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EMPLOYER LIABILITY FOR SEXUAL HARASSMENT: INCONSISTENCY UNDER TITLE VII

Congress enacted title VII of the Civil Rights Act of 1964 to prevent specific types of employment discrimination. Despite this mandate, federal courts originally viewed sexual harassment as "nothing more than a personal proclivity, peculiarity or mannerism." In one of the earliest opinions examining a sexual harassment claim, a court refused to find sexual harassment actionable under title VII, commenting that the employer did not discriminate because the supervisor merely "satisfied a personal urge." However, since the late 1970's, courts have recognized that sexual harassment in the workplace is unlawful sexual discrimination under title VII of the Civil Rights Act of 1964.

Title VII makes it unlawful for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex." In 1980, the Equal Employment Opportunity Commission (EEOC), entrusted with interpreting and enforcing title VII, issued guidelines clarifying title VII's prohibition of sexual harassment as a form of sex discrimination. Although not binding authority, the courts generally defer to the EEOC guidelines and have held


3. Id.

4. See, e.g., Simmons v. Lyons, 746 F.2d 265, 269-70 (5th Cir. 1984) (sexual harassment is gender employment discrimination prohibited by title VII); Henson v. City of Dundee, 682 F.2d 897, 902 (11th Cir. 1982) (hostile environment sexual harassment violates title VII); Tomkins v. Public Serv. Elec. & Gas Co., 568 F.2d 1044, 1048-49 (3d Cir. 1977) (a supervisor violates title VII when he makes sexual submission a condition of employment); Barnes v. Costle, 561 F.2d 983, 990-91 (D.C. Cir. 1977) (termination of job due to gender is a prima facie violation of title VII); Garber v. Saxon Business Prods., Inc., 552 F.2d 1032, 1032 (4th Cir. 1977) (employer acquiescence to supervisor's requirement of sexual favors as a condition of employment violates title VII).


6. EEOC Guidelines, 29 C.F.R. § 1604.11(a) (1987). For the relevant portions of the EEOC guidelines concerning discrimination because of sex, see id. § 1604.11(a)-(g).

sexual harassment unlawful under title VII.\textsuperscript{8}

The EEOC defined sexual harassment as “[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature.”\textsuperscript{9} Two types of sexual harassment may constitute employment discrimination: “quid pro quo” and “hostile environment” sexual harassment. Quid pro quo sexual harassment occurs when sexual favors are demanded as a condition of employment and a tangible job consequence follows as a result of the employee’s response.\textsuperscript{10} Hostile environment sexual harassment occurs when an individual’s work environment is made offensive or antagonistic due to pervasive or severe gender based harassment.\textsuperscript{11} An employee can establish either form of sexual harassment to prove that she\textsuperscript{12} suffered unlawful employment discrimination.\textsuperscript{13}

In most states, liability may attach to the employer as well as the individual who commits the sexual harassment.\textsuperscript{14} Agency principles are important.


9. EEOC Guidelines, 29 C.F.R. § 1604.11(a) (1987). Sexual harassment is unlawful conduct under title VII when unwelcome sexual demands are placed on only one gender. The unwelcome sexual advances become a condition of employment and submission to or rejection of these advances can either affect an employment decision or make the work environment hostile. See id. (1987). See generally Williams, 413 F. Supp. at 657 (government employee terminated because she refused to submit to supervisor’s sexual demands).


11. See Bundy, 641 F.2d at 945 (environment made hostile by four supervisors’ requests of sexual favors from employee).

12. Generally, this Note will refer to the employee who brings the sexual harassment as “she” or “her” for simplicity and because females are most frequently the complainants in sexual harassment cases. Although a sexual harassment claim can be brought by either a male or female, title VII cases are predominately brought by females. See generally Comment, A Theory of Tort Liability for Sexual Harassment in the Workplace, 134 U. PA. L. REV. 1461 (1986) (finding women to be the main victims of sexual harassment).


14. Employee suits against individuals are usually based on contract or tort theories such as assault and battery, wrongful discharge, or intentional infliction of emotional distress. See, e.g., Lucas v. Brown & Root, Inc., 736 F.2d 1202, 1203-06 (8th Cir. 1984); Phillips v. Smalley Maintenance Sys., 711 F.2d 1524, 1533-37 (11th Cir. 1983); Stewart v. Thomas, 538 F. Supp. 891, 894-97 (D.D.C. 1982). State law generally limits the choice of tort remedy. See generally Montgomery, Sexual Harassment in the Workplace: A Practitioner’s Guide to Tort Actions, 10 GOLDEN GATE U.L. REV. 879, 888-902 (1980) (discussing available tort remedies). In addi-
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in the analysis of employer liability. The position of the individual who commits the harassment, that is, whether he or she is a supervisor or co-worker, helps determine whether employer liability can be imputed. If the employer knew of the sexual harassment, regardless of the identity of the perpetrator, and did not take remedial action, the employer is liable. Liability ensues because failure to take immediate remedial action is an implicit approval of the discriminatory conduct.

Often, a supervisor or co-worker commits the unlawful discriminatory conduct. It is difficult to determine employer liability for supervisors or co-workers who commit sexual harassment when the employer has no knowledge of the unlawful conduct. Most courts have held employers vicariously liable for a supervisor who commits quid pro quo sexual harassment when the supervisor uses the employer’s authority to create a tangible job consequence. However, because a supervisor does not necessarily use employer granted authority in a hostile environment scenario, courts have required evidence of knowledge to find employer liability. Nevertheless, at least one circuit court has held employers strictly liable for the unlawful acts of their supervisors, regardless of whether the sexual harassment is of the quid pro quo or hostile environment form. The supporting rationale is that the supervisor need not make actual use of his authority if the mere cloak of authority enables him to sexually harass an employee.

19. See, e.g., Katz, 709 F.2d at 254-55; Henson, 682 F.2d at 909-10.
20. See, e.g., Katz, 709 F.2d at 255; Henson, 682 F.2d at 905.
22. Vinson, 753 F.2d at 150; see also Meritor Sav. Bank v. Vinson, 106 S. Ct. 2399, 2411 (1986) (Marshall, J., concurring). Agency analysis is applied to determine employer liability for supervisors and co-workers who sexually harass employees. To find employer liability, the
In Meritor Savings Bank v. Vinson, the United States Supreme Court did not establish a definitive rule on employer liability due to an incomplete trial record. However, the Supreme Court did recognize that title VII prohibits sexual harassment, that the hostile environment analysis is essential in determining whether sexual harassment occurred, and that an employee’s failure to invoke an employer’s grievance procedure does not necessarily insulate the employer from liability. In addition, the Supreme Court emphasized that the focus of a sexual harassment inquiry is on the “unwelcomeness” of the advances, not the “voluntariness” of the plaintiff’s conduct.

In Vinson, petitioner brought a claim against her supervisor and employer alleging that she had been sexually harassed in the workplace. The United States District Court for the District of Columbia held that Vinson was not a victim of sexual harassment. The court found that Vinson had not been required to submit to her supervisor’s sexual demands in order to keep her job or receive promotions, but rather that she had voluntarily engaged in sexual relations. Additionally, the district court held that even if sexual harassment had been proven, the bank would not be liable because it lacked knowledge of unlawful conduct.

The United States Court of Appeals for the District of Columbia Circuit courts require that the employer had knowledge of the unlawful conduct and failed to correct the situation. Barrett, 726 F.2d at 427.

24. Id. at 2408. Specifically, Justice Rehnquist found that the “debate over the appropriate standard for employer liability has a rather abstract quality about it given the state of the record in this case . . . . We therefore decline the parties’ invitation to issue a definitive rule on employer liability . . . .” Id.
25. Id. at 2404-05. Regarding a claim of sex discrimination under title VII, the Court stated: “Without question, when a supervisor sexually harasses a subordinate because of the subordinate’s sex, that supervisor ‘discriminate[s]’ on the basis of sex.” Id. at 2404.
26. Id. at 2406. The Court found that “[s]ince the [EEOC] guidelines were issued, courts have uniformly held, and we agree, that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment.” Id. at 2405.
27. Id. at 2408-09. However, the Court commented: “Petitioner’s contention that respondent’s failure [to use grievance procedures] should insulate it from liability might be substantially stronger if its procedures were better calculated to encourage victims of harassment to come forward.” Id. at 2409.
28. Id. at 2406.
30. Id.
31. Id. at 42.
32. Id.
reversed and remanded the district court's decision.\(^3\) The court of appeals criticized the district court for holding Vinson's conduct voluntary, thereby foreclosing a finding of sexual harassment.\(^4\) The appellate court considered the voluntariness of her participation immaterial.\(^5\) Additionally, the court of appeals remanded *Vinson* because the district court failed to consider the hostile environment analysis in determining sexual harassment.\(^6\) Furthermore, the appellate court rejected the district court's requirement of knowledge for finding employer liability and held that employers may be vicariously liable for their supervisors' sexual harassment.\(^7\)

The United States Supreme Court affirmed the court of appeals, holding that sexual harassment violates title VII.\(^8\) Justice Rehnquist, writing for the majority, concluded that Vinson's allegations stated a cause of action for hostile environment sexual harassment.\(^9\) The Court also determined that a sexual harassment inquiry should focus upon whether the sexual advances were "unwelcome," not whether the plaintiff participated voluntarily.\(^10\) In addition, the majority indicated that the court of appeals erred in holding the employer vicariously liable for the actions of its supervisor.\(^11\) Based upon the definition of "employer" given in title VII, Justice Rehnquist concluded that Congress intended agency principles to limit employer liability.\(^12\)

In a concurring opinion, Justice Marshall agreed with the majority that sexual harassment violates title VII.\(^13\) Justice Marshall, however, argued that employers should be held vicariously liable for their supervisors' sexual harassment,\(^14\) emphasizing that employers are held liable for their supervi-


\(^{34}\) *Id.* at 146.

\(^{35}\) *Id.*

\(^{36}\) *Id.*

\(^{37}\) *Id.* at 145-46.


\(^{39}\) *Id.* at 2405-06.

\(^{40}\) *Id.* at 2406.

\(^{41}\) *Id.* at 2408.

\(^{42}\) *Id.* Justice Rehnquist stated:

\[\text{"We do agree with the EEOC that Congress wanted courts to look to agency principles for guidance in this area. While such common-law principles may not be transfereable in all their particulars to Title VII, Congress' decision to define "employer" to include any "agent" of an employer ... surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible."}\]

\(^{43}\) *Id.* at 2409 (Marshall, J., concurring).

\(^{44}\) *Id.* at 2409-10 (Marshall, J., concurring).
sors' conduct for all other title VII violations.\textsuperscript{45}

This Note will discuss sexual harassment and its treatment as employment
discrimination under title VII. It will trace the evolution of the quid pro quo
and hostile environment forms of harassment. It will compare and contrast
the development of title VII principles as applied in race, religion, and na-
tional origin discrimination with the development of those principles as ap-
plied in sexual harassment cases. This Note will then focus on Vinson's
effect on employers' liability for supervisors' violations.\textsuperscript{46} Finally, it will
conclude that holding employers vicariously liable for a supervisor's sexual
harassment is the most effective motivation for employers to take affirmative
steps to prevent sexual harassment in the workplace.

I. TITLE VII'S GOAL OF ERADICATING DISCRIMINATION

Title VII of the Civil Rights Act of 1964 forbids employment discrimina-
tion on the basis of race, religion, national origin, or sex.\textsuperscript{47} Title VII seeks to
prevent these forms of employment discrimination, rather than merely rem-
edy them.\textsuperscript{48} Congress entrusted the Equal Employment Opportunity Com-
mission (EEOC) with the power to prevent illegal employment
discrimination.\textsuperscript{49} Pursuant to that authority, the EEOC created guidelines
interpreting title VII and setting forth requirements for employer
compliance.\textsuperscript{50}

In 1972, Congress amended the Civil Rights Act of 1964 with the Equal
Employment Opportunity Act because title VII was not effectively eradicat-
ing employment discrimination.\textsuperscript{51} The legislative history of the 1972 amend-
ment indicates congressional disappointment in the persistently

\textsuperscript{45} Id. at 2411 (Marshall, J., concurring).
\textsuperscript{46} This Note will discuss, but will not focus on, the issue of employers' liability for co-
workers' sexual harassment.
(1982)).
\textsuperscript{48} EEOC Guidelines, 29 C.F.R. § 1604.11(c), (f) (1987). The EEOC's guidelines suggest
that title VII's goal is prevention of sex discrimination in the workplace. Id. The EEOC
guidelines state that “[p]revention is the best tool for the elimination of sexual harassment.”
Id. § 1604.11(f). Expanding upon this statement, the guidelines explain that “[a]n employer
should take all steps necessary to prevent sexual harassment from occurring.” Id. In addition,
the guidelines state that if sexual harassment is not prevented, employers can be held vicari-
ously liable for the acts of their supervisors. Id. § 1604.11(c).
\textsuperscript{49} See 42 U.S.C. § 2000e-5(a). Congress listed the EEOC's powers under the subheading
"Power of the Commission to Prevent Unlawful Employment Practices." Id.
\textsuperscript{50} Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604 (1987). Because of
EEOC expertise, courts typically give the guidelines great deference, but guidelines are not
(quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).
Sexual Harassment is an unacceptable level of discrimination in the workplace. The Equal Employment Opportunity Act increased the EEOC's power to issue judicially enforceable cease and desist orders and extended jurisdiction of the Act to federal and state agencies. The original purpose and intent of title VII was clarified by the amendment.

Congress did not address the issue of employer liability in either the original Act or the 1972 amendment. However, the EEOC issued guidelines holding employers vicariously liable for supervisors discrimination on the basis of race, religion, national origin, or sex. Although courts are not bound by the EEOC's guidelines, they generally afford them great deference. For example, courts have promulgated standards based on the purpose of title VII as well as the EEOC guidelines. Courts have held employers vicariously liable for discrimination by supervisors based on race, religion, and national origin, but not for all forms of sexual harassment.

The persistence of discrimination, and its detrimental effects require a reaffirmation of our national policy of equal opportunity in employment. It is essential that seven years after the passage of the Civil Rights Act of 1964, effective enforcement procedures be provided the Equal Employment Opportunity Commission to strengthen its efforts to reduce discrimination in employment.


52. Discussing the proposed amendment to the Civil Rights Act of 1964, the committee stated: Despite the progress which has been made since passage of the Civil Rights Act of 1964, discrimination against minorities and women continues. ... An examination of the statistics with respect to the progress of equal employment opportunities clearly shows that the voluntary approach currently applied has failed to eliminate employment discrimination. During the first 5 years of its existence, the Commission has received more than 52,000 charges. Of these, 35,445 were recommended for investigation. Of this number approximately 56% involved complaints of discrimination because of race, 23% discrimination on sex, and the remainder involved charges of discrimination because of national origin or religion.

54. See EEOC Guidelines, 29 C.F.R. § 1604.11(c) (1987), which state that "an employer ... is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment 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."
55. See supra notes 7, 50, and accompanying text.
56. See, e.g., Flowers v. Crouch-Walker Corp., 552 F.2d 1277, 1282 (7th Cir. 1977) (race
II. CASE LAW UNDER TITLE VII: PARALLELS OF DEVELOPMENT IN SEXUAL HARASSMENT, RACE, RELIGION, AND NATIONAL ORIGIN EMPLOYMENT DISCRIMINATION

The foundation for the application of title VII in the sexual harassment context lies in prior law developed in the race, religion, and national origin contexts. However, sexual harassment discrimination cases raise distinct considerations, making it difficult to apply the same analytical principles used in race, religion, and national origin discrimination cases. Sexual advances can be ambiguous or even welcome and, thus, cannot be treated in the same manner as racial slurs which are intrinsically offensive and presumptively unwelcome. Therefore, the quid pro quo analysis used in sexual harassment cases generally does not apply in race and national origin employment discrimination cases, because an employee need not show a tangible job consequence to prove that discrimination affected a condition of discrimination); Young v. Southwestern Sav. & Loan Ass'n, 509 F.2d 140, 144 (5th Cir. 1975) (religious discrimination); EEOC v. University of N.M., 504 F.2d 1296, 1302 (10th Cir. 1974) (national origin discrimination).

75. See Katz v. Dole, 709 F.2d 251, 255 (4th Cir. 1983), and Henson v. City of Dundee, 682 F.2d 897, 905-09 (11th Cir. 1982) (holding employers strictly liable for quid pro quo harassment, but requiring knowledge for an employer to be held liable for hostile environment harassment). But see Vinson v. Taylor, 753 F.2d 141, 149-50 (D.C. Cir. 1985) (remanded to determine existence of hostile environment and employer liability), aff'd in part and remanded in part sub nom. Meritor Sav. Bank v. Vinson, 106 S. Ct. 2399 (1986) (the first hostile environment case to hold an employer strictly liable for a supervisor's sexual harassment of an employee under his supervision).


59. The federal judiciary is aware that sexual advances are sometimes welcomed and that sexual liaisons between employees usually are private and unacknowledged. See generally Brief for The United States and The Equal Employment Opportunity Commission as Amici Curiae at 13, Meritor Sav. Bank v. Vinson, 106 S. Ct. 2399 (1986) (No. 84-1979) [hereinafter EEOC Brief] (pointing out the differences between sexual harassment and race discrimination).

60. Id.
Despite the imperfect analogy between these causes of action, courts have applied the same basic principles to all forms of employment discrimination.\textsuperscript{62} For example, the courts first developed the hostile environment form of harassment in race, religion, and national origin cases. In Rogers \textit{v. EEOC},\textsuperscript{63} an Hispanic plaintiff sued under title VII for national origin discrimination, claiming that the employer's segregation of its clients made the employee's work environment hostile.\textsuperscript{64} The United States Court of Appeals for the Fifth Circuit held that "a working environment [that is] heavily charged with . . . discrimination"\textsuperscript{65} may violate title VII.\textsuperscript{66}

The hostile environment analysis also applies in race\textsuperscript{67} and religious employment discrimination cases. In \textit{Weiss v. United States},\textsuperscript{68} the United States District Court for the Eastern District of Virginia held that an employee can bring a suit under title VII for religious discrimination that creates a hostile environment.\textsuperscript{69} The court stated that "when an employee is repeatedly subjected to demeaning and offensive religious slurs . . . by his supervisor, such activity necessarily has the effect of altering the conditions of his employment within the meaning of Title VII."\textsuperscript{70} In addition, the


\textsuperscript{63} 454 F.2d 234 (5th Cir. 1971), \textit{cert. denied}, 406 U.S. 957 (1972).

\textsuperscript{64} \textit{Id.} at 237.

\textsuperscript{65} \textit{Id.} at 238.

\textsuperscript{66} \textit{Id.} In addition, the court found that title VII is not limited to protecting an employee's economic interest, but can also protect an employee's psychological well-being. \textit{Id.}

\textsuperscript{67} In \textit{Firefighters Inst. for Racial Equality v. City of St. Louis}, 549 F.2d 506 (8th Cir.), \textit{cert. denied}, 434 U.S. 819 (1977), the United States Court of Appeals for the Eighth Circuit concluded that employers have a duty to provide a nondiscriminatory work environment. \textit{Id.} at 514-15. In \textit{Firefighters}, the court found that the supper clubs, created by the firemen to prepare dinners at the firehouse, excluded minority members. \textit{Id.} at 514. A discriminatory hostile environment resulted from the segregated eating facilities. \textit{Id.} The court in \textit{Firefighters} ordered the district court on remand to direct the fire department to promulgate regulations requiring the supper clubs to either include minorities or prohibit the supper clubs from using city facilities. \textit{Id.} at 515.


\textsuperscript{69} \textit{Id.} at 1056.

\textsuperscript{70} \textit{Id.}
Weiss court recognized that there is a parallel between religious discrimination and sexual harassment, stating that a quid pro quo form of religious discrimination can occur when a supervisor requires an employee to change or renounce a religious belief to receive an employment benefit.\(^{71}\)

These cases illustrate that there is a parallel between the development of title VII sexual harassment case law and that of race, religion, and national origin case law. The race, religion, and national origin cases established the foundation for the hostile environment analysis, currently used in the sexual harassment context. Although these causes of action each present their own unique problems, principles applied in these cases generally apply to all forms of employment discrimination prohibited by title VII.

III. CASE LAW UNDER TITLE VII: APPLYING GENERAL TITLE VII PRINCIPLES TO SEXUAL HARASSMENT

A. Quid Pro Quo Sexual Harassment

Originally, federal courts refused to interpret title VII of the Civil Rights Act of 1964 as prohibiting sexual harassment in the workplace.\(^{72}\) Williams v. Saxbe \(^{73}\) first established that sexual harassment is sex discrimination prohibited by title VII.\(^{74}\) In Williams, the plaintiff asserted that she had favorable employment conditions until she repulsed her supervisor’s sexual advances, \(^{75}\) after which, he harassed her and eventually terminated her employment.\(^{76}\) The court held that the termination of her employment constituted sex discrimination as prohibited by title VII because Williams was fired for not submitting to her supervisor’s sexual demands.\(^{77}\) In Williams and other early cases, the courts found quid pro quo sexual harassment

\(^{71}\) See id.


The court in Corne expressed reservations about making sexual harassment a violation of title VII. The majority concluded that "an outgrowth of holding such activity to be actionable under Title VII would be a potential federal lawsuit every time any employee made amorous or sexually oriented advances towards another." Corne, 390 F. Supp. at 163.


\(^{74}\) Id. at 657. The court held that "[r]etaliatory actions of a male supervisor, taken because a female employee declined his sexual advances, constitutes sex discrimination within the definitional parameters of Title VII of the Civil Rights Act of 1964." Id. (emphasis omitted).

\(^{75}\) Id. at 655.

\(^{76}\) Id. at 655-56.

\(^{77}\) Id. at 657-62.
actionable\textsuperscript{78} where an employee suffered some economic loss or other tangible employment effect.\textsuperscript{79} The \textit{Williams} holding, recognizing that sexual harassment is prohibited by title VII, is now accepted in all circuits.\textsuperscript{80}

In \textit{Barnes v. Castle},\textsuperscript{81} the United States Court of Appeals for the District of Columbia found that a government supervisor terminated the employee's job because she refused to submit to her supervisor's sexual requests.\textsuperscript{82} The court reasoned that the supervisor's sexual advances imposed special conditions of employment on Barnes because of her gender.\textsuperscript{83} The court con-


\textsuperscript{79} For an example of tangible job detriments, see infra note 97.

\textsuperscript{80} See, e.g., Simmons v. Lyons, 746 F.2d 265, 269-70 (5th Cir. 1984) (sexual harassment will constitute gender employment discrimination violative of title VII); Henson v. City of Dundee, 682 F.2d 897, 902 (11th Cir. 1982) (hostile environment sexual harassment violated title VII); Tomkins v. Public Serv. Elec. & Gas Co., 568 F.2d 1044, 1048-49 (3d Cir. 1977) (supervisor violates title VII when he makes sexual submission a condition of employment); Barnes v. Costle, 561 F.2d 983, 990-91 (D.C. Cir. 1977) (use of gender as a criterion for terminating employment is a prima facie violation of title VII); Garber v. Saxon Business Prods., Inc., 552 F.2d 1032, 1032 (4th Cir. 1977) (employer acquiescence to supervisor's requirement of sexual favors as a condition of employment violates title VII); see also 1 A. LARSON & L. LARSON, EMPLOYMENT DISCRIMINATION § 41.62 (1985) ("[T]he universal rule now is that sexual harassment on the job can be employment discrimination within the meaning of Title VII.").

\textsuperscript{81} 561 F.2d 983 (D.C. Cir. 1977).


\textsuperscript{83} \textit{Barnes}, 561 F.2d at 989. The facts illustrated the special conditions placed upon the plaintiff as a result of her gender. The plaintiff claimed that her supervisor "repeatedly told her that indulgence in a sexual affair would enhance her employment status; that he endeavored affirmatively but futilely to consummate his proposition; and that, upon her refusal to accede, he campaigned against her continued employment in his department and succeeded eventually in liquidating her position." Id.

The court held "that gender was also involved to a significant degree. For while some but not all employees of one sex were subjected to the condition, no employee of the opposite sex was affected . . . ." Id. at 991. The court also cautioned:

These situations, like that at bar, are to be distinguished from a bisexual superior who conditions the employment opportunities of a subordinate of either gender upon participation in a sexual affair. In the case of the bisexual superior, the insistence upon sexual favors would not constitute gender discrimination because it would apply to male and female employees alike.

\textit{Id.} at 990 n.55.
cluded that these special conditions constituted a prima facie case of sex discrimination as prohibited by title VII.\textsuperscript{84}

The United States District Court for the District of Colorado refined the reasoning of \textit{Barnes} in \textit{Heelan v. Johns-Manville Corp.},\textsuperscript{85} explaining that title VII proscribes only those sexual advances that are unwanted, sufficiently enduring, and imputed as conditions of employment.\textsuperscript{86} As \textit{Heelan} illustrates, the standard applied to establish quid pro quo sexual harassment is that a condition be placed on an employee based on gender\textsuperscript{87} and a tangible job detriment occur as a result of this condition.\textsuperscript{88}

\textbf{B. Hostile Environment Sexual Harassment}

Unlike the quid pro quo analysis, in a hostile environment analysis a plaintiff need not show that a tangible job detriment resulted.\textsuperscript{89} Rather, the plaintiff is required to prove that sexual harassment occurred, resulting in a hostile working environment.\textsuperscript{90} The unpleasant working environment is viewed as a discriminatory condition of employment based on gender.\textsuperscript{91}

\textsuperscript{84} \textit{Id.} at 990. Two months later, the United States District Court for the Eastern District of Michigan adopted the reasoning of \textit{Barnes} in \textit{Munford v. James T. Barnes \\& Co.}, 441 F. Supp. 459, 465 (E.D. Mich. 1977). The court recognized that sexual stereotyping, assignment of specific tasks or roles to men or women based upon their sex, is not the exclusive basis for a sex discrimination suit under title VII. \textit{Id.} at 465. The court noted that title VII also prohibits artificial barriers to employment applied to one gender and not the other, such as sexual harassment. \textit{Id.} at 465-66.

Similarly, the United States Court of Appeals for the Third Circuit in \textit{Tomkins v. Public Serv. Elec. \\& Gas Co.}, 568 F.2d 1044 (3d Cir. 1977), added to this analysis by finding that illegal employment discrimination need not be based on characteristics "peculiar to one of the genders." \textit{Id.} at 1047 n.4 (quoting Williams v. Saxbe, 431 F. Supp. 654, 658 (D.D.C. 1976)). Rather it need only be proved that gender was a motivating factor in the discrimination. \textit{Id.} at 1047.

\textsuperscript{85} 451 F. Supp. 1382 (D. Colo. 1978). In \textit{Heelan}, the plaintiff's supervisor informed her that her job would be extremely demanding requiring extensive travel and family sacrifices. \textit{Id.} at 1387. The supervisor then put his arm around Heelan and explained that while she presently did not know the job qualifications, she would soon discover them. \textit{Id.} A year later sexual demands were made of Heelan by her supervisor who promised job security if she would submit, and termination if she would not. These threats continued for almost two years. \textit{Id.} Heelan refused the advances and was ultimately fired. \textit{Id.}

\textsuperscript{86} \textit{Id.} at 1388-89.

\textsuperscript{87} \textit{Id.} at 1389-90. For an example of a gender based condition placed on an employee see \textit{supra} note 83.

\textsuperscript{88} \textit{Heelan}, 451 F. Supp. at 1389-90. In Fisher v. Flynn, 598 F.2d 663 (1st Cir. 1979), the supervisor's romantic advances were not shown to affect the employee's job. \textit{Id.} at 666. As a result, no tangible employment impact could be proven, and the court dismissed the case. \textit{Id.}


\textsuperscript{90} For the elements of a prima facie case of hostile environment sexual harassment, see \textit{infra} text accompanying notes 103-04

\textsuperscript{91} In \textit{Katz v. Dole}, 709 F.2d 251, 254 (4th Cir. 1983), the court explained that when
Thus, the scope of title VII claims is expanded by permitting a cause of action based on a hostile environment in addition to a cause of action based on quid pro quo harassment.92

In Bundy v. Jackson,93 a court first applied the hostile environment analysis in the sexual harassment context.94 The United States Court of Appeals for the District of Columbia Circuit held that actionable sex discrimination is not limited to gender-based conditions resulting in a tangible job consequence, but occurs whenever sex is a motivating factor in treating an employee in an adverse manner.95 In Bundy, the plaintiff complained of sexual harassment by four of her supervisors at various times during her employment,96 but she could not prove that she suffered a tangible job effect.97 Despite her failure to prove quid pro quo harassment, the court recognized that sexual harassment becomes actionable when a hostile workplace is created based on gender.98

The United States Court of Appeals for the Eleventh Circuit adopted the hostile environment analysis in Henson v. City of Dundee.99 Here, the plaintiff, a police dispatcher, claimed that the police chief sexually harassed her, which led to her resignation.100 The court of appeals rejected a claim of quid pro quo harassment101 but found that the employee had a right to a trial on the merits to determine whether sexual harassment made her job environment hostile.102 The court, clarifying the elements necessary to es-

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92. See Fisher, 598 F.2d at 666 (illustrating the harsh results that occurred prior to the recognition of the hostile environment analysis).


94. Id. at 943-44.

95. Id. at 939-40.

96. Id. at 940. When the plaintiff complained to a high level supervisor about sexual advances that two of her immediate supervisors had made to her he "casually dismissed Bundy's complaints, telling her that 'any man in his right mind would want to rape you.' " Id. (quoting Bundy's supervisor Lawrence Swain). He then proceeded to ask her for sexual favors. Id.

97. Id. at 942. The district court determined that Bundy did not suffer any tangible job detriment because of her refusal to submit to sexual advances: she was not fired, demoted, or prevented from receiving a promotion. Id.

98. See id. at 943-44.

99. 682 F.2d 897 (11th Cir. 1982).

100. Id. at 899. The court of appeals found that the plaintiff was not constructively discharged, but chose to resign for personal reasons. Id. Because there was no tangible job detriment, the court applied the "hostile environment" analysis. Id. at 901.

101. Id.

102. Id. at 912-13.
tablish a prima facie case of hostile environment sexual harassment,\textsuperscript{103} required the plaintiff to demonstrate that: "(1) [She] belongs to a protected group. (2) [She] was subjected to unwelcome sexual harassment. (3) The harassment complained of was based upon sex. (4) The harassment complained of affected . . . terms, conditions, or privileges of employment."\textsuperscript{104} The court of appeals then remanded the case to the district court to examine the totality of the circumstances and determine whether the harassment was enduring and offensive enough to constitute a hostile environment.\textsuperscript{105}

The United States Court of Appeals for the Fourth Circuit adopted the hostile environment analysis in \textit{Katz v. Dole}.\textsuperscript{106} In \textit{Katz}, an air traffic controller claimed that she was sexually harassed by her fellow employees and supervisor prior to the termination of her employment.\textsuperscript{107} The court outlined the plaintiff's burden of persuasion in a sex discrimination suit. First, the plaintiff must make a prima facie case of employment discrimination.\textsuperscript{108} If the plaintiff meets this burden, the employer must defend its action as a valid business justification.\textsuperscript{109} Even if legitimate business reasons exist, the employee may prove that the alleged business justification was merely a pretext for discrimination.\textsuperscript{110}

In \textit{Cummings v. Walsh Construction Co.},\textsuperscript{111} the United States District Court for the Southern District of Georgia recognized that title VII prohib-

\textsuperscript{103.} \textit{Id.} at 903-04.
\textsuperscript{104.} \textit{Id.} at 909 (emphasis omitted).
\textsuperscript{105.} \textit{Id.} at 913.
\textsuperscript{106.} 709 F.2d 251 (4th Cir. 1983).
\textsuperscript{107.} \textit{Id.} at 253. The court explained that the plaintiff may have been terminated because of her alleged involvement in an illegal strike. \textit{Id.} Nevertheless, in its opinion the court found: The FAA workplace was pervaded with sexual slur[s], insult[s] and innuendo[s], and Katz was personally the object of verbal sexual harassment by her fellow controllers. This harassment took the form of extremely vulgar and offensive sexually related epithets addressed to and employed about Katz by supervisory personnel as well as by other controllers. \textit{Id.} at 254.
\textsuperscript{108.} \textit{Id.} at 256; see also Bundy v. Jackson, 641 F.2d 934, 950-51 (D.C. Cir. 1981). Adjusting the components of a prima facie case to the facts presented in \textit{Bundy}, the court found that: Plaintiff must show that she belongs to a protected group, that she was qualified for and applied for a promotion, that she was considered for and denied the promotion, and that other employees of similar qualifications who were not members of the protected group were indeed promoted at the time the plaintiff's request for promotion was denied. \textit{Id.} at 951 (citing Kunda v. Muhlenberg College, 463 F. Supp. 294, 307 (E.D. Pa. 1978)).
\textsuperscript{109.} \textit{Katz}, 709 F.2d at 256. This analysis is used in all title VII cases to allocate the burden of proof. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-05 (1973); see also Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981).
\textsuperscript{110.} \textit{Katz}, 709 F.2d at 255-56.
its hostile environment sexual harassment. Moreover, the court determined that an employee's mental well-being is a "term[, ] condition[ ] or privilege[ ] of employment" under title VII. Thus, if the sexual harassment is so antagonistic and persistent that it affects the plaintiff's mental health, a cause of action exists under title VII.

Despite the courts' application of similar principles to establish violations of title VII, they do not apply the same principles to determine employer liability. The courts find employers strictly liable for their supervisors' racial, religious, and national origin discrimination, but apply different rules to employers whose supervisors sexually harass employees.

IV. EMPLOYER LIABILITY UNDER TITLE VII

A. Use of Agency Principles to Determine Employer Liability Under Title VII

Although title VII makes it unlawful for "an employer" to discriminate on the basis of sex, it does not specify the basis for employer liability arising from discrimination. Title VII defines the term "employer" to include as "any agent" a person, individual, or organization "engaged in an industry affecting commerce." Courts require the application of agency principles to establish employer liability based on this definition. The term "agent" is not explicitly defined in title VII, leading courts to struggle in the application of agency principles to title VII law. Courts try to determine employer liability by applying either common law agency principles or a broader interpretation of agency consistent with title VII's remedial purposes.

Common law agency principles dictate that an employee is an "agent" if...
he acts within the scope of his employment.  

An agent's actions fall within the scope of his employment if he exercises either actual or apparent authority.  

Apparent authority exists when the employer's conduct makes it reasonable to believe that the supervisor has authority, regardless of whether the employer actually gave him the authority.  

Under general agency principles "[a] master is not subject to liability for the torts of his servants acting outside the scope of their employment." Therefore, strict application of common law principles would rarely result in employer liability for employment discrimination because employers do not employ supervisors to harass subordinates.  

Moreover, the employer could insulate himself from liability by creating a policy against employment discrimination. For example, if an employer had a policy against sexual harassment, sexual advances would be considered "personal proclivities," outside the authority granted a supervisor and, therefore, outside the scope of employment.

In contrast, a broad view of agency, consistent with title VII's remedial purposes, would not permit this result. The broad view of agency would conclude that as long as the discrimination is work related, the employer is liable for the supervisor's unlawful discrimination. This particular view of agency places more weight on the special relationship between an employer and his supervisors. This interpretation is similar to the one used under the National Labor Relations Act. Under the National Labor Relations Act, if a supervisor violates section 8(a) by discriminating against a union employee, he is liable for his acts.

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121. See EEOC Brief, supra note 59; see also Restatement (Second) of Agency § 219(1) (1958).
122. Restatement (Second) of Agency §§ 7, 8A (1958).
123. Id. § 8.
124. Id. § 219(2). An agent's illegal acts are imputed to a principal through the common law principles of vicarious liability or respondeat superior. Vicarious liability is in effect indirect liability, whereby a principal is responsible for his agent's conduct. Black's Law Dictionary 1404 (5th ed. 1979); see also W. Sell, Sell on Agency § 95 (1975). Similarly, respondeat superior means that a master is liable for his servant's conduct performed in the scope of employment. Black's Law Dictionary at 1179; see also W. Keeton, D. Dobbs, R. Keeton & D. Owen, Prosser and Keeton on the Law of Torts § 69 (1984).
127. Id.
128. Id.
129. 29 U.S.C. § 151 (1982). Interestingly, the National Labor Relations Act defines employer as including "any person acting as an agent of an employer, directly or indirectly." Id. § 152(2). But see Barnes v. Costle, 561 F.2d 983, 997 (1976) (MacKinnon, J., concurring) (comparing interpretation given under the National Labor Relations Act with the interpretation to be given title VII).
member because of his protected status, \(^{131}\) an employer's ignorance of this
conduct, or a supervisor's acts outside the scope of his employment and con-
trary to company policy, are immaterial; the employer would be liable. \(^{132}\)
Courts determined that to do otherwise "would provide a simple means for
evading the Act by a division of corporate personnel functions." \(^{133}\)

Agency law concepts such as the determination of when an agent is acting
within the scope of his employment are critical in determining employer lia-
B. Employer Liability for Race, Religion, and National
Origin Discrimination

Without exception, employers face liability for supervisors' violations of
title VII on the basis of race, religion, and national origin. \(^{134}\) Employers are
liable even if they lacked knowledge of the unlawful discrimination. The
common law view of agency and the broad view of agency dictate this result.
For example, when a supervisor fires an employee for racially motivated rea-
sons, the employer is held liable for the unlawful discrimination. \(^{135}\) The
common law theory supporting employer liability is that the employer gave
the supervisor the authority to hire or fire individuals, and is therefore, ac-
countable for the misuse of that authority. \(^{136}\)

The broad view of agency, taking into account title VII's remedial pur-
pose, also applies in race, religion, and national origin discrimination cases.
For instance, when a supervisor racially discriminates against an individual,
thereby creating a hostile work environment, the employer is liable for this
discrimination regardless of whether the supervisor acted against company
policy or outside of his authority. \(^{137}\) In other words, the employer's selec-

\(^{131}\) Id.

\(^{132}\) Barnes, 561 F.2d at 997 (MacKinnon, J., concurring).

\(^{133}\) Id. (quoting Allegheny Pepsi-Cola Bottling Co. v. NLRB, 312 F.2d 529, 531 (3d Cir. 1962)).

\(^{134}\) See sources cited supra note 56.

\(^{135}\) Flowers v. Crouch-Walker Corp., 552 F.2d 1277, 1282 (7th Cir. 1977).

\(^{136}\) This theory is summed up in an example concerning sexual harassment given in the
EEOC Brief, supra note 59, at 23, which states:

\[E\]mployers are likewise vicariously liable for sexual harassment practiced by super-
visory personnel where the supervisor's actions are undertaken within the scope of
authority delegated by the employer . . . . \[T\]hat is because the authority to make or
substantially influence such decisions is within the scope of authority that the em-
ployer has delegated to the supervisor.

\(^{137}\) See, e.g., Flowers, 552 F.2d at 1282.
tion of and vesting of authority in the supervisor makes the employer liable for the supervisor's discrimination against a subordinate.

Several landmark cases established the standards applied in order to determine employer liability for supervisors who discriminate on the basis of race, religion, or national origin.\(^{138}\) *Flowers v. Crouch-Walker Corp.*\(^{139}\) is one of the best known cases holding an employer liable for the acts of his supervisors. In *Flowers*, a new supervisor discharged a black bricklayer and replaced him with a white bricklayer.\(^{140}\) The defendant asserted the business justification of unsatisfactory job performance.\(^{141}\) The United States Court of Appeals for the Seventh Circuit found the employer's reason for discharge pretextual.\(^{142}\) The court held that racial discrimination motivated the discharge.\(^{143}\) Significantly, the court in *Flowers* cast its holding broadly enough to encompass all violations of title VII, stating that an employer should be held liable as principal for any violation of title VII committed by an authorized supervisor.\(^{144}\) Interpreted literally, the court's holding would require that employers be held strictly liable for all types of illegal employment discrimination.

*Young v. Southwestern Savings and Loan Association*\(^{145}\) is another case that held an employer liable for the acts of a supervisor who violated title VII. In *Young*, a supervisor who did not have authority to hire or fire required an atheist employee to attend a meeting which began with a prayer.\(^{146}\) The supervisor disregarded the employee's objections to the religious portion of the meeting and, against company policy, required her to

\(^{138}\) *Id.* (race discrimination); *Young v. Southwestern Sav. & Loan Ass’n*, 509 F.2d 140, 144 (5th Cir. 1975) (religious discrimination); *Anderson v. Methodist Evangelical Hosp.*, 464 F.2d 723, 725 (6th Cir. 1972) (race discrimination). Justice Marshall cited these cases to illustrate that employers bear vicarious liability for their supervisors' prohibited acts for other title VII violations and to support his conclusion that employers should also be held vicariously liable for sexual harassment. *Meritor Sav. Bank v. Vinson*, 106 S. Ct. 2399, 2410 (1986) (Marshall, J., concurring).

\(^{139}\) 552 F.2d at 1282.

\(^{140}\) *Id.* at 1280.

\(^{141}\) *Id.* at 1282.

\(^{142}\) *Id.*

\(^{143}\) *Id.* The court found the elements of a prima facie case of racial discrimination established by proof that: (1) "the plaintiff was a member of a racial minority"; (2) "he was qualified for the job he was performing"; (3) "he was satisfying the normal requirements in his work"; (4) "he was discharged"; and (5) "after his discharge the employer assigned white employees to perform the same work." *Id.* The defendant unsuccessfully tried to rebut the presumption by alleging that poor work performance motivated the termination. *Id.* at 1283.

\(^{144}\) *Id.* at 1282. In *Flowers*, the court held that a "defendant [employer] is liable as principal for any violation of Title VII or section 1981 by [a supervisor] in his authorized capacity as supervisor." *Id.* (citations omitted).

\(^{145}\) 509 F.2d 140, 144 (5th Cir. 1975).

\(^{146}\) *Id.* at 142.
attend the meeting.\textsuperscript{147} This action made working conditions unbearable for Young, forcing her to resign.\textsuperscript{148} The United States Court of Appeals for the Fifth Circuit found that the supervisor constructively discharged the employee because the employer disregarded her religious beliefs.\textsuperscript{149} The court stated further that the employer is "liable for any illegal conduct involved."\textsuperscript{150} This statement suggests that employers should be held liable for their supervisors' title VII violations.

The United States Court of Appeals for the Tenth Circuit also examined the issue of vicarious employer liability in \textit{EEOC v. University of New Mexico}.\textsuperscript{151} In \textit{University of New Mexico}, a professor claimed that he was being discriminated against in the workplace on the basis of national origin.\textsuperscript{152} The court held that the purpose of the Civil Rights Act is "the elimination of employment discrimination, whether practiced knowingly or unconsciously."\textsuperscript{153} Accordingly, the court suggested that the employer is liable without regard to intervening factors such as knowledge.\textsuperscript{154}

These cases illustrate that employers are vicariously liable for the acts of their supervisors who discriminate on the basis of race, religion, or national origin.\textsuperscript{155} In such cases courts do not consider intervening factors, such as the employer's knowledge, to be barriers to employer liability. The courts simply hold employers vicariously liable if a supervisor discriminated against an employee under his authority. However, this is not the case for sexual harassment. Intervening factors such as knowledge and an employer's policy against employment discrimination can protect an employer from liability for sexual harassment.\textsuperscript{156}

\section*{C. Employer Liability for Sexual Harassment: Inconsistency Under Title VII}

The agency principles applied in race, religion, and national origin employment discrimination cases to determine employer liability are also considered in a sexual harassment analysis. But, because of unique concerns

\begin{itemize}
\item \textsuperscript{147} \textit{Id.} at 142-44.
\item \textsuperscript{148} \textit{Id.} at 144.
\item \textsuperscript{149} \textit{Id.} The court further stated that, barring undue hardship, the employer was obligated to accommodate Young's religious beliefs and observances. \textit{Id.}
\item \textsuperscript{150} \textit{Id.}
\item \textsuperscript{151} 504 F.2d 1296, 1302 (10th Cir. 1974).
\item \textsuperscript{152} \textit{Id.} at 1298.
\item \textsuperscript{153} \textit{Id.} at 1302.
\item \textsuperscript{154} \textit{See id.}
\item \textsuperscript{155} \textit{See cases cited supra} note 138.
\item \textsuperscript{156} \textit{See infra} text accompanying notes 167-74 for examples of intervening factors recognized in sexual harassment cases.
\end{itemize}
arising in a sexual harassment context, the application of common law agency principles leads to a bifurcated basis for determining employer liabil-

ity.\footnote{157} Generally, employers are vicariously liable for a supervisor's quid pro quo sexual harassment, but not for a supervisor's hostile environment sexual harassment unless the employer had knowledge of the harassment.\footnote{158} This bifurcated scheme of employer liability results because, in a quid pro quo context, the supervisor exercises actual authority to effect a tangible job consequence.\footnote{159} In a hostile environment context the supervisor indirectly invokes his authority. As a result of this indirectness, courts consider other intervening factors when determining employer liability for sexual harassment.\footnote{160}

Section 219(2) of the Restatement (Second) of Agency (the Restatement) provides that an employer is not liable for the torts of an agent acting outside the scope of his employment unless, "the master was negligent or reckless, or the servant purported to act or speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relationship."\footnote{161} Close examination of this principle explains why courts hold an employer vicariously liable for a supervisor's sexual harassment if the employer has knowledge of this conduct and does not correct the situation. The employer may be viewed as

\begin{quote}
\footnote{157} Employer liability is bifurcated in the sense that employers are held strictly liable for quid pro quo sexual harassment but are not held strictly liable for hostile environment sexual harassment. To hold an employer vicariously liable for a supervisor's hostile environment sexual harassment, an employee must prove knowledge and a failure to act. \textit{See, e.g.}, Tomkins \textit{v. Public Serv. Elec. \\& Gas Co.}, 568 F.2d 1044, 1048-49 (3d Cir. 1977). The result of this bifurcated scheme is that it is much more difficult to hold an employer liable for hostile environment sexual harassment because of factual problems that occur in proving knowledge. \textit{Katz v. Dole}, 709 F.2d 251, 256 (4th Cir. 1983); \textit{Henson v. City of Dundee}, 682 F.2d 897, 905 (11th Cir. 1982).
\footnote{158} \textit{See Katz}, 709 F.2d at 255; \textit{Henson}, 682 F.2d at 905.
\footnote{159} Courts recognize that the supervisor effectuates a tangible job consequence, such as firing an individual, because the employer gives him authority to make such decisions. Therefore, courts are more willing to hold employers vicariously liable in a quid pro quo context. \textit{See Henson}, 682 F.2d at 909-10.
\footnote{160} See \textit{infra} text accompanying notes 166-74 for examples of intervening factors considered in a hostile environment context.
\footnote{161} Section 219(2) states:

\begin{enumerate}
\item A master is not subject to liability for the torts of his servants acting outside the scope of their employment unless:
\begin{enumerate}
\item the master intended the conduct or the consequences, or
\item the master was negligent or reckless, or
\item the conduct violated a non-delegable duty of the master, or
\item the servant purported to act or speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.
\end{enumerate}
\end{enumerate}

\textit{Restatement (Second) of Agency} § 219(2) (1958).
\end{quote}
negligent or reckless. Moreover, the employer who, with knowledge of the sexual harassment, fails to act, ratifies the unlawful act. 162 Tomkins v. Public Service Electric & Gas Co. 163 is one of the earliest quid pro quo cases examining the issue of employer liability for a sexual harassment violation. In Tomkins, the United States Court of Appeals for the Third Circuit reasoned that to establish employer liability the plaintiff must prove that the supervisor prescribed a condition of sexual submission and that the employer either directly or indirectly sanctioned this condition. 164 The court indicated that the employer effectively imposes the condition if he has knowledge of the sexual harassment and does not immediately correct the situation. 165

Further examination of section 219(2) of the Restatement suggests that an employer with a valid grievance procedure and a policy against sexual harassment may disprove negligence or recklessness and deny that the supervisor acted with apparent authority. 166 In sexual harassment cases, courts apply the above factors to shield an employer from liability for sexual harassment. For example, the court in Barnes v. Costle 167 examined not only the knowledge component but also the effect of an employer policy against employment discrimination. In Barnes, the United States Court of Appeals for the District of Columbia Circuit held that the employer should be generally liable for any supervisor who sexually harasses an employee under his authority. 168 The employer may avoid liability, however, if any supervisor acts against company policy without the employer’s knowledge. 169

162. In other words, the employer, by allowing this type of conduct to occur when he has knowledge of it, implicitly encourages the unlawful behavior and is liable for it. See id. § 43.
163. 568 F.2d 1044 (3d Cir. 1977).
164. Id. at 1048; see also Craig v. Y & Y Snacks, 721 F.2d 77, 80 (3d Cir. 1983). The Craig court also examined employer liability. The court considered whether the supervisor has authority over hiring, discipline, and dismissal to be relevant factors. Id. at 80. This is the broad analysis traditionally used to make employers vicariously liable for race, religion, and national origin employment discrimination. Although the court made reference to this analysis, it did not explicitly adopt it. Id.
165. Tomkins, 568 F.2d at 1048-49. Similarly, the analysis of employer liability in Munford v. James T. Barnes & Co., 441 F. Supp. 459, 466 (E.D. Mich. 1977), concentrated on the knowledge component. In Munford, the court held that employers are under an “affirmative duty to investigate complaints” and rectify any title VII violations, id. at 466, and that if the employer knew or should have known of the sexual harassment and did not investigate, he could be held liable. Id. In Craig, 721 F.2d at 77, the United States Court of Appeals for the Third Circuit applied a similar rule, finding that if an employer has knowledge of the violation and does not take prompt remedial steps, it would be liable. Id. at 80.
166. See Restatement (Second) of Agency § 219(2) (1958).
167. 561 F.2d 983, 993 (D.C. Cir. 1977).
168. Id.
169. Id. The court qualified this statement by holding that if the employer becomes aware of the violation, he must promptly remedy the situation. Id.
The company policy criterion was also examined in *Heelan v. Johns-Manville Corp.*, where the United States District Court for the District of Colorado held that employees need not prove that the employer has a policy of endorsing sexual harassment. Nevertheless, according to *Heelan*, the employer can escape liability by showing that the company has a policy against this type of behavior and that the aggrieved employee did not inform the employer of the violation.

In contrast, the United States Court of Appeals for the Ninth Circuit held in *Miller v. Bank of America*, that an employee's failure to use the company's grievance procedure does not necessarily bar the employer's liability. This holding prevents the employer from insulating itself by merely instituting a grievance procedure. Additionally, *Miller* emphasized that the employer can be held liable under title VII and for the tortious conduct of his supervisor.

Courts apply the same agency factors explained above in hostile environment cases. The United States Court of Appeals for the District of Columbia Circuit found liability where there was knowledge in *Bundy v. Jackson* because other supervisors knew of the hostile environment and did nothing to correct it. The United States Court of Appeals for the Eighth Circuit focused on the knowledge component in *Barrett v. Omaha National Bank*. The distinguishing factor in *Barrett* was that the harassing party was a co-employee, not a supervisor. The court found that to impose liability on the employer, the plaintiff had to prove that the employer had knowledge of the co-employee's sexual harassment.

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171. *Id.* at 1389.
172. *Id.*
173. 600 F.2d 211 (9th Cir. 1979).
174. *Id.* at 214.
175. *Id.* at 213. The employer's liability, however, would not subject him to burdensome penalties. Compensatory remedies are commonly used under title VII. Albemarle Paper Co. v. Moody, 422 U.S. 405, 421-22 (1975). One of the most commonly used remedies is the injunction. The injunction is used to prevent present and future sexual harassment. Punitive damages are not allowed under title VII because they would be inconsistent with title VII's goal to place the injured employee in substantially the same position as if the discrimination had not occurred. *Id.*; see also 42 U.S.C. § 2000e-5(g) (1982).
176. The employer can be liable for the tortious conduct of a supervisor who sexually harasses an employee under his authority. In order for the employer to be liable the supervisor must have the authority to "hire, fire, discipline or promote, or at least to participate in or recommend such actions." *Miller*, 600 F.2d at 213.
177. 641 F.2d 934, 943 (D.C. Cir. 1981).
178. *Id.*
179. 726 F.2d 424, 428 (8th Cir. 1984).
180. *Id.* at 427.
181. *Id.*
employer’s lack of awareness of the harassment relieves him of liability. As in the cases discussed above, the court held that if the employer knew of the violation and took prompt remedial corrective action, he would escape liability.

_Bundy_ and _Barrett_, like the quid pro quo cases, found employer liability where there was knowledge. In _Katz v. Dole_, the United States Court of Appeals for the Fourth Circuit, went further delineating a bifurcated scheme of employer liability requiring proof of actual or constructive knowledge of the harassment and failure to correct the situation before it would hold an employer strictly liable for hostile environment harassment. In contrast, the _Katz_ court would hold an employer liable for quid pro quo harassment without requiring knowledge. It would, however, find liability despite a policy against sexual harassment if an employer knew of the violation and did nothing to correct it.

In _Henson v. City of Dundee_, the United States Court of Appeals for the Eleventh Circuit held that, although an employer should be held strictly liable in a quid pro quo case, the employer’s knowledge and the superior’s authority should be considered when determining employer liability in hostile environment cases. As a consequence, it is more difficult to hold an employer liable for hostile environment sexual harassment than for quid pro quo sexual harassment.

Hostile environment cases have also emphasized the employer’s obligation

182. _Id_. Most likely, this would not change even if employers were held vicariously liable for the supervisor’s acts because under an agency analysis the cloak of authority which the employer gives to a supervisor is not given to a co-employee.

183. _Id_.

184. 709 F.2d 251 (4th Cir. 1983).

185. _Id_. at 255.

186. _Id_. at 255.

187. _Id_. at 256.

188. 682 F.2d 897 (11th Cir. 1982).

189. _Id_. at 909. As stated previously, a quid pro quo case can only be proven if a tangible job detriment occurs. _See supra_ text accompanying notes 10 & 88. Some of the tangible job benefits which, if conditioned on sexual submission, violate title VII are the loss of favorable evaluations, a promotion, or the job itself. _See, e.g._, _Tomkins v. Public Serv. Elec. & Gas Co._, 568 F.2d 1044, 1048-49 (3d Cir. 1977).

190. _Henson_, 682 F.2d at 905. The court found that in order for the employer to be liable in a “hostile environment” case, the employee must prove that the “employer knew or should have known of the harassment and failed to take prompt remedial action.” _Id_. The court suggested that an employer’s knowledge can be proven directly, by showing she complained to management, or constructively, by showing the sexual harassment was so pervasive that the employer had to know of it. _Id_.

191. According to _Henson_, the employer is strictly liable if quid pro quo sexual harassment is proven. _Id_. at 909.
to implement a policy against sexual harassment. The Bundy court held that employers should inform all employees that sexual harassment violates title VII, establish a publicized grievance procedure to handle complaints of sexual harassment, and correct valid complaints.

In Cummings v. Walsh Construction Co., the court found the employer liable when he knows of the sexual harassment but does nothing to remedy the illegal conduct. The court also found the fact that the employer has a policy against sexual harassment to be insignificant when the sexual harassment is ignored. In addition, the court held that if the supervisor who is sexually harassing an employee has broad power over an individual, the company can, under the doctrine of respondeat superior, be held liable regardless of whether company policy was broken. In Cummings, the court also found that it is inappropriate to consider the employee's failure to use the company's grievance system in determining employer liability.

In summary, courts originally required knowledge to hold an employer

193. Id. These procedures were identified as things that could help employers avoid liability. Id.
195. Id. at 879.
196. Id. at 878.
197. Id. The term "broad powers" suggests the supervisor has power "to hire and fire (or to participate in such decisions)." Id.
198. Id. In addition, the court found that if a hostile environment charge is proven, the employer may be liable based on the doctrine of respondeat superior. Id. In Cummings v. Walsh Construction Co., 561 F. Supp. 872, 878-80 (S.D. Ga. 1983), the court applied the doctrine of respondeat superior, holding the employer liable "whether the act is within the class of acts that the agent or employee is authorized to perform; . . . [or] whether the act is done in the course of the employer's business and for the purpose of promoting his business." Id. at 879 (citations omitted).

The problem with this test is determining whether there was a deviation from authorized acts. For example, in Cummings, the supervisor assigned tasks to the plaintiff that no one else wanted to do because she refused to submit to his sexual demands. Id. at 880. These tasks had to be done and the employer benefited when these tasks were performed. Id. Arguably, this violated title VII because the supervisor imposed a condition on the basis of sex which was also an authorized employment act. Id.

199. An example of a company grievance system is a publicized committee to which employees are encouraged to complain if they believe they are being discriminated against. The employer must inform the employees that the company is receptive to complaints and will correct the unlawful behavior if it exists. Heelan v. Johns-Manville Corp., 451 F. Supp. 1382, 1390 (D. Colo. 1978).
200. Cummings, 561 F. Supp. at 878. The court was merely restating what had been found in earlier cases. See Miller v. Bank of Am., 600 F.2d 211, 213-14 (9th Cir. 1979). The Cummings court reasoned that "Title VII rights are independent of any contractual rights. A plaintiff is not required to submit to contractually provided arbitration before resorting to federal court." Cummings, 561 F. Supp. at 878 (citing Alexander v. Gardner-Denver Co., 415 U.S. 36, 47-49 (1974)).
liable for a supervisor's quid pro quo sexual harassment, but gradually broadened their interpretation of agency to find employers strictly liable for their supervisors' quid pro quo sexual harassment. The courts have not, however, held employers strictly liable for hostile environment sexual harassment. In the hostile environment context, the supervisor does not directly invoke the employer's authority. Courts have relied on the lack of direct authority to justify a bifurcated liability scheme.


The Supreme Court addressed the issue of sexual harassment for the first time in Meritor Savings Bank v. Vinson.201 In Vinson, a bank teller brought an action under title VII against her supervisor and her employer, Meritor Savings Bank, for sexual harassment.202 Vinson testified that her supervisor made numerous sexual advances toward her and that she eventually submitted to his advances out of fear of losing her job.203 Her supervisor denied the claim.204 Meritor Savings Bank disclaimed liability because the plaintiff had not used the bank's grievance procedure, thus, it had no knowledge of the alleged conduct.205

The United States District Court for the District of Columbia Circuit held that Vinson was not the victim of quid pro quo sexual harassment.206 The district court also found that if the plaintiff and her supervisor engaged in

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201. 106 S. Ct. 2399, 2404 (1986).
202. Vinson brought an accompanying tort claim, as evidenced by her request for "punitive damages against Taylor, her supervisor, and the bank, and attorney's fees." Id. Punitive damages cannot be awarded under title VII. See supra notes 14, 175.
203. Vinson, 106 S. Ct. at 2402. In Vinson, the respondent testified that shortly after being hired her supervisor invited her to dinner and at that time suggested: they go to a motel to have sexual relations. At first she refused, but out of what she described as fear of losing her job she eventually agreed. According to respondent, Taylor thereafter made repeated demands upon her for sexual favors, usually at the branch, both during and after business hours; she estimated that over the next several years she had intercourse with him some 40 or 50 times. In addition, respondent testified that Taylor fondled her in front of other employees, followed her into the women's restroom when she went there alone, exposed himself to her, and even forcibly raped her on several occasions.

Id.
204. Id. at 2403. The opinion states that "Taylor denied respondent's allegations of sexual activity, testifying that he never fondled her, never made suggestive remarks to her, never engaged in sexual intercourse with her and never asked her to do so." Id.
205. Id.
sexual relations, it was done so voluntarily. As a final matter, the court noted that Meritor Savings Bank was not given notice of any sexual harassment, and the court rejected Vinson's claim that notice to her supervisor amounted to notice to the bank.

After examining the evidence, the United States Court of Appeals for the District of Columbia Circuit concluded that the district court had misapplied the law and arrived at several incorrect conclusions. The court of appeals noted that the district court failed to consider the hostile environment analysis in its rejection of Vinson's sexual harassment claim. The court of appeals emphasized the irrelevance of whether Vinson engaged in the conduct "voluntarily." The proper inquiry should be whether the sexual harassment was "unwelcome."

Finally, the court of appeals held that the employer should not be insulated from liability solely because it has a grievance procedure. Instead, the court concluded that employers could be vicariously liable for sexual harassment. The court reasoned that any other holding would frustrate

207. Id. at 42.
208. Id.
209. See Vinson v. Taylor, 753 F.2d 141, 146-47 (D.C. Cir. 1985), aff'd in part and remanded in part sub nom. Meritor Sav. Bank v. Vinson, 106 S. Ct. 2399 (1986). The court stated that evidence that the supervisor in question had made advances towards other tellers should have been considered and that testimony of the employee's dress and provocative speech should not have been considered. Id. at 146 n.36. The court of appeals commented that testimony concerning Vinson's dress and personal fantasies "had no place in this litigation." Id. The court of appeals also found that evidence that Taylor sexually harassed other women under his authority should be admitted because case law "makes clear that evidence tending to show Taylor's harassment of other women working alongside Vinson is directly relevant to the question whether he created an environment violative of Title VII." Id. at 146 (citing Bundy v. Jackson, 641 F.2d 934, 943 n.9 (D.C. Cir. 1981)).
210. Id. at 145. Because the district court held that Vinson "was not required to grant Taylor or any other member of Capital (the Bank's former name) sexual favors as a condition of either her employment or in order to obtain [a] promotion," the court of appeals concluded that the district court had not considered the hostile environment form of sexual harassment. Id. at 144-45.
211. Id. at 146.
212. Id. (quoting EEOC Guidelines, 29 C.F.R. § 1604.11 (1984)).
213. Id. at 147.
214. Id. The court stated: "We have no difficulty in concluding that an employer may be held accountable for discrimination accomplished through sexual harassment by any supervisory employee with authority to hire, to promote or to fire." Id. at 149-50. The court elaborated on this statement by concluding:

The mere existence—or even the appearance—of a significant degree of influence in vital job decisions gives any supervisor the opportunity to impose upon employees. That opportunity is not dependent solely upon the supervisor's authority to make personnel decisions; the ability to direct employees in their work, to evaluate their performances and to recommend personnel actions carries attendant power to coerce, intimidate and harass.
the intent of title VII.\textsuperscript{215}

The United States Court of Appeals for the District of Columbia Circuit rejected a petition for rehearing en banc.\textsuperscript{216} The court of appeals' dissent, written by Circuit Judge Bork, suggested that the majority was wrong to hold employers vicariously liable for sexual harassment.\textsuperscript{217} He reasoned that by doing so, the court would convert employers into insurers that all workplace relationships will be asexual.\textsuperscript{218} The dissent found this unjust considering the employer had done all it could reasonably do to prevent this type of conduct.\textsuperscript{219}

The United States Supreme Court recognized hostile environment sexual harassment as a form of sex discrimination actionable under title VII.\textsuperscript{220} The Court also held that the mere existence of a grievance procedure and a policy against discrimination, linked with the employee's failure to use this procedure, does not necessarily insulate the employer from liability.\textsuperscript{221} However, the Court remanded the case for application of the hostile environment analysis based on the incompleteness of the record,\textsuperscript{222} thereby avoiding a decision on the employer liability issue.\textsuperscript{223}

Justice Rehnquist, writing for the majority,\textsuperscript{224} criticized the district court for neglecting to consider the hostile environment, as well as the quid pro quo form of sexual harassment.\textsuperscript{225} Addressing the issue of employer liability, Justice Rehnquist declared that the "debate over the appropriate standard for employer liability has a rather abstract quality about it given the state of the record in this case."\textsuperscript{226} The majority did not create a definitive

\textit{Id.} at 150.
\textsuperscript{215} The court reasoned that "[T]o hold that an employer cannot be reached for Title VII violations unknown to him is, too, to open the door to circumvention of Title VII by the simple expedient of looking the other way, even as signs of discriminatory practice begin to gather on the horizon." \textit{Id.} at 151.
\textsuperscript{216} Vinson v. Taylor, 760 F.2d 1330, 1330 (D.C. Cir. 1985) (Bork, J., dissenting, joined by Scalia & Starr, J.J.).
\textsuperscript{217} \textit{Id.} at 1332 (Bork, J., dissenting).
\textsuperscript{218} \textit{Id.} at 1331 (Bork, J., dissenting).
\textsuperscript{219} \textit{Id.} at 1331 nn.2-3 (Bork, J., dissenting).
\textsuperscript{221} \textit{Id.} at 2408-09. However, this conclusion was not without qualification in the majority opinion. Justice Rehnquist stated "petitioner's contention that respondent's failure should insulate it from liability might be substantially stronger if its procedures were better calculated to encourage victims of harassment to come forward." \textit{Id.} at 2409.
\textsuperscript{222} \textit{Id.} at 2408.
\textsuperscript{223} \textit{Id.}
\textsuperscript{224} \textit{Id.} at 2402. Justice Rehnquist was joined in the majority opinion by Chief Justice Burger, Justices White, Powell, Stevens, and O'Connor. \textit{Id.}
\textsuperscript{225} \textit{Id.} at 2406.
\textsuperscript{226} \textit{Id.} at 2408.
rule on employer liability.\textsuperscript{227}

In contrast, Justice Marshall, in a brief concurrence found that the issue of employer liability was properly before the Court.\textsuperscript{228} Relying heavily on the EEOC guidelines and general title VII law, Justice Marshall concluded that employers should be held vicariously liable for the activities of supervisors who sexually harass employees under their authority.\textsuperscript{229} Justice Marshall reasoned that an employer can only act through individual supervisors and employees.\textsuperscript{230} Therefore, a supervisor's actions should be imputed to the employer for sexual harassment as they are imputed under federal labor law.\textsuperscript{231}

Although the majority declined to create a definitive rule on employer liability, dicta indicated that if the issue of employer liability could be reached, agency principles should be applied.\textsuperscript{232} The majority also cited sections of the Restatement for guidance.\textsuperscript{233} In response, Justice Marshall addressed the proper application of agency principles in a sexual harassment context. Restating Justice Rehnquist's theory that title VII places some limits on employer's liability, Justice Marshall described a situation where liability would be limited. Justice Marshall concluded: "[w]here, for example, a supervisor has no authority over an employee, because the two work in wholly different parts of the employer's business, it may be improper to find

\begin{itemize}
  \item [227] \textit{Id.} Justice Rehnquist found that "[t]his debate over the appropriate standard for employer liability has a rather abstract quality about it given the state of the record in this case. . . . We therefore decline the parties' invitation to issue a definitive rule on employer liability . . . ." \textit{Id.}
  \item [228] \textit{Id.} at 2409. Justice Marshall stated: "Because I believe that question to be properly before us, I write separately." \textit{Id.} (Marshall, J., concurring).
  \item [229] \textit{Id.} at 2409-10 (Marshall, J., concurring).
  \item [230] \textit{Id.} at 2410 (Marshall, J., concurring).
  \item [231] \textit{Id.} (Marshall, J., concurring); see also supra text accompanying notes 129-33.
  \item [232] Justice Rehnquist stated:

We do agree with the EEOC that Congress wanted courts to look to agency principles for guidance in this area. While such common-law principles may not be transferable in all their particulars to Title VII, Congress' decision to define "employer" to include any "agent" of an employer, surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible. \textit{Id.} at 2408 (citation omitted).

\item [233] Justice Rehnquist cited \textsc{Restatement (Second) of Agency} §§ 219-37 (1958). \textit{Id.}

These sections explain the relationship between a third person and a principal for the torts of his servant. \textit{See supra} note 161. It is the application of the principles announced under these sections that lead to a bifurcation of employer liability, as well as the examination of intervening factors. Consequently, if agency principles such as § 219 are applied to determine employer liability, the employer will be much less likely to be held vicariously liable. \textit{See supra} notes 157-61 and accompanying text; \textit{see also} \textsc{Restatement (Second) of Agency} § 219 (1958).
\end{itemize}
strict employer liability.”

Realizing that the application of agency principles can lead to several different results, Justice Marshall also chose to address the argument made by the Solicitor General in an amici curiae brief on behalf of the EEOC. The Solicitor General favored a rule which differentiates between employer liability for hostile environment and that for quid pro quo cases. Such a rule would impute liability to an employer for quid pro quo sexual harassment, but would require knowledge to hold an employer liable for hostile environment sexual harassment. The Solicitor General based this rule on the argument that “the supervisor is not exercising, or threatening to exercise, actual or apparent authority to make personnel decisions affecting the victim” in a hostile environment context.

Justice Marshall rejected this argument. Reasoning that the supervisor’s position permits him to commit the wrong, Justice Marshall found no justification for a rule requiring notice to an employer in the hostile environment context to create liability. The concurring opinion concluded that the employer liability rules applicable in all other title VII cases should be applied in sexual harassment cases.

VI. PROSPECTS FOR VICARIOUS LIABILITY AFTER MERITOR SAVINGS BANK v. VINSON

The majority opinion in Vinson did not prescribe a method for determining employer liability for sexual harassment. Thus, the majority did not provide the lower courts with clear guidance on the appropriate standard for

235. Id. at 2410 (Marshall, J., concurring).
236. For an explanation of the EEOC’s application of agency principles to sexual harassment, see EEOC Brief, supra note 59, at 24. But see EEOC Guidelines, 29 C.F.R. § 1604.11(c) (1987).
238. Id. (Marshall, J., concurring) (quoting EEOC Brief, supra note 59, at 24).
239. Justice Marshall concluded:
The Solicitor General’s position is untenable. A supervisor’s responsibilities do not begin and end with the power to hire, fire, and discipline employees, or with the power to recommend such actions. Rather, a supervisor is charged with the day-to-day supervision of the work environment and with ensuring a safe, productive, workplace. There is no reason why abuse of the latter authority should have different consequences than abuse of the former. In both cases it is the authority vested in the supervisor by the employer that enables him to commit the wrong: it is precisely because the supervisor is understood to be clothed with the employer’s authority that he is able to impose unwelcome sexual conduct on subordinates.
240. Id. at 2410-11 (Marshall, J., concurring).
241. Id. at 2408.
deciding employer liability. The majority opinion does provide support for adherence to the basic concepts expounded in prior sexual harassment case law.\textsuperscript{242} Adherence to the concepts expounded in prior sexual harassment case law would lead to a narrow application of agency principles resulting in a bifurcated analysis for determining employer liability.\textsuperscript{243}

For instance, Justice Rehnquist commented: "[W]e . . . agree with the EEOC that Congress wanted courts to look to agency principles for guidance in this area."\textsuperscript{244} In addition, Justice Rehnquist believed that "[w]hile such common-law principles may not be transferable in all their particulars to Title VII, Congress' decision to define 'employer' to include any 'agent' of an employer . . . surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible."\textsuperscript{245} Application of strict common law agency principles would limit employer liability, especially in the hostile environment context, by adding to the plaintiff's burdens.\textsuperscript{246} Finally, Justice Rehnquist's citation of the Restatement (Second) of Agency suggests adherence to the prior law requirement of employer knowledge.\textsuperscript{247} Section 219(2) shields employer liability "for the torts of . . . servants acting outside the scope of the employment."\textsuperscript{248} Moreover, Justice Rehnquist's willingness to apply agency rules in a tort context\textsuperscript{249} is likely to lead to a bifurcated analysis for determining employer

\textsuperscript{242} Id. at 2404-06. The basic concepts expounded in prior sexual harassment case law require a bifurcated scheme of employer liability, whereby employers are held strictly liable for quid pro quo sexual harassment but not held strictly liable for hostile environment sexual harassment. See infra note 250.

\textsuperscript{243} Vinson, 106 S. Ct. at 2408.

\textsuperscript{244} Id.

\textsuperscript{245} Id.

\textsuperscript{246} See supra note 157.

\textsuperscript{247} Vinson, 106 S. Ct. at 2408 (citing Restatement (Second) of Agency §§ 219-37 (1958)); see also supra notes 157-61.

\textsuperscript{248} Restatement (Second) of Agency § 219(2) (1958). Employers rely on this section to avoid liability because they assert that the acts performed by the employee were not within the scope of his employment. Typically, in a hostile environment sexual harassment case, employers rely on this section by stating that the sexual advances were purely personal acts not authorized by the employer. See supra notes 122-27 and accompanying text.

\textsuperscript{249} The appellate court in \textit{Vinson} warned that the application of tort principles was inappropriate in a sexual harassment context. The court of appeals explained:

Traditional principles of respondeat superior, as they obtain in the field of torts, are not altogether suitable for resolution of questions of Title VII law . . . . More particularly, limitations imposed by the doctrine of respondeat superior have no place in enforcement of the congressional will underlying Title VII. Confining liability, as the common law would, to situations in which a supervisor acted within the scope of his authority conceivably could lead to the ludicrous result that employers would become accountable only if they explicitly require or consciously allow their supervisors to molest women employees.
liability.\textsuperscript{250} It is not clear how Justice Rehnquist would handle employer liability, but the above mentioned factors suggest that the Court may adopt a bifurcated analysis.

Such a ruling would be problematic. First, there is little merit in differentiating employer liability based upon the type of sexual harassment alleged. In both instances, it is the authority granted the supervisor that allows him to sexually harass a subordinate, regardless of whether the supervisor actually uses this authority.\textsuperscript{251} Consequently, there is little justification for requiring proof of knowledge in order to hold an employer liable for hostile environment sexual harassment.\textsuperscript{252}

The difficult factual problems that arise when trying to prove knowledge in the hostile environment context would place a substantial burden on an individual alleging harassment.\textsuperscript{253} In addition, other intervening factors would be considered when determining employer liability for hostile environment sexual harassment, such as the employer's grievance procedure and the employer's policy against discrimination.\textsuperscript{254} Although the majority in \textit{Vinson} held that an employer's policy against discrimination and an employee's failure to use the employer's grievance procedure do not necessarily insulate an employer from liability,\textsuperscript{255} Justice Rehnquist did not rule out their relevance.\textsuperscript{256} Justice Rehnquist stated that an argument for insulation from liability would be given more weight if grievance “procedures were

\begin{itemize}
\item \textsuperscript{251} When agency principles, as applied in tort, are used in a sexual harassment context, the unlawful conduct appears to be outside the scope of employment. But, because a supervisor is given authority by an employer to hire, fire, or discipline and invokes this authority in a quid pro quo context, the employer can still be held strictly liable. In contrast, a supervisor does not directly use his authority in the hostile environment context so employers are not held strictly liable. Hence, the result is a bifurcated analysis of employer liability. \textit{See supra} text accompanying notes 157-60.
\item \textsuperscript{252} As Justice Marshall stated in \textit{Vinson}, regarding the authority invested in a supervisor who makes an individual's environment hostile by sexual harassment contrasted to the authority invested in a supervisor who commits quid pro quo sexual harassment:
\begin{quote}
There is no reason why abuse of the latter authority should have different consequences than abuse of the former. In both cases it is the authority vested in the supervisor by the employer that enables him to commit the wrong: it is precisely because the supervisor is understood to be clothed with the employer's authority that he is able to impose unwelcome sexual conduct on subordinates.
\end{quote}
\item \textsuperscript{253} \textit{Vinson}, 106 S. Ct. at 2410 (Marshall, J., concurring).
\item \textsuperscript{254} \textit{See supra} notes 157-58 and accompanying text.
\item \textsuperscript{255} \textit{See supra} notes 166-69 and accompanying text.
\item \textsuperscript{256} Id. at 2408-09.
\end{itemize}
better calculated to encourage victims of harassment to come forward."\textsuperscript{257} This suggests that adoption of a good grievance procedure and announcement of a strong policy against sexual harassment might insulate an employer from liability.\textsuperscript{258}

The bifurcation of employer liability for sexual harassment does violence to the policies supported in title VII. Employers are not motivated to adopt and enforce effective policies to prevent sexual harassment when they may be able to escape liability simply through the announcement of company policy and a claim of no knowledge of the sexual harassment.\textsuperscript{259} Instead, employers could seek stronger preventive measures by warning supervisors of the serious consequences of their discrimination against an employee and require them to keep a watchful eye for these types of violations.\textsuperscript{260} Educating and involving the supervisors in the process of identifying and preventing employment discrimination would help promote title VII objectives.\textsuperscript{261}

Furthermore, holding employers vicariously liable for both forms of sexual harassment achieves consistency under title VII. Currently employers are not held vicariously liable for sexual harassment but are held vicariously liable for race, religion, and national origin discrimination.\textsuperscript{262} This inconsis-

\textsuperscript{257} Id.

\textsuperscript{258} In \textit{Vinson}, the grievance procedure was ineffective because Mechelle Vinson was supposed to report her harassment to the perpetrator of the sexual harassment, her supervisor. \textit{Id.} at 2409. A better grievance procedure would be one calculated to encourage employees to report the illegal discrimination such as a publicized committee responsible for investigating these matters. \textit{See supra} note 199 and accompanying text. However, even this committee might not encourage employees to come forward if it routinely dismissed complaints, or if the perpetrator was a member of the committee. \textit{See Bundy v. Jackson}, 641 F.2d 934, 945 (D.C. Cir. 1981) (employee reported harassment to three other supervisors, all of whom also harassed her); \textit{supra} note 96.

\textsuperscript{259} Instead, employers may be concerned with facially meeting the requirement, by establishing a policy against discrimination on paper, but not taking the effort and expense to actually enforce the policy. \textit{See supra} text accompanying notes 122-27.

\textsuperscript{260} Supervisors might be less likely to sexually harass an individual under their authority if the likelihood of discharge and financial liability was high. If the supervisors understand that they will lose their jobs if caught sexually harassing employees under their authority, they may be much less likely to commit the unlawful conduct. Similarly, if penalties are imposed on a supervisor who has knowledge of sexual harassment, but fails to report it, this conduct is less likely to go unnoticed. \textit{See Horn v. Duke Homes Div. of Windsor Mobile Homes}, 755 F.2d 599, 605 (7th Cir. 1985).


\textsuperscript{262} \textit{See supra} note 56 for title VII cases of race, religion, and national origin employment discrimination in which employers were held vicariously liable for their supervisors’ unlawful conduct.
tency under title VII sends mixed signals to employers. It could lead employers to view sexual harassment as a less serious problem than race, religion, or national origin employment discrimination. Such an attitude is contrary to the policies embodied in title VII.\footnote{See supra text accompanying notes 47-50.}

VII. CONCLUSION

In \textit{Meritor Savings Bank v. Vinson}, the Supreme Court recognized that sexual harassment, which creates a hostile environment in the workplace, is a form of employment discrimination violating title VII of the Civil Rights Act. The Court, in dicta, suggested however that unlike other forms of employment discrimination an employer is not necessarily liable for hostile environment sexual harassment. By differentiating the method of determining employer liability for sexual harassment from the analysis used for other title VII violations, the Court implies that the prevention of sexual harassment is not as important a policy objective as the prevention of other forms of prohibited discrimination. This may cause employers to look the other way when suspecting that an employee, who has not directly informed the employer, is being sexually harassed. In contrast, imposing vicarious liability on employers will motivate them to take affirmative steps to prevent the serious problem of sexual harassment in the workplace.

\textit{Kathleen A. Smith}