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ARTICLES

EMPLOYER LIABILITY FOR HOSTILE ENVIRONMENT SEXUAL HARASSMENT BASED ON A SINGLE OCCURRENCE

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I. INTRODUCTION

The law of sexual harassment has been constantly evolving over the past quarter of a century, from hardly being recognized as a legitimate form of discrimination before the 1970s, to being recognized, first in cases involving tangible losses, then in cases involving a

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hostile work environment, and finally in cases involving third party harassment. This evolution is significant, considering the fact that until 1981 the term “sexual harassment” had seldom been used.

One of the significant recent developments in sexual harassment law relates to the possibility that a single occurrence may suffice to establish a hostile environment claim. The purpose of this paper is to examine this development by considering both federal and state court pronouncements on the issue. I will also discuss how potential employer liability for hostile environment sexual harassment deriving from a single event is exacerbated by other recent legal developments such as increased monetary liability under the Civil Rights Act of 1991, the recent Supreme Court holding that no psychological harm is required to be proven in hostile environment cases, and the increasing number of third party harassment claims.

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3. See, e.g., Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981) (holding that sexual harassment violated Title VII even though there is no tangible job loss or economic detriment). Until 1981, sexual harassment suits had been limited to cases where tangible losses were suffered. See William L. Woerner & Sharon L. Oswald, Sexual Harassment in the Workplace: A View Through the Eyes of the Courts, 41 LAB. L.J. 786, 788 (1990).
5. See Woerner & Oswald, supra note 3, at 788.

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II. TWO FORMS OF SEXUAL HARASSMENT

Sexual harassment is a form of sex discrimination, and therefore a violation of Title VII of the Civil Rights Act of 1964 ("Title VII"). Title VII makes it unlawful for an employer “to discriminate against any individual with respect to . . . compensation, terms, conditions, or privileges of employment because of such individual’s race, color, religion, sex, or national origin." The Equal Employment Opportunity Commission, ("EEOC"), the agency charged with enforcement of Title VII, has issued Guidelines on Discrimination Because of Sex which specifically cover the issue of sexual harassment. The Guidelines recognize two forms of sexual harassment: "quid pro quo” sexual harassment and hostile environment sexual harassment.

A. “Quid Pro Quo” Sexual Harassment

"Quid pro quo” sexual harassment is characterized by sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature “when submission to such conduct is made either explicitly or implicitly a term or condition of an individual’s employment,” or where “submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual." This form of sexual harassment was recognized as far back as 1976. To establish a prima facie case of quid pro quo sexual harassment, the plaintiff must show that (1) she was subject to unwelcome sexual advances by a supervisor and (2) that her reaction to these...
advances adversely affected her compensation, terms, or conditions of employment. In this type of sexual harassment "the supervisor relies upon his apparent or actual authority to extort sexual consideration from an employee."  

B. Hostile Environment Sexual Harassment

Hostile environment sexual harassment, with which this paper is concerned, focuses on the atmosphere in which the plaintiff works. Specifically, it involves "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature, when 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."

In 1981, the United States Court of Appeals for the District of Columbia decided in *Bundy v. Jackson* that sexual harassment without any tangible job detriment still violated Title VII. In addition to finding that "conditions of employment" include the psychological and emotional work environment, the court stated that sexual harassment can become so pervasive as to create a discriminatory and offensive work environment sufficient to establish a Title VII claim.

It was not until 1986 that the United States Supreme Court, in *Meritor Savings Bank v. Vinson*, recognized hostile environment


16. "Sexual consideration" as it is used here, refers to the demand of sexual favors in exchange for employment benefits such as a promotion. See, e.g., Spencer v. General Elec. Co., 894 F.2d 651, 659 (4th Cir. 1990). In *Spencer*, the plaintiff alleged that she received smaller pay raises than another employee who had submitted to her supervisor's advances. *Id.* She also alleged being turned down for a promotion for which she was qualified. *Id.* The court found, however, that the promotion had not been denied based on sex. *Id.* at 659.

17. *Henson v. City of Dundee*, 682 F.2d 897, 910 (11th Cir. 1982).

18. See B. Glenn George, *The Back Door: Legitimizing Sexual Harassment Claims*, 73 B.U. L. Rev. 1, 11 (1993). Examples of conduct that may affect the work environment include touching, pinching, rubbing, or the use of demeaning comments, embarrassing jokes, and obscene pictures. *Id.*


21. *Id.* at 943-44. Until this decision, sexual harassment cases had been limited to tangible losses, and the term "sexual harassment" was hardly used. See Woerner & Oswald, *supra* note 3, at 788.

22. *Bundy*, 641 F.2d at 944.

23. *Id.*

sexual harassment as a valid Title VII cause of action. The plaintiff in Meritor Savings alleged that she was subjected to repeated demands for sexual favors by her supervisor over a four-year period. She admitted sleeping with him on about forty to fifty occasions for fear of losing her job.

The district court, finding that the alleged relationship was voluntary, and that it had not affected the plaintiff's continued employment, advancement, or promotions, denied relief. On appeal, however, the District of Columbia Circuit recognized that a hostile environment was sufficient grounds to support a valid Title VII claim. As a result, the court imposed absolute liability on employers for the conduct of supervisors, independent of the employer's knowledge.

The Supreme Court subsequently decided that a plaintiff may recover against an employer for a hostile environment by showing that unwelcome sexual conduct which discriminated on the basis of sex was "sufficiently severe or pervasive to alter the conditions of employment and create an abusive work environment." While the high court would not impose strict liability on employers, it did uphold liability for acts of supervisors that create a hostile environment in line with agency principles.

25. Id. at 73.
26. Id. at 60.
27. Id.
28. See Vinson v. Taylor, 23 Fair Empl. Prac. Cas. (BNA) 37, 42 (D.D.C. 1980), rev'd, 753 F.2d 141 (D.C. Cir. 1985), aff'd sub nom. Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986). The plaintiff had received several promotions over a four year period which the court found to be based entirely on merit. Id. The court also found that the existence of an employer policy prohibiting the offending behavior, coupled with the plaintiff's failure to complain thereunder, defeated her claim. Id.
30. See id. at 150-52.
31. The Supreme Court stated that evidence of the plaintiff's sexually provocative dress or speech is relevant to the welcomeness issue. Meritor Savings, 477 U.S. at 68-69. The district court, on the other hand, looked at voluntariness, as opposed to unwelcomeness. Vinson, 23 Fair Empl. Prac. Cas. (BNA) at 42.
32. See Meritor Savings, 477 U.S. at 66.
33. Although the court rejected the imposition of strict liability, Justice Marshall in a separate concurring opinion favored strict liability as in other Title VII cases. Id. at 75-76 (Marshall, J., concurring).
34. Meritor Savings, 477 U.S. at 72. The EEOC interprets agency principles as requiring a consideration of the employer's policies, as well as the victim's failure to pursue internal complaint procedures. Id. at 71. While the mere existence of a policy against the offending conduct or lack of actual notice of the harassment by the employee will not automatically protect employers, failure to use the employer's complaint procedure would shield the employer from liability absent actual notice. Id. See generally Katherine S. Anderson, Note.
III. ESTABLISHING A PRIMA FACIE CASE OF HOSTILE ENVIRONMENT SEXUAL HARASSMENT

The elements of a hostile environment claim were fashioned by lower courts in reliance on the Meritor Savings decision. Thus, in Rabidue v. Osceola Refining Co., the Sixth Circuit laid down five elements that the plaintiff must establish in order to prevail on a hostile environment theory. Under the rule utilized by that court, a plaintiff must prove that:

1. the employee was a member of a protected class;
2. the employee was subjected to unwelcome sexual harassment in the form of sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature;
3. the harassment complained of was based upon sex;
4. the charged sexual harassment had the effect of unreasonably interfering with the plaintiff's work performance and creating an intimidating, hostile, or offensive working environment that affected seriously the psychological well-being of the plaintiff; and
5. the existence of respondeat superior liability.

Without requiring proof of psychological harm, the Third Circuit in Andrews v. City of Philadelphia laid down similar requirements for establishing a prima facie case of hostile environment sexual harassment.


The court failed to resolve the issue of liability for harassment by co-workers. While EEOC Guidelines propose strict liability for the acts of supervisors, a knowledge condition, whether actual or constructive, is required for the acts of co-workers. See id. at 1262. Most lower courts also use a knowledge requirement for the acts of co-workers. Id. at 619-20.

35. Id. at 619-20.
36. Id. at 619-20.
37. The Supreme Court has since eliminated the requirement to establish psychological harm. See Harris v. Forklift Sys., Inc., 114 S. Ct. 367 (1993).
38. Rabidue, 805 F.2d at 619-20.
40. See id. at 1482. There the court found that a prima facie case is established when:
1. the employee suffered intentional discrimination because of sex;
2. the discrimination was pervasive and regular;
3. the discrimination detrimentally affected the plaintiff;
4. the discrimination would reasonably affect a reasonable person of the same sex in that position; and
5. the existence of respondeat superior liability. Id. Notably, the Supreme Court in the Harris decision required the work environment to be hostile from the perspective of both a reasonable person and the particular plaintiff. Harris, 114 S. Ct. at 370 (1993).
IV. HOW SERIOUS MUST THE OFFENDING CONDUCT BE TO CREATE A HOSTILE ENVIRONMENT?

The Supreme Court's failure to clearly define what constitutes a hostile environment in Meritor Savings has led to confusion in the lower courts. For example, in Meritor Savings, Justice Rehnquist spoke in terms of conduct that was sufficiently severe or pervasive to alter the victim's conditions of employment and create an abusive working environment. The EEOC, on the other hand, defines hostile environment sexual harassment in terms of conduct which unreasonably interferes with a victim's work performance or creates an intimidating, offensive, hostile work environment. This confusion was reflected in several cases.

In its recent ruling in Harris v. Forklift Systems, Inc., the Supreme Court revisited and clarified its previous ruling in Meritor Savings. In Harris, the president of a company subjected an em-
ployee to demeaning remarks and sexual innuendoes. She lost on a hostile environment claim in district court because the conduct had not had a serious effect on her psychological well-being. The Sixth Circuit affirmed. The Supreme Court reversed the lower court decisions and remanded the case.

Writing for a unanimous Court, Justice O'Connor concluded that Title VII is violated when the workplace is permeated with discriminatory behavior that is sufficiently severe or pervasive to create a "discriminatorily hostile or abusive working environment," and that the court must look at all of the circumstances to determine whether an environment is hostile or abusive. The opinion made it clear that no single factor is required.

V. CAN A SINGLE OCCURRENCE BE SERIOUS ENOUGH TO CREATE A HOSTILE ENVIRONMENT?

The question as to whether a single occurrence can establish liability for hostile environment sexual harassment is an important one. It assumes even more importance when consideration is given to factors such as the elimination of the requirement of psychological harm, the increased monetary awards that may be had in hostile environment cases, and the increasing incidence of claims for ha-

46. Id. at 369.
47. Id. at 370. See also Christine Woolsey, Employers Review Harassment Policies, BUS. INS., Nov. 15, 1993, at 1, 4 (commenting on the Harris decision).
49. Harris, 114 S. Ct. at 371. Although affirming Meritor Savings, the court used language which was more consistent with the relevant EEOC Guidelines.
50. Harris, 114 S. Ct. at 370 (quoting Meritor Savings, 477 U.S. at 64). In addition to creating an abusive working environment, Meritor Savings required the conduct to alter the victim's conditions of employment.
51. Harris, 114 S. Ct. at 371. The totality of the circumstances may include the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating, as opposed to a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance. Id.
52. Id.
53. Although psychological harm is not required, it is relevant. See supra note 52 (referring to the "totality of the circumstances" test utilized by the Supreme Court in Harris). The Court thus changed the requirement of psychological harm imposed by courts. See Paroline v. Unisys Corp., 879 F.2d 100 (4th Cir. 1989); Vance v. Southern Bell Tel. & Tel. Co., 863 F.2d 1503 (11th Cir. 1989); Sparks v. Pilot Freight Carriers, Inc., 830 F.2d 1554 (11th Cir. 1987); Rabidue v. Osceola Ref. Co., 805 F.2d 611 (6th Cir. 1986), cert. denied, 481 U.S. 1041 (1987).
rassment by customers and clients of the employer. At least one state court and several federal courts have made pronouncements on this issue. These are the courts to which we now turn for guidance.

A. Guidance from State Courts

In Radtke v. Everett, the Michigan Supreme Court held that a single act could, if severe enough, be sufficient to create a hostile environment. In Radtke, the defendant touched plaintiff, caressed her back and arms, moved his hands towards her breasts, and tried to kiss her while in the employee lounge. After futile complaints, she quit the next day and subsequently filed suit against her employers alleging, inter alia, sexual harassment.

The trial court held that a single act does not support a hostile environment sexual harassment claim and dismissed her suit. On appeal, however, the Michigan Court of Appeals held that a single act could suffice to create a hostile environment claim. After an appeal by the defendants to the Michigan Supreme Court, the court held that "although a single incident of sexual harassment is generally insufficient to constitute a hostile work environment, a single incident may be sufficient if severe harassment is perpetrated by an employer in a closely knit working environment." The court went on to affirm the appellate decision, concluding that the plaintiff had established a prima facie case of sexual harass-

scattered sections of 42 U.S.C.).


56. See infra text accompanying notes 57-99.


58. Id. at 168. Although this case was filed under Michigan's Elliot-Larsen Civil Rights Act, Mich. Comp. Laws Ann. § 37.2101 (West 1985 & Supp. 1992), it must be noted that the language of that act is deliberately identical to the analogous federal legislation and EEOC regulations issued thereunder. Subsection 37.2101(h) makes it clear that discrimination because of sex includes sexual harassment. See id. § 37.2101(h). It then proceeds to define quid pro quo and hostile environment sexual harassment in the same terms as the EEOC Guidelines. Compare id. § 37.2101 with 29 C.F.R. § 1604 (1992).


60. Radtke, 471 N.W.2d at 662. Plaintiff also sued for assault and battery. Id.

61. Id.

62. Id. at 665.


64. Id. at 158 (footnote omitted).
ment. The court noted that the Michigan civil rights legislation imposes liability "whenever sexual harassment creates a hostile environment" and, "[a]lthough rare, single incidents may create a hostile environment." Although Radtke is not a federal court decision, its potential impact on future federal sexual harassment cases in which a single event is alleged to have created a hostile environment cannot be discounted. This is especially true in light of the fact that the language of the Elliot-Larsen Civil Rights Act, under which the case was decided, deliberately tracks federal civil rights legislation.

B. Guidance from Federal Courts

A number of federal courts have made pronouncements on the question of whether a single act of sexual harassment can result in liability based on a hostile environment. In King v. Board of Regents, an assistant professor who was denied contract renewal brought a sex discrimination case against the university and several of its employees, including a sexual harassment claim against one pro-

65. The court of appeals had used a "reasonable woman" test in assessing the impact of the single act on the plaintiff's work environment. See Radtke, 471 N.W.2d at 664-65. The Michigan Supreme Court, finding that "hostile," "intimidating," and "offensive" are terms primarily determined by objective factors, was also persuaded that an objective reasonableness standard is mandated by the plain meaning of the statute. Radtke, 501 N.W.2d at 164. The supreme court stated that "[t]he alternative to using a reasonableness inquiry would be to accept all of the plaintiff's subjective evaluations of conduct, thereby imposing on employers liability for behavior that, for idiosyncratic reasons, is offensive to an employee." Id.

66. Radtke, 501 N.W.2d at 168 (emphasis in original). The court offered rape and violent sexual assault as two possible traumatic experiences which may fulfill the statutory requirement. Id. If a single incident, because it is not extreme, does not create an offensive or intimidating environment, the plaintiff must prove that the employer failed to rectify a problem after adequate notice and that a continuous or periodic problem existed or a repetition of an episode was likely to occur. Id.

In the instant case, recourse to the employer was fruitless because the perpetrator was the employer. Id. The court held that the alleged conduct, combined with this fact, permitted the single incident to be sufficient to reach the jury. Id. It stated further that although the same conduct perpetrated by a co-worker might not constitute a hostile work environment, when an employer in a closely knit working environment physically restrains an employee and attempts to coerce sexual relations, the totality of the circumstances permits a jury to determine whether the defendant's conduct was sufficient to have created a hostile work environment. Id.

68. See supra note 61.
69. See, e.g., King v. Board of Regents, 898 F.2d 533 (7th Cir. 1990); Bohen v. City of East Chicago, 799 F.2d 1180 (7th Cir. 1986).
70. 898 F.2d 533 (7th Cir. 1990).
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fessor under both 42 U.S.C. § 1983 and Title VII. In returning a special verdict, the jury found that the professor had subjected the plaintiff to sexual harassment.

On appeal, the Seventh Circuit adopted the Meritor Savings standard requiring the plaintiff to demonstrate that the employer has created a hostile or abusive working environment. The court reasoned that “[a]lthough a single act can be enough, generally, repeated incidents create a stronger claim of hostile environment, with the strength of the claim depending on the number of incidents and the intensity of each incident.” Agreeing with the factual findings below, the court stated further that “this is not the case of a single, innocent, sexual query. Instead, we have repeated unwelcome sexual advances, fondling and a physical attack.”

In Boehen v. City of East Chicago, a former employee of the City of East Chicago Fire Department brought an action alleging, inter alia, sexual harassment in violation of Title VII. Although the trial court found evidence of extreme and ongoing sexual harassment, it held that the plaintiff had been fired for “obstreperous and insubordinate conduct” and not in violation of Title VII. The Seventh Circuit found the district court’s conclusion reasonable and consistent, but believed that the plaintiff could establish sex discrimination under

   Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , 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.

Id.

72. King, 898 F.2d at 536. The case was simultaneously tried to the jury on the § 1983 counts and to the judge on the Title VII claims. Id.

73. Id.

74. Id. at 537.

75. Id.

76. The district court found that the professor repeatedly verbally assaulted the plaintiff, fondled her and at one point, physically attacked her. Id. at 535.

77. Id. at 540. A physical attack, depending on its nature and gravity, could, if unremedied, create liability for a hostile environment. In Radtke, Justice Riley did say that a violent sexual assault was a possible scenario, and that one such extremely traumatic experience could fulfill the statutory requirement. See Radtke, 501 N.W.2d at 168.

78. 799 F.2d 1180 (7th Cir. 1986).

79. Id. at 1182.

the Equal Protection Clause of the Fourteenth Amendment\textsuperscript{81} and maintain an action under 42 U.S.C. § 1983.\textsuperscript{82}

In examining the scope of the constitutional right to be free from sexual harassment by a state, the court referred to the holding in \textit{Meritor Savings}.\textsuperscript{83} The court stated that "a single, innocent, romantic solicitation which inadvertently causes offense to its recipient is not a denial of equal protection"\textsuperscript{84} and that "[a]s a general matter, a single discriminatory act against one individual can amount to intentional discrimination for equal protection purposes," but that evidence of a pattern or practice of discrimination is stronger evidence supporting a claim of discrimination.\textsuperscript{85}

In \textit{Chamberlin v. 101 Realty, Inc.},\textsuperscript{86} the plaintiff brought a Title VII action after being terminated by the president of the company.\textsuperscript{87} After five incidents of refusing unwelcome sexual advances, the president started to find fault with her work.\textsuperscript{88} He fired her after he returned from vacation to find that she had been unable to complete a "substantial work load."\textsuperscript{89} He discharged her notwithstanding the fact that plaintiff worked long hours in a good faith effort to finish the assigned tasks.\textsuperscript{90} Although holding that the plaintiff had suffered quid pro quo sexual harassment, the lower court found that the five incidents did not create a hostile environment.\textsuperscript{91} The First Circuit

\begin{thebibliography}{99}
\bibitem{81} U.S. CONST. amend. XIV.
\bibitem{82} \textit{Bohen}, 799 F.2d at 1183, 1185.
\bibitem{83} \textit{Id.} at 1186.
\bibitem{84} \textit{Id.}
\bibitem{85} \textit{Id.} at 1186-87. The court reversed and remanded on the equal protection issue. \textit{Id.} at 1185, 1188.
\bibitem{86} 915 F.2d 777 (1st Cir. 1990).
\bibitem{87} \textit{Id.} at 779.
\bibitem{88} \textit{Id.} at 780.
\bibitem{89} \textit{See id.} at 781 (quoting the district court).
\bibitem{90} \textit{Id.}
\bibitem{91} \textit{Chamberlin}, 915 F.2d at 783-85. The five incidents included holding her hand at a luncheon as well as statements that the plaintiff had a good body, that she looked good in tight jeans, that he liked his women with good looks and brains, and that he liked to put his women on a pedestal. \textit{Id.} at 780. While these incidents were relevant to hostile environment sexual harassment, the court did not deem them serious enough to have made her work environment abusive. Thus, the court only found quid pro quo sexual harassment. \textit{Id.} at 783. The plaintiff argued on appeal that the sole act of her firing established how abusive her work environment had become. \textit{Id.} at 782-83. The court rejected this argument reasoning that the severity element of a hostile environment claim is not necessarily met with evidence sufficient to establish quid pro quo sexual harassment. \textit{Id.} at 783. The court also opined that "an isolated sexual advance, without more, does not satisfy the requirement that an employee asserting a cause of action for hostile environment discrimination demonstrate an abusive work environment." \textit{Id.}, see \textit{Meritor Savings}, 477 U.S. at 67.
\end{thebibliography}
agreed.\textsuperscript{92} Finally, there is the recent Supreme Court ruling in \textit{Harris v. Forklift Systems, Inc.}\textsuperscript{93} In \textit{Harris}, the president of the company subjected the plaintiff to numerous incidents of unwelcome sexual advances and innuendoes, including suggesting that they go to a hotel to negotiate her raise, asking her to retrieve coins from his front pants pocket, and suggesting in front of others that she had promised sex to a customer in order to arrange a deal.\textsuperscript{94}

After complaining to no avail, plaintiff quit.\textsuperscript{95} Both the district court\textsuperscript{96} and the Sixth Circuit\textsuperscript{97} held for the defendant, finding that the plaintiff had not established psychological harm, a prerequisite to establishing a hostile environment.\textsuperscript{98}

The Supreme Court reversed, however, holding that psychological harm is not required to establish a hostile environment and that the determination of whether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances.\textsuperscript{99}

\textbf{VI. EMPLOYER LIABILITY}

For cases based on a hostile environment theory, a significant number of courts predicate employer liability on the employer’s actual or constructive knowledge of the offending conduct.\textsuperscript{100} When a supervisor is involved, most courts impute knowledge to the employer since the supervisor is an agent of the employer.\textsuperscript{101} Some courts,
however, still require the plaintiff to establish actual or constructive knowledge on the part of the employer. The employer may still avoid liability by taking prompt and appropriate remedial action, such as firing or relocating the culprit.

With respect to the actions of agents and supervisory employees, the EEOC Guidelines hold employers liable irrespective of whether the acts complained of were authorized or forbidden by the employer and regardless of whether the employer knew or should have known of them. Additionally, harassment of an employee by co-workers will result in employer liability if the employer knew or should have known of the conduct, unless prompt and appropriate corrective action was taken.

The Supreme Court in Meritor Savings found that employers are not always automatically liable for sexual harassment by supervisors and urged courts to look to agency principles for guidance. Courts have differed, however, in their application of agency principles. For example, the Second Circuit has interpreted agency principles as holding that an employer is liable for a hostile environment created by a supervisor if he uses his actual or apparent authority to further the harassment, or if the existence of an agency relationship aided him in the harassment. If the culprit is a mere co-worker or a low-level supervisor not relying on supervisory authority to harass, then the employer is liable if it provided no reasonable avenue for the complaint or knew of the harassment but did nothing about it.


103. See, e.g., Dornhecker v. Malibu Grand Prix Corp., 828 F.2d 307, 309 (5th Cir. 1987) (holding that there is no liability where prompt remedial action is taken). When posed with this situation, the Seventh Circuit did not consider the relevant question to be solely whether the remedial action was successful, but whether the employer's total response was reasonable under the circumstances. See Brooms v. Regal Tube Co., 881 F.2d 412, 421 (7th Cir. 1989).

104. 29 C.F.R. § 1604.11(c) (1993).

105. See id. § 1604.11(d).

106. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 72-73 (1986). The Court acknowledged that its rule was in some tension with the EEOC Guidelines which hold employers liable for acts of supervisors regardless of notice. Id. at 71.


108. Karibian, 14 F.3d at 780.
VII. FACTORS HEIGHTENING POTENTIAL EMPLOYER LIABILITY FOR A SINGLE ACT OF SEXUAL HARASSMENT

A. A Single Act Could Create Substantial Monetary Liability Under the Civil Rights Act of 1991

Before the passage of the Civil Rights Act of 1991,109 a successful Title VII plaintiff was entitled to injunctive relief, including reinstatement, back pay, lost benefits, attorney's fees, certain litigation costs, and interest.110 As a result of the passage of the 1991 Act, a plaintiff who prevails in a Title VII action for intentional discrimination may also be entitled to recover compensatory damages, including damages for emotional pain, suffering, inconvenience, mental anguish, and loss of enjoyment of life in addition to punitive damages in cases where the plaintiff can prove that the employer discriminated with malice or reckless indifference to the employee's civil rights.111

The Act gives a plaintiff suing for compensatory or punitive damages the right to demand a jury trial.112 Attorney's fees may also be awarded, including expert fees.113 Additionally, if the defendant has mixed motives for an employment decision,114 attorney's fees, costs, declaratory and injunctive relief may be awarded to the plaintiff, provided it is established that race, color, religion, sex, or national origin was a "motivating factor" in reaching that decision, even if the employer is able to show that the same decision would have been

111. 42 U.S.C. § 1981a (Supp. V 1993). The maximum amounts that can be recovered for both compensatory and punitive damages under § 1981a(b)(3) are as follows:
   (A) $50,000 for employers with 15 to 100 employees;
   (B) $100,000 for employers with 101 to 200 employees;
   (C) $200,000 for employers with 201 to 500 employees;
   (D) $300,000 for employers with over 500 employees.

Id. § 1981a(b)(3).

The employer must have the stated number of employees in 20 or more calendar weeks in the preceding or current year. See id. § 1981a(b). For a discussion of the issue of whether the statute's provisions have retroactive application, see Janice R. Franke, Retroactivity of the Civil Rights Act of 1991, 31 AM. BUS. L.J., 484 (1993).
114. An "employment decision" is a decision that affects some aspect of the plaintiff's employment, such as promotion, pay, etc.
made absent the impermissible factors. In such a case, relief may not include compensatory or punitive damages, reinstatement, hiring, back pay, or promotion.

Previously, under Title VII a sexual harassment plaintiff could recover only economic losses. Since hostile environment cases do not usually involve tangible economic losses, little or no monetary relief was available, thereby leaving victims economically remediless in hostile environment cases. Providing a remedy for a discriminatory hostile work environment, even absent economic loss, is therefore an overdue and welcome development.

B. A Single Act Need Not Cause Psychological Harm

Before the Supreme Court's decision in *Harris v. Forklift Systems, Inc.*, several circuits held that the harassment a plaintiff experiences in the workplace must be so pervasive as to cause psychological harm.

In its recent *Harris* decision, the Supreme Court ruled that as long as the environment would reasonably be perceived and is perceived as hostile or abusive, there is no requirement that it also be psychologically injurious, even though the effect of the conduct on the employee's psychological well-being would be relevant. Eliminating any requirement to show psychological harm enhances a plaintiff's chances of showing that a single unremedied act of sexual harassment created a hostile environment. Thus, a single physical attack of a sexual nature which causes an employee to quit after the employer fails to remediate upon notification could suffice to have created a hostile environment, although the plaintiff's psychological well-being was not necessarily harmed.

119. *Id.*
123. The EEOC explicitly rejected the interpretation of its Guidelines to require psycho-
C. A Single Act of a Non-Employee Could Create Employer Liability

The possibility that a single act of harassment, if unremedied, may suffice to create a hostile environment, coupled with increasing claims of harassment by non-employees, could lead to serious liability problems for employers. For example, an employer may be held liable for the sexual harassment of an employee by a customer or client if the employer had actual or constructive notice of the harassment yet failed to take immediate and appropriate remedial action.

The Guidelines state that an employer may be held "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." The Guidelines also provide that "[i]n 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.

Harassment cases involving non-employees fall into two catego-

logical harm even before the high court handed down its Harris decision. See Guidelines on Harassment Based on Race, Color, Religion, Gender, National Origin, Age or Disability, 58 Fed. Reg. 51,266 (1993) (to be codified at 29 C.F.R. § 1609).

A third party harassment claim is a sexual harassment claim brought by an employee against an employer because of the acts of a non-employee precipitated by the employer's actions — such as requiring the employee to wear sexually revealing clothes — or because the employer, although aware of the acts of harassment, failed to promptly remediate. Such remediation could, in the latter case, take the form of discharging a culprit consultant. See Mark Hansen, The Next Litigation Frontier? Claims Against Employers for Third Party Harassment on the Rise, 79 A.B.A. J. 26 (1993) (reporting on the rising tide of third party harassment claims).

125. See, e.g., Dornheker v. Malibu Grand Prix Corp., 828 F.2d 307 (5th Cir. 1987) (holding that an employer who, upon being informed by employee that a hired consultant was harassing her, told employee that she did not have to work with him anymore and who fired the consultant at the end of the month was not liable for failing to take prompt remedial action); Llewellyn v. Celanese Corp., 693 F. Supp. 369 (W.D.N.C. 1988) (holding that an employer who failed to investigate the alleged sexual harassment of an non-employee for two weeks was liable for failing to take prompt remedial action); EEOC v. Sage Realty Corp., 507 F. Supp. 599 (S.D.N.Y. 1981) (holding that an employer who refused to let employee change her uniform after numerous suggestive remarks were passed to her by non-employees was liable for not taking prompt corrective action).

126. 29 C.F.R. § 1604.11(e) (1993).

127. This Guideline is only logical, since an employer who causes or condones a discriminatorily hostile work environment should not be able to abdicate its responsibility to ensure a workplace free of discrimination by pleading a third-party act.
ries; those in which an employer’s policy results in harassment and those in which the employer fails to take timely and appropriate action after receiving or having knowledge of an employee complaint of sexual harassment by a third party. In the first instance, the employer has a job requirement or policy which creates a situation in which a third party sexually harasses an employee as a direct consequence of the policy. In such a case, liability may be imposed on the employer.

One such example is the case of EEOC v. Sage Realty Corp. In Sage Realty, the employer required all of its female lobby attendants to wear a one-size-fits-all bicentennial uniform. The plaintiff’s uniform was ill-fitting and revealing, leading to sexual propositions and lewd comments by third parties walking through the lobby. She complained to her manager about the uniform and the subsequent harassment, but no remedial action was taken. When she refused to continue to wear the uniform, she was fired.

The court found that a prima facie case had been established because wearing the uniform was a condition of employment based on sex. The court also found that the defendant had failed to put forth a legitimate non-discriminatory reason for imposing the condition on female lobby attendants. The court found that, by requiring plaintiff to wear the uniform, the employer “made [the plaintiff’s] acquiescence in sexual harassment by the public . . . a prerequisite of her employment as a lobby attendant.” The court found the employer liable under Title VII and awarded the plaintiff back pay for wrongful discharge.

In Marentette v. Michigan Host, Inc., the employer required

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128. See generally BARBARA LINDEMAN & DAVID D. KADUE, SEXUAL HARASSMENT IN EMPLOYMENT LAW 250 (1992). See infra text accompanying notes 132-71 for examples of acts of third party harassment in both categories.
131. Id. at 604.
132. Id. at 604-05.
133. Id. at 605.
134. Id. at 606.
135. Id. at 607-08.
136. Id. at 608.
137. Id. at 609-10.
138. Id. at 613.
waitresses\textsuperscript{140} to wear sexually provocative uniforms which resulted in verbal and physical sexual harassment, insults, and taunts from customers.\textsuperscript{141} No remedial action was taken by the employer even after complaints by the employees.\textsuperscript{142} Although the court dismissed the case because the injunctive relief sought was no longer necessary,\textsuperscript{143} it agreed with \textit{Sage Realty} "that a sexually provocative dress code imposed as a condition of employment which subjects persons to sexual harassment could well violate the true spirit and the literal language of Title VII."\textsuperscript{144} The court did not however, reach the issue as to whether the dress code in this case actually violated Title VII.\textsuperscript{145}

Because it is possible that a single act of harassment can create a hostile environment, one egregious act by a non-employee affecting an employee as a direct result of an employer's job requirement — such as a sexually provocative dress code — can therefore also lead to employer liability.

The second instance of harassment of employees by non-employ-
ees relates to failure by the employer to take immediate and appropriate action in certain situations involving third parties. The EEOC Guidelines also imposes liability on an employer if appropriate corrective action is within the employer's control and the employer or its agents or supervisory employees know or should have known of the non-employee's conduct.\[146\]

In *EEOC Dec. No. 84-3*,\[147\] a waitress was verbally and physically assaulted by a male customer\[148\] while waiting on his table.\[149\] She was fired after informing her employer of the harassment.\[150\] The apparent grounds for her dismissal were her refusal to tolerate such behavior, her preference not to wait on the customer in the future and the fact she had contacted an attorney.\[151\]

The EEOC found the employer liable because it had failed to take corrective action.\[152\] The Commission found that corrective action was within the employer's control for two reasons: (1) because of the employer's relationship with the customer, the employer could have directly notified the customer of the impermissibility of his conduct toward the complainant; and (2) the employer could have acceded to the complainant's wish not to wait on the customer in the future.\[153\]

The Commission also thought it was important that the employer had taken no action to assure the complainant that sexual harassment would not be condoned and that she would not have to tolerate such conduct on the customer's part in the future.\[154\]

In *Magnuson v. Peak Technical Services*,\[155\] the plaintiff was hired as a manufacturer's representative by Peak Technical Services and assigned to work for Volkswagen of America, to whom Peak sent employees under a service contract.\[156\] Volkswagen subsequently assigned her to Fairfax Volkswagen to help with their sales promotion campaigns.\[157\]

\[146\] 29 C.F.R. § 1604.11(e) (1993).
\[148\] Evidence indicated that the owner had a friendly personal relationship with this customer. *Id.* at 1889-90.
\[149\] *Id.* at 1888.
\[150\] *Id.* at 1889-90.
\[151\] *Id.*
\[152\] *Id.* at 1891.
\[153\] *Id.*
\[154\] *Id.*
\[156\] *Id.* at 504.
\[157\] *Id.* at 505.
Subsequently, plaintiff was sexually harassed on numerous occasions by Blaylock, the General Manager at Fairfax Volkswagen.\(^{158}\) The conduct was always unwelcome.\(^ {159}\) She notified her supervisor at Peak, but was told to “put up with it for the sake of Volkswagen.”\(^ {160}\) She also complained, to no avail, to the manager at Volkswagen of America in charge of the manufacturer’s representative program.\(^ {161}\)

Blaylock called the plaintiff’s supervisor at Peak and called her a “bad apple,” resulting in her reassignment to other dealerships.\(^ {162}\) Peak later informed her of her impending termination, whereupon the plaintiff called the manager at Volkswagen about the possibility of being relocated.\(^ {163}\) The manager at Volkswagen told the plaintiff she was “too cute,” and that the same harassment would occur even if she were reassigned.\(^ {164}\)

On the issue as to whether an employer could be held liable for harassment by non-employees, the court held that if the employer knew of the harassment but failed to take remedial action,\(^ {165}\) it could be held liable under the EEOC’s Guidelines.\(^ {166}\) The court denied the employer’s summary judgment motion on the issue of liability.\(^ {167}\)

Thus, the possibility that just one occurrence of harassment could create liability for an employer through the theory of hostile environment sexual harassment — if egregious enough and not promptly remediated — poses potentially serious problems for employers with respect to both the acts of employees and non-employees.

\(^{158}\) Id.

\(^{159}\) Id.

\(^{160}\) Id. at 506.

\(^{161}\) Id.

\(^{162}\) Id.

\(^{163}\) Id.

\(^{164}\) Id.

\(^{165}\) On the issue as to what constitutes appropriate remedial action in the context of non-employee harassment, conflicting responses have been given by the courts. Thus, in Dornhecker v. Malibu Grand Prix Corp., 828 F.2d 307 (5th Cir. 1987), an employer whose employee was being harassed by a consultant informed her that she would not have to work with him, and did not renew his contract at the end of the month. \textit{Id.} at 308. The court found in a suit by the employee that the employer was not liable since prompt remedial action had been taken. \textit{Id.} at 309. On the other hand, in Llewellyn v. Celanese Corp., 693 F. Supp. 369 (W.D.N.C. 1988), the court found that the employer had failed to take prompt remedial action because it did not investigate the harassment for two weeks after it was reported. \textit{Id.} at 380-81.

\(^{166}\) Magnuson, 808 F. Supp. at 513.

\(^{167}\) Id.
In Radike v. Everett, Justice Riley gave rape and violent sexual assault as two possible scenarios where a single act could be found sufficient to create a hostile environment. Where the harasser is a non-employee, it would be a mistake for an employer to think that such an incident is appropriately dealt with by law enforcement as a criminal matter only. The employer should move quickly to remediate; e.g., by terminating a culprit consultant or a supplier or evicting a wayward customer. Evidently, many employers are unaware that they may be held liable for sexual harassment of an employee by a customer or a client and may, therefore, fail to respond adequately.

VIII. CONCLUSION

The possibility that one occurrence may create a hostile environment raises potentially serious liability concerns for employers that should not be ignored. The fact that such conduct need not cause psychological harm, coupled with the increased monetary recoveries under the Civil Rights Act of 1991 and the increasing tide of non-employee harassment claims, further exacerbates the question of potential liability.

So far, only the Radike decision has actually made a comprehensive and well thought-out pronouncement on this issue. The federal cases on the issue, including the recent Supreme Court decision in Harris, which stated that "no single factor is required" in determining liability for a hostile work environment, leave open the possibility that a single act may suffice to create a hostile environment and, therefore, create employer liability if not promptly remediated.

One recent development that mitigates potential employer liability is the adoption by the Supreme Court of a two-pronged perspective for viewing a hostile environment, which requires that both a reasonable person and the victim find the environment hostile or abu-

169. Id. at 168.
170. See supra notes 126-27 & 166 and accompanying text.
sive.\textsuperscript{175} This will make it more difficult to prove a hostile environment compared with the reasonable woman standard.\textsuperscript{176}

In spite of the softening effect of the two-pronged standard on employer liability, employer policies on sexual harassment cannot overlook this potentially troublesome issue and must incorporate measures to address potential liability for single acts of harassment on the part of both employees and non-employees. A policy that provides for prompt investigation and remediation of such acts is crucial.

It remains to be seen exactly how serious a threat this area of sexual harassment law poses to employer liability and what positions future state and federal decisions will articulate. What is certain is that employers and courts will take even more seriously the push to eliminate the incidence of workplace sexual harassment.

\textsuperscript{175} Id. at 370.

\textsuperscript{176} It has been argued that partly because of their greater physical and social vulnerability to sexual coercion, women view sexual harassment differently from men. See Kathryn Abrams, \textit{Gender Discrimination and the Transformation of Workplace Norms}, 42 \textit{VAND. L. REV.} 1183, 1203-15 (1989).