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Employer Liability and Sexual Harassment under Section 1983: A Comment on Starrett v. Wadley

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EMPLOYER LIABILITY AND SEXUAL HARASSMENT UNDER SECTION 1983: A COMMENT ON *STARRETT V. WADLEY*

I. INTRODUCTION

Sexual harassment[1] of women in the workplace has been and continues to be a widespread problem. It has been estimated that 49% to 90% of working women in various occupations have suffered from sexual harassment.[2] The harassment is not limited to lewd sexual comments and jokes on the job, but includes unsolicited touching and requests for sexual favors as well.[3] In response to this widespread problem, courts have begun to recognize sexual harassment as a cause of action under both section 1983[4] and Title VII of the Civil Rights Act of 1964.[5] A crucial issue in sexual harassment claims under either section 1983 or Title VII is employer liability for the misconduct of employees. In particular, when sexual harassment suits are brought pursuant to section 1983, one question is whether municipalities can be held liable for their public officials' misconduct.

The issue of municipal liability under section 1983 was addressed in *Starrett v. Wadley*.[6] In *Starrett*, the Tenth Circuit Court of Appeals denied a sexual harassment victim recovery against the municipal employer

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1. The Equal Employment Opportunity Commission defines sexual harassment as follows:

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

29 C.F.R. §§ 1604-1611 (a) (1985).

Moreover, two types of sexual harassment have been recognized by the courts: quid pro quo and hostile environment. Quid pro quo sexual harassment occurs when terms of employment are conditioned on the female employee's submission to sexual demands. Hostile work environment sexual harassment, on the other hand, occurs when the employee's work environment has become hostile or offensive, or the misconduct has unreasonably interfered with the employee's work performance. C. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 32-47 (1979).

2. *See* C. MACKINNON, *supra* note 1, at 26-32.

3. *See* Ebert v. Lamar Truck Plaza, 878 F.2d 338 (10th Cir. 1989); Starrett v. Wadley, 876 F.2d 808 (10th Cir. 1989); Eastwood v. Department of Corrections, 846 F.2d 627 (10th Cir. 1988).

4. 42 U.S.C. § 1983 (1982). An action brought under section 1983 is available only to the public sector employee. *See* Starrett v. Wadley, 876 F.2d 808 (10th Cir. 1989); Bohen v. City of East Chicago, 799 F.2d 1180 (7th Cir. 1986).

5. 42 U.S.C. § 2000 (e) (1982). *See* Meritor Savings Bank v. Venison, 477 U.S. 57 (1986)(holding that an abusive work environment is a form of sexual harassment prohibited by Title VII of the Civil Rights Act of 1964) (*Meritor* was also the first sexual harassment case considered by the Supreme Court.); Miller v. Bank of America, 600 F.2d 211 (9th Cir. 1979)(recognizing sexual harassment as a cause of action under Title VII).

6. 876 F.2d 808 (10th Cir. 1989).

under section 1983. This occurred despite the municipality's knowledge of the official's misconduct. [7]

This comment examines the significance of the *Starrett* decision. It further discusses the history of section 1983, and it looks at when a municipality, as employer, can be liable for the actions of its officials. Moreover, this article argues that a more liberal construction of section 1983 should be taken in sexual harassment cases in order to hold municipalities, with notice, liable for the unlawful acts of their officials.

II. BACKGROUND

A. *Section 1983 and Municipal Liability*

The Supreme Court first interpreted section 1983[8] in *Monell v. Department of Social Services*.[9] Unfortunately, however, *Monell* has resulted in much confusion regarding the limits of municipal liability.[10] In particular, confusion surrounds a municipality's liability for the tortious acts of its employees.[11]

In *Monell*, a group of female employees brought a class action under section 1983 against the Department of Social Services, its Commissioner, the Board and its Chancellor, and the City of New York and its Mayor. The pregnant employees argued that their federal rights were violated when they were forced to take unpaid leaves of absence before medical reasons demanded the leaves.[12]

The Court held that local governments, municipal corporations, and school boards are "persons" under section 1983 and, therefore, are not immune from suit.[13] The Court further held that local governments, such as municipalities and counties, can be sued directly for monetary, declaratory, or injunctive relief.[14]

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7. *Id.* at 812-19.

8. Section 1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1982).

9. 436 U.S. 658 (1978).

10. *See* Brown, *Municipal Liability Under Section 1983 and the Ambiguities of Burger Court Federalism: A Comment on City of Oklahoma City v. Tuttle and Pembaur v. City of Cincinnati-The "Official Policy" Cases*, 27 B.C.L. REV. 883, 883 (1986) (citing Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482, 482-83 (1982)). *See also* Kramer & Sykes, *Municipal Liability Under § 1983: A Legal and Economic Analysis*, 6 SUP. CT. REV. 249, 250 (1987).

11. *See generally* City of Springfield v. Kibbe, 480 U.S. 257 (1987); Pembaur v. City of Cincinnati, 475 U.S. 469 (1986); City of Oklahoma City v. Tuttle, 471 U.S. 808 (1985). In each of these cases, the Court was unable to reach a majority opinion.

12. *Monell*, 436 U.S. at 660-61.

13. *Id.* at 690 (*Monell* overruled Monroe v. Pape, 365 U.S. 167 (1961), which held that municipal corporations are not "persons" within the meaning of the statute.).

14. *Id.* (stating that the legislative history of the Civil Rights Act of 1871 intended section 1983 to apply to municipalities and other local government units).

The *Monell* Court also ruled, however, that a municipality cannot be held liable for simply employing a tortfeasor.[15] Consequently, a municipality cannot be held liable under section 1983 on a *respondeat superior* theory.[16] Justice Brennan, writing for the majority, instead "articulated a new standard" of municipal liability under section 1983. Justice Brennan stated:

> [A] local government may not be sued for an injury inflicted solely by its employees or agents; it is when execution of a government's policy or custom—whether made by its lawmakers or by those whose edicts or acts may firmly be said to represent official policy—inflicts the injury that the government as an entity is responsible under section 1983.[17]

The Court's "policy and custom" rule has, in effect, limited the circumstances in which a municipal employer can be held liable for its employees' tortious acts.[18] A municipality is liable for its employee's actions when a plaintiff "connect[s] the constitutional or federal statutory violation to an 'official policy' or 'governmental custom' of the municipality."[19] Consequently, municipal liability occurs only when a tort has resulted from action pursuant to municipal policy or custom.[20]

The *Monell* Court's official policy and custom decision has not only created confusion for lower courts, but it has also created a heavy burden for the plaintiff.[21] The confusion surrounding municipal liability has resulted from the Court's failure to define what constitutes official policy or custom.[22] In *Monell*, the Court announced broad, vague stan-

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15. *Monell*, 436 U.S. at 691.

16. The majority in *Monell* believed that the statute's legislative history compelled the conclusion that "Congress did not intend *respondeat superior* to form a basis for section 1983 municipal liability." This decision was based on Congress' rejection of the Sherman amendment, which was a proposed addition to the Civil Rights Act of 1871.

> First, the Court suggested that similar policies—deterrence and insurance—lie behind both respondeat superior and the Sherman amendment, so that allowing respondeat superior liability would give rise to the same constitutional objections that were raised by the opponents of the amendment. Second, the Court reasoned that Congress' rejection of the only form of vicarious liability presented to it demonstrated congressional opposition to respondeat superior.

Rothfeld, *Section 1983 Municipal Liability and the Doctrine of Respondeat Superior*, 46 U. CHI. L. REV. 935, 943-44 (1979) (quoting *Monell*, 436 U.S. 658, 692 n.57 (1978)). *See also* Gerhardt, *The Monell Legacy: Balancing Federalism Concerns and Municipal Accountability Under Section 1983*, 62 S. CAL. L. REV. 539, 555-56 (1989); Blum, *From Monroe to Monell: Defining the Scope of Municipal Liability in Federal Courts*, 51 TEMP. L.Q. 409, 412 n.14 (1978) (stating that the Court also relied on the language of section 1983 as a basis for rejecting *respondeat superior* . . . the "subject, or cause to be subjected" language precluded all forms of vicarious liability).

17. *Monell*, 436 U.S. at 694. The Court's rejection of *respondeat superior*, and its adoption of a new standard for municipal liability has resulted in much criticism. In particular, commentators have argued that the legislative history of section 1983 supports the conclusion that Congress did intend municipalities and other local government units to be liable on a *respondeat superior* theory. *See generally* Brown, *supra* note 10; Kramer & Sykes, *supra* note 10; Rothfeld, *supra* note 16.

18. Kramer & Sykes, *supra* note 10, at 250.

19. Brooks, *Pembaur v. City of Cincinnati: Refining the "Official Policy" Standard for Section 1983 Municipal Liability*, 29 ARIZ. L. REV. 323, 328 (1987).

20. Kramer & Sykes, *supra* note 10, at 255.

21. Brooks, *supra* note 19, at 328.

22. Kramer & Sykes, *supra* note 10, at 250; Brown, *supra* note 10, at 884.

dards which have resulted in conflicting applications by many lower courts.[23] The Court explained that a formal ordinance, regulation, decision, or policy statement adopted or put in force by officials would constitute official policy.[24] Moreover, informal practices which are permanent and well settled, or persistent and widespread may constitute custom.[25]

Commentators have argued that these vague standards announced by the Court "[tell] us only that municipal liability must rest on more than *respondeat superior*, and all of the competing definitions of policy satisfy this requirement. . . . Indeed, every definition of policy that in any way limits the ordinary scope of *respondeat superior* will satisfy *Monell* by not imposing liability . . ." simply because the municipality employs the tortfeasor.[26]

As a result of the Court's imprecise standards concerning municipal liability, interpretation of the *Monell* Court's policy and custom rule was left to future development.[27] The lower courts, therefore, are left with the task of determining what actions constitute official policy or custom under section 1983. Consequently, lower courts that take a conservative view of municipal liability may define policy or custom quite narrowly, thereby making it difficult for plaintiffs to recover against municipalities.

Moreover, the *Monell* decision has placed a double burden on plaintiffs.[28] First, the plaintiffs must show that their constitutional or federal rights were violated by an official action. Then, the plaintiffs must prove that the act complained of was a result of municipality policy or custom. The Court's purpose in imposing this heavy burden on the plaintiffs is to prevent municipal liability for an official's private acts.[29]

III. *STARRETT V. WADLEY*

A. *Facts*

In *Starrett v. Wadley*,[30] the Tenth Circuit addressed the issue of municipal liability under section 1983. In *Starrett*, a female employee brought a sexual harassment and retaliatory discharge suit under section 1983 against her supervisor, Wadley, and his employer, Creek County.[31]

23. Kramer & Sykes, *supra* note 10, at 254-55 (stating "[b]y limiting municipal liability to acts pursuant to 'policy' without saying anything more than policy is something different from *respondeat superior*, the Supreme Court established a vague category susceptible to many plausible definitions").

24. *Monell*, 436 U.S. at 690.

25. *Id.* at 691.

26. Kramer & Sykes, *supra* note 10, at 254.

27. *Id.* at 250.

28. Brooks, *supra* note 19, at 328.

29. *Id.*

30. 876 F.2d 808 (10th Cir. 1989).

31. *Id.* at 808. Starrett also sought damages under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (a) (1982), and she claimed that her first and fourteenth amendment rights were violated. *Id.* Moreover, she claimed that Wadley and the county violated the following provision of Title VII:

> It shall be an unlawful employment practice for an employer — (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against

Plaintiff Starrett worked as a deputy assessor for Wadley, who was elected to his post as County Assessor.[32] Starrett claimed that during her one-and-a-half year tenure at the County Assessor's office, Wadley continually made sexual advances toward her and toward other female employees.[33] Starrett alleged that Wadley pinched her on the buttocks with his full hand, made obscene gestures towards her, and requested that she meet him at his house and other locations.[34] On one occasion, Starrett claimed that Wadley asked her to go with him to a motel.[35] After Starrett declined his offers, Wadley retaliated. He suggested to Starrett that her job might be terminated for "budgetary" reasons.[36]

Starrett subsequently complained to Wadley, Wadley's attorney and to the Chairman of the Board of County Commissioners ("Board").[37] Despite her complaints, the Board did not take prompt remedial action.[38] The Board did not conduct an investigation, nor did it take any corrective action against Wadley.[39] The harassment and threats of termination continued. Thereafter, Starrett contacted her own attorney who wrote a letter to Wadley stating that his acts of sexual harassment violated Title VII.[40] Approximately two months after receiving this letter, Wadley terminated Starrett.[41]

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any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .

42 U.S.C. § 2000 e-2(a) (1982).

32. *Starrett*, 876 F.2d at 812.

33. *Id.* At trial, three different women, who previously worked under Wadley, testified that they had also been sexually harassed by Wadley on the job. The former employees testified that Wadley repeatedly called them at work asking them to meet him outside of the office. Transcript of the Proceedings at 503-66. *Starrett*, 876 F.2d 808 (10th Cir. 1989)(No. 84-695). In particular, Ola Stroud, who worked under Wadley at the assessor's office, recalled a harassing phone call from Wadley. Wadley asked Stroud if she missed being married. Thereafter, Wadley stated, "I can do something about that." Record at 564, *Starrett* (No. 84-695). In fact, on direct examination at trial, Wadley admitted that a claim of sexual harassment had previously been made against him by a former employee. Record at 52, *Starrett* (No. 84-695).

34. *Starrett*, 876 F.2d at 812.

35. *Id.* at 814-15. This proposition occurred when Wadley and Starrett were assessing a property. On the return trip, the two passed a motel, at which time Wadley suggested they stay there for the afternoon. Record at 81, *Starrett* (No. 84-695).

36. 876 F.2d at 812. Starrett testified that Wadley would call her repeatedly saying, "I'm going to let someone go, I've got to let someone go." Record at 98, *Starrett* (No. 84-695).

37. *Starrett*, 876 F.2d at 812.

38. The Board of County Commissioners has the authority to begin ouster proceedings against a county official under certain circumstances. OKLA. STAT. tit. 22, § 1181 (1988).

39. The Board commenced ouster proceedings against Wadley two years after Starrett complained to its Chairman. In fact, the proceedings began only after Wadley received his third D.U.I.. Moreover, the petition for ouster failed to mention any sexual harassment complaints brought against Wadley. Telephone interview with Gregory Bledsoe, plaintiff's attorney (Apr. 3, 1990).

40. *Starrett*, 876 F.2d at 812.

41. On October 3, 1983, Starrett received a phone call from Wadley saying that she was fired. Starrett testified that Wadley "told me to leave," and he also said that "I don't like you going to an attorney." Record at 120, *Starrett* (No. 84-695). Moreover, Starrett had more seniority in the assessor's office than other employees. Accordingly, she should

B. *Holding*

The Tenth Circuit held that there was sufficient evidence for the jury to conclude that Wadley's act of sexually harassing Starrett was a violation of her right to equal protection.[42] The court further affirmed the lower court's holding that the county was liable for Wadley's act of firing Starrett.[43] The Tenth Circuit reversed the lower court's holding, however, that the county was liable for Wadley's sexual harassment of Starrett.[44]

The court used the *Monell* holding as a basis for its decision.[45] Judge Ebel, writing for the panel, reasoned that under *Monell*, a municipality cannot be held liable under section 1983 on a *respondeat superior* theory.[46] Instead, a municipality is only liable for acts of its officials if those acts constitute official policy or custom.[47] Furthermore, under *Monell*, a municipality can only be liable for the acts of an official who has final policymaking authority with respect to the acts in question.[48] Mere exercise of discretion by a county official is not sufficient to create municipal liability.[49]

Because Wadley had the final authority concerning hiring and firing of personnel, his acts in this area constituted the official acts of the county. Wadley's actions of hiring and firing carried official sanction. The court, however, held that Wadley's private acts and personal urges did not carry official sanction or authority. According to the court, these acts did not concern any terms of employment and were, therefore, not the official acts of the county.[50] Nonetheless, the court reasoned that the county could be liable for the acts of Wadley if they were part of a custom or policy within the office.[51]

In addressing the "custom and policy" issue, the court stated that Wadley's acts of sexual harassment were sporadic and few. His actions

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not have been the first employee fired had there truly been layoffs due to budgetary reasons. Record at 118, *Starrett* (No. 84-695).

42. *Starrett*, 876 F.2d at 814.

43. *Id.* at 818 (reasoning "that Wadley's act of firing plaintiff was an act of the County because Wadley had final authority to set employment policy as to the hiring and firing of his staff").

44. Starrett's section 1983 claims were tried to a jury and her Title VII claims were tried to the district court. The jury returned a verdict in Starrett's favor and against defendants Wadley and the county. Thereafter, the county moved for a judgment notwithstanding the verdict ("JNOV") on the issue of municipal liability for the abusive work environment created by Wadley. The district court denied the motion for JNOV. *Id.* at 819. Moreover, the district court dismissed Starrett's Title VII claim based on the "personal staff" exemption found in Title VII definition of "employee." Title VII states: "[t]he term 'employee'. . . 'shall not include' any person elected to public office . . . or any person chosen by such officer to be on such officer's personal staff . . . ." *Id.* at 821 n.17.

45. *Id.* at 818-20.

46. *Id.* at 818.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 820 (stating the sexual harassment did not concern "job title or description, salary levels, or other conditions that Wadley could establish . . .").

51. *Id.*

were directed towards only a few members of his staff.[52] Furthermore, the court said that there was no evidence that any other officials in the County Assessor's office sexually harassed the female employees. As a result, the evidence did not support a view that there was widespread practice of sexual harassment. Consequently, the court held that the sexual harassment did not rise to the level of policy or custom.[53]

Moreover, the court noted that Starrett did not attempt to bring her grievance to the attention of the Board by placing it on the agenda, as she could have done.[54] The court suggested that this failure had the effect of shielding the county from liability for Wadley's acts of sexual harassment.

IV. ANALYSIS

A. *Official Action Constituting Custom or Policy*

Contrary to the Tenth Circuit's holding, Wadley's acts of sexual harassment did rise to the level of official policy or official custom.[55] Wadley's actions, therefore, violated Starrett's constitutional rights thereby creating municipal liability. In order to establish that the misconduct rose to a level of policy or custom three requirements must be satisfied. The plaintiff must: (1) prove that the policymaker chose to pursue a particular course of action or custom by proof of notorious practice; (2) attribute the misconduct to the municipality; and (3) prove that there is a causal connection between the policy or custom and the constitutional deprivation.[56] In *Starrett*, these three requirements were satisfied.

First, Wadley, as policymaker, deliberately chose to follow a course of action in the County Assessor's office. Wadley chose to create an environment of sexual and retaliatory harassment. Four women who worked under Wadley testified that they had all been sexually harassed by Wadley.[57] All four claimed, for example, that Wadley repeatedly called them at work and asked them to meet him in secluded places. Moreover, there was evidence that two other female employees were sexually harassed by Wadley subsequent to Starrett's termination.[58] Consequently, not only was sexual harassment a deliberate course of

52. *Id.* Moreover, the court noted that Wadley's harassment of the female employees usually only occurred while he was intoxicated. *Id.* at 812.

53. *Id.* at 820.

54. *Id.* at 812 n.1.

55. Commentators have criticized the courts for not distinguishing between policy and custom. *See* Gerhardt, *supra* note 16, at 584.

56. Gerhardt, *supra* note 16, at 583 (citing Spell v. McDaniel, 824 F.2d 1380, 1386-88 (4th Cir. 1987) and Bennett v. Slidell, 728 F.2d 762, 767 (5th Cir. 1984)).

57. Transcript of the Proceedings at 503-66. *Starrett*, 876 F.2d 808 (10th Cir. 1989) (No. 84-695).

58. The plaintiff attempted to introduce this evidence at trial. The trial court, however, did not admit the evidence because the harassment occurred after Starrett was fired. Record at 553, 572. *Starrett*, 876 F.2d 808 (10th Cir. 1989) (No. 84-695). This evidence is relevant in establishing that sexual harassment rose to a level of custom or policy at the assessor's office.

action in the assessor's office, but it was a notorious and pervasive practice as well.

Second, this misconduct is easily attributed to the county. For example, after Starrett complained to Wadley and his attorney, she then made a complaint to the Chairman of the Board of County Commissioners.[59] The Board did not conduct an investigation, nor did it take prompt corrective action against Wadley.[60] Essentially, the county acquiesced in Wadley's sexual demands on Starrett.[61]

Third, the county's policy of acquiescence caused a deprivation of Starrett's equal protection rights. The county's deliberate indifference towards Wadley's acts of sexual harassment is considered "supervisory encouragement" of the sexual harassment.[62] Since it is unconstitutional for an employer to discriminate against an employee based on sex, the county violated Starrett's constitutional rights.[63] The county's policy of acquiescence, in effect, amounted to encouragement of sexual harassment. The third element is, therefore, satisfied because there is an "affirmative link" between the policy and the constitutional right deprivation.

Sexual harassment rising to the level of official policy or custom was addressed in *Bohen v. City of East Chicago*.[64] In *Bohen*, a female dispatcher for a fire department, brought a sexual harassment action pursuant to section 1983.[65] The plaintiff claimed that her immediate supervisor was

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59. *Starrett*, 876 F.2d at 812.

60. *See supra* note 39 and accompanying text.

61. *See* Tomkins v. Public Service Electric & Gas Co., 568 F.2d 1044 (3d Cir. 1977). *Tomkins* considered whether the failure to take prompt action after receiving notice of misconduct constitutes acquiescence in the misconduct. *Id.* at 1046. In *Tomkins*, a female employee filed an employment discrimination suit under Title VII against her employer and male supervisor, complaining of sexual harassment. *Id.* at 1045. In deciding whether the employer could be held liable for the unconstitutional acts of its supervisor, the court considered whether the employer had actual or constructive knowledge of the sexual harassment. Moreover, the court considered whether the employer promptly remedied the situation after receiving notice. *Id.* at 1048-49. The court held that:

> [a person's equal protection rights are violated] when a supervisor, with the actual or constructive knowledge of the employer, makes sexual advances or demands toward a subordinate employee and conditions that employee's job status . . . on a favorable response to those advances or demands, and the employer does not take prompt and appropriate remedial action after acquiring such knowledge.

Id. See also Husband, *An Overview of the Law of Sexual Harassment*, 1983 COLO. LAW. 1459, 1460.

62. *See* Lipsett v. University of Puerto Rico, 864 F.2d 881 (1st Cir. 1988). A state official is liable for the acts of his or her subordinates if (1) the subordinate's behavior results in a constitutional violation and (2) the official's action or inaction was connected to the behavior in the sense that it could be considered as encouragement, condonation, or acquiescence. Essentially, to establish a link between the state official and the employee's misconduct, the plaintiff must prove that the official acquiesced in the behavior "by remaining impassive before complaints of such discriminatory and harassing conduct or by refusing to acknowledge and investigate a strikingly obvious pattern of sex discrimination and harassment . . . or that such discriminatory treatment was part of a policy sanctioned by them." *Id.* at 902.

63. *See supra* note 5 and accompanying text.

64. 799 F.2d 1180 (7th Cir. 1986).

65. *Id.* at 1187.

the "source of most of the abuse."[66] Bohen claimed, for example, that on her first night of work, she took a nap and awoke to find that her supervisor had his hands pressed against her crotch. She complained to the appropriate personnel but no remedial action was taken.[67] Bohen stated that this was the first of many sexual harassment incidents and the first of many complaints.[68]

The Seventh Circuit held that the city was liable under section 1983 for ongoing sexual harassment when management officials knew of the harassment and no corrective action was taken.[69] The court reasoned that "[e]vidence of a pattern or practice of discrimination . . . is of course strong evidence supporting a plaintiff's claim that she herself has been the victim of discrimination."[70] Moreover, the court stated that sexual harassment is attributable to the employer under section 1983 by showing the employer failed to protect the plaintiff from the abusive environment.[71] Finally, the court stated that "[a]n entity may be liable even for 'informal actions, if they reflect a general policy, custom, or pattern of official conduct which even tacitly encourages conduct depriving citizens of their constitutionally protected rights.' "[72]

B. *Wadley Is the County and His Actions Are the Actions of the County*

Alternatively, Wadley's actions as a top official and policymaker are the actions of the county. Under *Monell*, for example, the Court held that a policymaker's actions are considered the actions of the municipality[73] because the official is the agent of the municipality. Essentially, therefore, a municipality is responsible for the misconduct of its top public officials.

Since Wadley was a public official and top policymaker, the county is responsible for his actions, including his acts of sexual harassment.[74] Wadley qualified as a policymaker because under Oklahoma Statute title 19, section 161,[75] the County Assessor is a county officer. Generally, a

66. *Id.* at 1182. The plaintiff, however, also stated that other male employees at the fire department also sexually harassed her. Bohen stated that her supervisor constantly spoke to her in a lewd way. In particular, he described to her his preferred sexual positions. He also touched her by rubbing his pelvis against her and spreading his legs so that he touched her when she sat. Moreover, when Bohen used the bathroom, the supervisor forced her to leave the door open. *Id.*

67. *Id.* at 1187.

68. *Id.*

69. *Id.* at 1189.

70. *Id.* at 1187.

71. *Id.* (stating that the "officials knew of the sexually oppressive working conditions even before Bohen was hired . . . . The department, however, considered the abusive environment to be the female employees' problem").

72. *Id.* at 1189 (quoting Wolf-Lillie v. Sonquist, 699 F.2d 864, 870 (7th Cir. 1983)).

73. *Monell*, 436 U.S. at 694.

74. *See* Brandon v. Holt, 469 U.S. 464, 471-72 (1985)("[A] judgment against a public servant 'in his official capacity' imposes liability on the entity that he represents. . . ."); McGhee v. Draper, 639 F.2d 639, 642 (10th Cir. 1981)("[O]fficial-capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent.").

75. OKLA. STAT. tit. 19, § 161 (1981) (1) states that " 'County Officer' means the

public officer is considered one whose official "position requires the exercise of some portion of the sovereign power . . . ."[76] Moreover, essential characteristics of public office are: (1) a portion of the sovereign power is delegated to the position; (2) the duties and powers are defined; (3) the duties are performed independently without control of superior power other than law; and (4) the position has some permanency and continuity.[77] In effect, a public official with sovereign authority is a top policymaker.

Based on these definitions, Wadley, acting in his official capacity, was a top policymaker. First, Wadley was empowered with independent authority to perform certain governmental functions. The County Assessor, for example, has the sovereign authority to ascertain the amount of value of property.[78] Moreover, Wadley had the sovereign authority to determine and set the quality of atmosphere and environment in the assessor's office. Second, Wadley's duties and powers were statutorily defined. For example, Wadley was empowered with the authority to affirm that the value of property coincided with statements made by the property owners.[79] Third, Wadley had the power to perform his duties independently. Under Oklahoma law, an Elected County Assessor is the supreme official in his office. Essentially, only the Board of County Commissioners had power over Wadley. This power, however, was very limited. The Board could only commence ouster proceedings against Wadley in certain circumstances.[80] Fourth, Wadley's position had permanency and continuity. As an elected official, Wadley held his office for four years.[81] Consequently, Wadley's position satisfied the requirements of a public officer and top policymaker. Therefore, Wadley's acts "may fairly be said to represent official [county] policy. . . ."[82]

In *Brandon v. Holt*,[83] the Supreme Court addressed the issue of a public official's actions imposing "liability on the entity that he represented . . . ."[84] In *Brandon*, the plaintiff brought suit pursuant to section 1983 against a Memphis police officer, the Director of the Memphis Po-

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county clerk, county commissioner, county assessor, county superintendent of schools . . . ."

76. Durflinger v. Artiles, 727 F.2d 888, 909 (10th Cir. 1984)(quoting Town of Arlington v. Boards of Conciliation and Arbitration, 370 Mass. 769, 352 N.E.2d 914 (1976)).

77. *Durflinger*, 727 F.2d at 890 (quoting State v. Taylor, 260 Iowa 634, 639, 144 N.W.2d 289, 292 (1966)). *See also* BLACK'S LAW DICTIONARY 1107 (5th ed. 1979) ("Essential characteristics of public office are (1) authority conferred by law, (2) fixed tenure of office, and (3) power to exercise some portion of sovereign functions of government; key element of such test is that the officer is carrying out sovereign function.").

78. OKLA. STAT. tit. 68, § 2435 (1988).

79. *Id.*

80. The Board could only initiate ouster proceedings if it found, for example, that Wadley: (1) habitually or wilfully neglected his duties; (2) exercised gross partiality; (3) used oppression; (4) used corruption; (5) practiced extortion; and (6) practiced willful maladministration. OKLA. STAT. tit. 22, § 1181 (1988).

81. OKLA. STAT. tit. 19, § 131 (B) (1988).

82. *Monell*, 436 U.S. at 694.

83. 469 U.S. 464 (1985).

84. *Id.* at 471.

lice Department, and the city.[85] The plaintiff claimed that the director acted improperly in his official capacity. According to the plaintiff, the director "should have known [that an officer in the department had] dangerous propensities [which] created a threat to the rights and safety of citizens."[86] The district court attributed this lack of knowledge to policies in effect at the department.[87]

In *Brandon*, the Court "equated" the director's actions, in his official capacity, with the actions of the city.[88] The Court quoted *Monell* in saying "[o]fficial capacity suits generally represent an action against an entity of which an officer is an agent . . . ."[89] Consequently, the Court reversed and remanded stating that the city was not entitled to a "shield of qualified immunity from liability under section 1983."[90]

Moreover, in *Pembaur v. City of Cincinnati*,[91] the Supreme Court addressed the issue of whether a single action taken by a policymaker can result in municipal liability. In *Pembaur*, the Supreme Court stated that a single incident of unconstitutional activity may constitute official policy if the activity is consistent with formal rules or established practices of the municipality, or if the activity is directed by officials responsible for formulating government policy.[92]

The Court in *Pembaur* specified three circumstances in which a single action or decision creates municipal liability under section 1983.[93] First, a decision made by a properly constituted governing body such as a city council or legislature would qualify.[94] Second, the Court stated that a single decision made by a municipal official when that decision is

85. *Id.* at 464-65. Originally, the city was not named as a defendant in the action because the complaint was filed before *Monell* was decided. Consequently, at the time of filing, municipalities were not considered "persons" under section 1983. Thus, cities were immune from suit for the tortious acts of their officials. The Supreme Court granted *certiorari*, however, after *Monell* was decided. Consequently, the Court allowed the plaintiff to amend the pleadings. The plaintiff amended the pleading and claimed a right to recover against the city. *Id.* at 469.

86. *Id.* at 467.

87. *Id.* at 467 n.6 (stating that "when complaints were filed by citizens, little disciplinary action was apparently taken. . . . Instead, a standard form letter . . . was mailed to each complainant, assuring the person that appropriate action had been taken . . .").

88. *Id.* at 472.

89. *Id.* at 469-70 (quoting *Monell*, 436 U.S. 658, 690 n.55 (1978)).

90. *Id.* at 473. *See also* McKay v. Hammock, 730 F.2d 1367 (10th Cir. 1984). In *McKay*, the plaintiff brought suit under section 1983 against Routt County, the Colorado Sheriff's Office, the sheriff and a deputy sheriff, the Ruidoso, New Mexico Police Department, and a police officer. *Id.* at 1369. The plaintiff alleged his due process rights were violated when he was wrongfully arrested. *Id.* The Tenth Circuit stated that the Sheriff, as an official officer, was responsible for the policies and procedures of Routt County. *Id.* at 1375. Consequently, the county is liable under *Monell* for implementing "an unconstitutional act if [the Sheriff] knowingly was involved in an intentional constitutional deprivation." *Id. See also* Familias Unidas v. Briscoe, 619 F.2d 391 (5th Cir. 1980)(holding the county liable for a county judge's misconduct).

91. 475 U.S. 469 (1986). The plurality in *Pembaur* agreed that one decision made by a policymaker could constitute policy. *Id.* at 484. There were, however, five different opinions as to what legal standard should be applied in determining which official's actions may be considered policy. Gerhardt, *supra* note 16, at 568.

92. *Pembaur*, 475 U.S. at 484.

93. Brooks, *supra* note 19, at 330.

94. *Pembaur*, 475 U.S. at 480.

made according to formal rules or understandings constitutes official policy.[95] Third, the *Pembaur* plurality held that municipal liability can occur when a single decision is made by the government's authorized decisionmakers or by those who generally establish policy.[96] Justice Brennan, writing for the plurality stated:

> [i]f the decision to adopt that particular course of action is properly made by that government's authorized decisionmakers, it surely represents an act of official government "policy" . . . . [W]here action is directed by those who establish governmental policy, the municipality is equally responsible whether that action is to be taken only once or to be taken repeatedly.[97]

The Court consequently expanded municipal liability under section 1983.[98] One unconstitutional act by an official with decisionmaking authority constitutes official policy.

Using the *Pembaur* plurality's rationale, therefore, Wadley's actions were actions of the county, thereby creating municipal liability for Wadley's misconduct. As County Assessor, Wadley was an authorized decisionmaker who established policy for the office. Essentially, a single unconstitutional act taken by Wadley, in his official capacity, represented official government policy. Thus, Wadley's sexual harassment of Starrett amounted to government policy, and therefore, the county is responsible for this misconduct.

C. *Failure to Use Proper Grievance Procedure Does Not Insulate the Employer from Liability*

In *Starrett*, the court noted that even though the plaintiff personally complained to the Chairman of the Board of County Commissioners about the sexual harassment, she did not bring her complaint to the Board's attention by placing it on the agenda, as she could have done.[99] In essence, the court implied that Starrett's failure to use the proper grievance procedure insulated the county from liability.

In *Meritor Savings Bank v. Vinson*,[100] the Supreme Court addressed the issue of whether a plaintiff's failure to utilize a complaint procedure precludes or shields an employer from liability.[101] In *Meritor*, a female bank employee brought a sexual harassment suit against her supervisor and his employer, the bank.[102] The plaintiff claimed that her supervisor asked her to have sexual relations with him since she "owed him" for his

95. *Id.* at 480-81.
96. *Id.* at 480. *See generally*, Griffin, *Civil Rights-Municipal Liability Extended to Include Single Acts of Official Decisionmakers*, 21 SUFFOLK U.L. REV. 237 (1987); Krulewitch, *Civil Rights-Under the Civil Rights Act, Municipal Liability May Be Imposed Under Appropriate Circumstances*, 36 DRAKE L. REV. 465 (1987).
97. *Pembaur*, 475 U.S. at 481.
98. *Id.*
99. *Starrett*, 876 F.2d at 812 n.1 (1989).
100. 477 U.S. 57 (1986).
101. *Id.* at 71.
102. *Id.* at 59.

help in getting the job. She initially declined but eventually yielded to his demands out of fear that continual refusal would result in termination.[103] Thereafter, he made continual sexual demands on her both during and after business hours.[104] The plaintiff claimed that she never reported this harassment to any supervisor and never attempted to use the complaint procedure because she was afraid of her supervisor.[105]

In *Meritor*, the Supreme Court rejected automatic immunity for the employer because the plaintiff failed to use an existing grievance procedure.[106] The Court stated that "the absence of notice . . . does not necessarily insulate [an] employer."[107]

In making its decision, the Court relied extensively on the Solicitor General's Brief for the Equal Employment Opportunity Commission ("EEOC").[108] The Court drew upon the EEOC's belief that:

> [i]f the employer has an expressed policy against sexual harassment and has implemented a procedure specifically designed to resolve sexual harassment claims, and if the victim does not take advantage of that procedure, the employer should be shielded from liability absent actual knowledge of the sexually hostile environment . . . . In all other cases, the employer will be liable if he has actual knowledge of the harassment or if, considering all the facts of the case, the victim in question had no reasonably available avenue for making his or her complaint known to appropriate management officials.[109]

Consequently, using the rationale in *Meritor*, Starrett's claim against the county does not fail because she did not place her grievance on the Board's agenda. Rather, Starrett's complaint to the Chairman of the Board of County Commissioners was enough, standing alone, to notify the appropriate officials.

Moreover, neither the county nor the County Assessor's office had an expressed policy against sexual harassment.[110] In addition, a procedure specifically designed to resolve sexual harassment claims had not been implemented by the county. As a result, the county should not have been shielded from liability for Wadley's acts of sexual harassment.

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103. Vinson v. Taylor, 753 F.2d 141, 143 (D.C. Cir. 1985), *reh'g denied*, 760 F.2d 1330 (D.C. Cir. 1985) (en banc), *aff'd*, 477 U.S. 59 (1986).

104. *Meritor*, 477 U.S. at 60 (stating that the supervisor fondled the plaintiff in front of other employees, followed her into the women's rest room, exposed himself to her, and forcibly raped her on several occasions).

105. *Id.* at 61.

106. *Id.* at 72-73. *See also* Equal Employment Opportunty Commission v. Hacienda Hotel, 881 F.2d 1504 (9th Cir. 1989) (holding that the existence of a grievance procedure and policy against sex discrimination, coupled with employees' failure to invoke procedure, did not insulate employer from liability for sexually harassing conduct).

107. *Meritor*, 477 U.S. at 68.

108. Note, *Employer Liability Under Title VII for Sexual Harassment After Meritor Savings Bank v. Vinson*, 87 COLUM. L. REV. 1258, 1266-71 (1987) (noting that the EEOC entered as *amicus curiae*).

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

110. Telephone interview with Gregory Bledsoe, plaintiff's attorney (Apr. 3 1990).

D. *Policy Dictates Employer Sanctioning Employer or Conferring Liability*

Sexual harassment on the job pervades all areas of business. The victims not only suffer humiliation and embarrassment, but they suffer fear as well. Many victims realize that the loss of their job is a very real consequence they might face for making a complaint about the harassment. Consequently, many female employees simply remain silent. One way to remedy this problem, however, is to sanction and hold employers liable for not establishing policies aimed at preventing sexual harassment in the work place.

In *Starrett*, for example, had the county adopted a firm policy against sexual harassment and had the County Commissioner's office accepted this policy, Starrett would not have had to endure one-and-a-half years of suffering. Instead, however, it appears as though the Board and the county did not consider sexual harassment a problem in today's society. The county's brief on appeal demonstrates its permissive attitude toward sexual harassment. The county wrote:

> It is somewhat astonishing that in the most materialistic, if not hedonistic, culture ever created by man's ingenuity that rules of sexual conduct as stringent as any imagined by the Puritan fathers have suddenly been erected in the workplace. A pair of novelty glasses which picture a nude female when properly filled with water become relevant in determining whether a judgment should be rendered for sexual harassment. This in a culture whose highest court struggled with the difficulty of even defining obscenity and where billion dollar businesses (entertainment, advertising, publishing) are soundly founded upon female nudity and salaciousness. But if an improper remark is passed in the office or if the boss gets drunk and makes a pass at a secretary, whether serious or not, it's a jury question and a feast of lawyer's fees. No wonder our courts complain of being overworked.
>
> How much is it worth to a plaintiff if her boss flips her the finger? How much if she "thinks" he made an obscene gesture? How much for saying lets spend the afternoon at the Blue Top Motel in circumstances in which it would be almost impossible to take him seriously? How much per pinch on the rear? How much for spending an afternoon at the Cue Spot in Mannford drinking a few beers when he probably should have been working? Is this the sort of raw meat that should be thrown to a jury with no more education and instruction than to do right? And what more is an instruction that "sexual harassment is unwelcome sexual advances, requests for sexual favors and other verbal and physical conduct of a sexual nature."
>
> What the jury is really invited to do under such circumstances is to conduct a popularity poll. Do they approve or disapprove of the particular public official on trial. And of course, counsel are aware of this. It becomes a question of can we throw this thing on the wall and will it stick? Can we get enough of the opinions and rumors of his enemies, political op-

> ponents and dissatisfied employees through the hedge of the rules of evidence to make him look bad. If we can, we may walk away with a verdict.[111]

In *Arnold v. City of Seminole*,[112] the Oklahoma district court discussed a group of city officials' complete lack of understanding and awareness of sexual harassment. The district court stated that:

> [Many of the city officials] did not appear to recognize or admit that harassment was more than good fun or regular and expected behavior . . . . The [city officials] were clearly unwilling to confront the problem and the problem maker in particular . . . . It would have been relatively simple to put an end to the harassment of the plaintiff had anyone in authority chosen to do so.[113]

As a result, the court ordered the city to "raise affirmatively the subject of sexual harassment with all employees and to inform all employees that sexual harassment . . ."[114] violates a person's constitutional rights. Moreover, the court required the city to develop a plan whereby employees who are subject to sexual harassment may complain immediately and confidentially. The court stated that "[a]n important part of a preventative plan is an effective procedure for investigating, hearing, adjudicating and remedying complaints of sexual harassment and discrimination."[115]

V. CONCLUSION

Exploiting and taking advantage of female employees has extreme negative consequences. The female employees experience both physical and psychological effects. The victims suffer from stress, feelings of powerlessness, fear, anger, and diminished ambition. One way to combat this sex discrimination is to take a more liberal stance towards employer liability, especially towards employers who have notice of their employee's misconduct. This would, in effect, force employers to take precautions against sexual harassment in the workplace. In particular, a policy against sexual harassment will suggest to employees that such conduct in the workplace will not be tolerated.

Kristin D. Sanko

111. *Starrett*, 876 F.2d at 815 n.9.
112. 614 F. Supp. 853 (E.D. Okla. 1985).
113. *Id.* at 872.
114. *Id.*
115. *Id.*