VICARIOUS EMPLOYER LIABILITY FOR SUPERVISORY SEXUAL HARASSMENT: "SEE NO EVIL, HEAR NO EVIL" IS NO EXCUSE

Claims of sexual harassment[1] in the workplace are generally brought under Title VII of the Civil Rights Act of 1964, which, in part, prohibits employment discrimination on the basis of sex.[2] As the number of sexual harassment complaints skyrockets,[3] court-

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[1] Catharine MacKinnon defines "sexual harassment" as "the unwanted imposition of sexual requirements in the context of a relationship of unequal power." CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 1 (1979). The Equal Employment Opportunity Commission has provided the following definition:

> 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.

Equal Employment Opportunity Commission (EEOC) Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a) (1998).

[2] *See* 42 U.S.C. § 2000e-2 (1982). Section 2000e-2, which defines unlawful employment practices, prohibits discrimination "against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . ." 42 U.S.C. § 2000e-2(a)(1). For a fascinating account of how "on the basis of sex" found its way into Title VII, see generally Jo Freeman, *How "Sex" Got Into Title VII: Persistent Opportunism as a Maker of Public Policy*, 9 LAW & INEQ. J. 163 (1991).

Courts have considered sexual harassment to be actionable under Title VII as discrimination on the basis of sex. *See, e.g.*, Burns v. McGregor Elec. Indus., Inc., 955 F.2d 559, 564 (8th Cir. 1992) (noting that there is an inference of harassment based on sex if the sexual behavior is directed at a woman); Katz v. Dole, 709 F.2d 251, 254 (4th Cir. 1983) (stating that sexual harassment constitutes a violation of Title VII if condoned or carried out by a supervisor). *See also* 29 C.F.R. § 1604.11 (1998) (dictating that sexual harassment in the workplace is a violation of Title VII). *But see* Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 840 (1991) (noting that courts do not always equate sexual behavior with discrimination on the basis of sex).

[3] The Equal Employment Opportunity Commission received 6,883 sexual harassment complaints in fiscal year 1991. *See* Mark Hansen, *Love's Labor Laws*, 84 A.B.A. J. 78, 79 (June 1998). A total of 15,589 such complaints were filed in fiscal year 1997 (42-43 per day). *See id.* Damage awards in 1997 alone totaled 49.5 million dollars. *See id.* Especially interesting in light of these astounding figures, sexual harassment in the workplace was deemed to have reached "epidemic" proportions as far

rooms, boardrooms, and lunchrooms across the country are buzzing with discussion and debate over topics ranging from human sexuality and gender disparities[4] to First Amendment rights.[5] In recent years, the judiciary has attempted to grasp firmly what it once considered beyond its reach.[6] Of particular concern has been employers' liability for sexual harassment perpetrated by supervisory employees.[7]

Sexual harassment claims fall into two categories: quid pro quo and hostile environment.[8] If a victim of sexual harassment can demonstrate that a job detriment or benefit occurred as a result of his or her reaction to an unwelcome sexual advance, that harassment is labeled quid pro quo.[9] Hostile environment harassment, on the other

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back as 1975, when the term "sexual harassment" was relatively unheard of. *See* Enid Nemy, *Women Begin to Speak Out Against Sexual Harassment at Work*, N.Y. TIMES, Aug. 19, 1975, at 38 (quoting Lin Farley, director of the women's section of Cornell University's Human Affairs Program).

[4] *See* PETER RUTTER, UNDERSTANDING & PREVENTING SEXUAL HARASSMENT 31-54 (1996) (highlighting gender stereotypes and differences, both actual and perceived).

[5] *See* U.S. CONST. amend. I. The First Amendment of the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech . . . ." *Id.* Some commentators fear that sexual harassment law has a chilling effect on free speech in the workplace:

> To protect themselves from ruinous damages . . . companies will face increasing pressure to ensure that their policies are effective in preventing anything that might possibly provoke a complaint. This means adopting something close to a zero-tolerance policy for sexual expression. And, in a society whose citizens spend most of their time at work, free expression more generally will suffer.

Anti-Expressionism, THE NEW REPUBLIC, July 20 & 27, 1998, at 7.

[6] *See* Estrich, *supra* note 2, at 821 n.24 (citing Miller v. Bank of America, 418 F. Supp. 233, 236 (N.D. Cal. 1976), *rev'd*, 600 F.2d 211 (9th Cir. 1979) (intimating that courts should refrain from hearing such cases, since sexual attraction is a natural phenomenon); Tomkins v. Public Serv. Elec. & Gas Co., 422 F. Supp. 553, 557 (D.N.J. 1976), *rev'd*, 568 F.2d 1044 (3d Cir. 1977) (postulating that consideration of such actions would require "4,000 federal trial judges instead of some 400")).

[7] *See generally* Frederick J. Lewis & Thomas L. Henderson, *Employer Liability for "Hostile Work Environment" Sexual Harassment Created by Supervisors: The Search for an Appropriate Standard*, 25 U. MEM. L. REV. 667 (1995) (providing a circuit-by-circuit analysis of the various justifications for employer liability).

[8] *See* Estrich, *supra* note 2, at 834-47 (detailing the differences between a quid pro quo and hostile environment cause of action).

[9] *See* Henson v. City of Dundee, 682 F.2d 897, 900, 908-09 (11th Cir. 1982) (finding quid pro quo harassment where a police dispatcher was prevented from attending police academy for refusing to have sexual relations with a supervisor). Courts have explained, "'The gravamen of a quid pro quo claim is that a tangible job benefit or privilege is conditioned on an employee's submission to sexual blackmail and that adverse consequences follow from the employee's refusal.'" Karibian v. Columbia Univ., 14 F.3d 773, 778 (2d Cir. 1994) (quoting Carrero v. New York City Hous. Auth., 890 F.2d 569, 579 (2d Cir. 1989)); *see also* Michelle Adams, *Knowing Your Place: Theorizing Sexual Harassment at Home*, 40 ARIZ. L. REV. 17, 40 (1998)

hand, is less direct.[10] For a claim of hostile environment harassment to be actionable, the victim must demonstrate that the behavior was unwelcome and sufficiently severe or pervasive to alter the victim's employment conditions and create a working environment tainted with abuse.[11] Regardless of the characterization of a particular claim, the United States Supreme Court has suggested that agency principles should provide guidance to courts grappling with employer liability.[12]

Common law principles of agency incorporate the long-standing doctrine of respondeat superior, which declares that an employer is liable for the torts of his servants that are committed while acting within the scope of employment.[13] In cases involving quid pro quo

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(defining quid pro quo sexual harassment); Estrich, *supra* note 2, at 831 ("The prototype fact pattern is simple: If you sleep with me, you'll be promoted; if you don't, you'll be fired.").

[10] *See* Meritor Sav. Bank, F.S.B. v. Vinson, 477 U.S. 57, 67 (1986).

[11] *See id.* (citing *Henson*, 682 F.2d at 904).

[12] *See id.* at 72.

[13] *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 69, at 499-500 (5th ed. 1984). Proponents of respondeat superior justify the doctrine as follows: Since the employer places the employee in the position to commit a wrong, it is the employer, rather than the victim, who should bear the costs of that risk. *See* Rochelle Rubin Weber, Note, *"Scope of Employment" Redefined: Holding Employers Vicariously Liable for Sexual Assaults Committed By Their Employees*, 76 MINN. L. REV. 1513, 1518-19 (1992).

An "agent" is someone "employed by a master to perform service in his affairs whose physical conduct in the performance of service is controlled or subject to the right of control by the master." RESTATEMENT (SECOND) OF AGENCY § 2(2) (1958). Section 219 provides in full:

> (1) A master is subject to liability for the torts of his servants committed while acting in the scope of their employment.
> (2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:
> (a) the master intended the conduct or the consequences, or
> (b) the master was negligent or reckless, or
> (c) the conduct violated a non-delegable duty of the master, or
> (d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

Id. § 219.

Section 228 defines "scope of employment" as the following:

> (1) Conduct of a servant is within the scope of employment if, but only if:
> (a) it is of the kind he is employed to perform;
> (b) it occurs substantially within the authorized time and space limits;
> (c) it is actuated, at least in part, by a purpose to serve the master, and
> (d) if force is intentionally used by the servant against another,

harassment, the Court's suggestion has proven effective and results have been consistent.[14] When a hostile environment is alleged, however, what was meant to clarify the issue has in practice served to confound. In situations in which terms and conditions of employment have been affected by allegedly severe or pervasive sexual harassment, courts have been unable to agree upon the proper application of agency principles for imputing liability.[15]

In the recent case of *Faragher v. City of Boca Raton*,[16] the United States Supreme Court confronted the conflicting application of agency principles to cases of supervisory hostile environment harassment.[17] The Court concluded that an employer is vicariously liable for hostile environment harassment perpetrated by a supervisor upon an employee.[18] The Court clarified, however, that an employer may have an affirmative defense to damages and liability if there is proof

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the use of force is not unexpectable by the master.

(2) Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master.

Id. § 228.

[14] Courts have had little difficulty in reaching the conclusion that a strict liability approach is appropriate in cases of quid pro quo harassment. *See* Harrison v. Eddy Potash, Inc., 112 F.3d 1437, 1443 (10th Cir. 1997) ("In cases involving quid pro quo harassment, courts routinely hold, with little or no discussion, that the employer is 'strictly liable' for the supervisor's wrongful conduct."); *see, e.g.*, Pierce v. Commonwealth Life Ins. Co., 40 F.3d 796, 803 (6th Cir. 1994); Virgo v. Riviera Beach Assocs. Ltd., 30 F.3d 1350, 1363 n.9 (11th Cir. 1994). Since the supervisor in such cases acts with actual or apparent authority to bestow job benefits or detriments upon the victim, it can be said, without pause, that the supervisor acts within the scope of his or her employment, thereby implicating liability based upon the Restatement of Agency. *See* RESTATEMENT (SECOND) OF AGENCY §§ 219(1), 219(2)(d) (1958).

Strict liability is ordinarily "[a] concept applied by the courts in product liability cases in which seller is liable for any and all defective or hazardous products which unduly threaten a consumer's personal safety." BLACK'S LAW DICTIONARY 1422 (6th ed. 1990).

[15] *Compare* Karibian v. Columbia Univ., 14 F.3d 773, 780 (2d Cir. 1994) (imposing liability upon an employer despite existence of an anti-harassment policy, because the supervisor's hostile environment harassment was aided by the agency relation) *with* Gary v. Long, 59 F.3d 1391, 1398 (D.C. Cir. 1995) (imputing no liability upon an employer; finding that the existence of an anti-harassment policy demonstrated that, despite the representations of the supervisor, the victim "knew or should have known" that harassment was not tolerated and that no adverse consequences would have resulted from a report of the harassment). The Tenth Circuit adopted the *Karibian* approach, holding an employer vicariously liable where a supervisor uses actual or apparent authority to facilitate the harassment, despite the existence of a sexual harassment policy. *See Harrison*, 112 F.3d at 1446.

[16] 118 S. Ct. 2275 (1998).

[17] *See id.* at 2280. *Faragher* was released alongside *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257 (1998). *See Faragher*, 118 S. Ct. at 2292. The holdings of these companion cases are identical. *See id.*

[18] *See id.* at 2292-93.

of the employee's unreasonable failure to take advantage of existing, reasonable methods of prevention and correction.[19]

Beth Ann Faragher worked as a lifeguard for the City of Boca Raton, Florida, (City) from 1985 through 1990.[20] Specifically, Faragher was employed in the Parks and Recreation Department's Marine Safety Section.[21] Her immediate supervisors during this period were Bill Terry, who was Chief of the Marine Safety Division; David Silverman, who was the Marine Safety Lieutenant from 1985 through 1989 and later Captain; and Robert Gordon, who held the position of Training Captain.[22] Terry's duties included the hiring, supervision, counseling, and disciplining of lifeguards, while Silverman and Gordon were responsible for the delegation of lifeguard assignments and the supervision of lifeguard training.[23]

In 1986, the City drafted a memorandum that was addressed to all city employees but was issued only to some.[24] This memorandum, which was revised and reissued in 1990, detailed the City's newly adopted policy against sexual harassment.[25] The City, however, failed to disseminate its policy properly.[26] Accordingly, the lifeguards, as

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[19] *See id.* at 2293.

[20] *See* Faragher v. City of Boca Raton, 111 F.3d 1530, 1533 (11th Cir. 1997). Faragher, then a college student, was employed by the city of Boca Raton (City) as an ocean lifeguard. *See id.* She worked throughout the summer months and intermittently during the off-seasons. *See id.*

[21] *See id.* The Marine Safety Headquarters was housed in a small, one-story building. *See* Faragher v. City of Boca Raton, 864 F. Supp. 1552, 1556 (S.D. Fla. 1994). Of the 40 or 50 lifeguards employed during this period, only four to six of them were female. *See id.* All of them, both men and women, shared a common shower and locker room. *See id.*

[22] *See Faragher*, 118 S. Ct. at 2280.

[23] *See id.* The Marine Safety Section followed a strict chain of command. *See Faragher*, 111 F.3d at 1533. Lifeguards such as Faragher were supervised by Marine Safety Lieutenants. *See id.* Marine Safety Lieutenants, in turn, answered to captains, who reported directly to the Chief of the Marine Safety Section. *See id.* The Chief of the Marine Safety Section was supervised by a Recreation Superintendent, whose authority was subordinate to the Director of Parks and Recreation and, ultimately, City Hall. *See id.*

[24] *See Faragher*, 118 S. Ct. at 2280-81.

[25] *See id.* at 2280.

[26] *See id.* at 2280-81. The district court remarked, "Notwithstanding the existence of a written policy against sexual harassment, the [c]ourt finds a complete failure on the part of the City to disseminate said policy among Marine Safety Section employees." *Faragher*, 864 F. Supp. at 1560. This failure contravened the guidelines of the EEOC:

> Prevention is the best tool for the elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harass-

well as supervisors Terry, Silverman, and Gordon, were unaware of the policy prior to this litigation.[27]

During her five years of employment with the City, Faragher was repeatedly subjected to unwanted touching on the shoulders, waist, thighs, and buttocks by Marine Safety Chief Terry.[28] On a number of occasions Terry spoke suggestively and coarsely to Faragher and other female lifeguards.[29] His behavior was mirrored by Captain Silverman, whose unwanted touching and crude discourse were well-documented at trial.[30] Faragher made no complaint to upper-management about the offensive behavior of her supervisors.[31] While she and her fellow lifeguards did have some informal discussions with Gordon about the situation, Gordon chose not to make any official reports of his own.[32] In 1990, Faragher left her job to attend law school.[33]

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ment under Title VII, and developing methods to sensitize all concerned.

29 C.F.R. § 1604.11(f) (1998); *see supra* note 1.

[27] *See Faragher*, 118 S. Ct. at 2280-81.

[28] *See id.* at 2281. Details of Terry's behavior toward Faragher and the other female lifeguards were articulated by a number of eye-witnesses at testimony. *See Faragher*, 864 F. Supp. at 1556-57. One female lifeguard, Nancy Ewanchew, testified that Terry had pressed his crotch against Ewanchew's buttocks, simulating sexual movement. *See id.* at 1556. Ewanchew further stated that Terry had touched her breast and buttocks with his hand. *See id.* at 1557. Other female lifeguards also testified that Terry had touched them against their will. *See id.*

[29] *See Faragher*, 118 S. Ct. at 2281. On one occasion, Terry told Ewanchew that Faragher was "male-like" because "she had no breasts." *Faragher*, 864 F. Supp. at 1557. He repeatedly referred to women as "bitches" and "cunts," and during an employment interview he even asked a prospective lifeguard if she would "fuck" or "screw" the male lifeguards once hired, as, according to Terry, the rest of the female lifeguards did. *See id.*

[30] *See Faragher*, 864 F. Supp. at 1557-58. At one point, Silverman tackled Faragher and told her, "If you had tits I would do you in a minute." *Id.* at 1557. At another time, Silverman pantomimed cunnilingus in the presence of Faragher and Ewanchew. *See id.* His behavior toward the other female lifeguards was similar. *See id.* For example, Silverman once told Ewanchew "[t]here are a lot of tits on the beach today." *Id.* He told another lifeguard, Jamie Herrington, that he could see her nipples through her bathing suit, and that he wanted to "eat between her legs." *See id.* at 1558. In addition, Silverman told Gale Nye, "I want to lick your clit." *Id.* This particular comment was directed at Ms. Nye during her first day of employment as a lifeguard. *See id.* He also referred to her as a "cunt." *See id.*

[31] *See Faragher*, 118 S. Ct. at 2281.

[32] *See id.* Gordon felt that a confrontation with Terry would be inappropriate since Terry was his direct supervisor. *See id.* On one occasion, Gordon had told a distressed lifeguard that "the City just [doesn't] care." *Id.* (alteration in original).

[33] *See* Faragher v. City of Boca Raton, 111 F.3d 1530, 1533 (11th Cir. 1997). The district court found that Faragher's resignation was unrelated to Terry's and Silverman's offensive behavior. *See Faragher*, 864 F. Supp. at 1556. Curiously, when Faragher's sister sought employment as a city lifeguard, Faragher made no effort to

The City was unaware of Terry's and Silverman's misbehavior until April 1990, when Nancy Ewanchew, Faragher's co-worker, complained of sexual harassment in a letter to the City's Director of Personnel.[34] Upon investigation, the City found that Terry and Silverman had indeed conducted themselves improperly.[35] They were subsequently disciplined and reprimanded.[36]

In 1992, two years after her resignation, Faragher brought suit against the City, Terry, and Silverman in the United States District Court for the Southern District of Florida.[37] Following a bench trial, the district court held the City directly liable for the sexual harassment perpetrated by Terry and Silverman.[38] Having found that Faragher stated a prima facie case of hostile environment sexual harassment against Terry and Silverman,[39] the district court noted that

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dissuade her. *See id.*

[34] *See Faragher*, 111 F.3d at 1533.

[35] *See id.*

[36] *See id.* The City's disciplinary action against Terry and Silverman consisted of a choice: They could choose between forfeiture of annual leave, or suspension without pay. *See Faragher*, 864 F. Supp. at 1559. Terry ultimately chose a forfeiture of 160 hours annual leave, while Silverman forfeited 40 hours annual leave. *See id.*

[37] *See Faragher*, 111 F.3d at 1533. Faragher asserted claims of sexual harassment against the City in violation of Title VII of the Civil Rights Act of 1964. *See id.* She also asserted claims of sexual harassment against Terry and Silverman in violation of 42 U.S.C. § 1983 (1996). *See id.* at 1533-34. Section 1983 states that any 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. Faragher also brought a successful state claim for battery against Terry and an unsuccessful state claim against the City for negligent retention and supervision of Terry. *See Faragher*, 864 F. Supp. at 1567-68.

[38] *See Faragher*, 864 F. Supp. at 1564.

[39] *See id.* at 1561-64. The district court's finding was predicated upon an analysis of the five elements of hostile environment sexual harassment, which were set forth in *Henson*:

> (1) The employee belongs to a protected group .... (2) The employee was subject to unwelcome sexual harassment .... (3) The harassment complained of was based upon sex .... (4) The harassment complained of affected a "term, condition, or privilege" of employment; and (5) [r]espondeat superior.

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

The court had little difficulty in reaching a determination that the first three elements had been met. *See Faragher*, 864 F. Supp. at 1561. First, noted the court, Faragher, as a female, falls within a protected group. *See id.* Next, the court found the offensive nature of Terry's and Silverman's behavior to be dispositive of its unwelcomeness. *See id.* Finally, since Terry's and Silverman's behavior was directed solely at female lifeguards and secretaries, the court proclaimed that the harassment

the City could be held vicariously liable under a respondeat superior analysis.[40] Nonetheless, the court declared that such a finding would be unnecessary, since the City was directly liable for the harassment under principles of agency.[41] According to the court, Terry and Silverman's supervisory positions, coupled with the strictly delimited hierarchy of the Parks and Recreation Department,[42] suggested that Terry and Silverman acted as agents of the City, hence the City could be held liable for their harassing behavior.[43] Finally, the court maintained that the City's failure properly to disseminate its policy against sexual harassment robbed it of any potential defense.[44]

A panel of the United States Court of Appeals for the Eleventh Circuit found that, while Terry's and Silverman's behavior unquestionably constituted hostile environment sexual harassment, the City could not be held directly or vicariously liable.[45] According to the panel, neither Terry nor Silverman was acting within the scope of his

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was based on sex. *See id.*

The fourth element of the district court's hostile environment analysis was explored in more detail. *See id.* at 1562-64. Despite what the court referred to as Faragher's "attenuated reaction to [the offensive] environment," the court ultimately found that the "terms, conditions, or privileges" of her employment were affected. *Id.* at 1562-64. The court held:

> Terry's and Silverman's conduct unreasonably interfered with Faragher's work performance by promoting an environment where female lifeguards were considered fair game for uninvited touching and offensive remarks.... Looking at the totality of the circumstances, therefore, the [c]ourt finds Terry's and Silverman's conduct sufficiently severe or pervasive to alter the conditions of Faragher's employment and create an abusive working environment....

Id. at 1562-63.

[40] *See Faragher*, 864 F. Supp. at 1563-64; *see also supra* note 13 (explaining the doctrine of respondeat superior). To impute liability to an employer under the doctrine of respondeat superior, "the employee 'must show that the employer knew or should have known of the harassment in question and failed to take prompt remedial action.'" *Faragher*, 864 F. Supp. at 1563 (quoting *Henson*, 682 F.2d at 905). If the harassment in question reaches the level of "pervasiveness," an employer's knowledge or constructive knowledge will be inferred. *See id.* The district court explained that, since Terry's and Silverman's harassment was pervasive, the City had constructive knowledge, and could therefore be held vicariously liable. *See id.* at 1563.

[41] *See Faragher*, 864 F. Supp. at 1563-64; *see also supra* note 13 (setting forth the Restatement's basic principles of vicarious employer liability).

[42] *See supra* note 23.

[43] *See Faragher*, 864 F. Supp. at 1563-64. Furthermore, the court held that Gordon's failure to act implicated the City as well, since he too was an agent. *See id.* at 1564.

[44] *See id.* Faragher was ultimately awarded one dollar in damages. *See* Faragher v. City of Boca Raton, 111 F.3d 1530, 1534 (11th Cir. 1997).

[45] *See* Faragher v. City of Boca Raton, 76 F.3d 1155, 1162-66 (11th Cir. 1996).

employment while harassing Faragher.[46] The panel found that, since Terry and Silverman were not aided by the agency relationship,[47] and since the City had no constructive knowledge of their behavior, the City could not be held liable.[48]

The opinion of the circuit court was subsequently vacated and reheard by the entire United States Court of Appeals for the Eleventh Circuit, sitting en banc.[49] The panel's conclusions were ultimately adopted by the full court in a seven-to-five decision.[50] Having determined that Terry and Silverman acted outside the scope of their employment,[51] without any explicit or implicit approval or authorization from the City,[52] the court concluded that the district court's find-

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[46] *See id.* at 1166. According to the court, the harassment "consisted of offensive comments, gestures, and touching. If . . . Terry and Silverman had constructed something offensive and intimidating to women under the guise of trying to improve lifeguard performance, then their supervisory and disciplinary authority would support a finding that they acted as the City's agents in violating Title VII." *Id.*

[47] *See id.* at 1166 n.14.

[48] *See id.* at 1167 & n.16 (finding that Gordon was not an agent of the City when he was told of the harassment, since the lifeguards confided in him as a colleague, not a superior).

[49] *See Faragher*, 111 F.3d at 1534; *see also* BLACK'S LAW DICTIONARY 526-27 (6th ed. 1990) ("In the United States, the Circuit Courts of Appeal usually sit in panels of judges but for important cases may expand the bench to a larger number, when they are said to be sitting *en banc*.").

[50] *See Faragher*, 111 F.3d at 1539. Heeding *Meritor*'s advice, the court relied on the Restatement of Agency to hold that

> an employer may be indirectly liable for hostile environment sexual harassment by a superior: (1) if the harassment occurs within the scope of the superior's employment; (2) if the employer assigns performance of a non-delegable duty to a supervisor and an employee is injured because of the supervisor's failure to carry out that duty; or (3) if there is an agency relationship which aids the supervisor's ability or opportunity to harass his subordinate.

Id. at 1535 (citing RESTATEMENT (SECOND) OF AGENCY § 219 (1958)).

[51] *See Faragher*, 111 F.3d at 1536 (citing Bennett v. United States, 102 F.3d 486, 489 (11th Cir. 1996) (finding that agent is not acting within scope of employment if action is taken to seek a personal, rather than an employment-related, end); Spencer v. Assurance Co. of Am., 39 F.3d 1146, 1149 (11th Cir. 1994) (finding that an agent is not acting within scope of employment when pursuing an independent frolic)).

[52] *See id.* at 1537. The court recognized that supervisory hostile environment sexual harassment may always be aided by the agency relationship because the supervisor's responsibilities place him or her in close proximity to the victim. *See id.* (citing Gary v. Long, 59 F.3d 1391, 1397 (D.C. Cir.), *cert. denied*, 516 U.S. 1011 (1995)). The court chose not to adopt so broad a view, however, and found that Terry and Silverman were not aided by an agency relationship since they never threatened Faragher with job-related action in retaliation for her response to their harassing behavior. *See id.*

ing of vicarious liability against the City was wholly inappropriate.[53] Furthermore, the court proclaimed that the City could not be held directly liable since it lacked constructive knowledge of the harassment.[54]

Recognizing the need to set manageable standards for determining employer liability for supervisory hostile environment sexual harassment, the United States Supreme Court granted certiorari.[55] Justice Souter, writing for the majority, opined that a harassing supervisor is necessarily aided by an agency relationship, despite the fact that the victim in such circumstances is almost never expressly reminded of the supervisor's authority.[56] The Court noted that an employer is in the best position to train and screen supervisors.[57] Therefore, the Court reasoned that an innocent employer, rather than an innocent employee, should bear the risk.[58] As long as the victim has not suffered any tangible job detriment, the Court declared, the employer may have an affirmative defense to liability.[59] This defense, the Court explained, would require proof by a preponderance of the evidence that the employee unreasonably failed to take advantage of the employer's existing reasonable methods of prevention or correction.[60]

The origins of hostile environment sexual harassment jurisprudence can be traced to 1971, when the United States Court of Appeals for the Fifth Circuit decided *Rogers v. Equal Employment Opportunity Commission*.[61] That case, although analyzing Title VII in the context of racial discrimination, laid the groundwork for the Supreme Court's development of hostile environment sexual harassment theory.[62] The court held that an employee may have a cause of

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[53] *See id.*

[54] *See id.* at 1538-39. The majority disagreed with the district court's conclusion that the pervasiveness of the harassment was indicative of the City's constructive notice. *See id.* at 1538 ("The question of notice to the employer is distinct from the question of the environment's abusiveness."). The court felt that the facts of this case could not support an inference of the City's constructive notice. *See id.* at 1539.

[55] *See* Faragher v. City of Boca Raton, 118 S. Ct. 438 (1997).

[56] *See* Faragher v. City of Boca Raton, 118 S. Ct. 2275, 2291 (1998).

[57] *See id.*

[58] *See id.*

[59] *See id.* at 2292.

[60] *See id.*

[61] 454 F.2d 234 (5th Cir. 1971).

[62] *See* BARBARA LINDEMANN & DAVID D. KADUE, SEXUAL HARASSMENT IN EMPLOYMENT LAW 45 (1992). In *Rogers*, the plaintiff, who worked in an optometrist's office, complained of racial discrimination in violation of Title VII of the Civil Rights Act of 1964. *See Rogers*, 454 F.2d at 236. She claimed that her employer allowed her only to treat patients of Spanish descent. *See id.*

action under Title VII where the employer created an offensive work environment even in the absence of a tangible job detriment.[63] The court underscored the significance of an employee's relationship with his or her working environment[64] and acknowledged that a working environment charged with discrimination can be damaging to an employee's psychological well-being.[65] This recognition, coupled with a broad interpretation of Title VII, led the Fifth Circuit to sanction claims of environmental harassment in the workplace.[66]

Although *Rogers* would ultimately have a significant impact on the development of sexual harassment law, sexual harassment as a form of sex discrimination under Title VII was not recognized by the judiciary until 1976, five years later, in *Williams v. Saxbe*.[67] In *Williams*, Judge Charles R. Richey held that a male supervisor's retaliatory actions against a female employee who rejected the supervisor's sexual advances constituted a violation of Title VII of the Civil Rights Act of 1964.[68] Noting that Congress intended Title VII to be construed

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[63] *See Rogers*, 454 F.2d at 238 ("[T]he phrase 'terms, conditions, or privileges of employment' . . . is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination.").

[64] *See id.* at 237-38.

[65] *See id.* at 238. ("One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers, and I think [s]ection 703 of Title VII was aimed at the eradication of such noxious practices.").

[66] *See id.* at 238-39. For an additional example of the application of *Rogers*' principle of harassment, see *Firefighters Institute for Racial Equality v. City of St. Louis*, 549 F.2d 506, 515 (8th Cir. 1977), which determined that the failure to promote a black individual to fire captain was not the result of racial discrimination. *See also* Cariddi v. Kansas City Chiefs Football Club, Inc., 568 F.2d 87, 88 (8th Cir. 1977) (illustrating hostile environment analysis as applied to national origin); Compston v. Borden, Inc., 424 F. Supp. 157, 161 (S.D. Ohio 1976) (illustrating hostile environment analysis in context of harassment based on religion).

[67] 413 F. Supp. 654 (D.D.C. 1976). *Williams* involved the accusations of Diane R. Williams, employee of the Community Relations Service of the Department of Justice, against her immediate supervisor, Harvey Brinson. *See id.* at 655. Brinson maintained that Williams had been terminated because of her poor work performance, while Williams argued that she had been fired for refusing Brinson's sexual advances. *See id.* at 655-56.

[68] *See id.* at 657. Prior to *Williams*, courts had been extremely hesitant to equate quid pro quo sexual harassment with discrimination on the basis of sex, and stated a number of reasons for their hesitancy: (1) sexual harassment is of an inherently personal nature; (2) it is based upon attractiveness of the victim, rather than her gender; and (3) it falls outside the realm of employment-related conduct. *See, e.g.*, Miller v. Bank of Am., 418 F. Supp. 233, 234, 236 (N.D. Cal. 1976), *rev'd*, 600 F.2d 211 (9th Cir. 1979) (holding that an employer is not liable for simple flirtations; Title VII is not meant to cover such "isolated and unauthorized sex misconduct."); Corne v. Bausch & Lomb, Inc., 390 F. Supp. 161, 163 (D. Ariz. 1975), *vacated on pro-*

broadly,[69] the court found that the supervisor's conduct created an obstacle to employment for women and not for men.[70] The court concluded that any such obstacle, applied solely on the basis of gender, was actionable under Title VII.[71] *Williams* marked a significant departure from the judiciary's general hesitancy to equate sexual harassment with gender discrimination.[72]

One decade after *Williams*, the United States Supreme Court significantly broadened the scope of actionable sexual harassment in the workplace by extending the Fifth Circuit's analysis in *Rogers* to discrimination on the basis of sex.[73] In *Meritor Savings Bank, F.S.B. v. Vinson*,[74] Justice Rehnquist, writing for the Court, recognized that unwelcome sexual behavior[75] that is so severe or pervasive as to alter the terms and conditions of employment violates the dictates of Title VII.[76] The Court found that Title VII was not drafted by Congress

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cedural grounds, 562 F.2d 55 (9th Cir. 1977) (finding that sexual harassment is a conflict between individual personalities, not gender discrimination); Barnes v. Train, No. 1828-73, 1974 WL 10628, at *1 (D.D.C. Aug. 9, 1974) (determining that harassment was based upon employee's refusal to sleep with her supervisor, not the employee's gender), *rev'd sub nom.*, Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977). Furthermore, courts harbored a fear that such a finding would subject the judiciary to an overwhelming amount of litigation. *See Miller*, 418 F. Supp. at 236 (warning that if such harassment is to be characterized as gender discrimination, "flirtations of the smallest order would give rise to liability"); *see generally* BARBARA LINDEMANN & DAVID D. KADUE, SEXUAL HARASSMENT IN EMPLOYMENT LAW 10-13 (1992).

[69] *See Williams*, 413 F. Supp. at 658 (citing Willingham v. Macon Tel. Publ'g Co., 482 F.2d 535, 537 n.2 (5th Cir. 1973)).

[70] *See id.* at 657-58.

[71] *See id.* at 658 ("That a rule, regulation, practice, or policy is applied on the basis of gender is alone sufficient for a finding of sex discrimination.").

[72] *See supra* note 68. The fact pattern in *Williams* epitomizes what the courts would come to recognize as "quid pro quo" harassment — termination, demotion, or promotion in response to an employee's acceptance or rejection of an employer's sexual advances. *See supra* note 9 and accompanying text.

[73] *See* Meritor Sav. Bank, F.S.B. v. Vinson, 477 U.S. 57, 65, 66 (1986). "[*Rogers*] was apparently the first case to recognize a cause of action based upon a discriminatory work environment . . . . Nothing in Title VII suggests that a hostile environment based on discriminatory sexual harassment should not be likewise prohibited." *Id.*

[74] 477 U.S. 57 (1986).

[75] "The gravamen of any sexual harassment claim is that the alleged sexual advances were '[u]nwelcome.'" *Id.* at 68 (quoting 29 C.F.R. § 1604.11(a) (1985)).

[76] *See id.* at 65-67. *Meritor* considered the allegations of Mechelle Vinson, an employee of Meritor Savings Bank, who testified to having sexual intercourse with her manager, Sidney Taylor, forty to fifty times over a period of several years. *See id.* at 60. Vinson claimed that she complied with her manager's sexual requests for fear of losing her job. *See id.* According to Vinson, Taylor had raped her on several occasions. *See id.* Vinson testified that she did not report the harassment to Taylor's supervisor because she feared Taylor's possible reactions. *See id.* at 61. Taylor denied all of the allegations, claiming that he neither requested nor received sexual favors from Vinson and never even made a single suggestive remark. *See id.* The district

solely with economic and tangible discrimination in mind, but rather with the intent to obviate all permutations of discrimination, economic or otherwise.[77] Justice Rehnquist remarked that the Equal Employment Opportunity Guidelines (Guidelines) do not consider unwelcome conduct of a sexual nature to constitute prohibited sexual harassment only in quid pro quo circumstances; such behavior, according to the Guidelines, also amounts to sexual harassment in situations in which the conduct unreasonably interferes with work performance or creates an offensive or hostile work environment.[78] Hence, the Court added "hostile environment" sexual harassment to the catalogue of prohibited discriminatory employment practices under Title VII.[79] While declining to issue a determinative rule for imputing employer liability in such situations, the Court suggested that agency principles should be consulted for guidance.[80]

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court denied relief, finding that, even if Vinson and Taylor had sexual intercourse, the activity was purely voluntary and precipitated no tangible job benefit or detriment. *See* Vinson v. Taylor, No. CIV.A.78-1793, 1980 WL 100, at *8 (D.D.C. Feb. 26, 1980). The Court of Appeals for the District of Columbia reversed, finding that hostile environment harassment, even in the absence of an employment benefit or detriment, could give rise to liability under Title VII. *See* Vinson v. Taylor, 753 F.2d 141, 145-46 (D.C. Cir. 1985). Guided by principles of agency, the District of Columbia Circuit found that an employer is absolutely liable for supervisory harassment whether or not the employer knew or should have known of the offensive behavior. *See id.* at 151.

[77] *See Meritor*, 477 U.S. at 64. The Court explained, "The phrase 'terms, conditions, or privileges of employment' evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment." *Id.* (quoting City of Los Angeles v. Manhart, 435 U.S. 702, 707 n.13 (1978)).

[78] *See id.* at 65. According to the Guidelines,

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when . . . (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. § 1604.11(a) (1980).

[79] *See Meritor*, 477 U.S. at 73.

[80] *See id.* at 72. The Court rejected the court of appeals' proposal that employers are automatically liable for hostile environment sexual harassment perpetrated by supervisory employees. *See id.* Since Congress defined "'employer' to include any 'agent' of the employer," the Court concluded that Congress contemplated limits upon those acts, committed by employees, for which employers are to be held liable under Title VII. *See id.* (quoting 42 U.S.C. § 2000e(b) (1994)). The Court refused "to entirely disregard agency principles and impose absolute liability on employers for the acts of their supervisors, regardless of the circumstances of a particular case." *Id.* at 73. The Court's opinion suggests that, had the issue of liability been directly before it, it may have adopted a requirement of constructive or actual knowledge on the part of the employer for liability to attach. *See* Lucy B. Longstreth, Note, *Hostile Environment Sexual Harassment: A Wrong Without a Remedy?* — Meritor Savings Bank v. Vinson, 106 S. Ct. 2399, 21 SUFFOLK U. L. REV. 811, 823 (1986).

While *Meritor* recognized hostile environment sexual harassment as actionable under Title VII, the circuit courts were in conflict over the proper requirements for finding that a work environment had reached the actionable stage.[81] In *Harris v. Forklift Systems, Inc.*,[82] the United States Supreme Court examined whether or not an employer's conduct, to be actionable, must harm an employee's psychological well-being or cause the employee to suffer injury.[83] The unanimous Court, in an opinion penned by Justice O'Connor, held that, while conduct that would cause a reasonable person psychological injury is certainly prohibited under Title VII, a plaintiff need not demonstrate such an injury to bring a successful cause of action.[84] Psychological injury, according to the Court, is but one of several factors that a jury may consider when evaluating a claim of hostile environment sexual harassment.[85] The Court announced that, as long as the victim subjectively perceives the work environment to be hostile or abusive and, provided that an objective, reasonable person would find the conduct to be severe or pervasive, a claim of hostile environment sexual harassment may be successful on the merits.[86]

In *Oncale v. Sundowner Offshore Services, Inc.*,[87] the United States Supreme Court expanded the potential pool of sexual harassment plaintiffs, holding that Title VII applies to same-sex sexual harassment.[88] The Court refused to adhere to the notion that members of a

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[81] The circuit courts of appeal applied *Meritor's* "severe or pervasive" test inconsistently. *Compare* Rabidue v. Osceola Ref. Co., 805 F.2d 611, 620 (6th Cir. 1986) (requiring a serious effect on employee's psychological well-being) *with* Ellison v. Brady, 924 F.2d 872, 878-79 (9th Cir. 1991) (rejecting damaged psychological well-being requirement, adopting a "reasonable woman" standard for finding harassment actionable).

[82] 510 U.S. 17 (1993). The petitioner, Theresa Harris, alleged that her employer's use of gender-based insults constituted an abusive work environment. *See id.* at 19. Harris testified that her employer, who was the company president, made comments such as "You're a woman, what do you know . . . . We need a man as the rental manager." *Id.* According to Harris, her employer referred to her as a "dumb ass woman" and made several inappropriate sexual innuendoes. *See id.*

[83] *See id.* at 20.

[84] *See id.* at 22 ("Title VII comes into play before the harassing conduct leads to a nervous breakdown.").

[85] *See id.* at 23. Factors to weigh include the severity of the behavior, its frequency, whether it is humiliating or threatening in nature, whether it creates an unreasonable interference with work performance, or whether the behavior consists of a "mere offensive utterance." *See id.*

[86] *See id.* at 21.

[87] 118 S. Ct. 998 (1998).

[88] *See id.* at 1001-02. Joseph Oncale was employed by Sundowner Offshore Services, Inc. on an oil platform. *See id.* at 1000. Oncale claimed to have been sexually harassed by members of his eight-man crew. *See id.* at 1001. Specifically, Oncale al-

particular group will not discriminate against members of their own group.[89] Justice Scalia, writing for the Court, stressed that the decision does not interpret Title VII as a general civility code and reiterated that harassment because of sex is still the determinative factor for a successful claim.[90] The Court repeated the objective reasonable person standards that were articulated in *Harris*[91] and appealed to the common sense and sensitivities of the fact finders who must ultimately distinguish between innocent teasing and hostile environment sexual harassment.[92]

In the few cases in which the Supreme Court has had the opportunity to define actionable sexual harassment,[93] the Court has only hinted at a governing standard for imputing employer liability for

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leged that one of his co-workers, Danny Pippen, restrained him while John Lyons, Oncale's supervisor, placed his penis on Oncale's neck, and, on another occasion, placed his penis on Oncale's arm. *See* Oncale v. Sundowner Offshore Servs., Inc., 83 F.3d 118, 118 (5th Cir. 1996). Oncale claimed to be threatened with homosexual rape, and testified that, on one occasion, Pippen held him down in the shower while Lyons forcibly inserted a bar of soap into Oncale's anus. *See id.* at 118-19.

[89] *See Oncale*, 118 S. Ct. at 1001. The Court likened same-sex sexual harassment to same-race discrimination, which was addressed in *Castaneda*. *See id.* (citing Castaneda v. Partida, 430 U.S. 482, 499 (1977)). The Court reminded, "'Because of the many facets of human motivation, it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of that group.'" *Id.* (quoting *Castaneda*, 430 U.S. at 499).

Justice Scalia, writing for the Court, noted that courts have had little difficulty in adhering to this principle where employees suffered a tangible job detriment. *See id.* at 1002; *see also* Johnson v. Transportation Agency, 480 U.S. 616, 638 (1987) (finding that, where a female employee received a promotion and a male employee did not, the fact that the employer was male had no effect on a claim of gender discrimination). Where hostile environment sexual harassment is alleged, however, the Justice underscored a variety of conflicting approaches that federal courts have adopted. *See Oncale*, 118 S. Ct. at 1002. *Compare Oncale*, 83 F.3d at 120 (holding that same-sex sexual harassment is never actionable) *with* McWilliams v. Fairfax County Bd. of Supervisors, 72 F.3d 1191, 1195 n.4 (4th Cir. 1996) (suggesting that same-sex sexual harassment is actionable where the harassing employer is homosexual, since sexual desire can be inferred) *and* Wrightson v. Pizza Hut of Am., Inc., 99 F.3d 138, 144 (4th Cir. 1996) (holding that the harassment is actionable where the harasser is homosexual). *See also* Doe v. City of Belleville, 119 F.3d 563, 576 (7th Cir. 1997) (stating that all workplace harassment that is sexual in nature is actionable, regardless of harasser's motivations, sex, or sexual orientation).

[90] *See Oncale*, 118 S. Ct. at 1002. The Court reminded, "'The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.'" *Id.* (quoting *Harris*, 510 U.S. at 25 (Ginsburg, J., concurring)).

[91] *See supra* note 82 and accompanying text.

[92] *See Oncale*, 118 S. Ct. at 1003.

[93] The Court had considered workplace sexual harassment in only three major cases: *Meritor*, *Harris*, and *Oncale*. *See supra* notes 73-80, 82-86, 87-92 and accompanying text (discussing these major cases).

harassment perpetrated by supervisory employees.[94] In 1998, the Court was given an opportunity to focus its attention on this highly unsettled area of sexual harassment jurisprudence in *Faragher v. City of Boca Raton*.[95] In a seven-to-two opinion, the Court held that an employer is vicariously liable for sexual harassment perpetrated by a supervisory employer.[96] An employer, added the Court, may successfully defend against liability by proving that the allegedly harassed employee failed to take advantage of reasonable methods of prevention and correction.[97]

Cognizant of the circuit courts' inability to agree upon a uniform application of agency principles in this area,[98] Justice Souter, writing for the majority,[99] commenced the opinion with a brief history of sexual harassment jurisprudence that traced the development of the current hostile environment standard.[100] The Justice noted, however, that, while the Court has had ample opportunity to delineate the substantive contours of sexual harassment, neither it nor the lower courts have had occasion to rule definitively upon standards for employer liability.[101] Justice Souter referenced a number of cases, for example, in which an employer who knew or should have known of the harassment, and did nothing, was held liable.[102] In such cases, the

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[94] *See* Meritor Sav. Bank, F.S.B. v. Vinson, 477 U.S. 57, 72 (1986) (suggesting a consideration of agency principles for imputing liability to employers).

[95] 118 S. Ct. 2275 (1998).

[96] *See id.* at 2292-93.

[97] *See id.* at 2293.

[98] *See id.* at 2282; *see also supra* note 15 (citing examples of conflicting circuit approaches).

[99] *See Faragher*, 118 S. Ct. at 2279. Justice Souter's opinion was joined by Chief Justice Rehnquist and Justices Stevens, O'Connor, Kennedy, Ginsburg, and Breyer. *See id.* Justice Thomas, joined by Justice Scalia, authored a dissenting opinion. *See id.*

[100] *See id.* at 2282-83. Citing *Harris* and *Oncale*, the Court first acknowledged that Title VII was not solely meant to protect against tangible or economic discrimination and that "it covers more than '"terms" and "conditions" in the narrow contractual sense.'" *Id.* at 2283 (quoting Oncale v. Sundowner Offshore Servs., Inc., 118 S. Ct. 998, 1001 (1998). Justice Souter related the early Title VII race cases to the development of the "severe or pervasive" hostile environment sexual harassment standard announced in *Meritor* and stressed that the current standard should sufficiently weed out litigation over simple teasing and horseplay. *See id.*

[101] *See id.* at 2284 ("[I]t is not surprising that in many of [our cases], the issue has been joined over the sufficiency of the abusive conditions, not the standards for determining an employer's liability for them.").

[102] *See id.* The Court cited the Fourth Circuit's opinion in *Katz v. Dole*, in which a female air traffic controller informed her supervisor that her co-workers had been sexually harassing her, only to be answered with actionable harassment by the supervisor himself. *See id.* (citing Katz v. Dole, 709 F.2d 251, 253 (4th Cir. 1983)). The Fourth Circuit held that the Federal Aviation Administration (FAA) knew or should

Court stated, liability has been imputed with ease, for the employer's inaction can be seen as demonstrable negligence or as an affirmative authorization of the offensive conduct.[103] Similarly, Justice Souter noted that courts have frequently held employers liable in cases such as *Harris*[104] in which the offending party enjoys a position of relative power within the business organization.[105] The high-level position of such an offender, the Court posited, has led courts to find an inference of agency authority and employer approval.[106] Finally, Justice Souter remarked upon the seemingly unanimous findings of employer liability in quid pro quo situations wherein the supervisor's sexual harassment has resulted in tangible job action.[107] The Justice noted several theories that courts have applied in reaching this conclusion:[108] (a) The supervisor actually "merges" with the employer when such decisions are made,[109] (b) The supervisor who imposes a

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have known of the harassment because of its severity and because the plaintiff specifically complained to her supervisor. *See Katz*, 709 F.2d at 256. The FAA's policy against sexual harassment, according to the panel, could not shield it from liability because of the FAA's "unmistakable acquiescence in or approval of the harassment . . . ." *Id.*; *see also* Equal Employment Opportunity Comm'n v. Hacienda Hotel, 881 F.2d 1504, 1516 (9th Cir. 1989) (holding an employer liable for management's failure to respond to an employee's complaints of supervisory sexual harassment); Hall v. Gus Constr. Co., Inc., 842 F.2d 1010, 1016 (8th Cir. 1988) ("[A]n employer who has reason to know that one of his employees is being harassed . . . on grounds of race, sex, religion, or national origin, and does nothing about it, is blameworthy.").

[103] *See Faragher*, 118 S. Ct. at 2284.

[104] *See supra* notes 82-86 and accompanying text (discussing *Harris* in detail).

[105] *See Faragher*, 118 S. Ct. at 2284.

[106] *See id.* (citing Torres v. Pisano, 116 F.3d 625, 634 (2d Cir. 1997) (suggesting that liability may be imputed to an employer where the supervisor holds a "high level in the management hierarchy")). Courts have been unable to agree upon the point at which an employee's position within the business hierarchy is "high" enough to warrant a finding of employer liability. *See, e.g., Torres*, 116 F.3d at 634 (determining that an employer was not liable despite the fact that the offending supervisor was the highest ranking official at the employment site in question); Kotcher v. Rosa & Sullivan Appliance Ctr., Inc., 957 F.2d 59, 64 (2d Cir. 1992) (finding no constructive notice although the harassing supervisor occupied the highest level at his employment site, because of the site's distance from headquarters).

[107] *See Faragher*, 118 S. Ct. at 2284 (citing Meritor Sav. Bank, F.S.B. v. Vinson, 477 U.S. 57, 70-71 (1986) ("[C]ourts have consistently held employers liable for the discriminatory discharges of employees by supervisory personnel, whether or not the employer knew, should have known, or approved of the supervisor's actions.")).

[108] *See Faragher*, 118 S. Ct. at 2285.

[109] *See id.* (citing *Kotcher*, 957 F.2d at 62 (noting that the victimized employee does not differentiate between the supervisor and employer); Steele v. Offshore Shipbuilding, Inc., 867 F.2d 1311, 1316 (11th Cir. 1989) (finding that a supervisor necessarily acts as the company when sexual favors are requested in exchange for job benefits)).

tangible job detriment upon the employee in such situations naturally does so within the scope of his authority,[110] (c) The supervisor's actions are aided by the agency relation,[111] and (d) The supervisor is acting within the scope of authority *and* is aided by the agency relation.[112]

Next, the Court discussed *Meritor*, the only case in which it had touched upon standards of employer liability for sexual harassment.[113] In *Meritor*, the Court recounted, agency principles were deemed to be relevant in an analysis of employer liability for supervisory sexual harassment.[114] The Court noted *Meritor*'s observation that, while the existence of employee grievance procedures and employer notice of the harassment are relevant to a liability analysis, they are not dispositive in imputing liability to the employer.[115] In addition, Justice Souter acknowledged *Meritor*'s determination that Title VII places limits upon employer liability for hostile environment harass-

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[110] *See Faragher*, 118 S. Ct. at 2285 (citing Shager v. Upjohn Co., 913 F.2d 398, 405 (7th Cir. 1990) (holding that a supervisor who fires an employee is authorized to do just that — his wrongful intent does not bring the behavior "beyond the orbit of his responsibilities as to excuse the employer") (citing RESTATEMENT (SECOND) OF AGENCY § 228 (1958))).

[111] *See, e.g.*, Nichols v. Frank, 42 F.3d 503, 514 (3d Cir. 1994) (stating that a harassing supervisor who fires an employee has the actual or apparent authority to do so). *See supra* note 13 (setting forth the Restatement's basic principles of vicarious employer liability).

[112] *See, e.g.*, Harrison v. Eddy Potash, Inc., 112 F.3d 1437, 1443 (10th Cir. 1997); Henson v. City of Dundee, 682 F.2d 897, 910 (11th Cir. 1982) ("Because the supervisor is acting within at least the *apparent* scope of the authority entrusted to him by the employer when he makes employment decisions, his conduct can fairly be imputed to the source of his authority.") (emphasis added).

[113] *See Faragher*, 118 S. Ct. at 2285.

[114] *See id.* (citing Meritor Sav. Bank, F.S.B. v. Vinson, 477 U.S. 57, 72 (1986)); *see also supra* notes 74-81 and accompanying text (discussing the *Meritor* decision).

[115] *See Faragher*, 118 S. Ct. at 2285 (citing *Meritor*, 477 U.S. at 72). The *Meritor* Court explained, "[A]bsence of notice to an employer does not necessarily insulate that employer from liability." *Meritor*, 477 U.S. at 72 (citation omitted)). In *Meritor*, the Court stated:

> [W]e reject petitioner's view that the mere existence of a grievance procedure and a policy against discrimination, coupled with respondent's failure to invoke that procedure, must insulate petitioner from liability. While those facts are plainly relevant, the situation before us demonstrates why they are not necessarily dispositive.

Id. Justice Rehnquist, writing for the Court in *Meritor*, explained that the policy in question was inadequate because it did not specifically address sexual harassment. *See id.* Moreover, the Justice noted the ineffectiveness of a grievance procedure that would require a victim to complain first to her direct supervisor — in this case, the perpetrator of the sexual harassment. *See id.* at 73.

ment and that employers, as a result, cannot automatically be held liable for supervisory sexual harassment.[116]

The Court asserted its reliance upon *Meritor* as a foundation for its forthcoming analysis.[117] The majority remarked that, due to the principle of stare decisis,[118] *Meritor* would receive great deference, especially in light of the fact that Congress left *Meritor* intact when it expanded the liability provisions of Title VII in 1991.[119] With this in mind, the Court proceeded to speculate upon the advantages and disadvantages of the three approaches to employer liability that were considered by the Eleventh Circuit below: scope of employment, common law agency, and negligence.[120]

Justice Souter began an analysis of the scope of employment theory by recounting that courts of appeals have been overwhelmingly hesitant to place hostile environment sexual harassment within the scope of a supervisor's employment.[121] This hesitancy, Justice

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[116] *See Faragher*, 118 S. Ct. at 2285.

[117] *See id.* at 2286.

[118] Stare decisis is the "[d]octrine that, when court has once laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle, and apply it to all future cases, where facts are substantially the same; regardless of whether the parties and property are the same." BLACK'S LAW DICTIONARY 1406 (6th ed. 1990) (citing Horne v. Moody, 146 S.W.2d 505, 509, 510 (Tex. Civ. App. 1940)). For a more thorough treatment of the Court's modern applications of stare decisis, see generally Todd E. Freed, Comment, *Is Stare Decisis Still the Lighthouse Beacon of Supreme Court Jurisprudence?: A Critical Analysis*, 57 OHIO ST. L.J. 1767 (1996).

[119] *See Faragher*, 118 S. Ct. at 2286. The Court remarked:

> The decision of Congress to leave *Meritor* intact is conspicuous. We thus have to assume that in expanding employers' potential liability under Title VII, Congress relied on our statements in *Meritor* about the limits of employer liability. To disregard those statements now (even if we were convinced of reasons for doing so) would be not only to disregard *stare decisis* in statutory interpretation, but to substitute our revised judgment about the proper allocation of the costs of harassment for Congress's considered decision on the subject.

Id. at 2291 n.4. The Court made note of the presumption that Congress, when adopting rules that comport with judicial pronouncements, legislates with an awareness of those pronouncements. *See id.* at 2286 (citing Keene Corp. v. United States, 508 U.S. 200, 212 (1993)).

The amendments enacted by the Civil Rights Act of 1991 expanded the relief available under Title VII to include both compensatory and punitive damages. *See id.* at 2291 n.4 (citing 42 U.S.C. § 1981a (1994)).

[120] *See id.* at 2286.

[121] *See id.* Justice Souter provided an extensive list of cases in which courts found the harassment to fall outside of the supervisor's scope of employment. *See id.* (citing Harrison v. Eddy Potash, Inc., 112 F.3d 1437, 1444 (10th Cir. 1997); Andrade v. Mayfair Management, Inc., 88 F.3d 258, 261 (4th Cir. 1996); Gary v. Long, 59 F.3d 1391, 1397 (D.C. Cir. 1995)). An employer may nevertheless be liable for harassing conduct that falls outside of the scope of employment if the supervisor's purpose is

Souter stated, is attributable to determinations by various courts that sexually offensive behavior is motivated by individual desires rather than a wish to further some employment-related objective.[122] As such, the Court averred, employers would not be held vicariously liable for what was viewed as simple "frolic and detour."[123] The Justice mentioned, however, that courts have construed the term "scope of employment" liberally in cases that fall outside of Title VII, holding employers liable for employee behavior which, at first glance, would not seem to comport with employment-related expectations.[124] The

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to "effectuate the employer's overall policy of discrimination, even if the method chosen by the supervisor — sexual harassment — [falls] outside the scope of the supervisor's duties." BARBARA LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 812 (3d ed. 1996).

[122] *See Faragher*, 118 S. Ct. at 2286-87. Several earlier decisions provide evidence of the judiciary's characterization of sexual supervisory misconduct as outside of the scope of employment:

> [The perpetrator]'s conduct appears to be nothing more than a personal proclivity, peculiarity or mannerism. By his alleged sexual advances, [he] was satisfying a personal urge. Certainly no employer policy is here involved; rather than the company being benefited in any way by the conduct . . . it is obvious it can only be damaged by the very nature of the acts complained of.

Corne v. Bausch & Lomb, Inc., 390 F. Supp. 161, 163 (D. Ariz. 1975), *vacated on procedural grounds*, 562 F.2d 55 (9th Cir. 1977); *see also supra* note 68 (detailing reasons for the judiciary's hesitancy to hold sexual harassment within the scope of a supervisor's employment).

[123] *See Faragher*, 118 S. Ct. at 2287. The terms "frolic" and "detour" were first used in a scope of employment context by Baron Parke, in *Joel v. Morison*. *See* Joel v. Morison, 172 Eng. Rep. 1338, 1338-39 (1834). Baron Parke stated, "If the servants, being on their master's business, took a detour to call upon a friend, the master will be responsible . . . . but if he was going on a frolic of his own, . . . the master will not be liable." *Id.*

[124] *See Faragher*, 118 S. Ct. 2287. The Court discussed *Ira S. Bushey & Sons, Inc. v. United States*, in which the Second Circuit held the government vicariously liable for the actions of an inebriated sailor who, in his drunken state, flooded a ship and a drydock. *See id.* (citing Ira S. Bushey & Sons, Inc. v. United States, 398 F.2d 167, 168, 172 (2d Cir. 1968)). Judge Friendly, writing for a unanimous panel, acknowledged that the sailor did not act to further his employer's purpose but held the government liable nonetheless, relying upon the "deeply rooted sentiment that a business enterprise cannot justly disclaim responsibility for accidents which may fairly be said to be characteristic of its activities . . . . [The sailor]'s conduct was not so 'unforeseeable' as to make it unfair to charge the [g]overnment with responsibility." *Ira S. Bushey & Sons*, 398 F.2d at 171.

Justice Souter also noted several other cases in which courts have construed scope of employment liberally. *See Faragher*, 118 S. Ct. at 2287 (citing Leonbruno v. Champlain Silk Mills, 128 N.E. 711, 711 (N.Y. 1920) (holding the employer liable for injury caused when one employee threw an apple at another); Primeaux v. United States, 102 F.3d 1458, 1462-63 (8th Cir. 1996) (discussing the case of a police officer who sexually assaulted a motorist); Lyon v. Carey, 533 F.2d 649, 655 (D.C. Cir. 1976) (discussing the case of a furniture deliveryman who raped a customer)). The *Lyon* court opined that the employer should be held liable where "the assault, sexual or

Court chose not to attempt to reconcile the varied and inconsistent results among the courts, recognizing that any discord below was a result of uneven judicial interpretation.[125]

Whether an action is within the scope of employment, the Court explained, depends upon a determination of the propriety of holding an employer responsible for the acts of a subordinate.[126] The Court lamented that the phrase "scope of employment" provides little guidance,[127] and, thus, it undertook to determine whether an employer, when confronted with supervisory hostile environment sexual harassment, should rightly bear the risk of loss.[128]

The Court voiced possible justifications for holding an employer liable.[129] The Court determined that, since the employer is in a position to hire and train supervisors, and since the employer ultimately receives the benefit of that investment of time and trust, the employer may rightfully sustain liability for a supervisor's objectionable conduct.[130] The Court explicated the concept that the paramount influence that an employer commands over the development of supervisors, coupled with the increasing awareness of sexual harassment in

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otherwise, was triggered off or motivated or occasioned by a dispute over the conduct then and there of the employer's business . . . [rather than solely by] propinquity and lust . . . ." *Lyon*, 533 F.2d at 655.

[125] *See Faragher*, 118 S. Ct. at 2287.

[126] *See id.*

[127] *See id.* at 2287-88 (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 69, at 502 (5th ed. 1984)). According to Prosser and Keeton:

> This highly indefinite phrase . . . is so devoid of meaning in itself that its very vagueness has been of value in permitting a desirable degree of flexibility in decisions. It is obviously no more than a bare formula to cover the unordered and unauthorized acts of the servant for which it is found to be expedient to charge the master with liability, as well as to exclude other acts for which it is not.

KEETON ET AL., *supra* note 13, § 69, at 502.

[128] *See Faragher*, 118 S. Ct. at 2288. The Restatement advises courts to determine "'whether or not it is just that the loss resulting from the servant's acts should be considered as one of the normal risks to be borne by the business in which the servant is employed.'" *Id.* (quoting RESTATEMENT (SECOND) OF AGENCY § 229 cmt. a (1958)).

[129] *See id.* at 2288.

[130] *See id.* The majority praised the dissent's justification in the court below:

> "[A] pervasively hostile work environment of sexual harassment is never (one would hope) authorized, but the supervisor is clearly charged with maintaining a productive, safe work environment. The supervisor directs and controls the conduct of the employees, and the manner of doing so may inure to the employer's benefit or detriment, including subjecting the employer to Title VII liability."

Id. (quoting Faragher v. City of Boca Raton, 111 F.3d 1530, 1542 (11th Cir. 1997) (Barkett, J., dissenting in part and concurring in part)) (alteration in original).

the workplace,[131] might provide a compelling justification for the imposition of liability.[132] It would not be unreasonable, the Court submitted, for an employer to anticipate incidents of harassment in the workplace.[133] Nor would it be illogical, the Court stated, to hold an employer liable for what might be viewed as an ordinary cost of doing business rather than rest the burden and expense of harassment upon an unwitting victim.[134]

Despite these justifications for holding employers liable for supervisory sexual harassment, the Court considered two arguments that might counsel against such a holding: the possible impropriety of disregarding scope of employment analysis, and the possible application of a negligence standard, an approach that had been broadly embraced by district and circuit courts.[135] Justice Souter forewarned that Congress had never advocated an abandonment of the distinction between acts falling within the scope of the supervisor's employment and those falling without.[136] The Justice noted that the task of drawing this distinction is not impossible in cases of sexual harassment.[137] For example, the majority postulated, a supervisor might be working within the scope of employment if he treats the poor work performance of males with simple criticism while the shortcomings of female employees are greeted with overt vulgarity.[138] The Court suggested, on the other hand, that when a supervisor makes unwelcome sexual advances toward an employee, it is clear that the supervisor is acting to placate his own sexual appetite, not to bestow any employment-related benefit upon his employer.[139] Since the distinction is observable, the Court stated that an adherence to traditional agency principles would be a sensible approach.[140]

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[131] *See id.* at 2288; *see also supra* note 3 (setting forth statistics for sexual harassment complaints and damage awards).

[132] *See Faragher*, 118 S. Ct. at 2288.

[133] *See id.*

[134] *See id.*

[135] *See id.* at 2288-89.

[136] *See id.* at 2288.

[137] *See id.*

[138] *See Faragher*, 118 S. Ct. at 2289. The Court cited another example of a discriminatory practice prohibited by Title VII that would fall within the scope of a supervisor's employment. *See id.* at 2288-89. The Court explained that, where a supervisor discriminates on the basis of race in order to remedy a perceived workplace racial imbalance, the supervisor is acting for the benefit of the employer; hence, the supervisor is acting within the scope of his employment. *See id.*

[139] *See id.* at 2289.

[140] *See id.* ("[I]t thus makes sense in terms of traditional agency law to analyze the scope issue . . . just as most federal courts addressing that issue have done, classifying the harassment as beyond the scope of employment.").

The Court next suggested that the application of a negligence standard might also serve as an acceptable gauge of employer culpability.[141] Under a negligence standard, the Court explained, the employer would be held liable if he or she knew or should have known of the harassment and failed to rectify the situation.[142] The majority noted that courts of appeals and district courts have consistently used negligence standards to place harassment beyond the assigned duties of common employees.[143] This approach, the Court opined, has invariably shielded employers from liability absent a finding that the employer knew or should have known of the harassment.[144]

The majority recognized that automatically holding sexual harassment to be within the scope of supervisory employment would render the negligence approach obsolete.[145] Furthermore, noted the majority, automatic liability could logically extend from the tortious acts of common employees, since employers benefit from the productivity of common employees no less than from that of supervisors.[146] The Court criticized this suggestion, however, charging that it implicates basic principles of agency: Supervisors possess an authority that common employees lack and, thus, agency analysis is triggered.[147] With these principles in mind, the Court held that misuse of supervisory authority, without more, has no place in scope of employment analysis.[148]

Next, the Court turned to section 219(2)(d) of the Restatement of Agency, which provides that an employer may be liable for the

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[141] *See id.*

[142] *See id.*

[143] *See id.* at 2289. The Court cited an extensive list of courts of appeals that have applied negligence standards in the context of workplace harassment. *See id.* (citing Blankenship v. Parke Care Ctrs., Inc., 123 F.3d 868, 872-73 (6th Cir. 1997), *cert. denied* 118 S. Ct. 1039 (1998); Fleming v. Boeing Co., 120 F.3d 242, 246 (11th Cir. 1997); Perry v. Ethan Allen, Inc., 115 F.3d 143, 149 (2d Cir. 1997)).

[144] *See Faragher*, 118 S. Ct. at 2289. The traditional elements in a negligence cause of action are as follows: (1) a legally recognized duty for a person to conform to a certain standard of care; (2) failure on that person's part to conform to that standard, which constitutes "breach;" (3) causal connection between the breach and the subsequent injury, and; (4) actual damage or loss. *See* KEETON ET AL., *supra* note 13, § 30, at 164-65.

[145] *See Faragher*, 118 S. Ct. at 2289.

[146] *See id.* Common employees and supervisors, noted the Justice, "simply have different jobs to do." *Id.*

[147] *See id.* at 2289-90. This notion stems logically from the express language of section 219(2)(d) of the Restatement: A master is not responsible for the torts of his servant unless "the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority . . . ." RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (1958).

[148] *See Faragher*, 118 S. Ct. at 2290.

torts of its servant if "'the servant purported to act or [to] speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.'"[149] The majority rejected the City's contention that the aided-by-agency portion of section 219(2)(d) merely refines the part that holds a principal liable for reliance upon apparent authority.[150] The Court charged that such a reading would render the second qualification superfluous and proceeded to expound upon the merits of holding an employer liable in the absence of a supervisor's affirmative claim of authority.[151]

The Court found persuasive several factors in determining that a harassing supervisor is *always* aided by the agency relationship.[152] First, the Court validated Faragher's contention that a supervisor has the benefit of a captive audience, since a supervisor has the authority to demand attention and prohibit retreat.[153] Second, the Court acknowledged that a victim will be hesitant to report or resist the supervisor's advances for fear of retaliatory job action, whereas a victim may generally respond to harassment from a common co-worker without such apprehension.[154] Recognizing that an employer is uniquely capable of monitoring and training supervisors, the Court concluded that the aided-by-agency portion of section 219(2)(d)

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[149] *Id.* (quoting RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (1958)).

[150] *See id.* Respondents, in their brief to the Court, stated:

> Petitioner's reliance on this text ignores the common-law principles that underlie and give it meaning. It invites error to pluck a sentence fragment from the Restatement and apply it as if it were a statute, separate and apart from the legal background that the statement is intended to synthesize.

Brief for Respondent at 31, *Faragher* (No. 97-282). Respondents argued that the "second clause is simply a refinement of the 'apparent authority' doctrine articulated in the first clause of [s]ection 219(2)(d), which . . . is a theory of liability primarily applicable to tortious acts that appear normal on their face — generally torts of misrepresentation." *Id.* at 31 n.24.

[151] *See Faragher*, 118 S. Ct. at 2290. The Justice buttressed this argument by noting examples of torts which, according to the commentary accompanying the Restatement, fell into the aided-by-agency portion of section 219. *See id.* For example, according to section 219, comment e, a telegraph operator who sends false messages is capable of doing so only because of the position that he holds as operator. *See id.* (citing RESTATEMENT (SECOND) OF AGENCY § 219 cmt. e (1958)).

[152] *See id.*

[153] *See id.* at 2291.

[154] *See id.*; *see also* Rodgers v. Western-Southern Life Ins. Co., 12 F.3d 668, 675 (7th Cir. 1993) ("A supervisor's use of the term [nigger] impacts the work environment far more severely than use by co-equals.").

serves as an appropriate starting point for determining the propriety of employer liability for supervisory indiscretion.[155]

The Court, however, stressed the need to square its holding with *Meritor*'s admonition that employer liability for supervisory sexual harassment is not to be automatic.[156] The Court proposed two solutions to ensure some employer protection: a requirement of proof of the supervisor's affirmative invocation of authority, or recognition of an employer's affirmative defense in some circumstances.[157]

The majority swiftly rejected the first option, despite the existence of both scholarly and judicial approval of this approach.[158] Justice Souter recognized that affirmative invocation of authority is a rare event and noted that, from a victim's perspective, the supervisor's authority is always present — expressly advertised or not.[159] The Justice warned that subjective judicial attempts to discern the line between implicit and explicit invocation of authority would lead to increased litigation and contradictory results.[160] As such, the Court rejected this "active use" approach.[161]

The majority preferred the second option for avoiding automatic liability: An employer may be vicariously liable for supervisory sexual harassment, but an affirmative defense would allow the employer to demonstrate that reasonable care had been exercised to avoid harassment both before and after its occurrence.[162] The Court articulated its reasoning that an employer may likewise escape liability if the employer can demonstrate that the employee failed to make reasonable efforts to take advantage of existing safeguard procedures.[163] The Court stated that proof of the first element is not necessary in every case as a matter of law, but may be addressed appropriately in litigation.[164] The Court added that proof of the second

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[155] *See Faragher*, 118 S. Ct. at 2290-91 (quoting Estrich, *supra* note 2, at 854 (1991) (asserting that a supervisor's power to hire and fire "'does not disappear . . . when he chooses to harass through insults and offensive gestures rather than directly with threats of firing or promises of promotion'")).

[156] *See id.* at 2291; *see also supra* note 80 (discussing the reasoning behind *Meritor*'s rejection of automatic liability).

[157] *See Faragher*, 118 S. Ct. at 2291.

[158] *See id.* at 2291-92.

[159] *See id.* ("Supervisors do not make speeches threatening sanctions whenever they make requests in the legitimate exercise of managerial authority, and yet every subordinate employee knows the sanctions exist . . . .").

[160] *See id.* at 2292.

[161] *See id.*

[162] *See id.*

[163] *See Faragher*, 118 S. Ct. at 2292.

[164] *See id.* at 2293.

element, the employee's failure to take reasonable care in reporting the harassment, is likely to satisfy an employer's burden of proof under the defense.[165] Noting that Title VII's primary purpose is not to provide redress, but rather to avoid harm, the Court attested to the appropriateness of the defense in this statutory context.[166] This defense, the Court elucidated, comports with the statutory notion that the employer should not provide safeguards against sexual harassment as an option, but rather as an obligation.[167] The Court found that this defense would give employers added incentive to minimize the probability of sexual harassment in the workplace while protecting employers who have taken meaningful action.[168] Furthermore, the Court indicated that requiring a victim to take reasonable advantage of existing safeguard mechanisms comports logically with general damage theory such that a plaintiff will not be rewarded for damage that reasonably could have been avoided or mitigated.[169]

Finally, applying the facts of *Faragher* to its newly articulated standard, the Court reversed the judgment of the court of appeals, which had found that the City could not be held vicariously liable for supervisory hostile environment harassment.[170] The Court reiterated that an actionable hostile environment was caused by Faragher's direct supervisors, Silverman and Terry.[171] In light of Justice Souter's analysis, the Court concluded that the City was vicariously liable for the sexual harassment and could not assert an affirmative defense because it failed to exercise reasonable, preventative care, its anti-harassment policy was improperly disseminated, the supervisory behavior went unchecked, and the lifeguards had no general grievance

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[165] *See id.*

[166] *See id.* at 2292. Since 1980, the EEOC has urged employers to avoid sexual harassment in the workplace by informing employees of their rights. *See* 29 C.F.R. § 1604.11(f) (1998). In 1990, the Commission urged employers to provide their workers with practical complaint mechanisms. *See* BUREAU OF NAT'L AFFAIRS, POLICY GUIDANCE ON SEXUAL HARASSMENT, 8 FEDERAL EMPLOYMENT PRACTICES MANUAL 405:6699 (Mar. 19, 1990).

[167] *See Faragher*, 118 S. Ct. at 2292.

[168] *See id.*

[169] *See id.* (citing Ford Motor Co. v. Equal Employment Opportunity Comm'n, 458 U.S. 219, 231 n.15 (1982) (reiterating that a victim has a duty to mitigate harm)). The Court explained, "If the victim could have avoided harm, no liability should be found against the employer who had taken reasonable care, and if damages could reasonably have been mitigated no award against a liable employer should reward a plaintiff for what her own efforts could have avoided." *Faragher*, 118 S. Ct. at 2292.

[170] *See id.* at 2293; *see also supra* note 46 and accompanying text (discussing the reasoning for the circuit court's decision).

[171] *See Faragher*, 118 S. Ct. at 2293.

mechanism from which to benefit.[172] The Court remanded the case for reinstatement of the district court's judgment.[173]

Justice Thomas, joined by Justice Scalia, dissented,[174] directing the reader's attention to the dissent in *Burlington Industries, Inc. v. Ellerth*,[175] *Faragher's* sister case.[176] Justice Thomas disagreed with the majority and insisted that negligence standards, rather than agency principles, should determine employer liability in cases of supervisory hostile environment sexual harassment.[177] The dissent focused on precedent from the courts of appeals that established a negligence standard for determining employer liability in the context of racial harassment.[178] Justice Thomas opined that claims of sexual harass-

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[172] *See id.*

[173] *See id.* at 2294.

[174] *See id.* (Thomas, J., dissenting).

[175] 118 S. Ct. 2257, 2271 (1998) (Thomas, J., dissenting). Kimberly Ellerth quit her job as a salesperson for Burlington Industries after 15 months, alleging that an indirect supervisor, Ted Slowik, had sexually harassed her. *See id.* at 2262. Ellerth suffered no tangible job detriment as a result of the alleged harassment, and she claimed to have rejected Slowik's numerous advances. *See id.* As a matter of fact, Ellerth was actually promoted during the period in question. *See id.* Ellerth failed to take advantage of existing complaint mechanisms despite the company's implementation of a sexual harassment policy. *See id.*

Ellerth filed suit in the District Court for the Northern District of Illinois, alleging that Burlington Industries, in violation of Title VII, engaged in sexual harassment that resulted in Ellerth's constructive discharge. *See id.* at 2263. The district court acknowledged that Slowik's actions were severe or pervasive enough to create an actionable hostile environment; however, the case was dismissed under principles of negligence. *See* Ellerth v. Burlington Indus., Inc., 912 F. Supp. 1101, 1114, 1123 (N.D. Ill. 1996). The district court found that Burlington Industries did not know or have reason to know of the harassment, and, therefore, could not be held liable. *See id.* at 1123.

The Court of Appeals for the Seventh Circuit, sitting en banc, reversed. *See* Jansen v. Packaging Corp. of Am., 123 F.3d 490, 495 (7th Cir. 1997). Eight separate opinions, void of consensus, were issued with the decision, and the United States Supreme Court subsequently granted certiorari to define the standards of employer liability with respect to supervisory hostile environment sexual harassment. *See Burlington Indus.*, 118 S. Ct. at 2264. The Court's ultimate holding in *Burlington Industries* is identical to that in *Faragher*. *See id.* at 2270. The Court held Burlington Industries liable for the harassment, and remanded the case to give Burlington Industries an opportunity to take advantage of the newly constructed affirmative defense. *See id.* at 2271.

[176] *See Faragher*, 118 S. Ct. at 2294 (Thomas, J., dissenting).

[177] *See Burlington Indus.*, 118 S. Ct. at 2271 (Thomas, J., dissenting).

[178] *See id.* at 2272 (Thomas, J., dissenting). Justice Thomas first recounted the origin of the "hostile environment" category of sexual harassment, as it was developed in *Rogers*. *See id.* at 2271-72 (Thomas, J., dissenting) (citing Rogers v. Equal Employment Opportunity Comm'n, 454 F.2d 234, 238 (5th Cir. 1971)); *see also supra* notes 61-66 and accompanying text (discussing *Rogers*). The Justice then seized upon the judicially accepted negligence standard for determining employer liability in Title VII cases. *See Burlington Indus.*, 118 S. Ct. at 2272 (Thomas, J., dissenting)

ment should be treated no differently.[179] The Justice declared that if supervisory hostile environment sexual harassment falls outside the scope of supervisory employment, as the majority conceded, a negligence standard for employer liability is mandatory.[180] If the employer knew or should have known of the harassment and breached a duty to prevent or stop the offensive behavior, the dissent reasoned, then liability is appropriate.[181] Absent such knowledge or duty, added the dissent, the imposition of vicarious liability essentially serves to punish those who are not at fault.[182] Justice Thomas warned of dire consequences that will flow from the Court's decision, namely "Big Brother"-type[183] surveillance in the workplace instituted to monitor and prevent all sexual harassment, an impossible and intrusive task.[184] A negligence-based "reasonableness" standard, the dissent suggested, would be more appropriate.[185]

Justice Thomas also criticized the affirmative defense proposed by the majority as lacking clarity and direction.[186] The Justice lamented that the majority's failure to provide meaningful instruction regarding this defense will only add to the already muddled body of sexual harassment jurisprudence.[187] The dissent suggested that the defense fails realistically to ensure that *Meritor*'s rejection of automatic liability remains viable.[188] Since an employer may still be liable even after demonstrating a plaintiff's failure to take advantage of ex-

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(citing Dennis v. County of Fairfax, 55 F.3d 151, 155 (4th Cir. 1995) (holding that, absent tangible job detriment, the standard for determining employer liability for supervisory racial harassment is negligence); Davis v. Monsanto Chemical Co., 858 F.2d 345, 349 (6th Cir. 1988) (same)).

[179] *See Burlington Indus.*, 118 S. Ct. at 2272-73 (Thomas, J., dissenting).

[180] *See id.* at 2272-73 (Thomas, J., dissenting).

[181] *See id.*

[182] *See id.* at 2275 (Thomas, J., dissenting).

[183] In *1984*, George Orwell's masterpiece vision of negative utopia, "Big Brother" was a synonym for the ominous, tyrannical, manipulative government. GEORGE ORWELL, 1984 5 (1949). Throughout the novel, the narrator is constantly reminded that "Big Brother is Watching . . . ." *See id.*

[184] *See Burlington Indus.*, 118 S. Ct. at 2273 (Thomas, J., dissenting) ("Sexual harassment is simply not something that employers can wholly prevent without taking extraordinary measures — constant video and audio surveillance, for example — that would revolutionize the workplace in a manner incompatible with a free society.").

[185] *See id.*

[186] *See id.*

[187] *See id.* Justice Thomas forecasted "a continuing reign of confusion in this important area of the law." *Id.*

[188] *See id.* at 2274 (Thomas, J., dissenting).

isting complaint procedures, concluded the dissent, the rule is still essentially one of automatic liability.[189]

Finally, Justice Thomas found the majority's reading of section 219(2)(d) of the Restatement of Agency to be baseless.[190] The dissent argued that section 219(2)(d) imputes liability only when the plaintiff believes that the agent acted in the ordinary course of business or within the scope of employment.[191] The majority's imposition of liability based upon the agent's power, authority, or menacing nature, chided the Justice, is simply a policy decision without support from statute or precedent.[192] The Justice urged that all Title VII actions should be treated equally such that there are no extensions of employer liability for hostile environment harassment, on the basis of sex or otherwise, absent proof of negligence.[193]

With *Faragher*, the Court demonstrated an increased, admirable sensitivity toward alleged victims of sexual harassment. The majority's decision to hold employers vicariously liable for supervisory hostile environment sexual harassment is certain to increase awareness and attempts at prevention. As Justice Thomas noted in dissent, however, the point at which an employer's methods of prevention will provide an effective shield from liability remains unclear.[194] Over the past several years, there has been a marked increase in workplace sensitivity training programs and seminars.[195] No doubt employers who have heretofore been lax will scramble to institute strong anti-harassment policies following this decision.

But what is a "policy?" When all is said and done, after the lectures have ended and sensitivity seminars have wrapped up, a "policy" is still nothing more than a written warning hanging on the wall of a stockroom or bathroom.[196] The Court acknowledges that employers

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[189] *See id.*

[190] *See Burlington Indus.*, 118 S. Ct. at 2274 (Thomas, J., dissenting).

[191] *See id.* Justice Thomas disagreed with the majority's aided-by-agency analysis and would have found liability only in cases of recklessness or negligence. *See id.*

[192] *See id.*

[193] *See id.*

[194] *See id.*

[195] *See, e.g.*, Naftali Bendavid, *Cities Press Crackdown on Sexual Harassment*, MIAMI HERALD, July 13, 1992, at 1BR (discussing attempts to prevent sexual harassment at the workplace in several Florida cities); Chuck Philips, *You've Still Got a Long Way to Go, Baby*, L.A. TIMES, Apr. 18, 1993, at 9 (noting increased attempts at sexual harassment prevention in the music industry).

[196] *See* John Cloud, *Sex and the Law*, TIME, Mar. 23, 1998, at 52. The author stated:

> Companies have responded to the legal morass with wildly varying policies. Some ignore the issue, and others, particularly those burned with lawsuits, even ban interoffice dating. Nearly 9 out of 10 compa-

are in the best position to supervise, train, and screen employees, but that is no simple task. Unlike most employment-related problems, sexual harassment is not something that an employer is capable of preventing through simple instruction, demonstration, lecture, or policy-making. Initially, an employer may not be capable of detecting a potential supervisor's predilection toward harassment. Potentially dangerous stereotypical generalizations regarding sex are not likely to manifest themselves at a job interview. Sexism and gender objectification are the outgrowths of a lifetime of influences that give rise to a chauvinistic attitude deeply ingrained in the psyche of the offender — an attitude that female activists have struggled to change for many years. Gender bias that is planted during childhood and nurtured for years through the media is not easily reversed or contained. The Court certainly does not expect employers single-handedly to eradicate sexual harassment in the workplace. Yet if an employer is to have any hope of escaping liability, the employer must take steps to develop some reasonable policy.

Critics of *Faragher*, Justices Thomas and Scalia among them, fear that the uncertainty surrounding an appropriate, effective policy will give rise to a dilution of First Amendment freedoms in the workplace as well as a trampling of privacy rights due to employers' increased use of extensive monitoring systems in the name of prevention.[197] While such a result is certainly possible, it is unlikely that employers will not exercise reason when implementing new and more effective preventative measures.

Rather, an unfortunate side effect of *Faragher* will likely be mountains of litigation. The allegedly harassed employee, however, will not be the sole plaintiff. While the promise of a deep pocket will likely provide an added incentive for allegedly victimized employees

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> nies have procedures for dealing with sexual harassment . . . but many of those procedures are weak — "a paragraph in the company handbook" . . . .

Id. (quoting Ellen Bravo, co-director of the National Association of Working Women).

Another fascinating by-product of sexual harassment litigation has been the creation of the workplace "consensual relationship agreement," whereby employees attest to the consensual nature of their relationship in writing and agree that a breakup will have no adverse job impact. *See* Hansen, *supra* note 3, at 79.

[197] *See Burlington Indus.*, 118 S. Ct. at 2273 (Thomas, J., dissenting). As Chief Judge Posner stated, "It is facile to suggest that employers are quite capable of monitoring a supervisor's actions affecting the work environment. Large companies have thousands of supervisory employees. Are they all to be put under video surveillance? Subjected to periodic lie-detector tests? Trailed on business trips by company spies?" Jansen v. Packaging Corp. of Am., 123 F.3d 490, 513 (7th Cir. 1997) (Posner, C.J., concurring and dissenting).

to bring suit,[198] it will also encourage frustrated and frightened employers to fire supervisors before the behavior in question reaches the actionable "severe or pervasive" stage. Fear of hefty damage awards coupled with the uncertainty surrounding the definition of a reasonable, effective policy may prompt employers to move toward termination absent proper investigation and reasonable remedial efforts. Even prior to the Court's decision, there had been a rise in such "backlash" cases — actions brought by accused employees who claim to have been prematurely and unlawfully terminated.[199] Yet fear of a tyrannical workplace and rising backlash suits, without more, is no reason to condemn the *Faragher* decision. Obviously, just as apprehension of suits from victims of sexual harassment may prompt employers to develop innovative and more effective preventative mechanisms, fear of supervisors' backlash suits will likely calm an employer's trigger finger[200] and motivate employers to "protect the rights of the accused as well as the accuser."[201] Although no one can realistically expect employers to weed out all potential offenders and miraculously reform those who emerge, *Faragher* properly recognizes that it is the employer who must bear the burden at this point, not the victim.

Faragher, as both law and policy, is sound. The "aided-by-agency" portion of section 219(2)(d) provides an appropriate, logical basis for the Court's decision. As Justice Souter stated, a victim need not be reminded of her supervisor's authority; in the eyes of the victimized employee, it is always present. A victim cannot logically presume that the employer condones the actions of a supervisor who creates a severe or pervasive hostile work environment. Nonetheless, that supervisor has been given the ability to take meaningful job action against the victim. Such power, though not necessarily flaunted, is always present in the mind of the victimized employee. This unspo-

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[198] *See Anti-Expressionism*, *supra* note 5, at 8. "[B]ecause liability is almost automatic as soon as a complaint is filed, employees who seek generous settlements have an incentive not to complain until *after* the offensive conduct becomes severe and [sic] pervasive enough to be actionable." *Id.*

[199] *See generally* Kathy Barrett Carter, *Harassment Law Proves Double-Edged*, STAR-LEDGER, Aug. 7, 1998, at 1.

[200] In 1993, the Miller Brewing Company fired a male executive for discussing an episode of "Seinfeld," the popular situation comedy, with a female co-worker who took offense. *See* Dorothy Rabinowitz, *TV: 'The Seinfeld Firing,'* WALL ST. J., May 11, 1998, at A20. A jury subsequently awarded the terminated executive $18.5 million dollars in damages. *See id.* Cases like this might make an employer think twice before immediately firing supervisors who are accused of sexual harassment.

[201] Carter, *supra* note 199, at 28.

ken power fits precisely within the Restatement's aided-by-agency language.

Perhaps the law of sexual harassment would be clarified more adequately if it were removed from the confines of Title VII and treated independently by Congress. To provide victims with any hope of relief, courts have been forced to place sexual harassment awkwardly within Title VII's prohibition of discrimination on the basis of sex[202] and have essentially been left to the task of developing jurisprudential contours for a wrong that has been ill-defined by the legislature. Until Congress adopts a more aggressive approach toward refining the law of sexual harassment in the workplace, even-handed and consistent justice will continue to be elusive, and the workplace will likely remain permeated with accusation and suspicion.

Stuart J. Goldstein

[202] *See supra* note 2. Actions for same-sex sexual harassment have brought to light the somewhat fictional nature of the characterization of sexual harassment as harassment "on the basis of sex" for Title VII purposes. *See* Gabriel A. Terrasa, *Fitting a Square Peg into a Round Hole: "Same Sex" Sexual Harassment and the "Because of . . . Sex" Requirement in Hostile Environment Claims*, 67 REVISTA JURIDICA UNIVERSIDAD DE PUERTO RICO 163, 183-89 (1998). If, indeed, a male supervisor sexually harasses one male worker in an all-male workplace, it is difficult to comprehend how, if at all, the worker is being harassed because he is male. *See id.* at 196 (advocating a "[h]arassment that is sexual in nature" standard, rather than a strict "because of . . . sex" standard in hostile environment sexual harassment claims).