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EMPLOYMENT LAW—HERE'S LOOKING AT YOU: HIGH TECH "PEEPING" IN THE WORKPLACE AND THE ROLE OF TITLE VII

Shannon D. Leger

NOTES

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INTRODUCTION

A. *The Hypothetical*

Janet Johnson, a 31 year-old woman, worked for a prominent insurance company in the hypothetical city of Newfield. Every afternoon on her lunch break, Johnson went for a run around the city park. This practice had become habit a few years before when Johnson's employer installed showers and a changing area for employees who wished to exercise during work hours. Six months ago, however, Johnson stopped running. She stopped working for the insurance company. In fact, she stopped working all together.

After her last run in the park, Johnson headed to the women's locker room to shower. She undressed in the changing area, wrapped herself in a towel, and walked to the adjacent showers. Once showered and dressed, Johnson approached the mirror to do her hair and makeup, but noticed that the mirror was askew. Looking at the upper corner, she saw a small black object protruding out of the wall. When Johnson examined the object closer she realized it was a miniature camera.

An investigation revealed that the camera was part of an elaborate "peeping" system originating in the office of Johnson's supervisor, who had been viewing the women on an office television. The supervisor was fired and the system was dismantled. But for Johnson removing the camera was not enough, and she became paranoid and self-conscious at work. Her emotional state became so unstable that she was no longer able to perform her job duties and struggled just to remain in the office. Johnson eventually resigned from the insurance company and has not yet returned to work.

Johnson visited her lawyer to discuss the claims against her former supervisor. The attorney contemplated state and common law tort claims of invasion of privacy and intentional infliction of emo-

tional distress.[1] But realizing that such claims against the supervisor himself would afford his client minimal compensation, Johnson's lawyer suggested an aggressive alternative focusing on the insurance company as an employer. The claim he proposed: hostile work environment sexual harassment, resulting in a constructive discharge in violation of Title VII of the 1964 Civil Rights Act.[2]

B. *The Prevalence of Workplace "Peeping" and Title VII Protection*

Janet Johnson's situation is not isolated or restricted to a hypothetical. The sophisticated "peeping" by Johnson's supervisor is considered a form of "video voyeurism," a practice that involves videotaping or viewing others without knowledge or consent, usually for a sexual purpose.[3] Video voyeurism is likely to become prevalent in the workplace due to the advent of surveillance technology that provides "peeps" greater access to private areas with less risk of detection.[4] As a result of such technology it is estimated that "[m]ore than 20,000 women, men, and children are unknowingly taped everyday in situations where the expectation and the right to privacy should be guaranteed, i.e., while showering, dressing, using a public restroom, or making love in their own homes."[5] The number is so outrageously high because the technology is cheap, easy to use, and virtually undetectable.[6]

Traditional "peeping" has already infected the workplace and has been characterized as "an emerging issue in employment law."[7] With the addition of surveillance equipment the number of victims

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1. *See generally* Clay Calvert and Justin Brown, *Video Voyeurism, Privacy, and the Internet: Exposing Peeping Toms in Cyberspace*, 18 CARDOZA ARTS & ENT. L.J. 469, 555-59 (2000) (listing the civil remedies for the gathering of sexual images without consent).

2. 42 U.S.C. § 2000(e) (2000).

3. Video voyeurism has been defined as "[t]he use of any camera, videotape, photo-optical, photo-electric, or any other image recording device for the purpose of observing, viewing, photographing, filming, or videotaping . . . for a lewd or lascivious purpose." Calvert, *supra* note 1, at 521 (citing 1999 La. Acts 1240).

4. Dana Hawkins, *Cheap Video Cameras are Monitoring Our Every Move*, U.S. NEWS & WORLD REPORT, Jan. 17, 2000, at 52 ("With miniature cams now selling for under $100, it's much cheaper to be a spy than to catch one.").

5. Calvert, *supra* note 1, at 476-77 (quoting LOUIS R. MIZELL JR., INVASION OF PRIVACY 23 (1998)) (internal quotations omitted).

6. *Id.* at 480-82. "[B]y using pinhole cameras that may capture images through a space the size of a nail hole in the wall, just about anything imaginable is possible." *Id.* at 482.

7. *Id.* at 559 (citing MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW 307 (1994)).

and the severity of the harassment can only increase. Title VII is the proper statute to address and combat this form of workplace harassment before it becomes prevalent. As the doctrine prescribed to eliminate discriminatory harassment in the workplace,[8] Title VII can adequately compensate victims and deter future acts of voyeurism.[9] Specifically, Title VII encourages employers to create harassment policies and procedures in an effort to prevent harassing conduct.[10] Title VII also has the power to deter "peeping" by holding employers liable for damages, thereby enticing them to exercise greater control over supervisors and employees.[11] When deterrence fails, Title VII can make victims "whole" through compensatory and punitive damages.[12] Title VII's "make whole" provision would award deserving plaintiffs like Janet Johnson their lost wages[13] in addition to any compensation for lasting emotional injuries.

Joanna Ciesielski, a former employer of Hooters of America, realized the benefit of Title VII protection when she was "peeped" at work.[14] Ciesielski used a changing facility in the restaurant to get dressed for her shift until she noticed reoccurring holes in the wall.[15] The changing room was directly adjacent to the employee break room and Ciesielski suspected that she had been watched on

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8. 42 U.S.C. 2000e-2(a)(1)(2000); *see* Albemarle Paper Co. v. Moody, 422 U.S. 405, 417 (1975); Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971).

9. *See* Jennifer Miyoko Follette, *Complete Justice: Upholding the Principles of Title VII Through Appropriate Treatment of After-Acquired Evidence*, 68 WASH. L. REV. 651, 652 (1993) (stating that according to the language of the statute and the legislative history Title VII has both a remedial and deterrent purpose).

10. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 764 (1998). *See* 29 C.F.R. 1604.11(f) ("Prevention is the best tool for the elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring . . . .").

11. Civil Rights Act of 1991, Pub. L. 102-166, codified at 42 U.S.C. § 1981a(b)(3)(2000) (allowing compensatory recovery for "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses" when an employer violates 42 U.S.C. 2000e-2). The Civil Rights Act of 1991 also provides for punitive damages if an employee "demonstrates that the [employer] engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference." 42 U.S.C. § 1981a(b)(1).

12. *Albemarle Paper Co.*, 422 U.S. at 418 ("It is . . . the purpose of Title VII to make persons whole for injuries suffered on account of unlawful employment discrimination.").

13. 42 U.S.C. §2000e-5(g)(1)(2000).

14. Ciesielski v. Hooters of America, Inc., No. 03-C-1175, 2004 U.S. Dist. LEXIS 14478 (N.D. Ill. July 27, 2004).

15. *Id.* at *9-11.

numerous occasions.[16] Feeling as though she had been sexually harassed, Ciesielski brought a Title VII action against her employer and was awarded $25,000 in compensatory damages and $250,000 in punitive damages.[17]

The traditional hole-in-the-wall approach used by the perpetrators at Hooters will give way to high tech "peeping" as surveillance equipment becomes more obtainable and less detectible.[18] In addition, video surveillance equipment is already present in numerous workplaces to counteract theft, drug-use, and even sexual harassment among employees.[19] The ease with which a perpetrator could "[c]ross[ ] the line from permissible surveillance . . . to illegal video voyeurism"[20] enhances the probability that "elaborate peeping and videotaping scheme[s]"[21] will develop within the workplace.

Even the most innocent employment atmospheres are susceptible to a "peeping" scandal. In 1991, a Walt Disney World employee secretly viewed and videotaped a group of female performers who were undressing and using the bathrooms.[22] The videotaping went on until 1992 when, for evidentiary purposes, Disney taped the perpetrator taping the females.[23] The Disney video captured the employee "masturbating, observing, and videotaping" the females for over an hour.[24] The victims sued for, among other things, sexual harassment under Title VII.[25]

Women and men[26] alike are being spied on in bathrooms, showers and private changing areas, not by the sleazy window watcher outside their homes, but by supervisors or co-workers at their places of employment.[27] The result: more victims like Janet

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16. *Id.* at *9.

17. Ciesielski v. Hooters Management Corp., No. 03-C-1175, 2004 U.S. Dist. LEXIS 25884, at *2 (N.D. Ill. Dec. 23, 2004).

18. *See* Hawkins, *supra* note 4, at 52. Counter Spy Shop, a manufacturer of tiny cameras, sold 125,000 covert cameras in 1999. *Id.* The Shop will install cameras in a variety of objects, including sunglasses, smoke detectors, lamps, and watches. *Id.*

19. *See* Ron Dixon, *Nowhere to Hide: Workers are Scrambling for Privacy in the Digital Age*, 4 J. TECH. L. & POL'Y 1, 9 (1999) ("[T]he Orwellian nightmare of the Thought Police and Big Brother appears to reflect reality.").

20. Calvert, *supra* note 1, at 549.

21. Liberti v. Walt Disney World Co., 912 F. Supp. 1494, 1499 (M.D. Fla. 1995).

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* at 1500.

26. *See* Clement v. ITT Sheraton Boston Corp., Mass. Super. Ct. (No. 93-0909-F) (describing how a group of male union workers were videotaped in a locker room without consent).

27. Hawkins, *supra* note 4, at 52. Female employees discovered a miniature cam-

Johnson and a growing number of Title VII sexual harassment claims.

C. *The Challenge Facing Title VII Plaintiffs*

Although seeking recovery under Title VII for this type of harassment is attractive and arguably proper, it is not done without difficulty. High-tech "peeping" is a type of sexual harassment under Title VII as it occurs because of the employee's sex[28] and "has the purpose or effect of unreasonably interfering with [an employee's] work performance" by "creating [a] . . . hostile, or offensive working environment."[29] Recovery is difficult, however, because courts have constructed a Title VII framework specifically designed to deal with more traditional forms of sexual harassment. Typically, Title VII cases involve some level of interaction between the harasser and the victim, such as touching or verbal exchange. "Peeping" within the workplace, therefore, is not a traditional form of sexual harassment that fits squarely within the framework adopted by the Equal Employment Opportunity Commission (EEOC)[30] and the courts.

Title VII has always been construed liberally, however, to adapt to changing perceptions of what constitutes sexual harassment. In the past decade alone, courts have expanded the reach of Title VII to include less obvious forms of harassment, such as suggestive sexual photographs[31] or the presence of foul language in the workplace.[32] Moreover, as the societal definition of "sex" itself is changing, sexual harassment claims are extending to areas of same-sex harassment[33] and harassment based upon sexual orientation.[34]

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era in the bathroom ceiling and uncovered an entire surveillance system linked to a television in a supervisor's office. *Id.*

28. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986) ("[W]hen a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminates' on the basis of sex.").

29. 29 C.F.R. § 1604.11(a) (1990).

30. 29 C.F.R. § 1604 (1990) ("Guidelines on Discrimination Because of Sex").

31. Vigil v. City of Las Cruces, 119 F.3d 871, 875-76 (10th Cir. 1997) (stating that the plaintiff's Title VII claim was actionable because she was "exposed to pornographic, sexually explicit pictures").

32. Williams v. General Motors Corp., 187 F.3d 553, 562 (6th Cir. 1999) (noting that foul language is included in the "totality of the circumstances" analysis when deciding whether a hostile work environment was created).

33. *See* Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 79-80 (1998) (holding that same-sex harassment was not the type of harassment contemplated by the drafters of Title VII, but is a comparable evil entitled to protection).

34. *See* Jeff Mitchell, *Title VII's "Sex Life"*, 24 WOMEN'S RTS. L. REP. 137, 144-46

By constantly reevaluating the parameters of Title VII, the courts recognize that it is a "living" doctrine that must change as we change. High tech "peeping" within the workplace is a new brand of sexual harassment, and because of its severe and humiliating character, it is also the precise type of harassment that deserves Title VII protection.

This Note argues that when supervisors use surveillance devices to view or videotape employees in areas of extreme privacy, a Title VII hostile work environment is created and employers should be held liable. Furthermore, this Note will demonstrate that employer liability is the critical element in achieving the elimination of video voyeurism in the workplace and providing adequate compensation for victims. Part I of this Note provides a background detailing the legal evolution of sexual harassment and the scope of employer liability under Title VII. This section focuses primarily on the parameters of hostile work environment harassment, with specific attention to the changing perception of "hostile" conduct. Part II presents an analysis of the Title VII framework as it applies to the hypothetical situation presented in the Introduction. This section will illustrate how the evolving structure of Title VII can effectively prevent "peeping" and compensate victims. Finally, Part II. C proposes an equitable solution as a compromise between policy, prior precedent and common sense.

I. BACKGROUND

A. *Sexual Harassment under Title VII*

Under Title VII of the 1964 Civil Rights Act, Congress did not expressly address the issue of sexual harassment in the workplace, but rather discrimination based on "sex."[35] In fact, there is evidence that Congress did not want to address the issue of "sex" at all, and only added the category as an attempt to defeat the entire bill.[36] But Title VII passed, and it declared unlawful all employ-

(2003) (discussing the expansion of Title VII and the case for protection from harassment based on sexual orientation).

35. 42 U.S.C. § 2000e-2(a)(1) (2000) ("It shall be an unlawful employment practice for an employer . . . to discriminate against any individual . . . because of . . . sex.").

36. Ellen Frankel Paul, *Sexual Harassment as Sex Discrimination: A Defective Paradigm*, 8 YALE L. & POL'Y REV. 333, 346 (1990) (explaining that "sex" was added to Title VII at the eleventh hour in hopes of defeating the legislation); *see* Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, reprinted in 1964 U.S.C.C.A.N. 2391, 2401 (illustrating that Title VII, as originally proposed, only included discrimination based on "race, color, religion, or national origin").

ment practices that "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."[37]

With little or no legislative history as a guide, early judicial interpretations of Title VII proved inconsistent. Some courts looked to the literal language of the Act and held that harassment was not a form of discrimination that Title VII was intended to prevent.[38] In *Corne v. Bausch and Lomb, Inc.*[39]and *Miller v. Bank of America*,[40] for instance, the courts treated sexual harassment as a personal affront, one which "satisf[ied] a personal urge,"[41] instead of a discriminatory act. Other courts interpreted Title VII broadly. In *Barnes v. Costle* the court rejected the *Corne* and *Miller* approach, stating that, "[b]ut for [the employee's] womanhood" she would not have suffered the harassment.[42] Therefore, the *Barnes* court held, the harassment was based on gender, creating a "prima facie case of sex discrimination."[43]

In 1980, Congress finally offered an interpretation of "sexual discrimination" through the Equal Employment Opportunity Commission (EEOC)[44] Guidelines, which laid a framework for analyzing sexual discrimination claims under Title VII.[45] Adopting the *Barnes* interpretation, the EEOC Guidelines established that "[h]arassment on the basis of sex is a violation of . . . Title VII."[46] Furthermore, the EEOC Guidelines set out two forms of sexual

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37. 42 U.S.C. § 2000e-2(a)(1).

38. *See* Michael Rubenstein, *The Law of Sexual Harassment at Work*, 12 INDUS. 1, 3 (1983) (discussing the view that Title VII as civil rights legislation was intended to prevent discrimination, not harassment).

39. 390 F. Supp. 161, 163 (D. Ariz. 1975).

40. 418 F. Supp. 233, 236 (N.D. Cal. 1976) ("[I]t would seem wise for the Courts to refrain from delving into these matters short of specific factual allegations describing an employer policy which in its application imposes or permits a consistent, as distinguished from isolated, sex-based discrimination on a definable employee group.").

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

42. 561 F.2d 983, 990 (D.C. Cir. 1977).

43. *Id.*; *see* Williams v. Saxbe, 413 F. Supp. 654, 657 (D.D.C. 1976) ("[T]he plaintiff's supervisor created an artificial barrier to employment which was placed before one gender and not the other . . . .") (*rev'd on other grounds*).

44. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972) (codified at 42 U.S.C. § 2000e-4 (2000)). The EEOC is the government agency designed to interpret and enforce the Civil Rights Act of 1964. *Id.*

45. 29 C.F.R. § 1604 (1990).

46. 29 C.F.R. § 1604.11 ("Harassment on the basis of sex is a violation of section 703 of Title VII.").

harassment: "quid pro quo" and hostile work environment.[47] "Quid pro quo" harassment occurs when cooperation with sexual requests "is made . . . a term or condition of an individual's employment," or when a "rejection of such [request] is used as the basis for employment decisions."[48] Harassment in the form of a hostile work environment occurs when harassing conduct "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."[49] While prior case law established that "quid pro quo" harassment violated Title VII,[50] the EEOC was the first authority to argue that a sexually hostile work environment, absent a negative impact on tangible job benefits was actionable under Title VII.[51]

The standards set forth by the EEOC for sex-based claims, specifically hostile work environment harassment, mirrored the standards used by courts in similar race or national origin discrimination cases.[52] By adopting uniform standards of harassment that applied to sex as well as "race, color, religion or national origin,"[53] the EEOC heeded Congress's message in the Equal Employment Opportunity Act of 1972.[54] Congress stated that "wo-

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47. *Id.*

48. *Id.*

49. *Id.* The 1980 Guidelines specifically establish:

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

Id.

50. Barnes v. Costle, 561 F.2d 983, 990 (D.C. Cir. 1977) (holding that a plaintiff who was terminated for refusing sexual requests could assert a claim for recovery under Title VII).

51. After EEOC Guidelines were published, courts unanimously allowed for hostile work environment claims under Title VII. *See, e.g.*, Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981) (declaring a violation of Title VII on two grounds, quid pro quo and hostile work environment).

52. *See* Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971) (holding that an employer created an offensive work environment by giving discriminatory service to Hispanics); *see also* Firefighters Institute for Racial Equality v. St. Louis, 549 F.2d 506, 514-15 (8th Cir. 1977) (finding a discriminatory hostile environment when African American firefighters were segregated at workplace events).

53. 29 C.F.R. 1604.11 n.1 ("The principles involved here continue to apply to race, color, religion or national origin.").

54. Pub. L. No. 92-261, 86 Stat. 103 (1972) (codified at 42 U.S.C. 2000e-4 (2000)).

men's rights are not judicial divertissements. Discrimination against women is no less serious than other forms of prohibited employment practices and is to be accorded the same degree of social concern given to any unlawful discrimination."[55] Despite the persuasive nature[56] of the EEOC Guidelines, it was not until *Meritor Savings Bank v. Vinson*[57] that the Supreme Court adopted them and established a binding precedent.

In *Meritor*, the Court quickly affirmed that sexual harassment is a form of sexual discrimination prohibited by Title VII, stating that "[w]ithout question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex."[58] More detailed, however, was the court's discussion of hostile work environment harassment. The plaintiff in *Meritor* was a bank employee who claimed she suffered sexual harassment at the hands of her supervisor who "touch[ed]" and "fondl[ed]" her, and eventually forced her to have intercourse.[59] The plaintiff was not fired, demoted or transferred for objecting to this harassment, and hence did not assert quid pro quo harassment. Instead, she argued that she was the victim of constant sexual harassment that created a hostile work environment.[60]

The Court agreed that a hostile work environment violates Title VII according to the express wording of the statute.[61] Title VII prohibits discrimination against an employee "with respect to his compensation, terms, conditions, or privileges of employment."[62] One of the "privileges" that an employee enjoys is the "right to work in an environment free from discriminatory intimidation, ridicule, and insult."[63] The Court concluded that the phrase "terms, conditions or privileges" provides employees protection from

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55. H.R. REP. NO. 92-238, at 4-5 (1971).

56. The EEOC Guidelines, " 'while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.' " Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986) (quoting General Electric Co. v. Gilbert, 429 U.S. 125, 141-42 (1976)).

57. *Meritor*, 477 U.S. 57 (1986).

58. *Id.* at 64.

59. *Id.* at 60-61.

60. *Id.* at 60.

61. *Id.* at 64

62. 42 U.S.C. 2000e-2(a)(1) (2000).

63. *Meritor*, 477 U.S. at 65; *see* Henson v. City of Dundee, 682 F.2d 897, 902 (11th Cir. 1982) ("Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality.").

"'working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of . . .workers.'"[64] By upholding hostile work environment harassment, the Court rejected a statutory reading that would allow recovery only when the harassment produced a tangible economic consequence.[65] The Supreme Court stopped short, however, of holding that all unwelcome[66] crude or sexual behavior within the workplace creates a hostile work environment.[67]

To state a claim for hostile work environment harassment, the employee must establish that the alleged conduct was "sufficiently severe or pervasive" so as "'to alter the conditions of [his/her] employment.'"[68] This language excludes much of the boorish and crude behavior that does not rise to the level of "severe or pervasive."[69] But the *Meritor* Court emphasized that what is "severe and pervasive" should be determined by looking at the "totality of the circumstances,"[70] including the frequency of the harassment and its humiliating character.[71] Therefore, an actionable hostile work environment can arise if "'a single incident was extraordinarily severe, or [if] a series of incidents were sufficiently continuous and concerted to have altered the conditions of [the employee's] work environment.'"[72]

Although lower courts had hoped the *Meritor* decision would provide them with guidance, what they actually received was more uncertainty. It was clear that there were two actionable forms of

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64. *Meritor*, 477 U.S. at 66 (quoting Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971)).

65. *Id.* at 64-65.

66. *Id.* at 68. The issue is not whether participation was voluntary, but whether the sexual advances were unwelcome. *Id.*

67. *Id.* at 67 ("Of course . . . not all workplace conduct that may be described as 'harassment' affects a 'term, condition, or privilege' of employment within the meaning of Title VII.").

68. *Id.* (citing *Rogers*, 454 F.2d at 238).

69. *See* Melissa R. Null, *Disrespectful, Offensive, Boorish & Decidedly Immature Behavior Is Not Sufficient to Meet the Requirements of Title VII*, 69 MO. L. REV. 255, 259 (2004) (discussing how crude behavior that made the plaintiff feel "uncomfortable and embarrassed" was not enough to constitute a hostile work environment); *see generally* Duncan v. General Motors Corp., 300 F.3d 928 (8th Cir. 2002) (denying a hostile work environment claim despite allegations that the plaintiff's supervisor propositioned her and insulted her work product).

70. *Meritor*, 477 U.S. at 69 (citing EEOC Guidelines, 29 C.F.R. § 1604.11(b)).

71. *Id.*; *see* Harris v. Forklift Systems, Inc., 510 U.S. 17, 23 (1993).

72. Whidbee v. Garzarelli Food Specialties, Inc., 223 F.3d 62, 69 (2d Cir. 2000) (quoting Cruz v. Coach Stores, Inc., 202 F.3d 560, 570 (2d Cir. 2000)).

sexual harassment: quid pro quo and hostile work environment.[73] But courts now had to determine what constituted "severe and pervasive" conduct with little or no direction from the Supreme Court.[74]

B. *Evolution of the Hostile Work Environment*

1. Defining and Redefining the Framework

In the years following *Meritor*, courts continued to pursue the goal of equalizing the workplace by eliminating discriminatory or harassing conduct. It became clear that, to achieve this objective, the Title VII framework would have to adapt and expand to encompass changing styles and social perceptions of sexual harassment.[75] "Title VII was not created with an expiration date," and if courts refused to apply Title VII "according to . . . social developments," the statute's anti-discrimination purpose would be lost.[76]

Recognizing the need for malleability, Congress amended and supplemented Title VII with the Civil Rights Act of 1991, reaffirming the purpose of Title VII and emphasizing the importance of deterrence.[77] In response to concerns that victims' needs were not being properly met under Title VII, Congress "expanded the ability of the courts to make victims of discrimination whole" by allowing plaintiffs to seek compensatory and punitive damages.[78] The intention of the 1991 amendments was to further encourage employers, who could now suffer higher damages, to prevent, rather than correct, inappropriate conduct.[79]

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73. Specifically, to recover under a hostile work environment claim a woman must show that (1) she is a member of a protected class; (2) she was subjected to unwelcome sexual advances; (3) the harassment was based on sex; (4) the harassment affected a "term, condition or privilege of employment"; and (5) the employer is liable. Katz v. Dole, 709 F.2d 251, 255 (4th Cir. 1983).

74. The *Meritor* court also left unresolved the issue of employer liability for hostile work environments created by supervisors. Then-Justice Rehnquist wrote, "We. . . decline the parties' invitation to issue a definitive rule on employer liability, but we do agree with the EEOC that Congress wanted courts to look at agency principles for guidance in this area." *Meritor*, 477 U.S. at 72. A discussion of employer liability, as alluded to in *Meritor*, can be found in Part II. C of this Note.

75. "Title VII vows to protect against discrimination 'because of . . . sex.' Not only sex as understood in 1964, but sex as it evolves through time." Mitchell, *supra* note 34, at 150 (discussing the applicability of Title VII in cases of harassment based upon sexual orientation).

76. *Id.*

77. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified in scattered sections of 42 U.S.C. and 2 U.S.C.).

78. Follette, *supra* note 9, at 655.

79. *Id.* at 657. Prior to the 1991 amendments, plaintiffs were only entitled to equi-

In addition, the Supreme Court began expanding the traditional Title VII framework in 1993 when it interpreted the "severe and pervasive" standard in *Harris v. Forklift Systems, Inc.*[80] The plaintiff in *Harris* sought to recover under Title VII for sexual harassment in the form of a hostile work environment.[81] The harasser, the president of Forklift Systems, Inc., repeatedly directed "unwanted sexual innuendos" at the plaintiff and indicated that her inabilities were a direct result of her gender, stating, "You're a woman, what do you know?" and, "We need a man as the rental manager."[82] The District court held that although the president's comments were offensive, they were not "so severe as to be expected to seriously affect [Harris'] psychological well-being."[83] The Supreme Court, however, rejected the suggestion that the victim must suffer a psychological injury for the harassment to be "severe and pervasive."[84] Title VII, the Court held, "comes into play before the harassing conduct leads to a nervous breakdown."[85] Instead, whether conduct is sufficiently "severe and pervasive" requires an objective/subjective analysis of the victim and the circumstances.[86] If the harassing conduct is objectively hostile, in that a reasonable person would find the conduct offensive or abusive, and the victim subjectively perceives the harassing behavior to be so, then such

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table damages, and if they suffered no economic injury as a result of the harassment they could not, realistically, recover anything. By allowing compensatory and punitive damages, "the amendments forc[ed] employers to heighten their awareness of discrimination." *Id.*

80. Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993).

81. *Id.* at 19.

82. *Id.*

83. *Id.* at 20 (citing App. to Pet. for Cert. A-34 to A-35). The District court based its reasoning on Rabidue v. Osceola Refining Co., 805 F.2d 611, 620 (6th Cir. 1986), which held that conduct only creates an abusive environment when it seriously affects the well-being of the victim and causes an injury.

84. *Harris*, 510 U.S. at 22. *But see Rabidue*, 805 F.2d at 620; Vance v. Southern Bell Telephone & Telegraph Co., 863 F.2d 1503, 1510 (11th Cir. 1989) (both holding, prior to *Harris*, that the harassment must be severe and pervasive enough to effect a plaintiff's emotional well-being).

85. *Harris*, 510 U.S. at 22.

86. *Id.* at 21-22; *see* Ellison v. Brady, 924 F.2d 872, 877-88 (9th Cir. 1991).

> [I]n evaluating the severity and pervasiveness of sexual harassment, we should focus on the perspective of the victim; . . . [but,] [i]n order to shield employers from having to accommodate the idiosyncratic concerns of the rare hyper-sensitive employee, we hold that a female plaintiff states a prima facie case of hostile environment sexual harassment when she alleges conduct which a reasonable woman would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive work environment.

Ellison, 924 F.2d at 878-79.

conduct violates Title VII despite the lack of a "psychological injury."[87]

The *Harris* court also reinforced that "whether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances . . . includ[ing] the frequency. . . [and] severity, . . . whether it is physically threatening or humiliating . . . and whether it unreasonably interferes with an employee's work performance."[88] The practical effect of this holding is that even when no one incident is "severe and pervasive" enough to create a hostile work environment, individual actions taken in the aggregate could easily meet this standard. Therefore, the holding in *Harris*, while taking the "middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury," still had the effect of expanding the reach of Title VII.[89] *Harris* also served to broadly define the "severe and pervasive" standard for recovery, ultimately stating that "severe and pervasive" includes, but is not limited to, an injury to the victim's psychological well-being.[90]

Armed with the subjective/objective standard and the "totality of the circumstances" test from *Meritor* and *Harris*, the Supreme Court went on to confront, for the first time, how changing societal perceptions and cultural norms would affect the definition of "severe and pervasive" sexual harassment. In *Oncale v. Sundowner Offshore Services, Inc.*,[91] the issue was whether Title VII was intended to combat same-sex sexual harassment. In a relatively short opinion by Justice Scalia, the Court held that Title VII protects individuals from same-sex harassment,[92] although this type of harassment was "assuredly not the principal evil Congress was concerned with when it enacted" the statute.[93] The court recognized that "'discrimination . . . because of sex' must extend to sexual harassment of any kind"[94] regardless of whether "sex" is defined by gender, orientation, or social stereotypes.[95]

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87. *Harris*, 510 U.S. at 21.

88. *Id.* at 23.

89. *Id.* at 21.

90. *Id.* at 22.

91. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998).

92. *Id.* at 82. "[W]e hold today that nothing in Title VII necessarily bars a claim of discrimination 'because. . .of sex' merely because the plaintiff and the defendant. . .are of the same sex." *Id.* at 79.

93. *Id.* at 79.

94. *Id.* at 79-80 (citing 42 U.S.C. 2000e (2000)).

95. Implicit in the *Oncale* holding is the extension of Title VII protection to those

Clearly establishing that same-sex harassment was actionable under Title VII, the Court rejected the idea that this extension would "transform Title VII into a general civility code for the American workplace."[96] In an effort to control the scope of Title VII, the court reaffirmed the subjective/objective components of a hostile work environment claim, and stressed that "same-sex harassment . . . requires careful consideration of the social context in which particular behavior occurs."[97] "Common sense,"[98] the court noted, would dictate whether non-sexual behavior was harassment or just "roughhousing" as usual.[99]

The importance of *Oncale* goes beyond the realm of same-sex or opposite-sex sexual harassment, to demonstrate more broadly how culture can affect the interpretation of statutory language. Discrimination based on "sex," as defined in 1964, would not have included harassment because of one's sexual orientation or unfeminine-like characteristics. But the trend among courts, particularly the Supreme Court, has been to read Title VII liberally,[100] and to structure a framework that encompasses much of the harassing and discriminatory conduct that causes a hostile environment without discarding the statutory requirement that the harassment affect

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who are sexually harassed, even though that harassment is not motivated by a sexual desire. *But see* McWilliams v. Fairfax County Bd. of Supervisors, 72 F.3d 1191, 1196 (4th Cir. 1996) (holding that same-sex harassment may be based on "the perpetrator's own sexual perversion, or obsession, or insecurity. . .but not specifically 'because of' the victim's sex"). For instance, in *Oncale*, the plaintiff was a male who, whether homosexual or not, was harassed by heterosexual men within the workplace because they believed him to be homosexual. *Oncale*, 523 U.S. at 77-78. This harassment or discrimination may not have been the result of sexual attraction, but it was the result of the plaintiff's gender and sexual perception. *Id.* at 79-89.

96. *Oncale*, 523 U.S. at 80.

97. *Id.* at 81.

98. *Id.* at 82. "Common sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing among members of the same sex, and conduct which a person in the plaintiff's position would find severely hostile and abusive." *Id.*

99. *See generally* Jennifer J. Ator, *Same Sex Harassment After Oncale v. Sundowner Offshore Services, Inc.: Overcoming the History of Judicial Discrimination in Light of the "Common Sense" Standard*, 6 AM. U. J. GENDER & LAW 583, 614-15 (1998) (predicting that the vague "common sense" standard set forth in *Oncale* will be abused by conservative courts).

100. *See* Price Waterhouse v. Hopkins, 490 U.S. 228 (1988). In *Price Waterhouse*, a female employee was discriminated against because she was "macho," needed a "course in charm school," and should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Id.* at 235. The court held that discrimination based on gender stereotypes fell with the protection of Title VII because it was based on the victim's sex. *Id.* at 258.

a "term, condition or privilege of employment."[101] The Supreme Court case law illustrates a commitment to the purpose and objective of Title VII, which has forced the courts to expand the scope of the statute as society dictates.

2. Hostile Work Environment Resulting in a Constructive Discharge

Under the doctrine of constructive discharge, the victim of an intolerably hostile work environment can resign and bring a claim for back pay.[102] This doctrine is widely applied in Title VII cases,[103] although it was initially created by the National Labor Relations Board (NLRB).[104] In the 1930s the NLRB developed this form of compensation "to address situations in which employers coerced employees to resign, often by creating intolerable working conditions."[105] Because the NLRB is concerned with the deliberate stifling of union organizations, constructive discharge victims are compensated only if the employer intended to force the employee's resignation.[106]

In contrast to the NLRB approach, Title VII's focus is not on the subjective intention of the employer, but the effect of the harassing conduct on the employee.[107] As a result, the majority of courts strayed from the NLRB approach[108] in favor of a "reasona-

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101. 28 U.S.C. § 2000e-2(1) (2000).

102. Sarah H. Perry, *Enough is Enough: Per Se Constructive Discharge for Victims of Sexually Hostile Work Environments Under Title VII*, 70 WASH. L. REV. 541, 546-47 (1995) (noting that courts have allowed back pay under Title VII when an employee is constructively discharged); *see* Antonopoulos v. Zitnay, 360 F. Supp. 2d 420, 429 (D. Conn. 2005) ("The United States Supreme Court recently concluded that hostile work environment sexual harassment could, in certain circumstances, constitute a constructive discharge.").

103. 42 U.S.C. § 2000e-5(g) (permitting courts to award back pay upon a finding of intentional discrimination); *see* Cathy Shuck, Comment, *That's It, I Quit: Returning to First Principles in Constructive Discharge Doctrine*, 23 BERKELEY J. EMP. & LAB. L. 401, 410 (2002) (stating that originally, courts were hesitant to "recognize constructive discharges in Title VII cases").

104. *See* Sterling Corset Co., Inc., 9 N.L.R.B. 858, 865 (1938) (discussing the constructive discharge standard).

105. Pa. State Police v. Suders, 542 U.S. 129, 141 (2004).

106. Perry, *supra* note 102, at 547. Under the NLRB a constructive discharge victim must show the following: "(1) the burdens imposed upon the employee must cause, and be intended to cause, a change in working conditions so difficult or unpleasant as to force the employee to resign; and (2) it must be shown that those burdens were imposed because of the employee's union activities." *Id.*

107. 42 U.S.C. § 2000e-2(a) (making it unlawful to discriminate based on "race, color, religion, sex, or national origin").

108. The NLRB specific intent standard was used in early Title VII cases, and still

bleness" standard when analyzing Title VII constructive discharge claims.[109] To prove a constructive discharge claim under Title VII, the victim must establish that the harassment was so unbearable that "a reasonable person in the employee's shoes would have felt compelled to resign."[110] By adopting the "reasonableness" standard, courts have shifted the focus from the employer to the employee,[111] thereby forcing employers to eliminate all discriminatory conduct, even that which is not intended to prompt a resignation.[112]

The "reasonableness" standard is not without its limits. A victim must establish that the harassment passed a "threshold level of intolerability"[113] or involved aggravated factors beyond those present in a traditional hostile work environment.[114] This heightened standard is necessary to ensure that the constructive discharge is comparable to an actual discharge, ultimately forcing the employee to leave his/her job.[115] Furthermore, courts have imposed upon the employee a duty to mitigate damages by requiring the employee to give notice of the intolerable conditions before resigning.[116] Both

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is used in certain circumstances. The specific intent test for Title VII constructive discharge claims was first established in *Muller v. U.S. Steel Corp.*, 509 F.2d 923, 929 (10th Cir. 1975) (holding that the employee must demonstrate that the employer's actions were intended to provoke a resignation), *cert denied*, 423 U.S. 825 (1975); *see* Sheila Finnegan, Comment, *Constructive Discharge Under Title VII and the ADEA*, 53 U. CHI. L. REV. 561, 566 (1986) (examining the history and standards of recovery for constructive discharge claims).

109. The First, Third, Fifth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits have all adopted a form of the "reasonableness" standard. Shuck, *supra* note 103, at 413.

110. Alicea Rosado v. Garcia Santiago, 562 F.2d 114, 119 (1st Cir. 1977).

111. Shuck, *supra* note 103, at 404.

112. Bourque v. Powell Electrical Mfg. Co., 617 F.2d 61, 65 (5th Cir. 1980) (noting that the intent standard ignores the realities of the workplace). The adoption of the reasonableness standard is yet another example of the courts' commitment to the purpose of Title VII. For example, the Supreme Court noted that compensation for Title VII violations should be guided by two principles: the eradication of discriminatory employment practices and the objective of making the victim whole. Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975). The reasonableness standard allows more victims to receive compensation for their lost wages.

113. Suders v. Easton, 325 F.3d 432, 445 (3d Cir. 2003), *rev'd on other grounds sub nom.* Pa. State Police v. Suders, 542 U.S. 129 (2004).

114. *See* Drake v. Minn. Mining & Mfg Co., 134 F.3d 878, 886 (7th Cir. 1998) (holding that something more than mere discrimination is required to fulfill a claim for constructive discharge).

115. "The doctrine reflects the sensible judgment that employers charged with employment discrimination ought to be accountable for creating working conditions that are so intolerable to a reasonable employee as to compel that person to resign." Ramos v. Davis & Geck, Inc., 167 F.3d 727, 732 (1st Cir. 1999).

116. Shuck, *supra* note 103, at 425; *see* Ellerth v. Burlington Indus., Inc., 912 F. Supp. 1101, 1124 (N.D. Ill. 1996) (finding that when an employee does not take advan-

the "reasonableness" of the resignation and the duty to mitigate offer employers some protection against liability while encouraging the use of policies and procedures to combat harassment in the workplace.

3. The Changing Face of Sexual Harassment

Just as the framework of a hostile work environment claim has changed, the conduct that constitutes such an environment has gone through a metamorphosis of sorts. In traditional hostile work environment cases, the conduct almost always occurred face-to-face or through some other direct interaction.[117] This type of harassment includes, but is not limited to, sexual requests, offensive hand and body gestures,[118] and sexually explicit language.[119] Situations like these present an "easy case" for the plaintiff because the harassment is so clearly subjectively and objectively offensive that it "illegally poison[s]" the plaintiff's work environment, thereby violating Title VII.[120] Courts, however, have not limited the definition of sexual harassment to face-to-face interactions. Once the Supreme Court established the "totality of the circumstances" test[121] more and more conduct fell within the definition of harassment.[122]

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tage of the employer's harassment policies a constructive discharge claim cannot be sustained).

117. The use of "traditional" in this instance is not meant to indicate "old" or "outdated." In fact, this blatant style of harassment is still prevalent today despite the protection of Title VII. *See* Petrosino v. Bell Atlantic, 385 F.3d 210, 215 (2d Cir. 2004). In *Petrosino*, a female employee endured "frequent disparaging remarks" referencing her buttocks, breasts, menstrual cycle, weight, and eating habits. *Id.*

118. *See* Kotcher v. Rosa & Sullivan Appliance Ctr., 957 F.2d 59, 61 (2d Cir. 1992). The plaintiff in *Kotcher* had a viable Title VII claim when the defendant subjected her to "repeated episodes of sexual harassment, manifested by vulgar comments and gestures." *Id.* These gestures included "pretend[ing] to masturbate and ejaculate at [the plaintiff] behind her back." *Id.*

119. In *Henson v. City of Dundee*, for example, the harasser made "demeaning sexual inquiries and vulgarities" to the victim throughout a two-year period. 682 F.2d 897, 899 (11th Cir. 1982). In *Bundy v. Jackson*, the victim's supervisor requested her to visit his home to view obscene photos, and was once told "any man in his right mind would want to rape [her]." 641 F.2d 934, 940 n.2 (D.C. Cir. 1981).

120. *Bundy*, 641 F.2d at 944 (citing Rogers v. Equal Employment Opportunity Comm'n, 454 U.S. 957 (1972)).

121. *See* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 69 (1986) (endorsing the "totality of the circumstances" test as promulgated by the EEOC Guidelines); *see also* Harris v. Forklift Systems, 510 U.S. 17, 23 (1993) (noting that "whether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances").

122. Although many courts used the "totality of the circumstances" test to expand the reach of Title VII, others used it to qualify certain conduct depending on the work environment. For example, conduct which is obviously offensive in an office setting may not be so offensive in a mechanic shop or other blue-collar work environ-

Courts have used the totality of the circumstances test to conclude that even if no single act of harassment satisfies the "severe and pervasive" requirement, an accumulation of lesser instances can satisfy the standard.[123] In *Williams v. General Motors Corp.*, the plaintiff claimed that she was sexually harassed, and offered fifteen descriptive examples of such conduct,[124] including foul language, offensive treatment by co-workers, workplace inequalities, and sexually related language.[125] The Sixth Circuit held that the lower court erred in granting summary judgment for the defendants because they "disaggregated the plaintiff's claims . . . which robbed the incidents of their cumulative effect."[126] The court noted, "the issue is not whether each incident . . . *standing alone* is sufficient to sustain the cause of action in a hostile environment case, but whether—taken together— the reported incidents make out such a case."[127]

The hostile work environment analysis has not stopped here. Included in the "totality" of an environment is the surrounding atmosphere, even though there may not be any direct harassment of the plaintiff by the defendant.[128] For instance, in *Robinson v. Jack-*

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ments. *See* Gross v. Burggraf Constr. Co., 53 F.3d 1531, 1538 (10th Cir. 1995) (holding that the "totality of the circumstances" includes the type of work environment in which the harassing conduct occurs) (citing Rabidue v. Osceola Refining Co., 584 F. Supp. 419 (E.D. Mich. 1984)).

123. *See* Williams v. Gen. Motors Corp., 187 F.3d 553, 561-62 (6th Cir. 1999) (holding that the district court erred when it disaggregated the plaintiff's claims).

124. *Id.* at 559. On a few occasions the plaintiff was called a "slut"; as she bent over a male co-worker stood behind her and said, "[b]ack up; just back up"; and she overheard a co-worker say, "I'm sick . . . of these [f*ing] women." *Id.*

125. *Id.* at 562.

126. *Id.* at 561. *But see* Jeffery S. Lyons, Comment, *Be Prepared: Unsuspecting Employers Are Vulnerable for Title VII Sexual Harassment Environment Claims*, 37 U.S.F. L. REV. 467, 487-88 (2003) (arguing that the *Williams* approach unjustly burdens employers because they have little or no chance of knowing about the smaller, yet persistent, harassing conduct).

127. *Williams*, 187 F.3d at 562; *see* Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486 (M.D. Fla. 1991).

> [T]he analysis cannot carve the work environment into a series of discrete incidents and measure the harm adhering to each episode. Rather, a holistic perspective is necessary, keeping in mind that each successive episode has its predecessors, that the impact of the separate incidents may accumulate, and that the work environment created thereby may exceed the sum of the individual episodes.

Robinson, 760 F. Supp. at 1524.

128. *See* Amy Horton, Comment, *Of Supervision, Centerfolds, and Censorship: Sexual Harassment, the First Amendment, and the Contours of Title VII*, 46 U. MIAMI L. REV. 403, 410-15 (1991) (discussing the scope of the hostile work environment and its possible infringement upon First Amendment rights); *see also* Note, *Sexual Harassment*

sonville Shipyards, Inc., the plaintiff brought a claim for hostile work environment harassment based on pinups, offensive pictures, and calendars, all depicting female nudity in a degrading manner.[129] Furthermore, the plaintiff claimed that she was harassed by offensive language, although it was not always directed at her, including commentary and jokes.[130]

The court held that "[a] reasonable [woman] would find that the working environment at [Jacksonville Shipyards, Inc.] was abusive," considering the "sexual remarks, the sexual jokes, the sexually-orientated pictures of women, and the nonsexual rejection of women by coworkers."[131] It has been argued that Title VII was not intended to transform the "social mores of American workers,"[132] but courts have nevertheless agreed that in order to eradicate discriminatory conduct, the "pre-existing (meaning male dominating) atmosphere that deters women from entering or continuing in a profession" cannot be condoned.[133]

As previously stated, in sexual harassment cases like *Robinson*, the plaintiff need not be physically touched or even suffer direct verbal abuse. Such blatant harassment is unnecessary because an environment riddled with pornography is so pervasive that it would affect the working conditions of even a reasonable woman. In cases, however, where the conduct is not open and pervasive, such as e-mail correspondence, the hostile nature of the conduct is not so evident.[134] Courts thus far have not been willing to find that sexually explicit e-mails alone constitute a hostile work environment

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Claims of Abusive Work Environment Under Title VII, 97 HARV. L. REV. 1449, 1458 (1984) (stating that without a clearly proscribed definition of what conduct is illegal, it is difficult to hold employers liable for conduct that was "not previously understood or intended to be wrongful").

129. 760 F. Supp. at 1495-98.

130. *Id.* at 1498-99. Such commentary often occurred when the male employees made reference to the photographs on the walls. They included, "I'd like to have some of that," "That one there is mine" and numerous sexual jokes, one specifically referring to "sodomous rape." *Id.*

131. *Id.* at 1524.

132. Rabidue v. Osceola Refining Co., 805 F.2d 611, 620-21 (6th Cir. 1986), abrogated by Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993) (quoting Rabidue v. Osceola Refining Co., 584 F. Supp. 419, 430 (E.D. Mich. 1984)). The Sixth Circuit adopted the district court's view that "[s]exual jokes, sexual conversations and girlie magazines may abound. Title VII was not meant to—or can—change this." *Id.*

133. *Robinson*, 760 F.Supp. at 1526.

134. *See* Joan T.A. Gabel and Nancy R. Mansfield, *The Information Revolution and Its Impact on the Employment Relationship: An Analysis of the Cyberspace Workplace*, 40 AM. BUS. L.J. 301, 326-36 (2003) (discussing the increase in discriminatory and harassing conduct in the workplace due to cyberspace workplaces).

under Title VII.[135] The hesitation by the courts to classify unconventional conduct as "hostile" exhibits their dedication to the framework already established: specifically, whether the conduct was objectively hostile and whether the conduct affected the "terms, conditions, or privileges of employment."[136]

C. *Employer Liability*

1. The Basis for Employer Liability

If a female employee asserts a claim under Title VII for sexual harassment, and she has proven that (1) she is a member of a protected group, (2) she "was subject to unwelcome sexual harassment," (3) the harassment was based on her sex, and (4) the harassment "affected a 'term, condition, or privilege' of employment," she still has to prove (5) the existence of her employer's liability before she can recover.[137] Due to the Supreme Court's commitment to impose employer liability in accordance with the principles of agency law and the recent creation of employer affirmative defenses,[138] this may be the most difficult evidentiary requirement for victims to fulfill.

Just as the elements of "quid pro quo" and hostile work environment harassment are different, so too are the standards for employer liability in these two situations. For "quid pro quo" harassment, liability is an easy determination. If an employee suffers "quid pro quo" harassment, he/she has suffered some form of tangible job detriment at the hands of a supervisor who has the power to alter the employee's job characteristics.[139] Because the supervisor acts within the scope of his employment when firing, demoting, or transferring an employee for a discriminatory reason, that supervisor is an agent of the employer and "courts have con-

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135. *Id.* at 332-33; *see* Schwenn v. Anheuser Busch, No. CIVA95CV716 (RSP/GJD), 1998 WL 166845, at *4 (N.D.N.Y. April 7, 1998) ("The law does not make 'actionable any conduct that is merely offensive.'"). In *Schwenn*, the court held that e-mails received by the plaintiff, although sexually offensive, were "very minor in comparison to those considered to create a hostile work environment." *Id.* The cases relied on in the *Schwenn* decision "included physical contact." Gabel, *supra* note 134, at 333.

136. 42 U.S.C. 2000e-2 (2000).

137. Henson v. City of Dundee, 682 F.2d 897, 903-05 (11th Cir. 1982).

138. *See* Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998); Faragher v. City of Boca Raton, 524 U.S. 775 (1998).

139. *See* Cram v. Lamson & Sessions Co., 49 F.3d 466, 473 (8th Cir. 1995) (noting that quid pro quo harassment requires evidence that "[the] submission to . . . unwelcome advances was an express or implied condition for receiving a job benefit or [that a] refusal to submit resulted in a tangible job detriment" (citing Kauffman v. Allied Signal, Inc., 970 F.2d 178, 186 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 831 (1992))).

sistently held employers liable . . . whether or not the employer knew, should have known, or approved of the supervisor's actions."[140] In other words, an employer is vicariously liable to the victim for "quid pro quo" harassment.[141]

A hostile work environment, on the other hand, can result from the actions of a supervisor or a co-worker acting within or outside the scope of employment, and the standard of liability, therefore, depends on the facts. When a co-worker creates a hostile work environment, the employer is only liable for its own negligence, in that it knew or should have known about the harassment and failed to take proper action.[142] The negligence standard of liability applies in cases of co-worker harassment because a co-worker has no actual or apparent authority and does not act within the scope of employment.[143] The analysis becomes more difficult, however, when the harasser is a supervisor, because a supervisor, depending upon the conduct, may or may not be acting as an agent of the employer.

The Supreme Court had an opportunity to resolve the issue of employer liability in 1986 when it decided *Meritor Savings Bank v. Vinson*.[144] Recognizing that Congress intended Title VII liability to reflect agency principles, the Court held that it is inappropriate to impose automatic vicarious liability on an employer for "acts of their supervisors, regardless of the circumstances of a particular case."[145] By rejecting automatic liability as a bright-line rule, the Court agreed with the EEOC that when a supervisor creates a hostile work environment "the usual basis for a finding of agency will often disappear" because that agent is not acting within their scope

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140. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 70-71 (1986).

141. Vicarious liability in this instance stems from the Restatement Second of Agency. "A master is subject to liability for the torts of his servants committed while acting within the scope of their employment." RESTATEMENT (SECOND) OF AGENCY § 219(1) (1958).

142. Rhodes v. Ill. Dep't of Transp., 359 F.3d 498, 505-06 (7th Cir. 2004) (stating that an employer is only liable for co-worker harassment when the plaintiff proves that the employer has "been negligent either in discovering or remedying the harassment" (quoting Parkins v. Civil Constrs. of Ill., Inc., 163 F.3d 1027, 1032 (7th Cir. 1998) (internal quotations omitted))); *see, e.g.*, Christopher Massaro, Note, *The Role of Workplace Culture Evidence in Hostile Workplace Environment Sexual Harassment Litigation: Does Title VII Mean New Management or Just Business as Usual?*, 46 N.Y.L. SCH. L. REV. 349, 357 (2002) (detailing the origins of employer liability).

143. *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 756-65 (1998) (using principles of agency to distinguish between co-worker and supervisor harassment for purposes of employer liability).

144. 477 U.S. at 70.

145. *Id.* at 72-73.

of employment.[146] However, the Court did not fully embrace the knowledge or negligence standard because supervisors, by way of their position and power, are more culpable than standard employees.[147]

The EEOC weighed in on the *Meritor* decision with regard to employer liability. The Guidelines of 1980 originally suggested that employers be held vicariously liable for *all* actions of their agents.[148] However, in its amicus brief, the EEOC suggested to the Court that "[i]f the employer has an expressed policy against sexual harassment and had implemented a procedure specifically designed to resolve sexual harassment claims, and if the victim does not take advantage of that procedure," the employer should not be automatically liable.[149] The court did not expressly accept or reject the EEOC's suggestion, noting that the existence of a grievance procedure and policy are relevant, but not dispositive.[150] Because *Meritor* eluded any definitive conclusion as to the state of employer liability for hostile work environments created by supervisors, the issue remained in flux until the Supreme Court finally addressed it in 1998.[151]

2. Supreme Court Framework: *Burlington Industries* and *Faragher*

The Supreme Court decided two cases in tandem, *Burlington Industries, Inc., v. Ellerth*[152] and *Faragher v. City of Boca Raton*,[153] both dealing with the issue of employer liability for supervisory harassment under a hostile work environment claim. In *Ellerth*, the

146. *Id.* at 71-72.

147. *Id.* at 72 (asserting that the "absence of notice to an employer does not necessarily insulate that employer from liability" (citing RESTATEMENT (SECOND) OF AGENCY §§ 219-237 (1958))).

148. 29 C.F.R. § 1604.11(c) (1985). 29 C.F.R. § 1604.11(c) was repealed by the EEOC in light of the Supreme Court's decision in *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

149. Brief for the United States and EEOC as Amici Curiae at 26, Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986) (No. 84-1979).

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

151. *See* Valerie H. Hunt, Case Note, Faragher v. Boca Raton*: Employer Liability in Hostile Environment Sexual Harassment Cases—Ignorance Is No Longer Bliss*, 52 ARK. L. REV. 479, 481-86 (1999) (discussing the different liability standards within the federal circuits prior to 1998). For example, the Third Circuit followed strict agency principles in *Bouton v. BMW of N. Am., Inc.*, 29 F.3d 103, 105-09 (3d Cir. 1994), while the Eighth Circuit rejected agency principles in favor of the "knowledge standard" in *Davis v. City of Sioux City*, 115 F.3d 1365, 1369 (8th Cir. 1997). *Id.*

152. 524 U.S. 742 (1998).

153. 524 U.S. 775 (1998).

plaintiff brought a claim for "quid pro quo" harassment because on three occasions her supervisor threatened to deny her job benefits, although she never suffered a tangible job detriment.[154] The plaintiff also presented evidence of a hostile work environment in violation in the form of "boorish and offensive remarks and gestures" by her supervisor.[155] The District Court held that the harassment was "severe and pervasive" but that Burlington had no knowledge of the harassment and, therefore, was not liable.[156] The Seventh Circuit reversed, and held Burlington vicariously liable for the acts of its supervisor.[157]

Similarly, in *Faragher v. City of Boca Raton*, the plaintiff established that over a five-year period her supervisors had created a hostile work environment consisting of offensive touching, lewd remarks and language indicating that she would never be promoted.[158] The District court held the employer liable for the actions of its supervisors because (1) the harassment was severe and pervasive enough to infer knowledge or constructive knowledge on the part of the employer; (2) the supervisors were acting as agents of the employer; and (3) the supervisor was informed of the harassment but did not act to correct it.[159] On appeal, however, the Eleventh Circuit reversed and refused to impose vicarious liability because the supervisors were not acting as agents or aided by their agency relationship, and the employer "lacked constructive knowledge of the supervisors' harassment."[160] Because of the disparate results among the circuits, the Supreme Court granted certiorari to settle the issue.[161]

The Supreme Court established that whether or not an employer is liable for the acts of his employees depends, in large part, upon the principles of agency.[162] Although a supervisor is an agent when acting within the scope of employment, a supervisor who ha-

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154. *Ellerth*, 524 U.S. at 747-48 (describing the alleged harassment by the plaintiff's supervisor, including indirect threats regarding the plaintiff's job security).

155. *Id.* at 747.

156. *Id.* at 749 (citing Ellerth v. Burlington Indus., Inc., 912 F. Supp. 1101, 1118-23 (N.D. Ill. 1996)).

157. *Id.* at 749.

158. 524 U.S. 775, 780 (1998).

159. *Id.* at 783 (citing Faragher v. City of Boca Raton, 864 F.Supp. 1552, 1562-64 (S.D. Fla. 1994)).

160. *Id.* at 785 (citing Faragher v. City of Boca Raton, 76 F.3d 1155, 1166-67 (11th Cir. 1996)).

161. Burlington Indus., Inc. v. Ellerth, 522 U.S. 1086 (1998); Faragher v. City of Boca Raton, 522 U.S. 978 (1997)

162. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 754-55 (1998). "In express

rasses a subordinate is not acting within that scope, and thus, is usually not an agent of the employer.[163] Therefore, vicarious liability is not justified under the principles of agency law simply because the harasser is a supervisor, unless that supervisor caused the victim to suffer a tangible job detriment.[164]

The Court's analysis did not stop there. Concluding that supervisors are "aided-by-agency-relation" when they sexually harass employees, the Court refused to equate supervisory harassment with co-worker harassment for the purpose of employer liability.[165] Section 219 (2)(d) of the Restatement (Second) of Agency states that an employer "is not subject to liability for the torts of his [employees] acting outside the scope of their employment, unless: the [employee]. . .was aided in accomplishing the tort by the existence of the agency relation."[166] The Court held, therefore, that because a supervisor might be aided by the position and power of the agency relationship when he/she sexually harasses an employee, vicarious liability is appropriate.[167]

However, being bound by the decision in *Meritor*, which expressly refused to extend automatic employer liability to all supervisory acts of harassment,[168] the Supreme Court established an affirmative defense that an employer can assert to avoid liability when there has been no tangible employment action.[169] If (1) the employer exercised reasonable care to prevent and correct the sexually harassing behavior, and (2) the victim unreasonably failed to take advantage of any of the procedures or policies instituted by the employer to address such situations, the employer will not be vicariously liable for the sexually hostile environment created by its su-

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terms, Congress has directed federal courts to interpret Title VII based on agency principles." *Id.* at 754.

163. *Id.* at 757; *see Faragher v. City of Boca Raton*, 524 U.S. 775, 794 (1998).

164. When a supervisor fires, demotes, or transfers an employee for a discriminatory purpose, that supervisor is acting within the scope of his employment. *See* RESTATEMENT (SECOND) OF AGENCY § 228(1) (1958). "The scope of employment" includes conduct that the employee is "employed to perform" and that occurs "within authorized time and space." *Id.*; *see Faragher*, 524 U.S. at 793 (discussing agency principles in regard to employer liability).

165. *Faragher*, 524 U.S. at 802.

166. RESTATEMENT (SECOND) OF AGENCY, §219(2)(d) (1958).

167. *Ellerth*, 524 U.S. at 763. "On the other hand, there are acts of harassment a supervisor might commit which might be the same as a co employee would commit . . . ." *Id.*

168. *Faragher*, 524 U.S. at 804 1 n.4.

169. *Id.* at 807.

pervisors.[170] By contrast, if the employer does not establish that it was "reasonably diligent in educating its employees and policing the workplace for instances of improper conduct," vicarious liability will be imposed.[171]

3. Constructive Discharge as a Tangible Job Detriment

After *Ellerth* and *Faragher* it was clear that an employer would not be automatically liable unless the supervisory harassment resulted in a tangible job detriment, or the employer was unable to fulfill the affirmative defense. Therefore, in an effort to circumvent the difficult affirmative defense standard, some plaintiffs argued that a hostile work environment constructive discharge amounts to a tangible job detriment.[172] The circuits split on the question whether a constructive discharge is comparable to an actual discharge, thereby prompting vicarious liability.[173] The Supreme Court addressed this issue in *Pennsylvania State Police v. Suders*.[174]

Relying on the framework from *Ellerth* and *Faragher*, the Supreme Court began its analysis with the principles of agency law.[175] A constructive discharge, the Court held, is a tangible employment action if it results from "official act[s]" of the supervisor or the employer.[176] The Court reasoned that a supervisor who sexually harasses an employee through official acts is acting as an agent of the employer and automatic liability, therefore, is appropriate.[177] In contrast, when the constructive discharge does not result from "official act[s]" of the supervisor, the employer has no reason to be put on notice and should be allowed to assert the affirmative defense.[178]

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170. *Ellerth*, 524 U.S. at 765.

171. Lyons, *supra* note 126, at 476.

172. *See* Suders v. Easton, 325 F.3d 432, 461 (3d Cir. 2003) (addressing the plaintiff's claim that she suffered a tangible job detriment because she was constructively discharged).

173. *Compare* Jaros v. LodgeNet Entertainment Corp., 294 F.3d 960, 966 (8th Cir. 2002) (holding that a constructive discharge is a tangible employment action) *with* Caridad v. Metro-North Commuter R. Co., 191 F.3d 283, 294 (2d Cir. 1999) (concluding that a constructive discharge is not a tangible job action).

174. 542 U.S. 129 (2004).

175. *Id.* at 143 ("Our starting point is the framework of *Ellerth* and *Faragher* to govern employer liability for sexual harassment by supervisors.").

176. *Id.* at 147.

177. *Id.* at 148 ("[O]fficial directions and declarations are the acts most likely to be brought home to the employer, the measures over which the employer can exercise greatest control.").

178. *Id.* ("Absent 'an official act of the enterprise,' as the last straw, the employer

Following *Suders*, the lower courts were left to decide which acts of a supervisor are inherently "official" and which are "unofficial." Like so many other Title VII standards (severe and pervasive, totality of the circumstances, reasonable resignation, etc.), the line between official and unofficial appears to depend upon the facts of individual cases. Due to the recent nature of the *Suders* decision, the interpretation of the "official acts" standard in the lower courts is unclear. Early interpretations, however, suggest that "official acts" are those that have a tangible employment consequence, such as a demotion or pay decrease.[179] It appears, therefore, that if a constructive discharge results from quid-pro-quo harassment, an employer will be vicariously liable, but if the constructive discharge results from hostile work environment harassment, an employer will be afforded the opportunity to assert the affirmative defense.[180]

II. ANALYSIS

The foregoing discussion of the Title VII framework makes clear that, in developing the statutory structure, the courts did not consider plaintiffs like the hypothetical Janet Johnson. The courts have focused on more overt forms of harassment, as evidenced by the objective and subjective standards and the affirmative defense requiring victims to give notice. Despite the established structure, though, the fact that a victim of video voyeurism does not suffer a hostile environment until discovering the "peeping" does not make the effect of the harassment any less damaging, or the need to compensate victims any less pressing.

This analysis, therefore, will demonstrate that when a supervisor is guilty of video voyeurism, the victim suffers a hostile work environment for which the employer is liable. Employer liability is

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ordinarily would have no particular reason to suspect that a resignation is not the typical kind daily occurring in the work force.").

179. *See* Wade v. Minyards Food Stores, No. 3:03-CV-1403-B, 2005 U.S. Dist. LEXIS 4973, at *23-26 (N.D. Tex. March 25, 2005) (equating an "official act" with a "tangible employment action" such as "hiring, firing, failing to promote, reassignment with different and/or less desirable responsibilities, or a decision causing a significant change in benefits"); *see also* Hardage v. CBS Broadcasting, Inc., No. 03-35906, 2005 U.S. App. LEXIS 23551, at *16 (9th Cir. Nov. 1, 2005) (stating that sexually harassing remarks by a supervisor are "insufficient" to constitute an "official act" as defined in *Suders*).

180. *See* Wade, 2005 U.S. Dist. LEXIS at *26 (citing Reed v. MBNA Marketing Systems, Inc., 333 F.3d 27, 33 (1st Cir. 2003) (asserting that when "a supervisor, in retaliation for spurned advances, assigns the victimized employee to an extremely dangerous job assignment," such an action constitutes an official act).

proper because the perpetrator is a supervisor, and employers are vicariously liable for the acts of their supervisors. Moreover, an employer cannot shield itself from liability by asserting the affirmative defense in a video voyeurism case because it cannot fulfill the second prong of the defense, namely, that the employee unreasonably failed to avail himself or herself of the employer's sexual harassment remedial procedures.

Employer liability does not end the discussion, however, and this analysis concludes by offering a solution that would ease the burden on employers. The solution consists of a mitigated damages analysis that would decrease an employer's liability if it acted reasonably and effectively to eradicate the harassment. This approach would offer victims compensation while still encouraging employers to eliminate harassing behavior, thereby effectuating Title VII's dual goal of deterrence and compensation.

A. *The Johnson Hypothetical and Title VII's Hostile Work Environment*

1. "Peeping" as Discriminatory Sexual Harassment

Janet Johnson's hypothetical sexual harassment claim falls within the purview of discrimination based on sex as required by Title VII. Sexual discrimination under Title VII occurs when victims are subject to unwelcome conduct precisely because of their sex.[181] As then-Justice Rehnquist noted in *Meritor*, when harassment occurs because of the victim's sex, that harassment is discriminatory in nature.[182] The Supreme Court has endorsed a "but for" test when analyzing whether harassing conduct is based on sex.[183] In Johnson's case, "but for" her womanhood she would not have been the target of secret surveillance.[184] The harassment was not

181. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986).

182. *Id.*

183. American Law Institute, *Current Developments In Employment Law*, SK013 ALI-ABA 569, 589 (2004) ("The Supreme Court has emphasized the 'but for' pleading requirement for harassment claims . . . ."); *see, e.g.*, Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998) (noting that Title VII is directed at discrimination "because of" sex).

184. *See* Nicolle R. Lipper, Comment: *Sexual Harassment in the Workplace: A Comparative Study of Great Britain and the United States*, 13 COMP. LAB. L. 293, 306 (1992) (noting that "but for [the plaintiff's] womanhood, her participation in sexual activity would never have been solicited"). The "but for" test was first articulated in *Barnes v. Costle*, where the court stated that "[b]ut for [the victim's] womanhood, her participation in sexual activity would never have been solicited." 561 F.2d 983, 990 (D.C. Cir. 1977).

only sexual in nature but also discriminatory because the perpetrator would not have acted similarly towards a male employee. Therefore, the surveillance constitutes discriminatory harassment.

Undeniably, "peeping," and more specifically video voyeurism, is not the type of sexual harassment that Congress sought to address by passing Title VII. But it is also unlikely that the legislature contemplated same-sex harassment,[185] sexual orientation harassment,[186] or harassment based on gender stereotyping,[187] yet each has received Title VII protection. Discussing same-sex harassment, Justice Scalia observed:

> [M]ale-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed . . . . [Title VII] must extend to sexual harassment of any kind that meets the statutory requirements.[188]

Janet Johnson meets the statutory requirements of Title VII. She was discriminatorily harassed because of her "sex," and that harassment affected the "terms, conditions, [and] privileges of [her] employment."[189]

2. Severity and Subjectivity: The *Meritor* and *Harris* Hurdles

Not all sexually harassing conduct creates a hostile work environment. The harassment must be "sufficiently severe or pervasive"[190] and "subjectively" and "objectively"[191] hostile to be actionable under Title VII. The sexual invasion that victims of video voyeurism suffer is undoubtedly "severe"[192] enough to alter

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185. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998).

186. Heller v. Columbia Edgewater Country Club, 195 F. Supp. 2d 1212, 1224 (D. Or. 2002) (noting that the plaintiff was harassed because she dated other women and therefore did not conform to her supervisor's notion of how a woman should behave).

187. Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989); *see* Nichols v. Azteca Restaurant Enters., Inc., 256 F.3d 864, 869 (9th Cir. 2001) (discussing the plaintiff's allegation that "he was verbally harassed by some male co-workers and a supervisor because he was effeminate and did not meet their views of a male stereotype.").

188. *Oncale*, 523 U.S. at 79-80.

189. 42 U.S.C. 2000e-2(a)(1) (2000).

190. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986).

191. Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993).

192. The Second Circuit interprets the "severe or pervasive" standard to mean

employment conditions, rendering them unable to fulfill their job duties, and eventually compelling them to resign. The exact timeframe, or "pervasiveness," of the secret surveillance is unknown, but even a single episode of sexual harassment this detrimental and humiliating violates Title VII.[193] The "'frequency of the discriminatory conduct' is only one factor in the [*Meritor*] analysis,"[194] and whether it was continuous or an isolated event, "peeping" is sufficiently "severe" when compared with other hostile work environments.

The Seventh Circuit, for instance, held that a plaintiff suffered "severe" sexual harassment when her boss propositioned her for oral sex, a threesome, and phone sex within the context of one conversation.[195] In the Second Circuit, a plaintiff who was obscenely berated in front of other employees concerning her menstrual cycle and her inability to perform oral sex adequately experienced "severe" harassment to constitute a hostile work environment.[196] The common characteristic between these examples and the harassment in the Johnson hypothetical is the humiliating and degrading effect that a single event can create. If a victim is repeatedly "peeped," it accentuates the argument by making the harassment "severe" *and* "pervasive," but such a fact is not necessary for the claim to continue.

The harassing conduct, however, must be both objectively and subjectively hostile for the hostile environment claim to continue.[197] This is the first major obstacle that victims of video voyeurism face within the current Title VII framework. According to *Harris*, conduct must be objectively hostile in that a reasonable person would find it abusive, and the victim must "subjectively per-

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that "the plaintiff must demonstrate either that a single incident was extraordinarily severe, or that a series of incidents were 'sufficiently continuous and concerted' to have altered the conditions of her working environment." Cruz v. Coach Stores, Inc., 202 F.3d 560, 570 (2d Cir. 2000) (citing Perry v. Ethan Allen, Inc., 115 F.3d 143, 149 (2d Cir. 1997)).

193. Turnbull v. Topeka State Hosp., 255 F.3d 1238, 1243 (10th Cir. 2001) ("[A]n isolated incident may suffice if the conduct is severe and threatening.").

194. Little v. Windermere Relocation, Inc., 265 F.3d 903, 911 (9th Cir. 2001) (citing *Harris*, 510 U.S. at 23).

195. Quantock v. Shared Mktg. Servs., Inc., 312 F.3d 899, 902, 904 (7th Cir. 2002) (reversing summary judgment for the defendant employer because a reasonable jury could find that the plaintiff was subjected to severe sexual harassment).

196. Howley v. Town of Stratford, 217 F.3d 141, 148, 154 (2d Cir. 2000) (reversing summary judgment for the defendant employer because a rational juror could find the event humiliating).

197. *Harris*, 510 U.S. at 21.

ceive the environment to be abusive," or no Title VII violation exists.[198] Objectively, any rational person would perceive the act of being secretly watched or taped in areas of extreme privacy as hostile and abusive. Subjectively, however, a victim of video voyeurism does not perceive the harassing conduct, unlike a victim of verbal abuse or a physical assault. That is not to say that victims do not perceive a hostile work environment upon discovering the "peeping," but that they do not perceive it contemporaneous to the harassment.

A Florida court had the opportunity to address this issue in a suit following the Walt Disney World "peeping" scandal described in the Introduction. In *Liberti v. Walt Disney World Co.*, the plaintiffs were videotaped through peepholes in their dressing room.[199] Disney claimed that the actual "peeping" did not create a hostile work environment because the plaintiffs were unaware of the harassment while it was occurring.[200] The court denied Disney's motion for summary judgment, however, stating that it was "unwilling to find . . . that [the perpetrator's] alleged conduct had no impact on either an objective or subjective interpretation of a hostile work environment, notwithstanding the plaintiffs' lack of knowledge at the time of [the perpetrator's] peeping."[201] Disney's defense failed because it relied on cases where the plaintiffs did not perceive the harassment or become aware of the harassing conduct until they were no longer employed with the defendant company.[202]

Like the Disney plaintiffs, Janet Johnson learned about the "peeping" while she was still an employee. Her awareness triggered the hostile environment, making Johnson so self-conscious and suspicious that she could no longer fulfill her job responsibilities. Because video voyeurism is not on point with other, more direct forms of sexual harassment, the *Harris* test must be expanded to include subjectively hostile environments that occur after the harassment has ceased. The alternative would unjustly deny victims compensation, not because workplace "peeping" or video voyeur-

198. *Id.* at 21-22.

199. 912 F. Supp. 1494, 1505 (M.D. Fla. 1995).

200. *Id.* at 1504. Disney argued that "because [the perpetrator] had been terminated and arrested before any of the plaintiffs was [sic] aware of his activities, [the perpetrator's] conduct could not have contributed to the allegedly hostile work environment." *Id.*

201. *Id.* at 1505.

202. *Id.* at 1504; *see* Edwards v. Wallace Community Coll, 49 F.3d 1517, 1522 (11th Cir. 1995).

ism does not constitute harassment, but merely because it is a different form of harassment.

A similar rationale has taken root in racial discrimination cases involving indirect harassment.[203] In these cases, courts have held that racially-hostile comments about which the plaintiff has no personal knowledge, but of which the plaintiff later becomes aware[204] are sufficient to create a hostile work environment when viewed in light of the "totality of the circumstances."[205] Essentially, courts have concluded that the *Harris* standard requires subjective knowledge about the harassment, but not necessarily subjective observation at the time it occurs.[206] Janet Johnson's hostile work environment claim is fundamentally the same as those in the racial discrimination cases. Johnson, therefore, should be allowed to recover under Title VII since her knowledge of the harassment caused her to subjectively perceive a hostile or abusive environment, even if she did not subjectively perceive the harassing conduct.

B. *Constructive Discharge: The Reasonableness of Johnson's Resignation*

Johnson's resignation was reasonable[207] under the theory of constructive discharge because the hostile work environment created by her supervisor was "aggravated" compared to average hostile work environments.[208] Victims of video voyeurism suffer from

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203. *See* Schwapp v. Town of Avon, 118 F.3d 106, 111 (2d Cir. 1997) (stating that the district court erred when it discounted racial slurs that were said outside of the plaintiff's presence); *see also* Rodgers v. Western-Southern Life Ins. Co., 12 F.3d 668, 673 (7th Cir. 1993) (holding that a hostile environment is created even when comments are not directed at the plaintiff).

204. *Schwapp*, 118 F.3d at 111.

205. Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993).

206. *Schwapp*, 118 F.3d at 111 ("The mere fact that Schwapp was not present when a racially derogatory comment was made will not render that comment irrelevant to his hostile work environment claim.").

207. Although there are two tests for constructive discharge, "reasonableness" and "specific intent," this analysis will only address the "reasonableness" test since this test has been adopted by the majority of circuits. *See supra*, note 109. In addition, the Supreme Court recently endorsed the "reasonableness" test in Pa. State Police v. Suders, stating that the test for constructive discharge is "objective: Did working conditions become so intolerable that a reasonable person in the employee's position would have felt compelled to resign?" 542 U.S. 129, 141 (2004). This Note makes no argument that a plaintiff such as Janet Johnson would prevail under the "specific intent" test. *See supra* note 108.

208. *See* Landgraf v. USI Film Prods, 968 F.2d 427, 430 (5th Cir. 1992) (holding that constructive discharge claims "must demonstrate a greater severity or pervasive-

feelings of invasion, humiliation, and extreme self-consciousness, which together create an intolerably hostile work environment. A typical hostile work environment, the Supreme Court has stated, is created "before the harassing conduct leads to a nervous breakdown" and can be sufficiently severe even if the harassment "does not seriously affect [an employee's] psychological well-being."[209] Thus, when a hostile environment *does* result in severe emotional distress, as in the case of video voyeurism, the harassing conduct clearly involves the requisite "aggravated" or "intolerable" conditions to justify a constructive discharge.[210]

Victims of video voyeurism are emotionally traumatized, even characterizing the experience as "visual rape."[211] Long after the "peeping" has stopped, some victims still survey every room they enter, shy away from video cameras, and are burdened by a constant feeling that someone is watching them.[212] The hostile environments experienced by even the most reasonable victims of video voyeurism are "more than ordinary,"[213] as compared to, for instance, the workplace in *Robinson v. Jacksonville Shipyards Inc.*[214] In *Robinson*, the court held that a hostile work environment was created by pervasive pictures of nude women and the frequent sharing of sexual jokes between the male employees.[215] While the harassment in *Robinson* was clearly abusive and severe, the harassment suffered by victims of "peeping" is more direct, intimate, and emotionally damaging. "Peeping" victims are not just exposed to hostile environments, or forced to overhear sexually explicit conversations, but instead, they are the exact targets of the abuse with, literally, all eyes on them.

In light of the invasive and humiliating nature of video voyeurism, it is clear that a victim in Janet Johnson's situation would feel

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ness of harassment than the minimum required to prove a hostile working environment"); *see also* Shuck, *supra* note 103, at 424 (noting that "aggravated circumstance" is a question of fact judged on a case-by-case basis).

209. *Harris*, 510 U.S. at 22 (noting how a hostile environment can affect work performance without being detrimental to the victim's health).

210. *See* Chertkova v. Conn. Gen. Life Ins. Co., 92 F.3d 81, 90 (2d Cir. 1996) (discussing how a "finding of constructive discharge would be supported by the fact that plaintiff had a breakdown").

211. Katie Mulvaney, *Creeps with Tiny Camera Take Snooping to a New Low*, PROVIDENCE JOURNAL-BULLETIN (R.I.), April 20, 2003, at A-10.

212. *Id.*

213. Drake v. Minn. Mining & Mfg. Co., 134 F.3d 878, 886 (7th Cir. 1998)(stating that under "ordinary" conditions the employee is expected to stay on the job).

214. Robinson v. Jacksonville Shipyards Inc., 760 F. Supp. 1486 (M.D. Fla. 1991).

215. *Id.* at 1524-25.

compelled to resign. Johnson had become preoccupied and self-conscious at work, and therefore, was unable to fulfill her job responsibilities. As a direct result of the "peeping," Johnson found it difficult even to *remain* in the office. Under these "aggravated conditions," where an employee's emotional stability is at issue, a resignation would be tantamount to a termination because there is no choice but to quit.[216]

Lastly, the secret character of video voyeurism leaves victims with no opportunity to mitigate their damages by giving notice to the employer, as is typically required in the case of a constructive discharge.[217] As a result, the mitigation requirement should not preclude a constructive discharge claim for plaintiffs like Johnson unless it can be proven that the victim had knowledge of the "peeping." Victims of video voyeurism in the workplace should be awarded their lost wages[218] because they are subjected to "aggravated factors" that would compel a reasonable person to resign and, ultimately, it is the intolerability of the workplace, not the duty to give notice, that is at the heart of the constructive discharge doctrine.

C. *Employer Liability: Favoring the Victim in Choices of Equity*

Although video voyeurism victims such as Janet Johnson can establish valid Title VII claims, they will only be compensated for lost wages unless there is justification for holding the employer liable for compensatory damages. As explained in Part II. D, Johnson's employer is vicariously liable for the harassing conduct of its supervisor because the supervisor is an agent of the employer.[219] Vicarious liability is not automatic, however, and an employer can assert the two-part affirmative defense to avoid liability.[220] If the employer can establish that (1) it "exercised reasonable care to prevent and correct promptly" the harassment, *and* (2) the victim "*unreasonably* failed to take advantage of the corrective opportunities offered by the employer" or otherwise avoid harm,[221] then the em-

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216. Cadena v. Pacesetter Corp., 18 F. Supp. 2d 1220, 1232 (D. Kan. 1998).

217. Shuck, *supra* note 103, at 425.

218. Title VII allows courts to award back pay if the discrimination is intentional. 42 U.S.C. 2000e-5(g) (2000). But courts have only awarded back pay in situations where the plaintiff was fired or constructively discharged. *See* Shuck, *supra* note 103, at 403 n.7.

219. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 762-63 (1998).

220. *Id.* at 765.

221. *Id.*

ployer will escape liability. Assuming that Johnson's employer meets the first prong of the test, it may argue that Johnson did not give notice of the harassment or seek to use the corrective programs in place. But can it be said that Johnson's failure to act was *unreasonable* considering her lack of knowledge?

1. On Its Face, the Affirmative Defense Is Inappropriate in Covert "Peeping" Cases.

Janet Johnson's hypothetical situation poses a unique problem for employers seeking to assert the affirmative defense. Johnson's employer fulfilled its duty to prevent the harassment by instituting policies and procedures, and acted swiftly to correct the problem by firing the perpetrator. But, according to the wording of the defense, the employer should be held liable because Johnson acted reasonably as well. Any other result would be counterintuitive because Johnson was virtually unaware of the harassment until the employer remedied the situation.

Video voyeurism, in light of its secretive nature, exposes the problems with the current Title VII framework which is structured around only the most obvious forms of harassment. For example, the affirmative defense focuses not only on the employer but seeks to encourage victims to take appropriate steps to avoid or minimize the harm.[222] But when the harassment is virtually undetectable and unanticipated,[223] as with video voyeurism, this goal of mitigation is unachievable.

In cases where the second prong of the affirmative defense is not met because the employee acted reasonably, some courts have simply focused on the first prong in an attempt to avoid imposing "automatic" liability on employers.[224] This interpretation is flawed and ignores the plain requirements of the defense. While it is true that the defense was implemented by the Supreme Court to limit employer liability,[225] the Court explicitly gave the victim partial control over the issue of liability to increase the likelihood that em-

222. Faragher v. City of Boca Raton, 524 U.S. 775, 806 (1998).

223. *See* Todd v. Ortho Biotech, Inc., 175 F.3d 595, 598 (8th Cir. 1999).

224. *See* McCurdy v. Arkansas State Police, 375 F.3d 762, 772 (8th Cir. 2004) ("[W]e hold [the defendant] is entitled to a modified *Ellerth/Faragher* affirmative defense, despite [defendant's] inability to prove the second element.").

225. *Todd*, 175 F.3d at 598 ("The Supreme Court's new affirmative defense was adopted to avoid 'automatic' employer liability and to give credit to employers who make reasonable efforts to prevent and remedy sexual harassment." (citing Faragher v. City of Boca Raton, 524 U.S. 775, 805 (1998))).

ployees would report sexual harassment.[226] The Supreme Court expressed its view that "[i]f the victim could have avoided harm, no liability should be found against the employer which had taken reasonable care" to prevent and correct the harassment.[227] Or, in the alternative, if the victim could *not* have avoided harm, then even a reasonable employer would be liable. Viewing the affirmative defense as requiring both the reasonableness of the employer and the unreasonableness of the employee, victims of video voyeurism are entitled to compensatory damages under Title VII.

2. Employers Should be Vicariously Liable When Victims Lack Knowledge or Opportunity to Cure Harassment.

a. Two Views of Employer Liability

On two occasions the Eighth Circuit has discussed whether an employer will be protected by the affirmative defense when the employee lacked the ability to give notice of the harassment. In *Todd v. Ortho Biotech, Inc.*[228] and *McCurdy v. Arkansas State Police*,[229] the courts questioned the applicability of the affirmative defense to cases of "single incident harassment" that create hostile work environments.[230] Single incident harassment and the video voyeurism that Johnson suffered share the same unique quality: the victim is unable to remedy the situation until the hostile work environment has already arisen. The conflicting analyses from *Todd* and *McCurdy*, therefore, illustrate the dilemma that courts will face in deciding whether to hold employers liable for workplace "peeping."

The *Todd* court refrained from applying the affirmative defense because in situations of "single, severe, unanticipatable" harassment, the victim is unable to avoid the harm.[231] In his concurring opinion, Judge Arnold argued that the "affirmative defense . . . is not always a complete defense to liability" and "should [not] always erase the tort completely."[232] In *McCurdy*, however,

226. *Faragher*, 524 U.S. at 805.
227. *Id.* at 807.
228. 175 F.3d 595 (8th Cir. 1999).
229. 375 F.3d 762 (8th Cir. 2004).
230. *Todd*, 175 F.3d at 598.
231. *Id.*
232. *Id.* at 599 (Arnold, J., concurring); *see* Rachel Shachter, *Creating Equitable Outcomes Through Remedies: When Reasonable Employers Must Be Held Liable for Sexual Harassment Under Title VII*, 8 VA. J. SOC. POL'Y & L. 567 (2001) (noting that courts should follow the literal interpretation of the affirmative defense even in cases where employers acted reasonably).

the court rejected *Todd*, favoring the protection of employers who take the necessary precautionary and remedial steps.[233] With this conclusion, the *McCurdy* court admittedly created a "modified *Ellerth/Faragher* affirmative defense" that omits any analysis of whether the victim acted reasonably.[234] The majority in *McCurdy* justified this amended defense by relying on courts' adherence to agency principles. The court stated that when the employer acts reasonably and the supervisor had no authority to sexually harass the victim, agency law prevents the imposition of strict liability.[235]

Removing the second prong of the defense, as the *McCurdy* court did, is "as neat an illusion as any sleight-of-hand artist ever created with a real coin."[236] The illusion is that the Supreme Court's *Ellerth/Faragher* defense can be restricted to the facts of those cases, namely, long-lasting and pervasive harassment.[237] There is no language in either Supreme Court decision limiting the affirmative defense to certain types of sexually hostile environments to prevent automatic employer liability.[238] In fact, avoiding automatic liability is admittedly not the Supreme Court's only concern in Title VII cases.[239]

b. Deterrence and Compensation

Title VII requires courts to consider not only principles of agency, but also the preventative[240] and compensatory[241] aspects

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233. *McCurdy*, 375 F.3d at 772 (stating that denying an employer the protection of the affirmative defense essentially imposes strict liability).

234. *Id.* at 772.

235. *Id.* at 773 ("[W]e . . . could not faithfully follow Supreme Court precedent if we held the [employer] strictly liable . . . .").

236. Indest v. Freeman Decorating, Inc., 168 F.3d 795, 798 (5th Cir. 1999) (Wiener, J., concurring) [hereinafter Indest II].

237. Indest v. Freeman Decorating, Inc., 164 F.3d 258, 265 (5th Cir. 1999) [hereinafter Indest I] (stating that the *Ellerth/Faragher* decision does not speak to the specific instance where both employee and employer act reasonably).

238. *McCurdy*, 375 F.3d at 775 (Melloy, J., dissenting) ("I cannot read anything in *Ellerth/Faragher* that creates an exception to the two prong affirmative defense for those cases of single incident harassment that do rise to the level of actionable sexual harassment."); *see Indest II*, 168 F.3d at 798 (illustrating how the "*Ellerth* and *Faragher* opinions . . . unmistakably address[ ] . . . the entire spectrum of an employer's vicarious liability under Title VII"); Shachter, *supra* note 232, at 583 (arguing that the "affirmative defense reads more like a universal code than malleable, content-specific common-law").

239. Burlington Indus., Inc., v. Ellerth, 524 U.S. 742, 764 (1998) ("Although *Meritor* suggested the limitation on employer liability stemmed from agency principles, the Court acknowledged other considerations might be relevant as well.").

240. *Id.* at 764 (adopting the affirmative defense "[i]n order to accommodate . . . Title VII's . . . basic policies of encouraging forethought by employers and saving action

that the Civil Rights Act was intended to promote. If courts refuse to impose liability on certain employers the deterrent effect would be stifled because employers would not be expected to actively combat covert types of harassment such as video voyeurism. Such a result would be contrary to Congress's intent that Title VII be a "'spur or catalyst' to cause employers 'to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges' of discrimination."[242] Without the fear of liability, employers would have little motivation to ensure that the workplace is free of illegal video surveillance or to better monitor the use of legitimate office video equipment. Because video "peeping" creates a hostile work environment from the moment of inception, the only adequate means of fulfilling Title VII's vision is absolute prevention, and absolute prevention cannot be achieved if the only measure of an employer's liability is reasonableness after-the-fact.[243]

For victims like Janet Johnson, Title VII's "make whole" provision[244] would be irrelevant if employer liability depended solely on the first prong of the affirmative defense. The question of liability would focus exclusively on the employer's rights, disregarding the substantial and unavoidable loss suffered by the victim. Even if a victim of video voyeurism proves that he or she suffered severe sex-

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by objecting employees"); Faragher v. City of Boca Raton, 524 U.S. 775, 806 (1998) (noting Title VII's "primary objective" to "avoid harm").

241. Albemarle Paper Co., v. Moody, 422 U.S. 405, 418 (1975) (affirming a Title VII purpose "to make persons whole for injuries suffered on account of unlawful employment discrimination").

242. Shachter, *supra* note 232, at 593 (citing McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 358 (1995) (citations omitted)).

243. This view is supported by the EEOC:

> [I]f a supervisor's misconduct causes immediate harm and the employee promptly complains, 'corrective action by the employer could prevent further harm but might not correct the actionable harm that the employee already had suffered . . . . In these circumstances, the employer will be liable because the defense requires proof that it exercised reasonable legal care and that the employee unreasonably failed to avoid the harm.'

John H. Marks, *Smoke, Mirrors, and the Disappearance of "Vicarious" Liability: The Emergence of a Dubious Summary-Judgment Safe Harbor for Employers Whose Supervisory Personnel Commit Hostile Environment Workplace Harassment*, 38 HOUS. L. REV. 1401, 1427 (2002) (citing EEOC, ENFORCEMENT GUIDANCE: VICARIOUS EMPLOYER LIABILITY FOR UNLAWFUL HARASSMENT BY SUPERVISORS, at note 7 and accompanying text (June 21, 1999) (available at http://www.eeoc.gov/policy/docs/harassment.html) [hereinafter EEOC, ENFORCEMENT GUIDANCE]).

244. *Albemarle Paper Co.*, 422 U.S. at 418; *see* Squires v. Bonser, 54 F.3d 168, 172 (3d Cir. 1995) (noting that Title VII's make-whole purpose is further illustrated by Congress's broad grant of authority to the courts regarding equitable remedies).

ual harassment and that he or she acted reasonably under the circumstances, that victim would not be "restor[ed] . . . to the position that [he or] she would have likely enjoyed had it not been for the [harassment]."[245] Such an outcome begs the question: In situations where both parties act reasonably, why should the victim suffer the loss when the employer has a greater ability to control and combat harassment like video voyeurism?[246]

Proponents of a single-prong defense clearly side with the employer, claiming that compensation is a secondary concern in Title VII cases. Although compensation may not be the primary objective, it is an important objective, as evinced by the 1991 amendments to the Civil Rights Act. The Civil Rights Act of 1991[247] was enacted by Congress to better compensate victims that previously received only equitable remedies such as injunctive or declaratory relief and reinstatement.[248] After 1991, victims of employment discrimination were able to claim compensatory damages for "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses"[249] as well as punitive damages if the employer acted with "malice or with reckless indifference to the federally protected rights."[250] Arguably, the addition of punitive damages would have been sufficient to increase deterrence, but Congress also intended to "ensure compensation commensurate with the harms suffered by victims of intentional discrimination"[251] by including compensatory damages. Therefore, any judicial action that fails to compensate a victim who fulfills the Title VII requirements, such as Janet Johnson, disregards the intent of Congress.

To accomplish Title VII's dual objective of prevention and compensation, the *Todd* approach to employer liability should pre-

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245. Dilley v. SuperValu, Inc., 296 F.3d 958, 967 (10th Cir. 2002) (quoting Fitzgerald v. Sirloin Stockade, Inc., 624 F.2d 945, 957 (10th Cir. 1980)).

246. *See* Michael C. Harper, *Employer Liability for Harassment Under Title VII: A Functional Rationale for* Faragher *and* Ellerth, 36 SAN DIEGO L. REV. 41, 48 (1999) (stating that the when both parties act reasonably, the clear language of the *Ellerth/ Faragher* defense places the burden on the employer).

247. Pub. L. No. 102-166, 105 Stat. 1071 (codified in various sections of 42 U.S.C. and 2 U.S.C.).

248. 42 U.S.C. § 2000e-5(g) (2000); *see* Mitchell v. Seaboard Sys. R.R., 883 F.2d 451, 452 (6th Cir. 1989) (holding that Title VII victims are not entitled to compensatory damages).

249. Civil Rights Act of 1991, § 102(b)(1) (codified at 42 U.S.C. § 1981a(b)(3) (1992)).

250. *Id.*

251. H.R. REP. NO. 102-40(I), at 18 (1991).

vail. The *McCurdy* decision and others like it[252] ignore the unique characteristics of Title VII and the delicate balance between agency and equity that is required to fulfill its goals. Understanding the intricacies of Title VII, the *Meritor* Court recognized that "common-law [agency] principles may not be transferable in all their particulars to Title VII."[253]

c. *Stare Decisis*

Some courts continue to insist that agency law is paramount and argue that imposing automatic liability on employers in any Title VII case violates *Meritor* and offends the doctrine of stare decisis. These courts interpret *Meritor* as rejecting automatic liability for employers in all cases of supervisory harassment that do not result in a tangible job detriment.[254] This is an overly broad reading of *Meritor*, especially in light of the Supreme Court's *Ellerth/Faragher* decisions requiring vicarious employer liability for supervisory harassment.[255] What *Meritor* expressly held was that it is inappropriate to impose automatic liability upon an employer for *all* acts of its supervisor, *irrespective of the circumstances*.[256]

It is the more narrow reading of *Meritor* that allowed the Supreme Court to endorse vicarious liability for supervisory harassment unless the employer can fulfill the affirmative defense.[257] The *Ellerth/Faragher* defense is the Court's attempt to consider the surrounding circumstances before imposing liability on the employer.

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252. *See* Coates v. Sundor Brands Inc., 164 F.3d 1361, 1369 (11th Cir. 1999) (concluding that "a prompt response . . . to halt [the] harassment is sufficient to relieve the employer of liability"); Yerry v. Pizza Hut, 186 F. Supp. 2d 178, 185 (N.D.N.Y. 2002) (holding that the employer is entitled to prevail if either "(a) the plaintiff did not avail himself of these preventative or corrective opportunities; *or* (b) the employee complained and the employer responded by acting soon thereafter to appropriately correct the action or behavior") (emphasis added).

253. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 72 (1986).

254. *See* McCurdy v. Arkansas State Police, 375 F.3d 726, 772 (8th Cir. 2004) (stating that denying an employer the affirmative defense creates strict liability contrary to the holding in *Meritor*); Indest I, 164 F.3d 258, 266 (5th Cir. 1999) (claiming that automatic or vicarious liability would "undermine" *Meritor*).

255. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998) (holding that an employer is subject to vicarious liability for acts of its supervisors).

256. *Meritor*, 477 U.S. at 73. "[W]e hold that the Court of Appeals erred in concluding that employers are always automatically liable for sexual harassment by their supervisors." *Id.* at 72.

257. *See Ellerth*, 524 U.S. at 763 ("[W]e are bound by our holding in *Meritor* that agency principles constrain the imposition of vicarious liability in cases of supervisory harassment."). It is important to note that the Supreme Court interprets *Meritor* and the principles of agency as a constraint on liability, not an outright barrier to it.

Under the circumstances as presented in the Johnson hypothetical, an employer cannot fulfill both prongs of the affirmative defense, and vicarious liability is not only appropriate, but necessary to effectuate the express holding of the Supreme Court.

The courts that have refused to apply both prongs of the affirmative defense argue that it is the Supreme Court that should declare employers strictly liable when both parties act reasonably.[258] Yet these same courts, which defer to the Supreme Court as the proper authority on the matter of liability, have little difficulty disregarding the holdings in *Ellerth* and *Faragher*.[259] This is the essence of judicial picking and choosing.[260] The Supreme Court did not disregard *Meritor* when it decided *Ellerth* and *Faragher*. In fact, with *Meritor* as a starting point, the Court incorporated the principles of agency into the affirmative defense to the greatest extent possible without abandoning their obligation to Congress and the purposes of Title VII.[261] Stare decisis, therefore, is a thin premise for lower courts to rest upon as they disregard the express language of the affirmative defense in favor of a modified standard that protects employers.

D. *Suggested Solution: Vicarious Liability with a Twist of Compromise*

An employer's reasonable efforts to prevent and promptly eliminate video voyeurism in the workplace should not be a complete shield from liability. Because the damage from supervisory "peeping" cannot be undone, "the employer should be forced to

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258. *See McCurdy*, 375 F.3d at 772 ("To hold the [employer] liable for [the supervisor's] unauthorized acts would be to expand the scope of strict liability under Title VII. Expanding strict liability principles is better left to the Supreme Court . . . .").

259. *See id.* at 771 ("Strict adherence to the Supreme Court's two-prong affirmative defense in this case is like trying to fit a square peg into a round hole. We will not tire ourselves with such an exercise.").

260. As stated previously, some courts have disregarded the second prong of the two-prong Ellerth/Faragher defense in favor of employers. *See supra* note 224. Still others have developed an alternative negligence standard considering the "'critical issue' to be whether the [employer] knew of the supervisor's 'proclivity to commit the sexual assault, and if so, whether they took reasonable steps to protect the plaintiff [employee] from him.'" Shachter, *supra* note 232, at 580 (second alteration in original) (quoting Whitaker v. Mercer County, 65 F. Supp. 2d 230, 245 (D.N.J. 1999)).

261. Harper, *supra* note 246, at 50. The majority in *Ellerth* and *Faragher* "looked to the purposes, structure, and compromises of Title VII, as well as the guidelines expressed in *Meritor*, to limit responsibly the exercise of a law-making power delegated by Congress through the use of the general agency term in Title VII's definition of employer." *Id.*

bear the costs"[262] of the harassment when the victim acts reasonably. Alternatively, the employer's reasonable actions cannot be discounted simply because harassment damages "[are] one of the costs of doing business, to be charged to the enterprise rather than the victim."[263] Such an approach would stifle the employer's motivation to actively prevent or rectify the harassment, thereby undermining Title VII's deterrent purpose. Instead, when both parties act reasonably, the employer's commendable behavior should serve to mitigate its damages.[264]

Both the EEOC and the Supreme Court recognize that "[i]n some cases, an employer will be unable to avoid liability completely, but may be able to establish the affirmative defense as a means to limit damages."[265] For example, an employer with a comprehensive prevention program who takes swift action to correct the harassment would protect itself from punitive damages for "reckless indifference."[266] Likewise, the employer's prompt remedial action would minimize the actual harm from the harassment, thus reducing the compensatory damages claimed by the victim.

Real equity, though, requires that the trier of fact be allowed to weigh the reasonableness of the employer against the victim's need for compensation and then allocate the damages accordingly. This analytic approach would begin with a "base-line damages figure" that incorporates the "attack itself" and any "costs of . . . medical and psychological treatment."[267] The base-line figure could then be reduced by the extent of the employer's reasonableness.[268] All reductions in compensatory damages, however, would be qualified by "the egregiousness of the sexual harassment and the severity of the harm to the employee."[269]

The mitigated damages approach would compensate victims for actual harm and further Title VII's deterrence policy by moti-

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262. Harper, *supra* note 246, at 72.

263. Faragher v. City of Boca Raton, 524 U.S. 775, 798 (1998).

264. Shachter, *supra* note 232, at 586-88 (advancing a proposed solution that would allow employers to mitigate damages through the affirmative defense).

265. EEOC, ENFORCEMENT GUIDANCE, *supra* note 243, at note 51 and accompanying text (citing *Faragher*, 524 U.S. at 807 and Burlington Indus., Inc., v. Ellerth, 524 U.S. 742, 764 (1998)).

266. Civil Rights Act of 1991, § 102(b)(1), 42 U.S.C. § 1981a(b)(1) (2000) (authorizing punitive damages against employers who act with "reckless indifference").

267. Shachter, *supra* note 232, at 588.

268. *Id.* ("[T]he trier of fact may reduce this base-line award if the defendant took efforts to mitigate damages . . . .").

269. *Id.* at 586.

vating employers to avoid excessive monetary losses. For a victim like Janet Johnson, this approach to liability would consider the particularly severe nature of the "peeping" and the emotional duress that followed, including her inability to remain in the workforce and her constant insecurity. Alternatively, Johnson's employer could evoke a sympathetic decision from the trier of fact by demonstrating that it "[took] corrective measures such as [immediately] firing the supervisor . . . or allowing the victim employee to take time off"[270] to seek medical or psychological care. Remedial actions by an employer, although aimed at reducing litigation awards, may also facilitate "conciliation rather than litigation" between mutually reasonable parties.[271] Imposing automatic liability on an employer for violating Title VII, therefore, does not necessarily end the discussion of damages. Through a mitigated damages analysis, courts can provide reasonable employers a level of equitable relief while still adhering to the clear meaning of the affirmative defense and the goal of victim compensation.

CONCLUSION

Janet Johnson is a hypothetical plaintiff with a hypothetical claim, but video voyeurism in the workplace is a harsh and growing reality. The Johnson situation illustrates how targets of video voyeurism are victimized, and how their lives and careers can be altered as a result. Despite the reasonableness of employers, the damage suffered by these victims cannot be ignored.

The numbers cannot be ignored either; video voyeurism is on the rise[272] and on its way into the workplace.[273] To prevent the continued increase of victims like Janet Johnson, courts must apply Title VII with an open perspective and remain mindful of the need for deterrence and compensation. If courts were to deny victims a claim under Title VII simply because "peeping" is a more difficult type of harassment to reconcile with the Title VII framework, the opportunity to prevent further incidents of voyeurism in the workplace would be lost.

In the same vein, courts should not seek to avoid employer liability by strictly adhering to agency principles or establishing a

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270. *Id.* at 589.

271. Burlington Indus., Inc., v. Ellerth, 524 U.S. 742, 764 (1998) (citing EEOC v. Shell Oil Co., 466 U.S. 54, 77 (1984)).

272. *See generally supra* notes 3-27 and accompanying text.

273. *See* Hawkins, *supra* note 4, at 52.

"modified" affirmative defense[274] that disregards the express command of the Supreme Court. Employer liability, even in situations were the employer acts reasonably, is crucial to the advancement of Title VII's dual deterrent and compensation purpose. Employers are not only more capable of compensating victim than are individual perpetrators, but employers also have a greater ability to prevent "peeping" in the workplace. The fear of burdening reasonable employers with damages should not prevent courts from imposing strict liability when it is warranted. Instead, courts can grant employers equitable relief through a mitigated damages analysis that accounts for the employer's reasonableness.

"Common sense," it has been argued, should serve as a guide for judges and juries when analyzing Title VII sexual harassment claims.[275] A common sense solution is exactly what this Note advances by balancing the interests of a victimized employee and a reasonable employer, while still effectuating Congress's intent to eradicate workplace discrimination.[276]

*Shannon D. Leger**

274. McCurdy v. Arkansas State Police, 375 F.3d 762, 772 (8th Cir. 2004).

275. Oncale v. Sundowner Offshore Servs. Inc., 523 U.S. 75, 82 (1998).

276. 42 U.S.C. § 2000e-2(a)(1) (2000) ("It shall be an unlawful employment practice for an employer to . . . discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .").

* To my teachers, past and present, who have instilled in me the continuing desire to do better. Thank you. "The task of the excellent teacher is to stimulate 'apparently ordinary' people to unusual effort." – K. Patricia Cross