Third-Party Sexual Harassment in the Workplace: An Examination of Client Control

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THIRD-PARTY SEXUAL HARASSMENT IN THE WORKPLACE: AN EXAMINATION OF CLIENT CONTROL

"Harassment is about Power — the undue exercise of power by a superior over a subordinate."
— Fictional attorney, Louise Fernandez, consulting her client, Tom Sanders, as Tom considers bringing a sexual harassment suit against his female supervisor.¹

I. INTRODUCTION

As the specter of sexual harassment² looms above today’s workplace, its presence undeniably haunts the consciousness of every member of our labor force.³ The pervasiveness of sexual harassment

¹. MICHAEL CRICHTON, DISCLOSURE 183 (1993). As one will discover upon reading this Note, power in the workplace can be exercised by more than just traditional supervisory employees, it can also be exercised by customers, clients, suppliers, and other non-employees.


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in the workplace has been confirmed through official surveys conducted of federal government employees in 1980 and 1987. Each survey concluded that roughly twenty-five percent of all federal employees reported having experienced some form of sexual harassment at work over a two year period. In fact, in 1993 the total number of sexual harassment claims filed with the Equal Employment Opportunity Commission ("EEOC") more than doubled from those in 1989 and plaintiffs recovered more than $25 million from employers in damages. Another survey remarkably found that the problem of sexual harassment has even continued to exist in today's law firms.

Amidst this sexual harassment phenomenon, a new twist to the mainstream sexual harassment claim by an aggrieved employee has emerged. Rather than "simply" worrying about the legal liability which may stem from the egregious conduct of its supervisors or co-workers, employers must now be aware that they can be held liable for the sexual harassment of their employees by people outside their workforce, such as customers, clients, suppliers, and other non-em-

that the issue of sexual harassment shall remain at the forefront of public concerns for some time, as evidenced by Paula Jones' sexual harassment action recently brought against President Bill Clinton, see Jones v. Clinton, No. LR-C-94-290 (E.D. Ark. filed May 6, 1994), and the 1994 world-wide Hollywood motion picture release of DISCLOSURE, the film adaptation of Michael Crichton's bestselling novel starring notable film celebrities Michael Douglas and Demi Moore.


5. See U.S. MERIT SYSTEMS PROTECTION BOARD OFFICE OF MERIT SYSTEMS REVIEW & STUDIES, SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: IS IT A PROBLEM? 3, 34-35 (1981) (concluding that 42% of all female respondents and 15% of all male respondents surveyed had recounted incidents of sexual harassment at work between May 1978 and May 1980); U.S. MERIT SYSTEMS PROTECTION BOARD OFFICE OF POLICY & EVALUATION, SEXUAL HARASSMENT IN THE FEDERAL GOVERNMENT: AN UPDATE 2, 11 (1988) (concluding that 42% of all female respondents and 14% of all male respondents surveyed had recounted incidents of sexual harassment at work between May 1985 and May 1987). Another updated sexual harassment study conducted by the United States Merit Systems Protection Board will be available to the public beginning April 1995.


ployees. Like many creatures of the law, Title VII began under the auspices of a seemingly basic concept; yet as we pass the thirtieth anniversary of its enactment it has grown to be a very complex legal organism indeed. To illustrate merely one example of its dynamic character, in 1993 the Supreme Court decided to settle a disparity among the United States Circuit Courts of Appeals regarding whether a plaintiff need prove psychological injury in order to recover for an employer's Title VII violation.

During the last decade or so, the non-employee sexual harassment appendage of Title VII has grown subtly. Some commentators have referred to it as "third-party harassment" and its most apparent manifestation exists within a section of the EEOC Guidelines pertaining to sexual harassment. The novelty of the third-party harassment doctrine lies in its essential premise that liability may be imposed upon one's employer for Title VII violations committed by people outside that employer's workforce.

Within the past few years, there has been a marked increase in the number of third-party harassment cases and some commentators

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10. See, e.g., Hansen, supra note 8, at 26.

11. See 29 C.F.R. § 1604.11(e) (1994). The EEOC Guidelines state that: [a]n employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing these cases the Commission will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees.

12. See supra note 11 and accompanying text.
believe their prevalence shall soon become even more widespread.\textsuperscript{13} Currently, most cases are brought by employees in sales or service related industries “where pleasing the customer is paramount — and where taking rudeness in stride traditionally has been part of the job.”\textsuperscript{14} In fact, one of the most widely publicized lawsuits to be brought under the auspices of third-party sexual harassment is that recently filed by a group of waitresses against their employer, an Atlanta-based chain of restaurants colloquially named “HOOTERS,” for fostering a work environment which allegedly encourages restaurant patrons to sexually harass their servers.\textsuperscript{15} Their claim is currently pending before both the EEOC and a Minnesota State District Court and many will undoubtedly examine the outcome closely, especially those outside the legal profession.\textsuperscript{16}

Since the problem of third-party harassment has consistently arisen within the context of sexually hostile environments,\textsuperscript{17} this

\textsuperscript{13} See, e.g., Hansen, supra note 8, at 26; Murray, supra note 3, at H2.

\textsuperscript{14} Murray, supra note 3, at H2; see also Watson, supra note 8, at 227 (stating that “the majority of cases of sexual harassment by customers involve entertainment establishments, bars, and restaurants where the environment the customer experiences sometimes lends itself to actions that can be deemed harassing”).

\textsuperscript{15} See Hansen, supra note 8, at 26; Andrew Blum, Assumption of Risk Tested in Hooters Suit, NAT’L LAW J., May 24, 1993, at 7.

\textsuperscript{16} The filing of the Hooters suit has stirred considerable debate throughout the United States and Canada regarding the “political incorrectness” of the Hooters chain’s practice of selling feminine sex appeal in a family-style restaurant, and whether an employee may be said to have “assumed the risk” of being sexually harassed by customers through accepting employment at such a workplace. See, e.g., Dateline NBC (NBC television broadcast, Mar. 15, 1994); James Carlisle, Employer Liable for Sexual Harassment by Customer, THE FIN. POST, Sept. 28, 1993, at 20 (discussing the liability of employers under Canadian law for the sexual harassment of their employees by customers); Eric J. Wieffering, Defending Hooters, CORP. REP. MNN., Sept. 1993, at 52; Hooters Restaurants Faces Sexual Harassment Lawsuit (NPR morning edition broadcast, Aug. 4, 1993); Myriam Marquez, Editorial: Skimpy Outfits Fine, But Keep Sex Harassment Off Hooters' Menu, ORLANDO SENTINEL TRIB., May 19, 1993, at A12.

Note will first canvass the history and development of the hostile environment sexual harassment doctrine since its official recognition by the Supreme Court in 1986.\textsuperscript{18} The next section will trace the limited history of the third-party harassment doctrine within the context of "client-control" cases.\textsuperscript{19} The subsequent segment will examine the evolution of the third-party harassment doctrine within the context of "client-non-control" cases.\textsuperscript{20} The succeeding section will then address the importance of the employer's ability to take sufficient action to prevent the recurrence of non-employee sexual harassment as it relates to and affects the imposition of liability. The final segment of this Note will focus on a proposal to modify the current EEOC Guidelines, which set forth suggested standards for determining an employer's liability for third-party harassment, so that they can more accurately reflect the significance of third-party accountability.

II. HISTORY AND DEVELOPMENT OF THE SEXUAL HARASSMENT CLAIM SINCE 1986

Within the rubric of Title VII,\textsuperscript{21} the judiciary has recognized two types of sexual harassment: quid pro quo sexual harassment\textsuperscript{22} and "hostile [or abusive] work environment sexual harassment."\textsuperscript{23}

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19. The term "client-control" shall hereinafter refer to those situations in which the employee performs his/her work under circumstances wherein the primary employer (i.e., the employer which initially hired the employee) has authorized, either explicitly or implicitly, a non-employee third-party to exercise the requisite degree of control over the employee's compensation, terms, conditions, or privileges of employment so as to render that third-party a Title VII "employer" of the employee. For a more elaborate discussion of the Title VII's definition of "employer," see infra notes 43-68 and accompanying text.
20. The term "client-non-control" shall hereinafter refer to those situations and instances wherein the primary employer has not, either explicitly or otherwise, authorized the non-employee to wield the requisite level of control over the employee's compensation, terms, conditions, or privileges of employment such that the non-employee can be classified as an "employer" under Title VII.
22. The term "quid pro quo harassment" has been said to have been coined by Professor Catherine A. MacKinnon in her book, SEXUAL HARASSMENT OF WORKING WOMEN (1979). See Note, Sexual Harassment Claims of Abusive Work Environment under Title VII, 97 Harv. L. Rev. 1449, 1454 n.27 (1984). Quid pro quo sexual harassment was the first type of sexual harassment recognized by the courts as a form of sex discrimination under Title VII. See Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977); Williams v. Saxbe, 413 F. Supp. 654 (D.D.C. 1976), rev'd on other grounds sub nom. Williams v. Bell, 587 F.2d 1240 (D.C. Cir. 1978).
23. Steele v. Offshore Shipbuilding, Inc., 867 F.2d 1311, 1315 (11th Cir. 1989); see also
While the former occurs "when an employer alters an employee's job conditions as a result of the employee's refusal to submit to sexual demands,"\textsuperscript{24} the latter exists when the "workplace is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."\textsuperscript{25} The federal courts have found Title VII to prohibit certain discriminatory work environments (or "non quid pro quo" harassment) since 1971,\textsuperscript{26} but it was not until 1986 that the U.S. Supreme Court, in the landmark case of \textit{Meritor Savings Bank v. Vinson},\textsuperscript{27} officially recognized that "a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment."\textsuperscript{28} In addition, the EEOC's Guidelines, which explicitly proclaim that "sexual harassment" constitutes a form of sexual discrimination in violation of Title VII,\textsuperscript{29} have been repeatedly accepted and relied upon by the judiciary as authoritative in determining the scope of Title VII's application toward sex discrimination claims.\textsuperscript{30} It is

\begin{quote}
Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65-66 (1986); Hicks v. Gates Rubber Co., 833 F.2d 1406, 1413 (10th Cir. 1987); Katz v. Dole, 709 F.2d 251, 254-55 (4th Cir. 1983). In addition, the EEOC Guidelines state that:

[...] harassment on the basis of sex is a violation of Section 703 of title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or other 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 ["quid pro quo harassment"], (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual [also "quid pro quo harassment"], or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

29 C.F.R. § 1604.11(a) (1994) (emphasis added).
24. Steele, 867 F.2d at 1315.
26. The application of the discriminatory work environment doctrine first appeared in a case involving a Hispanic complainant, in which the court held that "the phrase 'terms, conditions and privileges of employment' in [Title VII] is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination." Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972). It was then later expanded to religious discrimination in Compston v. Borden, Inc., 424 F. Supp. 157 (S.D. Ohio 1976); then toward workplace harassment based upon one's national origin in Cariddi v. Kansas City Chiefs Football Club, Inc., 568 F.2d 87 (8th Cir. 1977); and ultimately toward sexual harassment in Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981).
28. Id. at 66.
29. See supra note 23 and accompanying text.
30. In the 1972 amendments to the Civil Rights Act of 1964, the EEOC was established.
within these Guidelines that third-party sexual harassment was first explicitly addressed and recognized by the EEOC.

To prove the existence of a hostile or abusive work environment created by sexual harassment, a plaintiff must demonstrate to the court that: "(1) [he/she] belongs to a protected class;\(^31\) (2) the conduct in question was unwelcome;\(^2\) (3) the harassment was based on sex;\(^3\) (4) the harassment was sufficiently severe or pervasive to create an abusive working environment;\(^3\) and (5) there is some basis for imputing liability to the employer."\(^3\)

This last element, which re-


31. To satisfy this element, the plaintiff need only be a man or a woman. Sparks v. Regional Medical Ctr. Bd., 792 F. Supp. 735, 742 n.16 (N.D. Ala. 1992); see also Henson v. City of Dundee, 682 F.2d 897, 903 (11th Cir. 1982).

32. Such conduct includes "sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature," 29 C.F.R. § 1604.11(a) (1994), as well as "nonsexual harassing act[s]" directed through physical force or verbal attacks because of the gender of the employee. Sparks, 792 F. Supp. at 743 n.17. This element is normally the "gravamen of any sexual harassment claim." Meritor, 477 U.S. at 68.

33. That is, "but for the fact of her sex, the plaintiff would not have been the object of harassment." Jones v. Flagship Int'l, 793 F.2d 714, 719 (5th Cir. 1986), cert. denied, 479 U.S. 1065 (1987).

34. The classification "hostile" or "abusive" is determined "only by looking at all the circumstances," which "may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." Harris, 114 S. Ct. at 371. Furthermore, the conduct must "create an objectively hostile or abusive work environment — an environment that a reasonable person would find hostile or abusive," in addition to one in which the victim "subjectively perceived" as abusive. Id. at 370.

A heated controversy has erupted over the application of an objective standard toward evaluating perversiveness, that is, whether it should be made by a reasonable genderless person or a reasonable person of the same sex as the plaintiff. Cooper, supra note 3, at 402-13. Some circuits apply the standard of the reasonable person of the same gender as the plaintiff. See Burns v. McGregor Elec. Indus., Inc., 989 F.2d 959, 962 n.3 (8th Cir. 1993); Ellison v. Brady, 924 F.2d 872, 879-80 (9th Cir. 1991); Andrews v. City of Phila., 895 F.2d 1469, 1485-86 (3d Cir. 1990); Lipsett v. University of P.R., 864 F.2d 881, 898 (1st Cir. 1988); Yates v. Avco Corp., 819 F.2d 630, 636-37 (6th Cir. 1987). Other circuits, however, prefer to utilize the standard of a reasonable genderless person. See Paroline v. Unisyis Corp., 879 F.2d 100 (4th Cir. 1989), \(aff'd\) on \(reh'g\) in pertinent part, 900 F.2d 27 (1990) (en banc); Brooms v. Regal Tube Co., 881 F.2d 412 (7th Cir. 1989).

quires some legitimate ground for imputing liability to the employer, has significant ramifications upon the concept of third-party harassment. The EEOC Guidelines have set forth that such legitimate grounds shall exist, in third-party sexual harassment claims, when the plaintiff proves that the employer had actual or constructive knowledge of the sexual harassment and that it subsequently failed to respond with "immediate and appropriate corrective action." Since typical claims of hostile environment sexual harassment ensue when the employee suffers from the abusive behavior of either supervisors, co-workers, or both, the courts will generally examine each claim with careful consideration for the degree of power and authority of the harasser over the victim. Consequently, claims of third-party harassment can exist within two distinct contexts, those of client-control and those of client-non-control. Since each category tends to raise its own distinct issues, they will be examined sepa-

36. See, e.g., Magnuson, 808 F. Supp. at 513 (holding that liability could have been imposed upon plaintiff's primary employer, a workers' placement agency, if the agency in fact knew of the sexual harassment committed by the non-employee client); Powell v. Las Vegas Hilton Corp., 841 F. Supp. 1024, 1028 (D. Nev. 1992) (holding that an employer may be subject to liability for third-party sexual harassment merely for failing to "afford[] employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult" (quoting Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986))).

37. This may also soon hold true for third-party harassment on the basis of one's race, color, religion, gender, national origin, age, or disability. See 58 Fed. Reg. 51,266, 51,269 (1993) (to be codified at 29 C.F.R. § 1609.2(c)) (proposed Oct. 1, 1993) (extending the same standard of liability to employers for "the acts of non-employees with respect to harassment of employees in the workplace related to race, color, religion, gender, national origin, age, or disability" as that contained in 29 C.F.R. § 1604.11(e)).

38. That is, where "the employer (or its agents or supervisory employees) knows or should have known of the conduct." 29 C.F.R. § 1604.11(e) (1994) (emphasis added).

39. Id.; see also Magnuson, 808 F. Supp. at 512-13 (adopting the EEOC's requirement that an employer promptly implement appropriate remedial action, yet subtly modifying the knowledge standard recommended in the Guidelines).

40. See, e.g., Sauers v. Salt Lake County, 1 F.3d 1122, 1125 (10th Cir. 1993). In examining a third-party sexual harassment claim, one court stated, "[a]lthough we recognize that there may be a power imbalance in a customer-supplier relationship, we cannot find that it is the same as that inherent in a supervisory relationship." Hernandez v. Miranda Velez, Civ. No. 92-2701, 1994 WL 394855, at *5 (D.P.R. July 20, 1994).

41. This generally occurs when the employee acts as a pseudo-independent contractor, working for a considerable period of time within the environment of one or more of its employer's clients (e.g., an installer of a large, sophisticated computer system or an accounting auditor), such that the client retains a significant amount of control over the employee's immediate work environment. See supra note 19.

42. This scenario generally exists when the employee works in an environment largely concentrated with other employees, yet with close and repeated customer contact (e.g., a blackjack dealer, a waitress, or a hospital nurse) such that the customer does not retain any significant degree of control over the immediate workplace environment. See supra note 20.
III. EMPLOYER LIABILITY IN CLIENT-CONTROL CONTEXTS

A. WHO IS REALLY THE VICTIM’S EMPLOYER UNDER TITLE VII?

A common scenario of third-party harassment litigation exists when a plaintiff sues her primary employer\(^4\) for sexual harassment committed by a client or supplier with whom the employee closely works, possibly for long periods of time.\(^4\) A primary employer’s liability in these situations can be significantly affected by a court’s determination of which entities may qualify as Title VII employers.\(^4\) For purposes of Title VII liability, there exists a very expansive definition which does not limit the term “employer” merely to that person or entity responsible for providing the employee’s compensation.\(^4\) Thus, the proper analysis of any sexual harassment claim raised under Title VII generally begins with the threshold question: Who is the grievant’s employer?\(^4\)

According to the statutory language of Title VII, an “employer” is “a person engaged in an industry affecting commerce who has fifteen or more employees . . . and any agent of such person.”\(^4\) Unfortunately, Title VII does not define the word “agent,” nor has Congress provided any guidance toward interpreting its precise mean-

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\(^4\) For purposes of this Note, the term “primary employer” refers only to that entity which initially hired the employee.

\(^4\) This scenario, hereinafter referred to as one of client-control, can arise within many contexts, particularly where the employee of a temporary hiring agency suffers from the inappropriate behavior of their assigned employer or where the employee serves as an outside company representative who works more closely with clients than with fellow employees.

\(^4\) See generally Magnuson v. Peak Technical Servs., Inc., 808 F. Supp. 500, 513 (E.D. Va. 1992) (finding that plaintiff’s primary employers could be held liable under Title VII only if “they knew of the harassment,” while the harasser and his employer could be held liable if they had actual or constructive knowledge of the harassment). For a more detailed discussion of this case, see infra notes 80-95 and accompanying text.

\(^4\) See, e.g., Magnuson, 808 F. Supp. at 507-08.

\(^4\) See id. at 507. The court went on to say that “[i]n order to be subject to liability under Title VII, a defendant must (1) fall within Title VII’s statutory definition of ‘employer,’ and (2) have exercised substantial control over significant aspects of the compensation, terms, conditions, or privileges of plaintiff’s employment.” Id.; see also Katz v. Dole, 709 F.2d 251, 255 (4th Cir. 1983) (stating that the determination of whether an employer is liable is generally “the most difficult legal question”).


\(^4\) Id.; see also Sayers v. Salt Lake County, 1 F.3d 1122 (10th Cir. 1993) (noting that “[u]nfortunately, nowhere in Title VII is the term ‘agent’ defined.” (quoting Barger v. Kansas, 630 F. Supp. 88, 89 (D. Kan. 1985))).
Thus, the judiciary has been left with the responsibility of determining how traditional agency law principles should apply in Title VII cases.

1. Agency Principles and Title VII

Agency law generally applies to those situations where, similar to the conventional master and servant relationship, one person acts for another pursuant to the latter's authority. Under the traditional principles of agency law, a master is held vicariously liable for the damaging acts of its servants, regardless of fault. This form of respondeat superior liability is applied when the servant's acts further the master's business (i.e., when they are within the scope of the servant's employment arrangement). A servant's scope of employment pertains to that conduct "of the same general nature as . . . or incidental to the conduct authorized."

As agency law is based primarily on the principle that an employer may be held liable for the acts of individuals employed by him, it seldom applies to third-party harassment cases. It may be applicable, however, when a plaintiff brings suit against the employer of the "client-harasser" rather than against his/her own primary employer. Therefore, the principles of agency law relevant to third-party sexual harassment actions under Title VII are likely to be ap-

50. See Vinson v. Taylor, 753 F.2d 141, 148 (D.C. Cir. 1985) (finding that Congress neither explicitly adopted nor rejected any particular interpretation of the term "agency"), aff'd and remanded sub nom. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 72 (1986) (finding that while Congress did intend for courts to "look to agency principles for guidance in this area [of employer liability]," a hard and fast rule has not yet been developed).

51. "[F]ull time employees of a business are typical [servants]." RESTATEMENT (SECOND) OF AGENCY § 218 (1958) [hereinafter RESTATEMENT]. A servant has been defined as one employed to perform services for another and whose conduct in the performance of those services is subject to a right of control by the other. Id. § 220(1).


54. RESTATEMENT, supra note 51, § 219(1).

55. RESTATEMENT, supra note 51, § 229(1). For a list of factors one should use to determine if the test is met, see RESTATEMENT, supra note 51, § 229(2). But see 29 C.F.R. § 1604.11(c) (1994) (stating that an employer will be responsible for the acts of its agents and supervisory employees "regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence").

56. See, e.g., Magnuson v. Peak Technical Servs., Inc., 808 F. Supp. 500, 511 (E.D. Va. 1992) (accepting plaintiff's claim that several parties could each qualify as her Title VII "employer").
plied in the same fashion as in ordinary sexual harassment claims, and thus are only tangential to the focus of this Note.

2. Application of the Multi-Employer Doctrine

While most Title VII claims involve "the conventional single employer situation,"57 client-control third-party harassment claims will, in most instances, entail an investigation into the presence of multiple employers.58 As a rule, "the term 'employer' under Title VII should not be 'construed in a functional sense to encompass persons who are not employers in conventional terms, but [rather, those] who nevertheless control some aspect of an individual's compensation, terms, conditions, or privileges of employment."59 To determine if the third-party harasser can qualify as a Title VII "employer," the most important factor to consider is whether or not the third-party controls the "means and manner of the worker's performance."60 Where more than one entity has the power to exert the

57. Id. at 507.

58. See, e.g., id. at 507-11.

59. Id. at 507-08 (quoting Bostick v. Rappleyea, 629 F. Supp. 1328, 1334 (N.D.N.Y. 1985)). See also Sauers v. Salt Lake County, 1 F.3d 1122, 1125 (10th Cir. 1993) (holding that "'an individual qualifies as an 'employer' under Title VII if he or she serves in a supervisory position and exercises significant control over the plaintiff's hiring, firing or conditions of employment'" (quoting Paroline v. Unisys Corp., 879 F.2d 100, 104 (4th Cir. 1989), aff'd on reh'g in pertinent part, 900 F.2d 27 (1990) (en banc)).

The Magnuson court found additional support for its expansive definition of an employer in "the broad remedial purpose of Title VII." 808 F. Supp. at 507-08. See Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971) (stating that Congress intended for Title VII to proscribe employment discrimination "in the broadest possible terms"), cert. denied, 406 U.S. 957 (1972).

60. Magnuson, 808 F. Supp. at 509 (quoting Amamare v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 611 F. Supp. 344, 348 (S.D.N.Y. 1984), aff'd, 770 F.2d 157 (2d Cir. 1985)). Some of the other factors which aid in determining whether a sufficient degree of control was retained by the employer are:

(1) the kind of occupation, with reference to whether the work usually is done under the direction of a supervisor or is done by a specialist without supervision; (2) the skill required in the particular occupation; (3) whether the "employer" or the individual in question furnishes the equipment used and the place of work; (4) the length of time during which the individual has worked; (5) the method of payment, whether by time or by the job; (6) the manner in which the work relationship is terminated, i.e., by one or both parties, with or without notice and explanation; (7) whether annual leave is afforded; (8) whether the work is an integral part of the business of the "employer"; (9) whether the worker accumulates retirement benefits; (10) whether the "employer" pays social security taxes; and (11) the intention of the parties.

Amamare, 611 F. Supp. at 348 n.14 (quoting Spirides v. Renhardt, 613 F.2d 826, 831-32 (D.C. Cir. 1979)).
requisite level of control over the employee’s terms, conditions, or privileges of employment, the injured employee can very well be found to have multiple or “joint” employers. As a result, a finding of multiple employers in a Title VII action will undoubtedly affect the primary employer’s exposure to liability. If more than one defendant qualifies as the plaintiff-employee’s Title VII “employer,” allocation of liability based upon fault is practicable because the plaintiff is permitted to join all of the parties involved, particularly the third-party (i.e., the party directly responsible for inflicting the injury).

In Amarnare v. Merrill Lynch, Pierce, Fenner & Smith, Inc., the United States District Court for the Southern District of New York recognized that a plaintiff alleging hostile environment sexual harassment may have multiple employers. In doing so, it acknowledged the legitimacy of the Title VII single employee/multi-employer concept which can be applied to many non-employee hostile environment sexual harassment claims, particularly in client-control cases.

In Amarnare, the court denied Merrill Lynch’s motion to dismiss, finding that both the temporary services agency and Merrill Lynch — the company that contracted with that agency for the purpose of securing temporary employees — were each “employers” of the plaintiff for purposes of the plaintiff’s race and sex discrimination claim under Title VII.

Due to the recent wave of “employee leasing” within corporate America during the economic recession of the early 1990s, there is

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61. See, e.g., Magnuson, 808 F. Supp. at 508-10 (stating that “the joint-employer concept recognizes that the business entities involved are in fact separate but that they share or co-determine those matters governing the essential terms and conditions of employment”); Amarnare, 611 F. Supp. at 349-50.
63. See id. at 349.
64. In Amarnare, the court noted that “in providing a right of action against a statutory employer[,] Title VII does not refer to ‘employee’ but to ‘the person aggrieved,’ a term that has been construed ‘as comprehending individuals who do not stand in a direct employment relationship with an employer.’” Id. at 347 (citations omitted).
65. Plaintiff was paid directly by Mature Temps, Inc., who placed her as a temporary administrative assistant at Merrill Lynch. Id. at 346.
66. Id. at 347-50. The court alternatively found that Merrill Lynch’s subsequent interference with the plaintiff’s ability to gain other employment through Mature Temps, Inc. violated Title VII as well, holding “‘employers who are neither actual nor potential direct employers of particular complainants, but who control access to such employment and who deny such access by reference to invidious criteria’” may be held liable if they adversely affect the plaintiff’s employment in violation of Title VII. Id. at 349 (quoting Sibley Memorial Hosp. v. Wilson, 488 F.2d 1338, 1342 (D.C. Cir. 1973)).
even greater significance to the multi-employer doctrine upheld by the Second Circuit in the Amarnare decision. The practice of leasing employees from one company to another (most often from a personnel agency to an outside company) during that period of fiscal uncertainty has since become widespread. Accordingly, the potential number of sexual harassment claims arising from these arrangements is higher and as the courts begin to examine these cases, there is likely to be even greater development of the multi-employer doctrine.

B. THE "KNOWLEDGE" REQUIREMENT

To establish a prima facie case of non-employee hostile environment sexual harassment, a plaintiff must demonstrate that the "employer" knew or should have known of the unlawful harassing conduct. Since the doctrine of respondeat superior will generally not apply in cases where the Title VII violation is committed by a non-employee, the courts require the employer to have had some degree of actual or inferable knowledge of the sexual harassment before they will hold that employer directly liable for the injury inflicted upon the employee. The rationale which forms the basis for this requirement asserts that:

[i]f the employer has actual knowledge [of the sexual harassment] and does nothing to prevent or rectify it, the employer, in one sense, participates in the harassment and through its own fault is directly liable. If the sexual harassment is so pervasive that the employer can be deemed to have constructive knowledge of it, the employer similarly may merit liability directly as a result of its apparent laxity and tolerance of illegal conditions.

Actual knowledge may be established by proving that the employee had complained of the non-employee's harassing conduct di-

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68. Id.
69. See supra note 38 and accompanying text. This issue, however, was never reached in the Amarnare decision, as the court was limited to the issues raised in the defendant's motion to dismiss. 611 F. Supp. at 350.
70. See supra notes 51-56 and accompanying text.
71. Liability will not be imposed even though actual or constructive knowledge is proven if the employer can show it took appropriate action toward rectifying the situation within a sufficient time period. See supra notes 38-39 and accompanying text.
rectly to higher management. The alternative, establishing that the employer had constructive knowledge of the sexually hostile environment, may be accomplished "by showing the pervasiveness of the harassment." The satisfaction of either prong of the knowledge requirement, however, must also be accompanied by a showing that the defendant-employer failed to take appropriate corrective action within a reasonable period of time after its actual or implied ascertainment of the sexually hostile environment.

In client-control cases, however, it will sometimes be difficult for the plaintiff-employee to prove his/her primary employer's constructive knowledge of the alleged sexually hostile environment. This is due to the fact that the situs of the hostile environment will typically not be located within the primary employer's own workplace because the employee has been assigned to work at the client's office. Under this type of arrangement, the primary employer is generally isolated from the actual hostile environment.

A plaintiff may establish the primary employer's constructive knowledge if the employer had reason to know of the sexually hostile environment. In light of the potential ways an employee may establish this, it is important to note that the courts have not yet imposed an affirmative duty on employers to ascertain whether the reported hostile environment has continued to exist for other employees when that environment is actually located at another's place of business.

73. Henson v. City of Dundee, 682 F.2d 897, 905 (11th Cir. 1982) (citations omitted).
74. Id. (citing Taylor v. Jones, 653 F.2d 1193, 1199 (8th Cir. 1981)). See also Sparks v. Regional Medical Ctr. Bd., 792 F. Supp. 735, 744 (N.D. Ala. 1992) (holding that "knowledge may be imputed if the harassment is so severe and pervasive that a reasonable employer would be inspired to investigate and discover the facts").
75. See supra notes 38-39 and accompanying text. See also Saxton v. American Tel. & Tel. Co., 10 F.3d 526, 535 (7th Cir. 1993) (stating that "[t]he employer acts unreasonably either if it delays unduly or if the action it does take, however promptly, is not reasonably likely to prevent the misconduct from recurring" (quoting Guess v. Bethlehem Steel Corp., 913 F.2d 463, 465 (7th Cir. 1990))).
76. This is often the case with temporary or permanent placement agencies or manufacturer's representatives. See, e.g., Magnuson v. Peak Technical Servs., Inc., 808 F. Supp. 500, 513 (E.D. Va. 1992) (indicating that because the aggrieved employee claimed she had notified her primary employer of the sexually hostile environment, that employer's constructive knowledge was not at issue).
77. For example, this may be demonstrated through the employer's knowledge of past incidents involving the client's sexual harassment, or otherwise inappropriate behavior, toward the employer's representatives.
78. Such a requirement, however, may soon develop from the notion that employers have a duty to provide a workplace safe from forbidden forms of discrimination because "Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult." Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986).
C. WHEN THE CLIENT IS IN CONTROL: MAGNUSON V. PEAK
TECHNICAL SERVICES, INC. 79

In 1992, the United States District Court for the Eastern District of Virginia decided a landmark case involving client-control third-party sexual harassment. 80 In Magnuson, the plaintiff, a female manufacturer’s representative, brought suit against four defendants. 81 They included: (i) the placement firm for whom she directly worked (Peak); 82 (ii) the local car dealership where Peak had placed her and where her employment activities were concentrated (Fairfax); 83 (iii) the national car manufacturer who placed her at Fairfax as their representative (Volkswagen); 84 and (iv) Richard Blaylock, the general manager at Fairfax. 85 The plaintiff alleged that Blaylock had made “sexual advances toward [her]” while on the job, and in support of these allegations she cited specific instances of his objectionable conduct. 86 She also alleged that neither Peak nor Volkswagen took any corrective measures after she had complained to them of Blaylock’s harassing behavior. 87 The court denied the defendants’ summary judgment motion as to the plaintiff’s Title VII claims, finding that defendants Peak, Fairfax, and Volkswagen could each legally be held liable as the plaintiff’s “employers” under Title VII, but that “genuine issues of material fact exist[ed] concerning each defendants’ status as an employer of Magnuson’s for purposes of Title VII.” 88

80. See id.
81. Id. at 503.
82. Id. The firm, Peak Technical Services, Inc., was under contract with Volkswagen to provide employees for Volkswagen’s field marketing and manufacturer’s representative program. Id. at 504.
83. Id. at 503. Fairfax Volkswagen was the retail automobile dealership where plaintiff worked as a manufacturer’s representative. Id. at 505.
84. Id. at 504.
85. Id. at 503. Blaylock, whose behavior formed the basis of the complaint, became Fairfax’ general manager five months after the plaintiff began working there. Id. at 505.
86. Id. The complaint alleged that Blaylock had, inter alia, made lewd and offensive comments to her concerning her appearance (such as calling her “sweetheart,” “hon,” and his “Fahrvergnugen girl”) in addition to having repeatedly made sexual advances toward her, including inviting her several times to accompany him to a motel in the middle of the day. Id.
87. Id. at 506. Peak ultimately discharged plaintiff only two months after the alleged harassment began, informing her that “she no longer ‘fit the profile’ of what Volkswagen sought in a manufacturer’s representative.” Id.
88. Id. at 508-11. This marked the first utilization of the multi-employer doctrine in a federal third-party sexual harassment claim after Amarnare v. Merrill Lynch, Pierce, Fenner &
In analyzing the sufficiency of the plaintiff's case, the court initially determined that each of the defendants (Peak, Fairfax, and Volkswagen) qualified as Title VII “employers.” The court then confronted the issue of how the knowledge standard should be applied with regard to each of her employers' awareness of the alleged sexually hostile environment. With no direct federal judicial precedent to rely upon, the court examined the EEOC Guidelines and EEOC Dec. No. 84-3 and ultimately decided that Peak and Volkswagen could only be held liable for the harassing conduct of Fairfax's general manager if: “i) they [actually] knew of the harassment; and ii) failed to take any corrective actions to remedy the situation.”

Since Fairfax was the primary employer of the harassing party, in whose workplace the harassment actually took place, its liability was contingent on the plaintiff's ability to show that Fairfax had “actual or constructive knowledge of the existence of a sexually hostile working environment and [that they] took no prompt and adequate remedial action.” The court thus treated the plaintiff's employers, Peak and Volkswagen, differently than it did the third-party and his primary employer, Fairfax. Since Peak and Volkswagen could only be held liable for the harassing conduct of Fairfax's employees if the plaintiff could prove they had positive knowledge of the harassment, the court chose to eliminate the constructive knowledge prong from the test set forth in the EEOC Guidelines. While this unquestionably created an additional barrier for the plaintiff to overcome in her Title VII claim against her primary employers, it nonetheless provided added protection for the employers whose liability hinged on the unlawful conduct of persons essentially outside their control.

By permitting an employee to sue the client-employer directly with the added benefit of a more expansive knowledge standard that

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90. *Id.*
91. See supra note 11 and accompanying text.
92. 34 Fair Empl. Prac. Cas. (BNA) 1887 (1984). For a more detailed discussion of this particular case, see infra notes 126-43 and accompanying text.
94. *Id.* (quoting *Katz v. Dole*, 709 F.2d 251, 255 (4th Cir. 1983)) (emphasis added). Since the plaintiff failed to allege that she had complained directly to Fairfax, she was required to prove that the harassment was so "pervasive that [Fairfax's] awareness may be inferred." *Id.* at 513-14.
95. *Id.* at 513.
will not be applied to the primary employers, the entity responsible for maintaining a harassment-free environment in its own workplace can be held accountable under the same standards for determining liability in ordinary hostile environment cases. Furthermore, by narrowing the primary employer’s knowledge requirement to a showing of actual knowledge of the employee’s harmful working conditions, the standard for imposing liability has been fairly adjusted according to fault.

The knowledge standard utilized by the Magnuson court additionally hinders the plaintiff who has arbitrarily chosen to sue the primary employer simply because this entity has the deepest pocket. By employing the Variable Knowledge standard in third-party sexual harassment cases, the plaintiff must be prepared to meet a more demanding standard of knowledge to establish a prima facie case against the primary employer. The application of this Variable Knowledge standard in third-party sexual harassment cases will likely encourage injured employees to sue the party most responsible for engendering unlawful behavior.

Ironically, proponents of a vicarious liability standard, in cases where the hostile environment sexual harassment was created by a supervisor, fear that the very use of a knowledge requirement is too protectionist and will only “lead employers to look the other way even as early warning signs become apparent.” As a result, these proponents feel that Title VII’s knowledge requirement creates a greater “incentive to circumvent than to comply with Title VII.”

However, unlike supervisor-employee harassment situations, in third-party claims the harasser is inherently not an employee hired by the primary employer — much less one hired as a supervisor. Rather, the harasser is intrinsically a person from a different company altogether. Therefore, by applying the multi-employer doctrine and the

96. See supra notes 31-39 and accompanying text.
97. This standard shall hereinafter be referred to as the “Variable Knowledge” standard.
98. Where multiple employers are present, as they were in Magnuson, the application of the Variable Knowledge standard may cause aggrieved employee Plaintiffs to hesitate before filing suit against the primary employer because the aggrieved employee’s case against the client-employer has a considerably higher probability of success.
100. Id.
Variable Knowledge standard in client-control third-party sexual harassment cases, the easiest target for the injured employee becomes the precise, infected work environment where the harm actually occurred. By focusing the legal viewfinder on the proper target, Title VII's goal of eliminating all forms of sexual discrimination from the workplace is much closer to being realized.\textsuperscript{102}

IV. EMPLOYER LIABILITY IN CLIENT-NON-CONTROL CONTEXTS

A. EEOC v. SAGE REALTY CORP.:\textsuperscript{103} EMPLOYER DRESS CODES THAT CAUSE EMPLOYEES TO BE SUBJECTED TO SEXUAL HARASSMENT BY THE GENERAL PUBLIC

Even before the Supreme Court recognized the legitimacy of the "hostile environment" sexual harassment claim in 1986, federal courts had already utilized the doctrine in accordance with the EEOC Guidelines which were promulgated in 1980.\textsuperscript{104} Yet, prior to the enactment of the EEOC Guidelines, the United States District Court for the Southern District of New York decided a case involving "hostile environment" sexual harassment.\textsuperscript{105} In fact, that case is even more intriguing because the court never used the terms "hostile or abusive environment" in its published opinion.\textsuperscript{106}

In EEOC v. Sage Realty Corp.,\textsuperscript{107} the lobby hostess of an office building brought a sexual discrimination suit against her employer

\textsuperscript{102} In addition, the Supreme Court has already implicitly warned against unsubstantiated judicial extensions of employer liability not contemplated within the Civil Rights Act of 1964. See Meritor Sav. Bank v. Vinson, 477 U.S. 57, 72 (1986) ("Congress' decision to define 'employer' to include any 'agent' of an employer, surely evinces an intent to place some limits on the acts of employees for which employers under Title VII may be held responsible."). This suggests that courts must be wary when confronted with third-party sexual harassment suits since the literal language in Title VII does not explicitly address its application toward claims of third-party sexual harassment. See Robert J. Aalberts & Lorne H. Seidman, Sexual Harassment of Employees by Non-Employees: When Does the Employer Become Liable?, 21 PEPP. L. REV. 447, 454 (1994).


\textsuperscript{104} See, e.g., Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982); Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981).

\textsuperscript{105} Sage Realty, 507 F. Supp. at 599.

\textsuperscript{106} Id. While the main thrust of the court's decision focused upon the notion that the sexual harassment which the plaintiff had to endure as a result of the her donning a sexually provocative and revealing uniform as required by her employer constituted a form of gender discrimination under Title VII, id. at 607-08, essentially, the employer had also created a hostile or abusive work environment.

alleging that the requirement that she wear a revealing "Bicentennial uniform"\(^\text{108}\) during work was an unlawful "term and condition of her employment" that had the effect of discriminating against her on the basis of her gender,\(^\text{109}\) and that her subsequent discharge for refusing to wear the sexually-provocative uniform also violated Title VII.\(^\text{110}\) When confronted with the defendants' motion for summary judgment, the court determined that "[by] requiring [the plaintiff] to wear the revealing Bicentennial uniform in the lobby of 711 Third Avenue, defendants made her acquiescence in sexual harassment by the public, and perhaps by building tenants, a prerequisite of her employment as a lobby attendant."\(^\text{111}\)

Even though the term "hostile environment" was never explicitly mentioned in the opinion, the court had essentially laid the foundation for other plaintiffs to utilize the provisions of Title VII where the conditions of their employment created an environment prone to generating sexual harassment by non-employees.\(^\text{112}\) This holding has been especially significant in situations where the non-employee had relatively little control over the injured employee's compensation,

\(^\text{108}\) The uniform, which plaintiff considered to be too small for her frame, left portions of both her thighs and buttocks exposed. Id. at 604. In addition, she claimed that whenever she raised either of her arms, she exposed the side of her body above the waist. Id. at 605.

\(^\text{109}\) Id. at 607. As such, it was also asserted that "[d]ue to its revealing nature, the uniform caused [plaintiff] to endure harassment in the performance of her job," id., in that a number of people propositioned her sexually, while others had made lewd and lascivious comments and gestures. Id. at 605.

\(^\text{110}\) Id. at 607. Specifically, plaintiff alleged a violation of section 703(a) of the Civil Rights Act of 1964 (codified at 42 U.S.C. § 2000e-2(a) (1988)), which provides, in pertinent part, that "[i]t shall be an unlawful employment practice for an employer . . . to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges or employment, because of such individual's . . . sex." Id.

\(^\text{111}\) Id. at 609-10. The court supported its finding by stating that "Title VII's prohibition of sex discrimination was 'intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.'" Id. at 610 n.16 (quoting Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (7th Cir.), cert. denied, 404 U.S. 991 (1971)).

Furthermore, the court quickly disavowed the defendant's contention that a requirement that female lobby attendants wear a sexually revealing uniform constituted a bona fide occupational qualification ("BFOQ"). Id. at 611 (stating that "[i]ndeed, the evidence establishes that wearing the uniform interfered with [plaintiff's] ability to perform her job").

\(^\text{112}\) While the defendant in Sage Realty did argue that it was entitled to "unfettered discretion" in designing its employees' uniforms, the court decided that — unlike the typical 'grooming and dress policy' cases in which one's employment opportunities become limited on account of the employer's application of invidious criteria — "Sage's requirement that [plaintiff] wear a sexually revealing outfit in a public lobby unquestionably had an effect on her right to privacy" in addition to having more than a "negligible effect on [her] employment opportunities." Id. at 609 n.15.
terms, conditions, or privileges of employment. Nevertheless, while Sage Realty did pave the way for employees to sue their employers for requiring them to wear uniforms which precipitate sexual harassment by non-employees, not all grooming and dress requirements, per se, will give rise to a "hostile environment" cause of action. With respect to third-party sexual harassment, however, the employer will not necessarily be held liable in those cases where the employer exposes his employee to sexual harassment by the general public merely by establishing sexually-suggestive dress requirements until actual sexual harassment results.

B. THE RETAIL END: Powell v. Las Vegas Hilton Corp.

The United States District Court for the District of Nevada was the first federal court to directly confront the otherwise vestal issue of client-non-control third-party sexual harassment. Not altogether surprisingly, it was alleged to have occurred within the confines of a Las Vegas casino. In Powell, a female blackjack dealer com-

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113. See, e.g., EEOC v. Newtown Inn Assocs., 647 F. Supp. 957 (E.D. Va. 1986) concerning cocktail waitresses' allegations of sexual harassment on the job as a result of their employer's dress requirements and policy that waitresses flirt with customers; Priest v. Rotary, 634 F. Supp. 571, 581 (N.D. Cal. 1986) (holding a cocktail waitress established a prima facie case of sexual harassment after refusing to wear a sexually provocative dress as a condition of her employment); EEOC Dec. No. 81-17, 27 Fair Empl. Prac. Cas. (BNA) 1791 (1981) (involving a supervisor who contributed to other alleged instances of his inappropriate behavior towards a particular female employee by forcing her to wear a sexually revealing "Indian Maiden" costume during a 4-day visit by VIPs to their place of business); see also supra notes 14-16 and accompanying text.

114. The crux of a Title VII action based upon an employer's dress requirements lies in the factual determination of the reasonableness of the employer's decisions and the equal treatment of men and women alike with regard to such requirements. See, e.g., Carroll v. Talman Fed. Sav. & Loan Ass'n, 604 F.2d 1028, 1032-33 (7th Cir. 1979), cert. denied, 445 U.S. 929 (1980) (holding uniform requirements must be reasonable and applied equally to both sexes); Marentette v. Michigan Host, Inc., 506 F. Supp. 909, 911-12 (E.D. Mich. 1980) (upholding the validity of a Title VII action based on an employer's requirement that female waitresses wear sexually provocative uniforms, but dismissing the action on the grounds that the relief prayed for was not yet available under Title VII).

Under some circumstances, the employer may claim the employee had 'assumed the risk' by accepting employment after being informed of such requirements. Such a defense has recently been discussed in light of the case brought by several waitresses against the "HOOTERS" chain of restaurants where they claim the required uniforms, consisting of a skimpy, tight-fitting T-shirt accompanied with similar style shorts, encourage customer harassment. See Blum, supra note 15, at 7.

115. See Aalberts & Seidman, supra note 102, at 460.


117. Id.

118. Id.
plained that her discharge from the casino was made in retaliation against her protests of "hostile environment" sexual harassment committed by casino patrons. The defendant-casino moved for summary judgment, claiming that an employer could not be held liable for the sexual harassment of its employees by non-employee customers. The court, in denying the defendant's motion, held that "Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult," and that if the plaintiff could demonstrate to the jury that she was indeed a victim of hostile environment sexual harassment, her employer's liability would then depend on adequate factual proof that they knew or "in the exercise of reasonable care should have known" of the harassment and subsequently failed to "take immediate and appropriate corrective action . . . reasonably calculated to end the harassment." Even though the casino had already had a policy against harassment in force (in which any dealers having a problem were to notify a "floorperson"), the court held that, according to the plaintiff's allegations, "a reasonable jury could find, that [d]efendant's policy either was not enforced or its procedure was inadequate." Subsequently, at trial the jury decided in favor of the defendant-employer.

Although the Powell case was the first in which a federal court affirmed the validity of a cause of action against an employer for pure client-non-control third-party harassment, it was by no means the

119. Id. at 1025-26. Plaintiff complained of repeated incidents of lewd and lascivious comments being made about her anatomy by customers of the casino (e.g., being yelled at by an intoxicated customer who claimed she had "great tits"; being told she had "great legs"; being told dirty jokes; and being the subject of incessant and unusually long-standing glares), and furthermore that her complaints to supervisors of the harassment were ignored. Id.

120. Id. at 1027. Defendant's alternative argument that "it is inevitable in a job that requires constant contact with the public (particularly one in a city that is a 'fun' destination where people sometimes imbibe to excess . . . ) that customers will sometimes make inappropriate comments, sexual or otherwise," was held to be an inadequate defense for a summary adjudication. Id. at 1029.

121. Id. at 1028 (quoting Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986)).

122. Id. at 1029-30 (citations omitted). The court's formulation relied primarily on Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991), EEOC v. Hacienda Hotel, 881 F.2d 1504 (9th Cir. 1989), and the EEOC Guidelines, 29 C.F.R. § 1604.11(e) (1994). Powell, 841 F. Supp. at 1029-30. The court went on to say that "the reasonableness of an employer's remedy will depend on its ability to stop the harassment by the person who engaged in harassment." Id. at 1030 (quoting Ellison, 924 F.2d at 882); see also Saxton v. American Tel. & Tel. Co., 10 F.3d 526, 536 (7th Cir. 1993) (holding that "Title VII requires only that the employer take steps reasonably likely to stop the harassment").

123. Powell, 841 F. Supp. at 1030.

first time a federal court was presented with such a claim.125

V. THE IMPORTANCE OF AN EMPLOYER’S ABILITY TO PROMPTLY INITIATE SUITABLE REMEDIAL ACTION AIMED TOWARD CURING THE SEXUALLY HOSTILE ENVIRONMENT

A. THE CLIENT-NON-CONTROL CONTEXT

In 1984, the EEOC was presented with a claim of pure client-non-control third-party sexual harassment.126 In EEOC Dec. No. 84-3, a restaurant waitress complained that her employer had subjected her to unlawful Title VII sex discrimination by exposing her to the sexual innuendos of several restaurant patrons.127 The nexus of her complaint stemmed from a series of events which began one evening when four customers entered the restaurant and, upon sitting at the bar, immediately began hurling sexual epithets at her.128 After they were seated at one of her assigned tables, one man continued the harassment by “making grabbing gestures toward [her] breasts . . . [in addition to] slid[ing] his hand under the skirt of her uniform and squeez[ing] her buttocks.”129 Then, when the male waiter she had consequently asked to relieve her began waiting on the four men, they decided to leave the restaurant altogether.130 When the owner of the restaurant arrived later that evening, she reported the earlier incident to him.131 Before he left, he promised her that he would attempt to rectify the situation.132 Roughly an hour later, the owner returned, assuring her that he had spoken with the alleged harassers.

127. Id. The waitress also charged her employer with violating Title VII’s ban on retaliation for summarily discharging her when she complained of the harassment and informed her boss that she had also consulted with an attorney. Id.
128. Id. at 1888. One of the customers remarked in very explicit terms that he wished to engage in sexual activity with the plaintiff. Id.
129. Id.
130. Id.
131. Id. Both the waiter and another waitress supported her account of the events when the owner was informed. Id.
132. Id. In fact, before she even finished discussing the incident with the owner, he left the restaurant to join the four men, who at that point were waiting for him outside. Id.
and that they had apologized for their unruly behavior.133

The next evening, the owner arrived at the restaurant with three friends, among whom was the man who had grabbed her the night before.134 After having unsuccessfully waited for an apology, the aggrieved waitress, then off-duty, made a few derogatory remarks to the man who had grabbed her when passing by his table.135 When she was later confronted by the owner about these remarks, she complained of his “friend’s” behavior and expressed her refusal to tolerate such behavior any longer.136 The owner then told her she may no longer need to worry about that; when she notified him that she had spoken to an attorney in order to protect herself, he fired her.137

In examining the waitress’ case, the EEOC applied the non-employee sexual harassment standard set forth in its Guidelines.138 It determined that the defendant-owner had actual knowledge of the harassment because the plaintiff had, indeed, complained of it to him directly.139 However, the EEOC was concerned about the owner’s ability to initiate corrective action against the harasser and whether he had adequately attempted to do so in this case.140 It found that it was within the owner’s particular ability to confront the harasser because the harasser was a frequent customer and friend of the owner.141 The EEOC further noted that “immediate and appropriate corrective action by an employer is not limited to action required to stop sexual harassment that is presently occurring; it includes action addressing sexual harassment that has already occurred to ensure against its recurrence.”142 It was then ultimately determined that the employer’s “failure to take any action to assure the [complainant] that he did not condone sexual harassment of his employees and that she would not have to tolerate such conduct by a customer in the future”

133. Id.
134. Id.
135. Id.
136. Id. She expressed her disapproval with the customer’s conduct and charged that the restaurant’s environment “was conducive to sexual harassment.” Id. She also explained that she did not inform the owner sooner because she feared that, since the most common harassers were friends of his, complaining of their behavior would inevitably result in her immediate discharge. Id.
137. Id. at 1889.
138. Id. at 1890. For the exact language used in the EEOC Guidelines, see supra note 11.
139. Id. at 1891.
140. Id.
141. Id.
142. Id. at 1891 n.4.
was sufficient to subject him to liability for injuries she sustained as a result of the customers' harassment.143

B. THE CLIENT-CONTROL CONTEXT: OTIS V. WYSE144

In Otis v. Wyse, the plaintiff, a nurse at the Phillips County Medical Clinic and employee of the Great Plains Health Alliance, objected to the sexually harassing behavior of Dr. Wyse, an independent medical provider at the Clinic.145 Ms. Otis specifically alleged that, while she was merely an employee of one of the independent doctors at the clinic between May 1986 and 1988, Dr. Wyse left sex-related articles on her desk; requested sexual histories of his patients; and once left a “lotion-filled condom on her desk.”146 After Ms. Otis became a Great Plains employee in May 1989, Dr. Wyse’s behavior continued and, consequently, she complained to her supervisors at Great Plains about his sexually offensive conduct.147 Great Plains responded by issuing a letter to Dr. Wyse, directing him to “avoid all contact, including clinical supervision, with our employee, Sue Otis, and to avoid any conduct which unreasonably interferes with any clinic employee’s work performance or creates an offensive work environment.”148 Great Plains also warned Dr. Wyse that non-compliance with their directive could result in the termination of his contract to perform medical services.149

Several months had passed before Ms. Otis again felt that Dr. Wyse was harassing her, at which time she reported the incidents to her supervisors.150 Not long thereafter, Ms. Otis sought to increase her diminishing patient load and was told by the clinic manager that, in order to do so, she would need to resume working with Dr. Wyse.151 Several months later, the plaintiff resigned and brought suit under Title VII claiming the hostile work environment at the clinic.

143. Id. at 1891.
145. Id. at *1-2.
146. Id. at *1.
147. Id. at *2.
148. Id.
149. Id.
150. Id. Unfortunately, neither party introduced any evidence indicating whether or not any remedial action had been taken or whether Dr. Wyse’s behavior continued after Ms. Otis’ latest round of complaints. Id.
151. Id. When the plaintiff mentioned Great Plains’ directive, addressed specifically at Dr. Wyse’s inappropriate behavior towards her, she was told to “let the past go here and get on with it.” Id.
caused her to be constructively discharged.\footnote{152}

In Great Plains’ motion for summary judgment, it argued that it could not be held liable for the acts of Dr. Wyse, an independent contractor and non-employee.\footnote{153} In response, the court adopted the standard for third-party sexual harassment set forth in the EEOC Guidelines\footnote{154} and held that “the identity and employment status of the harasser is immaterial” and that the central issue was “whether the employer subjected its employee to a hostile work environment by allowing the known harassment to continue unabated.”\footnote{155} The court never considered the Variable Knowledge standard because it conclusively decided that the documented evidence of Great Plains’ affirmative knowledge of the hostile environment was sufficient.\footnote{156} Judge Vratil then focused on whether the measures taken by Great Plains’ were “prompt and reasonably calculated to end the harassment.”\footnote{157}

Because Great Plains had limited control over the harasser, the court held that their letter of reprimand could have been sufficient.\footnote{158} However, in denying defendant’s motion, the court held that whether one letter was sufficient or if additional action should have been taken was a factual issue for the jury to determine.\footnote{159}

In Wyse, the court considered “the extent of the employer’s control and any other legal responsibility which the employer may have with respect to the conduct of [the non-employee harasser].”\footnote{160} Thus, appropriate remedial measures in ordinary hostile environment cases may not necessarily be feasible in third-party contexts. It is important for the victim’s primary employer in client-control circumstances to be careful before undertaking remedial measures. Foolhardy action may alienate the client rather than apprise him/her of the situation and there will always be the possibility that a jury might one day reevaluate the propriety of those measures.

\footnotesize
\begin{itemize}
\item \footnote{152}{Id. at *2-3.}
\item \footnote{153}{Id. at *6.}
\item \footnote{154}{See supra note 11.}
\item \footnote{155}{Wyse, 1994 WL 566943, at *6.}
\item \footnote{156}{Id.}
\item \footnote{157}{Id.}
\item \footnote{158}{Id. at *7.}
\item \footnote{159}{Id.}
\item \footnote{160}{Id. (quoting 29 C.F.R. § 1604.11(e) (1994)).}
\end{itemize}
C. THE IMPORTANCE OF ANTI-DISCRIMINATION POLICIES

1. In the Client-non-control Context

As illustrated by EEOC Dec. No. 84-3,\textsuperscript{161} in client-non-control contexts, retail employers must be vigilant with regard to harassment of their employees and must assure their workforce that disorderly and offensive behavior by customers need not be tolerated. The best way to communicate this policy to their employees is through a formal, written sexual harassment policy that prohibits \textit{all} forms of sexual harassment, including third-party sexual harassment. This policy should clearly convey to all employees the precise behavior which constitutes sexual harassment.\textsuperscript{162} It should also advise employees that "sexual harassment may result from the behavior of third parties."\textsuperscript{163} Furthermore, supervisors must be trained so that they are familiar with the law and are properly equipped to recognize sexual harassment when it occurs.\textsuperscript{164} More importantly, they must be trained to deal with it promptly and effectively, especially in cases of third-party sexual harassment.\textsuperscript{165}

The anti-discrimination policy should encourage employees to report incidents of perceived unlawful conduct.\textsuperscript{166} It should include a complaint procedure which employees must utilize when reporting incidents of sexual harassment.\textsuperscript{167} Furthermore, investigations of all reported incidents should be kept as confidential as possible.\textsuperscript{168} It should also include a pledge from the highest officer in the company that no retaliatory action will be initiated against a reporting employee.\textsuperscript{169}

Once an employee has complained of third-party sexual harassment, the company must make it clear to the aggrieved employee that the company does not tolerate such behavior and that it will promptly

\textsuperscript{161} See supra notes 126-43 and accompanying text.
\textsuperscript{162} See Aalberts & Seidman, supra note 102, at 473-74.
\textsuperscript{163} Aalberts & Seidman, supra note 102, at 473.
\textsuperscript{164} Aalberts & Seidman, supra note 102, at 473-74.
\textsuperscript{165} Aalberts & Seidman, supra note 102, at 473-74.
\textsuperscript{167} Id.
\textsuperscript{168} Id. Maintaining confidentiality will encourage employees to report the incidents. Id.
\textsuperscript{169} See id. at 266 n.96.
investigate, and if necessary, take appropriate steps to prevent any recurrences. Because "courts [do] not settle for "lip service"" from companies who have merely conducted skeletal investigations or have essentially swept away problems of internal sexual harassment, there is no reason to expect otherwise in cases of third-party sexual harassment.¹⁷⁰

Lastly, companies should properly educate all of their employees regarding the illegality of third-party sexual harassment and all other forms of unlawful harassment. This education should include sensitivity and multi-cultural training in order to increase employees’ awareness of what constitutes inappropriate behavior in the workplace.

2. In the Client-control Context

Although widespread implementation of anti-discrimination policies can be effective in client-control contexts, where the primary employer has furnished the client with a significant degree of control over the employee’s terms and working conditions,¹⁷¹ the primary employer will invariably face a dilemma. All businesses naturally have strong concerns toward maintaining favorable and amicable relationships with their customers and clients in order to preserve their own fiscal health. Unfortunately, even a mere inquiry about the propriety of a client’s behavior, or that of its employees, could very likely jeopardize the stability of these relationships. Furthermore, because no reciprocal levels of control are granted by the client to the primary employer with respect to the client’s own employees, the latter would be hard pressed in trying to directly eliminate the sexual harassment occurring in the client’s workplace without first confronting the client or its liaison. This becomes especially true when the employee is being harassed by the client outside the primary employer’s geographic domain.

Therefore, the employer is essentially left with three alternatives: (a) to confront the client about the unlawful conduct and, in order to end the hostile work environment, risk irreparable damage to their business relationship; (b) to not confront the client and take independent remedial action;¹⁷² or (c) to not confront the client, decline to

¹⁷⁰. Aalberts & Seidman, supra note 102, at 473.
¹⁷¹. See supra note 19 and accompanying text.
¹⁷². Some solutions are not as effective as others in the long term, such as quick removal of the aggrieved employee from the hostile environment. While this may sometimes seem to be the most diplomatic solution, the removal of a woman from a large client’s account for her own protection may simply send a message to the other women in the company that if
pursue any corrective measures, and risk being subject to Title VII liability. Herein lies the paradox, because while the employer is in business to make money, it does not want its employees to be harassed on the job nor does it "want to hurt business either." For this reason, although employers must be wary in deciding which steps amount to proper remedial action, the second alternative mentioned above can often be the most practical means of solving the problem.

VI. PROPOSED SOLUTION

A. ADOPTION OF THE VARIABLE KNOWLEDGE STANDARD AND THE MULTI-EMPLOYER DOCTRINE IN CLIENT-CONTROL CASES

Before adopting the standard for third-party sexual harassment formulated in the current EEOC Guidelines, courts should consider the suitability of the Variable Knowledge standard when determining the appropriate measure for gauging an employer’s liability. At the outset, there should be a significant difference between the formulation of the knowledge standard as applied in control cases versus non-control cases. In the most notable client-control case to date, Magnuson v. Peak Technical Services, Inc., the plaintiff’s primary

they cannot protect themselves from such conduct, they cannot be a part of the megadeals. Winokur, supra note 8, at B1.

173. This is clearly not an option which this author advocates pursuing.


175. See supra note 11. The problem is even more pressing as increased third-party harassment litigation is likely to ensue upon the Equal Employment Opportunity Commission’s implementation of its newly proposed Guidelines on Harassment Based on Race, Color, Religion, Gender, National Origin, Age, or Disability, which state, in relevant part, that:

[a]n employer may also be responsible for the acts of non-employees with respect to harassment of employees in the workplace related to race, color, religion, gender, national origin, age, or disability where the employer or its agents or supervisory employees knew or should have known of the conduct and failed to take immediate and appropriate corrective action, as feasible. In reviewing these cases, the Commission will consider the extent of the employer’s control over non-employees and any other legal responsibility that the employer may have had with respect to the conduct of such non-employees on a case-by-case basis.


176. Compare 29 C.F.R. § 1604.11(e) (1994) (imposing a uniform standard satisfied by the employer’s actual or constructive knowledge of the harassment with respect to all claims of non-employee sexual harassment) with Magnuson v. Peak Technical Servs., Inc., 808 F. Supp. 500, 513 (E.D. Va. 1992) (imposing a variable standard of required knowledge based upon the degree of control retained by each of the plaintiff’s “employers” over the sexually hostile environment).

employer was held to a standard of actual knowledge of the harassment, even though that standard conflicted with the EEOC Guidelines.\textsuperscript{178}

To foster the development of a uniform rule, the EEOC should further elaborate on its knowledge standard in order to permit the courts to adequately consider not only the level of the primary employer’s control over the work environment, but also the level of client-control (i.e., whether or not that client sufficiently meets the definition of an “employer” under Title VII).\textsuperscript{179} The client’s ability to exercise a significant amount of control over the employee’s working conditions must affect the length of the measuring stick used to gauge the primary employer’s liability. After all, in cases such as Magnuson, where the employee has been assigned the duty of working within the confines of the client’s own work environment, it is the client who should bear the brunt of the responsibility of eliminating the abusive atmosphere. Accountability for tolerance of illegal conditions should rest with the entity in the best position to cure those conditions. All employers should be made aware that no one may be sexually harassed in their workplace, employees and non-employees alike.

When the Variable Knowledge standard is applied in conjunction with the Multi-Employer Doctrine, the primary employer will be required only to have had actual knowledge of the hostile work environment. This protects the primary employer from over-sympathetic juries who feel that the primary employer’s knowledge may be inferred “in favor of a greater good,” namely, compensating the injured employee. In client-control cases, when the employee is found to have multiple employers, the employee has a greater number of potential defendants from whom recovery may be sought and true accountability for the commission of unlawful conduct can be realized.

In addition, such an alteration of the knowledge standard in client-control cases will discourage plaintiffs from arbitrarily seeking retribution from the deepest pocket. If an enhanced likelihood of recovery is permitted against the client in whose workplace the harassment was committed (by imposing the ordinary EEOC standard of liability),\textsuperscript{180} then the goal of Title VII in deterring discrimination and harassment in the workplace is far closer to being achieved.

\textsuperscript{178} Id. at 513.
\textsuperscript{179} See supra notes 57-61 and accompanying text.
\textsuperscript{180} See supra note 11.
through the just apportionment of liability according to fault. At the very least, enough leeway should be provided in the EEOC Guidelines for a judge or magistrate to determine which standard ought to be applied in cases where both the employer and the client each retain a significant degree of control over the workplace environment.

The risk of harm which may result if the plaintiff is permitted to sue the direct employer under a constructive knowledge standard in client-control cases is also heightened by the degree of damages now recoverable under Title VII. Since the enactment of the 1991 amendments to the Civil Rights Act of 1964, a plaintiff who has asserted a Title VII violation against her employer for intentional discrimination has been granted the right to recover: 1) compensatory damages, which include "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses," and 2) punitive damages, which may be recovered "if the complaining party demonstrates that the respondent engaged in a discriminatory practice . . . with malice or with reckless indifference to the federally protected rights of an aggrieved individual." In addition, the 1991 Amendment affords litigants the right to a trial by jury. In light of these aforementioned alterations in the Civil Rights Act of 1964, some commentators claim that aggrieved parties are more likely to bypass filing under state law in favor of heading straight for federal court where they can try to obtain larger monetary judgments from a jury. As a result, the need for the EEOC and the judiciary to cure the current defects in the liability standards for employers in third-party harassment claims is even more pressing.

183. Id. § 1981a(b)(1) (emphasis added). Limitations on the aggregate amount of recovery have been established depending upon the size of the employer's workforce. See id. § 1981a(b)(3).
184. Id. § 1981a(c).
B. THE PROPRIETY OF APPLYING THE CURRENT EEOC STANDARD IN CLIENT-NON-CONTROL CASES

The standard to be applied in most client-non-control cases should remain consistent with the one currently established in the EEOC Guidelines. Since the non-employee customer retains virtually no level of control over the employee's compensation, terms, conditions, or privileges of employment, the employee has no other route through which she may seek recourse for a non-employee's Title VII violation. It is for that reason that the law should provide for a constructive knowledge standard. Plainly, the EEOC standard in client-non-control cases genuinely conforms with the duty of an employer to provide a workplace "free from discriminatory intimidation, ridicule, and insult." In most client-non-control cases, the employee is assigned to the primary employer's own workplace and it is precisely within that environment that the employer is expected to protect its employees. In these situations, employers who are lax in their supervisory duties should be held accountable for the injuries inflicted upon their employees if the harassment is sufficiently pervasive that a reasonable person would have had knowledge of it. Thus, the standard in client-non-control cases should conform with that used in pure hostile environment sexual harassment cases (i.e., a standard of actual or constructive knowledge).

VII. CONCLUSION

As the problem of third-party sexual harassment continues to grow, the EEOC and the federal judiciary must seek to harmonize their respective methods of analyzing these cases. Accountability for the allowance of an abusive work environment should always be of paramount concern. Determining where exactly to direct accountability is usually difficult, but that will generally be left to the fact-finder.

186. That is, the actual or constructive knowledge standard. See supra note 11.
187. While the customer can always complain about the employee's behavior and thereby indirectly influence the employer's actions, any resultant adverse decisions affecting that employee's job status are clearly the responsibility of the employer for which he may legitimately be held legally accountable.
188. See supra notes 36 & 121 and accompanying text.
Determining how to direct liability, however, is not as arduous. So long as the law in this area accurately focuses upon the wrongful act(s) and upon the parties best able to remedy the situation and prevent its recurrence, by examining the feasibility and propriety of the Variable Knowledge standard in client-control cases, proper accountability can remain paramount.

However, it is extremely important that lawyers educate their clients about the ramifications of third-party sexual harassment and that employers educate their employees about it. It is only through education and training that this problem can be prevented from escalating. Moreover, reasonable efforts must consistently be made to eliminate all forms of harassment in the workplace because whichever standard of knowledge is ultimately adopted by the judiciary in third-party harassment claims, “[p]revention is [clearly] the best tool for the elimination of sexual harassment.”

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189. 29 C.F.R. § 1604.11(f) (1994).

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