
Robert E. Wone†

Freda and Sonia, both African-Americans, are waitresses at a local hotel. A local civic group has booked the ballroom and invited a noted comedian as the entertainment for the evening. The group has informed the hotel management that the comedian will be performing. The hotel manager is aware, from personal experience at another banquet, that the comedian uses racially and sexually explicit jokes in his routine.

Both waitresses are sent in to clear dishes while the comedian is performing. They hear him make jokes about the sexual organs and sexual abilities of black men and women, using terms such as: "wog," "nigger," and "sambo." Upon spotting the waitresses, the comedian, addressing them from the stage, makes racial jokes about their appearances and sexual abilities.

The waitresses, although upset, continue their work. Later in the evening, while serving coffee, one waitress is asked by an audience member, "What is it like to do it with a black woman?" The other waitress is also the target of racial remarks from an audience member.1 The next morning, both waitresses file a complaint with the Equal Employment Opportunity Commission under Title VII, charging sexual and racial harassment.

What is the proper role of the employer in combating racism in the workplace? Is it sufficient to hold the employer responsible for the racial harassment only of those under the employer’s direct control—supervisors

† B.A. 1996, The College of William and Mary; J.D. Candidate 1999, University of Pennsylvania Law School. The author wishes to thank his family, friends, classmates, and fellow Journal members for their patience, support, and shared passion for learning. He further thanks his undergraduate faculty and University of Pennsylvania Law School Professors Susan Sturm, Alan Lerner, and Regina Austin for their able instruction, support, and inspiration beyond the classroom. Of course, any errors remain the responsibility of the author. Leges sine moribus vanae.

and coworkers? Alternatively, may society impose liability on employers for exposing employees to racial harassment from third parties, such as customers and clients? A well-developed body of law addresses the former, but little addresses the latter. Clarity and consistency in the law would render imposing liability on employers advantageous in both contexts.

The United States District Court of Minnesota confronted the dearth of precedent in third-party liability cases in *Rosenbloom v. Senior Resource, Inc.* In *Rosenbloom*, clients and a member of the general public racially harassed a social services agency employee at a senior center operated by the agency. The cited harassment included name-calling, using slurs such as "nigger," "sambo," and "zebra," as well as physical assaults and threats. Concluding that this case presented a question of first impression regarding employer liability under Title VII for third-party racial harassment, the court sought guidance from the developing body of case law regarding employer liability for third-party sexual harassment.

The *Rosenbloom* court's deference to the sexual harassment case law is not surprising. Title VII of the Civil Rights Act of 1964 strikes at discrimination against protected categories such as race and sex, stating that "[i]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin . . . ." Nothing in the statute's language suggests that differing definitions of "discrimination" should be applied in racial and sexual harassment cases.

Harassment claims under Title VII historically have been analyzed in

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2. Title VII's content-based focus disturbs some courts and critics because they perceive it as government regulation of free speech. While these points are interesting, this Comment will presume the validity of the existing framework. *See generally* Eugene Volokh, *Freedom of Speech vs. Workplace Harassment Law* (visited Nov. 20, 1998) <http://www.law.ucla.edu/Faculty/volokh/harass/>.


4. *See id.* at 740-41.

5. *See id.*

6. Third-party harassment is not to be confused with third-party claims based on sexual or racial harassment of coworkers, colleagues, etc. *See, e.g.*, Crockwell v. Blackmon-Mooring Steamatic, Inc., 627 F. Supp. 800, 808 (W.D. Tenn. 1985) (concluding that a female employee was discharged for opposing the sexual harassment of a coworker).


two categories: quid pro quo claims and hostile work environment claims. The Supreme Court recognized the legitimacy of hostile work environment claims in *Meritor Savings Bank v. Vinson*. The *Meritor* Court relied extensively on an earlier Fifth Circuit decision, *Rogers v. EEOC*, finding Title VII liability for a racially hostile work environment. Accordingly, it is only fitting that we look to the evolution of sexual harassment case law for guidance on third-party racial harassment.

This Comment examines the *Rosenbloom* scenario and the implications of imposing liability on employers for the racially harassing acts of third parties. This Comment seeks to navigate between the need to combat racial harassment, the desire for consistent hostile work environment standards in both the sexual and racial contexts, the hope for workplaces where women and minorities have equal opportunities to work free from harassment, and the belief that assessing liability under Title VII for the action of third parties unfairly burdens the employer with the task of combating society's ills. Part I will review the development of hostile work environment theory generally, the development of third-party sexual

10. Courts may consider some third-party harassment to be a form of quid pro quo harassment. See infra notes 91-96 and accompanying text (illustrating the treatment of sexually revealing employer dress codes as quid pro quo harassment). This Comment reflects a belief that third-party harassment is best viewed as establishing a hostile work environment.


12. Hostile work environment harassment exists "[w]hen the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment . . . ." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (citations and internal quotation marks omitted).

13. 477 U.S. 57 (1986). Justice William Rehnquist wrote: "[p]laintiff] argues . . . that unwelcome sexual advances that create an offensive or hostile working environment violate Title VII." *Id.* at 64. "[W]e hold that a claim of 'hostile work environment' sex discrimination is actionable under Title VII . . . ." *Id.* at 73.

14. 454 F.2d 234 (5th Cir. 1971).


16. This Comment analogizes racial and sexual harassment as part of a reasoned system for combating workplace discrimination. Professor Hebert fears that analogizing racial harassment to sexual harassment makes it more difficult for employees to establish racially hostile work environment claims. *See L. Camille Hebert, Analogizing Race and Sex in Workplace Harassment Claims*, 58 Ohio St. L.J. 819 (1997). Specifically, she does not believe that the "stringent burdens" of sexual harassment cases would have been imposed in any other Title VII context. *See id.* at 824. Such concerns undervalue the language found in Title VII which underlies all hostile work environment claims. The statute does not differentiate between the two contexts and no reasonable rationale justifies why work environments—objectively and subjectively hostile in the racial or sexual contexts—should not be analyzed similarly.
harassment theory specifically, and the relationship between the sexual harassment and the racial harassment contexts under Title VII. In Part II, this Comment will advocate the adoption of the sexual harassment third-party harassment theory set forth in Rosenbloom and explore its implications for the employer. Finally, this Comment will suggest how a conscientious employer may seek to respond adequately to this developing area of Title VII liability.

I. TITLE VII: DEFINING HOSTILE WORK ENVIRONMENT LIABILITY OF THE EMPLOYER

Described as the “most broadly based and influential federal statute prohibiting discrimination in employment,” Title VII, as proposed originally, did not apply to sex-based discrimination. Adding a prohibition against sex discrimination to the bill as a last minute effort to defeat the measure, opponents of the Civil Rights Act argued that sex discrimination was sufficiently different to warrant separate treatment. The opponents failed and Title VII was passed, including prohibitions against discrimination based on sex.

Two historic cases have dominated the hostile work environment analysis, starting with the Fifth Circuit’s 1971 recognition of hostile work environment claims in Rogers, and concluding with the Supreme Court’s 1986 imprimatur in Meritor.

In Rogers, the plaintiff maintained that her employer’s practice of allowing her to work only with patients of a certain race constituted an unlawful employment practice. Finding congressional intent for a liberal interpretation of Title VII, the Fifth Circuit rejected the lower court’s dismissal of the hostile work environment claim, stating:

[T]he relationship between an employee and his working environment...
environment is of such significance as to be entitled to statutory protection.

... One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers... Section 703 of Title VII was aimed at the eradication of such noxious practices.25

Courts since Rogers have demonstrated a robust willingness to use the hostile work environment theory to combat workplace racial harassment.26

However, courts resisted adopting the hostile work environment theory in sexual harassment contexts. Hostile work environment claims routinely failed in the 1970s.27 The adoption of racial hostile work environment theory to the sexual harassment context came first in 1981 in Bundy v. Jackson,28 followed by Henson v. City of Dundee29 in 1982. The Eleventh Circuit noted in Henson that “[s]exual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality.”30 The Supreme Court in Meritor31 recognized the

25. Id. at 237-38.
26. See, e.g., Taylor v. Jones, 653 F.2d 1193, 1202 (8th Cir. 1981) (affirming a district court's conclusion that racial slurs, discriminatory work assignments, and the hanging of a noose constituted a racially hostile work environment); Gray v. Greyhound Lines, 545 F.2d 169, 176 (D.C. Cir. 1976) (recognizing a pattern of racial slurs as creating a standing to sue for a hostile work environment); Daniels v. Essex Group, Inc., 740 F. Supp. 553, 560 (N.D. Ind. 1990) (finding that repeated instances of racially hostile graffiti and a dummy hung in effigy constituted a racially hostile work environment); EEOC v. Murphy Motor Freight Lines, Inc., 488 F. Supp. 381, 386 (D. Minn. 1980) (finding that slashed tires, racially derogatory graffiti, and racial comments constituted a hostile work environment).
28. 641 F.2d 934, 946 (D.C. Cir. 1981) (reversing a lower court's refusal to hold that sexual harassment is a per se violation of Title VII).
29. 682 F.2d 897, 904 (11th Cir. 1982) (holding that Title VII sexual harassment violations must be “sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment”).
30. Id. at 902.
extension. In Meritor, Justice Marshall concluded that a plaintiff might recover by showing that "discrimination based on sex has created a hostile or abusive work environment." In the later case of Harris v. Forklift Systems, Inc., the Supreme Court clarified the plaintiff’s burden in sexual harassment cases so as not to require a showing of psychological harm. The Harris Court adopted a three-step test that explored the following questions: (1) Would a reasonable person have found the environment hostile or abusive? (2) Did the victim subjectively believe the environment to be abusive? and (3) Did this alter the conditions of the plaintiff’s employment?

The recognition of the hostile work environment doctrine created many competing theories about the scope and extent of the employer’s liability. Given the broad role of employers in defining their workplace environments, the frequent scenario of supervisor-originated harassment, and the frequently brazen coworker harassment in early cases, theories of liability for hostile environment analysis were primarily based on: (1) notice and (2) abuse of authority.

In 1998, the Supreme Court furthered the evolution of harassment analysis. In Faragher v. City of Boca Raton, the Court heard the case of a Boca Raton lifeguard who claimed she was sexually harassed by low-level superiors within the lifeguard ranks. Burlington Industries, Inc. v. Ellerth, a companion case to Faragher, involved a sexually hostile work environment claim based on unfulfilled threats by a supervisor to an employee for sexual favors. The Court’s decisions, while not disturbing

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32. At that time, the Supreme Court did not explicitly comment on the viability of hostile work environment claims for racial harassment. See infra notes 50-51 and accompanying text (acknowledging that the Supreme Court had yet to address hostile work environment for racial harassment).

33. 477 U.S. at 66.

34. 510 U.S. 17 (1993).

35. See id. at 21-23; see also Dawn M. Buff, Note, Beyond the Court’s Standard Response: Creating an Effective Test for Determining Hostile Work Environment Harassment Under Title VII, 24 STETSON L. REV. 719 (1995). Other observers characterize the Harris decision as a two-step test. See Lewis, supra note 17, §3.1, at 188 (noting an objective prong and a subjective prong from Harris).

36. See, e.g., Reed v. A.W. Lawrence & Co., 95 F.3d 1170, 1180 (2d Cir. 1996) (observing that employer knowledge of a coworker’s harassment gives rise to employer liability).

37. See, e.g., Sauers v. Salt Lake County, 1 F.3d 1122, 1125 (10th Cir. 1993) (holding that employer liability for a supervisor’s actions exists where the supervisor possessed the authority to hire, fire, and otherwise alter conditions of employment).


39. See id. at 2280.

theories of vicarious liability based on negligence,\footnote{1} drew attention instead to the purpose of Title VII: the eradication of discrimination in the workplace. The Court posited two additional questions for assessing employer liability: (1) whether the employer exercised reasonable care to avoid and remedy harassment; and (2) whether the employee acted with reasonable care to use internal complaint procedures.\footnote{2} Fulfilling the former constitutes an affirmative defense for employers,\footnote{3} as does the failure of the employee to utilize the latter.\footnote{4}

II. JEALOUS COUSINS: EXAMINING THE TWIN-TRACKED DEVELOPMENT OF RACIAL AND SEXUAL HARASSMENT

"Title VII declares discriminatory practices based on race, gender, religion, or national origin equally unlawful," wrote Justice Ginsburg in her concurring opinion in \textit{Harris v. Forklift Systems, Inc.}\footnote{5} But have the courts adopted equally uniform standards?

The courts and the Equal Employment Opportunity Commission ("EEOC") maintain that they recognize a uniform standard of hostile work environment for all of the Title VII categories,\footnote{6} but several commentators question this characterization. Hostile work environment began with racial harassment in \textit{Rogers}\footnote{7} in 1977 and migrated to sexual harassment four years later in \textit{Bundy}.\footnote{8} The cross-pollination seen in the very beginnings of harassment law suggests that, despite the rhetoric, the development is less

\begin{itemize}
\item \footnote{1}{"An employer is negligent with respect to sexual harassment if it knew or should have known about the conduct and failed to stop it. Negligence sets a minimum standard for employer liability under Title VII . . . ." \textit{Id.} at 2267.}
\item \footnote{2}{\textit{See Faragher}, 118 S. Ct. at 2291.}
\item \footnote{3}{\textit{See id.} at 2292.}
\item \footnote{4}{In one of the early reported sexual harassment decisions following \textit{Burlington Industries} and \textit{Faragher}, the Fourth Circuit examined a state employee's claim of a racially hostile work environment caused by a supervisor. The Fourth Circuit articulated the new nuances in \textit{Reinhold v. Virginia}, 151 F.3d 172 (4th Cir. 1998). There, the court determined that employer vicarious liability results from a hostile work environment when: (1) a supervisor takes a tangible employment action; (2) the employer cannot prove by a preponderance of the evidence that the employer exercised reasonable care to prevent and cure the harassing behavior; or (3) the employer can show that the employee unreasonably failed to take advantage of the preventive or corrective opportunities of the employer. \textit{See id.} at 174-75.}
\item \footnote{5}{510 U.S. 17, 26 (1993) (Ginsburg, J., concurring) (emphasis added).}
\item \footnote{6}{For example, the court observed no difference in \textit{Williams v. Perry}, 907 F. Supp. 838 (M.D. Pa. 1995). "Although the claim in \textit{Harris} involved sexual harassment, the hostile work environment theory applies equally to racial harassment." \textit{Id.} at 846. "The EEOC asserts that the same standard it uses to assess claims of environmental sexual harassment . . . should also be used to decide harassment claims based on race, religion or national origin." \textit{Lewis}, supra note 17, § 3.1, at 185 n.47.}
\item \footnote{7}{\textit{See Rogers v. EEOC}, 454 F.2d 234 (5th Cir. 1971).}
\item \footnote{8}{\textit{See Bundy v. Jackson}, 641 F.2d 934 (D.C. Cir. 1981).}
\end{itemize}
like a single track and, instead, more like parallel tracks, one for each context.

Does a difference exist between the current racial hostile work environment theory and its cousin in sexual harassment? If there is a difference between the racial and sexual harassment contexts, is it manifested in the wording of the standards or in the application of the standards?

As far as the courts’ explicit statements of the law are concerned, there are no substantive differences between the sexual and racial harassment standards.\(^49\) The Supreme Court, in *Patterson v. McLean Credit Union*,\(^50\) linked the legal standards together, stating that “[w]hile this Court has not yet had the opportunity to pass directly upon [racial harassment claims under Title VII], the lower federal courts have uniformly upheld [them], and we implicitly have approved [them] in... [our approval of sexual harassment in] *Meritor Savings Bank v. Vinson.*”\(^51\)

In *Faragher v. City of Boca Raton*,\(^52\) the Supreme Court compared racial and sexual harassment and noted that “there is good sense in seeking generally to harmonize the standards of what amounts to actionable harassment.”\(^53\) In this footnote and the decision’s examination of the historical interplay between racial and sexual harassment,\(^54\) the Supreme Court seemingly invited further cross-fertilization between racial and sexual harassment contexts.\(^55\)

Lower courts, in handling both types of claims, frequently interchange precedents from both lines without any underlying analysis\(^56\) and permit the aggregation of both claims to constitute a hostile work environment on the totality of the circumstances.\(^57\)

The EEOC guidelines, cited with approval in harassment cases,\(^58\) hint

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49. See Harrison v. Metropolitan Gov’t, 80 F.3d 1107, 1118 (6th Cir. 1996) (“[T]he elements and burden of proof that a Title VII plaintiff must meet are the same for racially charged harassment as for sexually charged harassment.”).


51. Id. at 180.


53. Id. at 2283 n.1.

54. See id. at 2282-83.

55. Indeed, the first sentence of the footnote approvingly noted that the circuit courts “have properly drawn on standards developed in cases involving racial harassment” in sexual harassment cases. Id. at 2283 n.1.


57. See, e.g., Hicks v. Gates Rubber Co., 833 F.2d 1406, 1416 (10th Cir. 1987) (permitting the totality of racial and sexual harassment together to form a Title VII claim).

58. For general approval of the EEOC sexual harassment guidelines, look to *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65-66 (1986), and *Henson v. City of Dundee*, 682 F.2d 897, 903 (11th Cir. 1982). More generally, the Supreme Court stated in *General Electric*
at the parallel contexts by the very existence of two guidelines and the timing in the creation of the two guidelines. The guidelines also illustrate the significant cross-pollination between the two contexts.

A prime judicial example of the cross-pollination is *Booker v. Budget Rent-A-Car Systems*. In *Booker*, an African-American manager alleged racial harassment by a supervisor. The court applied the first four prongs of the old racially hostile work environment analysis, but then applied the new "reasonable" factors enunciated by the Supreme Court in *Faragher* and *Burlington Industries* in the sexual harassment context. The district court first looked to determine whether the supervisor had taken "tangible employment action," which would lead to employer liability regardless of *Budget Rent-A-Car's* notice. The district court then noted that even if there was no tangible employment action, *Budget Rent-A-Car* still incurred vicarious liability for failing to exercise "reasonable care to correct and prevent promptly" racial harassment.

An abortive attempt by the Sixth Circuit in 1988 to vary the standards was criticized by commentators and rejected by the Sixth Circuit two years later. The lower courts appear certain that either a

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Co. v. Gilbert that EEOC rulings, interpretations, and opinions form a "body of experience and informed judgment to which courts and litigants may properly resort for guidance." 429 U.S. 125, 141-42 (1976) (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).

59. While there are EEOC guidelines for both national origin harassment, 29 C.F.R. § 1606.8 (1997), and sexual harassment, 29 C.F.R. § 1604.11 (1997), note the first footnote in the sexual harassment guidelines, which states that "[t]he principles involved here continue to apply to race, color, religion or national origin." 29 C.F.R. § 1604.11 n.1 (1997).

60. 17 F. Supp. 2d 735 (M.D. Tenn. 1998).

61. "The [Supreme] Court defined a tangible employment action as one which "constitutes a significant change in employment status, such as hiring, [...] different responsibilities, or a decision causing a significant change in benefits." Id. at 747 (quoting *Burlington Indus., Inc. v. Ellerth*, 118 S. Ct. 2257, 2268 (1998)).

62. See id. at 746.

63. Id. at 747 (quoting *Faragher v. City of Boca Raton*, 118 S. Ct. 2275, 2293 (1998)).

64. The Sixth Circuit created a lesser standard of intermediate scrutiny for sexual harassment, while using a higher standard of strict scrutiny for racial classifications. See *Davis v. Monsanto Chem. Co.*, 858 F.2d 345 (6th Cir. 1988). The *Davis* court reasoned that the existence of two standards was not contrary to Title VII and consistent with civil rights jurisprudence. See id. at 348 n.1 (6th Cir. 1988) ("Some circuits apply the same legal standard for both types of hostile work environment claims, race and sex. We believe that the standards need not necessarily be identical. [...] The application of slightly different standards in different types of hostile work environment claims is entirely consistent with established civil rights jurisprudence.") (internal citations omitted). Id.

65. See Lisa Rhode, Case Note, *The Sixth Circuit's Double Standard in Hostile Work Environment Claims: Davis v. Monsanto Chemical Co.*, 858 F.2d 345 (6th Cir. 1988), 58 U. Cin. L. Rev. 779 (1989) (pointing out the dangers of varying standards, warning of complications when presented with claims under other Title VII protected classes (religion, national origin, etc.), and advocating a return by the Sixth Circuit to a single standard).

66. See *Risinger v. Ohio Bureau of Workers' Compensation*, 883 F.2d 475, 485 (6th Cir. 1990) ("The decision in *Davis* ... was a departure from the standard intended to be
single body of harassment law exists that may be interchanged freely, or
the elusive harassment situation that would necessitate varying legal
standards between racial and sexual harassment has yet to be encountered.67

However, even if the same standards are purportedly adopted by the
courts in sexual and racial harassment, are the same results reached in
application? Several commentators see variation in courts’ treatment of the
differing Title VII claims despite similar statements of the legal standards.68
Specifically, some observers suggest that courts today are more willing to
act in the racial harassment context than in the sexual harassment context.
These observations are made either by those advocating stricter attention
by the courts towards achieving a consistent standard through more liberal
judicial enforcement,69 or those advocating the need for a special standard
(leading to less robust enforcement) to accommodate perceived differences
attendant to particular types of harassment.70

For an example of the perceived differences in application between
the sexual and racial harassment contexts, compare the judicial responses in
Galloway v. General Motors Service Parts Operations71 and Rodgers v.
Western-Southern Life Insurance Co.72 In Galloway, the plaintiff was
repeatedly referred to as a “sick bitch” by a coworker.73 In Rodgers, the
plaintiff’s supervisor called the plaintiff “nigger” twice and made
disparaging comments about black employees.74 Despite the roughly
similar fact patterns, in Galloway the Seventh Circuit did not find sufficient
harm for a Title VII claim, while in Rodgers it affirmed a lower court

applicable to both racial and sexual harassment causes of action predicated upon a
pervading hostile climate within the workplace generally . . . .”); see also Hebert, supra note
16, at 827-29 (suggesting that the Davis court sought to avoid unfavorable requirements
from another Sixth Circuit sexual harassment case by setting a separate standard for racial
harassment).

67. In Faragher v. City of Boca Raton, Justice Souter left open the possibility that the
standards are not “entirely interchangeable.” 118 S. Ct. 2275, 2283 n.1 (1998).
68. See e.g., Kimberly McCreight, Comment, Call for Consistency: Title VII and Same-
(“[T]he inconsistent treatment of sexual harassment claims cannot be reconciled with the
treatment of racial and religious harassment cases from which the cause of action for sexual
harassment originally evolved.”).
69. See Robert J. Gregory, You Can Call Me a “Bitch” Just Don’t Use the “N-Word”:
Some Thoughts on Galloway v. General Motors Service Parts Operations and Rodgers v.
Western-Southern Life Insurance Co., 46 DEPAUL L. REV. 741 (1997) (highlighting the
different application of Title VII in racial and sexual contexts).
70. For a discussion advocating a less robust enforcement in the context of religious
harassment out of respect for the inherent constitutional issues involved with attempting to
control an employee’s religious views, see Dworkin & Peirce, supra note 27, at 89-91.
71. 78 F.3d 1164 (7th Cir. 1996).
72. 12 F.3d 668 (7th Cir. 1993).
73. See 78 F.3d at 1165.
74. See 12 F.3d at 671.
judgment for the plaintiff, noting that "[p]erhaps no single act can more quickly 'alter the conditions of employment and create an abusive working environment,' than the use of an unambiguously racial epithet such as 'nigger' . . . ." 75

While Rodgers involved the actions of a supervisor, 76 it is still striking to note the basic similarities of the fact patterns and the varying analyses of the two panels. The Galloway court differentiated between various invectives for females and inquired into the context of the sexual slurs. 77 Conversely, the Rodgers opinion cited with approval Bailey v. Binyon, 78 in which the court stated that "[t]he use of the word 'nigger' automatically separates the person addressed from every non-black person; this is discrimination per se." 79 In fairness to the Seventh Circuit, not all cases of racial slurs lead to per se liability. Numerous cases exist—albeit older cases—in which the use of clear racial or ethnic slurs was not granted per se Title VII relief. 80

In comparison, within the context of religious harassment under Title VII, many religious groups argue against imposing the same standard used for other Title VII protected groups. 81 Advocates for a different standard draw a distinction between hanging a picture of Jesus in a cubicle and

75. 12 F.3d at 675 (citations omitted) (quoting Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67 (1986)).

76. In Burlington Industries, the Supreme Court held that an employer is vicariously liable when a supervisor creates an actionable hostile work environment. See Burlington Indus., Inc. v. Ellerth, 118 S. Ct. 2257, 2270 (1998). It is unclear how a court could weigh similarly offensive statements from an employer and from a coworker, yet reach varying results absent any additional facts, given Meritor's holding that employers are not per se vicariously liable for supervisors' sexual harassment of subordinates. See Meritor Sav. Bank v. Vinson, 477 U.S. 57, 74 (1986).

77. Chief Judge Posner parsed through varying levels of sexual epithets by reasoning that "[t]he terms 'fucking broads' and 'fucking cunts' are more gendered than 'bitch' . . . ." 78 F.3d at 1168. The Galloway decision underweighted the question of the impact on the victim. As the Supreme Court noted in Meritor, "[t]he gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome.'" 477 U.S. at 68. Whether actions are unwelcome is a question analyzed from the victim's point of view. See Ellison v. Brady, 924 F.2d 872, 878-80 (9th Cir. 1991); cf. King v. Frazier, 77 F.3d 1361, 1363 (Fed. Cir. 1996) (holding that under 5 U.S.C. § 7513(a) "sexual harassment [must] be judged from the perspective of the one being harassed"). One must question an appellate court's ability to assess the impact on a victim from a sterile trial transcript. See Galloway, 78 F.3d at 1168.

78. 583 F. Supp. 923 (N.D. Ill. 1984).

79. Id. at 927.

80. See, e.g., Cariddi v. Kansas City Chiefs Football Club, Inc., 568 F.2d 87, 88 (8th Cir. 1977) (denying Title VII claims where the stadium director referred to ticket-taker as a "dago" and suggested that all Italian-American employees are members of the Mafia). These cases reflect a less developed understanding of Title VII and evolving standards of what a reasonable person would view as harassment. See Bailey, 583 F. Supp. at 931-34.

81. See Dworkin & Peirce, supra note 27, at 44-47 (asking if all harassment should be treated similarly and judged by the same standard).
hanging a "girlie" picture in a workstation.\textsuperscript{82} Those advocating a separate religious harassment standard draw support from the differences in treatment by the courts, despite the fact that the courts have not recognized these differences.\textsuperscript{83} These advocates see an inherent conflict between the suppression of religious harassment and the exercise of free religion, which further justifies separate treatment.\textsuperscript{84} Thus, the question of whether a single standard for all Title VII claims exists can be answered with a single response. Both are closely related and frequently litigated areas under Title VII, but evidence suggests that they are separate contexts that have developed at different rates.

By glossing over the existence of different contexts, courts borrow concepts and theories of liability at will. However, each time an innovation cross-pollinates from one track to the other, there is initial resistance and caution. In some instances, such as when courts give varying treatment to racial epithets and sexual slurs as illustrated by comparing Rodgers and Galloway, the caution seemingly blurs the courts' abilities to perceive the evidence.\textsuperscript{85}

III. EXTENDING EMPLOYER LIABILITY TO INCLUDE SEXUAL HARASSMENT BY THIRD PARTIES

Just as Anita Hill's testimony at Justice Thomas's confirmation hearings gave national publicity to sexual harassment in the workplace, the 1993 sexual harassment suit by former Hooters waitresses, alleging harassment by customers and managers, helped bring the question of employer liability for sexually harassing acts of third parties—in this case customers and crowd members—to the forefront.\textsuperscript{86} The waitresses' claims, while controversial,\textsuperscript{87} illustrated one of the two types of third-party sexual

\textsuperscript{82} See id. at 44 (citing examples of the different kinds of harassment covered under Title VII).

\textsuperscript{83} See id. at 46-47 (suggesting that harassment standards are not uniform in practice, despite contrary language from the courts).

\textsuperscript{84} See id. at 76-77 (advocating separate standards for religion versus other Title VII categories).

\textsuperscript{85} Perhaps the courts perceive a benign tinge of awkward sexual relationships, but do not recognize a similar benign context in the use of racial banter. This benign tinge to the sexual harassment context may explain, but does little to justify, the disparity in the Galloway and Rodgers decisions given the close similarity in facts and the mandate of Title VII analysis. Accord Ellison v. Brady, 924 F.2d 872, 878-79 (9th Cir. 1991) (discussing the different viewpoints of women and men that may lead to misunderstandings).

\textsuperscript{86} See Andrew Blum, Assumption of Risk Tested in Hooters Suit, Nat'l L.J., May 24, 1993, at 7, 7 ("There is a difference between a place holding itself as a sexual type of environment vs. going to work in a nunnery.").

\textsuperscript{87} Compare Kelly Ann Cahill, Special Project, Hooters: Should There be an Assumption of Risk Defense to Some Hostile Work Environment Sexual Harassment
harassment claims.

There are two categories of third-party sexual harassment liability cases: (1) when an employer's practices or policies place an employee in a compromising situation in the path of sexual harassment; and (2) when an employer incurs vicarious liability under agency principles and fails to exercise reasonable care to avoid and eliminate harassment when it occurs.

When an employer places an employee in a compromising situation that bears increased likelihood of harassment, the courts have not been sympathetic to the employer for resulting harassment. In the first application of employer liability for third-party acts, EEOC v. Sage Realty Corp., the EEOC sued an employer who required female lobby attendants to wear revealing costumes. The employer had fired an employee for refusing to wear a revealing flag uniform that, in two days, generated cat whistles, propositions, and comments such as, "I'll run it up the flag pole any time you want to." The district court held the employer liable on the theory that forcing the employee to wear the uniform was the equivalent of forcing her to acquiesce to the harassment. The court summarily rejected...
any bona fide occupational qualification defenses of the employer, but did not go so far as to say that requiring an employee to wear a sexually provocative outfit automatically leads to a Title VII claim.

Additionally, an employer’s failure to remedy sexual harassment is seen by the EEOC and courts as sufficient grounds to impute liability to the employer. The Supreme Court in Faragher and Burlington Industries underscored this point with the provision of an affirmative defense for conscientious employers. The EEOC’s guidelines similarly consider the “extent of the employer’s control and any other legal responsibility which the employer may have with respect to the conduct of . . . non-employees,” which would seem to be part of any reasonableness analysis of an employer’s responses.

For example, immediately in the wake of Sage Realty, the EEOC concluded in EEOC Decision No. 84-39 that a restaurant owner was liable under hostile work environment and retaliation theories when a waitress was sexually harassed by the owner’s friends, but the owner failed to act upon complaints. The owner did not claim to have taken any remedial or preventative steps, but acknowledged that he knew of the harassment. The EEOC concluded that “[w]hat is significant . . . is . . . [the owner’s] failure to take any action to assure the [waitress] that he did not condone sexual harassment of his employees and that she would not have to tolerate such conduct by a customer in the future.” Here, in essence, the employer’s inaction was sufficient to create liability. In the terms of Burlington Industries and Faragher, the owner failed to act reasonably.

The adequacy of an employer’s response has been used as a factor in third-party sexual harassment as well. In Folkerson v. Circus Circus

95. See Sage Realty, 507 F. Supp. at 611 (denying any “bona fide occupational qualification” in requiring employees to wear sexually revealing costumes).
96. Cf. Priest v. Rotary, 634 F. Supp. 571, 574, 581 (N.D. Cal. 1986) (sustaining the Title VII claim based on the totality of the circumstances, where the employer required employee to wear “something low-cut and slinky,” but failing to note any third-party acts).
97. See supra notes 38-44 and accompanying text.
98. 29 C.F.R. § 1604.11(e) (1997).
100. These facts are similar to those confronted by the Tenth Circuit in Lockard v. Pizza Hut, Inc. There, the Tenth Circuit held a restaurant franchisee liable for its manager’s failure to control the abusive conduct of two customers towards a waitress. See Lockard v. Pizza Hut, Inc., 162 F.3d 1062 (10th Cir. 1998). The Tenth Circuit cited the First, Eighth, and Ninth Circuits as accepting the EEOC’s guidelines on third-party harassment. See id. at 1073.
101. See 1984 WL 23399, at *5 (“In this case, the requirement of actual or constructive knowledge on the part of the Respondent has been satisfied . . .”).
102. Id. (emphasis added); see also Crockwell v. Blackmon-Mooring Steamatic, Inc., 627 F. Supp. 800, 807 n.5 (W.D. Tenn. 1985) (“Conditioning of continued employment on acceptance of suggestive remarks made by a non-employee can violate Title VII”).
103. See supra notes 38-44 and accompanying text.
Enterprises, Inc.,\textsuperscript{104} the Ninth Circuit addressed patron harassment of a casino employee and held "that an employer may be held liable for sexual harassment on the part of a private individual, such as [a] casino patron, where the employer either ratifies or acquiesces in the harassment by not taking immediate and/or corrective actions when it knew or should have known of the conduct."\textsuperscript{105}

In facing the question of third-party sexual harassment, the courts and the EEOC have repeatedly imputed liability to employers. In the process, the EEOC and the courts have applied a reasonableness analysis in measuring employer responses. The reasonableness of a response is tempered by the constraints of the situation. In the case of third-party sexual harassment, the employer has fewer coercive tools and frequently has less information to fashion a response. The same underlying theories would seem applicable for the question of third-party racial harassment.\textsuperscript{106}

IV. EXPLORING THIRD-PARTY HARASSMENT: DEFINING THE EMPLOYER’S LIABILITY FOR A FAILURE TO ACT

In formulating the standard of liability for third-party harassment, the courts have expanded the general hostile work environment theory and borrowed liberally from the standard applied for coworker harassment. Meritor sets out that "[f]or sexual harassment to be actionable, it must be sufficiently severe or pervasive "to alter the conditions of [the victim’s] employment and create an abusive working environment."\textsuperscript{107} The Supreme Court’s refinements in Harris elaborate that:

[W]e can say that whether an environment is “hostile” or “abusive” can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance. The effect on the employee’s psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive. But while psychological

\begin{thebibliography}{99}
\bibitem{104} 107 F.3d 754 (9th Cir. 1997).
\bibitem{105} Id. at 756; see also Lockard v. Pizza Hut, Inc., 162 F.3d 1062, 1073-74 (10th Cir. 1998) (“An employer who condones or tolerates the creation of such [a hostile] environment would be held liable regardless of whether the environment was created by a coemployee or a nonemployee, since the employer ultimately controls the conditions of the work environment.”).
\bibitem{106} See \textit{supra} notes 45-85 and accompanying text (describing the relationship between sex and race under Title VII).
\bibitem{107} Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67 (1986) (alteration in original) (quoting Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).
\end{thebibliography}
harm... may be taken into account, no single factor is required.\(^{108}\)

In the racial harassment context, several courts historically adopted enumerated prongs for assessing the plaintiff's claim. Under the common five-prong test the plaintiff must show: (1) that the plaintiff “suffered intentional discrimination because of race”; (2) that “the discrimination was pervasive and regular”; (3) that “the discrimination detrimentally affected the plaintiff”; (4) that “the discrimination would detrimentally affect a reasonable person”; and 5) “the existence of respondeat superior liability.”\(^{109}\)

Respondeat superior liability has historically been a source of much confusion.\(^{110}\) The Supreme Court's clarification of harassment standards in Burlington Industries and Faragher provides direction for the evolution of employer liability.\(^{111}\)

The courts, in the creation of a standard to govern third-party sexual harassment, look to coworker harassment case law for guidance.\(^{112}\) For example, in Mart v. Dr Pepper Co.,\(^{113}\) the district court compared the standard of employer liability for harassment by third parties to the standard for coworker harassment.\(^{114}\) Similarly, a district court in North Carolina examined a case of mixed alleged sexual harassment by coworkers and customers in Llewellyn v. Celanese Corp.\(^{115}\) The court

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110. See J. Hoult Verkerke, Notice Liability in Employment Discrimination Law, 81 VA. L. REV. 273 (1995) (discussing the various applications of respondeat superior as part of a proposal for an alternative liability schema); see also Hunter v. Allis-Chalmers Corp., 797 F.2d 1417, 1422 (7th Cir. 1986) (addressing the confusion of respondeat superior and the attendant employer duties).
111. See supra notes 38-44 and accompanying text.
112. Employer liability for harassment as the result of an employer policy, such as a uniform requirement, thus far is best likened to a hybrid form of quid pro quo harassment. At least two courts directly link the imposition of liability for the third-party harassment to quid pro quo theory. In Wenner v. C.G. Bredting Manufacturing Co., the court writes that quid pro quo harassment would exist where “the employer made clear to its employee that submission to the customer's advances was a condition of employment.” 917 F. Supp. 640, 646 (W.D. Wis. 1995). The Sage Realty court says that via the uniform requirement, the “defendants made [the plaintiff's] acquiescence in sexual harassment by the public, and perhaps by building tenants, a prerequisite of her employment as a lobby attendant.” EEOC v. Sage Realty Corp., 507 F. Supp. 599, 609-10 (S.D.N.Y. 1981).
114. The Mart court's statement of the law is a bit antiquated given the Faragher-Burlington Industries factors for assessing employer vicarious liability. See Mart, 923 F. Supp. at 1388 (“Under both [the third-party standard and the coworker standard], the employer is liable, not for the harassment in the first instance, but for negligence in failing to end the harassment after being made aware of it.”).
applied a two-step analysis in which the plaintiff must create a rebuttable presumption: (1) that sexual harassment took place; and (2) that the employer "knew or should have known of the harassment, and took no effectual action to correct the situation."  

The standard for third-party harassment, as seen in the sexual harassment context and incorporating the new principles of *Burlington Industries* and *Faragher*, therefore represents a logical evolution from sexual harassment law that can also easily be applied to racial harassment contexts.

V. ADOPTING THE SEXUAL HARASSMENT THIRD-PARTY FRAMEWORK FOR THIRD-PARTY RACIAL HARASSMENT

The court's willingness to impute liability to employers for clear failures to combat sexual harassment should be emulated in the racial harassment context. The call for a consistent standard by the courts is practical and the need to combat racism in the workplace continues today. The *Rosenbloom* court moved towards this conclusion, but in doing so, stated unwarranted fears of overextending Title VII. In *Rosenbloom*, a senior center employee was subjected to continued racial harassment by both clients and a member of the general public. The center management was aware of the situation and took steps to end the harassment by both the clients and the non-client through advertisements, announcements of center policies, and seeking a restraining order against the non-client harasser.

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116. *Id.* at 380 (quoting *Katz v. Dole*, 709 F.2d 251, 256 (4th Cir. 1983)) (emphasis added by Llewellyn).

117. *See supra* notes 45-85 and accompanying text (examining the relationship between sexual and racial harassment).

118. Antidiscrimination laws and lawsuits have "educated" would-be violators such that extreme manifestations of discrimination are thankfully rare. Though they still happen, the instances in which employers and employees openly use derogatory epithets to refer to fellow employees appear to be declining. Regrettably, however, this in no way suggests that discrimination based upon an individual's race, gender, or age is near an end. Discrimination continues to pollute the social and economic mainstream of American life, and is often simply masked in more subtle forms. It has become easier to coat various forms of discrimination with the appearance of propriety, or to ascribe some other less odious intention to what is in reality discriminatory behavior. In other words, while discriminatory conduct persists . . . the impermissible impact remains the same, and the law's prohibition remains unchanged.


120. *See id.* at 740-42.
The Rosenbloom court feared that the Supreme Court had "implicitly warned against unsubstantiated judicial extensions of employer liability not contemplated within the Civil Rights Act of 1964." These concerns are muted in light of the Burlington Industries and Faragher standard of employer liability, even in the absence of knowledge or benefit to the employer, for the failure to remedy harassing workplace conditions. Title VII's real goal is the eradication by employers of workplace harassment, not the imposition of a liability scheme or a tortured examination of agency principles.

In looking at third-party sexual harassment case law, the Rosenbloom court identified three categories of precedent: (1) where a third-party exercises control over the employee and harasses the employee; (2) where an employer imposes a policy or dress code that makes harassment a condition of employment; and (3) where "several courts have gone beyond these two categories of cases and suggest that employers have a broad duty to protect their employees from sexual harassment, even when an employer does not directly benefit from the harassment." The Rosenbloom court did correctly identify Title VII's imposition of a general duty of the employer to provide a harassment-free workplace. This, however, does not represent a new theory of liability, but is the overarching theme of Title VII protections. As stated in Garziano v. E.I. DuPont de Nemours & Co., "federal law imposes a specific duty upon employers to protect the workplace and the workers from sexual harassment, including redressing known occurrences of sexual harassment."

Hostile work environment and quid pro quo analysis provide the framework for the courts to identify the offensive actus reus. For third-party sexual harassment, as discussed in Mart and echoed in Burlington Industries and Faragher, the offensive actus reus is the failure of the employer to take reasonable corrective action. Stated alternatively, "the identity and employment status of the harasser is immaterial; the relevant

121. Id. at 743 (quoting David S. Warner, Note, Third-Party Sexual Harassment in the Workplace: An Examination of Client Control, 12 Hofstra Lab. L.J. 361, 378 n.102 (1995)).
122. See supra notes 38-44 and accompanying text.
123. 974 F. Supp. at 743 (emphasis added).
125. See Zweighaft, supra note 27, at 441-43. "The employer's responsibility to provide a safe workplace is a positive obligation, distinct from theories of agency." Id. at 442. In the context of same-sex harassment, Justice Scalia rejected concerns that Title VII was developing into a "general civility code" for the workplace. See Oncale v. Sundowner Offshore Servs., Inc., 118 S. Ct. 998, 1002 (1998).
126. 818 F.2d 380, 387 (5th Cir. 1987).
issue is whether the employer subjected its employee to a hostile work environment by allowing the known harassment to continue unabated.127 Society does not automatically impute the actual harassing actions of third parties to the employer, but instead the employer’s liability stems from the failure to act reasonably in providing a harassment-free work environment. Thus, the employer allows harassment to become a term or condition of continued employment indirectly.128 This approach relieves the plaintiff of having to prove, as suggested by Rosenbloom, some nexus between the harassing behavior and employer benefits.129

As discussed earlier, it is common for sexual and racial harassment law to borrow freely from each other’s innovations.130 Given the intertwining history of the two doctrines, the adoption of third-party liability for racial harassment cases would not be shocking, but in fact would be consistent with Title VII’s goals and statutory language. Such adoption would promote a cohesive common framework in the Title VII harassment context. While it seems inevitable that racial and sexual harassment law develop at different paces, the courts should not want the doctrines to diverge significantly. It is ironic that racial harassment law, the first context in which hostile work environment claims were accepted, must look to its sexual harassment cousin for guidance on third-party harassment questions.

Other countries have already applied this responsibility to employers. In Burton v. De Vere Hotels, a British Employment Appeals Tribunal confronted the case of two waitresses who were sexually and racially harassed while they worked at a banquet.131 Both the performer and audience members barraged the employees with lewd comments and jokes, while management, who had advance knowledge of the performer’s racially tinged routine, stood by and watched.132 Reversing a lower court’s

127. Otis v. Wyse, No. 93-2349-KHV, 1994 WL 566943, at *6 (D. Kan. Aug. 24, 1994). In Otis, an employer attempted to avoid liability by arguing that the harasser was an independent contractor. See id. The court rejected this contention, citing the broader principle quoted. See id.

128. Regarding policies and dress codes which represent illegal conditions of employment, it can be suggested that providing such conditions of employment amounts to a per se failure by the employer. See supra notes 91-96 (discussing employer liability as a hybrid form of quid pro quo harassment).

129. See 974 F. Supp. 738, 744 (D. Minn. 1997). Presumably, the Rosenbloom approach is derived from agency law requirements that traditionally limit liability to acts within the scope of employment. See generally Rebecca Hanner White, Vicarious and Personal Liability for Employment Discrimination, 30 GA. L. REV. 509 (1996) (discussing the evolution of employer liability for the acts of employees).

130. See supra notes 45-85 and accompanying text (exploring the shared history of sexual and racial harassment doctrines).


132. See id.
finding, the tribunal ruled that the failure of the manager to act was sufficient to justify liability.\(^\text{133}\)

VI. POLICY RATIONALES IN FAVOR OF ADOPTION

Rachel Zweighaft asks, "What's the harm?" in her comparison of hostile work environment theory in the United States, Canada, England, and Australia.\(^\text{134}\) Critics of the third-party sexual harassment theory argue that the harm is to the employer: the employer's predicament is severe when the demands of Title VII liability conflict with the economic realities of corporate survival.\(^\text{135}\)

When posed with a choice between losing a client or tolerating racially harassing behavior, many employers believe they cannot, or are not inclined to, side with their employee for economic reasons. Instead, they would rather retain the client and terminate the employee. One sexual harassment victim reported, "When I was dismissed, the agency told me, in so many words, that it was either me or the account."\(^\text{136}\) Is the employer, as one critic of sexual harassment policy described it, an "almost universally unacknowledged victim?"\(^\text{137}\)

At the furthest end of the analytical extreme Professor Achampong discussed potential employer liability from single isolated third-party acts: "one egregious act by a non-employee affecting an employee as a direct result of an employer's job requirement—such as a sexually provocative dress code—can... lead to employer liability."\(^\text{138}\) Professor Achampong additionally saw potential for employer liability after single incidents where the employer failed to act reasonably, citing scenarios such as third-party rape and violent sexual assault.\(^\text{139}\) It would seem to be a conceptually possible, but rare, instance for a single event by a third party, without an act of failure to act by the employer, to run afoul of Title VII's hostile work environment scheme.

In applying the courts' articulation of Title VII to employers when

\(^{133}\) See id. at 13.

\(^{134}\) See Zweighaft, supra note 27, at 434.


\(^{136}\) Id.

\(^{137}\) Paul, supra note 27, at 356.


\(^{139}\) Professor Achampong cited a Michigan Supreme Court case applying Michigan law, Radtke v. Everett, 501 N.W.2d 155, 168 (Mich. 1993), for this proposition and accompanying scenarios.
there is third-party racial harassment, it is vital to remember that courts find liability in the implicit sanction of the harassment when the employer fails to take reasonable corrective and preventive steps. This standard reflects the result of the courts' balancing of Title VII goals and concerns about imposing unreasonable burdens on employers.

The Fourth Circuit, in *Spicer v. Virginia Department of Corrections*, commented in a sexual harassment context:

The work place is a complex and diversified community in which employees work closely and continuously in each other's presence over long hours, during which, experience has shown, inappropriate conduct occurs from time to time. While employers can and should be required to adopt reasonable policies... and to take reasonable measures to enforce these policies, they cannot be held... liable for any and all inappropriate conduct of their employees. When presented with the existence of illegal conduct, employers can be required to respond promptly and effectively, but when an employer's remedial response results in the cessation of the complained of conduct, liability must cease as well. Employers cannot be saddled with the insurmountable tasks of conforming all employee conduct at all times to the dictates of Title VII, irrespective of their knowledge of such conduct or the remedial measures taken in response to such conduct.40

In offering an employer a choice between repudiating harassing behavior by clients, customers, and other non-employees by taking proper remedial steps or repudiating their employees, society presents the employer with choices no more difficult than the choices expected of other corporate citizens. If the employer chooses to avail himself of the market, in this case, the labor market, he also imposes on himself certain societal expectations and responsibilities. One of these is to assist in the furtherance of public policies. As discussed, Title VII's express goal is the elimination of workplace harassment.141

To accept anything less, even based on misplaced sympathies for the employer, would perpetuate illegal and hostile work environments. Due to the employer's position, the employer is best able to end the harassment.142 Of course, under Title VII's rejection of employer strict liability for non-

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140. 66 F.3d 705, 711 (4th Cir. 1995) (en banc). It would seem that the *Burlington Industries* and *Faragher* analyses respond to the Fourth Circuit's concerns. See supra notes 38-44 and accompanying text.


142. Other actors may be empowered to act against harassment. See supra note 9 (suggesting that elements of criminal law may be used to combat harassment, implicating law enforcement agencies).
supervisor harassment, the extent of employer liability is tempered (as suggested by the EEOC guidelines) so that there will be no liability where an employer reasonably responds to the extent of its ability.

VII. IMPLICATIONS FOR THE EMPLOYER

Assuming, arguendo, that liability for third-party racial harassment is accepted and we can look to the body of third-party sexual harassment case law, what are the implications for the employer—especially the conscientious employer? What is the employer's obligation to discover a racially hostile work environment and to take curative steps?

As discussed earlier, the Supreme Court has placed a new emphasis on the responsible employer's reasonable effort to prevent and stop harassing behavior. In the words of the Court, reasonable steps amount to an affirmative defense for the employer. A great deal turns for the employers on the reasonableness of their actions.

EEOC guidelines suggest that assessments of liability will take into account the "extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees." While the expectations regarding the employer's obligations may vary according to the situation, as well as to the employer's opportunities to end the offensive behavior, this language provides less comfort than it would seem in practice. In several instances, courts have declined to provide a robust reading to that exception and instead have found liability.

In Costilla v. State, the Minnesota Court of Appeals looked to the EEOC guidelines in interpreting the Minnesota Human Rights Act to find liability in the state's failure to protect a state labor inspector from

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143. See Spicer, 66 F.3d at 711 (essentially rejecting a strict liability standard).
144. See supra notes 38-44 and accompanying text.
146. See Mart v. Dr Pepper Co., 923 F. Supp. 1380, 1388 (D. Kan. 1996) ("What is reasonable in terms of remedial action depends on the gravity of the alleged harassment.").
harassment. Costilla, the plaintiff, complained that she was harassed by her federal government partner over a three year period. While the state complained repeatedly to the U.S. Department of Labor about the sexually harassing behavior of the federal employee and eventually succeeded in getting the federal employee transferred, the state continued to require the plaintiff to attend training sessions and conduct a professional relationship with her harasser. The court concluded that "when the employer initially delays five months before acting, and ultimately fails to protect its employee from known sexual harassment by a known sexual harasser for a period of two years," the employer will be liable.

In his dissent, Judge Willis objected that the state could not be expected to do more than what it had done—complain directly to the harasser's employer. "Acosta [the harasser] was an employee of the federal government, not of the state. The state could not discipline Acosta, nor could it terminate his employment."

It could be suggested that the Costilla decision is different because the state knew the harasser's identity and was therefore better able to respond. The Ninth Circuit's decision in Folkerson dealt with crowd harassment of a female mime dressed as a life-sized doll. The Folkerson court concluded that the management took sufficient steps to avoid liability by alerting the casino security of the potential harassment, modifying the plaintiff's costume to include a "Stop, Do Not Touch" sign, and assigning a male partner performer.

In the racial harassment context, in keeping with the sexual harassment case law, an employer must exercise reasonable vigilance to detect and prevent a hostile work environment. Simply pleading ignorance in the face of an obvious case of racial harassment would lead a court to conclude that the employer failed to take reasonable steps to deter harassing behavior.

149. See id.

This court holds that the EEOC [Title VII] guidelines, other jurisdictions' persuasive decisions, and the broad, liberally construed remedial provisions of the [Minnesota Human Rights Act] may impose liability upon an employer when it is aware that its employee is subject to sexual harassment by a non-employee, yet fails to take timely and appropriate action to protect its employee.

Id. at 592.

150. See id. at 589.

151. Id. at 597.

152. See id. at 597-98 (Willis, J., dissenting).

153. Id. at 597 (Willis, J., dissenting).

154. See Folkerson v. Circus Circus Enters., Inc., 107 F.3d 754, 755 (9th Cir. 1997) (patrons try to see if the mime is a real human by touching her; in the instant case, the patron moved toward the mime as if to hug her).

155. See id. at 755-56.

Applying the logic of Otis v. Wyse, Burlington Industries, and Faragher, the non-supervisor's status as a harasser does not necessarily enhance the ability of a person to create a hostile work environment, but the harasser's status is important if we give any weight to the EEOC Guideline's second sentence. A supervisor has more potent tools available for the creation of a hostile work environment, and thus is treated differently. But coworkers and third parties are all equally capable of creating a hostile work environment from which employer liability may arise.

VIII. OBLIGATIONS OF THE CONSCIENTIOUS EMPLOYER

If employers' current awareness of their liability for third-party sexually hostile work environments is sparse at best, then their awareness of liability from third-party racial harassment is likely to be even less well-known. Still, as Professor Achampong warned, courts are not likely to look far to find liability in cases of egregious harassment. Given the already established low judicial tolerance of racially harassing behavior, employers who do not proactively seek to limit their liability may be exposing themselves to tremendous liability. Looking to commentaries and cases for sexually hostile work environments, one can get a sense of likely

("Lack of actual knowledge may not insulate an employer; knowledge may be imputed if the harassment is so severe and pervasive that a reasonable employer would be inspired to investigate and discover the facts."). It would seem that, in the wake of Burlington Industries and Faragher, a court would analyze the reasonableness of the employer's ignorance. Surely one must question the reasonableness of preventative acts and policies in light of blatant harassment fact patterns.

157. See Otis v. Wyse, No. 93-2349-KHV, 1994 WL 566943, at *6 (D. Kan. Aug. 24, 1994) (addressing the question of a medical center’s liability for the harassment of a nursing student by an independently contracted doctor and stating that “[t]his standard [for non-employee sexual harassment] is identical to one test presently employed by the Tenth Circuit to determine whether an employer can be held liable for harassment perpetrated by its employees.”); cf Henson v. City of Dundee, 682 F.2d 897, 910 (11th Cir. 1982).

The environment... can be rendered offensive in an equal degree by the acts of supervisors, coworkers, or even strangers to the workplace. The capacity of any person to create a hostile or offensive environment is not necessarily enhanced or diminished by any degree of authority which the employer confers upon that individual.

Id. (citations omitted).

158. See supra note 145 and accompanying text.


160. See Achampong, supra note 138, at 204-08.

161. See supra notes 69-80 and accompanying text.
judicial expectations of employers.\textsuperscript{162} Courts will: (1) look to see if employers have reasonably acted to prevent racial harassment, including the adoption of policies; (2) observe how the procedures for the policy were followed upon notice; and (3) assess the efficacy of the employer’s efforts to remedy the situation.\textsuperscript{163}

The existence of an effective sexual harassment policy helps an employer avoid liability when such a policy is reasonably implemented.\textsuperscript{164} Presumably the same would be true in the racial harassment context. Well-designed policies encourage employees to come forward with complaints and voluntarily provide notice to the employer.\textsuperscript{165} A court in such a situation would likely view the non-interest or a failure to adhere to written policies as unreasonable.\textsuperscript{166}

Once notified of the harassment, an employer must investigate the claim thoroughly and aggressively.\textsuperscript{167} Actions taken must be “prompt and reasonably calculated to end the harassment.”\textsuperscript{168}

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\textsuperscript{162} A good starting point assessment of individual circuits and their standards may be found in an American Law Institute-American Bar Association publication, subject to updates. For a broad framework, see Nancy L. Abell et al., Circuit by Circuit Review of Selected Sexual Harassment Issues, CA01 A.L.I.-A.B.A. 609 (1995).


\textsuperscript{164} See supra notes 31-44 and accompanying text.

\textsuperscript{165} See Gary v. Long, 59 F.3d 1391, 1398 (D.C. Cir. 1995).

\textsuperscript{166} See, e.g., Moffett v. Gene B. Glick Co., 621 F. Supp. 244, 274 (N.D. Ind. 1985) (reasoning that defendant’s “hear no evil, see no evil” policy, which attempts to avoid dealing with the racial harassment of employees, fails to meet Title VII expectations), overruled on other grounds, Reeder-Baker v. Lincoln Nat’l Corp., 644 F. Supp. 983, 986 (N.D. Ind. 1986) (citing a change in Indiana state law on the question of retaliatory discharge).

\textsuperscript{167} See, e.g., Hanlon v. Chambers, 464 S.E.2d 741, 751 (W. Va. 1995) (citations and internal quotation marks omitted); see also Otis v. Wyse, No. 93-2349-KHV, 1994 WL 566943, at
\end{quote}
that they will look to the circumstances to determine the adequacy of an employer’s response. For example, the West Virginia Supreme Court of Appeals recently reasoned in the sexual harassment context that

For example, if a supervisor complains to her employer of a subordinate’s harassment and employer responds, “You take care of it,” that may in some cases be sufficient—if the supervisor has full disciplinary authority and circumstances permit use of it. In other cases, however, that response may be inadequate. The harassed supervisor could be the object of an entire crew of male harassers and would likely need greater assistance from her employer than a flippant, “You handle it.” Similarly, the power to discipline a six-foot, five-inch, 300-pound ex-felon with a history of violence may not be terribly comforting to a lot of women supervisors. The point is that common sense must be applied to the facts in each case . . . .

Similarly, if “employees donned white suits and hats and pranced around plaintiff’s work station, giving the appearance of the Ku Klux Klan,” courts would more likely expect greater remedial acts by the employer.

Of course, such a fact and circumstance-intensive inquiry places a variable expectation on the employer’s remedial acts, that may range from counseling and warning, to the dismissal of the offender or, in the


169. Hanlon, 464 S.E.2d at 750-51 (emphasis added).

170. Abell et al., supra note 162, at 625 (describing the facts from Harris v. International Paper Co., 765 F. Supp. 1509 (D. Me. 1991)).

171. “What is reasonable in terms of remedial action depends on the gravity of the alleged harassment.” Mart v. Dr Pepper Co., 923 F. Supp. 1380, 1388 (D. Kan. 1996); see also Welsch v. Camelot Soc’y, Inc., No. 37139-8-I, 1997 WL 79479, at *6 (Wash. Ct. App. Feb. 24, 1997) (holding that in the case of a harasser who was a resident of employer’s facility but could not be fired or disciplined, the employer had no control and therefore had no liability). The courts do not appear too concerned about the physical location of harassment as a deciding factor for liability; employers have a duty whether the third-party harassment is in their facility or in someone else’s facility. See, e.g., Kudatzky v. Galbreath Co., No. 96 Civ. 2693(HB), 1997 WL 598586, at *5 (S.D.N.Y. Sept. 23, 1997) (“[I]t would defeat the purpose of Title VII to absolve the defendant of liability . . . simply because its employee’s work cite [sic] is different than the [defendant employer’s primary workplace].”); EEOC v. Federal Express Corp., No. C94-790C, 1995 WL 569446, at *3 (W.D. Wash. Aug. 8, 1995) (dismissing the fact that customers harassed a Federal Express employee in the customer’s building as a dispositive factor).

172. See, e.g., Spicer v. Virginia Dep’t of Corrections, 66 F.3d 705, 711 (4th Cir. 1995) (en banc) (reversing panel decision, court finds that Virginia’s investigation, admonishments, and mandatory counseling were sufficient steps taken by the employer). Accord Trent v. Valley Elec. Ass’n, 41 F.3d 524, 527 (9th Cir. 1994) (reversing trial court summary judgment for defendant where the employee was fired after complaining about the contractor’s sexual harassment); Menchaca v. Rose Records, Inc., No. 94 C 1376, 1995 WL
third-party context, the banishment of the client.\(^{175}\) The banishment of a client is not the only response, or even the best response to third-party harassment. The \textit{Costilla} case illustrated an example of this; the Minnesota agency/employer could hardly "fire" the Department of Labor. Instead, approaching the increasingly higher levels of the U.S. Department of Labor may have been an adequate response.\(^{174}\) An employer should think creatively about the range of options and tools at its disposal to combat third-party harassment.\(^{175}\)

While the employer's choice of response may be reasonably calculated, must it be effective as well? The courts appear unwilling to determine whether or not an employer escapes liability based on the third party's decision to desist—so long as the employer's steps are "reasonably calculated" to end the harassment.\(^{176}\) The court in \textit{Llewellyn} cited an earlier Fourth Circuit framework where "the plaintiff must show that the employer... took no effectual action to correct the situation. This showing can also be rebutted by the employer directly, or by pointing to prompt remedial action reasonably calculated to end the harassment."\(^{177}\)

This framework flies in the face of an expectation that an employer

\footnotesize{151847, at *4 (N.D. Ill. Apr. 3, 1995) (holding that a manager's failure to act, after receiving clerk's complaints and witnessing acts of harassment, creates liability); Otis v. Wyse, No. 93-2349-KHV, 1994 WL 566943, at *7 (D. Kan. Aug. 24, 1994) (noting that the adequacy of remedial measures implemented one year later is a question for the jury); Powell v. Las Vegas Hilton Corp., 841 F. Supp. 1024, 1029-30 (D. Nev. 1992) (finding an inadequate policy where casino card dealers are supposed to notify floorwalkers when there is a problem, but complaints nonetheless are ignored).

173. \textit{See} Hallberg v. Eat'n Park, No. 94-1888, 1996 WL 182212, at *11 (W.D. Pa. Feb. 28, 1996) (holding that warning patron that repeated sexual harassment would result in his being denied service was sufficient to relieve employer of liability); \textit{Federal Express}, 1995 WL 569446, at *3 ("FedEx's argument that it could not remove the customer is disingenuous. FedEx's own policies condemning sexual harassment... extend to clients and customers. FedEx might... have chosen to decline to serve [the harasser], the functional equivalent of removing the harassing customer from the shop or casino.").

174. \textit{See} Costilla v. State, 571 N.W.2d 587 (Minn. Ct. App. 1997). However, in the specific facts of \textit{Costilla}, the state agency took five months to act, which might represent an unreasonable response under \textit{Faragher} and \textit{Burlington Industries}.

175. Options include: judicial restraining orders, pursuing criminal complaints, and approaching the harasser's superiors. Professor Lerner suggested an additional scenario wherein an employee/customer's representative is harassed by a supplier's representative. In that scenario, the economic threat of the employer to cease business with the supplier if the harassment continues might be a reasonable (and effective) employer response. \textit{See} Interview with Alan M. Lerner, Associate Practice Professor of Law, University of Pennsylvania Law School, in Phila., Pa. (Sept. 25, 1998).

176. \textit{See} Hallberg, 1996 WL 182212, at *11 ("Since Hallberg did not return to work, it is unclear whether Eat'n Park's remedial action was actually effective. Nevertheless, a remedy need only be 'reasonably calculated to stop the harassment' in order to relieve an employer from liability.").

"remedy" harassment, and is not uniformly embraced by courts. The Burlington Industries and Faragher cases do not suggest whether a gray area exists between a reasonable employer's response and eradication of the harassing behavior. Thus, potential situations exist in which harassment continues and employers are without liability because they acted reasonably.

However, imposing any tougher standard would simply have the effect of a weak strict liability standard on employers—if your employees are harassed and you do not act, you are liable; if you do act reasonably and if the harassment nevertheless continues, you are liable. Given the unique lack of control presented by the harasser's third-party status, the disincentive posed for managers to take reasonable steps that may not be effective is an undesirable result that militates against moving towards a stricter standard of employer liability. Instead, public policy should encourage all parties to take reasonable steps designed to end harassment in the workplace.

In sexual and racial harassment case law, the experiences of the courts unfortunately include instances where tools of redress have been used as retaliatory measures by employers against harassment victims. For example, in EEOC v. Federal Express Corp., a Federal Express courier was sexually harassed repeatedly by a customer on her route. After the customer failed to change his behavior, even after a Federal Express request, Federal Express managers responded by removing the courier from the route and notifying the harassing customer that they would still deliver his packages because they "value[d] [his] business." The court wrote, "FedEx's response to [the courier's] continuing concerns was to strip her of an entire building on her route, thereby diminishing her pay. The [EEOC] guidelines require the employer to take 'appropriate' corrective action, not action that, in effect, punishes the victim for complaining."

178. See EEOC v. Hacienda Hotel, 881 F.2d 1504, 1515-16 (9th Cir. 1989) ("The prevailing trend of the case law... hold[s] that employers are liable for failing to remedy...") (emphasis added).
179. See Mart v. Dr Pepper Co., 923 F. Supp. 1380, 1388 (D. Kan. 1996) ("Dr Pepper is not liable because... Dr Pepper took prompt, adequate and effective action to remedy the situation.") (emphasis added); Costilla v. State, 571 N.W.2d 587, 597 (Minn. Ct. App. 1997) (finding liability "when the employer... ultimately fails to protect its employee from known sexual harassment...") (emphasis added).
180. The Third Circuit has recognized this precise scenario in the sexual harassment context. See Knabe v. Boury Corp., 114 F.3d 407, 411 n.8 (3d Cir. 1997).
182. Id. at *1.
183. Id. at *3; see also Kadaba, supra note 159, at 4C ("The [employee] account manager told her supervisor about the [harassing] client... and [the supervisor] supported [the employee] by reassigning the account. But [the employee] wonders if that's the best way to handle such a situation. Why should she lose a good account for no fault of her
Consequently, even the most conscientious employer must exercise great caution in implementing any measure that may be perceived as retaliatory rather than remedial.

IX. ROSENBLOOM v. SENIOR RESOURCE, INC.

As discussed in the Introduction and Part IV of this Comment, Rosenbloom is a case of racial harassment at a senior center in Minnesota. There, an employee complained of repeated racial harassment from one third-party, Kolb, who "hung around" the senior center, as well as by the clients of the center. Kolb threatened the employee, assaulted the employee, and made racial remarks on a number of occasions at the center. Senior Resource, the defendant, distributed antiracism posters, distributed notices that racial harassment was not accepted, and obtained a restraining order against Kolb. Judge Alsop concluded:

the record shows Senior Resource was concerned about both incidents and... took rapid measures to remedy the situation. Although it is disappointing that Senior Resource did not respond more rapidly to the racist slurs by its clients, there are no facts suggesting that Senior Resource ratified or condoned the comments...

Judge Alsop's application of sexual harassment theory to the racial harassment context reflected history. His conclusion that Senior Resource had fulfilled its duty to deter racial harassment in the workplace gave force to the EEOC guidelines.

X. CONCLUSION

Just as we expect employers to provide safe working environments as a minimal matter, Title VII directs employers to provide a harassment-free workplace. The courts and society are engaged in an asymptotic pursuit of the harassment-free workplace—an aspirational goal. In this pursuit, society uses the law to allocate burdens reasonably among the parties. This Comment suggests that the resulting hostile work environment scheme is own?

184. See supra notes 4-7, 117-23 and accompanying text.
186. See id. at 740-42.
187. See id. at 744 (footnote omitted). Judge Alsop additionally cited the lack of employer benefit from the harassment as an additional factor. See id. This factor appears less important in the wake of Burlington Industries and Faragher, which adjust the framework of employer liability. See supra notes 38-44 and accompanying text.
an evolving scheme, built on parallel tracks for each Title VII context. Just as the wheels for a train run parallel, so should the wheels underpinning this Title VII scheme.

The decision to find employer liability for third-party harassment made sense in the sexual harassment context and would make equal sense in the racial harassment context. As discussed, the adoption of a sexual harassment concept to the racial harassment context is neither surprising, nor novel in the history of Title VII.

The employer's decision to adopt a policy that invites third-party harassment of employees represents a practice that we should not condone. Imposing direct liability on the employer for the results of its own policies and practices should deter the adoption of such policies in the first place.

When an employer instead encounters the harassment of an employee by a third party but fails to act, that failure to act is as much a decision deserving of deterrence as the harasser's decision to target the employees in the first place. As the party with the greatest opportunity to correct the prohibited behavior, the employer has the overarching obligation to provide a harassment-free workplace. The harasser's third-party status should not allow the evasion of employer liability, although it may temper our expectations about the employer's efforts.

The presence of racial harassment in the workplace is an ongoing problem of great severity. Where coworkers may be deterred by admonishments of their employer, third parties may not be similarly affected. The courts must give weight to the EEOC guidelines, which recognize the employer's limited ability to cure entirely all scenarios of third-party harassment. In this balanced fashion, the law is able to make its headway against the undercurrent of workplace racism.

188. The suggestion discussed previously for a separate religious harassment standard has problems similar to the separate racial and sexual harassment standards. The failure of the statutory language to indicate separate standards, the interpretation of the Supreme Court to date, and the lack of further clarification from Congress together suggest that the same harassment regime be applied to all Title VII contexts—including race, sex, and religion. See supra notes 81-84 and accompanying text (discussing some commentary in favor of separate religious harassment standards). But see supra note 2 and accompanying text (discussing First Amendment concerns about Title VII).