THE LAW ON SEXUAL HARASSMENT: A FOCUS ON EMPLOYER'S LIABILITY

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> *"Sexual harassment, then is not about sex.... When we speak of sexual harassment, what we are really talking about is the use of sex as an instrument or means of domination. Sexual harassment also is not about sexual attraction.... Although in some cases women and men do meet on the job and begin sexual relationships, these relationships are premised on mutual agreement. To the contrary, sexual harassment involves sexual advances that are not mutual but are imposed in most instances, upon a woman by a man who directly or indirectly holds power over her, more often than not, the direct power to hire and fire. Sexual harassment can take many forms, but most often involves such behaviour as verbal abuse, indecent suggestions, propositions for dates, requests for sexual favours, demands for sexual intercourse, physical touching and even rape. However, no matter what form it takes, sexual harassment is a form of coercion that ultimately derives from male domination and female subordination and, thus, should be examines as one of the methods used to perpetuate a patriarchal structure."*
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> – From Taylor, *How to Avoid Taking Sexual Harassment Seriously: A New Book That Perpetuates Old Myths* (Book Review), 10 CAP. U.L. REV. 673, 675 (1981)

I. INTRODUCTION

A. Republic Act 7877

In the Philippines, Congress enacted Republic Act No. 7877 otherwise known as the "Anti-Sexual Harassment Act of 1995."[1] Under said law, sexual harassment is considered a criminal offense for which the offender, upon conviction, could be penalized by imprisonment of not less than Ten thousand pesos (P10,000) nor more that Twenty thousand pesos (P20,000) or both fine and imprisonment at the discretion of the court.[2] The victim of sexual harassment, however, is not precluded from

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1 Congress enacted this law last 14 February 1995.

2 R.A. 7877 § 7.

instituting a separate and independent action for damages and other affirmative relief.[3]

B. Civil Rights Act of 1964 as Amended

1. HISTORICAL BACKGROUND

In the United States, prior to the 1980s, there were no federal or state laws prohibiting sexual harassment on the job.[4] As a matter of fact, the term "sexual harassment" was unheard of.[5] Sexual discrimination in employment became illegal only when the Civil Rights Act of 1964 was adopted.[6] The Act established the Equal Employment Opportunities Commission (EEOC) which later issued important regulations and guidelines on sexual harassment.[7]

As originally introduced in Congress, Title VII of the Civil Rights Act of 1964 only prohibited discrimination in employment based on race, color, religion or national origin.[8] Discrimintaion on the basis of sex was not included.[9] The prohibition against sex discrimination was added by a floor amendment by Representative Smith on 8 February 1964.[10] Representative Smith was an opponent of Title VII and his amendment was considered an attempt to confuse the purpose of Title VII and a means to defeat the bill.[11] Nonetheless, the House of Representatives adopted the amendment without hearing and with a little debate.[12]

The term sexual harassment was not mentioned anywhere in the Civil Rights Act of 1964.[13] Many women, however, cogently argued that sexual harassment was a form of sex discrimination and that laws

3 R.A. 7877 § 6.

4 PETROCELLI AND KATE REPA, SEXUAL HARASSMENT ON THE JOB, 1-19 (1991).

5 *Id.*

6 *Id.* at p. 1-20

7 *Id.*

8 *Id.*

9 *Id.*

10 110 Cong. Rec. 2577 (1964).

11 *See Id.* at 2581 (remarks of Rep. Green).

12 *See Id.* at 2582, 2804.

13 *See supra* Note 5.

prohibiting sex discrimination should outlaw sexual harassment as well.[14] Finally, in 1980, the EOCC issued guidelines defining sexual harassment and stating that it was a form of sex discrimination prohibited by the Civil Rights Act. It was not until 1986, however, that the US Supreme Court ruled that "sexual harassment on the job was a form of sex discrimination and therefore illegal."[15]

After 1980, several states followed suit and enacted their own laws and regulations making sexual harassment illegal.[16] All of the state fair employment practices laws that were enacted after the US Civil Rights Act have theoretically outlawed sexual harassment on the job, but in terms of enforcement, they have ranged from the strict to the weak.[17]

2. RELIEF THAT MAY BE GRANTED

Under the Civil Rights Act of 1964, the only compensation a victim of sexual harassment could recover was for lost wages.[18] The statute did not allow for what would be the most effective remedy: compensatory damages for physical, emotional and other personal injuries.[19] In 1991, the Civil Rights Act of 1964 was amended to allow an employee to sue for damages but put a strict limit on the total amount of damages that an employee could recover in any case - $50,000 to $300,000 based on the number of employees in the company.[20]

[14] *Id.*

[15] *Id. citing* Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986).

[16] *Id.* at p. 1-22.

[17] *Id.*

[18] *Id.* at p.23.

[19] *Id.*

[20] 42 U.S.C. § 1981 (b) provides:

20(b) Compensatory and Punitive Damages –

(1) Determination of Punitive Damages – A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency, or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

(2) Exclusions from Compensatory Damages – Compensatory damages awarded under this section shall not include back pay, interest on back pay, or any other type of relief authorized under § 706(g) of the Civil Rights Act of 1964.

(3) Limitations – The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party -

(A) in case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calender year, $50,000; and

(B) in case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $100,000; and

(C) in case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $200,000; and

(D) in case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $300,000.

C. *Landgraf v. USI Film Products*

In a recent case,[21] the US Supreme Court held that the provisions of the Civil Rights Act of 1991, creating the right to recover compensatory and punitive damages for certain violations of Title VII and providing for trial by jury if such damages are claimed, do not apply to Title VII cases pending on appeal when the statute was enacted.

In *Landgraf*, after a bench trial in Landgraf's suit under Title VII of the Civil Rights Act of 1964, the District Court found that she had been sexually harassed by a co-worker, but the harassment was not so severe as to justify her decision to resign from her position.[22] Because the court found that her employment was not terminated in violation of Title VII, she was not entitled to equitable relief, and because Title VII did not then authorize any other form of relief, the court dismissed her complaint.[23] While her appeal was pending, the Civil Rights Act of 1991 became law, Section 102 of which includes provisions that create a right to recover compensatory and punitive damages for intentional discrimination violative of Title VII, and authorize any party to demand a jury trial if such damages are claimed.[24] Landgraf argued that her case should be remanded for a jury trial on damages pursuant to Section 102.[25]

In resolving the issue, the Supreme Court focused "on the apparent tension between two seemingly contradictory canons for interpreting statutes that do not specify their temporal reach: the rule that a court

[21] Landgraf v. USI Film Products, 114 S. Ct. 1483 (1994).

[22] *Id.* at p. 1486.

[23] *Id.*

[24] *Id.*

[25] *Id.*

must apply the law in effect at the time it renders its decision and the axiom that statutory retroactivity is not favored."[26]

The Court noted that resort to the aforementioned default rules is only necessary if Congress has not expressly provided for the reach of the statute:

> ...[W]hen a case implicates a federal statute enacted after the events giving rise to the suit, a court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, there is no need to resort to judicial rules. Where the statute in question unambiguously applies to pre-enactment conduct, there is no conflict between the retroactivity presumption and the principle that a court should apply the law in effect at the time of the decision. Even absent specific legislative authorization, application of a new statute to cases arising before its enactment is unquestionably proper in many situations. However, where the new statute would have a genuinely retroactive effect, *i.e.*, where it would impair rights a party possessed when he acted, increase his liability for past conduct, or impose new duties, with respect to transactions already completed – the traditional presumption teaches that the statute does not govern absent clear congressional intent favoring such a result ...[27]

Applying the foregoing principles, the Court did not have any difficulty in disposing of Landgraf's argument. It ruled that Section 102 is subject to the presumption against statutory retroactivity:

> ...[A]bsent guiding instructions from Congress, Section 102 is not the type of provision that should govern cases arising before its enactment, but is instead subject to the presumption against statutory retroactivity. Section 102 (b)(1), which authorizes punitive damages in certain circumstances, is clearly subject to the presumption, since the very labels given "punitive" or "exemplary" damages, as well as the rationales supporting them, demonstrate that they share key characteristics of criminal sanctions, and therefore would raise a serious question under the *Ex Post Facto* Clause if retroactively imposed. While the Section 102 (a)(1) provision authorizing compensatory damages is not so easily classified, it is also subject to the presumption, since it confers a new right to monetary relief on persons like Landgraf, who were victims of a hostile work environment but were not constructively discharged, and substantially increases the liability of their employers for the harms they caused, and thus would operate "retrospectively" if applied to pre-enactment conduct. Although a jury trial right is ordinarily a procedural change of the sort that would govern in trials conducted after its effectivity date regardless of when the underlying conduct occurred, the jury trial option set out in Section 102 makes a jury trial available only "if a complaining party seeks compensatory or punitive damages."[28]

[26] *Id.* citations omitted

[27] *Id.* at p. 1487.

II. DEFINITION AND FORMS OF SEXUAL HARASSMENT

A. Definition Under R.A. 7877 and Under the EEOC Guidelines

Under 3 of Republic Act No. 7877, "work, education, training-related sexual harassment is committed by an employer, employee, manager, supervisor, agent of the employer, teacher, instructor, professor, coach, trainor, or any other person who, having authority, influence or moral ascendancy over another in a work or training or education environment, demands, requests, or otherwise requires any sexual favor from the other, regardless of whether the demand, request, or requirement for submission is accepted by the object of the act."

Under the EEOC Guidelines on Sexual Harassment, "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment; (2) submission to or rejection of such conduct by an individual is used as basis for employment decisions affecting such individual; or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."[29]

B. Forms of Sexual Harassment

1. UNDER R.A. 7877

Under 3 of Republic Act 7877,

> (a) In a work-related or employment environment, sexual harassment is committed when (1) The sexual favor is made as a condition in the hiring or in the employment, or continued employment, re-employment,

[28] *Id.*

[29] 29 C.F.R. § 1604, 11(a) (1983).

or continued employment of said individual, or in granting said individual favorable compensation, terms, conditions, promotions, or privileges; or the refusal to grant the sexual favor results in limiting, segregating, or classifying the employee which in any way would discriminate, deprive or diminish employment opportunities, or otherwise adversely affect said employee; (2) The above acts would impair the employee's right or privileges under existing labor laws; or (3) The above acts would result in an intimidating environment for the employee.

(b) "In an education or training environment, sexual harassment is committed: (1) Against one who is under the care, custody, or supervision of the offender; (2) Against one whose education, training, apprenticeship is entrusted to the offender; (3) When the sexual favor is made a condition to the giving of a passing grade, or the granting of honors and scholarships, or the payment of a stipend, allowance or other benefits, privileges, or considerations; or (4) When the sexual advances result in an intimidating, hostile, or offensive environment for the student, trainee, or apprentice.

2. UNDER U.S. LAW

In the United States, sexual harassment can either be a *quid quo pro*-type or a hostile work environment-type. In the *quid pro quo*-type of sexual harassment, plaintiff claims that sexual advances have been made and rejected and she suffered some employment consequences (*e.g.* she has been fired, not promoted, demoted, or lost her job).[30] In the hostile work environment-type, the sexual conduct falls short of causing the plaintiff a tangible job detriment, but she has been subjected to sexual harassment that creates "a hostile, intimidating, or offensive work environment."[31]

A careful analysis of the two types of sexual harassment reveals that the distinction between *quid pro quo* and offensive work environment harassment is justified.[32] In *quid pro quo* harassment, the supervisor is using his authority as supervisor to secure submission to his demands.[33] Without

[30] *See* William v. Saxbe, 413 F. Supp. 654, 12 FEP Cases 1093 (D.C. Cir. 1976).

[31] *See* Bundy v. Jackson, 641 F.2d 934, 24 FEP Cases 1155 (D.C. Cir. 1981).

[32] Burge, *Employment Discrimination – Defining an Employer's Liability Under Title VII for On-the-Job Sexual Harassment: Adoption of a Bifurcated Standard*, 62 N.C.L. REV. 808 (1984).

[33] *Id. citing* Henson v. City of Dundee, 682 F.2d 897, 910 (11th Cir. 1982).

his express use of authority, the *quid pro quo* harassment would be meaningless. A non-supervisory employee would be unable to effect harassment of this type because he lacks the supervisor's ability to retaliate if his demands are not met. In contrast, a non-supervisory employee is fully capable of creating an offensive work environment. In this type of harassment, the ability to harass is a function of the proximity of the victim to the harasser.[34] Supervisory authority plays no role; the supervisor and the co-worker are equally capable of affecting such harassment.[35]

Williams was one of the first cases to consider the problem of unwanted sexual advances by a supervisor. The District Court for the District of Columbia considered the Title VII claim of a female employee discharged from the Justice Department. The Court was faced with the legal issue of whether retaliatory actions, taken by the supervisor against the victim who spurned the advances, constituted sex discrimination within the definitional parameters of Title VII.[36] Broadly construing the Act, the court answered in the affirmative.[37] The Court said:

> The fact that Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes... does not mean that only a "sex stereotype" can give rise to discrimination within Title VII. The statute prohibits any discrimination based on... sex.... There is ample evidence that Congress' intent was not to limit the scope and effect of Title VII, but rather, to have it broadly construed.... Furthermore, the plain meaning of the term "sex discrimination"... encompasses discrimination between genders whether the discrimination is the result of a well-recognized sex stereotype or for any other reason.[38]

In *Bundy*, the court significantly extended the law of sexual harassment. Bundy, a vocational rehabilitation specialist, filed charges of sexual harassment against several supervisors and the agency's director. She was never fired, demoted, or denied promotion by the employer for refusing her supervisor's sexual demands. She was still fully employed when the suit was brought. In this case, the court held that "even without

[34] *Id. citing* Henson at 905.

[35] *Id.*

[36] *See* Williams, *supra* note 30, at 657.

[37] *Id.* at 657.

[38] *Id.* at 658.

tangible adverse employment consequences, such a job loss or denial of promotion, there may still be a liability for sexual harassment."[39] Thus, while there may be no monetary damages, since there need not be a job loss, injunctive relief may still be available to terminate the illegal practices.[40] The victim need not lose tangible benefits to have still suffered harassment for which there may now be at least injunctive relief.[41] In either event, whether or not there are tangible adverse employment consequences, sexual harassment violates Title VII.[42]

III. EMPLOYER'S LIABILITY FOR SEXUAL HARASSMENT

A. Under Republic Act 7877

Employer's liability for acts of sexual harassment under Philippine law is clear. The standard is knowledge on the part of the employer after having been informed by the offended party. This is regardless of whether the offender is a supervisor or a mere employee or whether the act of sexual harassment is a *quid pro quo* type or a hostile work environment type. Section 5 of R.A. No. 7877 states that the employer or head of office, educational or training institution shall be solidarily liable for damages arising from the acts of sexual harassment committed in the employment, education or training environment if the employer or head of office, educational or training institution is informed of such acts buy the offended party and no immediate action is taken thereon."

Moreover, it shall be the duty of the employer or the head of the work-related, educational or training environment to prevent or deter the commission of acts of sexual harassment.[43] In this regard, the employer or head of office shall promulgate rules and regulations[44] and create a committee on decorum and investigation of cases on sexual harassment.[45]

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[39] *See* Bundy, *supra* note 31, at 943-44.

[40] *See also* Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982).

[41] *See* Bundy, *supra* note 31, at 943-44.

[42] *Id.* at 934.

[43] R.A. 7877 § 4.

[44] R.A. 7877 § 4.

[45] R.A. 7877 § 4.

B. Under the Civil Rights Act of 1964 as Amended

It has been said that one of the most hotly contested legal questions in sexual harassment litigation is when an employer becomes liable for illegal sexual conducting in the workplace?"[46] In fact, "this is the most difficult legal question in a sexual harassment case. It is also an important element of the *prima facie* case which a plaintiff must establish. That element of proof requires finding the employer responsible for sexual harassment under respondeat superior."[47]

In *Henson*,[48] the court enumerated the elements of a Title VII sexual harassment claim. To establish a claim, plaintiff must show: (1) the employee belongs to a protected group; (2) the employee was subject to unwelcome sexual harassment; (3) the harassment complained of was based upon sex; (4) the harassment complained of affected a term, condition, or privilege of employment; and (5) a basis to impose liability on the employer under some theory of respondeat superior. Federal courts are in full agreement on the first four elements of the claim. It is on the fifth that the courts disagree.[49]

1. FOR SUPERVISOR ACTS IN *QUID PRO QUO* CASES: STRICT LIABILITY STANDARD

Prior to the issuance of the law the 1980 EEOC guidelines, the Court of Appeals for the Ninth Circuit imposed upon the employer a strict liability for all acts of harassment by a supervisor. In *Miller v. Bank of America*,[50] a female employee claimed that she had been fired for refusing

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[46] OMILIAN, SEXUAL HARASSMENT IN EMPLOYMENT 61 (1986).

[47] *Id. Respondeat superior* is a common law theory of imputed liability whereby an employee's illegal act is imputed to the employer. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 458 (1971).

[48] *See* Henson, *supra* note 40, at 897, 905 (1982).
Section 703(a) of Title VII provides that:

> It shall be unlawful employment practice for an employer – (1) to fail or refuse to hire, or to discharge any individual, or otherwise 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; or to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

[49] *See* Burge, *supra* note 32, at 795, 798.

[50] 600 F. 2d. 211 (9th Cir. 1979).

sexual demands of her male supervisor.[51] The bank had a long-standing policy against sexual harassment and an effective grievance procedure for reporting violations of this policy. Because the employee failed to use this grievance procedure, the bank argued that she waived any claims she might had.[52] The district court found the employer was not liable for sexual harassment because the plaintiff did not complain under the company's existing internal grievance procedure and the company had a policy expressly condemning sexual harassment.[53] The Court of Appeals reversed the district court's dismissal of the employee's Title VII claim, ruling that Title VII provides a cause of action to the employee. According to the Court, the standard for employer's liability is as follows:

> We conclude that *respondeat superior* does apply here, where the action contemplated was that of a supervisor, authorized to hire, fire, discipline, and promote, or at least participate in or recommend such actions, even though what the supervisor is said to have done violates company policy.[54]

Thus, the bank was held liable for the supervisor's harassing behavior even though it arguably did not have any knowledge of the behavior.

The 1980 EEOC Guidelines recognize both the quid *pro quo-type* and hostile work environment-type of sexual harassment. When, however, the guidelines set forth employer liability, the deciding factor is not what form of sexual harassment has occurred, but whether the harasser is a supervisor or co-worker.[55] The guidelines provide in pertinent part:

> An employer is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer regardless of whether the employee knew or should have known of their occurrence.
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> With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer or its agents or supervisory employees know or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.[56]

[51] *Id.* at 212

[52] *Id.* at 213.

[53] *Id.* at 211.

[54] *Id.* at 213.

[55] *See* Omilian, *supra* note 46, at 67.

In *Henson*, the employee, a female radio dispatcher for a municipal department, alleged that she had been subjected to repeated sexual demands by the chief of police and also had been denied admission to the academy by the chief for refusing these demands.[57] According to the Henson Court, the repeated sexual advances had created an offensive work environment in violation of Title VII.[58] The Court held that actual or constructive knowledge standard of employer liability applied to this type of harassment: "[w]here, as here, the plaintiff seeks to hold the employer responsible for the hostile work environment created by the plaintiff's supervisor or co-worker, she must show that the employer knew or should have known of the harassment in question and failed to take remedial action."[59]

After resolving the offensive work environment claim, the Court addressed the second charge. The Court found that Henson had been barred from attending the police academy by the police chief for refusing his sexual demands and that this action was *quid pro quo* harassment.[60] The City was held strictly liable for this form of harassment: "we hold that an employer is strictly liable for the actions of its supervisors that amount to sexual harassment resulting in tangible job detriment to the subordinate employee."[61]

The Court explained the difference in the treatment of the two cases:

> The environment in which as employee works can be rendered offensive in an equal degree by the acts of supervisors, co-workers, 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 the individual. When a supervisor gratuitously insults an employee, he generally does so for his reasons and by his own means. He thus acts outside the actual or apparent scope of the authority he possesses as a

[56] 29 C.F.R. § 1604.11(c) and (d).

[57] *See* Henson, *supra* note 33, at 899-900.

[58] *Id.* at 902.

[59] *Id.* at 905.

[60] *Id.* at 911-12.

[61] *Id.* at 910.

supervisor. His conduct cannot automatically be imputed to the employer any more so than can the conduct of an ordinary employee.

The typical case of *quid pro quo* harassment is fundamentally different. In such a case, the supervisor relies upon his apparent or actual authority to extort sexual consideration from an employee. Therein lies the *quid pro quo*. In that case the supervisor uses the means furnished to him by the employer to accomplish the prohibited purpose. He acts within the scope of his actual or apparent authority to "hire, fire, discipline, or promote." Because the supervisor is acting within at least the apparent scope of the authority entrusted to him by the employer when he makes employment decisions, his conduct can fairly be imputed to the source of his authority.[62]

Thus, as to *quid pro quo* sexual harassment cases, federal courts are now in accord with the EEOC guidelines on sexual harassment that when supervisors sexually harass a subordinate, liability of the employer is strict liability. [63]

II. HOSTILE WORKING ENVIRONMENT-CASES INVOLVING SUPERVISORS

A. Actual or Constructive Knowledge Standard

Some court decisions hold the employer liable for hostile work environment harassment by supervisors only when the had actual or constructive knowledge of of and failed to take appropriate corrective action.[64]

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[62] *Id.*

[63] After the *Meritor* case *supra*, the EEOC issued another set of guidelines governing sexual harassment. With respect to *quid pro quo* cases committed by supervisors, the guidelines provide:

An employer will always be held responsible for act of *quid pro quo* harassment.

A supervisor in such circumstances has made or threatened to make a decision affecting the victim's employment status, and he therefore has exercised authority delegated to him by his employer. Although the question of employer liability for *quid pro quo* harassment was not an issue in Vinson, the Court's decision noted with apparent approval the position taken by the Commission in its brief that: where a supervisor exercises the authority actually delegated to him by his employer, by making or threatening to make decisions affecting the employment status of his subordinate, such actions are properly imputed to the employer whose delegation of authority empowered the supervisor to undertake them. EOCC Policy Guidance on Current Issues of Sexual Harassment p. 21 (1990).

[64] *See* Omilian, *supra* note 46, at 68 *citing* Tomkins v. Public Service Electric & Gas 568 F. Supp. 1044, 1048, 16 FEP Cases 22 (3rd Cir. 1977); Meyers v. I.T.T. Diversified Credit Corp. 527 F. Supp. 1064 (E.D. Mo. 1981).

In *Tomkins*, the supervisor informed a female employee during a job performance review session that she must accede to his sexual demands if they were to maintain "satisfactory working relationship." The employee reported these demands to senior management and requested a transfer to another department. After promising her a transfer to a similar job, management personnel assigned her to an inferior position and later fired her. The Tomkins Court concluded that "Title VII is violated when a supervisor, with the actual or constructive knowledge of the employer, makes sexual advances or demands toward a subordinate employee and conditions that employee's job status – evaluation, continued employment, promotion, or other aspects of career development –on a favorable response to those demands, and the employer does not take prompt and appropriate remedial action after acquiring such knowledge.[65]

Meyers presented a sexual harassment case with a claim of termination for resistance to sexual overtures. A Missouri federal district court concluded that "in order to impose liability on an employer for the discriminatory acts of its supervisors, the plaintiff must make the additional showing that the employer had actual or constructive knowledge of the discriminatory acts of its supervisors and did nothing to rectify the situation."[66]

B. Bifurcated Standard

Some courts adopted a bifurcated standard: for *quid pro quo*-type of sexual harassment, the employer is strictly liable for acts of its supervisors, for hostile working environment-type of sexual harassment, the employer is liable if it knew or should have known of the harassment and failed to take prompt remedial action.[67]

The Court of Appeals for the Fourth Circuit recently adopted the bifurcated standard enunciated in Henson, in *Katz v. Dole*.[68] Katz, an air traffic controller for the Federal Aviation Administration and the only female employee on her particular work shift, was subjected to sexual harassment by her co-workers and her supervisor.[69] She complained about

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[65] *Id.*

[66] *See* Meyers, *supra* note 64, at 1068.

[67] *See* Henson, *supra* note 33.

[68] Katz v. Dole, 709 F.2d 252 (4th Cir. 1983).

[69] *Id.* at 253.

the harassment to the supervisor, but his response was further harassment.[70] Her complaints to higher management were likewise ignored.[71] She requested for a transfer to another shift, but was informed by the supervisor of that shift that the transfer could be arranged only if exchanged for sexual favors.[72] Katz was eventually fired in 1981 for participating in the air traffic controllers strike against the FAA.[73]

The Court ruled that an offensive work environment existed in the FAA control room. Relying on Henson, The Court treated the offensive conduct by Katz's co-workers and supervisor under the knowledge standard of liability: "We believe that in a condition of work case the plaintiff must demonstrate that the employer had actual or constructive knowledge of the existence of a sexually hostile working environment and sought no prompt or adequate remedial action.[74]

Again, relying on Henson, the Court also held that "where the plaintiff's complaint is of *quid pro quo* harassment by supervisory personnel, the employer is strictly liable."[75] The Court found that Katz had stated a claim for *quid pro quo* harassment by alleging that a supervisor had demanded sexual favors in exchange for a transfer to his shift. The Court, however, declined to adjudicate this claim because Katz had stated a sufficient claim for condition of work environment and would prevail on that claim.[76]

C. Strict Liability Standard

Some courts have adopted the strict liability standard of the EEOC guidelines even in hostile working environment cases involving supervisors.

The Bundy Court strongly endorsed the strict liability rule in the EEOC guidelines on sexual harassment:

[70] *Id.*

[71] *Id.*

[72] *Id.* at 256 n. 6.

[73] *Id.* at 253.

[74] *Id.* at 255.

[75] *Id.* at 255 n. 6.

[76] *Id.*

> The Final Guidelines on Sexual Harassment in the Workplace (Guidelines) issued by the Equal Employment Opportunity Commission on November 10, 1980 ... offer a useful basis for injunctive relief in the case. Those Guidelines define sexual harassment broadly:
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> ... The Guidelines go on to reaffirm that an employer is responsible for discriminatory acts of its agents and supervisory employees with respect to sexual harassment just as with other forms of discrimination, regardless of whether the employer authorized or knew or even should have known of the acts ... and also remains responsible for sexual harassment committed by non-supervisory employees if the employer authorized, knew of, or should have known of such harassment ... The general goal of the Guidelines is preventive. An employer may negate liability by taking "immediate and appropriate action" when it learns of any illegal harassment ... but the employer should fashion rules within its firm or agency to ensure that such corrective action never becomes necessary.[77]

Similarly, the Court of Appeals for the District Court of Columbia in the case of *Vinson v. Taylor*[78] strongly endorsed the EEOC 1980 Guidelines which, as "administrative interpretation of the Act by the enforcing agency, are entitled to great deference especially when they are supported by the statute and not inconsistent with its legislative history; and EEOC's Guidelines on Discrimination Because of Sex are unambiguous on the subject . . . ."[79] As to liability of the employer, the Court held that "the employer is absolutely liable for sexual harassment practiced by supervisory personnel, whether or not the employer knew or should have known about the misconduct."[80]

Vinson sued her employer, the Capital City Federal Savings and Loan Association (which later became the Meritor Savings Bank) and her supervisor, Sidney Taylor, for Taylor's alleged sexual harassment.[81] She alleged that during her four years in various positions at the bank, her supervisor repeatedly demanded sexual favor, fondled her, and other women employees of the bank, exposed himself to her, followed her into

[77] *See* Bundy, *supra* note 31, at 947.

[78] 753 F.2d 141 (1985).

[79] *Id.* at 148-49.

[80] *Id.* at 150.

[81] *Id.* at 143.

the ladies' room, and forcibly raped her.[82] However, Vinson never complained about this behavior under Capital's grievance procedure or otherwise because she feared Taylor. Both Taylor and Capital denied Vinson's allegations. Capital also argued that even if these allegations are true, the harassment did not occur with its knowledge, consent, or approval.[83] Undisputedly, Vinson had received several promotions during her four years of employment.[84]

The District Court found that Vinson had not suffered sexual harassment. It concluded "that her promotions had been obtained on merit alone, that she had not been required to grant Taylor sexual favors to obtain on merit alone, that she had been required to grant Taylor sexual favors to obtain them, and that any sexual relations between herself and Taylor were voluntary on her part."[85] With respect to employer's liability, the District Court ruled that "the employer could not be held liable for sexual harassment by employees absent notice.[86]

In reversing the District Court, the Circuit Court found that "a violation of Title VII may be predicated on either two types of sexual harassment: harassment that involves the conditioning of concrete employment benefits on sexual favors, and harassment that, while not affecting economic benefits, creates a hostile or offensive working environment."[87] Believing that Vinson's grievance was clearly of the hostile environment type, and considering that the District Court had not considered whether a violation of this type occured, the Court concluded that a remand was necessary.[88] With respect to liability of the bank, the Circuit Court that "an employer is absolutely liable for sexual harassment practised by supervisory personnel, whether or not the employer knew or should have known about the misconduct."[89] The Court relied chiefly on Title VII's definition of "employer" to include "any agent of such a person," as well as on the EEOC Guidelines. The Court held that supervisor

[82] *Id.* at 143-44.

[83] *Id.* at 144.

[84] *Id.* at 143.

[85] *Id.* at 145.

[86] *Id.* at 146-47.

[87] *Id.* at 145-46.

[88] *Id.* at 145.

[89] *Id.* at 151.

is an "agent" of his employer for Title VII purposes, even if he lacks authority to hire, fire, or promote, since "the mere existence or even the appearance of a significant degree of influence in vital job decisions gives any supervisor the opportunity to impose on employees."[90]

More important, the Circuit Court stated that in reaching such a conclusion, they have not resorted to the common law doctrine of *respondeat superior*. According to the Court: "Title VII is a mandate from Congress to cure a perceived evil – certain types of discrimination in employment – in a prescribed fashion. Rules of tort law, on the other hand, have evolved over centuries to meet diverse societal demands by allocating risk of harm and duties of care. Without clear congressional instruction, we think it unsafe in developing Title VII jurisprudence to rely uncritically on dogma thus begotten."[91] Moreover, the Circuit Court agreed that limiting an employer's liability to harassment committed within the scope of employment "could lead to the ludicrous result that employees would become accountable only if they explicitly require or consciously allow their supervisors to molest women employees.[92]

Finally, the Circuit Court rejected the notice requirement imposed by the District Court:

> A requirement of knowledge of knowledge by the employer of Title VII transgressions by supervisory personnel would effectively eliminate vicarious Title VII responsibility altogether. It would reserve Title VII liability for only those employers who fail to redress known violations – a direct, not a substitutional theory of attribution. This would be a retreat from the level of protection Title VII has consistently and designedly afforded and takes a backward step we refuse to endorse.[93]

D. Meritor Savings Bank, FSB v. Vinson

The question of employer's liability in hostile work environment cases involving supervisors was squarely addressed by the US Supreme Court in the appeal of *Vinson*.[94] The Supreme Court affirmed the appellate court's decision. The Court recognized that "sexual harassment was sexual

[90] *Id.* at 150.

[91] *Id.* at 150-51.

[92] *Id.* at 151.

[93] *Id.* at 151-52.

[94] *See* Meritor, *supra* note 15.

discrimination prohibited by Title II, and that Title VII did not limit sexual harassment claims to cases of tangible loss."[95] The Court justified a cause of action for work environment harassment by explicitly comparing sexual harassment to racial, ethnic, and religious harassment and determining that nothing in Title VII suggested that sexual harassment should not likewise be prohibited.[96] The Court, however, recognizes that "not all workplace conduct that may be described as "harassment" affects a "term, condition or privilege" of employment within the meaning of Title VII ... For 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."[97]

The Court's ruling on the employer liability question, however, differed substantially with the Circuit Court. After examining the positions presented by the various briefs submitted, Chief Justice Rehnquist, writing for the Court declined to issue a definitive rule on employer's liability. He asserted, however, that they do "agree with the EEOC brief that Congress wanted courts to look to traditional agency principles for guidance in this area."[98] He justified this resort to agency by invoking Title VII's definition of the term employer:

> While such common law principles may not be transferable in all their particulars to Title VII, Congress's decision to define employer to include any agent of an employer for which employers under Title VII are to be held responsible. For this reason, we hold that the Court of Appeals erred in concluding that employers are always automatically liable for sexual harassment by their supervisors.[99]

The Court also asserted that "for the same reason, absence of notice to an employer does not necessarily insulate that employer from liability."[100] Finally, the *Meritor* Court found that "the mere existence of a grievance procedure and a policy against discrimination would not insulate an employer from liability."[101] The Court explained that there might be

[95] *Id.* at 64.

[96] *Id.* at 67.

[97] *Id.*

[98] *Id.* at 72.

[99] *Id.*

[100] *Id.*

[101] *Id.*

deficiencies in the Meritor Savings Bank Policy because (1) it "did not address sexual harassment in particular, and thus did not alert employees to their employer's interest in correcting that form of discrimination";[102] (2) it "apparently required an employee to complain first to her supervisor;[103] and (3) it was not well "calculated to encourage victims of harassment to come forward."[104] Although it may be somewhat instructive to know what the Supreme Court might consider inadequate, still, the Supreme Court failed to make clear what is required to establish a valid anti-harassment policy and procedure.[105]

E. Harris v. Forklift Systems, Inc.[106]

Harris was the first substantive opinion of the Supreme Court on Title VII sexual harassment claims since *Meritor*. *Harris* reiterated *Meritor* and it enumerated the circumstances that should be looked into to determine a hostile or abusive work environment.

Harris worked as a manager at Forklift System, Inc. Hardy was Forklifts's president. Harris sued Forklift claiming that Hardy's conduct had created an abusive work environment. The Magistrate found that "throughout Harris's time at Forklift, Hardy often insulted her because of her gender, and often made her the target of unwanted sexual innuendoes. Hardy told Harris on several occasions, in the presence of other employees, "what do you know" and "we need a man as the rental manager;" at least once, he told her she was "a dumb ass woman." In front of others, he suggested that the two of them "go to Holiday Inn to negotiate Harris's raise." Hardy occasionally asked Harris and other female employees to get coins from his pants pocket. He threw objects on the ground in front of Harris and other women. And asked them to pick the objects. He made sexual innuendoes about Harris's and other women's clothing."[107]

Declaring this to be a close case, the District Court held that "Hardy's conduct did not create an abusive environment."[108] While the Court found

[102] *Id.* at 72-73.

[103] *Id.* at 73.

[104] *Id.*

[105] Levy, *The United States Supreme Court Opinion in Harris v. Forklift Systems: "Full of Sound and Fury Signifying Nothing,"* 43 U. KAN. L. REV. 275, 312 (1995).

[106] Harris v. Forklift Systems, Inc. 114 S. Ct. 367 (1993).

[107] *Id.* at 369.

[108] *Id.*

that some of Hardy's comments offended Harris, and would offend the reasonable woman, they were not:

> [S]o severe as to be expected to seriously affect Harris's psychological well being. A reasonable manager under like circumstances would have been offended by Hardy, but his conduct would not have arisen to the level of interfering with that person's work performance.
>
> Neither do I believe that Harris was subjectively so offended that she suffered injury ... . Although Hardy may at times have genuinely offended Harris, I do not believe that he created a working environment so poisoned as to be intimidating or abusive to Harris."[109]

The Court of Appeals for the Sixth Circuit affirmed the decision of the district court.

In reversing the Circuit Court's decision, the Supreme Court ruled that the applicable standard for an abusive work environment to be actionable is *Meritor*.[110] "When the workplace is permeated with discriminatory intimidation, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment, Title VII is violated."

"Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment — an environment that a reasonable person would find hostile or abusive — is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation."[111] Furthermore, the Harris Court ruled that "no proof of serious psychological effect or injury is needed to win a discriminatory work environment case."[112] Finally, it ruled that "whether an environment is hostile or abusive can be determined 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

[109] *Id.* at 370.

[110] *Id.* citations omitted.

[111] *Id.*

[112] *Id.* 371.

while psychological harm, like any other factor, may be taken into account, no single factor is required."[113]

F. Employer's Liability for Hostile Environment Cases Committed by Supervisors after Meritor

Meritor left open many questions.[114] Truth to tell, it did not settle the controversy regarding employer's liability for hostile environment cases committed by supervisors.[115] Post-*Meritor* courts continue to disagree about the appropriate liability standard for work environment harassment by supervisors. Some courts occasionally used strict liability in such cases,[116] while other courts continue to apply the actual or constructive knowledge standard.[117]

What does the Supreme Court actually mean in *Meritor* when it stated that "Congress wanted to look to *agency principles* for guidance in this area?" In 1990, the EEOC issued another set of guidelines on current issues of sexual harassment.[118] The EEOC interprets *Vinson* to require a careful examination in "hostile environment cases" of whether the harassing supervisor was acting in an "agency capacity."[119] Under this interpretation, the employer would incur liability under any of the following theories: direct liability, imputed liability, imputed liability (which includes scope of employment and apparent authority), and other theories (*e.g.* agency by estoppel).[120]

[113] *Id.*

[114] *See* Levy, *supra* note 105, at 316.

[115] Phillips, *Employer Sexual Harassment Liability Under Agency Principles: A Second Look at Meritor Savings Bank, FSB v. Vinson*, 44 VAND. L. REV. 1229, 1238 (1991).

[116] *Id. citing* Ross v. Double Diamond, Inc., 672 F. Supp. 692, 694 (N.D. Tenn. 1989); Volk v. Coler, 845 F. 2d 1422, 1436 (7th Cir. 1988).

[117] *Id. citing* Brooms vs. Regal Tube Co., 881 F. 2d 412, 420-21 (7th Cir. 1989); Paroline v. Unisys Corp., 879 F.2d 100, 106 (4th Cir. 1989); Steele v. Offshore Shipbuilding, Inc., 867 F.2d 1311, 1316 (11th Cir. 1989); Ross vs. Twenty-Four Collection, Inc., 681 F. Supp. 1547, 1552 (S.D. Fla. 1988).

[118] *See* Levy, *supra* note 105.

[119] *Id.* at 23.

[120] The pertinent provisions of the Guidelines are as follows:

b) Direct Liability — The initial inquiry should be whether the employer knew or should have known of the alleged sexual harassment. If actual or constructive knowledge exists, and if the employer failed to take immediate and appropriate corrective action, the employer would be directly liable.

An article had criticized *Meritor* concluding that "courts should avoid the common law of agency when determining an employer's Title VII liability for sexual harassment."[121] "Unfortunately, *Meritor's* command to consult agency principles does little to promote a rational evaluation of the competing alternatives. Although agency law might be used to justify any number of approaches to the employer-liability question, it does little to demonstrate the superiority of one approach over the other. Instead, it merely gives courts a smorgasbord of rationales for achieving predetermined results without having to defend those results on their merits."[122]

On the other hand, a commentator on the subject thought that the *Meritor* majority had chosen the agency principle of *respondeat superior:*

> Reading the majority opinion together with the concurrence reinforces the conclusion that *respondeat superior* is the agency principle of choice. Of the four possible bases of liability listed in Restatement Section 219, the majority chose the first, *respondeat superior*, and Justice Marshall chose the fourth, authority. The Majority cited the specific sections of the Restatement explaining *respondeat superior*, Sections 220-37, not those explaining authority, Sections 265-67. The Majority also rejected the second possibility, direct liability, and rejected innovations to the law of agency such as the vicarious-liability-without-scope-of-employment-limits test devised by the circuit court or the hybrid direct and vicarious liability scheme advocated by the EEOC. Despite Justice Steven's statement that the opinions are consistent, when the majority opinion is read in the context of the circuit court's ruling and Justice Marshall's concurrence, the Supreme Court's choice of common law *respondeat superior* liability, with its attendant limit of the scope of employment, is clear.[123]

c) Imputed Liability – The investigation should determine whether the alleged harassing supervisor was acting in an agency capacity. This requires a determination whether the supervisor was acting in an agency capacity ... or whether his actions can be imputed to the employer. The following principles should be considered and applied where appropriate in "hostile environment sexual harassment cases.

1. Scope of Employment – A supervisor's actions are generally viewed as being within the scope of his employment if they represent the exercise of authority actually vested in him. It will rarely be the case that an employer will have authorized a supervisor to engage in sexual harassment cases. However, if the employer becomes aware of work-related sexual misconduct and does nothing to stop it, the employer, by acquiescing, has brought the supervisor's actions within the scope of his employment.
2. Apparent Authority – An employer is also liable for a supervisor's actions if these actions represent the exercise of authority that third parties reasonably believe him to possess by virtue of his employer's conduct. This is called "apparent authority".
3. Other theories – A closely related theory is agency by estoppel. And employer is liable when he intentionally or carelessly causes an employee to mistakenly believe the supervisor is acting for the employer, or knows of the misapprehension and fails to correct it.

Liability also may be imputed if the employer was "negligent or reckless" in supervising the alleged harasser.

An employer cannot avoid liability by delegating to another person a duty imposed by the statute.

Finally, an employer also may be liable if the supervisor "was aided in accomplishing the tort by the existence of the agency relationship."

[121] *See* Phillips, *supra* note 115, at 1263.

[122] *Id.* at 1257.

It has been opined, however, that it would almost be impossible for employers to incur any liability if *respondeat superior* would be the agency principle of choice:

> Employers should virtually never be liable for sexual harassment if *respondeat superior* is the agency principle of choice because such behavior is rarely, if ever, within the scope of employment under the Restatement criteria. The most important reason is the last scope-of-employment requirement: that the employee at least partially intends the conduct to serve the employer. As Judge Richard Posner once remarked: It would be the rare case where. harassment against co-worker could be thought by the author of the harassment to help the employer's business. Because sexual harassment hardly seems within the scope of an employee's employment, courts and commentators often conclude that employer liability cannot be justified under *respondeat superior*.[124]

III. FOR CASES INVOLVING CO-WORKERS: ACTUAL OR CONSTRUCTIVE KNOWLEDGE STANDARD

In addition for the actions of supervisors, employers can also be held liable under certain circumstances for racial, religious, or national origin harassment of employees by co-workers.[125] Liability for co-worker harassment is unlike that for supervisory harassment, however, because

[123] Weddle, *Title VII Sexual Harassment: Recognizing an Employer's Non-Delegable Duty to Prevent a Hostile Workplace*, 95 COLUM. L. REV. 724, 734 (1995).

[124] *See* Phillips, *supra* note 115, at 1245.

[125] Chudacoff, *New EEOC Guidelines on Discrimination Because of Sex: Employer Liability for Sexual Harassment under Title VII*, 61 B.U.L. REV. 535, 545, (1981) citing EEOC v. Murphy Motor Freight Lines, 448 F. Supp. 381, 384 (D. Minn. 1980); De Grace v. Rumsfeld, 614 F.2d 796, 803 (1st Cir. 1980); Bell v. St. Regis Paper Co., 425 F. Supp. 1126, 1137 (N.D. Ohio 1976).

the nature of the agency relationship differs.[126] Although the co-worker is the employer's agent for the specific job he or she is employed to perform, the co-worker usually has no authority over the person he or she harasses.[127] The harassing act therefore cannot occur within the scope of the harasser's employment and cannot be imputed to the employer.[128]

Under the 1980 EEOC Guidelines, with respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer or its agents or supervisory employees knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.[129]

Liability is not imposed vicariously because of the co-worker's act, but directly for the employer's failure to correct a discriminatory condition of which it was aware.[130] Whether the employer knew or should have known of the harassment is, therefore, an issue in co-worker harassment cases.[131] Some courts have found employer knowledge only if a supervisor participated in the harassment, either by condoning the harassment or by actually harassing the employee.[132] Others have held that notice to supervisory personnel of racial problems constitutes sufficient notice to the employer to state a claim under Title VII.[133] Direct liability will only be imposed on the employer, if after receiving notice of the harassment, the employer fails to take reasonable steps to correct and prevent further harassment by non-supervisory personnel.[134]

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[126] *Id.*

[127] *Id.*

[128] *Id*

[129] 29 C.F.R. § 1604.11

[130] *See* Chudacoff, *supra* note 125, at 545.

[131] *Id.*

[132] *Id. citing* Compston v. Borden, Inc., 424 F. Supp. 157. 160-1 (S.D. Ohio 1976); Ostopowicz v. Johnson Bronze Co., 369 F. Supp. 527, 537 (W.D. Pa. 1973).

[133] *Id. citing* EEOC v. Murphy Motor Freight Lines, 488 F. Supp. 381, 386 (D. Minn. 1980); Croker v. Boeing Co., (Vertol Div.), 437 F. Supp. 1138, 1194 (E.D. Pa. 1977); Anderson v. Methodist Evangelical Hospital, 464 F.2d 723 (6th Cir. 1972).

[134] *Id. citing* De Grace v. Rumsfeld, 614 F.2d 796, 805 (1st Cir. 1980); Howard v. National Cash Register Co., 388 F. Supp. 603, 603 (S.D. Ohio 1975); Fekete v. United States Steel Corp., 355 F. Supp. 1177, 1187 (W.D. Pa. 1973).

In *Scott v. Sears, Roebuck and Co.*,[135] the employer was absolved from liability because the court found that it had no actual or constructive knowledge of the alleged harassment.

After completing the required training course, Scott was employed by Sears as an auto mechanic.[136] She was assigned at the brake section in the automotive department of Sears' Orland Park store.[137] Gadberry was assigned to train Scott during her first three months.[138] In her complaint, Scott alleged that Gadberry and other mechanics sexually harassed her.[139] Gadberry, the alleged principal harasser, supposedly propositioned her repeatedly.[140] Scott said that when she asked Gadberry for help with a brake problem, he often asked in reply "what will I get for this?"[141] Scott also said Gadberry would often "ask to take her out."[142] Scott also claim that Gadberry was generally suggestive or has an attitude.[143] As for the other mechanics, Scott claimed they were always coming over to talk to her, trying to take her out on dates or whatever the case may be, or flirting.[144]

In ruling for Sears, the court found that "Scott admits she never complained to a superior, and she offers no evidence at all that Sears officials knew of harassment by Gadberry or any other co-worker."[145]

In *Barrett v. Omaha Natural Bank*,[146] the court ruled that employer was not liable for the alleged harassment of an employee by a co-worker because it took immediate and appropriate corrective action.

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[135] 605 F. Supp. 1047 (1985).

[136] *Id.* at 1050.

[137] *Id.*

[138] *Id.*

[139] *Id.*

[140] *Id.*

[141] *Id.*

[142] *Id.*

[143] *Id.*

[144] *Id.*

[145] *Id.* at 1055.

[146] 726 F.2d 424 (1984).

Barrett was employed by Omaha as a personal banker.[147] Day, another personal banker, worked at a desk approximately fifteen feet from Barrett's desk.[148] On January 17, 1979, Barrett, Day, and Legenza, an assistant manager of a branch of Omaha, drove to Grand Island to attend a loan seminar.[149] Barrett claimed that, on the way to and during the two-day conference, Day talked about sexual activity and touched her in an offensive manner.[150] Upon being informed of the incident, Omaha investigated the charges, determined that Day and Legenza had engaged in inappropriate conduct and took disciplinary measures.[151] Day was reprimanded for his grossly inappropriate conduct, was placed on probation for ninety days, and was warned that any further misconduct would result in discharge.[152] Legenza was reprimanded for his failure to intervene on Barrett's behalf.[153]

The Circuit Court affirmed the ruling of the District Court absolving Omaha from liability on the ground that "ample evidence exists that Omaha took immediate and appropriate corrective action."[154]

IV. For Sexual Harassment of Non-employers: Actual or Constructive Knowledge Standard

Under the 1980 EEOC Guidelines, an employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer or its agents or supervisory employees knows or should have known of the conduct and fails to take immediate and appropriate corrective action.[155]

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[147] *Id.* at 426.

[148] *Id.*

[149] *Id.*

[150] *Id.*

[151] *Id.*

[152] *Id.*

[153] *Id.*

[154] *Id.* at 427.

[155] 29 C.F.R. 1604.11.

In *EEOC v. Sage Realty Corp.*,[156] a female lobby attendant brought suit for sexual harassment on the ground that she was required by the employer to wear a uniform which, due to its revealing nature, subjected her to sexual harassment by the public and by the building tenants.

The *Sage* Court ruled that "the employer is liable in discriminating plaintiff on the basis of sex in violation of Section 703(a)."[157] According to the court, "in requiring plaintiff to wear the revealing uniform in the lobby, the employer made its acquiescence in sexual harassment by the public, and perhaps by building tenants, a requisite of her employment as a lobby attendant."[158]

In *Morgan v. Safeway Stores Inc.*,[159] the Court held that for an employer to be held responsible for discriminatory programs of third parties, it must affirmatively, actively participate in the third-party programs.

The *Morgan* court was confronted with a Title VII suit brought by an employee against her employer and an employer-sponsored credit union, alleging discriminatory denial of credit disability benefits which excluded disability resulting from pregnancy or childbirth. According to the *Morgan* court, "Title VII primarily governs relations between employees and their employers, not between employees and third parties. An employer, however, cannot avoid Title VII liability by delegating discriminatory programs to third parties. Title VII specifically applies to 'any agent' of a covered employer."[160] Nonetheless, "to establish employer responsibility for the discriminatory programs of third parties, the employer must be more than a broker, or other intermediary, that simply enables its employees to enter into arrangements with third parties; the employer must affirmatively, actively participate in the third-party program."[161]

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[156] 507 F. Supp. 599 (1981).

[157] *Id.* at 611.

[158] *Id.* at 609-10.

[159] 884 F.2d. 1211 (9th Cir. 1989).

[160] *Id.* at 1214 *See* also City of L.A. Dep't. of Water & Power v. Manhart, 435 U.S. 702, 718 n.33 (1978). ("We do not suggest, of course, that an employer can avoid his responsibilities by delegating discriminatory programs to corporate shells. Title VII applies to any "agent" of a covered employer.")

[161] *Id.*

C. California Law on Employer's Liability

1. CALIFORNIA FAIR EMPLOYMENT PRACTICE STATUTE

In California, there is a fair employment practice statute which governs sexual harassment. The pertinent provisions of said statute are as follows:

> It is hereby declared as the public policy of this state that it is necessary to protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination or abridgement on account of race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, sex, or age.[162]
>
> It shall be an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California:
>
> ... (h) For an employer, labor organization, employment agency, apprenticeship training program or any training program leading to employment, or any other person, because of race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, sex, or age, to harass an employee or applicant. Harassment of an employee or applicant by an employee other than an agent or supervisor shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action. An entity shall take all reasonable steps to prevent harassment from occurring. Loss of tangible job benefits shall not be necessary in order to establish harassment. The provisions of this subdivisions are declaratory of existing law, except for the new duties imposed on employers with regard to harassment. For purposes of this subdivision only, "employer" means any person regularly employing one or more persons, or any person acting as an agent of an employer, directly or indirectly, the state, or any political or civil subdivision thereof, and cities. However, "employer" does not include a religious association or corporation not organized for private profit . . . .[163]

Interpreting the aforementioned statute, the Court of Appeals, Second District, Division 3, of California has ruled that "an employer is

[162] Cal. Gov't. Code § 12920 et seq. (West 1980, as amended).

[163] *Id.* § 12940(h).

strictly liable for compensatory damages for the harassing conduct of its agents and supervisors."[164] The court reasoned out that "harassment of an employee by an employee other than an agent or supervisor shall be unlawful only if the employer knows or should have known of the harassment and fails to intervene, Section 12940 reflects that harassment by a supervisor is unlawful regardless of whether the employer knows or should have known and fails to intervene."[165] On the other hand, "the standard for co-worker liability is that an employer is liable where it, its agents, or supervisors knows or should have known of this conduct and fails to take immediate and appropriate corrective action."[166]

With respect to punitive damages, the court said that the applicable legal provision is Civil Code Section 3294, subdivision (b), not Section 12940 of the California Government Code:

> An employer shall not be liable for (punitive) damages pursuant to subdivision (a) based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others, or authorized or ratified the wrongful conduct for which the damages are awarded, or was personally guilty of oppression, fraud, or malice. With respect to corporate employer, the advance knowledge and conscious disregard, authorization or act of oppression, or fraud, or malice must be on the part of an officer, director, or managing agent of the corporation.[167]

2. *KELLY-ZURIAN V. WOHL SHOE CO., INC.*

Zurian started working with Wohl Shoe Co. in 1979.[168] In 1984, Zurian was promoted to regional supervisor.[169] At the time of her promotion, Lawicki was company administrator and in charge of two supervisors, including Zurian.[170] During Zurian's first week in that new position while on drive to a store in Oxnard, Lawicki put his hand on

[164] Kelly-Zurian v. Wohl Shoe Co., Inc. Cal. Rptr. 2d 457, 466 (Cal. App. 2 Dist. 1994).

[165] Kelly-Zurian citing Fisher v. San Pedro Peninsula Hospital 214 Cal. App. 3d 590, 608 (1989).

[166] *Id.*

[167] *See* Kelly Zurain, *supra* note 164, at 468.

[168] *Id.* at 460

[169] *Id.*

[170] *Id.*

her knee and asked if she "fooled around."[171] For the next three years, Lawicki sexually harassed Zurian both physically and verbally.[172] He would come up from behind and put his hands on her breast.[173] He would pinch her buttocks as he walked by. He would grab her crotch and ask "if she was wet".[174] He made other graphic inquiries such as: "what kind of lingerie she was wearing underneath her clothes," "how was her 'pussy,' "if she got any last night," "if she took it in the ass," "if she swallowed," and "if she gave head."[175]

Zurian tendered her resignation on September 3, 1987. In December 1988, Zurian commenced an action for sexual harassment against Wohl and Lawicki.

The Court of Appeals affirmed in full the ruling of the trial court. Due to Lawicki's status as a supervisor, Wohl is strictly liable to Zurian in compensatory damages for Lawicki's misconduct.[176] However, Zurian is not entitled to recover punitive damages against Wohl because Lawicki, although a supervisor, was not a managing agent of Wohl.[177]

Under *Kelly-Zurian*, punitive damages may be recovered against the employer (1) if there is advance knowledge by employer of the employee's unfitness; (2) if there is authorization or ratification; (3) if employer was personally guilty of oppression, fraud, or malice; and (4) for an act of oppression, fraud, or malice committed by an officer, director, or managing agent, without any further showing of authorization or ratification by the corporate principal.[178]

Additionally, *Kelly-Zurian* cited *Agarwal v Johnson*[179] in the matter of punitive damages which stated:

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[171] *Id.*

[172] *Id.* at 461.

[173] *Id.*

[174] *Id.*

[175] *Id.*

[176] *Id.* at 460.

[177] *Id.*

[178] *Id.* at 468-69.

[179] 25 Cal. 3d at 950.

> While an employer may be liable for an employee's tort under the doctrine of *respondeat superior*, he is not responsible for punitive damages where he neither directed nor ratified the act .... California follows the rule laid down in Restatement of Torts, Section 909, which provides punitive damages can properly be awarded against a principal because of an act by an agent if, but only if (a) the principal authorized the doing and the manner of the act, or (b) the agent was unfit and the principal was reckless in employing him, or (c) the agent was employed in a managerial capacity and was acting in the scope of employment, or (d) the employer or a manager of the employer ratified or approved the act.

3. *WEEKS V. BAKER & MCKENZIE*

Sexual harassment is taken more seriously today than ever before, especially in the wake of *Weeks v. Baker & McKenzie*, No. 943043 (Calif. Sup. Ct. 1994). The punitive award against the law firm of Baker & McKenzie and a former partner is believed to be the largest judgment in a sexual harassment case.[180] Verily, "law firms can no longer ignore claims of inappropriate conduct by any partner or employee. They have to come to terms with the rules of conduct and discipline that other employers have learned to follow over the last ten years."[181]

a. The Background of Weeks

From 23 July to 1 October 1991, Rena Weeks (Weeks for brevity) was employed as a legal secretary at Baker & McKenzie's office in Palo Alto, California. For two weeks in August 1991, Weeks worked for Martin Greenstein (Greenstein for brevity), a former partner of the firm. During said period, Greenstein allegedly "(1) placed M&M's in Weeks's breast pocket as they walked out of a restaurant; (2) lunged toward her with cupped hands as if he were going to grab her breasts and stated, "what's wrong? Are you afraid I'm going to grab you?," (3) repeatedly inquired "what's the wildest thing you've ever done?" during a lunch at a local restaurant; and (4) "grabbed her butt" in the presence of two other employees as they were packing some items into a van.[182] At the end of

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[180] *Award a Lesson for Firms, Baker & McKenzie, ex-partner to pay $7.1 million*, A.B.A.J. 19 (November 1994).

[181] Brown & Shallow, *Learning From Mistakes*, 8 NEW JERSEY L. J. 303, 19 (September 1994).

[182] Harstein, *Weeks v. Baker & McKenzie: A Potential "Blueprint" for Sexual Harassment Litigation*, EMPLOYEE RELATIONS LAW JOURNAL 657, 658 (1995).

said two-week period, Weeks complained to the firm that she was being sexually harassed.[183] In response, the firm immediately placed her on paid leave until she was reassigned to work in another department.[184] Weeks subsequently resigned at the end of September 1991 to accept another job.[185]

In December 1991, Weeks filed a formal charge of sexual harassment with the EEOC. A formal complaint was filed before the California Superior Court in November 1992.

b. The Verdict of the Jury

On August 26, 1994, a jury panel composed of twelve persons found that Weeks was able to prove by preponderance of evidence that she was sexually harassed by Greenstein; that Baker and McKenzie failed to take all reasonable steps to prevent the sexual harassment of Weeks from occurring; that Greenstein was guilty of oppression or malice in his conduct upon which they based their finding of sexual harassment; and that Baker and McKenzie either (a) had advance knowledge of the unfitness of Greenstein, and with a conscious disregard of the rights or safety of others, continued to employ him, or (b) ratified the conduct of Greenstein which is found to be oppression (sic) or malice (sic).[186] The jury also awarded Weeks $50,000 in compensatory damages.[187] With respect to punitive damages, the jury awarded Weeks $6.9 million against Baker & McKenzie and $225,000 against Greenstein.[188]

c. Judge Munter's Decision on Defendant's Motion for New Trial and for Judgment Notwithstanding the Verdict

Defendants Baker & McKenzie and Greenstein moved for a new trial and, for judgment notwithstanding the verdict, Judge Munter denied Greenstein's motions reasoning out that the evidence showed that his sexual harassment was severe and pervasive. The court said:

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[183] *Id.*

[184] *Id.*

[185] *Id.*

[186] *Id.*

[187] *Id.*

[188] *Id.* This award does not include the plaintiff's attorney's fees, which will also be assessed against the defendants after determination by the court.

> The evidence supported, if not compelled, the conclusion that, by acts of unwelcome sexual conduct, Greenstein sexually harassed numerous women, including the plaintiff, that he did so on a repeated basis extending over a period of several years, that his conduct was seriously abusive, and that he persisted in this behavior with insensitivity and disregard to the many women who manifested their distress. In short, Greenstein's harassment was severe and pervasive, moreover, he denied or minimized his actions, both when questioned about them by his partners and under oath during discovery in this action.[189]

Judge Munter denied Baker & McKenzie's motion for judgment notwithstanding the verdict. However, he granted its motion "for a new trial of that portion of the second phase of the trial in which the jury assessed punitive damages against Baker in the amount of $6.9 million on the ground that the punitive damages imposed are excessive."[190] The order granting a new trial "is subject to the condition that the motion for new trial is denied if plaintiff consents to a reduction of punitive damages against Baker & McKenzie to the amount of $3.5 million."[191]

d. Employer's Liability under Weeks

The fact that Weeks was employed less than 90 days is an important reminder that employers are not shielded from potential discrimination or harassment claims during the hiring process or any so-called probationary or introductory period.[192] Moreover, "a unique aspect of the *Weeks* case is that it was tried in California courts based on California's fair employment practice statute which permits jury trials and unlimited compensatory and punitive damages in discrimination actions."[193] From a legal perspective, there was little doubt that defendants would be liable for sexual harassment. California's fair employment practice statute imposes strict liability for sexual harassment by an employer's management or supervisory personnel.[194]

In *Weeks*, Baker & McKenzie and Greenstein were adjudged jointly and severally liable to Weeks in the sum of $50,000 as compensatory

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[189] Weeks v. Baker & McKenzie, 1994 WL 774633 (Cal. Superior).

[190] *Id.*

[191] *Id.*

[192] *See* Harstein, *supra* note 182, at 662.

[193] *Id.* at 658.

[194] *Id.*

damages. Baker & McKenzie was held strictly liable for sexual-harassment-hostile environment type committed by one of its partners who can be considered a supervisor.[195] This is clearly in accord with the California Fair Employment Practice Statute and Kelly Zurian. The reason for this limited amount of compensatory damages is that "Weeks had virtually no out-of-pocket-loss when she left Baker & McKenzie for another job. Further, the testimony about the 'mental distress' was limited. While she had received counseling based on her negative experience at Baker & McKenzie, she immediately moved on in her life."[196]

As to punitive damages, the jury in Weeks was instructed to "determine whether Baker and McKenzie either had advance knowledge of the unfitness of Greenstein and with a conscious disregard of the rights or safety of others continued to employ him or ratified the conduct of Greenstein which is found to be oppression (sic) or malice (sic)."[197] The jury was further instructed that "the proper amount of punitive damages is based on an assessment of three factors. They are: (1) the reprehensibility of the conduct of the defendant; (2) the amount of punitive damages which will have a deterrent effect on the defendant in the light of its financial condition; and (3) the reasonable relation that the punitive damages must bear to the injury, harm, or damage actually suffered by the plaintiff."[198]

Judge Munter found that "the evidence fully showed that Baker knew or possessed information that Greenstein was engaged in harmful activities toward women at Baker and continued to employ him with a conscious disregard of the rights of Weeks and other women in the workplace."[199] The Judge noted:

> Greenstein's harassing activities spanned over four years and two offices of Baker. When made aware of the harassing activities of Greenstein as respects seven women prior to the episodes involving

[195] Supervisors are those individuals who have the power to hire, fire, discipline or promote subordinates. Miller v. Bank of America, 600 F.2d 211, 20 FEP Cases 462 (9th Cir. 1979). Co-workers, on the other hand, do not exercise such powers over other co-workers, although some may also have supervisory functions. When that occurs, the courts have held co-workers to the standard of liability for a supervisor. Robson v. EVDS Supermarket, 538 F. Supp. 857, 30 FEP Cases 1213, 1217 (N.D. Ohio, 1982).

[196] *See* Harstein, *supra* note 182, at 661.

[197] *See* Weeks (No. 943043), *supra* note 189, at 2.

[198] *Id.* at 1. citations omitted.

[199] *Id.* at 2.

> the plaintiff, Baker failed to take reasonable steps to investigate the episodes and the results necessarily was a failure to curtail Greenstein's pernicious conduct.[200]

The judge also found that "the evidence well supported a finding of ratification on the part of Baker."[201] The Judge continued:

> While the firm received information between 1987 and 1991 that many of its female employees found Greenstein conduct to be abusive, the firm continued to employ him until 1993, when it caused him to leave, and then at least in part for reasons unrelated to his conduct toward women. Furthermore, Baker did not impose any sanction upon Greenstein at any time prior to his termination, which was many years after Baker learned of his workplace abuse. Baker failed reasonably to investigate or discipline this errant partner once his conduct became known.[202]

Due to the advance knowledge and ratification by Baker & McKenzie, Judge Munter concluded that "the level of reprehensibility of Baker's conduct was sufficiently high to justify an award of $3.5 million in punitive damages."[203]

In the mind of Judge Munter, said amount is also sufficient to deter future misconduct on the part of Baker & McKenzie. The Judge cited the following factors:

a. The sum of $3.5 million is large by almost any standard, and it is a full five percent of Baker's net worth.

b. Baker will be required to pay plaintiff's attorney's fees in an amount which this Court determines to be appropriate.

c. After the events which gave rise to this lawsuit, and before the commencement of trial, Baker substantially improved its approach to sexual harassment and introduced throughout its offices in California a program designed to prevent repetition of the kinds of events which occurred in this case.

[200] *Id.*

[201] *Id.*

[202] *Id.*

[203] *Id.*

d. Although slow to act against Greenstein, the firm eventually did cause him to leave.[204]

Finally, the Judge observed that "the ratio of $3.5 million in punitive damages to $50,000 in compensatory damages is 70 to 1."[205] He said that "it is a reasonable ratio, given all the facts and circumstances of this case."[206] For, "depending upon the facts of the individual case, a ratio of 32.7 to 1 has been held unreasonable whereas of as much as 2000 to 1 has been held reasonable."[207]

IV. CONCLUSION

First of all, while there are differences between Philippine law and US law on sexual harassment, there are similarities as well. Both jurisdictions recognize *quid pro quo type* and hostile work environment type of sexual harassment. Liability of the employer under R.A. 7877 is very much similar to the actual or constructive knowledge standard adopted by some courts in the United States. Consequently, cases decided by US courts would be very relevant in resolving sexual harassment litigation that might arise under R.A. 7877.

Secondly, while sexual harassment is considered a criminal offense under Philippine law and merely a civil offense under US law, the offender as well as the employer in the United States couldd be held liable for a tremendous amount of damages. *Weeks* will certainly be "a wake-up call" to employers concerning the potential costs of sexual harassment and other types of employee litigation.[208] Weeks tells us that "lawyers and law firms are no longer insulated from the realities of workplace litigation by the supposed collegiality of the profassional environment."[209] Employers, including law firms, are advised to "reaffirm their equal employment commitment, to publicize a policy which prohibits discrimination and/or

[204] *Id.* at 3.

[205] *Id.* at 4.

[206] *Id.*

[207] *Id. citing* Little v. Stuyvesant Life Ins. Co. 67 Cal. App. 3d 452, 469-470 (1977) and Finney v. Lockhart, 35 Cal. 2d 161,162, 164-165 (1950).

[208] *See* Harstein, *supra* note 182, at 657.

[209] *See* A.B.A.J., *supra* note 180.

harassment, and to include an effective procedure."[210] It is likewise suggested" that employers should conduct supervisory training to help prevent such problems from arising."[211] More importantly, "an immediate investigation of discrimination and /or harassment complaints is essential, and appropriate corrective must be taken."[212]

Thirdly, the appropriate standard for determining the liability of an employer remains a very live issue in the United States.[213] The *Meritor* court explicity avoided deciding the issue of employer liability in sexual harassment cases. Under R.A. 7877, however, the standard is knowledge on the part of the employer after having been informed of acts of sexaul harassment by the offended party.

Fourthly, a harassed employee in the United States should carefully consider whether to file the claim under the Fair Employment Practice statute of his or her state of the Civil Rights Act of 1964 is amended. The effectiveness of the Fair Employment Practice Statute of each state varies considerably from state to state. Under R.A. 7877, however, the victim of sexual harassment can institute an independent action for damages.

Finally, the Guidelines issued by the EEOC on sexual harassment should always be taken into account. The *Meritor* court observed that "these guidelines, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgement to which courts and litigants may properly resort for guidance."[214]

[210] *See* Harstein, *supra* note 182, at 663.

[211] *Id.*

[212] *Id.*

[213] *See* Phillips, *supra* note 115, at 1257.

[214] *See* Meritor, *supra* note 15, at 65.