.*, 893 F. Supp. 672, 683 (S.D. Tex. 1995) (holding requirement was satisfied when plaintiff’s subordinate “instructed contractors not to deal” with plaintiff and verbally harassed her as such behavior “could have impaired Humphreys’ ability to do her job and altered her working conditions as a building manager”); *Ott v. Perk Dev. Corp.*, 846 F. Supp. 266, 273 (W.D.N.Y. 1994) (ruling that although only one of incidents complained of could be considered as blatantly “of a sexual nature,” “totality of the circumstances” show plaintiff met her burden in proving she was subject to unwelcome harassment due to her gender and that employer’s conduct was severe or pervasive enough to alter conditions of employment); *Cronin v. United Serv. Stations, Inc.*, 809 F. Supp. 922, 929-30 (M.D. Ala. 1992) (stating that “combination of sexual overtures, demeaning comments, and physical abuse” aimed at plaintiff created environment that adversely affected her ability to perform her job and her psychological well-being). For decisions finding that the requirement is not met, see *Pfahl v. Synthes (USA)*, 13 F. App’x 832, 835 (10th Cir. 2001) (holding that totality of conduct involving four allegations did not amount to abusive working environment); *Garcia v. V. Suarez & Co.*, 288 F. Supp. 2d 148, 160 (D.P.R. 2003) (stating that there was no specific act directed at plaintiff and therefore no evidence of severe or pervasive conduct); *Johnson v. Prof’l Servs. Group*, No. 4-93-1197, 1996 WL 33324813, at \*6 (D. Minn. April 17, 1996) (holding requirement was not met where plaintiff was viewed as distrustful by subordinates and subjected to occasional uncivil behavior, as Title VII does not protect against such “snubs, criticisms, and discourteous conduct”); *Perkins v. Gen. Motors Corp.*, 709 F. Supp. 1487, 1501 (W.D. Mo. 1989) (“Perkins has failed to satisfy her burden that the few credible unwelcome incidents *reasonably* affected a term, condition or privilege of her employment.” (alteration in original)); *Otterstedt v. U.S. Postal Serv.*, 96 M.S.P.R. 688, 694 (2004) (noting that incidents complained of did not involve conduct that could be designated as abusive, severe or pervasive so as to constitute harassment, even when considered as whole). One court, although denying summary judgment for the employer, questioned whether the plaintiff was subjectively offended by the conduct. See *Mingo v. Roadway Express, Inc.*, 135 F. Supp. 2d 884, 899-900 (N.D. Ill. 2001). Several decisions do not discuss the requirement. See *Davis v. Coastal Int’l Sec., Inc.*, 275 F.3d 1119 (D.C. Cir. 2002); *Ward v. Bechtel Corp.*, 102 F.3d 199 (5th Cir. 1997); *Wilson v. Univ. of Tex. Health Ctr.*, 973 F.2d 1263 (5th Cir. 1992); *Needham v. BI, Inc.*, No. 00 C 1550, 2001 WL 558144 (N.D. Ill. May 21, 2001); *Malladi v. Brown*, 987 F. Supp. 893 (M.D. Ala. 1997); *Wilson v. Univ. of Tex. Health Ctr.*, 773 F. Supp. 958 (E.D. Tex. 1991).

<sup>316</sup> See *DeAngelis v. El Paso Mun. Police Officers Ass’n*, 51 F.3d 591, 596 (5th Cir. 1995); *Erebia v. Chrysler Plastic Prods. Corp.*, 772 F.2d 1250, 1260-61 (6th Cir. 1985); *Hill v. K-Mart Corp.*, 699 F.2d 776, 778 (5th Cir. 1983); *Odom v. St. Louis Cmty. Coll.*, 36 F. Supp. 2d 897, 903 (E.D. Mo. 1999), *aff’d*, 205 F.3d 1347 (8th Cir. 2000); *Kirkland v. Brinias*, 741 F. Supp. 692, 698 (E.D. Tenn. 1989), *aff’d*, 944 F.2d 905 (6th Cir. 1991).

<sup>317</sup> *Kirkland*, 741 F. Supp. at 698.

<sup>318</sup> *Id.* The court found for the defendants because although “some misconduct was of a sexually offensive nature that would create a hostile and intimidating working environment for a reasonable person under those circumstances, there is no hint that it had any harmful psychological effect on the plaintiffs.” *Id.* *Kirkland* was decided prior to the Supreme Court’s *Harris* opinion wherein the Court held that psychological harm is not necessary for a successful hostile environment claim. See *supra* note 189.

*Community College*.<sup>319</sup> The court noted that the plaintiff was the one in a position of authority and could determine the conditions of employment for the subordinate.<sup>320</sup> Because, at times, the plaintiff was solely in charge of the office, the court held a “subordinate employee could not have created an environment so pervasively hostile or abusive that it would have affected a term or condition of a reasonable supervisor’s employment.”<sup>321</sup> Similarly, the court in *DeAngelis v. El Paso Municipal Police Officers Ass’n* opined that the plaintiff’s Title VII case was not compelling.<sup>322</sup> Factoring in the decision was that the plaintiff was not “preyed upon by a superior,” but was in a “command position” herself.<sup>323</sup> Thus, the totality of circumstances did not equate to a severe or pervasive hostile environment.<sup>324</sup>

The plaintiff’s position of authority also contributed to a finding for the defendant in *Hill v. K-Mart Corp.*<sup>325</sup> Hill was a black female supervisor who brought Title VII and §1981 charges against her employer, K-Mart, for racial and sexual harassment by subordinates.<sup>326</sup> One subordinate who made a racial slur was a white female and the other was of an unidentified race and gender.<sup>327</sup> Hill also complained about a white male subordinate who harassed her, but the court noted that this subordinate treated all supervisors with equal disrespect regardless of race or gender.<sup>328</sup> Of major importance to the decision was the fact that the two racial incidents did not significantly impact Hill’s position of authority.<sup>329</sup> The court was convinced that Hill “stood above” the remarks and that her position suffered nothing as a result.<sup>330</sup> Thus, it found that the record of harassment was not severe or pervasive enough.<sup>331</sup>

One of the most straightforward discussions of the interaction between contra-power harassment and the “severe or pervasive” requirement is from a race discrimination case. In *Erebria v. Chrysler Plastic Products Corp.*, Judge Kennedy wrote a strong dissenting opinion that questioned the ability of a subordinate to create a hostile environment.<sup>332</sup> The dissent thought the evidence of racial hostility was insufficient to support a claim.<sup>333</sup> At any single time during Erebria’s tenure, depending on the department, he was subject to racial slurs by a single white male subordinate.<sup>334</sup> The dissent opined that Erebria’s claim that a single subordinate making

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<sup>319</sup> See *Odom*, 36 F. Supp. 2d at 903 (stating that contra-power situation “differs drastically from the common situation where a superior creates or fosters an environment so harmful or threatening to a subordinate” that it affects term or condition of employment).

<sup>320</sup> *Id.*

<sup>321</sup> *Id.*

<sup>322</sup> *DeAngelis v. El Paso Mun. Police Officers Ass’n*, 51 F.3d 591, 596 (5th Cir. 1995).

<sup>323</sup> See *id.* (implying that only when harassing conduct is committed by superior can such actions be “interpreted as an abuse of power” against target).

<sup>324</sup> *Id.*

<sup>325</sup> *Hill v. K-Mart Corp.*, 699 F.2d 776, 778 (5th Cir. 1983).

<sup>326</sup> *Id.* at 776-77.

<sup>327</sup> *Id.* at 777.

<sup>328</sup> *Id.* at 778.

<sup>329</sup> See *id.* (stating that “only evidence of a negative effect was Hill’s conclusional statement that the two episodes placed her in a bad light” and that after examining record as whole, Hill’s tenure after slurs was still “successful and indicated no lack of respect or dignity”).

<sup>330</sup> *Id.*

<sup>331</sup> *Id.* See also *Mingo v. Roadway Express, Inc.*, 135 F. Supp. 2d 884, 899-900 (questioning whether plaintiff was subjectively offended but denying summary judgment to employer due to genuine issue of material fact).

<sup>332</sup> *Erebria v. Chrysler Plastic Prods. Corp.*, 772 F.2d 1250, 1260-61 (6th Cir. 1985) (Kennedy, J., dissenting).

<sup>333</sup> *Id.* at 1260.

<sup>334</sup> *Id.*

racial slurs “dominated the foreman’s working environment” was the “weakest case of all.”<sup>335</sup> It continued by showing examples of other cases where the hostile environment was more widespread and stated that “the bigotry of one subordinate does not poison the working atmosphere to the extent it was poisoned in these cases.”<sup>336</sup>

It is this very attitude which necessitates a focus on the contra-power claim and a change to the “totality of the circumstances” approach. Courts should not consider the organizational relationship between the harasser and harassee at this point in the analysis. Rather, courts should consider whether the behavior at issue is sufficiently severe or pervasive to alter the plaintiff’s working environment without regard to the organizational status of the harasser. If it is, then the court should not underestimate the effect that harassment may have simply because the harasser(s) is a subordinate. If anything, social science tells us that contra-power harassment is less welcome and more upsetting behavior than “typical” cases.<sup>337</sup>

This change will not adversely impact claims of women harassed by supervisors or co-workers. First, my proposal has no impact on quid pro quo claims. A court engages in an analysis of the “totality of the circumstances” only for a hostile environment claim. An employee who suffers a loss of a tangible employment benefit at the hands of her supervisor has a quid pro quo claim. Thus, a quid pro quo claim may only be brought by an employee harassed by a supervisor. The organizational status of the parties is the heart of the claim. Second, for claims of a hostile environment created by co-workers, the plaintiff suffers no detriment by ignoring the organizational status of the actors involved. The only potential detriment lies in claims for hostile environments created by a supervisor. However, the organizational status of the parties would have no effect on a finding of pervasiveness. Because courts interpret pervasiveness as “frequency” – something either is pervasive or it is not. Thus, the only scenario wherein setting aside the organizational status of the parties would have a potential negative effect on the plaintiff is in determining the “severity” of the conduct engaged in by a supervisor. The standard is that the conduct be severe or pervasive; it need not be both. Thus, a plaintiff should be able to prove that the behavior meets this standard without a discussion of the organizational status of the parties.

By setting aside the hierarchical relationship of the parties, contra-power claims should receive greater attention from the courts without negatively impacting other hostile environment claims. The only place the organizational status of the parties should be considered is in the final element – employer liability.

## V. Employer Liability

Employer liability, or the lack thereof, is one of the most common reasons for a plaintiff to lose in her sexual harassment claim.<sup>338</sup> Title VII proscribes certain employment practices of

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<sup>335</sup> See *id.* at 1260-61. The dissent compares Erebria’s claim to other situations involving harassment, arguing that racial harassment that is “directed at an employee by a single supervisor can sufficiently poison the employee’s working atmosphere, since a supervisor can dominate the workplace with respect to his subordinate.” *Id.* at 1260. The dissent further argues that attitudes of several co-workers can additionally “control one’s working atmosphere.” *Id.*

<sup>336</sup> *Id.* at 1261.

<sup>337</sup> Wayne, *supra* note 16, at 319.

<sup>338</sup> Juliano & Schwab, *supra* note 178, at 589.

“employers.”<sup>339</sup> As Justice Marshall noted, most employment decisions are carried out by individuals.<sup>340</sup> Anticipating this, Congress included “agents” within the definition of “employer.”<sup>341</sup> Thus, the plaintiff must show some reason why the employer, as an entity, should be liable for the actions of its agents. The correct standard to hold an employer liable has been much debated by academics and caused much confusion in the courts.<sup>342</sup>

This confusion was initially caused by the Supreme Court’s failure to provide definitive standards in its *Meritor Savings Bank v. Vinson* decision.<sup>343</sup> In *Meritor*, the Court explicitly “decline[d] the parties’ invitation to issue a definitive rule on employer liability.”<sup>344</sup> Noting that Congress defined employer to include any agent of the employer, the Court concluded that Congress intended “to place some limits on the acts of employees for which employers under Title VII are to be held responsible.”<sup>345</sup> The Court therefore rejected the Court of Appeals and the EEOC Guidelines, which held employers absolutely liable for sexual harassment by supervisors regardless of the notice the employer received.<sup>346</sup> For the same reasons, the Court held that a lack of notice to the employer does not insulate the employer from liability.<sup>347</sup> The Court specifically held that the existence of a grievance procedure and a policy against discrimination along with the victim’s failure to invoke that procedure does not insulate an employer from liability.<sup>348</sup> Without further explication, the Court stated that agency principles should apply to determine liability.<sup>349</sup>

Justice Marshall concurred in the judgment but wrote separately on the question of employer liability.<sup>350</sup> Justice Marshall discussed the EEOC Guidelines, which he believed are entitled to great deference.<sup>351</sup> Under the Guidelines, an employer would be liable for the actions of its supervisory employees regardless of the notice given to the employer.<sup>352</sup> For sexual

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<sup>339</sup> 42 U.S.C. § 2000e-2(a) (2006). For a discussion of the unlawful employment practices proscribed by Title VII, see *infra* notes 6-14 and accompanying text.

<sup>340</sup> *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 75 (Marshall, J, concurring) (“An employer can act only through individual supervisors and employees; discrimination is rarely carried out pursuant to a formal vote of a corporation’s board of directors.”).

<sup>341</sup> See 42 U.S.C. § 2000e (b) (2006).

<sup>342</sup> *Faragher v. City of Boca Raton*, 524 U.S. 775, 785 (1998) (“Since our decision in *Meritor*, Courts of Appeals have struggled to derive manageable standards to govern employer liability for hostile environment harassment perpetrated by supervisory employees.”).

<sup>343</sup> *Meritor*, 477 U.S. 57.

<sup>344</sup> *Id.* at 72. The Court also seemed reluctant to issue a definitive employer liability rule based on the fact that the “debate over the appropriate standard for employer liability has a rather abstract quality about it given the state of the record in this case.” *Id.* The Court pointed out that they were presently unsure of whether defendant Taylor had “made any sexual advances toward respondent at all, let alone whether those advances were unwelcome, whether they were sufficiently pervasive to constitute a condition of employment,” and finally, if they were so pervasive and continuous as to imply constructive knowledge on the employer’s part. *Id.*

<sup>345</sup> *Id.*

<sup>346</sup> *Id.*

<sup>347</sup> *Id.*

<sup>348</sup> *Id.* The Court suggested that the facts before it provided the very reason why the employer may still be liable. The nondiscrimination policy of the Bank did not address sexual harassment specifically, and the grievance procedure required employees to complain to their supervisor first. Given that the plaintiff’s supervisor was the alleged harasser, “it is not altogether surprising that respondent failed to invoke the procedure and report her grievance to him.” *Id.* at 73.

<sup>349</sup> *Id.* at 72.

<sup>350</sup> *Id.* at 74 (Marshall, J, concurring).

<sup>351</sup> *Id.*

<sup>352</sup> *Id.*



harassment perpetrated by co-workers, the employer would be responsible for acts where the employer “knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.”<sup>353</sup> Justice Marshall rejected the argument that hostile environment cases require notice to the employer before liability attached whereas cases with a tangible job detriment to the plaintiff trigger absolute liability.<sup>354</sup> “No such requirement appears in the statute, and no such requirement can coherently be drawn from the law of agency.”<sup>355</sup> Justice Marshall would therefore craft a rule wherein the employer is liable for the sexual harassment by a supervisor regardless of notice to the employer.

#### A. Current State of the Law

After twelve years of disagreement amongst the Circuits as to the results of these agency principles, the Supreme Court issued a pair of cases that clarified the standards for employer liability in cases involving sexual harassment by a supervisor.<sup>356</sup> In *Burlington Industries, Inc. v. Ellerth* and *Faragher v. City of Boca Raton*, the Court held that an employer is vicariously liable for sexual harassment by a supervisor where the harassment results in tangible employment action.<sup>357</sup> For cases without a tangible employment action but rather involving a hostile environment created by the actions of a supervisor, the employer is vicariously liable but retains a two-part affirmative defense.<sup>358</sup> To avoid liability, the employer must prove “(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”<sup>359</sup>

The Court based its decisions on agency principles found in the Restatement (Second) of Agency, the holding of *Meritor* and the inclusion of damages in the 1991 Civil Rights Act. Because the definition of “employer” in Title VII includes “agents,” the Court turned to the

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<sup>353</sup> *Id.* at 74 (quoting EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. §§ 1604.11(c), (d) (1985)).

<sup>354</sup> *Id.* at 76-77. Justice Marshall argued that the responsibilities of supervisors “do not begin and end with the power to hire, fire, and discipline employees,” yet extend to both the “day-to-day supervision of the work environment and with ensuring a safe, productive workplace.” *Id.* at 76. Justice Marshall further argued that there is no justification as to why an “abuse of the latter authority should have different consequences than abuse of the former,” as in both situations “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.” *Id.* at 76-77.

<sup>355</sup> *Id.* at 77.

<sup>356</sup> *Burlington Indus, Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

<sup>357</sup> See *Ellerth*, 524 U.S. at 760-61 (citing *Meritor*, 477 U.S. at 70-71); *Faragher*, 524 U.S. at 790 (citing *Meritor*, 477 U.S. at 70-71 for same provision). The continued demarcation between cases with tangible employment actions (quid pro quo cases) and those without has placed great weight on the definition of “tangible employment action.”

<sup>358</sup> *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

<sup>359</sup> *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807. The Court in both decisions notes that the affirmative defense is subject to proof by a preponderance of the evidence. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807. “While proof that an employer had promulgated an anti-harassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense.” *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807. The Court also adds “while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing any unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer’s burden under the second element of the defense.” *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807-08. See also Ryan P. Harley, Note, *Sexual Harassment in the Workplace – Prompt and Remedial Action as a Measure of Employer Liability Under Title VII of the Civil Rights Act of 1964*, 27 WHITTIER L. REV. 533 (2005) (discussing fact patterns that meet, or fail to meet, affirmative defense).

Restatement. The Court considered the various methods of imposing liability under the Restatement section 219.<sup>360</sup> The Court rejected imposing liability under a “scope of employment” test, holding that generally, “sexual harassment by a supervisor is not conduct within the scope of employment.”<sup>361</sup> Rather, the harassing supervisor acts out of personal motives and/or motives antithetical to the interests of the employer.<sup>362</sup>

The Court then considered the various methods for imposing liability under section 219(2) of the Restatement (Second) of Agency.<sup>363</sup> Section 219(2) describes those instances in which an employer is liable for acts committed by an employee acting outside of the scope of employment.<sup>364</sup> The section embodies four principles: the employer intended the conduct of the consequences; the employer was negligent or reckless; the conduct violated a non-delegable duty of the employer; or the servant purported 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 relationship.<sup>365</sup> The Court rejected the first (direct and indirect liability) and the third (non-delegable duty) as irrelevant to the particular case.<sup>366</sup>

Turning to the question of negligence, the Court found that an employer may be liable for harassment, although outside of the scope of employment, where the employer’s own negligence is a cause of the harassment.<sup>367</sup> Further, the Court found that negligence is a “minimum standard of employer liability under Title VII” wherein an employer is liable if it knew or should have

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<sup>360</sup> RESTATEMENT (SECOND) OF AGENCY § 219 (1958).

<sup>361</sup> See RESTATEMENT (SECOND) OF AGENCY § 219(1) (1958) (stating that “master is subject to liability for the torts of his servants committed while acting in the scope of employment”). See also *Ellerth*, 524 U.S. at 755-57; *Faragher*, 524 U.S. at 793-801. Although the *Ellerth* decision rejects liability under the “scope of employment” test, the Court did note that “[t]here are instances, of course, where a supervisor engages in unlawful discrimination with the purpose, mistaken or otherwise, to serve the employer.” *Ellerth*, 524 U.S. at 757. The *Faragher* opinion contains a longer discussion of the “scope of employment” basis for imposing liability. The *Faragher* opinion notes that the cases holding that sexual harassment falls outside of the scope of employment are “in tension” with those cases outside of the Title VII context where the scope of employment has been defined broadly. *Faragher*, 524 U.S. at 794. Some courts have included sexual assaults within the scope of employment. *Id.* at 795. The Court considered whether the costs of sexual harassment should be placed on the employer through a broad definition of scope of employment rather than on the employee. However, the Court found two reasons not to do so: congressional intent and distinction between co-worker harassment and supervisor harassment. *Id.* at 798-800. First, the Court found that there was no evidence that Congress intended courts to ignore the distinction between acts falling within the scope and actions falling outside the scope. *Id.* at 798. Because acts of harassment would generally be defined as outside of the scope of harassment, the Court chose to apply the traditional agency principles. *Id.* at 799. Second, the Court noted the lower courts, by employing a negligence standard for co-worker harassment, have determined harassment to be outside the scope of co-workers’ duties as well. *Id.* If the scope of employment reasoning was used to require the employer to bear the costs of harassment for supervisors, the same logic would apply to co-worker harassment. *Id.* at 800. Therefore, the Court rejected the scope of employment as a basis for employer liability for supervisory harassment. *Id.* at 801.

<sup>362</sup> *Ellerth*, 524 U.S. at 757; *Faragher*, 524 U.S. at 794.

<sup>363</sup> See *Ellerth*, 524 U.S. at 758-64. See also *Faragher*, 524 U.S. at 801-07. In the *Faragher* opinion, the Court focused more on a specific evaluation of the use of § 219(2)(d) as a standard for imposing liability on employers as opposed to a comprehensive examination of all four standards within § 219(2). *Id.*

<sup>364</sup> RESTATEMENT (SECOND) OF AGENCY § 219(2) (1958).

<sup>365</sup> *Id.*

<sup>366</sup> *Ellerth*, 524 U.S. at 759. Note, however, that the Court did not exclude the possibility that some supervisors who harass will be of sufficiently high rank in the company, making him or her the employer’s alter ego. *Id.* As such, the employer will be indirectly liable for the harassment. *Id.*

<sup>367</sup> *Ellerth*, 524 U.S. at 758-59.

known about the conduct and failed to stop it.<sup>368</sup> However, the Court went on to consider whether a stricter standard should apply.

The last possibility under section 219(2) involves vicarious liability for intentional torts committed when the employee uses apparent authority or when the employee “was aided in accomplishing the tort by the existence of the agency relation.”<sup>369</sup> The *Ellerth* Court quickly rejected the apparent authority theory because “a supervisor’s harassment involves the misuse of actual power, not the false impression of its existence.”<sup>370</sup> Thus, the Court grounded its decision in the “aided in the agency relation” rule.

The Court noted that all torts in the workplace are aided by the existence of the agency relationship because the relationship allows for proximity and contact with potential victims.<sup>371</sup> However, if liability depended solely on this formulation, then the employer would be liable for all harassment committed by supervisors and co-workers.<sup>372</sup> Therefore, the Court held that there must be something more than the employment relation itself to impose vicarious liability.<sup>373</sup> It found that “something more” in those cases where the supervisor takes a tangible employment action.<sup>374</sup> Where there is a tangible employment action, there is a direct economic injury and an official act of the company, often reviewed by higher-level supervisors.<sup>375</sup> This injury could not have been inflicted in the absence of the agency relation and only a supervisor can cause this sort of injury.<sup>376</sup> Therefore, in regard to the requirements of the aided in the agency standard, the Court held, “its requirements will always be met when a supervisor takes a tangible employment action against a subordinate. In that instance, it would be implausible to interpret agency principles to allow an employer to escape liability . . . .”<sup>377</sup>

Turning to those cases where there is no tangible employment action, the Court found the aided in the agency relationship more difficult to apply. A supervisor’s harassing conduct is that much more menacing due to the supervisor’s power and authority.<sup>378</sup> In that way, a supervisor is always aided in the agency relationship.<sup>379</sup> However, some acts of harassment by a supervisor could be the same acts as those of a co-employee.<sup>380</sup> The Court referred to this aspect of the

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<sup>368</sup> *Id.* at 759.

<sup>369</sup> *Ellerth*, 524 U.S. at 759 (quoting RESTATEMENT (SECOND) OF AGENCY § 219(2) (1958)). *See also Faragher*, 524 U.S. at 801 (quoting same provision).

<sup>370</sup> *Ellerth*, 524 U.S. at 759. The Court held that in the unusual case of a false impression that the actor was indeed a supervisor, the victim’s mistake must be a reasonable one. *Id.*

<sup>371</sup> *Ellerth*, 524 U.S. at 760. “In a sense, most workplace tortfeasors are aided in accomplishing their tortious objective by the existence of the agency relation: Proximity and regular contact may afford a captive pool of potential victims.” *Id.*

<sup>372</sup> *Id.* (noting that this is “result enforced by neither the EEOC nor any court of appeals to have considered the issue”).

<sup>373</sup> *Id.*

<sup>374</sup> *Ellerth*, 524 U.S. at 760. The Court defined tangible employment action as a “significant change in employment status, such as hiring, firing, failure to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.” *Id.* at 761.

<sup>375</sup> *Id.* at 762.

<sup>376</sup> *See id.* (explaining further that employment actions that are tangible “fall within the special province of the supervisor,” as supervisors are empowered by their companies as “distinct class of agent[s] to make economic decisions affecting other employees” under their control).

<sup>377</sup> *Ellerth*, 524 U.S. at 762-63.

<sup>378</sup> *Id.* at 763; *Faragher*, 524 U.S. at 803 (noting that “victim may well be reluctant to accept the risks of blowing the whistle on a superior”).

<sup>379</sup> *Ellerth*, 524 U.S. at 763; *Faragher*, 524 U.S. at 802.

<sup>380</sup> *Ellerth*, 524 U.S. at 763.

aided in the agency relationship as a “developing feature of agency law” and “hesitate[d] to render a definitive explanation of our understanding of the standard . . . .”<sup>381</sup> The *Faragher* Court approved in a general manner of the imposition of vicarious liability for misuse of supervisory authority. However, the Court noted that it must “square” this principle with the decision in *Meritor* that an employer is not automatically liable.<sup>382</sup> Further, Congress had not altered the *Meritor* rule, but rather made significant changes to Title VII while cognizant of *Meritor*’s precedent.<sup>383</sup> The *Faragher* Court determined that there were two possibilities to reconcile these two principles.<sup>384</sup> Under the first possibility, the plaintiff would need to show proof that the harassing supervisor engaged in some sort of affirmative invocation of supervisory authority.<sup>385</sup> The Court rejected this approach as too difficult to determine, not practical and litigation-producing.<sup>386</sup> The second alternative, and the one the Court adopted, is the creation of the two-part affirmative defense.<sup>387</sup> Both the *Faragher* and *Ellerth* decisions summoned the goals of Title VII in support of the affirmative defense for employers. Title VII is intended to avoid harm through the creation of anti-harassment policies and effective grievance procedures.<sup>388</sup> Further, limiting employer liability could “encourage employees to report harassing conduct before it becomes severe or pervasive,” which would serve Title VII’s deterrent purpose.<sup>389</sup> The Court limited this holding to cases involving “an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee.”<sup>390</sup>

Although superficially resolving the debate about employer liability, the *Faragher/Ellerth* standard has earned its fair share of criticism.<sup>391</sup> Joanna Grossman, an astute critic of employer liability standards, refers to these cases as a “victory for the misguided culture of compliance.”<sup>392</sup> Employers, according to Grossman, may insulate themselves from liability

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<sup>381</sup> *Ellerth*, 524 U.S. at 763. For a more expansive reading of the aided in the agency standard, see Carle, *supra* note 27a, at 91 (arguing that some co-workers possess informal power vested in them by employers to alter the terms and conditions of employment).

<sup>382</sup> *Faragher*, 524 U.S. at 804. See also *Ellerth*, 524 U.S. at 763 (explaining that they are “bound by our holding in *Meritor* that agency principles constrain the imposition of vicarious liability in cases of supervisory harassment”).

<sup>383</sup> *Faragher*, 524 U.S. at 804 n.4; *Ellerth*, 524 U.S. at 763-64.

<sup>384</sup> *Faragher*, 524 U.S. at 804.

<sup>385</sup> *Id.*

<sup>386</sup> *Id.* at 804-05.

<sup>387</sup> *Id.* at 805.

<sup>388</sup> *Ellerth*, 524 U.S. at 764; *Faragher*, 524 U.S. at 806.

<sup>389</sup> *Ellerth*, 524 U.S. at 764.

<sup>390</sup> *Id.* at 765; *Faragher*, 524 U.S. at 807. Justice Thomas, with Justice Scalia joining, dissented. See *Ellerth*, 524 U.S. at 766-74 (Thomas, J., dissenting); *Faragher*, 524 U.S. at 810-11 (Thomas, J., dissenting). Justice Thomas described the standards for employer liability for racial hostile environment cases as solely that of negligence. *Ellerth*, 524 U.S. at 768. He argued that the standards for racial hostile environments and hostile environments based on sex should be the same and that the standard should be a negligence standard. *Id.* at 769-71. He criticized the majority’s holding as lacking support from agency principles and as violating the premise of *Meritor* that employers are not automatically liable. *Id.* at 771-74.

<sup>391</sup> One student note suggested that the decisions would make the grant of summary judgment for employers a more difficult decision because the standards are so fact intensive. See Tara Kaesbier, Note, *Employer Liability in Supervisor Sexual Harassment Cases: The Supreme Court Finally Speaks*, 31 ARIZ. ST. L.J. 203, 223-24 (1999). Cf. Carle, *supra* note 27a, at 93-94 (informal survey shows plaintiffs are losing sexual harassment cases at the summary judgment stage based on the assertion of the affirmative defense).

<sup>392</sup> Joanna L. Grossman, *The Culture of Compliance: The Final Triumph of Form Over Substance in Sexual Harassment Law*, 26 HARV. WOMEN’S L.J. 3, 3 (2003) (arguing through article for abolition of affirmative defense, increase in availability of punitive damages, and creation of individual supervisory liability for harassment). See

without making a dent in the prevalence of sexual harassment.<sup>393</sup> Another commentator has argued that the liability standards have caused employers to discharge those accused of sexual harassment, leading to a “paradox” of liability for employers.<sup>393a</sup>

### B. The Negligence Standard

Although the *Faragher* and *Ellerth* decisions did not explicitly set forth a standard for co-worker harassment, the Supreme Court did describe negligence as the “minimum” standard under Title VII.<sup>394</sup> Most lower courts, pre- and post-*Faragher/Ellerth*, apply a negligence standard to co-worker harassment cases.<sup>395</sup> In its most basic formulation, an employer may be held liable for harassment by a co-worker based on its own negligence when the employer either knew or should have known about the harassment and failed to stop it.<sup>396</sup> This test examines the same workplace factors as the affirmative defense developed in *Ellerth* and *Faragher*.<sup>397</sup> However, under the negligence standard, the burden is on the plaintiff to prove these elements rather than on the employer.<sup>397a</sup>

The lower courts have stated the test as whether the employer had either actual or constructive notice of the harassment and whether the employer failed to take prompt remedial action.<sup>398</sup> In addition, in some jurisdictions, a plaintiff may show that the employer provided no reasonable avenue for complaint.<sup>399</sup> Actual notice does not require the plaintiff to follow the reporting procedures as long as a high-level management official or someone with the power to

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*also* Grossman, *supra* note 15, at 719-35 (criticizing Supreme Court and lower courts’ interpretation of Title VII as too lenient with regard to employer liability).

<sup>393</sup> Grossman, *supra* note 392, at 3.

<sup>393a</sup> Estelle D. Franklin, *Maneuvering Through the Labyrinth: The Employers’ Paradox in Responding to Hostile Environment Sexual Harassment – A Proposed Way Out*, 67 *Fordham L. Rev.* 1517 (March 1999). Franklin proposes a set system of offenses and punishments in order to put employees on notice. She advocates a dual responsibility approach under which all supervisory personnel have the duty to report complaints and all potentially harassing conduct. All employees must report all potentially harassing conduct or be foreclosed from later raising a complaint. *Id.* at 1524. Franklin balances her requirement of complete reporting with the requirement on the employer that all complaints are taken seriously and the consequences are known. *Id.* at 1593.

<sup>394</sup> *Ellerth*, 524 U.S. at 759.

<sup>395</sup> See *infra* notes 398-410 and accompanying text. See *also Faragher*, 524 U.S. at 799. As part of its argument concerning why sexual harassment should not be considered within the scope of employment, the court states that the district courts and courts of appeals thus far have uniformly judged “employer liability for co-worker harassment under a negligence standard.” *Id.*

<sup>396</sup> *Ellerth*, 524 U.S. at 759.

<sup>397</sup> *Id.* at 765; *Faragher*, 524 U.S. at 807. The EEOC regulations hold an employer responsible for co-worker 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).

<sup>397a</sup> See, e.g., *Swinton v. Potomac*, 270 F.3d 794, 804 (9th Cir. 2001) (same facts relevant to negligence and vicarious liability claims although the party bearing the burden of proof differs); *Wilson v. Tulsa J.C.*, 164 F.3d 534, 541 (10<sup>th</sup> Cir. 1998) (same).

<sup>398</sup> See, e.g., *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 794-95 (8th Cir. 2004); *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1119 (9th Cir. 2004); *Miller v. Kenworth of Dothan, Inc.*, 277 F.3d 1269, 1280 (11th Cir. 2002); *Berry v. Delta Airlines, Inc.*, 260 F.3d 803, 811 (7th Cir. 2001); *Mikels v. City of Durham*, 183 F.3d 323, 332 (4th Cir. 1999); *Moore v. KUKA Welding Sys.*, 171 F.3d 1073, 1079 (6th Cir. 1999); *Jeffries v. Kansas*, 147 F.3d 1220, 1229 (10th Cir. 1998).

<sup>399</sup> See, e.g., *Feingold v. N.Y.*, 366 F.3d 138, 152 (2d Cir. 2004); *Susko v. Romano’s Macaroni Grill*, 142 F. Supp. 2d 333, 338 (E.D.N.Y. 2001); *Badlam v. Reynolds Metals Co.*, 46 F. Supp. 2d 187, 197 (N.D.N.Y. 1999).

remedy the problem has actual notice of the harassment.<sup>400</sup> In some cases, courts have found notice to the employer when the notice came from someone other than the target of the harassment.<sup>400a</sup> However, if the employee does follow the terms of the policy, then the employer's notice is established.<sup>401</sup> Courts have found constructive notice of the harassment where high-level management officials should have gained knowledge of the harassment had they acted with reasonable care,<sup>402</sup> or when the harassment was so open and pervasive that a reasonable employer would have been aware of it.<sup>403</sup> For an employer to be charged with constructive knowledge, the harassment must be greater than that required for an actionable hostile environment claim. That is, it must be more than severe or pervasive; it must equate to a "campaign" of harassment.<sup>404</sup>

As for the prompt remedial action prong, the employer's response, in general, must simply be reasonable.<sup>405</sup> Courts decline to find negligence on the employer's part when the employer implements remedial measures unless the remedial measures exhibit a high level of indifference as to the amount of discrimination.<sup>406</sup> The reasonableness of the remedial measures depends on the ability to stop the current harassment, to deter future harassers, the alternatives available to the employer, and the amount of time that elapsed between the notice and the initiation of remedial measures.<sup>407</sup> Thus, courts have found the employer not liable when the employer takes prompt action in response to the complaint, gives a strong warning to the harassers,<sup>408</sup> transfers or suspends the harasser,<sup>409</sup> and/or implements training for the entire department.<sup>410</sup>

With these two standards in mind, I turn now to the contra-power cases.

### C. Employer Liability in Contra-power Cases

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<sup>400</sup> See *Cerros v. Steel Techs., Inc.*, 398 F.3d 944, 952-53 (7th Cir. 2005); *Wanchik v. Great Lakes Health Plan, Inc.*, 6 F. App'x 252, 264 (6th Cir 2001); *Sharp v. City of Houston*, 164 F.3d 923, 929-30 (5th Cir. 1999). Often there is a question as to whether a particular official who received notice of the harassment is of sufficient rank so that the notice may be imputed to the employer. For a discussion of the tests employed by the courts, see Stanford Edward Purser, Note: *Young v. Bayer Corp.: When is Notice of Sexual Harassment to an Employee Notice to the Employer?*, 1998 B.Y.U. L. REV. 909 (1998) (arguing that courts should adopt a test for notice which considers who within the company plaintiff reasonably believed had the power to respond to sexual harassment).

<sup>400a</sup> See, e.g., *Varner v. National Super Markets, Inc.*, 94 F.3d 1209 (8<sup>th</sup> Cir. 1996)(notification by plaintiff's boyfriend sufficient notice to employer).

<sup>401</sup> See, e.g., *Breda v. Wolf Camera & Video*, 222 F.3d 886, 889-90 (11th Cir. 2000); *Collier v. Ram Partners, Inc.*, 159 F. Supp. 2d 889, 900 (D. Md. 2001).

<sup>402</sup> See, e.g., *Glover v. NMC Homecare, Inc.*, 13 F. App'x 896, 902 (10th Cir. 2001); *P. v. Delta Air Lines, Inc.*, 102 F. Supp. 2d 132, 140 (E.D.N.Y. 2000).

<sup>403</sup> See, e.g., *Bishop v. Nat'l R.R. Passenger Corp.*, 66 F. Supp. 2d 650, 668 (E.D. Pa. 1999); *King v. The Finish Line, Inc.*, 997 F. Supp. 987, 993 (N.D. Ill. 1998).

<sup>404</sup> See *Ford v. West*, 222 F.3d 767, 776 (10th Cir. 2000).

<sup>405</sup> See *Hockman v. Westward Commc'ns, LLC*, 407 F.3d 317, 329 (5th Cir. 2004); *Mandy v. Quad/Graphics, Inc.*, 49 F. Supp. 2d 1095, 1108-09 (E.D. Wis. 1999).

<sup>406</sup> See, e.g., *Martin v. Boeing-Oak Ridge Co.*, 244 F. Supp. 2d 863, 874 (E.D. Tenn. 2002).

<sup>407</sup> See *Carter v. Chrysler Corp.*, 173 F.3d 693, 702 (8th Cir. 1999); *Wilson v. City of Des Moines*, 338 F. Supp. 2d 1008, 1034 (S.D. Iowa 2004).

<sup>408</sup> See, e.g., *Williams v. Waste Mgmt. of Ill.*, 361 F.3d 1021, 1030 (7th Cir. 2004); *Henderson v. Heartland Press, Inc.*, 65 F. Supp. 2d 991, 1000 (N.D. Iowa 1999).

<sup>409</sup> See, e.g., *Stephany v. Brooklyn Hebrew Sch. for Special Children*, 356 F. Supp. 2d 248, 265-66 (E.D.N.Y. 2005); *Lowe v. Unifi, Inc.*, 292 F. Supp. 2d 773, 784 (M.D.N.C. 2003).

<sup>410</sup> See, e.g., *Robinson v. Valmont Indus.*, 238 F.3d 1045, 1047 (8th Cir. 2001); *Wieland v. Dep't of Transp.*, 98 F. Supp. 2d 1010, 1023 (N.D. Ind. 2000).

Of the twenty-four contra-power cases, fourteen mention a standard for employer liability, if only in passing, and each uses the negligence-based test.<sup>411</sup> Only two cases engage in any discussion about the rationale behind using the co-worker standard for a subordinate-created hostile environment.<sup>412</sup> The rest mention the negligence standard without any elaboration as to why it is the appropriate standard.<sup>413</sup> No court has explicitly adopted a separate standard for contra-power harassment.

In *Cronin v. United Serv. Stations, Inc.*, the court discussed the negligence standard as appropriate in those cases in which the harasser is not the plaintiff's "employer" or "agent."<sup>414</sup> As examples, the court mentioned co-workers or supervisors with no authority over the plaintiff.<sup>415</sup> That, however, is the extent of the discussion. *Mingo v. Roadway Express, Inc.* contains the most in-depth discussion as to which standard of employer liability should apply.<sup>416</sup> There, the court begins by noting that the employer's liability depends on the status of the harasser and defines the alternatives as either a supervisor or a co-worker.<sup>417</sup> After describing the negligence standard, the court observed that "most of the harassers were not supervisors but were low-level dock workers. In fact, some of the men who [plaintiff] claims harassed her were supervised by [plaintiff] herself."<sup>418</sup> The court then deemed the plaintiff's status as a supervisor irrelevant, and that the relevant issue was the employer's knowledge of and response to the harassment.<sup>419</sup> With a bit of a leap in the analysis, the court then held that because the alleged harassers were of equal or lesser rank than the plaintiff, the co-employee standard was the comparable and appropriate standard.<sup>420</sup>

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<sup>411</sup> See *Ward v. Bechtel Corp.*, 102 F.3d 199 (5th Cir. 1997); *DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591 (5th Cir. 1995); *Garcia v. V. Suarez & Co.*, 288 F. Supp. 2d 148 (D.P.R. 2003); *Mingo v. Roadway Express, Inc.*, 135 F. Supp. 2d 884 (N.D. Ill. 2001); *Jones v. U.S. Gypsum*, 126 F. Supp. 2d 1172 (N.D. Iowa 2000); *Jones v. U.S. Gypsum*, No. C99-3047-MWB, 2000 WL 196616 (N.D. Iowa Jan. 21, 2000); *Odom v. St. Louis Cmty. Coll.*, 36 F. Supp. 2d 897 (E.D. Mo. 1999); *Cleveland v. Int'l Paper Co.*, No. 96-CV-1068(RSP/DNH), 1998 WL 690915 (N.D.N.Y. Sept. 30, 1998); *Johnson v. Prof'l Servs. Group, Inc.*, No. 4-93-1197, 1996 WL 33324813 (D. Minn. April 17, 1996); *Ott v. Perk Dev. Corp.*, 846 F. Supp. 266 (W.D.N.Y. 1994); *Cronin v. United Serv. Stations, Inc.*, 809 F. Supp. 922 (M.D. Ala. 1992); *Reynolds v. Atlantic City Convention Ctr.*, Civ. A. No. 88-4232, 1990 WL 267417 (D.N.J. May 26, 1990); *Kirkland v. Brinias*, 741 F. Supp. 692 (E.D. Tenn. 1989); *Perkins v. Gen. Motors Corp.*, 709 F. Supp. 1487 (W.D. Mo. 1989).

<sup>412</sup> See *Mingo*, 135 F. Supp. 2d at 895; *Cronin*, 809 F. Supp. at 928. This is not entirely surprising given that nine of the fourteen cases were decided before the Supreme Court made clear in *Faragher v. City of Boca Raton* and *Burlington Indus., Inc. v. Ellerth* that the status of the harasser is of paramount importance. See *Faragher*, 524 U.S. 775, 807 (1998); *Ellerth*, 524 U.S. 742, 763 (1998). However, a contra-power race discrimination case does discuss the relevance of the target of the harassment as supervisor. See *Underwood v. Northport Health Servs.*, 57 F. Supp. 2d 1289, 1303-04 (1999). The *Underwood* court notes that the standard depends on the position of the alleged harasser relative to the plaintiff. *Id.* at 1303. It notes the two different standards depending on whether the harasser is a supervisor or co-employee and then states that other courts have not addressed what standard applies when the plaintiff claims to be harassed by subordinates. *Id.* The court holds that the co-employee standard should be used because a subordinate is more akin to a co-worker than to a supervisor, and the principles relied upon for supervisor cases do not apply to a harasser in a subordinate position. *Id.* at 1304.

<sup>413</sup> See, e.g., *Kirkland*, 741 F. Supp. at 698 (discussing that contra power facts are unlike typical harassment case and then using respondeat superior framework without discussing rationale).

<sup>414</sup> *Cronin*, 809 F. Supp. at 928.

<sup>415</sup> *Id.*

<sup>416</sup> *Mingo*, 135 F. Supp. 2d at 895.

<sup>417</sup> *Id.*

<sup>418</sup> *Id.*

<sup>419</sup> *Id.* (citing two racial contra-power harassment cases).

<sup>420</sup> *Id.*

A third contra-power case does not discuss the appropriate standard for employer liability but contains an interesting discussion of the plaintiff's actual authority over the harasser.<sup>421</sup> In *Lewis v. Sugar Creek Stores, Inc.*, the employer argued that because the plaintiff was the store manager, she was responsible to "detect, stop, and report any sexual harassment taking place" and that any hostile environment which she suffered was of her own making by her failure to discipline the harasser.<sup>422</sup> After first recognizing the viability of a contra-power claim,<sup>423</sup> the court discussed the reality of the plaintiff's power over the harasser. The defendants argued that the plaintiff was authorized to take any necessary action, including termination, against the harasser.<sup>424</sup> The plaintiff responded by stating that she did not have the authority to terminate the harasser, that her supervisor told her she could not fire or hire without his express permission, that she reported the conduct to her supervisor, that he failed to take any action, and that the employer failed to provide any training as to how to respond to harassment.<sup>425</sup> The court held that this discrepancy in the facts precluded summary judgment for the employer. "[A] jury will have to determine whether [plaintiff] had the ability to stop [the] harassment and if so, whether she should be held partly or wholly responsible" for damages she suffered.<sup>426</sup> The court could not have employed the negligence standard because it did not discuss the question of notice to the employer or the employer's response. Thus, the *Lewis* court appears to have created a standard for contra-power cases wherein the plaintiff will not be able to recover against the employer if she failed to exercise any authority she had over the harasser. Importantly, the court does not accept the employer's assertion that simply because her job title indicates that the plaintiff was the supervisor, she could fire the harasser. However, as mentioned above, the court does not explain why these facts matter in a determination of employer liability.

Other courts, although not as explicitly as the *Lewis* court, also discussed whether the target of the harassment attempted any discipline against the harasser. The court in *Perkins v. General Motors Corp.* noted that the plaintiff "exercised her authority as a supervisor and had [the harasser] sent to labor relations for a disciplinary interview . . . Perkins knew how to use the available disciplinary procedures and had the supervisory power to stop the conduct and punish the offender."<sup>427</sup> The court found for the employer.<sup>428</sup> Similarly, in *Mingo*, the court noted that the plaintiff never reprimanded, counseled or disciplined her subordinates.<sup>429</sup> Finally and somewhat ironically, in *Wilson v. University of Texas Health Center*, the court noted that the plaintiff took no action against her subordinates allegedly engaged in harassment.<sup>430</sup> Rather, she received a reprimand herself for failing in her duty as police officer to report the harassment immediately and for failing to take supervisory action.<sup>431</sup> Despite discussing the supervisor-

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<sup>421</sup> See *Lewis v. Sugar Creek Stores, Inc.*, No. 96-CV-0100E(H), 1996 WL 685730, at \*2 (W.D.N.Y. Nov. 25, 1996).

<sup>422</sup> *Id.*

<sup>423</sup> *Id.* (holding that employer's argument assumes that employee may not bring claim for hostile environment created by supervisor and noting rejection of this assumption by other courts).

<sup>424</sup> *Id.*

<sup>425</sup> *Id.*

<sup>426</sup> *Id.*

<sup>427</sup> *Perkins v. Gen. Motors Corp.*, 709 F. Supp. 1487, 1497-98 (W.D. Mo. 1989).

<sup>428</sup> *Id.* at 1501.

<sup>429</sup> *Mingo v. Roadway Express, Inc.*, 135 F. Supp. 2d 884, 891 (N.D. Ill. 2001).

<sup>430</sup> *Wilson v. Univ. Tex. Health Ctr.*, 773 F. Supp. 958, 959-60 (E.D. Tex. 1991), *aff'd*, 973 F.2d 1263 (5th Cir. 1992).

<sup>431</sup> *Id.* at 960.



target's power to discipline the harassers, the courts never explain the relevance of such power for an analysis of employer liability.

Most of the remaining cases gloss over the contra-power nature of the facts. Of the eleven cases that even touch upon the question of employer liability, five found for the plaintiff on the issue<sup>432</sup> and another made statements in the plaintiff's favor (although ultimately finding against her).<sup>433</sup> One case reached judgment in favor of the plaintiff where the employer had actual notice "but laughed about it and was utterly unresponsive in remedying the situation."<sup>434</sup> The court found actual notice where the plaintiff told the general manager of the store about the harassment and gave him notes she had kept about the harassment.<sup>435</sup> In four of these cases, the court denied summary judgment for the employer on the question of employer liability. As discussed above in *Lewis*, the court determined there was a question as to whether the plaintiff had the authority to discipline the harasser and therefore denied summary judgment.<sup>436</sup> In *Cleveland v. International Paper Co.*, the court found that there was an issue of fact as to whether the defendant knew or should have known about the harassing conduct.<sup>437</sup> Although the plaintiff did not make a formal complaint of harassment until months after it began, she stated that she informally told the human resources manager about the conduct.<sup>438</sup> The court found that this evidence created enough of an issue of fact as to whether the defendant had notice of the harassment, particularly because the "human resources office normally is the appropriate avenue for discrimination complaints."<sup>439</sup> Similarly, in *Humphreys v. Medical Towers, Ltd.*, the court denied summary judgment for the employer because of a dispute as to whether the employer responded to notice of the sexual harassment with prompt remedial action.<sup>440</sup> The employer argued that he reprimanded the harasser and sent both parties to counseling. After noting that Humphreys could show actual notice on the part of the employer, the court reconsidered her version of the events.<sup>441</sup> According to Humphreys, her supervisor dismissed her complaints, criticized her for overreacting, and tried to excuse the behavior by stating that the harasser "could not work for and would not take orders from a woman."<sup>442</sup> Therefore, the court denied summary judgment.

In *Mingo*, the employer also lost its motion for summary judgment.<sup>443</sup> In that case, the employer had a written policy for filing sexual harassment complaints which Mingo, the plaintiff, did not follow.<sup>444</sup> However, both the employer and Mingo stated that there was an unwritten policy wherein complaints could be reported to certain supervisory staff, although they

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<sup>432</sup> See *Mingo*, 135 F. Supp. 2d at 896-98; *Cleveland v. Int'l Paper Co.*, No. 96-CV-1068(RSP/DNH), 1998 WL 690915, at \*6-7 (N.D.N.Y. Sept. 30, 1998); *Lewis v. Sugar Creek Stores, Inc.*, No. 96-CV-0100E(H), 1996 WL 685730, at \*4-5 (W.D.N.Y. Nov. 25, 1996); *Humphreys v. Med. Towers Ltd.*, 893 F. Supp. 672, 684 (S.D. Tex. 1995); *Cronin v. United Serv. Stations, Inc.*, 809 F. Supp. 922, 930-31 (M.D. Ala. 1992).

<sup>433</sup> See *Ott v. Perk Dev. Corp.*, 846 F. Supp. 266, 273 (W.D.N.Y. 1994).

<sup>434</sup> *Cronin*, 809 F. Supp. at 930.

<sup>435</sup> *Id.*

<sup>436</sup> *Lewis*, 1996 WL 685730, at \*2. See also *supra* notes 421-26 and accompanying text.

<sup>437</sup> See *Cleveland*, 1998 WL 690915, at \*7.

<sup>438</sup> *Id.*

<sup>439</sup> *Id.*

<sup>440</sup> *Humphreys v. Med. Towers, Ltd.*, 893 F. Supp. 672, 684 (S.D. Tex. 1995).

<sup>441</sup> *Id.*

<sup>442</sup> *Id.*

<sup>443</sup> *Mingo v. Roadway Express, Inc.*, 135 F. Supp. 2d 884, 904 (N.D. Ill. 2001).

<sup>444</sup> *Id.* at 896.

disagreed as to which supervisors could receive such complaints.<sup>445</sup> Mingo reported her complaints to her immediate supervisor.<sup>446</sup> The court therefore found that there was an issue of fact as to whether Mingo followed the unwritten policy of the employer.<sup>447</sup> Further, the court found that a jury could find that Mingo was reasonable in bringing her complaints to her supervisor who could be expected to report them to the appropriate persons.<sup>448</sup> Finally, in *Ott v. Perk Development Corp.*, the plaintiff raised a sufficient factual issue on the question of employer liability.<sup>449</sup> She testified that she reported the alleged harassment to her supervisor and that her complaint was not taken seriously, that her supervisor laughed at her and that the harasser was merely verbally reprimanded.<sup>450</sup>

In the remaining cases which discuss the employer liability prong of the claim, courts found that the employer had adequately responded to the complaints of harassment by investigating the complaints,<sup>451</sup> disciplining the harasser and threatening the harasser with termination if the behavior persisted,<sup>452</sup> instructing the harasser to have no further contact with the target,<sup>453</sup> and forcing the harasser into early retirement.<sup>454</sup> In *Perkins*, the court found that when the plaintiff did complain about harassing incidents, “appropriate corrective actions were taken either by plaintiff individually or in her capacity as a supervisor or by management or union officials.”<sup>455</sup> In two of the cases, the courts found lack of notice to the employer. In *Kirkland v. Brinias*, the court noted that the “evidence that the defendant employers recognized, or should have recognized, that any of the employees found [the harasser’s] conduct sexually offensive, did not preponderate in favor of the plaintiffs.”<sup>456</sup>

Thus, the contra-power cases either do not discuss the employer liability standard or apply the negligence standard. In applying the negligence standard, some courts hint that the failure of the supervisor-target to exercise any discipline against the harassers undercut her claim in some undescribed or unanalyzed manner. The rest of the courts do not give any special

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<sup>445</sup> *Id.*

<sup>446</sup> *Id.*

<sup>447</sup> *Id.* at 896-97.

<sup>448</sup> *Id.* at 898.

<sup>449</sup> *Ott v. Perk Dev. Corp.*, 846 F. Supp. 266, 273 (W.D.N.Y. 1994).

<sup>450</sup> *Id.* The court ultimately granted summary judgment for the employer. The court adopted the Report and Recommendation of the magistrate who mystifyingly analyzed the claim under the McDonnell Douglas Corp. v. Green burden-shifting scheme. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). The magistrate first found that the plaintiff presented sufficient evidence of a prima facie case of sexual harassment. *Ott*, 846 F. Supp. at 273. The magistrate then considered whether the employer had a legitimate, nondiscriminatory reason for its actions against the plaintiff and found that the employer did have such a reason. *Id.* at 274. Finally, the court determined that the plaintiff could not meet her burden of proving intentional discrimination and entered summary judgment for the employer. *Id.* at 274-75. This is not the typical structure of a hostile environment claim, to say the least.

<sup>451</sup> See *Ward v. Bechtel Corp.*, 102 F.3d 199, 202 (5th Cir. 1997); *Jones v. U.S. Gypsum*, 126 F. Supp. 2d 1172, 1179 (N.D. Iowa 2000).

<sup>452</sup> See *Ward*, 102 F.3d at 203; *Jones*, 126 F. Supp. 2d at 1179.

<sup>453</sup> See *Ward*, 102 F.3d at 203. In addition, the employer offered the plaintiff paid time off, medical leave, participation in a medical assistance program, and an escort to and from her car each day. The employer also hired experts to perform a risk assessment on the harasser, but the plaintiff refused to cooperate in the study. *Id.* at 203.

<sup>454</sup> See *Garcia v. V. Suarez & Co.*, 288 F. Supp. 2d 148, 159 (D.P.R. 2003).

<sup>455</sup> *Perkins v. Gen. Motors Corp.*, 709 F. Supp. 1487, 1501 (W.D. Mo. 1989).

<sup>456</sup> *Kirkland v. Brinias*, 741 F. Supp. 692, 698 (E.D. Tenn. 1989). This holding was stated after finding that the plaintiffs and others were subjected to sexual harassment on the job but that it had no psychological effect on the plaintiffs. *Id.* See also *Garcia*, 288 F. Supp. 2d at 160 (finding that plaintiff failed to report certain instances and presented no evidence that employer knew or should have known about harassment).

analytical value to the contra-power nature of the facts. The question then is whether they should.

#### D. Proposal

Although I agree with much of the criticism of the current employer liability standards, I do not argue here for a change in the standards. Adopting the “actual state of things” perspective,<sup>457</sup> the two alternatives for employer liability are the *Faragher/Ellerth* “aided in the agency relation” standard with accompanying affirmative defense, and the negligence standard. The agency principles rejected by the Supreme Court for holding employers liable for supervisory harassment are equally inapplicable to contra-power harassment. As described above, the courts have rejected the scope of employment test, finding harassment to be generally outside the scope of employment.<sup>458</sup> The options from Restatement section 219(2) are equally irrelevant to contra-power harassment.<sup>459</sup> In general, there is no non-delegable duty involved, no direct liability (the harasser here is not high enough in the organizational hierarchy to be considered an “agent” of the employer), and certainly no question of apparent authority in contra-power situations.<sup>460</sup> This leaves the aided in the agency standard and the negligence standard. Under the Supreme Court’s reasoning in *Faragher/Ellerth*, the aided in the agency relationship does not apply.<sup>461</sup> The subordinate is not an agent of the employer. Therefore, under the current options, employers could be liable under the negligence standard for contra-power harassment.<sup>462</sup>

How then should the negligence standard work in a contra-power case? Does the standard need to change? More specifically, should courts adopt the approach of the court in *Lewis v. Sugar Creek Stores, Inc.*, and the like: that is, examining the target’s authority to take action and discipline the harasser prior to determining the employer’s liability and, presumably, finding no liability where the supervisor does *not* exercise her authority?<sup>463</sup>

There is a compelling argument that the supervisor-target of the harassment should be required to exercise any power she may have to discipline the harasser, and that if she does not do so, the employer cannot be held liable. Why should the employer be liable when a management official is unwilling to exercise that authority given to her? There is some appeal to this argument from the perspective of supporting women’s agency. The law should not assume that women with power cannot exercise that power simply because they are women. The law should not assume that women at work need to be rescued.

However, requiring female supervisors to take preemptive action excuses an employer from preventing, or even paying attention to, the sexual harassment of an entire class of its workers. Such a standard would absolve employers from maintaining a discrimination-free

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<sup>457</sup> See Robert Laurence, *Learning to Live with the Plenary Power of Congress over the Indian Nations: An Essay in Reaction to Professor Williams’ “Algebra,”* 30 ARIZ. L. REV. 413, 435-36 (1988) (referring to Chief Justice John Marshall’s statement in *Worcester v. Georgia*, 31 U.S. 515, 543 (1832): “[w]e proceed, then, to the actual state of things . . .”).

<sup>458</sup> See *supra* note 361 and accompanying text.

<sup>459</sup> See RESTATEMENT (SECOND) OF AGENCY § 219(2) (1958).

<sup>460</sup> *Id.*

<sup>461</sup> See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 760-64 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 801-07 (1998). See also *supra* notes 369-390 and accompanying text.

<sup>462</sup> Courts and the EEOC have held employers liable for harassment by third party, non-employees under the negligence standard. See, e.g., *Quinn v. Green Tree Credit Corp.*, 159 F.3d 759, 766 (2d Cir. 1998) (involving sexual harassment by customers); 29 C.F.R. § 1604.11(e) (describing negligence standard).

<sup>463</sup> *Lewis v. Sugar Creek Stores, Inc.*, No. 96-CV-0100E(H), 1996 WL 685730, at \*2 (W.D.N.Y. Nov. 25, 1996).

workplace. Requiring supervisors who are targets of harassment to take action preemptively ignores the realities of how women respond to sexual harassment.<sup>464</sup> In fact, the most common responses to sexual harassment are avoidance and appeasement (including the use of humor in less serious situations).<sup>465</sup> The most infrequent response is to seek institutional support, e.g., telling a supervisor, bringing a formal complaint, or filing a suit.<sup>466</sup> For contra-power harassment, the evidence as to reporting is mixed. Some suggest that victims are more likely to report supervisor harassment over co-worker harassment.<sup>467</sup> This suggests that targets of sexual harassment would report contra-power harassment the least. However, one study reported that contra-power harassment situations were more easily resisted and had better outcomes; when the targets were in organizational positions that afforded direct power over the harasser's employment status, there were better opportunities for the target to resolve the situation.<sup>468</sup> As a result, there were fewer impediments to reporting contra-power harassment.<sup>469</sup> Yet, simply because women have achieved a certain place in the management hierarchy does not mean that they possess *actual* power to stop the harassment. As the same study noted, "even if women succeed in attaining formal organizational power, they often have less access to informal power, derived from access to resources, alliances and informal political influence, which is necessary to exercise the power associated with their formal position."<sup>470</sup> In fact, a separate study found that contra-power complaints were often dismissed by management.<sup>471</sup> In discussing how management engages in the construction and interpretation of sexual harassment, this study found that some supervisors created an exemption from the sexual harassment policies for same-sex, contra-power harassment.<sup>472</sup> In the particular situation discussed, the supervisors were reluctant to intervene because the person who engaged in the questionable conduct was female, the lowest-level staffer in the office, and her behavior was considered not very intrusive.<sup>473</sup> In this way, supervisors and management create obstacles to reporting contra-power harassment.

In light of this overwhelming evidence, a supervisor who is a target of contra-power harassment should not be required to discipline or otherwise take action against the harasser in order to have a viable claim. Rather, the negligence standard should be used. I believe that the negligence standard can be employed in a manner which does not undercut women's agency, and does not place women in a "help me, I'm a girl" role. Reporting the harassment to supervisors or designated human resources persons should count as taking action. Given the obstacles to reporting sexual harassment, notifying the employer is, in fact, an exercise of personal power which should be supported and encouraged.<sup>474</sup>

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<sup>464</sup> See Grossman, *supra* note 15, at 722-29; Beiner, *supra* note 79, at 173.

<sup>465</sup> Fitzgerald et al., *supra* note 62, at 120.

<sup>466</sup> *Id.* at 121.

<sup>467</sup> *Id.* at 121. But see James E. Gruber & Michael D. Smith, *Women's Responses to Sexual Harassment: A Multivariate Analysis*, 17 BASIC APPLIED SOC. PSYCHOL. 543, 554, 558 (1995) (arguing that targets of harassment complain most often when harasser is co-worker rather than supervisor).

<sup>468</sup> Rospenda et al., *supra* note 16, at 47-48.

<sup>469</sup> *Id.* at 47-48.

<sup>470</sup> *Id.* at 45.

<sup>471</sup> See Marshall, *supra* note 110, at 103.

<sup>472</sup> *Id.* See also Rospenda et al., *supra* note 16, at 48 (noting that when women do have organizational power, it is often resisted or denied through lack of serious attention to their harassment complaints, while men have better outcomes).

<sup>473</sup> See Marshall, *supra* note 110, at 103.

<sup>474</sup> The fear of reprisal is not irrational. Women who report harassment do suffer adverse consequences. See Grossman, *supra* note 392, at 52 n.300.

How then should the negligence standard be employed in a contra-power case? There are two parts to the standard: notice and prompt remedial action.

### 1. Notice

As discussed above, there are two ways by which the employer can receive notice of the conduct: actual notice and constructive notice. In fourteen of the contra-power cases, the courts mentioned that the targets of the harassment reported the harassment to someone within the organization.<sup>475</sup> In five of these cases, there was an issue as to whether the target reported to the correct official, or the target filed an informal, verbal complaint as opposed to a formal complaint.<sup>476</sup> The courts should continue to find that the employer has actual notice even if the target of the harassment reports to someone outside of the official sexual harassment policy. If a supervisor reports the harassment to someone who can reasonably be expected to report the harassment to the proper official, then the employer should be deemed to have actual notice of the harassment. In this way, employers will be encouraged to adopt policies that encourage targets of harassment to report.<sup>477</sup> Actual notice to the employer then triggers the duty to take prompt remedial action.<sup>477a</sup>

As for constructive knowledge, the harassment of a supervisor may be more open and notorious than that of a line worker, so much so that a mindful employer could not help but become aware of the harassment. In some cases, the supervisor will take pains to hide the fact she is being harassed so that her ability to manage is not called into question. Courts should be equally willing to find constructive knowledge in contra-power cases as in other harassment cases.

### 2. Prompt Remedial Action

As one of the goals of Title VII is to deter future harassment, the system should provide incentives to employers to actually end the harassment. Thus, employers who explicitly authorize the target of the harassment to take action against the harasser should be found ordinarily to have met their obligations under Title VII.<sup>478</sup> I say “ordinarily” because in

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<sup>475</sup> See *Davis v. Coastal Int'l Sec., Inc.*, 275 F.3d 1119, 1121 (D.C. Cir. 2002); *Pfahl v. Synthes (USA)*, 13 F. App'x 832, 834 (10th Cir. 2001); *DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591, 592 (5th Cir. 1995); *Hill v. K-Mart Corp.*, 699 F.2d 776, 777 (5th Cir. 1983); *Garcia v. V. Suarez & Co.*, 288 F. Supp. 2d 148, 153 (D.P.R. 2003); *Needham v. BI, Inc.*, No. 00 C 1550, 2001 WL 558144, at \*1 (N.D. Ill. May 21, 2001); *Mingo v. Roadway Express, Inc.*, 135 F. Supp. 2d 884, 891 (N.D. Ill. 2001); *Jones v. U.S. Gypsum*, 126 F. Supp. 2d 1172, 1174 (N.D. Iowa 2000); *Odom v. St. Louis Cmty. Coll.*, 36 F. Supp. 2d 897, 900-01 (E.D. Mo. 1999), *aff'd*, 205 F.3d 1347 (8th Cir. 2000); *Cleveland v. Int'l Paper Co.*, No. 96-CV-1068(RSP/DNH), 1998 WL 690915, at \*1 (N.D.N.Y. Sept. 30, 1998); *Lewis v. Sugar Creek Stores, Inc.*, No. 96-CV-0100E(H), 1996 WL 685730, at \*2 (W.D.N.Y. Nov. 25, 1996); *Humphreys v. Med. Towers, Ltd.*, 893 F. Supp. 672, 683 (S.D. Tex. 1995); *Ott v. Perk Dev. Corp.*, 846 F. Supp. 266, 270 (W.D.N.Y. 1994); *Otterstedt v. U.S. Postal Serv.*, 96 M.S.P.R. 688, 693 (M.S.P.B. 2004).

<sup>476</sup> See *Needham*, 2001 WL 558144, at \*7 (involving “verbal” complaint but no formal complaint); *Mingo*, 135 F. Supp. 2d at 895-98 (involving “verbal” complaint); *Jones*, 126 F. Supp. 2d at 1179 (involving “verbal” complaint but no formal complaint); *Odom*, 36 F. Supp. 2d at 903 n.3 (involving “verbal” complaint but no formal complaint); *Cleveland*, 1998 WL 690915, at \*7 (involving situation where target reported “informally”).

<sup>477</sup> See *Beiner*, *supra* note 79, at 161.

<sup>477a</sup> For an argument that employers should be directly liable for their role in creating the hostile environment and thus notice is not required, see *Anne Lawton, The Bad Apple Theory in Sexual Harassment Law*, 13 GEO. MASON L. REV. 817 (Summer 2005).

<sup>478</sup> See, e.g., *Needham*, 2001 WL 558144, at \* 5 (noting that supervisor told plaintiff to ““tell [harasser] to stop, you are supervisor, direct her to do so”).

particular circumstances, such action may not adequately respond to the harassment. As the Supreme Court of West Virginia discussed in a contra-power case:

[I]f a supervisor complains to her employer of a subordinate's harassment and the employer responds, "You take care of it," that may in some cases be sufficient – if the supervisor has full disciplinary authority and circumstances permit use of it. In other cases, however, that response may be inadequate. The harassed supervisor could be the object of an entire crew of male harassers and would likely need greater assistance from her employer than a flippant, "You handle it."<sup>478a</sup>

Encouraging employers to empower female supervisors will respect women's choices and support the ability of women to choose the role they wish to inhabit at work. It will also provide an incentive to employers to take action that will end the harassment as opposed to simply taking "reasonable steps."<sup>479</sup> For example, in *DeAngelis v. El Paso Municipal Police Officers Ass'n* and *Ott v. Perk Development Corp.*, the target of the harassment took action in some form against the harasser.<sup>480</sup> In both cases, the employer supported the exercise of power by the plaintiffs<sup>481</sup> and in both cases, the court found the employers not to be liable.<sup>482</sup>

Similarly, if an employer undercuts or reverses a supervisor's discipline against a harasser, there should be a presumption that the employer failed to take prompt remedial action. In *Johnson v. Professional Services Group, Inc.*, the plaintiff reprimanded a subordinate for reading a sexually explicit magazine on the job.<sup>483</sup> She was told not to take any action against any further employees.<sup>484</sup> Assuming the remaining elements of the claim are met, the employer should be liable in such a situation.

However, if a supervisor-target reports the harassment and is told by the employer to take action but fails to do so, then employer should not be liable. The employer, on notice of the harassment, has chosen to respond to the harassment by delegating the authority to the target of the harassment. She has been given the explicit authority to discipline the harasser. If she fails to act because she is uncomfortable exercising organizational power, the employer should not be liable. Female supervisors should not be excused in such situations from taking action simply because they are women. This would build a "women as victims" mentality into Title VII. Giving the female supervisor the explicit power to discipline the harasser may not stop the harassment, in which case the employer must take other reasonable measures. By reporting the harassment and receiving explicit authorization to discipline, the supervisor unequivocally establishes her power and authority to do so. In addition, courts must carefully consider if the employer has unnecessarily set up the supervisor for retaliation or ostracism by her subordinates.

I realize that this explicit authorization standard does not overcome the problem of reluctance to report as an initial matter. Employers must provide an environment that allows

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<sup>478a</sup> Hanlon v. Chambers, 195 W. Va. 99, 108-109, 464 S.E. 2d 741, 750-51 (1995).

<sup>479</sup> See Grossman, *supra* note 15, at 721-22.

<sup>480</sup> See *DeAngelis*, 51 F.3d at 596 (noting that plaintiff reprimanded subordinates for their inappropriate behavior); *Ott*, 846 F. Supp. at 270 (same).

<sup>481</sup> *DeAngelis*, 51 F.3d at 596; *Ott*, 846 F. Supp. at 270.

<sup>482</sup> *DeAngelis*, 51 F.3d at 595-97; *Ott*, 846 F. Supp. at 274-76.

<sup>483</sup> *Johnson v. Prof'l Servs. Group, Inc.*, No. 4-93-1197, 1996 WL 33324813, at \*1 (D. Minn. Apr. 17, 1996).

<sup>484</sup> *Id.*

targets to express “resistance through both formal and informal channels.”<sup>485</sup> The courts should remain open to showings that the employer had constructive notice and, therefore, an obligation to end the harassment.

In applying the negligence standard, courts should not require the supervisor-target to exercise discipline preemptively. Other targets of sexual harassment are not required to engage in self-help remedies. In other cases of sexual harassment, a complaint of sexual harassment puts the employer on notice. There is no compelling reason to create a different rule here. Supervisors should be penalized for failing to exercise power only when the employer explicitly authorizes the exercise of such power. Discipline of a tangible nature against a subordinate harasser is enough of an official act to put the employer on notice of the sexual harassment. Failure to take prompt remedial action, specifically in the form of undermining the supervisor’s authority to discipline, should lead to liability.

### **Conclusion**

Among the many factors that drive women from the workplace, being harassed as a manager is within the grasp of the employer to remedy. Creating a professional atmosphere and promoting more female managers and supervisors should help to diminish sexual harassment. The harassment of female managers is not an insubstantial problem. Courts and employers have discounted contra-power harassment because of its contra-power nature. Instead, courts should accept contra-power claims and approach such claims as they would other sexual harassment claims. The status of the target of the harassment should be irrelevant to whether a claim exists, how the harassment is perceived, and how the harassment affects the target’s working conditions. Further, courts should not require supervisors to preemptively discipline harassers in order to have a claim. To do so would place a greater burden on those targeted than on employers to resolve the epidemic of harassment. If a supervisor reports that she is being harassed, then under the negligence standard the employer has an obligation to remedy the problem. Employers should not be excused from this obligation simply because the target has organizational power. Women who struggle against the odds still present in the workplace to reach positions of formal power should be protected by the law and by employers.

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<sup>485</sup> Fitzgerald et al., *supra* note 62, at 135.