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## Labor Law—Employment Discrimination—Employer May Be Held Liable for Hostile Work Environment

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**LABOR LAW—EMPLOYMENT DISCRIMINATION—EMPLOYER MAY BE HELD LIABLE FOR HOSTILE WORK ENVIRONMENT. *Meritor Savings Bank v. Vinson*, 106 S. Ct. 2399 (1986).**

Mechele Vinson was hired as a teller-trainee at Capital Savings Bank<sup>1</sup> in September 1974. Vinson was promoted to teller after completing a ninety-day probationary period. During the course of her employment, Vinson received promotions to head teller and then assistant branch manager. She was dismissed in November 1978 while on sick leave. Vinson filed suit against Capital City Federal Savings and Loan Association in the United States District Court for the District of Columbia, claiming sexual harassment under Title VII of the Civil Rights Act of 1964.<sup>2</sup> Vinson alleged that she had been subjected to sexual advances by Sidney Taylor, Vice-President and branch manager of the Northeast Branch of Capital Savings, where both were working. She claimed that she engaged in sexual relations with Taylor only because he was her supervisor and she was afraid to refuse his requests. Taylor claimed that Vinson fabricated the story in retaliation for a job-related dispute. Counsel for the bank contended that Taylor's version was correct, but claimed that even if advances were made by Taylor, the advances were made without the knowledge, consent, or approval of the bank; consequently, counsel argued, the bank was not liable.

The trial court concluded that Vinson was not the victim of sexual harassment because any relationship between Taylor and Vinson was "voluntary."<sup>3</sup> The trial court found that the bank had a written policy against sex discrimination and a formal grievance procedure that Vinson had not followed. Since the bank had not received notice of harassment from Vinson or anyone else, the trial court concluded that the bank could not be held liable even if Vinson had a valid Title VII claim. The court reasoned that notice to Taylor was not notice to the bank.

The United States Court of Appeals for the District of Columbia

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1. The name of the bank was changed from Capital Savings Bank to Meritor Savings Bank after a merger and while the case was being appealed.

2. The original suit contained additional claims under 42 U.S.C. § 1985(2) and the fifth amendment to the United States Constitution. This note discusses only the Title VII sexual harassment charges.

3. *Vinson v. Taylor*, 23 Fair Empl. Prac. Cas. (BNA) 37, 42 (D.D.C. 1980).

Circuit remanded<sup>4</sup> the case for reconsideration in light of precedent recognizing Title VII claims for a "hostile environment" created by sexual harassment.<sup>5</sup> Additionally, the court of appeals reversed the district court, finding the employer strictly liable. The court of appeals based its decision on the statutory definition of employer in Title VII<sup>6</sup> and the guidelines promulgated by the Equal Employment Opportunity Commission.<sup>7</sup> The court of appeals analogized this holding to racial harassment and religious discrimination cases in which employers were held liable when a supervisor acted in an unauthorized manner.<sup>8</sup>

The Supreme Court affirmed the portion of the court of appeals' decision remanding the case for a determination of whether Vinson had been a victim of sexual harassment.<sup>9</sup> On the issue of strict liability, however, the Supreme Court reversed the court of appeals decision and

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4. *Vinson v. Taylor*, 753 F.2d 141 (D.C. Cir. 1985).

5. *Id.* at 145 (citing *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981), which the court decided after the trial in *Vinson* but before appeal). In *Bundy* the Court of Appeals for the District of Columbia recognized that a Title VII claim is not dependent on the victim's loss of employment or a lack of promotion. 641 F.2d at 945-46. The court also held that a work environment in which sexual harassment and intimidation were prevalent violated Title VII even if it were shown that the employee suffered no tangible job loss. *Id.* at 946. This is now recognized as "non *quid pro quo*" harassment.

6. 753 F.2d at 147-48 and nn.49 & 51 (citing 42 U.S.C. § 2000e(b)(1982)). The Code provides: "The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person."

7. *Id.* at 149 (citing EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(c) (1984)). The guidelines state:

Applying general Title VII principles, an employer, employment agency, joint apprenticeship committee or labor organization (hereinafter collectively referred to as "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. The Commission will examine the circumstances of the particular employment relationship and the job functions [sic] performed by the individual in determining whether an individual acts in either a supervisory or an agency capacity.

*Id.*

8. *Calcote v. Texas Educ. Found., Inc.*, 578 F.2d 95 (5th Cir. 1978) (racial harassment by a supervisor acting in the course of his duties is enough to support a finding that the supervisor's acts are deliberate acts of the employer); *Flowers v. Crouch-Walker Corp.*, 552 F.2d 1277 (7th Cir. 1977) (employer held liable for racial discrimination under Title VII); *Young v. Southwestern Sav. & Loan Ass'n*, 509 F.2d 140, 144, n.7 (5th Cir. 1975). (Employer was held liable for religious discrimination after the supervisor required an atheist to attend a religious meeting. This was against company policy. The court imposed liability on the employer even though the supervisor had no authority to dismiss the employee and the employer was not given an opportunity to remedy the situation since the supervisor had no right to compel attendance at any form of religious service.)

9. *Meritor Sav. Bank v. Vinson*, 106 S. Ct. 2399, 2406 (1986).

directed courts to look to agency principles, without expressly enunciating a definite test for employer liability.<sup>10</sup> The Supreme Court also rejected the absolute defenses of antidiscrimination policies or grievance procedures. *Meritor Savings Bank v. Vinson*, 106 S. Ct. 2399 (1986).

Only in the last few years have courts recognized a cause of action of sexual harassment.<sup>11</sup> Title VII of the Civil Rights Act of 1964<sup>12</sup> made it unlawful for an employer to discriminate against anyone based on race, color, religion, sex or national origin.<sup>13</sup> Legislative history lends little insight in determining what Congress intended by the phrase "discrimination based on sex."<sup>14</sup> The 1964 Act was later amended by the passage of the Equal Employment Opportunity Act of 1972.<sup>15</sup> At that time, members of Congress indicated that discrimination against women was a serious social problem and should be "accorded the same degree of social concern given to any type of unlawful discrimination."<sup>16</sup> In recognition of that intent, the United States Supreme Court has held that one purpose of Title VII is the removal of arbitrary barriers to sexual equality in the workplace with regard to "compensation, terms, conditions, or privileges of employment."<sup>17</sup>

One form of discrimination recognized by the courts is unlawful harassment.<sup>18</sup> Harassment is overt, intentional, and repeated race-based or sex-based conduct, which can affect work performance or create an offensive or demanding work environment.<sup>19</sup> Courts recognize sexual harassment as a form of sex discrimination.<sup>20</sup> The first form of sexual harassment recognized under Title VII was a supervisor's demand for sexual favors in return for the promise of a benefit or the withholding of a detriment, also known as "*quid pro quo*"

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10. *Id.* at 2408.

11. *Katz v. Dole*, 709 F.2d 251 (4th Cir. 1983); *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982).

12. 42 U.S.C. § 2000e (1982).

13. *Id.* at § 2000e-2.

14. 110 CONG. REC. 2577 (1964) (Statement of Rep. Smith). In an effort to defeat the passage of the bill, opponents of the bill added the term "sex" at the last minute. *Id.* at 2581 (statement of Rep. Green). There is little legislative history that indicates what the sponsors of that change intended the term to mean in the context of the Civil Rights Act of 1964.

15. Equal Employment Opportunity Act, Pub. L. No. 92-261 (1971), 86 Stat. 103 (1972) (codified as amended, 42 U.S.C. § 2000 (1982)).

16. H.R. REP. No. 238, 92d Cong., 1st Sess. 4-5 (1971); S. REP. No. 415, 92d Cong., 1st Sess. 7-8 (1971).

17. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

18. *Katz v. Dole*, 709 F.2d 251, 254 (4th Cir. 1983).

19. *Id.* at 254-55; *Henson v. City of Dundee*, 682 F.2d 897, 901-02 (11th Cir. 1982). See also EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a) (1986).

20. See *Barnes v. Costle*, 561 F.2d 983, 993 (D.C. Cir. 1977).

harassment.<sup>21</sup>

In *Tomkins v. Public Service Electric & Gas Co.*,<sup>22</sup> the Court of Appeals for the Third Circuit found a violation of Title VII when a supervisor conditioned employment status on the granting of sexual favors.<sup>23</sup> Tomkins contended that the employer knew or should have known of the alleged conduct of the supervisor, and therefore should be liable.<sup>24</sup> The court held that the employer was liable because he did not take prompt and appropriate action after learning of the situation.<sup>25</sup> In *Henson v. City of Dundee*<sup>26</sup> the United States Court of Appeals for the Eleventh Circuit noted that in the typical case of *quid pro quo* harassment, "the supervisor relies on his apparent or actual authority to extort sexual considerations from the employee."<sup>27</sup> In *Henson*, because the supervisor was acting within the apparent scope of the authority given to him by the employer, the supervisor's conduct was imputed to the employer.<sup>28</sup>

The courts expanded the doctrine of *quid pro quo* harassment to include protection from harassment caused by a hostile working environment.<sup>29</sup> The United States Court of Appeals for the Eighth Circuit recognized this form of harassment in *Gilbert v. City of Little Rock*,<sup>30</sup> when it held that "a working environment dominated by racial hostility and harassment constitutes a violation of Title VII, regardless of any other tangible job detriment."<sup>31</sup> The court found that liability should be imposed on the employer for a hostile environment when the employer either creates or condones "an environment at the work place which significantly and adversely affects the psychological well-being of

21. *Miller v. Bank of America*, 600 F.2d 211 (9th Cir. 1979). See also *Garber v. Saxon Business Prods., Inc.*, 552 F.2d 1032 (4th Cir. 1977); *Heelan v. Johns-Mansville Corp.*, 451 F. Supp. 1382 (D. Colo. 1978). This "*quid pro quo*" harassment was analogized to the racial harassment cases that the courts had previously recognized. See, e.g., *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972) (relationship between ethnic employee and working environment is of such significance to be entitled to statutory protection); *EEOC v. Murphy Motor Freight Lines*, 488 F. Supp. 381 (D. Minn. 1980) (where black employee is subjected to harassment, employer is responsible for taking positive action to redress or eliminate employee intimidation).

22. 568 F.2d 1044 (3rd Cir. 1977).

23. *Id.* at 1048-49.

24. *Id.* at 1047.

25. *Id.* at 1048-49.

26. 682 F.2d 897 (11th Cir. 1982).

27. *Id.* at 910.

28. *Id.* See also, RESTATEMENT (SECOND) OF AGENCY § 219 (1958).

29. *Rogers v. EEOC*, 454 F.2d 234, 237-38 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972).

30. 722 F.2d 1390 (8th Cir. 1983), cert. denied, 466 U.S. 972 (1984).

31. *Id.* at 1394.

an employee because of his or her race."<sup>32</sup> However, no cause of action will arise from a few isolated instances.<sup>33</sup> In *Johnson v. Bunny Bread Company*,<sup>34</sup> the Eighth Circuit held that an employee can not be unusually sensitive to his environment.<sup>35</sup> The court held the standard is whether a reasonable person would find the conditions intolerable.<sup>36</sup>

The Court of Appeals for the District of Columbia recognized a claim of sexual harassment from a hostile environment in *Bundy v. Jackson*.<sup>37</sup> Bundy was subjected to numerous demands for sexual favors from two supervisors.<sup>38</sup> After complaining to the supervisors' superior, the superior told Bundy that "any man in his right mind would want to rape you."<sup>39</sup> The court held the employer liable for the hostile environment created by Bundy's supervisors when her complaints were not investigated and no remedial action was taken.<sup>40</sup> Sexual harassment resulting from a hostile work environment is often referred to as "non *quid pro quo*" harassment.

The Court of Appeals for the Eleventh Circuit, in *Henson*, enunciated the elements that must be proven to establish a claim against an employer for a hostile work environment.<sup>41</sup> The court held that the employee initially must show that he or she is a member of a protected group.<sup>42</sup> Next, the employee must show that the advances are unwelcome.<sup>43</sup> The court held that the employee must regard the conduct as undesirable or offensive and must not have solicited or incited the conduct.<sup>44</sup> The third element of a sexual harassment claim based on a hostile environment is that the harassment must be based on sex.<sup>45</sup> The employee must show that he or she would not have been the object of the harassment but for the employee's sex.<sup>46</sup> The fourth element as outlined by the court in *Henson* requires the victim to show that the har-

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32. *Id.*

33. *EEOC v. Murphy Motor Freight Lines*, 488 F. Supp. 381, 384 (D. Minn. 1980).

34. 646 F.2d 1250 (8th Cir. 1981).

35. *Id.* at 1256.

36. *Id.* See also, *Taylor v. Jones*, 653 F.2d 1193 (8th Cir. 1981).

37. 641 F.2d 934, 938 (D.C. Cir. 1981).

38. *Id.* at 940.

39. *Id.*

40. *Id.* at 943.

41. 682 F.2d 897, 903-05 (11th Cir. 1982).

42. *Id.* at 903. For sex discrimination cases, the employee need only stipulate that the employee is a male or a female to meet this requirement.

43. *Id.*

44. *Id.* The EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a) (1984), provide that only unwelcome sexual advances will give rise to Title VII liability.

45. 682 F.2d at 903.

46. *Id.* at 904.

assment affected a "term, condition, or privilege" of employment.<sup>47</sup> Finally, the court in *Henson* held that an employee must show that the employer knew or should have known of the harassment and took no remedial action.<sup>48</sup> Employees can show this by presenting evidence that complaints were made,<sup>49</sup> or by a showing that the pervasiveness of the harassment was such as would give rise to a presumption of constructive knowledge.<sup>50</sup>

The court in *Mays v. Williamson & Sons Janitorial Services, Inc.*<sup>51</sup> utilized the elements set forth in *Henson*.<sup>52</sup> Mays alleged that she had been the victim of sexual harassment.<sup>53</sup> She presented evidence that her superior made repeated demands for sexual favors while she worked and assigned her a heavier workload when she rejected his demands.<sup>54</sup> After she filed a complaint with the EEOC, Mays was terminated.<sup>55</sup> The court held that Mays had presented adequate evidence to prove that she had been the victim of sexual harassment and imposed liability on her employer after finding that the employer failed to take adequate steps to investigate and remedy the situation.<sup>56</sup> The Eight Circuit Court of Appeals affirmed the decision.<sup>57</sup>

The Fourth Circuit Court of Appeals reached the same result in *Katz v. Dole*.<sup>58</sup> Katz was an air traffic controller who sued the Secretary of Transportation for harassment by her supervisor.<sup>59</sup> After presenting all the required elements for a *prima facie* case, Katz presented evidence that harassment in the environment was so pervasive that the Federal Aviation Administration (FAA) should have

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47. *Id.* In *Rogers*, 454 F.2d at 238, the Fifth Circuit Court of Appeals held that the state of psychological well-being is a term, condition, or privilege of employment within the meaning of Title VII. Courts are to look to the "totality of the circumstances" to see whether sexual harassment is so pervasive in the workplace so as to affect the psychological well being of the employee. 29 C.F.R. § 1604.11(b) (1986). The totality of the circumstances includes the extent to which the complainant contributes to the environment. *See Gan v. Kepro Circuit Systems*, 28 Fair Empl. Prac. Cas. (BNA) 639 (E.D. Mo. 1982). (Plaintiff alleged sexual harassment and constructive discharge. Relief was denied when the court determined the plaintiff frequently contributed to vulgar conversations.)

48. 682 F.2d at 905.

49. *Bundy*, 641 F.2d at 943.

50. *Taylor v. Jones*, 653 F.2d 1193, 1199 (8th Cir. 1981).

51. 591 F. Supp. 1518 (E.D. Ark. 1984), *aff'd*, 775 F.2d 258 (8th Cir. 1985).

52. *Id.* at 1521. *See also*, *Lucas v. Brown & Root, Inc.*, 736 F.2d 1202 (8th Cir. 1984).

53. 591 F. Supp. at 1520-21.

54. *Id.*

55. *Id.*

56. *Id.* at 1522.

57. 775 F.2d 258 (8th Cir. 1985).

58. *Katz v. Dole*, 709 F.2d 251, 254-55 (4th Cir. 1983).

59. *Id.* at 254-55.

known of it.<sup>60</sup> Additionally, Katz had made specific complaints to higher officials about her supervisor and those complaints had been disregarded.<sup>61</sup> The court held that the FAA was liable because it took no significant steps to end the harassment.<sup>62</sup> The FAA was not allowed to use the existence of a policy against harassment as an absolute defense, because agency officials were aware that the policy was not effective.<sup>63</sup>

The EEOC guidelines impose strict liability on an employer for acts of supervisory employees.<sup>64</sup> Under these guidelines, the employer is responsible for its acts and those of its "supervisory" employees, regardless of whether the "specific acts complained of were authorized or even forbidden by the employer, and regardless of whether the employer knew or should have known of their occurrence."<sup>65</sup> Strict liability is imposed if the EEOC determines that the offending party acts in a supervisory rather than merely an agency capacity.<sup>66</sup>

Courts are inconsistent in the amount of weight they give to the EEOC guidelines in litigation.<sup>67</sup> The United States Supreme Court in *General Electric Co. v. Gilbert*,<sup>68</sup> ruled that the guidelines are an informed source of guidance and that the judiciary may or may not follow them.<sup>69</sup> The Court held that the guidelines are interpretative rather than substantive regulations.<sup>70</sup> Since the regulations are only interpretive of congressional intent, courts are not required to follow them as they would a substantive law.<sup>71</sup> The Eighth Circuit Court of Appeals in *Crimm v. Missouri Pacific Railroad Co.*<sup>72</sup> ruled that the lower court

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60. *Id.* at 256.

61. *Id.*

62. *Id.*

63. *Id.*

64. 29 C.F.R. § 1604.11(c) (1985). The full text of these guidelines can be found in note 7.

65. *Id.*

66. *Id.* An examination is made of the circumstances of the employment relationship and the job functions performed by the individuals in evaluating whether the employee acts in a supervisory or agency capacity. An employee may be an agent of the employee for some purposes and a supervisor for others.

67. *See General Electric Co. v. Gilbert*, 429 U.S. 125, 140-45 (1976).

68. *Id.* at 140-45.

69. *Id.*

70. *Id.*

71. *Id.* The guidelines are an informed source of direction. The regulatory agencies draft their interpretations of congressional intent into interpretive regulations or guidelines. Although these guidelines do not operate of their own accord with the same force as substantive regulations drafted and passed pursuant to specific enabling legislation adopted by Congress, they are entitled to consideration when determining legislative intent. *Id.* at 141 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), as the most comprehensive statement of the role of such guidelines).

72. 750 F.2d 703 (8th Cir. 1984).

did not err by taking judicial notice of the EEOC regulations on sexual harassment.<sup>73</sup>

As courts in the various circuits applied their own interpretation of the guidelines, distinctions arose regarding the question of employer liability. The Court of Appeals for the Eleventh Circuit has interpreted the law to hold an employer strictly liable in a case of "*quid pro quo*" harassment, but not in a "*non quid pro quo*" situation unless it is shown that the employer knew or should have known of the harassment.<sup>74</sup> This same approach was followed by the Court of Appeals for the Fourth Circuit.<sup>75</sup> The holding of the Court of Appeals for the District of Columbia Circuit in *Vinson v. Taylor*<sup>76</sup> was inconsistent with these decisions because in *Vinson* the employer was held strictly liable in a "*non quid pro quo*" situation.<sup>77</sup> The Supreme Court granted the petition for certiorari<sup>78</sup> because of this split among the circuits on the imposition of strict liability on employers for a hostile work environment.

The United States Supreme Court certified three basic issues in *Meritor Savings Bank v. Vinson*.<sup>79</sup> The first issue was whether unwelcome sexual advances by a supervisor toward an employee created a "hostile environment" in violation of Title VII.<sup>80</sup> The Court held that "*non quid pro quo*" harassment is a violation of Title VII,<sup>81</sup> and affirmed the court of appeals' decision that the case must be remanded to determine whether *Vinson* was the victim of this form of sexual harassment.<sup>82</sup> The Court held that on remand the lower court must determine whether *Taylor* made any "unwelcome" advances.<sup>83</sup> The Court identified the proper inquiry as being whether respondent, by her conduct, indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary.<sup>84</sup>

The second issue considered by the Court was whether evidence of

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73. *Id.* at 709-10. The Eighth Circuit also held that a court may take judicial notice of the Federal Register and the Code of Federal Regulations and may use its discretion in determining when to follow them. *Id.*

74. *Henson v. City of Dundee*, 682 F.2d 897, 905 (11th Cir. 1982).

75. *Katz v. Dole*, 709 F.2d 251 (4th Cir. 1983).

76. 753 F.2d 141 (D.C. Cir. 1985).

77. *Id.* at 148-49.

78. *Vinson v. Taylor*, *sub nom.* PSFS Savings Bank v. *Vinson*, 106 S. Ct. 57 (1985) (mem.).

79. 106 S. Ct. 2399 (1986).

80. *Id.* at 2405-06.

81. *Id.* at 2405.

82. *Id.* at 2406.

83. *Id.*

84. *Id.*

the employee's dress and sexual fantasies was admissible to refute the allegation that sexual advances were unwelcome.<sup>85</sup> The Court held that evidence of the complainant's sexual fantasies and provocative dress and speech are not irrelevant, as a matter of law, in a Title VII suit.<sup>86</sup> The Court looked to the EEOC's Guidelines on Discrimination Because of Sex for insight.<sup>87</sup> Because those guidelines require that the totality of the circumstances must be examined to determine if sexual harassment has occurred,<sup>88</sup> the Court held that evidence of conduct and proclivities is relevant.<sup>89</sup>

The last issue the Court considered was whether employers are absolutely liable for sexual harassment by supervisors when the employer neither knew nor reasonably could have known of the harassment and had a written policy against such conduct.<sup>90</sup> The Court held that strict liability should not be imposed in every case.<sup>91</sup> The Court reasoned that congressional intent was to place some limits on the liability of employers for acts committed by employees in the Title VII context,<sup>92</sup> and directed lower courts to look to common-law agency principles.<sup>93</sup> The Court recognized that these agency principles may not be transferable into every area of Title VII because of its unique nature.<sup>94</sup> However, the Court directed lower courts to examine those principles, and referred them to the *Restatement (Second) of Agency*<sup>95</sup> as an example.

The Court held that lack of notice,<sup>96</sup> the existence of a grievance procedure, and a policy against discrimination<sup>97</sup> would not constitute absolute defenses to liability. The Court reasoned that allowing these absolute defenses would insulate employers from all liability and would defeat congressional intent.<sup>98</sup>

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85. *Id.* at 2407.

86. *Id.* Since the victim must show the sexual advances were unwelcome and that the victim did not contribute to the sexual environment, the presentation of evidence that the victim continually wears provocative clothing can be admitted to refute allegations that the advances were unwelcome.

87. *Id.* at 2407 (citing 29 C.F.R. § 1604.11(b) (1985)).

88. 29 C.F.R. § 1604.11(b) (1985).

89. 106 S. Ct. at 2407.

90. *Id.*

91. *Id.* at 2408.

92. *Id.*

93. *Id.*

94. *Id.*

95. RESTATEMENT (SECOND) OF AGENCY §§ 219-237 (1958).

96. 106 S. Ct. 2408.

97. *Id.* at 2408-09.

98. *Id.* at 2408.

Because of the unique nature of a “non *quid pro quo*” sexual harassment suit, the EEOC argued in its amicus curiae brief that the EEOC Guidelines advocating strict liability should not apply, but that a three-part test should be used instead. The Court appears to have impliedly endorsed this three-part test proposed by the EEOC,<sup>99</sup> but it did not do so expressly. The EEOC test requires a determination of whether the victim of the sexual harassment has a reasonably available avenue of complaint and whether that procedure is responsive to the complaint.<sup>100</sup> Under the EEOC test, an employer will not be liable for claims of sexual harassment if: (1) the employer has a stated company policy against harassment, and a procedure designed to resolve sexual harassment claims; (2) the victim fails to utilize the procedure; and (3) the employer has no knowledge of the hostile environment.<sup>101</sup> The employer would be liable in those cases in which he has actual knowledge of the situation or in which the victim has no reasonable way to make a complaint known to proper principals.<sup>102</sup>

The Supreme Court in *Meritor* has directed courts to look to agency principles<sup>103</sup> and the totality of the circumstances<sup>104</sup> to make a determination of liability. The Court has not ruled on the imposition of strict liability, and has refused to accept as absolute defenses the mere existence of an antidiscrimination policy, the failure of the employee to complain, or the lack of actual notice to the employer.<sup>105</sup> Consequently, the employer is left in an uncertain position in which he is forced to try

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99. *Id.* at 2408-09.

100. *Id.* at 2408.

101. *Id.*

102. *Id.* For example, it would be unreasonable to allow the victim to complain only to the immediate supervisor if that person is the individual who is responsible for the harassing conduct. In an opinion concurring in the judgment, Justice Marshall stated that a separate rule should not be created to apply to only “non *quid pro quo*” harassment cases. In his opinion, in some situations, such as the employee and supervisor working in wholly distinct departments, strict liability should not be imposed. However, nothing in the statute or general agency principles would logically lead to the conclusion that an employee in a “hostile environment” case should be required to report the harassment to other supervisors before liability would attach. 106 S. Ct. at 2409.

103. 106 S. Ct. at 2409. The Court directed lower courts to look to common-law agency principles and the Restatement (Second) of Agency. The Restatement takes the position that an employer is subject to liability for torts of his employees committed while acting within the scope of their employment. The Restatement further defines this position stating that the employer is not liable for torts committed by servants acting outside the scope of their employment unless the employer (1) intended the conduct or consequences, or (2) was negligent or reckless, or (3) the conduct was a violation of a nondelegable duty, or (4) the servant had apparent authority to act or was aided in the accomplishment of the tort by the existence of the agency relationship. RESTATEMENT (SECOND) OF AGENCY § 219 (1958).

104. 106 S. Ct. at 2409.

105. *Id.* at 2408-09.

to prevent sexual harassment even though this will not assure that his efforts will afford protection from violations by supervisors. Furthermore, the EEOC's Guidelines on Discrimination Because of Sex, which would automatically impose liability on an employer, will not necessarily be followed in a sexual harassment case based on a hostile environment.<sup>106</sup> The Court reasoned that this approach was what Congress intended under Title VII.<sup>107</sup>

A lawyer faced with litigating a "non *quid pro quo*" sexual harassment suit after *Meritor* may choose to look to analogous areas of law such as the National Labor Relations Act (NLRA)<sup>108</sup> or sexual harassment suits under 42 U.S.C. § 1983.<sup>109</sup> While these other areas may give some guidance, they can not give a definite rule to be followed.

Multistate employers could be faced with the problem of the application of different common-law agency principles in the different states. A large employer doing business in several states may find that the actions of a supervisory employee would give rise to liability in one state and not in another. The employer will have to have a different personnel policy depending on the state in which the supervisor works.

The *Meritor* decision is exasperating for employers who try to maintain a good working environment in the midst of the social dilemma posed by sexual harassment cases. While even a dilemma is better than strict liability in every case, attempts by employers to comply

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106. *Id.* at 2409.

107. *Id.* at 2408.

108. Title VII and the National Labor Relations Act have similar definitions for the term "employer." See 29 U.S.C. § 152(2) (1982). The NLRA was used as a model when Title VII legislation was drafted, and the Supreme Court has referred to Title VII and the NLRA as the "twin" areas of discriminatory hiring and discharges. See also *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 768 (1976); *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 419 n.11 (1975). Under the NLRA, the acts of a supervisor are imputed to the employer. An employer is responsible for the conduct of its supervisors if the employer does not specifically repudiate the conduct. See, e.g., *Graves Trucking, Inc. v. NLRB*, 692 F.2d 470, 474 (7th Cir. 1982) (employer is responsible for personal injury inflicted by supervisor when employer did not specifically repudiate supervisor's conduct); *NLRB v. Kaiser Agricultural Chem., Division of Kaiser Aluminum & Chem. Corp.*, 473 F.2d 374, 384 (5th Cir. 1973) (company is responsible for unfair labor practices when employer took no steps to disavow prohibited conduct of supervisors); *Amalgamated Clothing Workers of America v. NLRB*, 365 F.2d 898, 909 (D.C. Cir. 1966) (court remanded the case to determine whether floor ladies were "supervisors" under NLRA, and held company was responsible for condoning supervisor's conduct).

109. 42 U.S.C. § 1983 (1982). See, e.g., *Bohen v. City of East Chicago*, 799 F.2d 1180 (7th Cir. 1986). The Seventh Circuit held that sexual harassment of female employees by a state employer is discrimination based on sex, and is a violation of the equal protection clause of the fourteenth amendment to the United States Constitution. The court cited *Meritor* as authority for the principle that sexual harassment is a form of sex discrimination under Title VII.

with current law could well force them to take steps that increasingly intrude upon the private social relationships of their employees.

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