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What Can You Say, Where Can You Say It, and to Whom?: A Guide to Understanding and Preventing Unlawful Sexual Harassment

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Abstract
After an increase in visibility for sexual harassment cases in 1991, employers have had to treat allegations of sexual misconduct more seriously now that juries have the authority to award both compensatory and punitive damages. Many employers and employees remain confused, however, as to what conduct is considered unlawful sexual harassment. This article explains how courts have analyzed allegations of unlawful sexual harassment under Title VII of the Civil Rights Act of 1964 by discussing what a court must find before it will impose liability. In response to the very real and immediate demand for a straightforward discussion of the law concerning sexual harassment in the workplace, this article provides a summary that is hoped to educate and assist both employers and employees. This article also discusses relevant sections of the Civil Rights Act of 1991.

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WHAT CAN YOU SAY, WHERE CAN YOU SAY IT, AND TO WHOM? A GUIDE TO UNDERSTANDING AND PREVENTING UNLAWFUL SEXUAL HARASSMENT

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This nation has finally begun to discuss sexual harassment at the workplace.[1] When Professor Anita Hill alleged that Supreme Court Justice Clarence Thomas sexually harassed her while she was an employee and he was Chairman at the Equal Employment Opportunity Commission, millions of Americans tuned in to watch the televised proceedings. Although viewers' reactions may have ranged from sympathy to anger to embarrassment, the hearings did prompt employers and employees to closely examine their own workplace experiences.[2]

Additionally, sexual harassment has received increased attention this past year because Congress and the White House finally reached an agreement on the much-debated Civil Rights Act of 1991.[3] This new legislation, which President George Bush signed on November 21, 1991, significantly expands the remedies for unlawful sexual harassment and provides that victims of unlawful intentional discrimination are now entitled to a jury trial. Employers must treat allegations of sexual misconduct more seriously now that juries have the authority to award both compensatory and punitive damages.

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1. This increased attention is certainly far overdue. Studies have revealed that a high percentage of women have been victims of sexual harassment. For instance, in 1981 the United States Merit Systems Protection Board interviewed women who were working for the federal government. Forty-two percent reported they had been victims of sexual harassment in the workplace. When the study was repeated in 1987, again over 40% of female federal employees reported incidents of sexual harassment. When sexual harassment occurs, both employers and employees lose. The United States Merit Systems Protection Board concluded that sexual harassment cost the government $267,000,000 as a result of losses in productivity, sick leave costs, and employee replacement costs from May, 1985, to May, 1987. Office of Policy and Evaluation, United States Merit Systems Protection Board, *Sexual Harassment in the Federal Government: An Update* 16, 39 (June, 1988).

2. Justice Clarence Thomas was sworn in as a United States Supreme Court Justice in October of 1991.

3. *See infra*, notes 128-31 and accompanying text.

Many employers and employees remain confused, however, as to what conduct is considered unlawful sexual harassment. This Article explains how courts have analyzed allegations of unlawful sexual harassment under Title VII of the Civil Rights Act of 1964 by discussing what a court must find before it will impose liability.[4] In response to the very real and immediate demand for a straightforward discussion of the law concerning sexual harassment in the workplace, this Article provides a summary that will hopefully educate and assist both employers and employees.[5] This Article also discusses relevant sections of the Civil Rights Act of 1991.

THEORIES OF SEXUAL HARASSMENT

QUID PRO QUO

Title VII of the Civil Rights Act of 1964 makes it "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."[6] Courts have determined that this statutory language prohibits two different types of unlawful sexual harassment: quid pro quo and hostile environment.

The quid pro quo form of unlawful sexual harassment is generally easier to understand. Quid pro quo sexual harassment occurs when an employer "conditions the granting of an economic or other job benefit upon the receipt of sexual favors from a subordinate, or

4. This Title prohibits discrimination on the basis of race, color, religion, sex, and national origin.

5. Sexual harassment claims can take a number of different forms. For instance, unlawful discrimination charges may be brought under Title VII of the Civil Rights Act of 1964. 42 U.S.C. §§ 2000e-2000e-17 (1988). Sexual harassment victims may also assert violations of 42 U.S.C. § 1983 (1988) (which provides that any person who, under the authority of the government, deprives rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured). *See* Dwyer v. Smith, 867 F.2d 184 (4th Cir. 1989) (holding that, although plaintiff's evidence was sufficient to avoid dismissal of her § 1983 claim, she was collaterally estopped from further litigating), and Lipsett v. University of P.R., 864 F.2d 881, 897 (1st Cir. 1988) (stating that, although state officials directly engaging in sexual discrimination are subject to § 1983 liability, those officials are not liable for the actions of supervisors). A myriad of tort common law theories are available, including assault, battery, and intentional infliction of emotional distress. *See* Wing v. JAMB Property Management Corp., 714 P.2d 916 (Colo. Ct. App. 1985) (holding allegations of sexual harassment, ridicule, threats, and humiliation sufficient to avoid dismissal of tort claim for outrageous conduct). Plaintiffs may also be able to assert newly developing wrongful discharge theories. *See* Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974) (finding a bad faith breach of plaintiff's employment contract when she was discharged for refusing to date her foreman). As stated in the text, this Article will concentrate on sexual harassment claims alleging a violation of Title VII of the Civil Rights Act of 1964.

6. 42 U.S.C. § 2000e-2(a)(1) (1988).

punishes that subordinate for refusing to comply."[7] In this situation, an employer is forcing an employee to accede to sexual demands. If the employee refuses, he or she will either forfeit job benefits (including continued employment, promotion, or salary increases) or suffer tangible job detriments (such as demotion or discharge).[8] Thus, the employee must prove that submission to the employer's requests was either an express or implied condition of receiving job benefits, or that a tangible job detriment resulted from the employee's failure to submit to the sexual demands.

A plaintiff alleging quid pro quo sexual harassment must establish that:

(1) he or she is a member of a protected group,
(2) the sexual advances were unwelcome,
(3) the harassment was sexually motivated, or based on sex, and that
(4) the advances affected a tangible aspect of employment.[9]

Quid pro quo sexual harassment necessarily involves owners, supervisors, and managers because persons in those positions have the power to grant benefits or threaten employment related detriments. Employers have been held strictly liable for the misconduct of those supervisory employees who have plenary authority over hiring, ad-

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7. *Lipsett*, 864 F.2d at 897 (extending VII standard for proving discriminatory treatment to alleged discrimination in violation of Title IX).

8. Highlander v. K.F.C. Nat'l. Management Co., 805 F.2d 644, 648 (6th Cir. 1986).

9. Sparks v. Pilot Freight Carriers, Inc., 830 F.2d 1554, 1564 (11th Cir. 1987). A number of courts have described the prima facie case for unlawful quid pro quo sexual harassment as including a fifth element. The United States Court of Appeals for the Fifth Circuit stated that the plaintiff must also prove that the employer knew or should have known of the harassment and took no remedial action. Spencer v. General Elec. Co., 894 F.2d 651, 658 (4th Cir. 1990). The court went on to explain, however, that when a supervisor is committing sexual hassassment "this element is automatically met because under 42 U.S.C. § 2000e(b) knowledge of the harassment is imputed to the employer through its agent-supervisor." *Id.* at 658-59 n.10 (citing Spencer v. General Elec. Co., 697 F. Supp. 204, 217 (E.D. Va. 1988) (citing Meritor Sav. Bank v. Vinson, 477 U.S. 57, 72 (1986)). The Sixth Circuit stated that a plaintiff must establish *respondeat superior* liability. *Highlander*, 805 F.2d at 648. *See also* Showalter v. Allison Reed Group, Inc., 767 F. Supp. 1205 (D.R.I. 1991). The *Highlander* court immediately added, however, that employers are strictly liable for their supervisors' quid pro quo sexual harassment because "knowledge of an employment decision based on impermissible sexual factors is imputed to the employer." *Highlander*, 805 F.2d at 648-49. The First Circuit, on the other hand, described a prima facie case of quid pro quo sexual harassment as having only two elements. *Lipsett*, 864 F.2d at 898. According to that court the plaintiff must prove that:

(1) he or she was subject to unwelcome sexual advances by a supervisor or teacher and
(2) that his or her reaction to these advances affected tangible aspects of his or her compensation, terms, conditions, or privileges of employment or educational training.

Id.

vancement, dismissal, and discipline.[10]

In a quid pro quo case, an employee must establish causation and show that he or she was denied a job benefit or suffered a job detriment for refusing the demands of the employer or its agent. Where an employee was transferred between business locations because she could not cope with the high volume of business at the original workplace; where she admitted that her performance was adversely affected by her inability to respond to the high volume; and where there was no evidence that the supervisor who made the sexual demands participated in any way in the decision to terminate plaintiff's employment for her extended absences, the employer was not held liable.[11]

It is helpful to examine more closely the preceding outline describing the elements that a quid pro quo plaintiff must establish. Regarding the first requirement, that the plaintiff be a member "of a 'protected group,' Title VII protects both males and females from sexual harassment."[12] Consequently both males and females will be members of a "protected group."

As to the second requirement, in order to determine what is "unwelcome" one must ask "whether sexual advances were uninvited and offensive or unwanted from the standpoint of the employee."[13] It should be noted that an employee's own use of foul language or sexual innuendo in a consensual setting does not waive his or her legal protections against unwelcome harassment. In *Showalter v. Allison Reed Group, Inc.*,[14] a male employee who had boasted about his sexual exploits and his possession of x-rated videos, and who had made repeated lewd proposals to a female co-worker, expressly re-

10. *Highlander*, 805 F.2d at 648. The United States Court of Appeals for the Third Circuit stated that the prevailing view in the United States Courts of Appeals is that employers will be held liable for unlawful sexual harassment when a supervisor has plenary authority regarding employment decisions. Craig v. Y & Y Snacks, Inc., 721 F.2d 77, 80-81 (3d Cir. 1983) (citing Henson v. City of Dundee, 682 F.2d 897, 910 (11th Cir. 1982); Miller v. Bank of America, 600 F.2d 211, 213 (9th Cir. 1979); Barnes v. Costle, 561 F.2d 983, 993 (D.C. Cir. 1977)). The Third Circuit rejected the argument that employers should not be held liable under Title VII unless they have actual or constructive knowledge of the sexual harassment at the time it occurs. *Id.* at 80. The Fourth Circuit explained that its requirement that the employer knew or should have known of the harassment and took no remedial action is automatically met when supervisors commit sexual harassment because, according to the Title VII definition of "employer" in 42 U.S.C. § 2000e-(b), "knowledge of the harassment is imputed to the employer through its agent-supervisor." *Spencer*, 894 F.2d at 658 n.10.

11. *Highlander*, 805 F.2d at 649.

12. Showalter v. Allison Reed Group, Inc., 767 F. Supp. 1205, 1211 (D.R.I. 1991) (citing Henson v. City of Dundee, 682 F.2d 897, 903 (11th Cir. 1982)).

13. *Showalter*, 767 F. Supp. at 1211 (citing Chamberlin v. 101 Realty, Inc., 915 F.2d 777, 784 (1st Cir. 1990)).

14. 767 F. Supp. 1205 (D.R.I. 1991).

jected a supervisor's invitation to join an ongoing sexual affair with the manager's secretary. Because the employee manifested his displeasure clearly and unambiguously, he satisfied this part of his proof.[15]

Concerning the third requirement, typically there is little question as to whether the request is sexually motivated. Cases addressing allegations of hostile environment, however, have established that advances need not be explicitly sexual in order to amount to a sexual advance.[16]

The fourth requirement for a finding of quid pro quo sexual harassment is that the sexual advance or sexual comment affect a tangible aspect of employment. If an employer's request imposes a new condition on the plaintiff's employment, a "tangible" aspect of employment is affected.[17] For example, if an employee must accede to an employer's request in order to keep his or her job, the obvious tangible job benefit the plaintiff receives for succumbing to the harassment will be the retention of his or her employment.

Finally, employers are held strictly liable in cases of quid pro quo sexual harassment.[18] If the harasser is the employee's own supervisor, the employer's liability is direct. It does not matter whether the employer knew, or should have known, about the supervisor's conduct.[19] The United States Supreme Court confirmed this rule in 1986 when it approvingly stated that "courts have consistently held employers liable for the discriminatory discharges of employees by supervisory personnel, whether or not the employer knew, should have known, or approved of the supervisor's actions."[20]

The United States Court of Appeals for the Fourth Circuit has explained that once an employee has established a prima facie case of liability, an inference of quid pro quo sexual harassment will arise.[21] At this point, a burden shifts to the defendant to produce some evidence to rebut this presumption. This evidence must take the form of legitimate, nondiscriminatory reasons for the employment decision in question. If this presumption is successfully rebutted, the burden of producing evidence returns to the plaintiff to show that the de-

15. *Id.* at 1211-12. The issue of "unwelcomeness" will be further discussed in the following section on hostile environment.

16. For further discussion, *see infra* at notes 40-48 and accompanying text.

17. *See* Henson v. City of Dundee, 682 F.2d 897, 909 (11th Cir. 1982) (explaining that "as in the typical disparate treatment case, the employee must prove that she was deprived of a job benefit which she was otherwise qualified to receive because of the employer's use of a prohibited criterion in making the employment decision.").

18. Katz v. Dole, 709 F.2d 251, 255 n.6 (1983). *See infra* note 10.

19. *Spencer*, 894 F.2d at 658 n.10.

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

21. *Spencer*, 894 F.2d at 658-59.

fendant's suggested nondiscriminatory reasons are pretextual and that the actions in question were based on a sexually discriminatory criterion. The ultimate burden of persuading the trier of fact that unlawful conduct occurred always remains with the plaintiff, however.

HOSTILE ENVIRONMENT

Allegations of hostile environment sexual harassment are more confusing than charges alleging quid pro quo sexual harassment. In *Meritor Savings Bank v. Vinson*,[22] the United States Supreme Court described how a court should determine whether unlawful hostile environment sexual harassment has occurred.[23]

In *Meritor Savings Bank*, a vice president and manager of a branch bank allegedly made repeated sexual demands and had intercourse with the plaintiff some forty to fifty times. Additionally, it was alleged that the manager fondled the plaintiff in the presence of co-workers, pursued her into the women's restroom, exposed himself to her, and on several occasions forcibly raped her.[24]

In its discussion, the United States Supreme Court distinguished quid pro quo sexual harassment from hostile environment sexual harassment. The Court stated that the language of Title VII is not limited to "economic" or "tangible" discrimination.[25] Instead, "the phrase 'terms, conditions, or privileges of employment' evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment."[26]

The Court explained, however, that not all workplace conduct that may be described as "harassment" affects a "term, condition, or privilege" of employment within the meaning of Title VII. The

22. 477 U.S. 57 (1986).

23. The United States Court of Appeals for the Third Circuit identified an intriguing question that deserves further examination. According to that court, the circumstances that give rise to quid pro quo sexual harassment claims are common to both men and women. The theory of hostile environment sexual harassment, however, arises from the belief that a woman's sexuality defines her in our society. There is a "sexual power asymmetry between men and women" because men are not similarly defined by their sexuality. This understanding, when combined with the history of workplace discrimination against women, may create causes of action for hostile environment sexual harassment that are only available to women. Drinkwater v. Union Carbide Corp., 904 F.2d 853, 861 n.15 (3d Cir. 1990) (citing C. MACKINNON, SEXUAL HARASSMENT 151, 174 (1979)). Those further interested in this question will find substantial thoughtful discussion in the writings of Catherine MacKinnon, among others.

24. *Meritor Sav. Bank*, 477 U.S. at 60.

25. *Id.* at 64.

26. *Id.* (quoting Sprogis v. United Airlines, Inc., 444 F.2d 1194, 1198 (7th Cir. 1977)).

Supreme Court cited *Rogers v. EEOC*[27] for the proposition that the "mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee" will not affect the conditions of employment sufficiently to violate Title VII.[28] Rather, "[f]or sexual harassment to be actionable, it must be *sufficiently severe or pervasive* 'to alter the conditions of [the victim's] employment and *create an abusive working environment.*' "[29]

Additionally, the Court stated that "the gravamen of any sexual harassment claim is that the alleged sexual advance be *'unwelcome.'* "[30] The Court took great care to distinguish the term "voluntary" from the term "unwelcome." It emphasized that although a plaintiff's conduct may be regarded as voluntary, in the sense that the plaintiff was not forced to participate against his or her will, this characterization is not a defense to a sexual harassment claim brought under Title VII.[31]

Although an employee's voluntariness in submitting to advances may be immaterial, the Supreme Court added that an employee's sexually provocative speech or dress may be relevant in determining whether he or she found particular sexual advances unwelcome. The Court cautioned, however, that while there is no per se rule against admissibility of this type of evidence, a trial court must carefully weigh the probative value of such evidence against its potential for unfair prejudice.[32]

In deciding that this evidence was relevant, the Supreme Court relied in part on the Equal Employment Opportunity Commission guidelines. Those guidelines state:

> (b) In determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case by case basis.[33]

To conclude its discussion of unlawful sexual harassment, the Supreme Court addressed the question of when courts should hold an employer liable for hostile environment sexual harassment. Rejecting the Court of Appeal's position that an employer should be

27. 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972).
28. *Meritor Sav. Bank*, 477 U.S. at 67 (quoting *Rogers*, 454 F.2d at 238).
29. *Id.* (quoting *Henson*, 682 F.2d at 904) (emphasis added).
30. *Id.* at 68 (citing Equal Employment Opportunity Commission guidelines 29 C.F.R. § 1604.11(a)) (emphasis added).
31. *Id.*
32. *Id.* at 69.
33. 29 C.F.R. § 1604.11(b) (1991).

strictly liable for a supervisor's sexual advances that create a hostile environment (even where an employer did not know nor reasonably could have known of the alleged conduct), the Court refused to issue a definitive rule on employer liability. Rather, the Court simply stated that Congress wanted courts to be guided by agency principles.[34]

The Court's refusal to issue a definitive rule addressing employer liability has resulted in substantial litigation. The Supreme Court did state that courts should not always hold employers automatically liable for hostile environment sexual harassment committed by their supervisors.[35] It added, however, that the absence of notice to an employer will not necessarily insulate the employer from liability.[36] Additionally, it rejected the argument that the mere existence of a grievance procedure and policy, combined with an employee's failure to invoke that procedure, will insulate an employer from liability.[37]

The Supreme Court declared that an anti-discrimination policy will not protect an employer if:

> (1) the policy does not address sexual discrimination in particular, thus alerting employees to the employer's interest in correcting that form of discrimination, or -
> (2) the company's grievance procedure requires an employee to complain first to his or her supervisor who, as in *Meritor Savings Bank*, may be the person harassing the plaintiff (making it understandable that the employee did not invoke the procedure).[38]

Thus, the Court identified a number of factors to consider when determining whether an unlawful hostile environment exists. The United States Court of Appeals for the Ninth Circuit summarized the prima facie case for unlawful hostile environment sexual harassment by stating that a plaintiff must show that:

> (1) she [he] was subjected to sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature;
> (2) that the conduct was unwelcome; and
> (3) that the conduct was sufficiently severe or pervasive to alter the conditions of her [his] employment and create an abusive working environment.[39]

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34. *Meritor Sav. Bank*, 477 U.S. at 72.
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.* at 72-73.
39. E.E.O.C. v. Hacienda Hotel, 881 F.2d 1504, 1514-15 (9th Cir. 1989) (quoting Jordan v. Clark, 847 F.2d 1368, 1373 (9th Cir. 1988), *cert. denied*, 109 S.Ct. 786 (1989) (quoting *Henson*, 682 F.2d at 904)).

A CLOSER LOOK AT HOSTILE ENVIRONMENT

Since the United States Supreme Court's decision in *Meritor Savings Bank*, there have been a number of cases involving allegations of hostile environment sexual harassment. These cases further explain the factors that combine to create a hostile environment.

PROHIBITED CONDUCT

To determine whether a hostile environment exists, one must first focus on the allegedly offensive conduct. Initially, one should recognize that it is not necessary that the plaintiff prove explicit sexual advances or sexual overtones in order to establish a hostile environment. For instance, in *McKinney v. Dole*,[40] the United States Court of Appeals for the District of Columbia stated that an incident of physical force toward an employee by a supervisor can create a hostile environment if it is sufficiently pervasive or patterned, and "if it is apparently caused by the sex of the harassed employee."[41]

The *McKinney* court stated that any harassment or other unequal treatment of an employee or group of employees that would not occur but for the sex of the employees may, if sufficiently patterned or pervasive, comprise an illegal condition of employment under Title VII.[42] The court explicitly rejected the argument that an assault cannot be sexually discriminatory if it is not explicitly sexual, although the court added that proving that a pattern of physical force is illegally discriminatory might be significantly more difficult than proving unlawfulness based upon a pattern of explicitly sexual advances. Plaintiffs will obviously find it easier to prove that a pattern of explicit sexual advances occurred a result of the sex of an employee.[43] The court, however, interpreted this as simply an evidentiary problem.

The United States Court of Appeals for the Tenth Circuit took a comparable position when it stated that evidence of threatened physical violence and incidents of verbal abuse could be considered along with evidence of two incidents of sexual harassment when deciding whether a black female security guard established hostile environ-

40. 765 F.2d 1129 (D.C. Cir. 1985). *See also* Hall v. Gus Constr. Co., 842 F.2d 1010, 1013-14 (8th Cir. 1988) Defendants argued calling one plaintiff "Herpes" was merely "cruel," that urinating in her gas tank was a practical joke, and that neither of these occurrences, in addition to a refusal to fix her truck, was sexual harassment. The court responded that it had never held that sexual harassment or unequal treatment that occurs because of the sex of the employee must take the form of sexual advances or have clearly sexual overtones. *Id.*

41. *McKinney*, 765 F.2d at 1138.

42. *Id.* at 1138 n.20 and accompanying text.

43. *Id.* at 1139 n.21.

ment sexual harassment.[44] As a Florida District Court stated in 1991, the key is whether the harassment was based upon sex.[45]

The United States Court of Appeals for the Third Circuit has stated that, to show unlawful conduct, it is only necessary to establish that gender was a substantial factor in the discrimination and that a female [male] would not have been treated in the offensive manner if she [he] had been a man [woman].[46] This court recently determined that the offensive conduct need not include sexual overtones in every instance, and that each incident need not be sufficiently severe to affect a female employee. The court held that "the pervasive use of derogatory and insulting terms relating to women generally and addressed to female employees personally may serve as evidence of a hostile environment."[47] Similarly, the United States Court of Appeals for the Ninth Circuit held that a supervisor's disparaging remarks about the maids' pregnancies could be construed as a form of sexual harassment.[48]

The posting of pornographic pictures in common areas and in employees' work spaces may be unlawful conduct. *Robinson v. Jacksonville Shipyards, Inc.*[49] involved male shipyard workers who had posted pictures of nude and partially nude women and who had made sexually demeaning remarks and jokes. The court accepted a psychologist's testimony that these pictures "sexualized" the entire work environment to the detriment of all female employees.[50] Accordingly, the posting of these pictures was unlawful sexual harassment.

The psychologist's testimony asserted that stereotyping, or categorizing defined groups as sharing certain traits, means that individual members of those groups will eventually be evaluated in these terms as well. In the process of perceiving people as divided into groups, persons will tend to maximize the differences among the groups, exaggerate those differences, and minimize the differences within the groups. The result is that women are perceived as more similar to other women and more different from men (and vice versa) than they may be in reality.[51]

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44. Hicks v. Gates Rubber Co., 833 F.2d 1406, 1415 (10th Cir. 1987). The court described two incidents of sexual harassment involving one supervisor who rubbed a female security guard's thigh and a second superivor who touched her breasts. *Id.* at 1409-10.

45. Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1522 (M.D. Fla. 1991).

46. Andrews v. City of Philadelphia, 895 F.2d 1469, 1485 (3d Cir. 1990) (quoting Tomkins v. Public Serv. Elec. & Gas Co., 568 F.2d 1044, 1047 n.4 (3d Cir. 1977)).

47. *Id.*

48. *Hacienda Hotel*, 881 F.2d at 1515 n.8.

49. 760 F. Supp. 1486 (M.D. Fla. 1991).

50. *Id.* at 1505.

51. *Id.* at 1502.

According to the *Robinson* court, "this perceptual process produces the 'in-group/out-group' phenomenon."[52] Those persons in the outside group will be viewed less favorably. This can produce discriminatory decisions at the workplace and it may lead to employees being judged based on qualities unrelated to job performance. Rather than being judged according to merit, employees who are members of the outside group will be judged simply upon the stereotype assigned to the designated group within which they fall. In other words, when a male supervisor categorizes a female employee based on a sexual stereotype, that supervisor will evaluate her performance and capabilities in terms of characteristics that comport with the stereotypes assigned to women, rather than in terms of this individual's job skills and performance.[53]

Although stereotyping has been found to be an unlawful practice, some courts may still find conduct of an explicitly sexual nature lawful. A trial court found that where no sexual language was ever directed at a female police officer, although sexual language was used in the workplace; where only one of the unwelcome mailings that plaintiff received in her mailbox was pornographic; where the plaintiff could not establish the source of these mailings; where one of the pieces of "artwork" about which the plaintiff complained was placed in the workplace by another female employee; and where two female police officers testified that there was no sexual harassment at the workplace, the plaintiff failed to establish a prima facie claim of sexual harassment.[54]

UNWELCOME

Once an employee can show that there was conduct of a sexual nature, or conduct based on sex, then he or she must show the conduct was unwelcome. As mentioned earlier in this article, in *Meritor Savings Bank*, the Supreme Court discussed the term "unwelcome." The Court distinguished "unwelcomeness" from "voluntariness" and indicated that an employee's sexually provocative speech or dress is relevant in determining whether an employee welcomed sexual advances.[55]

In a subsequent case, *Swentek v. United States Air, Inc.*,[56] the United States Court of Appeals for the Fourth Circuit focused on the term "unwelcome." Numerous witnesses testified at trial that the

52. *Id.*
53. *Id.*
54. Dwyer v. Smith, 867 F.2d 184, 188 (4th Cir. 1989).
55. *See supra* notes 30-32 and accompanying text.
56. 830 F.2d 552 (4th Cir. 1987).

plaintiff, a female employee, was a foul-mouthed individual who frequently talked about sex. In addition, unrebutted testimony revealed that the plaintiff tried to "loosen up" her supervisor by placing a sexual toy in her mailbox, filled a cup with urine and presented it to another employee as something to drink, and once grabbed a pilot's genitals while inviting him to join her in a sexual liaison.[57]

The trial court held that the plaintiff's own past behavior and use of foul language indicated that another pilot's allegedly harassing conduct and comments were "not unwelcome," even though the plaintiff had told the alleged harasser to leave her alone.[58] The trial judge concluded that this plaintiff could not be offended by these types of comments and therefore should be regarded as welcoming them.[59]

On appeal, however, the Fourth Circuit concluded that a "[p]laintiff's use of foul language or sexual innuendo in a consensual setting does not waive 'her legal protections against unwelcome harassment.' "[60] The appellate court distinguished *Swentek* from *Meritor Savings Bank*. In *Meritor Savings Bank*, the Supreme Court found that evidence of plaintiff Vinson's past conduct bore directly on her relationship with the alleged harasser because she worked with the harasser, who was her supervisor, on a daily basis.[61] As a result, the Supreme Court concluded that Vinson's dress and conversation were relevant in determining whether she welcomed sexual advances.

By contrast, in *Swentek*, there was no evidence that the alleged harasser knew of Swentek's past conduct or that he believed his conduct would be welcomed. Under these circumstances, according to the appellate court, it was improper for the trial judge to suggest that Swentek's past conduct should be interpreted to mean that she welcomed the harasser's behavior.[62]

Thus, when determining whether certain conduct was unwelcome, one should explore whether the alleged victim ever expressly indicated his or her distaste or dislike. One should also distinguish consensual relationships from nonconsensual circumstances.

A truly consensual relationship is not unwelcome and should not be considered unlawful sexual harassment, at least as between the consenting participants. A consensual relationship in the workplace may, however, result in a hostile environment. The United States

57. *Id.* at 556. At a second trial, plaintiff denied these occurrences. *Id.*
58. *Id.*
59. *Id.* at 557.
60. *Id.* at 557 (quoting Katz v. Dole, 709 F.2d at 254 n.3).
61. *Id.*
62. *Id.*

Court of Appeals for the Third Circuit has acknowledged that, under certain circumstances, a consensual relationship may fill the workplace with sexual innuendo and interfere with standard business procedures such that nonparticipating fellow employees are subjected to hostile environment sexual harassment.[63]

One must also identify the point in time at which a plaintiff indicated his or her preferences regarding certain conduct. In a very recent 1992 case, *Burns v. McGregor Electronic Industries, Inc.*,[64] the United States Court of Appeals for the Eighth Circuit reviewed a trial court's conclusion that certain sexual conduct did not create an unlawful hostile environment.[65] A critical fact for the trial court was that the plaintiff had previously appeared nude in two motorcycle magazines. Relying on this evidence, the trial court stated that "[i]n view of [Burns'] willingness to display her nude body to the public in Easy Riders publications, crude magazines at best, her testimony that she was offended by sexually directed comments and Penthouse or Playboy pictures is not credible."[66]

The Eighth Circuit did not accept the trial court's conclusion. The appellate court acknowledged the Supreme Court's statement that evidence of a plaintiff's sexually provocative speech or dress is relevant in determining whether conduct was unwelcome. The Eighth Circuit also recognized that the plaintiff had repeatedly indicated the conduct was offensive. The court determined that both of these factors should enter into the trial court's analysis. Accordingly, the court remanded the case to the trial court with instructions that the conduct "incited" by the nude photographs should be distinguished from conduct that began before the photographs appeared and that "did not change in kind or intensity after the appearance of the photos."[67]

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63. Drinkwater v. Union Carbide Corp., 904 F.2d 853, 860-62 (3d Cir. 1990) (holding that there is no unlawful sexual harassment when an employee fails to produce sufficient evidence to establish that the working environment caused her to suffer based upon her gender. The court concluded that two comments, standing alone, were insufficient to show that there was a continuous period of harassment, and thus insufficient to show an abusive working environment). *See infra* notes 73-94 and accompanying text for a discussion of what constitutes an "abusive environment."

64. No. 90-2504, (8th Cir. Jan. 30, 1992).

65. *Id.* slip op. at 7.

66. *Id.* (quoting the District Court opinion).

67. *Id.* slip op. at 11-12. It is not entirely clear that an employee's workplace speech or dress should be considered relevant once he or she has explicitly expressed distaste for certain types of conduct. By accepting evidence of plaintiff's conduct away from the workplace, the Eighth Circuit appellate court has gone one step beyond the Supreme Court's opinion in *Meritor Savings Bank* and has raised even more serious questions as to relevancy.

SEVERE OR PERVASIVE

Conduct of a sexual nature will not be unlawful if it is merely unwelcome. Among other things, it must also be severe or pervasive. In an effort to determine whether conduct was unlawful, the United States Court of Appeals for the Tenth Circuit stated that the district court may combine evidence of sexual hostility with evidence of racial hostility in making its assessment.[68]

In determining whether conduct is pervasive or severe, courts will not look at alleged incidents in isolation. Rather, they will consider the cumulative effect of allegedly unlawful conduct in its totality. As the United States Court of Appeals for the Eleventh Circuit explained in 1989, "[w]hat may appear to be a legitimate justification for a single incident of alleged harassment may look pre-textual when viewed in the context of several other related incidents."[69]

If there are only a few incidents, but they are particularly offensive, a court may still find unlawful sexual harassment. The United States Court of Appeals for the Ninth Circuit stated in 1991 that "the required showing of severity or seriousness of the harassing conduct varies inversely with the pervasiveness or frequency of the conduct."[70]

A Florida federal district court recently explained that, although the terms "severe" and "pervasive" do not have a precise definition, there is an interaction between these two requirements.[71] As the severity and impact of harassing behavior increases, the level of pervasiveness required to establish Title VII liability will decline. According to the court, a holistic perspective is required. One must keep in mind that each successive episode has its predecessors, that distinct incidents have a cumulative impact, and that the workplace atmosphere may be something more than merely the sum of individual episodes. Thus, even if no single episode created a hostile workplace, the combination of past and current incidents may lead to the

68. *Hicks*, 833 F.2d 1406, 1416. It may be possible, however, to construct an argument in response to a plaintiff's attempt to combine types of discrimination. In Degraffenreid v. General Motors Assembly Div., St. Louis, 413 F. Supp. 142 (E.D. Mo. 1976), *aff'd in part, rev'd in part on other grounds*, 558 F.2d 480 (8th Cir. 1977), the United States Court of Appeals for the Eighth Circuit held that black women should not be considered as an independent Title VII protected class. Rather, to be successful, black women must show that they were discriminated against either because of gender or because of race. If an employer cannot be held liable for treating black women differently from the way it treats both black men and white women, one can argue that it is similarly inappropriate to combine evidence of racial hostility with evidence of sexual hostility in an effort to prove a hostile environment. *See id.* at 143.

69. Vance v. Southern Bell Tel. & Tel. Co., 863 F.2d 1503, 1510 (11th Cir. 1989).

70. Ellison v. Brady, 924 F.2d 872, 878 (9th Cir. 1991).

71. *Robinson*, 760 F. Supp. at 1524.

conclusion that Title VII has been violated.[72]

ABUSIVE ENVIRONMENT

Even after proving there was severe or pervasive unwelcome conduct of a sexual nature, an employee has not established that there was hostile environment sexual harassment. The employee must also establish that the harassment affected a term, condition or privilege of employment. The United States Supreme Court, in *Meritor Savings Bank*, declared that the harasser's conduct must create an abusive working environment.[73]

Courts have begun to look at this requirement both subjectively and objectively. As to the subjective requirement, courts will ask whether the plaintiff/employee has shown that she personally has been at least as affected as a hypothetical reasonable person would be under similar circumstances.[74] The subjective factor is deemed critical because it establishes that the alleged misconduct harmed this particular plaintiff, giving rise to a claim for judicial relief.[75] For example, even where the United States Court of Appeals for the Eighth Circuit was convinced that "a reasonable person would consider the conduct of [the owners and supervisors] to be sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment," the court remanded to the trial court to "determine whether Burns [the plaintiff] was as affected as that hypothetical 'reasonable person.' "[76]

The objective standard is intended not only to protect employers from "hypersensitive" employees, but also to serve the goal of equal opportunity by removing barriers to employment.[77] This standard, however, has been the subject of recent debate.

Several courts have concluded that, when reviewing the objective requirement, a court must recognize that males and females do not always perceive the same incident in a similar fashion. The United States Court of Appeals for the Third Circuit stated in *Andrews* that "[a]lthough men may find these actions harmless and innocent, it is entirely possible that women may feel otherwise."[78] That court directed the trial judge to "look at all the incidents to see if they produce a work environment hostile and offensive to *women* of

72. *Id.*
73. *Meritor Sav. Bank*, 477 U.S. at 67.
74. *Robinson*, 760 F. Supp. at 1524; *Burns*, slip op. at 13-14.
75. *Andrews*, 895 F.2d at 1483.
76. *Burns*, slip op. at 13-14.
77. *Andrews*, 895 F.2d at 1483.
78. *Id.* at 1486 (citing Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV. L. REV., 1449, 1451 (1984)).

reasonable sensibilities," adding that all the evidence should be viewed in its totality.[79]

In January of 1991, the United States Court of Appeals for the Ninth Circuit announced that it would examine a harasser's allegedly unlawful conduct from the perspective of a reasonable woman because:

> a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women. The reasonable woman standard does not establish a higher level of protection for women than men. . . . Instead, a gender-conscious examination of sexual harassment enables a woman to participate in the workplace on an equal footing with men.[80]

The court also stated in that case, *Ellison v. Brady*,[81] that where male employees allege there has been conduct creating a hostile environment, the victim's response would be examined from the perspective of a "reasonable man."[82]

The persons responsible for the harassment need not realize that their conduct rises to the level of "abusive." The court in *Ellison* explained that the reasonable victim standard classifies conduct as unlawful sexual harassment even if the harassers did not understand that their conduct created a hostile working environment. The court stated that even well-intentioned compliments can result in sexual harassment if a reasonable victim of the same sex as the plaintiff would view the statements as so severe or pervasive that they altered a condition of employment and created an abusive working environment.[83] The *Robinson* court took a similar position, stating that "[t]he objective standard asks whether a reasonable person of Robinson's sex, that is, a reasonable woman, would perceive that an abusive working environment has been created."[84]

The United States Court of Appeals for the Sixth Circuit took a more restrictive position in 1986. In *Rabidue v. Osceola Refining Co.*,[85] the court declared that, when deciding whether an unlawful hostile environment existed, it would consider:

> the nature of the alleged harassment, the background expe-

79. *Id.* (emphasis added).
80. Ellison v. Brady, 924 F.2d at 879.
81. 924 F.2d 872 (9th Cir. 1991).
82. *Id.* at 879 n.11.
83. *Id.* at 880. The court added, however, that "if sexual comments or sexual advances are welcomed by the recipient, they, of course, do not constitute sexual harassment. Title VII's prohibition of sex discrimination in employment does not require a totally desexualized workplace." *Id.* at n.13.
84. *Robinson*, 760 F. Supp. at 1524.
85. 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987).

> rience of the plaintiff, her co-workers, and supervisors, the totality of the physical environment of the plaintiff's work area, the lexicon of obscenity that pervaded the environment of the workplace both before and after the plaintiffs introduction into its environs, coupled with the reasonable expectation of the plaintiff upon voluntarily entering that environment.[86]

The *Rabidue* court concluded that the presence of actionable sexual harassment would depend upon the personality of the plaintiff and the prevailing work environment and that allegations of sexual harassment must be considered and evaluated on an ad hoc basis. The court asserted that the plaintiffs' allegations should be considered from the perspective of a reasonable *person*.[87]

Robinson and *Ellison* both expressly rejected *Rabidue*. The *Ellison* court began by asserting that if it analyzed situations from the perspective of the alleged harasser, by asking whether a reasonable person would engage in such conduct, it would run the risk of reinforcing the prevailing level of discrimination. "Harassers could continue to harass merely because a particular discriminatory practice was common, and victims of harassment would have no remedy."[88] Instead, allegedly unlawful conduct should be examined from the perspective of the victim.

The *Ellison* court stated that, although there is a broad range of viewpoints among women as a group, many women share common concerns which men do not necessarily share.

> Women who are victims of mild forms of sexual harassment may understandably worry whether a harasser's conduct is merely a prelude to violent sexual assault. Men, who are rarely victims of sexual assault, may view sexual conduct in a vacuum without a full appreciation of the social setting or the underlying threat of violence that a woman may perceive.[89]

Moving beyond the question of whether the appropriate standard is "reasonable woman/man" as opposed to "reasonable person," another important observation about abusive environment is that sexual harassment directed at employees *other than* the plaintiff can be used to prove hostile work environment. According to the Tenth Circuit in *Hicks*,[90] evidence of the overall workplace atmosphere, as distinguished from evidence of specific hostility directed toward the

86. *Id.* at 620.
87. *Id.* (emphasis added). *See Burns*, slip op. at 13-14.
88. *Ellison*, 924 F.2d at 878.
89. *Id.* at 879.
90. 833 F.2d 1406 (10th Cir. 1987).

plaintiff, is also an important consideration in evaluating allegedly unlawful hostile environments.[91]

Several courts have added an additional element to the plaintiff's prima facie case. The *Rabidue* court asserted that, to prevail in a Title VII action, a plaintiff must prove the alleged sexual misconduct created a hostile environment "that affected seriously the psychological well-being of the plaintiff."[92] Similarly, the United States Court of Appeals for the Fourth Circuit has stated that, "[t]o succeed with a hostile environment claim, the plaintiff must first demonstrate that the harassment interfered on her ability to perform her work or significantly affected her psychological well-being."[93]

The suggestion that showing a significant impact on psychological well-being is properly part of a plaintiff's prima facie hostile environment sexual harassment case has been aggressively challenged, however. Although the United States Court of Appeals for the Fourth Circuit softened this requirement by stating it in the alternative, other courts have refused to consider this to be part of a hostile environment prima facie case.[94]

EMPLOYER LIABILITY

Although employers are being held liable for unlawful sexual harassment committed by supervisors and coworkers, the theoretical basis for these holdings remains somewhat unclear. As mentioned earlier in this article, *Meritor Savings Bank* confirmed that an employer will be held strictly liable for supervisors who engage in quid pro quo sexual harassment. In that case, however, the Supreme Court did not articulate a definitive rule regarding employers' liability for hostile environment sexual harassment. Although the Court instructed lower courts to look to agency principles, it expressly stated that in hostile environment situations employers will not automatically be held liable for sexual misconduct by their supervisors.[95]

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91. *Id.* at 1415.

92. *Rabidue*, 805 F.2d at 619.

93. Paroline v. Unisys Corp., 879 F.2d 100, 105 (4th Cir. 1989) (citing *Rabidue*, 805 F.2d at 620).

94. The Ninth Circuit Court of Appeals emphatically rejected this requirement when it stated "employees need not endure sexual harassment until their psychological well-being is seriously affected to the extent that they suffer anxiety and debilitation." *Ellison*, 924 F.2d at 877-78. Other courts have implicitly rejected this requirement by omitting it from their description of the plaintiff's prima facie case. *See Hicks*, 833 F.2d at 1413 (adopting the Supreme Court's language from *Meritor Sav. Bank*, which stated that a hostile environment exists when sexual conduct "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.").

95. *Meritor Sav. Bank*, 477 U.S. at 72.

Thus, the question remains—when will employers be held liable for hostile environment sexual harassment?

As to harassment by co-workers, courts have handled these cases in a relatively consistent manner. Employers will be held liable if they had actual or constructive knowledge of the misconduct and they did not take prompt remedial action.[96] The question of when an employer should be held liable for sexual harassment by supervisors, however, has not been answered as clearly or consistently.

Courts have suggested several distinct bases for holding employers liable for a supervisor's sexual misconduct. For instance, in *Hirschfeld v. New Mexico Corrections Department*,[97] the United States Court of Appeals for the Tenth Circuit cited *Hicks* for the proposition that there are three possible bases. First, relying on the Restatement (Second) of Agency section 219(1) (1958), the court stated that it is possible to find an employer liable because an agent was acting within the scope of employment. The court immediately dismissed this *respondeat superior* basis of liability, however, as extremely unlikely and far too narrow. If this were the only basis for liability, declared the court, employers would become accountable only if they explicitly required or conscientiously allowed their supervisors to "molest women employees."[98]

Second, the court explained that an employer may be held liable

96. Hall v. Gus Constr. Co., 842 F.2d 1010, 1015-16 (8th Cir. 1988) (holding the employer liable for sexual harassment by a co-worker where the employer has reason to know of the harassment and does nothing in response); Barrett v. Omaha Nat'l Bank, 726 F.2d 424, 427 (8th Cir. 1984) (holding that "sexual harassment by a co-employee is not a violation of Title VII unless the employer knew or should have known of the harassment and failed to take immediate and appropriate corrective action."); Guess v. Bethlehem Steel Corp., 913 F.2d 463, 464-65 (7th Cir. 1990) (repeating that an employer will not be liable unless the employer knew or should have known of the harassment but failed to take immediate corrective action and further explaining that the basis of liability is not *respondeat superior*, essentially a doctrine of strict liability, but rather negligence); Marshall v. Nelson Elect., 766 F. Supp. 1018, 1039 (N.D. Okla. 1991). *See also* 29 C.F.R. § 1604.11(d) (1991). Equal Employment Opportunity Commission regulations assert that "[w]ith respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show it took immediate and appropriate corrective action." *Id.*

97. 916 F.2d 572 (10th Cir. 1990). Although the court provided a broad analysis of possible bases for employer liability, it ultimately determined that the Corrections Department Captain responsible for the unlawful conduct had no supervisory authority over plaintiff's position; that, even though the Captain did have authority over subordinate security guards, he did not ever invoke that authority to harass the plaintiff; and that an occasional delegation of authority over the plaintiff concerning security matters did not bring these facts within Restatement § 219(2)(d). *Id.* at 579-80 n.7 and accompanying text.

98. *Hirschfeld*, 916 F.2d at 577 (citing Vinson v. Taylor, 753 F.2d 141, 151 (D.C. Cir. 1985), *aff'd in part and reversed in part sub. nom.* Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986)).

for recklessness or negligence in failing to respond to a hostile work environment.[99] Employers will be found negligent when management level employees knew or, in the exercise of reasonable care, should have known of a hostile or offensive work environment and the employer fails to correct the situation. Noting that this form of negligence has occasionally been mischaracterized as *respondeat superior*, the court explained that, under these circumstances, employers will be held directly liable for negligence or recklessness.[100]

The court further explained that, under this second standard, employers can avoid liability by taking prompt remedial action. For example, in *Swentek*, the United States Court of Appeals for the Fourth Circuit held that a corporate defendant was not liable for the hostile work environment created by a pilot. The employer was able to avoid liability because it responded quickly and effectively. The employer first confronted the allegedly harassing pilot with the plaintiff's allegations, then explored the pilot's version of the facts, and finally determined that it should believe the pilot's denial of the most serious allegations. Because there did appear to be a problem with the pilot's comments, however, he received a written warning to curb his language and to keep away from the plaintiff. He was informed that any further complaints about his language would result in a suspension. The employer also advised the pilot that it would continue to monitor his future conduct.

A third possible basis of liability is section 219(2)(d) of the Restatement (Second) of Agency.[101] That section provides that a master [employer] may be liable for the acts of a servant [employee] acting outside the scope of delegated authority if "the servant purported to act or to speak on behalf of the principle and there was reliance upon apparent authority, or he [she] was aided in accomplishing the tort by the existence of the agency relationship."[102]

In *Hirschfeld*, the court gave section 219(2)(d) a relatively narrow reading. The court rejected the position that an employer could be held liable where the only way the supervisor "was aided by the agency relationship in the accomplishment of the tort is that he would not have been there but for his job."[103]

It is obviously possible to read this restatement section more broadly. A more expansive reading would interpret this section as asserting that a supervisor's authority always aids in harassment be-

99. *Id.*
100. *Id.* at n.5.
101. Restatement (Second) of Agency (1958).
102. *Id.* § 219(2)(d).
103. *Hirschfeld*, 916 F.2d at 579 (quoting Dist. Ct. Op. at 19).

cause employees understand that supervisors have power and that, as mere employees, they may suffer if they ignore a supervisor's demands. This fear allows supervisors to commit unlawful action.

In *Sparks v. Pilot Freight Carriers, Inc.*,[104] the United States Court of Appeals for the Eleventh Circuit announced that, because the Civil Rights Act of 1964 defines the term "employer" as "a person engaged in an industry affecting commerce . . . and any agent of such a person,"[105] if a supervisor was acting as an "agent" of the employer when he or she sexually harassed an employee, the employer will be directly liable to the employee for the supervisor's conduct.[106] The *Sparks* court explained that an agent's acts are considered the acts of the employer and that employers are directly, rather than indirectly, liable for the unlawful sexual misconduct of their "agents."[107] By comparison, *respondeat superior* liability is an indirect form of liability that arises when the person harassing the plaintiff was not the statutory "employer."[108] For example, the court explained, where the alleged harasser was one of plaintiff's co-workers or was a supervisor with no authority over plaintiff, this would be a situation where one should consider respondeat superior liability.

Because Title VII does not define the term "agent," the *Sparks* court looked to the Restatement (Second) of Agency for assistance. Looking to section 219(2)(d), the court stated that a master will not escape liability merely because a servant was acting entirely in his own interest if the servant was aided in accomplishing the tort by the existence of the agency relationship.[109] The court observed that:

> the Equal Employment Opportunity Commission (EEOC) has concluded that a supervisor acts as an "agent" of the employer for Title VII purposes, thus rendering the employer directly liable for the supervisor's actions, where [the] supervisor exercises the authority actually delegated to him by his employer, by making or threatening to make decisions affecting the employment status of his subordinates.[110]

The employer must be held liable under agency principles where it was the employer's delegation of authority that empowered the supervisor to commit the misconduct, according to the Equal Employment Opportunity Commission.[111] The *Sparks* court was sympathetic

104. 830 F.2d 1554 (11th Cir. 1987).
105. 42 U.S.C. § 2000e(b) (1988).
106. *Sparks*, 830 F.2d at 1558.
107. *Id.* at 1558 n.4.
108. *Id.*
109. *Id.* at 1559.
110. *Id.* (quoting *Meritor Sav. Bank*, 477 U.S. at 70(stating, without relying on, the position of the EEOC in its *amicus* brief)).
111. *Id.* At this point, however, the EEOC was simply stating its position regarding

to this analysis and concluded that the plaintiff had established an issue of material fact as to whether the corporation was directly liable under Title VII.

The circumstances in *Sparks*, however, involved both quid pro quo and hostile environment sexual harassment. The United States Court of Appeals for the Eleventh Circuit stated in *Sparks* that it did not need to address the issue of what rule should govern an employer's liability for its supervisor's sexual harassment where the claim rested "exclusively" on a hostile environment sexual harassment theory.[112] When the Eleventh Circuit was subsequently confronted with a claim alleging only unlawful hostile environment, the court declared that corporate liability "exists only through *respondeat superior*; liability exists where the corporate defendant knew or should have known of the harassment and failed to take prompt remedial action."[113]

Courts thus continue to inquire as to what employers knew about allegedly unlawful hostile environment sexual harassment, as well as what they should have known. In *EEOC v. Hacienda Hotel*,[114] the United States Court of Appeals for the Ninth Circuit concluded that the prevailing trend is to hold employers liable for failing to remedy or prevent a hostile or offensive work environment of which management-level employees knew, or in the exercise of reasonable care should have known.

Employers may be able to avoid problematic situations, and subsequent liability, by adopting an anti-discrimination policy. In *Mer-*

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quid pro quo sexual harassment. The *Meritor Sav. Bank* Court added that the EEOC suggested in its brief that this "usual basis for a finding of agency will often disappear" when a sexual harassment complaint asserts only a hostile environment theory. *Meritor Sav. Bank*, 477 U.S. at 70-71. The EEOC position in its brief was that, if an employer had an explicit policy against sexual harassment and a procedure to resolve claims, the employer should not be held liable when an alleged victim does not utilize the complaint procedure and when the employer does not have actual knowledge of the hostile environment. *Id.* at 71 (citing *Amicus* Brief for United States and EEOC at 26, *Meritor Sav. Bank*, 477 U.S. 57). The EEOC added that, in any other situation, the employer should be held liable if the employer had actual knowledge or the victim had no reasonable avenue for making a complaint. *Id.* The EEOC guidelines state, on the other hand, that an employer "is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence." 29 C.F.R. § 1604.11(c) (1988).

112. *Id.* at 1560 n.9.

113. Steele v. Offshore Shipbuilding, Inc., 867 F.2d 1311, 1316 (11th Cir. 1989) (citing *Henson*, 682 F.2d at 905; Bundy v. Jackson, 641 F.2d 934, 943 n.8 (D.C. Cir. 1981); *Meritor Sav. Bank*, 477 U.S. at 72)). *But see Hicks*, 833 F.2d at 1418 (stating that the Restatement (Second) of Agency § 219(2)(d) may provide a basis for holding an employer liable for unlawful sexual harassment).

114. 881 F.2d 1504 (9th Cir. 1989).

itor Savings Bank, however, the Supreme Court stated that the mere existence of a grievance policy and procedure, combined with a complainant's failure to invoke that procedure, will not necessarily protect the employer from liability.[115]

The Supreme Court was not required to directly address the question of whether a properly drafted anti-discrimination policy will always protect an employer because the employer's policy in *Meritor Savings Bank* was deficient in several respects. The policy of the bank did not expressly address sexual harassment in particular, and thus did not inform employees as to their employer's desire to prohibit this conduct. Additionally, the grievance procedure required employees to first complain to their own supervisors. In *Meritor Savings Bank*, the supervisor happened to be the same person who was harassing the plaintiff.

The employer's anti-discrimination policy was found deficient for similar reasons in *Hacienda Hotel*. The United States Court of Appeals for the Ninth Circuit concluded that it would be unreasonable to require discrimination victims to exhaust internal procedures where the employer's anti-discrimination policy did not specifically prohibit sexual harassment, and where the policy required initial resort to a supervisor condoning, or engaging in, the harassment.[116]

An anti-discrimination policy that explicitly prohibits sexual harassment and that provides alternative avenues for registering a complaint would avoid the deficiencies found in *Hacienda Hotel* and *Meritor Savings Bank*. Such a policy could then be used to support an employer's claim that sexual misconduct is well beyond a supervisor's delegated authority, and that the employer is committed to both prevention and prompt corrective action.[117] Although it is not settled that a properly drafted anti-discrimination policy will necessarily protect an employer from liability, it is clear that the absence of an appropriate policy increases the possibility that an employer will be held liable for unlawful hostile environment sexual harassment.

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115. *Meritor Sav. Bank*, 477 U.S. at 72.

116. *Hacienda Hotel*, 881 F.2d at 1516.

117. If an employer has a clearly worded policy that provides several avenues for registering a complaint and an employee fails to use the complaint procedure, an employer may have an additional argument as to why it should not be held liable for unlawful hostile environment sexual harassment. When the employee later asserts he or she was unlawfully sexually harassed, the employer may be able to argue that the failure to invoke the accessible grievance procedure is evidence that the allegedly unlawful conduct was not regarded as unwelcome at the time it occurred. *See Showalter*, 767 F. Supp. at 1211-12.

REMEDIES

Until President George Bush signed the Civil Rights Act of 1991[118] on November 21, 1991, perhaps the most discouraging aspect of unlawful sexual harassment from the plaintiff's point of view was the lack of adequate remedies. Under prior law, victims of sexual harassment were at best limited to backpay, injunctive relief, reinstatement, and attorneys' fees.[119] Recognizing that harassment continues to occur in the workplace, it is clear that the threat of these limited damages has not deterred unlawful behavior.

The lack of adequate remedies was most apparent when an employee remained on the job and continued to suffer harassment. An employee might choose to continue to return to a job where she is sexually harassed for any number of reasons. For instance, an employee might find a certain job to be perfectly matched with her own unique training and experience, or she might simply enjoy the work itself and derive great satisfaction from her accomplishments. Even if she does not have what would be, in the absence of unlawful conduct, the "perfect" job, an employee might not be able to find another job that pays the same salary, or any other job at all. She thus might be compelled by economic necessity to return to a workplace that it is tainted by unlawful conduct. Her financial obligations may be so pressing that she might endure behavior that would support a constructive discharge finding if she could afford to quit.

An employee who continued to work at the same position was obviously not eligible for back pay or reinstatement. If this employee pursued her charge through both the administrative process and a civil lawsuit and was ultimately successful, under prior law she would have been rewarded with only injunctive relief and, possibly, attorney's fees. Because the potential rewards that could result from civil litigation were relatively meager, and because litigation itself can be financially and emotionally exhausting, it might have appeared that the only realistic choices under prior law were either to

118. Pub. L. No. 102-166, § 102(a)(1), 105 Stat. 1071 (1992).

119. "If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . ., or any other equitable relief as the court deems appropriate." 42 U.S.C. § 2000e-5(g) (1988). "In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the commission or the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. § 2000e-5(k) (1988). The attorneys' fees section is also applicable to suits brought by employees of the federal government. 42 U.S.C. § 2000e-16(d) (1988).

continue to suffer the harassment or, instead, quietly leave the workplace and find another job.

In *Dockter v. Rudolph Wolff Futures, Inc.*,[120] the United States Court of Appeals for the Seventh Circuit reached a conclusion that illustrates how difficult it was to recover damages. In that case, a female employee's supervisor repeatedly sexually harassed her during her first two weeks of employment. On her first day at work, her supervisor asked her to join him to meet a client at a luncheon appointment. As it turned out, the supervisor misrepresented the purpose of the luncheon and used the opportunity to ask her what she would be doing that evening. When she said she was meeting her roommate, he insisted on accompanying her when she went to her roommate's office.[121]

Ms. Dockter was also subjected to harassment at the workplace. She testified that her supervisor would come into her office, lock the door, sit down and stare at her.[122] She alleged that he "played with her hair on several occasions" and, on one occasion when she was bent over, he came up behind her, grabbed her by the waist and said "I could drive you crazy."[123] She also asserted that he frequently called her at her home during these two weeks requesting that she meet him at various locations. Her description of her supervisor's behavior was corroborated by other female employees who were subjected to the same treatment.[124]

The final act of sexual misconduct occurred at the end of these first two weeks of employment. Her supervisor asked her to join him after work to meet with clients at a restaurant. As he had at the earlier luncheon appointment, he again insisted on sitting on the same side of the booth as she did. Again, no clients ever materialized. He attempted to kiss her several times and, in response, she asked him to take her home. The supervisor did apologize, but tried to kiss her again and fondled her breast when they arrived at her apartment.

Although the Seventh Circuit determined that this conduct did create a hostile work environment, the court concluded that Ms. Dockter did not allege or prove an injury that could be remedied under Title VII's equitable provisions.[125] It was undisputed that her supervisor's misconduct ended when he was reprimanded the evening that they went to dinner. Consequently, the court decided that "[e]ven if her initial two-weeks were 'hostile' such as to be actionable

120. 913 F.2d 456 (7th Cir. 1990).
121. *Id.* at 459.
122. *Id.* at 460.
123. *Id.*
124. *Id.*
125. *Id.*

under Title VII, in the absence of any continuing sexual harassment or discharge based on that sexual harassment, Ms. Dockter cannot obtain relief under Title VII."[126] This result was proper, according to the Seventh Circuit, because the remedial provisions of Title VII allowed for only equitable relief, and did not contemplate nominal, compensatory, or punitive damages.[127]

The Civil Rights Act of 1991 has dramatically changed this situation. Section 102(a) provides that in an action alleging unlawful intentional discrimination, the complaining party may recover compensatory and punitive damages in addition to any relief authorized by Section 706 of the Civil Rights Act of 1964.[128] Subsection (b)(1) provides that a complaining party may recover punitive damages if he or she can show that the respondent acted with malice or reckless indifference.[129] Subsection (b)(2) explains that compensatory damages (which include emotional pain and suffering, mental anguish, and other nonpecuniary losses) will not include back pay, interest on back pay, or any other type of relief authorized under section 706(g), and (b)(3) limits the sum of compensatory damages, punitive damages and other non-economic losses to a range of $50,000 to $300,000, depending upon the size of the employer.[130]

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126. *Id.* at 461.

127. *Id.* (citing King v. Bd. of Regents, 898 F.2d 533, 537 (7th Cir. 1990); Bohen v. City of East Chicago, 799 F.2d 1180, 1184 (7th Cir. 1986).

128. Civil Rights Act of 1991, Pub. L. No. 102-66, § 102(a)(1), 105 Stat. 1071 (1992). Section 102(a)(1) states:

> In an action brought by a complaining party under Section 706 or 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under Section 703, 704 or 717 of the Act (42 U.S.C. 2000e-2 or 2000e-3), and provided that the complaining party cannot recover under section 1977 of the Revised Statutes (42 U.S.C. 1981), the complaining party may recover compensatory and punitive damages as allowed in subsection (b), in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

Id.

129. *Id.* § 102(b)(1). Section 102(b)(1) states:

> (1) DETERMINATION OF PUNITIVE DAMAGES.—A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

Id.

130. *Id.* § 102(b)(2)-(3). Section 102(b)(2)-(3) states:

> (2) EXCLUSIONS FROM COMPENSATORY DAMAGES.—Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964.
>
> (3) LIMITATIONS.—The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain,

In addition to increasing the damages that may be recovered for unlawful sexual harassment, the Civil Rights Act of 1991 makes another significant change. Section 102(c) provides that, for the first time, victims of intentional discrimination are entitled to have their Title VII cases tried before a jury.[131] Many plaintiffs, and plaintiffs' attorneys, may believe that their chances of establishing liability, as well as their prospects for recovering compensatory and punitive damages, have significantly improved because a jury trial is available.

Many victims who previously did not file charges because they doubted whether it would be worth the disruption to their lives now have a much greater incentive to challenge unlawful conduct. Even with these expanded remedies and the right to a jury trial, however, many victims will not be eager to file sexual harassment charges. One reason is that, as discussed earlier, a plaintiff in a sexual harassment case must prove the harasser's conduct was unwelcome.

In *Meritor Savings Bank*, the United States Supreme Court declared that evidence of a complainant's sexually provocative speech or dress will be relevant in determining whether he or she found particular sexual advances unwelcome.[132] Consequently, during the investigation and trial, the complainant's own conduct will become the subject of an intense and broad-reaching inquiry. This type of examination may still be sufficient to deter a significant number of victims. Nonetheless, the expanded damages will likely encourage many victims to come forward and file charges.

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suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party—

(A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $50,000;

(B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $100,000; and

(C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $200,000; and

(D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $300,000.

Id.

131. *Id.* § 102(c). Section 102(c) states:

(c) JURY TRIAL.—If a complaining party seeks compensatory or punitive damages under this section—

(1) any party may demand a trial by jury; and

(2) the court shall not inform the jury of the limitations described in subsection (b)(3).

Id.

132. *Meritor Sav. Bank*, 477 U.S. at 69.

CONCLUSION

Although the requirements for establishing unlawful quid pro quo sexual harassment are relatively straightforward, there is still significant confusion surrounding unlawful hostile environment sexual harassment. Courts essentially agree that plaintiffs alleging hostile environment sexual harassment must show there was severe or pervasive unwelcome conduct of a sexual nature, or based on sex, that created an abusive working environment. There is not complete agreement, however, as to the specific nature of each of these factors. A relatively recent development is that courts are beginning to differ as to whether allegedly unlawful conduct should be viewed from the perspective of a reasonable person, or a reasonable woman [man].

Courts have not agreed as to when employers should be held liable for their supervisors' hostile environment sexual harassment. Employees often only understand that supervisors have power, and employees are not always informed as to the precise limits of that power. One can make a strong argument that employers give supervisors a broad cloak of authority which always aids harassers in their misconduct. Courts should thus seriously consider holding employers liable for unlawful sexual harassment under Restatement (Second) Agency section 219(2)(d), and employers should review the conduct of their supervisors.

The Civil Rights Act of 1991 has significantly increased the remedies for unlawful sexual harassment. Judges and juries may not hesitate to award the full measure of the new damages for at least two reasons. First, judges and jurors are increasingly aware that sexual misconduct continues to occur and that the limited damages previously available have proven inadequate to deter unlawful behavior. Second, because sexual harassment often occurs in the absence of witnesses, many employees will not be able to satisfy a preponderence of the evidence burden of proof. Judges and juries may respond with a significant award to those plaintiffs who are successful in order to send a clear message to other offending employers. Accordingly, although many employers do respond effectively to allegations of sexual harassment, it is now time for the remaining employers to recognize the seriousness of such allegations.