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Employment: Sexual Harassment

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EMPLOYMENT: SEXUAL HARASSMENT

INTRODUCTION

Sexual harassment in the workplace has been an enigma both in the nature of the acts which violate Title VII and the extent of an employer's liability for the acts of harassing employees. In recent decades Supreme Court rulings have broadly advanced the goals of congressional legislation[1] to define both actionable sexual harassment in the workplace and the related responsibilities of the employer.[2] However, Congress and the Court have left much of the specifics for the federal circuits to determine, as discussed in the following analysis.[3]

Part I of this survey[4] analyzes the elements which make up a claim for sexual harassment in the Tenth Circuit, focusing primarily on *Seymore v. Shawver & Sons, Inc.*[5] *Seymore* adopted a four-part standard necessary for asserting a claim of hostile environment sexual harassment, but failed to further clarify the specific nature of conduct violating Title VII. Part II examines the employer's liability for the hostile environment sexual harassment committed by both employees and supervisors, focusing on *Harrison v. Eddy Potash, Inc.*[6] In *Harrison*, the Tenth Circuit appeared to establish strict liability for employers whose supervisors commit hostile environment sexual harassment.

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1. *See* 42 U.S.C. § 2000e-2(a)(1) (1995). Title VII of the Civil Rights Act of 1964 states that it is unlawful for an employer "to discriminate against any individual with respect to his [or her] compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." *Id.*

2. *See* Harris v. Forklift Sys. Inc., 510 U.S. 17, 17 (1993) (adopting an objective/subjective standard for determining the existence of hostile environment sexual harassment while clarifying what types of behavior contribute to a hostile environment); Meritor Sav. Bank v. Vinson, 477 U.S. 57, 72 (1986) (holding that hostile environment sexual harassment is a violation of Title VII and that courts should look to agency principles for guidance in determining employer liability for sexual harassment by employees).

3. Jennifer L. Johnson, Note, *Employment Law*, 38 S. TEX. L. REV. 965, 974-75 (1997). The only guidance the *Meritor* Court gave regarding liability was to advise the district and circuit courts to look to agency principles to determine employer liability for the hostile environment sexual harassment by supervisors and stated that employers are not strictly liable for their supervisors' tortious conduct. *Meritor*, 477 U.S. at 72-73. However, due to the "malleable" nature of agency principles, the circuits have reached conflicting conclusions regarding employer liability. Johnson, *supra*, at 975.

4. The survey period covered cases decided between September 1, 1996 and August 31, 1997.

5. 111 F.3d 794 (10th Cir. 1997).

6. 112 F.3d 1437 (10th Cir. 1997); *see infra* note 232 (discussing the subsequent history of *Harrison*).

I. REQUIREMENTS FOR A SEXUAL HARASSMENT CLAIM IN THE TENTH CIRCUIT

A. *Background*

There are two theories of liability on which to bring a cause of action for workplace sexual harassment: quid pro quo and hostile work environment.[7] Quid pro quo sexual harassment occurs when an employee either performs sexual favors for a supervisor in return for employment privileges or suffers adverse, work-related repercussions for refusing a supervisor's advances.[8] In the early 1970s, when sexual harassment claims were new to the courts, no analogous law addressed the issue.[9] As the case law sought to root sexual harassment in the expanded theories of racial and ethnic harassment, the subsequent years saw the development of the first cause of action recognized by the courts as the unlawful barter defined in this theory of liability.[10]

Generally, the elements required for stating a claim of quid pro quo sexual harassment are that: (1) the victim/employee was a member of a protected group; (2) the victim was subject to sexual harassment; (3) the harassment was due to the victim's sex; (4) the victim's response to the alleged harassment affected tangible aspects of the victim's employment and the submission or refusal to cooperate with the harasser's demands were an express or implied condition as to whether the victim's employment is positively or negatively impacted; and (5) the harassment was carried on by the employee or supervisor in the course of his employment, incurring employer liability.[11] In finding quid pro quo sexual harassment, most courts focus on the connection between the alleged har-

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7. *See* J. Hoult Verkerke, *Notice Liability in Employment Discrimination Law*, 81 VA. L. REV. 273, 280 n.15 (1995) (discussing the development and treatment of employer liability for quid pro quo sexual harrassment among the various circuits).

8. *Id.*

9. *See* David Benjamin Oppenheimer, *Exacerbating the Exasperating: Title VII Liability of Employers for Sexual Harassment Committed by Their Supervisors*, 81 CORNELL L. REV. 66, 109-10 (1995) ("[C]onditioning employment on sexual demands, and harassment through sexual advances, had no ready analogue in existing employment and discrimination law.").

10. *Id.*

11. Lynn T. Dickinson, Note, *Quid Pro Quo Sexual Harassment: A New Standard*, 2 WM. & MARY J. WOMEN & L. 107, 108-09 (1995). The article states:

> To determine whether a plaintiff has proven quid pro quo sexual harassment, most courts use the following five-part test:
>
> (1) The employee belongs to a protected group.
>
> (2) The employee was subject to unwelcome sexual harassment.
>
> (3) The harassment complained of was based upon sex.
>
> (4) The employee's reaction to [the] harassment complained of affected tangible aspects of the employee's compensation, terms, conditions, or privileges of employment. The acceptance or rejection of the harassment by an employee must be an express or implied condition to the receipt of a job benefit or the cause of a tangible job detriment in order to create liability under this theory of sexual harassment . . . .
>
> (5) Respondeat superior.

Id. (quoting Henson v. City of Dundee, 682 F.2d 897, 909 (11th Cir.1982)).

assment and the promised employment benefit or detriment.[12] However, to date, this set of elements has not been adopted by the Tenth Circuit.[13] The court instead focuses on whether "'specific benefits of employment [were] conditioned on sexual demands' by the victim's supervisor."[14]

The second basis of liability is hostile environment sexual harassment,[15] which results when an employee suffers sexually discriminatory practices by co-employees or supervisors creating a hostile or abusive work environment.[16] An actionable claim under this theory, defined by the Supreme Court in *Meritor Savings Bank v. Vinson*,[17] requires hostile environment sexual harassment to be "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"[18] The *Meritor* Court found guidance from the Equal Employment Opportunity Commission (EEOC), which treated this form of harassment as violating Title VII.[19] The EEOC adopted this position in its Guidelines on Discrimination Because of Sex[20] despite controversy, including initial criticism by Reagan transition team member, Clarence Thomas.[21] However, the Court in *Meritor* ultimately concluded that a cause of action existed by acknowledging the EEOC's conclusion that hostile environment sexual harassment is unlawful.[22]

In *Meritor*, a Meritor Savings Bank employee brought a claim for sexual harassment in violation of Title VII against the bank and her supervisor.[23] The alleged harassment included rape and fondling of the employee by the supervisor in front of other employees.[24] The bank argued that regardless of whether an actual sexual relationship existed, the language, congressional intent, and judicial interpretation of Title VII only

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12. Marlisa Vinciguerra, Note, *The Aftermath of* Meritor*: A Search for Standards in the Law of Sexual Harassment*, 98 YALE L.J. 1717, 1722 (1989) ("Courts focus upon the nexus between the alleged threats and economic detriment: The judicial gloss on the quid pro quo claim requires a clear temporal link between the advances or threats and adverse employment decisions.").

13. Harrison v. Eddy Potash, Inc., 112 F.3d 1437, 1443 (10th Cir. 1997).

14. *Id.* at 1443 (quoting Ball v. Renner, 54 F.3d 664, 665 n.2 (10th Cir. 1995)).

15. *Id.*; Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986).

16. *Harrison*, 112 F.3d at 1443.

17. 477 U.S. 57 (1986).

18. *Meritor*, 477 U.S. at 798 (quoting Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).

19. *Id.*

20. 29 C.F.R. § 1604.11(a) (1985).

21. Oppenheimer, *supra* note 9, at 115-16. Oppenheimer states:

> The EEOC's view that "hostile work environment" sexual harassment violates Title VII was highly controversial at the time it was proposed. [The view] . . . was criticized in a report to President-elect Reagan from transition team member Clarence Thomas, who predicted that it would lead "to a barrage of trivial complaints against employers around the nation."

Id.

22. *Meritor*, 477 U.S. at 65-67 ("Since the guidelines were issued, courts have uniformly held, and we agree, that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment.").

23. *Id.* at 60.

24. *Id.*

focused on economic detriment resulting from the harassment or sexual favors given quid pro quo for economic benefits.[25] The Court held that the language of Title VII was intended "'to strike at the entire spectrum of disparate treatment of men and women' in employment,"[26] and agreed with the EEOC's Guidelines on Discrimination Because of Sex which describe sexual harassment as including "verbal or physical conduct of a sexual nature."[27] The Court found this treatment to be prohibited by Title VII where "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."[28] Rather than following the EEOC's lead, however, the Court held that an actionable claim of hostile environment sexual harassment required the harassment not only to affect working conditions, but also to be sufficiently oppressive to create an abusive working environment.[29]

After *Meritor*, the federal circuits struggled with defining the conduct and injury that constituted actionable hostile environment sexual harassment until the Supreme Court sought to resolve these conflicts in *Harris v. Forklift Systems, Inc.*[30] *Harris* clarified the Court's *Meritor* decision by holding that a hostile environment exists "[w]hen the workplace is permeated with 'discriminatory intimidation, ridicule, and insult,' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'"[31] This environment was to be evaluated in light of a standard, incorporating both an objective and subjective prong, adopted by the Court to determine the presence of a hostile working environment.[32] This standard requires that the victim subjectively perceive the environment to be hostile while at the same time an objective person would also view the conditions as such.[33] This standard helped address the question of whether and what type of injury was required for Title VII to apply.[34]

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25. *Id.* at 64 ("[Petitioner] contends . . . that in prohibiting discrimination with respect to 'compensation, terms, conditions, or privileges' of employment, Congress was concerned with what petitioner describes as 'tangible loss of an economic character; [and] purely psychological aspects of the workplace environment.'" (quoting Brief for Petitioner 30-31, 34)).

26. *Id.* at 64 (quoting Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (quoting Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (7th Cir. 1971))).

27. *Meritor*, 477 U.S. at 65 (quoting 29 C.F.R § 1604.11(a) (1985)).

28. *Id.* (quoting C.F.R. § 1604.11(a)(3)).

29. *Id.* at 67.

30. 510 U.S. 17, 20 (1993) ("We granted certiorari to resolve a conflict among the Circuits on whether conduct, to be actionable as 'abusive work environment' harassment . . . must 'seriously affect [an employee's] psychological well-being' or lead the plaintiff to 'suffe[r] injury.'" (alterations in original) (citation omitted)).

31. *Harris*, 510 U.S. at 21 (citation omitted) (quoting *Meritor*, 477 U.S. at 65, 67).

32. *Id.* at 21-22.

33. *Id.* The court stated:

> Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment . . . is beyond Title VII's purview. Likewise, if the victim does not

Applying the objective/subjective standard, the Court stated that the determining factor of whether a Title VII violation occurred was not proof of actual injury, psychological or otherwise, but whether "the environment would reasonably be perceived, and is perceived, as hostile or abusive."[35] Furthermore, the Court held that a determination of whether an environment was hostile should be made only after examining all of the circumstances.[36] Such circumstances include "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."[37] The Court noted that the harassment's psychological effect on the employee was relevant to finding an environment abusive but, "while psychological harm, like any other relevant factor, may be taken into account, no single factor is required."[38]

Even with the *Harris* clarification, the circuits still differ in their opinions on the specific type and quantum of behavior that violates Title VII. For example, the Seventh Circuit appears to require substantially higher standards for demonstrating a hostile work environment.[39] In *Baskerville v. Culligan International Co.*, a supervisor of the defendant employer subjected the plaintiff employee to vulgar and suggestive conduct over a period of seven months.[40] This conduct included gestures suggesting masturbation and references to the employee as "pretty girl" and "Ms. Anita Hill."[41] The plaintiff brought an action for sexual harassment in violation of Title VII against her employer.[42] At trial, the jury awarded the plaintiff $25,000 in damages.[43] After Culligan International appealed, the Seventh Circuit reversed and remanded, concluding that no reasonable jury could have found that the supervisor's remarks created a hostile working environment.[44] The majority stated that an actionable hostile work environment for purposes of proving sexual harassment is one considered "hellish" for the harassed women.[45] In its analysis, the

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subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment and there is no Title VII violation.

Id.

34. *Id.* at 22 (stating that Title VII did not mandate a threshold question of whether the conduct affected the plaintiff's psychological well-being or suffered injury, but only required that "the environment would reasonably be perceived, and is perceived, as hostile or abusive").

35. *Id.*

36. *Id.* at 23.

37. *Id.*

38. *Id.*

39. *See* Baskerville v. Culligan Int'l Co., 50 F.3d 428, 430-31 (7th Cir. 1995).

40. *Baskerville*, 50 F.3d at 430.

41. *Id.*

42. *Id.* at 428.

43. *Id.* at 430.

44. *Id.* at 431.

45. *Id.* ("The concept of sexual harassment is designed to protect working women from the kind of male attentions that can make the workplace hellish for women . . . . It is not designed to purge the workplace of vulgarity."); *see* Jansen v. Packaging Corp. of Am., 123 F.3d 490, 502 (7th

court declared that there was a "'line that separates the merely vulgar and mildly offensive from the deeply offensive and sexually harassing,'" which was not a bright line but varied with the circumstances.[46] Furthermore, the court held that "[a] handful of comments spread over months is unlikely to have so great an emotional impact as a concentrated or incessant barrage."[47]

The Tenth Circuit adopted the *Meritor* holding in *Hicks v. Gates Rubber Company.*[48] In *Hicks*, a security guard alleged that she was subjected to sexual jokes, sexually offensive language, and unwanted touching by her supervisor and other co-employees over an eight-month period.[49] She also alleged that she was subjected to general disparate treatment based on her sex.[50] At trial, the court dismissed the plaintiff's sexual harassment claims because it found no evidence that the supervisor made his advances or sexual treatment a condition of employment, or quid pro quo harassment.[51] The Tenth Circuit, deferring to the recent *Meritor* decision, reversed and remanded because the trial court failed to consider whether the conduct constituted hostile environment sexual harassment.[52] *Hicks* further held that a finding of hostile environment sexual harassment requires an evaluation of the totality of the circumstances, rather than listing specific elements to be considered.[53]

In *Hirase-Doi v. U.S. West Communications, Inc.*,[54] the Tenth Circuit adopted the subjective/objective standard from the Supreme Court's recent holding in *Harris* as the appropriate standard of review for whether a work environment was sufficiently severe or pervasive to violate Title VII.[55] In *Hirase-Doi*, an operator for U.S. West Communications, Inc. (U.S. West) brought a sexual harassment claim alleging sexual

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Cir. 1997) (stating that theoretically, a cause of action for hostile environment harassment will not exist until the harassment reaches a "severe and pervasive" level).

46. *Baskerville*, 50 F.3d at 431 (quoting Carr v. Allison Gas Turbine Div., 32 F.3d 1007, 1010 (7th Cir. 1994)).

47. *Id.*

48. 833 F.2d 1406 (10th Cir. 1987).

49. *Hicks*, 833 F.2d at 1408-10. The allegations included an incident where the plaintiff's supervisor rubbed her thigh and told her, "I think you're going to make it;" an admonition that the supervisor was going to "put his foot up [her] ass so far that [she] would have to go to the clinic to take it out;" and her supervisor's touching of her buttocks while stating, "I'm going to get you yet." *Id.* at 1409-10.

50. *Id.* at 1408-10.

51. *Id.* at 1411, 1414.

52. *Id.* at 1414-16.

53. *Id.*; *see* Hirschfeld v. New Mexico Corrections Dep't, 916 F.2d 572, 575-76 (10th Cir. 1990).

54. 61 F.3d 777 (10th Cir. 1995).

55. *Hirase-Doi*, 61 F.3d at 782 ("In *Harris v. Forklift Systems, Inc.*, the Supreme Court required both an objectively hostile work environment, as well as a subjective perception by the plaintiff that the environment was abusive, for a sexual harassment hostile work environment claim." (citation omitted)).

harassment by a co-employee, Kenneth Coleman.[56] The harassment consisted of Coleman's sexually offensive behavior towards other employees and an incident where he grabbed the plaintiff between the thighs.[57] The grabbing incident led to Coleman's suspension and immediate resignation.[58] The trial court held that by suspending Coleman immediately after grabbing the plaintiff, U.S. West took appropriate remedial action and granted summary judgment for U.S. West.[59] The Tenth Circuit, however, reversed and remanded, holding that even if U.S. West was unaware of Coleman's harassment of the plaintiff, it could have been put on notice of the harassment by his previous conduct toward other employees.[60] Furthermore, the court held that Coleman's harassment of other employees contributed to a hostile work environment as long as the plaintiff was aware of it during the time she was harassed.[61]

B. *Tenth Circuit Decisions*

1. *Seymore v. Shawver & Sons, Inc.*[62]

a. *Facts*

Lou Ella Seymore, a female journeyman electrician employee of Shawver & Sons, Inc. (Shawver), was subjected to sexually offensive remarks and gestures during her employment.[63] She repeatedly complained about the conduct to her job steward and filed a grievance with her union.[64] However, according to Seymore, the sexually inappropriate conduct never ceased.[65] She filed a discrimination charge against Shawver with the Oklahoma Human Rights Commission (OHRC), who then filed a charge with the EEOC on her behalf.[66] Shawver subsequently terminated her employment.[67] Seymore then filed another charge with the EEOC alleging both racial and sexual discrimination.[68] In addition, she filed suits against Shawver and the union alleging sexual discrimination and retaliatory practices.[69] At trial, the district court granted summary

56. *Id.* at 780.

57. *Id.* at 780-81. Coleman's harassing conduct towards employees other than the plaintiff included sexually offensive comments, an attempted kissing of an employee, and possibly sexually charged staring. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 783-86.

61. *Id.* at 782-83.

62. 111 F.3d 794 (10th Cir. 1997).

63. *Seymore*, 111 F.3d at 796 ("Ms. Seymore claims she was subjected to a plethora of sexually offensive remarks and gestures during her tenure at Shawver.").

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

judgment for the union.[70] The court also granted summary judgment for Shawver on the retaliatory practices claim for lack of subject matter jurisdiction because Seymore did not allege retaliation in her EEOC charge against Shawver.[71] The jury returned a verdict for Shawver on the sexual discrimination claim.[72] Seymore appealed the district court's summary judgment on her discrimination claim against the union, claiming error in not holding the union responsible for unlawful sexual harassment by Shawver and in granting summary judgment Shawver's favor.[73]

b. *Decision*

In defining a sexually hostile work environment under the *Meritor* rule, the Tenth Circuit adopted the Eighth Circuit's holding in *Marquart v. Lodge 837, International Association of Machinists & Aerospace Workers*,[74] which established the four elements that comprise a prima facie case of hostile environment sexual harassment.[75] Under this standard a plaintiff must show that: "1) she is a member of a protected group; 2) she was subject to unwelcome harassment; 3) the harassment was based on sex; and 4) the harassment altered a term, condition, or privilege of the plaintiff's employment, creating an abusive working environment."[76] The court applied the *Meritor* severe or pervasive standard of review to the adopted elements of hostile environment sexual harassment and found that the union workers' sexual harassment of Seymore was not severe enough to violate Title VII.[77]

The court further held that because the jury found for defendant Shawver on the sexual harassment claim, Seymore's sexual harassment claim against the union likewise failed because under Title VII the union could not be held liable for the employer's actions as a matter of law:[78]

> [A] union may be held responsible under Title VII for discriminatory practices by an employer if the union does not take appropriate action against such practices . . . . However, where a jury determines an employer did not engage in unlawful discrimination under Title VII, a union may not be held responsible under Title VII for the employer's actions.[79]

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70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*
74. 26 F.3d 842 (8th Cir. 1994).
75. *Seymore*, 111 F.3d at 797 (citing *Marquart*, 26 F.3d at 853).
76. *Id.* (quoting *Marquart*, 26 F.3d at 853).
77. *Id.* at 798.
78. *Id.*
79. *Id.*

2. *Harrison v. Eddy Potash, Inc.*[80]

a. *Facts*

Jeanne Harrison, a female underground potash miner, suffered unwanted sexual conduct from her male supervisor over a period of two months.[81] The supervisor's conduct including groping, requests to have sex, and forcing Harrison to masturbate him.[82] Subsequently, she reported the conduct to a manager in the mine's safety office.[83] In response, the human resources manager placed her on administrative leave pending an investigation into her grievance.[84] After hearing the conflicting accounts of the events, including the supervisor's claims that the conduct was consensual, the human resources manager decided Harrison would be reimbursed for lost time, and provided with medical and counseling support if needed.[85] Moreover, her supervisor was placed on permanent probation and ordered not to work with Harrison.[86] Harrison never returned to work and was terminated the following year due to reductions in the mine's work force.[87]

Harrison then brought actions under Title VII for hostile work environment sexual harassment against her supervisor and employer.[88] At trial, the jury returned verdicts for the defendants on the sexual harassment claim and Harrison appealed, alleging that the jury was improperly instructed regarding employer liability.[89] She also alleged that the trial court improperly required that before establishing employer liability the plaintiff must prove the harasser was a supervisor who had authority over the conditions of employment, including the authority to hire and fire.[90]

b. *Decision*

Before analyzing the sexual harassment liability implications for the employer regarding sexual harassment, the Tenth Circuit referred to *Meritor*'s quotation of the EEOC's Guidelines on Discrimination Because of Sex[91] that hostile environment sexual harassment occurs where a supervisor's or co-worker's sexual conduct "has the purpose or effect of

80. 112 F.3d 1437 (10th Cir. 1997).
81. *Harrison*, 112 F.3d at 1440-41.
82. *Id.*
83. *Id.*
84. *Id.* at 1441.
85. *Id.* at 1441-42.
86. *Id.* at 1442.
87. *Id.*
88. *Id.* at 1439.
89. *Id.*
90. *Id.* at 1447 (adopted from Sauers v. Salt Lake County, 1 F.3d 1122, 1125 (10th Cir. 1993)).
91. 29 C.F.R. § 1604.11(a) (1985).

unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."[92]

C. *Other Circuits*

In *Perry v. Ethan Allen, Inc.*,[93] the Second Circuit held that hostile environment sexual harassment required a showing of two elements.[94] The first is that the sexual harassment is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."[95] The second is that there was a basis on which conduct creating the abusive environment could be imputed to the employer.[96]

To satisfy the severe or pervasive standard of the first element, the alleged incidents had to be "more than episodic," and should be "sufficiently continuous and concerted in order to be deemed pervasive."[97] The court also noted that an important factor in finding a hostile environment was the environment itself: "Evidence of a general work atmosphere . . . as well as evidence of specific hostility directed toward the plaintiff" should be evaluated.[98] However, in *Torres v. Pisano*,[99] the Second Circuit also noted that "even a single episode of harassment, if severe enough, can establish a hostile work environment."[100]

In contrast, the Seventh Circuit held in *Jansen v. Packaging Corp. of America*[101] that hostile environment sexual harassment occurs "[w]hen the workplace is permeated with discriminatory intimidation, ridicule and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."[102] The court clarified the required threshold of unlawful conduct for actionable

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92. *Harrison*, 112 F.3d at 1443 (quoting Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986) (quoting 29 C.F.R. § 1604.11(a))).

93. 115 F.3d 143 (2d Cir. 1997).

94. *Perry*, 115 F.3d at 149.

95. *Id.* (quoting Harris v. Forklift Sys., 510 U.S. 17, 21 (1993)).

96. *Id.* at 143. In *Perry*, the plaintiff claimed she was sexually harassed by her coworkers. *Id.* at 146. Specifically, she alleged she was subjected to catcalls, that certain of her coworkers "asked her to have sex, pulled at her bra strap, pulled at her pants, pawed her neck, rubbed up against her and grab[bed] at [her] chest." *Id.* at 147 (alteration in original) (internal quotations omitted). The defendant employer presented evidence that it had in place a sexual harassment policy and that on the day it was notified of the harassment by the plaintiff, it began an investigation which, in the absence of any corroborating evidence for the plaintiff's allegations, resulted only in reprimands of the coworkers. *Id.* at 148. The jury found that a hostile environment existed but that because the employer took appropriate remedial action after notice of the harassment, it rendered a verdict for the defendant and the Second Circuit affirmed. *Id.* at 143.

97. *Id.* (quoting *Harris*, 510 U.S. at 21).

98. *Id.* (quoting Hicks v. Gates Rubber Co., 833 F.3d 1406, 1415 (1993)).

99. 116 F.3d 625 (2d Cir. 1997).

100. *Torres*, 116 F.3d at 631 n.4.

101. 123 F.3d 490 (7th Cir. 1997).

102. *Jansen*, 123 F.3d at 533 (citations omitted).

sexual harassment as consisting of neither "'isolated and/or trivial remarks of a sexual nature'"[103] nor harassment that is "'too tepid or intermittent or equivocal to make a *reasonable* person believe that she has been discriminated against on the basis of sex.'"[104] Furthermore, the Seventh Circuit reiterated its language from *Baskerville* stating that the purpose of hostile environment sexual harassment is "to protect working women from the kind of male attentions that can make the workplace hellish for women."[105]

D. *Analysis*

While *Seymore* established the four factors necessary for a prima facie case of hostile environment sexual harassment, neither it nor *Harrison* had any occasion to give further indication of what specific types of conduct would contribute to hostile environment sexual harassment. Both decisions merely reiterated the vague definition of an actionable claim of hostile environment sexual harassment from *Meritor*. However, after both the *Seymore* and *Harrison* decisions during this survey period, a panel of Tenth Circuit court justices issued an order denying a petition for rehearing en banc in *Rocha Vigil v. City of Las Cruses*.[106] In a dissent, Judge Lucero criticized the panel, and the court as a whole, for relying on its *Hicks* holding that for hostile environment sexual harassment to apply, "[t]here must be a steady barrage of opprobrious racial [or sexual] comment" such that the work environment is "so heavily polluted with discrimination as to destroy the emotional and psychological stability of the minority [employee]."[107] Judge Lucero argued that in light of the Supreme Court's holding in *Harris*, psychological injury alone cannot be a determinative factor indicating a Title VII violation and *Hicks* should be overruled.[108]

Furthermore, according to Judge Lucero, the Tenth Circuit cases subsequent to *Harris* have continued to require *Hicks*'s "steady barrage"

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103. *Id.* (quoting Galloway v. General Motors, 78 F.3d 1164, 1168 (7th Cir. 1996)).

104. *Id.* (quoting Rennie v. Dalton, 3 F.3d 1100, 1107 (7th Cir. 1993)).

105. *Id.* (citing Baskerville v. Culligan Int'l Co., 50 F.3d 428, 430 (7th Cir. 1995)). In *Jansen*, the plaintiff argued that her boss sexually harassed her by subjecting her to unwanted and offensive sexual advances that included intimations that her raise would not be held up if she allowed his advances. *Id.* at 493. This was the basis for an unsuccessful quid pro quo argument. *Id.* Her hostile environment claim was based on other remarks of a similar nature made by her boss. *Id.* The plaintiff claims she was subjected to sexual advances by one of her supervisors in her marketing division of Burlington Industries which consisted of intimations that sexual relations with that supervisor would lead to success and promotions. *Id.* In both cases, the court remanded for resolution of material issues of fact. *Id.* at 490, 495.

106. 119 F.3d 871 (10th Cir. 1997).

107. *Rocha Vigil*, 119 F.3d at 872 (quoting Hicks v. Gates Rubber Co., 833 F.2d 1406, 1412-13 (10th Cir. 1987)).

108. *Id.* ("[O]ur claim in *Hicks* that 'Title VII is violated only where the work environment is so heavily polluted with discrimination as to destroy the emotional and psychological stability of the minority employee' cannot stand.").

of harassing conduct to find a Title VII violation.[109] Such a requirement is not well-suited to this purpose in light of its historical association with a required psychological injury.[110] He therefore argued that that test should be abandoned because it requires a much more severe standard than required under *Harris*.[111]

The Tenth Circuit's adoption of the elements for a prima facie case for hostile environment sexual harassment will provide a necessary and uniform guide for employers, attorneys, and the courts in the future. However, the absence of clear parameters or consensus as to the nature and quantum of conduct necessary for an actionable hostile environment sexual harassment claim leaves employers without direction as to how to structure internal sexual harassment policies and evaluate such grievances from employees.

II. EMPLOYER LIABILITY FOR SEXUAL HARASSMENT OF EMPLOYEES BY SUPERVISORS

A. *Background*

Quid pro quo sexual harassment and hostile environment sexual harassment have had different liability implications for employers in the Tenth Circuit.[112] If a district court finds quid pro quo sexual harassment by a supervisor, the employer is generally held strictly liable for the actions of the supervisor.[113] However, the Supreme Court specifically held that employers should not be strictly liable for the hostile environment sexual harassment caused by their supervisors[114] and the Tenth Circuit has

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109. *Id.* at 872.

110. *Id.* at 872-73.

111. *Id.* at 873. Judge Lucero stated:

> In its continued reliance on Hicks, this court appears to believe that only the most egregious cases will give rise to an actionable claim of hostile work environment under Title VII. Such a belief is entirely without foundation. As the Second Circuit has noted even since I requested an en banc hearing, Harris stands for a very simple and straightforward proposition: "Whenever the harassment is of such quality or quantity that a reasonable employee would find the conditions of her employment altered for the worse, it is actionable under Title VII, so long as the employee subjectively experienced the hostile work environment."

Id. (quoting Torres v. Pisano, 116 F.3d 625, 633 (2nd Cir. 1997)).

112. Harrison v. Eddy Potash, Inc., 112 F.3d 1437, 1443 (10th Cir. 1997). The court stated that "[i]n cases involving quid pro quo harassment, courts routinely hold, with little or no discussion, that the employer is 'strictly liable.'" *Id.* However, the Tenth Circuit stopped short of this standard for hostile environment sexual harassment: "As the Supreme Court specifically emphasized in *Meritor*, and as this court has since acknowledged, an employer is not strictly liable for hostile work environment sexual harassment committed by one of its supervisors." *Id.* at 1451.

113. *Id. But see* Sims v. Brown & Root Indus. Serv., Inc., 889 F. Supp. 920, 923 (W.D. La. 1995), *aff'd*, 78 F.3d 581 (5th Cir. 1996) (holding that defendant would be liable for quid pro quo sexual harassment if the employer had notice of the harassment and failed to take prompt remedial action).

114. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 72 (1986).

acknowledged this limitation.[115] The *Meritor* Court advised the lower courts to refer to agency principles in order to avoid findings of strict liability.[116]

In the years following the *Meritor* decision, the circuits split over the correct test for employer liability for hostile environment sexual harassment by a supervisor.[117] Several circuits followed the negligence standard without holding the employer strictly liable.[118] For example, the Sixth Circuit, in *Kauffman v. Allied Signal*,[119] held that in order to find the employer liable, the plaintiff must show that the supervisor's actions were foreseeable or within his scope of employment.[120] However, even if the plaintiff carried its burden, the defendant could still succeed by showing that the employer responded appropriately to avoid liability.[121] In *Kauffman*, a supervisor and other co-employees harassed the plaintiff after she had breast enlargement surgery.[122] Once the harassment by the supervisor was reported to the company, the supervisor was terminated.[123] The trial court found the harassment neither foreseeable nor within the scope of the supervisor's employment.[124] Ultimately, the trial court held that the supervisor's immediate termination upon first notification of the harassment was an appropriate remedial response and absolved the employer of liability; the Sixth Circuit agreed.[125]

The Third Circuit also followed this negligence standard in *Andrews v. City of Philadelphia*.[126] The *Andrews* court required the trial judge, in light of all the circumstances, to determine whether plaintiff's working environment was one which women of "reasonable sensibilities" would find hostile or offensive.[127] Under such conditions an employer could be

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115. *See Harrison*, 112 F.3d at 1451.

116. *Id.* (stating that since Congress's definition of "employer" includes agents of the employer, this demonstrates an intent to limit the acts of employees for which employers are liable under Title VII). The court stated in *Meritor*:

> Congress' decision to define "employer" to include any "agent" of an employer . . . surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible. For this reason, we hold that the Court of Appeals erred in concluding that employers are always automatically liable for sexual harassment by their supervisors.

Meritor, 477 U.S. at 72.

117. *See* Oppenheimer, *supra* note 9, at 131.

118. *Id.* at 132-33.

119. 970 F.2d 178 (6th Cir. 1992).

120. *Kauffman*, 970 F.2d at 184 ("[T]he determination of whether or not Allied is liable for its supervisor's actions depends on 1) whether [the supervisor's] harassing actions were foreseeable or fell within his scope of employment and 2) even if they were, whether Allied responded adequately and effectively to negate liability.").

121. *Id.*

122. *Id.* at 179-81.

123. *Id.* at 181.

124. *Id.* at 184.

125. *Id.* at 185.

126. 895 F.2d 1469 (3d Cir. 1990).

127. *Andrews*, 895 F.2d at 1486.

liable by respondeat superior if, under *Meritor*'s direction to look to agency principles, the employer knew or should have known of the harassment and failed to take adequate remedial action.[128] The First, Eighth, and Ninth Circuits have subsequently followed this direct negligence standard in a similar fashion.[129]

Some circuits have kept the negligence standard while also adopting elements of agency law.[130] The Eleventh Circuit, in *Faragher v. City of Boca Raton*,[131] held the employer could be liable if it had actual or constructive knowledge of the sexual harassment and failed to take prompt remedial action.[132] In addition, the court held that liability would attach if the harassing supervisor acted as the employer's agent while creating the hostile environment.[133] However, the court noted it would be rare for a supervisor to act as an agent while creating a hostile environment, since such tortious behavior is not within the scope of any supervisor's employment.[134]

The Second Circuit in *Karibian v. Columbia University*,[135] came close to holding employers automatically liable for their supervisors' sexual harassment of employees.[136] In that case, the plaintiff alleged that she was pressured into a sexual relationship with her supervisor.[137] The trial court granted summary judgment for the defendant employer on the

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128. *Id.* ("Thus, if a plaintiff proves that management-level employees had actual or constructive knowledge about the existence of a sexually hostile environment and failed to take prompt and adequate remedial action, the employer will be liable.").

129. *See* Klessens v. United States Postal Serv., 42 F.3d 1384 (1st Cir. 1994) (adopting direct liability standard and holding that the victim's verbal complaints of harassment by her supervisor to management were insufficient to put the company on notice and also that the employer's subsequent transfer of the supervisor was appropriate, thereby avoiding liability); Steiner v. Showboat Operating Co., 25 F.3d 1459 (9th Cir. 1994) (holding that even where the vice-president of the company is the alleged harasser, employer liability would result only if the company failed to adequately respond to the victim's complaint, ignoring any claim of vicarious liability); Davis v. Tri-State Mack Distribs., Inc., 981 F.2d 340 (8th Cir. 1992) (holding that since the victim gave notice of sexual harassment to the branch manager, she did not have to also complain to corporate headquarters to impute liability to the employer); Oppenheimer, *supra* note 9, at 134.

130. *See id.* at 136.

131. 76 F.3d 1155, *vacated on reh'g en banc*, 83 F.3d 1346 (11th Cir. 1996).

132. *Faragher*, 76 F.3d at 1164 ("The district court correctly reconciled this precedent in holding that an employer may be liable in a hostile environment case if either (1) the employer knew or should have known of the harassment and failed to take prompt remedial action, or (2) the harasser acted as the employer's agent.").

133. *Id.*

134. *Id.* at 1164-65.

135. 14 F.3d 773 (2d Cir. 1994). In holding that employers could be liable solely if the harasser was aided in the harassment by the existence of the agency relationship under Restatement (Second) of Agency section 219(2)(d), the *Harrison* court found support in the Second Circuit's holding in *Karibian*. *Harrison*, 112 F.3d at 1445-46.

136. David L. Gregory, *Sex Discrimination: Continuing Clarifications by the Second Circuit*, 61 BROOK. L. REV. 363, 393-94 (1995) (explaining how the court's merging of liability standards for quid pro quo sexual harassment indicate the court's pro-plaintiff slant).

137. *Karibian*, 14 F.3d at 776.

plaintiff's hostile environment sexual harassment claim on the grounds that the employer had no notice of the harassment and also had a grievance procedure in place.[138] The Second Circuit reversed, holding that if the factfinder found for plaintiff on her allegations of hostile environment sexual harassment, the employer would be liable regardless of actual or constructive notice because the supervisor misused the employer's delegated authority to create an abusive working environment.[139] However, the *Karibian* court also stated that if the supervisor did not rely on his authority, then employer liability could only be established using the negligence standard.[140]

In contrast to the Second Circuit's holding in *Karibian*, the D.C. Circuit in *Gary v. Long*[141] stated that the supervisor's agency relation to the employer always aids accomplishment of the unlawful activity because the supervisor's authority includes responsibilities requiring the supervisor to be proximate to and regularly meet with his or her employees.[142] The court agreed with the district court that the employee had suffered hostile environment sexual harassment but refused to hold the employer liable for the supervisor's abuse of authority to facilitate the harassment.[143] The court held that no liability imputes if an employer creates a hostile work environment grievance policy and informs the plaintiff employee to the extent that the employee knew or should have known that the unlawful conduct of her supervisor was not authorized or condoned by the employer.[144]

In *Hicks*, the Tenth Circuit adopted sections 219(1) and 219(2) of the Restatement (Second) of Agency as possible bases for employer liability in hostile environment sexual harassment in employment.[145] These

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138. *Id.* at 775.

139. *Id.* at 780. While not specifically addressing the separate clauses of section 219(2)(d), the court nevertheless held that the employer, Columbia, would be liable "regardless of the absence of notice or the reasonableness of Columbia's complaint procedures." *Id.*

140. *Id.*; *see also* Kracunas v. Iona College, 119 F.3d 80, 88-89 (2d Cir. 1997) (applying the negligence standard when supervisor did not rely on supervisory authority).

141. 59 F.3d 1391 (D.C. Cir. 1995).

142. *Gary*, 59 F.3d at 1397 ("In a sense, a supervisor is always 'aided in accomplishing the tort by the existence of the agency' because his responsibilities provide proximity to, and regular contact with, the victim." (quoting Barnes v. Costle, 561 F.2d 983, 996 (D.C. Cir. 1977) (Mackinnon, J., concurring))).

143. *Id.* at 1397-98. The harassment included threats of termination if sexual demands were not satisfied, battery and rape. *Id.*

144. *Id.* at 1398. The court stated:

> [W]e conclude that an employer may not be held liable for a supervisor's hostile work environment harassment if the employer is able to establish that it had adopted policies and implemented measures such that the victimized employee either knew or should have known that the employer did not tolerate such conduct and that she could report it to the employer without fear of adverse consequences.

Id.

145. Hicks v. Gates Rubber Co., 833 F.2d 1406, 1417 (10th Cir. 1987) ("We find guidance in the Restatement (Second) of Agency § 219 (1958). Under section 219(1), an employer is liable for any tort committed by an employee 'while acting in the scope of . . . employment.'"). However, the

principles were further defined in *Hirschfeld v. New Mexico Corrections Department*,[146] which held that an employer could be liable for the actions of a supervisor or employee only if: (1) the employer failed 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" (negligence or recklessness standard);[147] (2) the unlawful actions of the harassing employee were within the scope of his employment;[148] or (3) the harassing employee "'purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he [or she] was aided in accomplishing the tort by the existence of the agency relation.'"[149] Of these separate and exclusive avenues of employer liability for hostile environment sexual harassment, the Tenth Circuit has been most reluctant to hold an employer liable only under the scope of employment theory because sexual harassment is never a part of an employee's job description.[150]

While these same principles apply to both supervisors and co-employees, the nature of these respective positions trigger different liability principles. Employer liability is more likely to attach when supervisors, rather than employees, sexually harass employees under the hostile environment theory.[151] The Tenth Circuit has generally applied the "knew or should have known" negligence standard as the basis for employer liability for employees' hostile environment sexual harassment of co-employees.[152] In the case of supervisor harassment, however, the court

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court found that section 219(1) was not a reliable tool for finding an employer liable for sexual harassment by its employees since "'sexual harassment simply is not within the job description of any supervisor or any other worker in any reputable business.'" *Id.* at 1417-18 (quoting David Holtzman & Eric Trelz, *Recent Development in the Law of Sexual Harassment: Abusive Environment Claims after* Meritor Savings Bank v. Vinson, 31 ST. LOUIS U. L.J. 239, 276 (1987)). Instead, the court felt that section 219(2) was a more helpful standard. *Id.* at 1418. Section 219(2) "creates employer liability when (1) the master was negligent or reckless . . . and (2) where the servant purported to act or to speak on behalf of the principal and there was reliance on apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation." *Id.* (citing RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (1958)).

146. 916 F.2d 572 (10th Cir. 1990).

147. *Hirschfeld*, 916 F.2d at 577 (quoting EEOC v. Hacienda Hotel, 881 F.2d 1504, 1516 (9th Cir. 1989)).

148. *Id.* at 576-77.

149. *Id.* (quoting RESTATEMENT (SECOND) OF AGENCY § 219(d)(2)) (alteration in original).

150. *Hicks*, 833 F.2d at 1417-18 ("'[C]onfining liability . . . to situations in which a supervisor acted within the scope of his authority conceivably could lead to the ludicrous result that employers would become accountable only if they explicitly require or consciously allow their supervisors to molest women employees.'" (quoting Vinson v. Taylor, 753 F.2d 141, 151 (D.C. Cir. 1985))).

151. *See Hirschfeld*, 916 F.2d at 577 (upholding the district court's finding that because the harasser was not the plaintiff's supervisor there was no apparent authority and the employer could only be held liable if the negligence standard was met).

152. Hirase-Doi v. U.S. West Communications, Inc., 61 F.3d 777, 783 (10th Cir. 1995) (stating that since the parties have not disputed the harassing employees' lack of apparent authority, the court will examine employer liability under the negligence standard); *cf.* Creamer v. Laidlaw Transit, Inc.,

has yet to hold an employer liable under the "apparent authority" rule of liability for a supervisor's hostile environment sexual harassment of supervised employees under Restatement (Second) of Agency section 219(2)(d).[153]

The Tenth Circuit clarified the definition of "employer" in *Sauers v. Salt Lake County*.[154] Finding no definition of "agent" in the text of Title VII, the *Sauers* court held that a supervisor qualifies as an "employer" under Title VII if the supervisor holds significant control over the plaintiff's work environment, including the hiring and firing of the plaintiff.[155] Moreover, under this definition, the supervisor functions as the employer's "alter ego" and can make the employer liable by his or her illegal actions regardless of whether the employer had notice of the supervisor's conduct.[156] However, in *Harrison* this language was limited to a court's determination of whether a sexual harassment claim naming only the harassing supervisor can also function as a claim against the employer and does not bear on the employer's liability.[157]

B. *Tenth Circuit Decisions*

1. *Seymore v. Shawver & Sons, Inc.*[158]

a. *Facts*

After allegedly being exposed to sexually offensive remarks and gestures by co-employees, Seymore filed grievances with her job steward and her union, the International Brotherhood of Electrical Workers.[159] Even after she filed these complaints, the plaintiff claims that the har-

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86 F.3d 167, 170-71 (10th Cir. 1996) (refusing to hold employer liable but focusing exclusively on the negligence basis).

153. *See* Griffith v. Colorado, 17 F.3d 1323, 1330 (10th Cir. 1994) (applying the negligence "knew or should have known" standard while acknowledging the "apparent authority" avenue); Sauers v. Salt Lake County, 1 F.3d 1122, 1125 (10th Cir. 1993) (holding only that the supervisor held sufficient authority over plaintiff to allow plaintiff's claim against supervisor to also be a claim a claim against the employer); *Hirschfeld*, 916 F.2d at 579-80 (affirming the district court's finding that harassing supervisor did not purport to act on behalf of employer under section 219(2)(d)); *Hicks*, 833 F.2d at 1417-18 (rejecting negligence as only standard for employer liability for supervisor's hostile environment sexual harassment of supervised employees and remanding for review in light of agency principles).

154. 1 F.3d 1122 (10th Cir. 1993).

155. *Sauers*, 1 F.3d at 1125 ("We agree with the Fourth Circuit that 'an individual qualifies as an "employer" under Title VII if he or she serves in a supervisory position and exercises significant control over the plaintiff's hiring, firing or conditions of employment.'" (quoting Paroline v. Unysis Corp., 879 F.2d 100, 104 (4th Cir. 1989))). This language was subsequently limited in *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437 (10th Cir. 1997). *See infra* Part II.B.2.b.

156. *Sauers*, 1 F.3d at 1125 ("In such a situation, the individual operates as the alter ego of the employer, and the employer is liable for the unlawful employment practices of the individual without regard to whether the employer knew of the individual's conduct.").

157. *See* discussion *infra* Part II.B.2.b.

158. 111 F.3d 794 (10th Cir. 1997). For a discussion of the facts, see *supra* Part I.B.1.a.

159. *Seymore*, 111 F.3d at 796.

assing conduct continued.[160] The plaintiff then filed a discrimination charge against Shawver with the Oklahoma Human Rights Commission (OHRC), who filed a charge on her behalf with the EEOC.[161] Subsequently, Shawver terminated her employment, which resulted in the plaintiff filing another charge with the EEOC alleging both racial and sexual discrimination.[162] She also filed suits against Shawver and the union alleging only sexual discrimination and retaliatory practices.[163] At trial the district court granted summary judgment for the union.[164]

b. *Decision*

The Tenth Circuit reiterated the agency principles recited in *Hirschfeld*.[165] However, these principles were never applied to the facts because the court found that the defendant's employees had not satisfied the requirements for sexual harassment under Title VII.[166] In this case, the plaintiff also wanted to hold the union liable on the basis that unions should not be able to ignore an employer's unlawful discrimination and avoid Title VII liability.[167] The court held that because the jury found the employer not liable for sexual harassment, the union could not likewise be held liable since the original conduct was not found to be unlawful.[168]

2. *Harrison v. Eddy Potash, Inc.*[169]

a. *Facts*

On appeal, the plaintiff contended that the jury instructions failed to properly instruct the jury regarding employer liability for hostile environment sexual harassment under Title VII.[170] Specifically, Harrison alleged that the trial court: (1) incorrectly combined two separate bases for employer liability under Title VII; (2) erred in instructing the jury that the allegedly harassing supervisor, Brown, had to be empowered with a high degree of control over the plaintiff to impose liability on the defendant;[171] (3) wrongly defined "apparent authority;[172] and (4) improperly

160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.*
165. *Id.* at 797.
166. *Id.* at 798.
167. *Id.*
168. *Id.*
169. 112 F.3d 1437 (10th Cir. 1997).
170. *Harrison*, 112 F.3d at 1442. For a discussion of the facts, see *supra* Part I.B.2.a.
171. *Harrison*, 112 F.3d at 1442. The jury instruction defining an agency relationship was as follows:

> In order for you to hold the defendant Eddy Potash, Inc. liable to the plaintiff Jeanne Harrison for the acts of Robert Brown, you must find that Robert Brown was an agent of defendant Eddy Potash, Inc. In order to determine whether Robert Brown was an agent of

rejected three of her proposed instructions for employer liability for the sexual harassment of its supervisors under Title VII.[173]

b. *Decision*

In determining whether the district court properly instructed the jury regarding employer liability, the Tenth Circuit examined the third possible avenue of liability under the Restatement (Second) of Agency section 219(2)(d).[174] The court held that the first and second clauses of section 219(2)(d) should be viewed as two separate bases for liability instead of one as held in *Hirschfeld*.[175] Under the first clause, the court held that a plaintiff must show that: (1) the employer vested the harassing supervisor with authority to control "significant aspects" of the harassed employee's work environment;[176] (2) the supervisor sexually harassed the plaintiff;[177] and (3) the plaintiff relied or acted on the apparent authority of his or her supervisor.[178]

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defendant Eddy Potash, Inc., you must find that Robert Brown exercised significant control over plaintiff's hiring, firing or conditions of employment at Eddy Potash, Inc., such that Robert Brown's supervisory position was equivalent to that of managerial control over plaintiff, thereby creating an employer/employee relationship, thus making Robert Brown the alter ego of Eddy Potash, Inc.

Id. at 1448.

172. *Id.* at 1449. The jury instruction on apparent authority was as follows:

If you find that Robert Brown was an agent of Eddy Potash, Inc. then you must also determine whether Robert Brown was acting with "apparent authority" as an agent of Eddy Potash, Inc.

In this regard you are instructed that an employer, such as Eddy Potash, Inc., may not be liable to an employee for the acts of its agent (supervisor) unless its agent had "authority," whether apparent or otherwise, to commit the acts in question.

In order to determine whether an agent had "apparent authority" you should consider what knowledge the plaintiff had regarding the authority of the agent to commit such acts in question. In this regard you should consider whether the employer had established by a preponderance of the evidence that it had adopted policies against sexual harassment, and had implemented measures such that a victimized employee knew or should have known that the employer did not tolerate such conduct and that she could report it to her employer without fear of adverse consequences.

Id.

173. *Id.* at 1442.

174. *Id.* at 1443-46.

175. Hirschfeld v. New Mexico Corrections Dep't, 916 F.2d 572, 579 (10th Cir. 1990).

176. *Harrison*, 112 F.3d at 1444 ("The first element is established '[w]henever an employer vests its supervisor with the authority to control significant aspects of the work environment.'" (quoting Glen Allen Staszewski, *Using Agency Principles for Guidance in Finding Employer Liability for A Supervisor's Hostile Work Environment Sexual Harassment*, 48 VAND. L. REV. 1057, 1089 (1995)) (alteration in original)).

177. *Id.*

178. *Id.* The court states that this element would be difficult to prove if the employer has a formal written grievance policy and has "taken steps 'to remove any possible inference that a supervisor has authority to sexually harass his subordinates.'" *Id.* (quoting Staszewski, *supra* note 176, at 1090). In contrast, if an employer fails to have such an established grievance policy, "'a victim of sexual harassment will reasonably perceive her only available options to be silently acquiescing in the harassment or leaving her job.'" *Id.* (quoting Staszewski, *supra* note 176, at 1090). The court appears to imply that absent a grievance policy, the employer is likely to be liable.

The second clause of section 219(2)(d) states that the employee "was aided in accomplishing the tort by the existence of the agency relation."[179] The court determined that this clause is satisfied when the employer authorizes a supervisor to control a work environment and the supervisor abuses that authority by sexually harassing an employee.[180] Moreover, the court held that employer liability can attach regardless of whether or not the employer had a written sexual harassment grievance policy in place which was known to the plaintiff.[181] The court limited the extent of this liability, however, by holding that the employer would not be liable if the agency relation only placed the supervisor in proximity to the plaintiff.[182]

The court summarized its new interpretation of the agency principles with which to hold employers liable for sexual harassment as follows:

> In summary, an employer in this circuit can be held liable under Title VII for hostile work environment sexual harassment committed by one of its supervisors if any of the following conditions are met:
>
> 1) The supervisor committed the harassment while acting in the scope of his employment. *See* Restatement (Second) of Agency § 219(1).
>
> 2) The employer knew about, or should have known about, the harassment and failed to respond in a reasonable manner. *See* Restatement (Second) of Agency § 219(2)(b).
>
> 3) If the employer manifested in the supervisor the authority to act on its behalf, such manifestation resulted in harm to the plaintiff, and the plaintiff acted or relied on the apparent authority in some way. *See* Restatement (Second) of Agency § 219(2)(d), clause 1.
>
> 4) If the employer delegated the authority to the supervisor to control the plaintiff's work environment and the supervisor abused that delegated authority by using that authority to aid or facilitate his perpetration of the harassment. *See* Restatement (Second) of Agency § 219(2)(d), clause 2.[183]

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

180. *Harrison*, 112 F.3d at 1445 ("[I]f the supervisor 'is able to misuse that power to create a hostile work environment, the employer will be liable for having placed him in the position to do so.'" (quoting Staszewski, *supra* note 176, at 1091)).

181. *Id.* at 1446.

182. *Id.* ("We emphasize . . . that this interpretation does not allow liability of attach where the harasser's agency relationship merely provided him with proximity to plaintiff.").

183. *Id.*

The *Harrison* court also limited its holding in *Sauers* regarding the definition of an "agent" for purposes of Title VII liability.[184] The court agreed with the plaintiff that she was not required to show that the harasser was a supervisor who exercised "significant control" over workplace conditions including hiring and firing, which the trial court interpreted as a prerequisite to establishing employer liability under *Sauers*.[185] The court explained that the *Sauers* holding concerned whether a claim against a supervisor, in his official capacity, could also operate as a claim against the employer, who was not listed as a party in the plaintiff's initial cause of action.[186] Because Harrison appropriately filed claims against both her supervisor *and* the employer, *Sauers* did not apply.[187]

In addressing the question of whether the jury was properly instructed, the court held that employer liability for hostile environment sexual harassment under section 219(2)(d) requires the supervisors to have apparent or actual authority over the plaintiff's working environment and that the harassment be aided by that authority.[188] Moreover, all that is required for apparent authority is that the victim or plaintiff reasonably believe that the supervisor has such authority based on "written or spoken words or any other conduct" of the employer.[189]

C. *Other Circuits*

Many circuits are struggling with the correct agency standard to apply to employer liability for the sexual harassment by a supervisor. For example, a plurality of justices on the Seventh Circuit in *Jansen v. Packaging Corp. of America* believed that negligence was the best standard in cases of hostile environment sexual harassment, including that of supervisors.[190] However, there was not much clarification on the specific negligence standard.[191] In fact, a per curiam opinion in *Jansen* called on the

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184. *Id.* at 1448 ("[W]e conclude the discussion in *Sauers* of who constitutes an "agent" for Title VII purposes is strictly limited to situations in which a court is determining whether a claim against a named individual defendant (in his official capacity) can operate as a claim against the employer itself.").

185. *Id.* at 1447-48 (holding that the requirement of showing the harassing supervisor's significant control over the work environment only applies in determinations of whether a suit may proceed against an employer not listed in the pleadings and "has no applicability in deciding whether the employer is liable for the conduct of its employees").

186. *Id.* at 1448.

187. *Id.*

188. *Id.* at 1449-50.

189. *Id.* at 1450 (stating that jury instruction wrongly focused on the knowledge of the plaintiff regarding apparent authority rather than the plaintiff's reasonable belief).

190. Jansen v. Packaging Corp. of Am., 123 F.3d 490, 493-94 (7th Cir. 1997) ("All the judges with the exception of Judges Easterbrook, Rovner, and Wood believe that negligence is the only proper standard of employer liability in cases of hostile-environment sexual harassment even if as here the harasser was a supervisor rather than a coworker of the plaintiff.").

191. *Jansen*, 123 F.3d at 493-94; *see* Michael A. Warner, Jr., *Franczek Sullivan Labor and Employment Report: Supreme Court Agrees to Hear Sexual Harassment Cases While Lower Courts Struggle*, CORP. LEGAL TIMES, Jan. 1998, at 61 (referring to *Jansen*, the article states "[a] narrow

Supreme Court to "bring order to the chaotic case law in the important field of practice."[192]

In *Faragher v. City of Boca Raton*,[193] the Eleventh Circuit, applying the negligence standard, held that "[a]n employer is directly liable for hostile environment sexual harassment if it knew, or upon reasonably diligent inquiry should have known, of the harassment and failed to take immediate and appropriate action."[194] The court further reiterated it's holding that "in a pure hostile environment case, a supervisor's harassing conduct is typically outside the scope of his employment," because in conducting hostile environment sexual harassment only, the supervisor is not acting within his "actual or apparent authority to hire, fire, discipline or promote."[195] The court further emphasized, in deference to *Meritor*, that "employers are not automatically liable for the hostile environment sexual harassment by their supervisors or employees."[196] However, in addition to the above direct avenue of employer liability, the Eleventh Circuit would allow indirect liability to attach if the harassing employee were acting within the scope of his employment in conducting the harassment or if he or she was acting outside the scope of his or her employment, but is nevertheless aided in accomplishing the unlawful activity due to the existence of the agency relationship.[197]

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majority of the Seventh Circuit agreed that . . . a 'negligence' standard applies to claims in which a supervisor's sexual harassment is alleged to have created a 'hostile work environment'").

192. *Jansen*, 123 F.3d at 494-95. The Seventh Circuit, aware of the problems its holding in *Jansen* would present the district courts, advised them to "recognize in this welter of opinions that certain views do command a majority within our court: in particular, that the standard for employer liability in cases of hostile-environment sexual harassment by a supervisory employee is negligence, not strict liability." *Id.*; *see* Brendan Stephens, *7th Circuit Divided Over Liability for Harassment*, CHI. DAILY L. BULL., Aug. 14, 1997, at 1 (summarizing the court's divisive ruling in *Jansen*).

193. 111 F.3d 1530 (11th Cir.), *rev'd*, 118 S. Ct. 2275 (1998). For a discussion of the Supreme Court's decision in *Faragher v. City of Boca Raton*, which was decided after the conclusion of this survey period, see *infra* note 232.

194. *Faragher*, 111 F.3d at 1535. The Eleventh Circuit emphasized that under this theory the city could be held liable for its own negligence but would not be liable for the harassing conduct of its supervisors. *Id.* Like many circuits, the Eleventh Circuit labeled the various agency employer liability categories as direct and indirect: "[A]n employer is indirectly, or vicariously, liable for the wrongful conduct of its agent, whether or not the employer knew or should have known about the agent's wrongful act." *Id.* The employer is likewise indirectly liable for the sexual harassment by its supervisors if the supervisor was acting within the scope of his or her employment, and if there's an "agency relationship which aids the supervisor's ability or opportunity to harass his subordinate." *Id.*

195. *Id.* at 1535-36.

196. *Id.* at 1536.

197. *Id.* The court stated that

> this circuit has articulated two agency principles under which an employer may be held indirectly or vicariously, liable for hostile environment sexual harassment: (1) when a harasser is acting within the scope of his employment in perpetrating the harassment and (2) when a harasser is acting outside the scope of his employment, but is aided in accomplishing the harassment by the existence of the agency relationship.

Id. (citations omitted). The court explained that the harasser could be within his or her scope of employment if the harassing act was the agent's method for accomplishing an authorized purpose.

The plaintiff in *Faragher* argued that she suffered alleged harassment by her supervisors when she was a lifeguard between 1985 and 1990.[198] The alleged harassment consisted of unwanted touching and patting.[199] However, the plaintiff did not officially complain to her management, the City of Boca Raton's Parks and Recreation Department.[200] The plaintiff subsequently left her employment to attend law school in 1990 and filed her sexual harassment action against the city in 1992.[201] At trial, the court found for the plaintiff on the sexual harassment claim, awarding nominal damages of one dollar.[202] The trial court reasoned that the city was directly liable for the supervisors' conduct under agency law due to the supervisors' authority over the plaintiff and the management structure.[203] Furthermore, the court held that the city was indirectly liable due to the fact that the conduct was severe and pervasive, supporting "an inference of knowledge, or constructive knowledge, on the part of the city" regarding the supervisors' conduct.[204]

On appeal, the Eleventh Circuit reversed the trial court's judgment for plaintiff on the sexual harassment claims, finding that: (1) the supervisors were not acting within the scope of their employment because no evidence supported an inference that the supervisors committed the harassment in performing a service for the city;[205] and (2) the supervisors were not aided in accomplishing the sexual harassment due to the existence of the agency relationship because, under common law, the definition of "aided" refers to use of "an instrumentality of the agency or through conduct associated with the agency status" to accomplish the harassment.[206] Because no such evidence was present in that case the employer could not be held liable for the unlawful conduct of its supervisors.[207]

The Second Circuit in *Torres v. Pisano*[208] provided an alternative approach of applying agency principles to employer liability in holding

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Id. In this situation, the employer would be unable to avoid liability even if the harasser had been specifically instructed not to engage in the unlawful behavior. *Id.*

198. *Id.* at 1533.

199. *Id.*

200. *Id.* The plaintiff did discuss the subject with a friend who was a supervisor but the conversation was not in the context of a subordinate to superior discussion and the supervisor never reported the incidents to management. *Id.*

201. *Id.*

202. *Id.* at 1534.

203. *Id.*

204. *Id.*

205. *Id.* at 1537 ("[T]here is no evidence that Terry and Silverman harassed [the plaintiff] in order to perform any service for the City, or that they were either explicitly or implicitly authorized by the city to engage in such harassment."). Furthermore, the court stated that "[t]his case provides the archetypical example of employees stepping outside of the scope of their employment and seeking to further personal ends." *Id.*

206. *Id.*

207. *Id.*

208. 116 F.3d 625 (2d Cir. 1997).

that an employer is liable for the sexual harassment by one of its supervisors if:

> (a) the supervisor was at a sufficiently high level in the company, or (b) the supervisor used his actual or apparent authority to further the harassment, or was otherwise aided in accomplishing the harassment by the existence of the agency relationship, or (c) the employer provided no reasonable avenue for complaint, or (d) the employer knew (or should have known) of the harassment but unreasonably failed to stop it.[209]

Furthermore, in order for the plaintiff to prove liability on the grounds that the supervisors abused the agency relationship to commit the harassment, he or she "must allege facts which establish a nexus between the supervisory authority and the harassment."[210] This would mean that if the supervisor was aided in accomplishing the tort simply because his position put him in regular proximity and contact with the victim, no liability would attach.[211] Neither would an employer be liable under the abuse of the employment relationship standard if the plaintiff failed to complain or resist the harassment because he or she feared repercussions.[212]

In *Torres*, the Second Circuit limited a portion of its broad holding in *Karibian* in a footnote which drew, ironically, from the Tenth Circuit's treatment of the second clause of section 219(2)(d) of the Restatement of Agency in *Harrison*.[213] *Karibian* had held the existence of a complaint procedure and lack of notice to the employer would not automatically protect the employer from liability.[214] In contrast, *Torres* focused on *Harrison*'s statement that the apparent authority standard will be difficult to prove "and will often hinge upon whether the employer has a formal policy against sexual harassment."[215] Moreover, "if an employer has taken steps to remove any possible inference that a supervisor has authority to sexually harass his subordinates, the victim is likely aware the harassment is not authorized and reliance on apparent authority

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209. *Torres*, 116 F.3d at 634; *see* Jeffrey S. Klein & Nicholas J. Pappas, *Employment Law: Liability for Sexual Harassment by Supervisors*, N.Y. L.J., Oct. 6, 1997, at 3 (explaining the *Torres* decision).

210. *Torres*, 116 F.3d at 635 (quoting Tomka v. Seiler Corp., 66 F.3d 1295, 1306 (2d Cir. 1995)).

211. Klein & Pappas, *supra* note 209.

212. *Id.*

213. *Torres*, 116 F.3d at 635 n.14 ("[T]he first clause of section 219(2)(d) of the Restatement . . . provides for liability if 'the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority.'" (quoting RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (1958))).

214. Karibian v. Columbia Univ., 14 F.3d 773, 779-80 (2d Cir. 1994); *see also* Gregory, *supra* note 136, at 386 ("Most significantly, the court [in *Karibian*] held that lack of notice to the employer and the existence of complaint procedures do not automatically insulate an employer from liability.").

215. *Torres*, 116 F.3d at 636 n.14 (quoting *Harrison*, 112 F.3d at 1444).

will be difficult to establish."[216] Under this new language, the *Torres* court found that because it was not disputed that the plaintiff knew of the defendant's sexual harassment policy, the employer could not be liable.[217] The effect of *Torres* was to limit *Karibian* to its facts in regards to the apparent authority issue. This means that the presence of a sexual harassment policy combined with efforts to make the employees fully aware of that policy will, in the Second Circuit, generally shield employers from liability for the sexual harassment by its supervisors as long as the employer is not actually or constructively aware of the harassment.[218]

D. *Analysis*

Under the Tenth Circuit's new interpretation of the agency principles regarding employer liability, the court appears to have made employers strictly liable for their supervisors hostile environment sexual harassment of their supervised employees, contrary to the Supreme Court's holding in *Meritor*. The decision also allows employees to bring hostile environment sexual harassment claims against co-employees under the court's interpretation of the third basis of liability, instead of the standard "knew or should have known" direct negligence approach.

Unlike past hostile environment sexual harassment cases involving co-employees, the negligence standard need not be applied in cases alleging supervisor's hostile environment sexual harassment. The third basis of liability, as interpreted by the court, bypasses all other avenues of liability and hinges only on the plaintiff's reasonable, subjective belief that the employer authorized the supervisor's behavior.[219] An employer's

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216. *Id.* (quoting *Harrison*, 112 F.3d at 1444).

217. *Id.* at 635 (explaining that liability under the indirect apparent authority argument "cannot attach . . . in the instant case . . . as it is undisputed that Torres knew of NYU's harassment policy and its availability").

218. *See* Klein & Pappas, *supra* note 209 ("*Torres*' contrary application of § 219(2)(d) limits *Karibian* to its facts and supercedes this aspect of *Karibian*."). A particular irony for the Tenth Circuit occurred with the *Torres* holding. Essentially, the Second Circuit in *Torres* borrowed specific language on apparent authority from the holding in *Harrison* to limit its broad language in *Karibian*, which was in conflict with a majority of the federal circuit courts. *Id.* ("*Karibian* . . . place[d] the Second Circuit in conflict with a majority of the other federal circuits by suggesting that a claim for hostile work environment sexual harassment could be established even in circumstances where the employer had a written policy against sexual harassment and took prompt action to end it following proper notice of the victim's claim."). *Harrison*, however, borrowed that same language from *Karibian*, limited by *Torres*, to announce a much broader reading, not of the first clause of section 219(2)(d), as *Karibian* did, but for the second clause. *Harrison*, 112 F.3d at 1446 ("In our view, the better interpretation is that adopted by the Second Circuit in *Karibian* [which] . . . allows an employer to be held liable, even if a sexual harassment policy is in place and is made known to plaintiff, where the supervisor uses his actual or apparent authority to aid or facilitate his perpetration of the harassment.").

219. *Harrison*, 112 F.3d at 1450. The court stated that apparent authority only requires that the victim, or third party, perceive that the supervisor is empowered by "written or spoken words or any other conduct of the principal which, reasonably interpreted, causes the [victim] to believe that the principal consents to have the act done on his behalf by the person purporting to act for him." *Id.* (quoting RESTATEMENT (SECOND) OF AGENCY § 27 (1958)). This "consent" reasonably perceived

strongest defense argument appears to be that the plaintiff's belief in the apparent authority of the supervisor is unreasonable due to the existence of a written sexual harassment grievance policy, combined with efforts to notify prospective plaintiffs that the supervisor has no authority to sexually harass them.[220]

However, even this defense is circumvented by the new interpretation of the second clause of section 219(2)(d), which finds the employer liable only if the supervisor is empowered to control the work environment and then abuses that authority in harassing employees.[221] Such employer consent to the supervisor's control is virtually inherent in all supervisory authority.[222] Any hostile environment sexual harassment by the supervisor that occurs while on the job is an abuse of the supervisor's authority over his or her employees. As long as these basic employment circumstances are proven, the employer is strictly liable.

Yet, even in *Karibian*, with its similar holding to *Harrison*, the Second Circuit held an employer automatically liable only if its supervisor relied on his authority in committing hostile environment sexual harassment.[223] Under *Karibian*, if no such reliance is found, liability is not automatically imputed to the employer and the negligence standard is applied.[224] The *Harrison* court suggested no such distinction.[225] Therefore,

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by the victim can merely include the fact that the supervisor is continuously employed by the principal. *See* Oppenheimer, *supra* note 9, at 81 ("The principal may manifest his consent to a community of persons in a variety of ways, including continuously employing the agent.").

220. *Harrison*, 112 F.3d at 1450 (stating that the first clause of section 219(2)(d) will be difficult to prove if there is an existing grievance policy plus efforts "to remove any possible inference that a supervisor has authority to sexually harass his subordinates" (quoting Staszewski, *supra* note 176, at 1087)).

221. *Id.*

222. *See* Oppenheimer, *supra* note 9, at 80 ("Employers . . . often act only through the actions of their supervisors. Supervisors act as the eyes, ears, and, most importantly, voice of the employer in all interactions with employees. Supervisors . . . oversee operations . . . and generally influence—and at times determine—the working environment of non-supervisory employees.").

223. Karibian v. Columbia Univ., 14 F.3d 773, 780 (2d Cir. 1994).

224. *Id.*

225. *Harrison*, 112 F.3d at 1450 ("[T]he fact that the supervisor has actual or apparent authority to control the victim's working environment, and is aided in harassing the victim by that authority, is sufficient to establish employer liability under the second clause of § 219(2)(d)."). The *Harrison* court's requirement that the supervisor's authority "aid" the supervisor's conduct is a lower standard than the *Karibian* court's requirement of a supervisor's "reliance" on his own supervisory authority to enable his harassment. Reliance on existing authority implies active invocation or assertion of that authority to act unlawfully, whereas existing authority as aiding or facilitating unlawful activity implies a passive, opportunistic activity. For example, a supervisor who calls a victim to his office for the purpose of harassing him or her relies on the employee's obeying his delegated authority and dutifully reporting to the office at the time the supervisor chooses; however, a supervisor who receives random, unscheduled visits from his employees in his office for purposes of daily updates may choose to take advantage of such a chance visit to commit unlawful harassment once the opportunity has presented itself. In the first instance, the supervisor has actively initiated the harassing encounter by exercising the authority on which he relies to compel the employee into his office. In the second instance, the supervisor merely takes advantage of a chance situation, whereby the em-

if a supervisor is found by a jury to have committed hostile environment sexual harassment of employees under his or her control under Title VII, the employer is strictly liable.[226]

The Tenth Circuit attempted to avoid criticism of applying strict liability in an area forbidden by the Supreme Court by stating that the employer will not be held liable if the authority delegated to the supervisor only provides the supervisor with proximity to the plaintiff. However, such a scenario could not occur unless the supervisor had no supervisory authority over the plaintiff. In this situation, the supervisor's legal status for purposes of employer liability is converted to that of a co-employee.

For example, if the supervisor did have authority over the plaintiff then the supervisor would not only have the right to be in proximity to the plaintiff but would also have supervisory control over the plaintiff. If, however, a harassing supervisor's delegated authority only gives him the right to be in proximity to the plaintiff and the plaintiff does not reasonably believe that the supervisor has authority over him or her, then the supervisor is merely a co-employee in relation to the plaintiff. Therefore, the issue is no longer whether a supervisor harassed his employee, but whether a co-employee harassed another co-employee. In this situation the "knew or should have known" negligence standard would apply.[227]

Another effect of the court's decision regarding the third basis of liability is that an employee may reasonably perceive a co-employee to hold supervisory authority over him or her and argue hostile environment sexual harassment under the third or fourth bases of liability instead of under the negligence standard similar to past cases. Because the court rejects the *Sauers* requirement of proving the employer vested the employee with supervisory power over the plaintiff prior to establishing employer liability, no such determination ever has to be made under the

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ployee has entered his office under no compulsion but to inform the supervisor of job-related developments in deference to the supervisor's authority. This small distinction will lead to different results depending upon whether the case arises in the Second or Tenth Circuits: under *Karibian*, only the first scenario will impute liability to the employer whereas under *Harrison* both scenarios will result in employer liability. *Id.* at 1445, 1448.

226. *See* Gregory, *supra* note 136, at 391-92. In discussing the second clause of section 219(2)(d) as interpreted by the Second Circuit in *Karibian*, which contains the same language adopted by the Tenth Circuit in *Harrison*, Gregory argues:

> [U]nder the [*Karibian*] court's broad holding, a high-level supervisor charged with creating a hostile work environment invariably will be viewed by the employee as able to harass primarily because of his position in the company. The employee naturally will be fearful that the supervisor will use the authority delegated by the employer to retaliate. Thus a plaintiff will always be able to show that—at least from her perspective—the supervisor was "aided in accomplishing" the harassment because . . . he was a supervisor. Whether that supervisor in fact used his supervisory authority to create the abusive environment becomes irrelevant. An employer is thus held strictly liable for misconduct by supervisors, even though the supervisor did not utilize the power granted by the employer to further his illicit actions.

Id.

227. For a discussion of the different standards of employer liability between harassment by supervisors and harassment by co-employees, see *supra* Part II.A.

third basis for liability.[228] All that is required is that the plaintiff reasonably believed that the harassing employee held sufficient authority from the employer to control "significant aspects" of the work environment,[229] based on written or verbal communications, "or any other conduct" of the employer.[230]

For example, co-employees may appear to have authority to control "significant aspects" of the victim's work environment if the harassing employee holds seniority over the victim; they may have been authorized or told to train the victim by the company's management; or the employee may simply believe that management's favorable treatment of senior employees coupled with their assertion of authority over the victim demonstrates their control over the victim's work environment. If the company does not have a written sexual harassment grievance policy in place and has not taken steps to assure the employee that the harasser has no authority to sexually harass him or her, the harassed employee may feel he or she has no other options but to endure the abusive environment or quit his or her job.[231]

Policies behind hostile environment sexual harassment law are not well served under the court's ruling in *Harrison*. Employers may establish sexual harassment grievance policies and employee training programs at great expense, but even the most efficient of such programs will have no effect upon the employer's liability where a plaintiff brings a hostile environment sexual harassment action against an employer under the fourth basis of liability. Recall that *Harrison* only requires that the employer give an employee control over a particular work environment, and, if in the course of supervising that environment, the supervisor is found to have committed hostile environment sexual harassment then the employer is automatically liable. As a result of this decision, employers can only extensively train their supervisors regarding sexual harassment and then hope that they never commit an indiscretion or act in any way that may be interpreted as creating a hostile environment under Title VII.

Once an incident of sexual harassment by a supervisor occurs, the employer's defenses—(1) that it was unaware of the activity, (2) that it took appropriate remedial action to end the harassment, or (3) that the employee was aware of sexual harassment grievance policies and failed to use them—are all irrelevant. The employer is left with the alternatives of settlement or expending all of its energies in court trying to prove the sexually hostile environment did not exist. In other words, regardless of

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228. For a discussion of the *Harrison* court's limitation of the *Sauers* opinion, see *supra* Part II.B.2.b.

229. *Harrison*, 112 F.3d at 1444.

230. *Id.* at 1450.

231. *Id.* at 1444 ("'When an employer lacks a formal written grievance policy, a victim of sexual harassment will reasonably perceive her only available options to be silently acquiescing in the harassment or leaving her job.'" (quoting Staszewski, *supra* note 176, at 1090)).

what positive, proactive, effective steps the employer has taken to eradicate sexual harassment and provide victims with internal recourse, its prior efforts are in vain once such harassment occurs.

CONCLUSION

Seymore and *Harrison* represent a significant shift in the Tenth Circuit's attitude toward the elements of hostile environment sexual harassment and the employer's liability for such acts by both employees and supervisors. In *Seymore*, the court established clear-cut elements for a prima facie case of hostile environment sexual harassment but failed to address the nature of the conduct contributing to a hostile environment.

More significantly, *Harrison*'s holding poses a new and substantial risk to employers. *Harrison*'s holding gives plaintiffs an entirely new basis to establish liability and allows the plaintiff's subjective perceptions of the authority of the harasser to impute liability to the employer. Thus, in the Tenth Circuit the deep pockets of the employer have become substantially more accessible to plaintiffs with viable hostile environment claims against their supervisors.[232] Moreover, under *Harrison*, liability insurance providers may choose to raise their premiums as well as their requirements for coverage due to employers' increased liability under *Harrison*.

The cost of this decision in terms of financial expenditure and irrelevant good intentions falls on the backs of the employers. This was the

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232. The Tenth Circuit's holding in *Harrison v. Eddy Potash, Inc.*, regarding employer liability for sexual harassment by supervisors, proved to be short-lived. Following this survey period and the completion of this article, the Supreme Court issued two decisions on June 26, 1998, *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257 (1998) and *Faragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998), which announced a new standard of employer liability for sexual harassment by supervisors.

In these cases, the Court held that employers are vicariously liable for the sexual harassment committed by their supervisors and will be automatically liable "when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment." *Faragher*, 118 S. Ct. at 2292–93.

However, where the supervisor's harassment does not result in a tangible employment action, yet still creates an allegedly hostile environment, the employer may raise an affirmative defense as to liability or damages. *Id.* at 2293. The affirmative defense must be proven by a preponderance of the evidence and requires the satisfaction of two elements: "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise." *Id.*

On the same day that the Court decided *Bulington Industries* and *Faragher*, it vacated and remanded *Harrision v. Eddy Potash, Inc.* for reconsideration in light of the new liability standard. Eddy Poatash, Inc. v. Harrison, 118 S. Ct. 2364 (1998) (mem.). At publication, the Tenth Circuit has yet to render a decision in the case.

very same fate the Supreme Court in *Meritor* directed the federal circuit courts to avoid.[233]

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233. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 72 (1986). The Court held that because Congress's definition of "employer" in Title VII included the employer's agents, Congress intended to limit employer liability for certain sexually harassing acts by supervisors. *Id.* Therefore, the Court held that employers are not always "automatically" liable under such circumstances but neither can employers always insulate themselves from liability by arguing they had no notice of the harassment. *Id.*