

EXACERBATING THE EXASPERATING: TITLE VII LIABILITY OF EMPLOYERS FOR SEXUAL HARASSMENT COMMITTED BY THEIR SUPERVISORS

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INTRODUCTION	68
I. THE EXASPERATING PROBLEM OF APPLYING THE COMMON LAW OF MASTER AND SERVANT IN ASSESSING LIABILITY FOR WORKPLACE INJURIES	77
A. Vicarious Liability Based on the Relationship Between the Employer and the Harasser	80
1. <i>Liability Based on Harassment Within the Scope of the Supervisor's Authority</i>	80
a. <i>The Requirement that the Servant Be Exercising the Authority Delegated by the Master</i>	80
b. <i>The Requirement that the Servant Be Acting Within the Scope of Employment</i>	81
i. <i>The requirement that the wrongful conduct be the kind of conduct the employee is employed to perform, occurring substantially within the time and space limits of the employment</i>	82
ii. <i>The requirement that the employee be motivated, at least in part, by a purpose to serve the master</i>	84
iii. <i>The inclusion of intentional wrongful acts</i> ..	86
2. <i>Vicarious Liability Based on Harassment in Which the Supervisor is Aided by the Agency Relationship</i> ...	88
B. Vicarious Liability Based on Public Policy	90
C. Liability Based on the Relationship Between the Employer and the Harassed Employee	94
1. <i>Vicarious Liability Based on the Employer's Non- Delegable Duty to Prevent Harassment</i>	94

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2.	<i>Direct Liability Based on the Employer's Negligence . . .</i>	97
D.	Summary of Common-Law Theories of Employer Liability	98
II.	EARLY HARASSMENT LAW UNDER TITLE VII	99
A.	The Development of Title VII's Prohibition of Racial, Religious, and Ethnic Harassment	99
1.	<i>The Emergence of a Right to be Free from Harassment</i>	100
2.	<i>Applying the Doctrine of Respondeat Superior to the Right to be Free from Harassment</i>	102
a.	<i>Cases Denying Liability Because the Harassment Was Committed by Nonsupervisor Co-Employees and the Employer Was Either Unaware of the Harassment or Acted Properly to Protect the Harassed Employee</i>	103
b.	<i>Cases Imposing Liability Because the Employer Failed to Act to Protect Its Employees from Known Harassment Committed by Nonsupervisor Co-Employees</i>	106
c.	<i>Cases Considering Liability for Harassment by Supervisors</i>	106
d.	<i>Assessing Liability for Supervisor Harassment While Denying Liability for Nonsupervisor Co-Employee Harassment Pursuant to the Law of Agency</i>	107
B.	The Early Development of Title VII's Prohibition of Sexual Harassment	109
1.	<i>The Emergence of a Right to Be Free from Sexual Harassment</i>	109
2.	<i>Applying the Law of Agency to the Right to Be Free from Sexual Harassment</i>	112
III.	EXACERBATING THE EXASPERATING I—THE EEOC AND <i>MERITOR SAVINGS BANK V. VINSON</i>	114
A.	The Adoption of the EEOC Guidelines on Sexual Harassment	114
1.	<i>The Guidelines Generally—Sexual Harassment Defined</i>	114
2.	<i>The Guidelines' Application of the Law of Agency to the Right to Be Free from Sexual Harassment</i>	116
3.	<i>The Application of the Guidelines in the Courts</i>	119
B.	The <i>Vinson</i> Case and the Application of Agency Law to the Problem of Employer Liability for Sexual Harassment by Supervisors	122
1.	<i>The Vinson Case in the District Court and Court of Appeals</i>	122

2.	<i>The Vinson EEOC Brief—A Shift in Position</i>	124
3.	<i>The Vinson Decision</i>	129
IV.	EXACERBATING THE EXASPERATING II— <i>VINSON</i> APPLIED . . .	131
A.	<i>Vinson</i> Applied by the Courts	131
1.	<i>Cases Requiring Both Vicarious Liability and Direct Liability</i>	132
2.	<i>Cases Rejecting Strict Vicarious Liability While Adopting Some Elements of Agency Law</i>	136
B.	<i>Vinson</i> Applied by the EEOC.	141
V.	A CRITIQUE OF <i>VINSON</i> AND ITS PROGENY	141
A.	Why Employers Should Be Vicariously Liable for Sexual Harassment by Supervisors	141
B.	The Growing Risk to Employment Discrimination Law Caused by <i>Vinson</i>	143
C.	Theories on Why the Federal Courts Have Failed to Properly Apply the Law of Agency in Determining Employer Liability for Sexual Harassment by Supervisors	145
VI.	CALIFORNIA'S STATUTORILY IMPOSED STRICT LIABILITY FOR SUPERVISORIAL HARASSMENT—AN ALTERNATIVE APPROACH	149
	CONCLUSION	152

INTRODUCTION

Consider the case of Pamela Kotcher and Barbara Davis.¹ Both women worked at the Oswego, New York branch store of the Rosa and Sullivan Appliance Center—Kotcher as a salesperson, Davis as a clerk. Their supervisor, store manager Herbert Trageser, sexually harassed them with “continuous episodes of distasteful and abrasive comments and gestures.”² Trageser regularly stood behind Kotcher and pretended to masturbate and ejaculate onto her.³ He also suggested that Kotcher exchange sex for sales⁴ and continuously made comments about Davis’s breasts and other parts of her body.⁵ The women repeatedly asked Trageser to stop and complained to other supervisors at the store.⁶

¹ See *Kotcher v. Rosa & Sullivan Appliance Ctr., Inc.*, 53 Fair Empl. Prac. Cas. (BNA) 1148 (N.D.N.Y. 1990), *rev'd and remanded*, 957 F.2d 59 (2d Cir. 1992), *opinion on remand*, 65 Fair Empl. Prac. Cas. (BNA) 1714 (N.D.N.Y. 1992).

² 53 Fair Empl. Prac. Cas. (BNA) at 1150.

³ *Id.*

⁴ Trageser told Kotcher that if he had “the same bodily ‘equipment’ as Kotcher, his sales would be more substantial.” *Id.*

⁵ *Id.*

⁶ 957 F.2d at 63-64.

Despite the complaints, nothing changed until Kotcher and Davis contacted the company's main office in Rochester. The company temporarily transferred and demoted Trageser.⁷ However, five months later, after Davis quit and Kotcher was fired,⁸ the company reinstated Trageser as manager of the Oswego store.⁹ Kotcher, who was psychologically disabled by Trageser's harassment, engaged in nine months of therapy before applying for another job.¹⁰

Kotcher and Davis brought an action for sexual harassment against the company under Title VII of the 1964 Civil Rights Act.¹¹ Following a bench trial, the district court dismissed the action, holding that although both women had been sexually harassed, the immediate temporary transfer and demotion of the harasser, combined with the plaintiffs' failure to report the conduct to the main office in a timely manner, immunized the company from liability.¹²

Only Kotcher chose to appeal, arguing that because Trageser was an agent of the company, the district court should have ruled against the company under the law of vicarious liability.¹³ The Second Circuit rejected her argument, holding that liability would extend to the employer company only if it "provided no reasonable avenue for complaint or knew of the harassment but did nothing about it."¹⁴ If instead the company responded properly when the main office received Kotcher's complaint, it was not liable.¹⁵

Or consider the case of Sally Klessens.¹⁶ After beginning work as a mail handler for the Postal Service, Klessens became the target of sexual remarks made by male co-employees. In one instance, a co-worker stated that if he didn't "get laid [he was] going to take hostages."¹⁷ Another told her that she had "small tits"; a third, that she

⁷ *Id.* Notably, Trageser had been disciplined for sexual harassment on a separate occasion; one year earlier, he had received a written reprimand for harassing another employee. *Id.* at 63.

⁸ The court's decision does not make clear the chronology; instead, this information was provided by Faith Seidenberg, attorney for Kotcher and Davis. Telephone Interview with Faith Seidenberg, Esq. (May 15, 1995).

⁹ 957 F.2d at 62.

¹⁰ The court never explicitly adjudged Kotcher psychologically disabled by the incident; however, Kotcher recovered her counseling expenses and compensatory damages for mental anguish. 65 Fair Emp. Prac. Cas. (BNA) at 1715.

¹¹ 42 U.S.C. §§ 2000e to 2000e-17 (1988 & Supp. V 1993).

¹² 53 Fair Empl. Prac. Cas. (BNA) at 1151.

¹³ 957 F.2d at 63-64.

¹⁴ *Id.*

¹⁵ *See id.* at 64. The court then remanded the case for factual findings to determine whether Trageser's transfer was a "sham" and whether Rosa and Sullivan discharged Kotcher in retaliation for the complaint. *Id.* at 63-65.

¹⁶ Klessens v. United States Postal Serv., 66 Fair Empl. Prac. Cas. (BNA) 1630 (1st Cir. 1994).

¹⁷ *Id.* at 1631.

was a "nice piece of ass."¹⁸ When Klessens complained to her immediate supervisor, he joked with one of the harassers about "getting laid."¹⁹ She then reported the activities to her supervisor's supervisor. After informing Klessens that one of the harassers had a history of sexual harassment, the second supervisor then explicitly described to her one of the incidents: "[H]e wrote a letter to another female that worked there, saying that he wanted to slip his tongue . . . up her ass"²⁰

When Klessens sued the Postal Service for sexual harassment, it disclaimed responsibility for its employees' acts.²¹ The district court agreed, holding that Klessens' initial complaints to management were insufficient to put her employer on notice, and that the employer's eventual transfer of the supervisor was sufficiently timely for the employer to avoid liability.²² The First Circuit affirmed.²³

Or consider the case of Mary Steele and Barbara McCullough.²⁴ While employees of Offshore Shipbuilding, Inc. at its Palatka, Florida repair facility, the women were supervised by Anthony Bucknole, the company's corporate vice-president and general manager.²⁵ As the court of appeals explained: "Bucknole often engaged in sexually-oriented joking [sic] with employees. For example, Bucknole requested sexual favors from Steele and McCullough. He commented on their attire in a suggestive manner and asked them to visit him on the couch in his office."²⁶

Like Kotcher, Davis, and Klessens, the two women sued their employer for sexual harassment. And, as in *Kotcher* and *Klessens*, the trial and appellate courts in *Steele* held that because the company reprimanded Bucknole when Steele and McCullough complained to corporate headquarters, the company was not liable for the harassment.²⁷

Many may find these decisions surprising. And well they should. It is well established that sexual harassment constitutes unlawful sex discrimination under Title VII.²⁸ A number of early cases, as well as

18 *Id.*

19 *Id.*

20 *Id.*

21 *See id.*

22 *See id.* at 1632-33.

23 *Id.*

24 *Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311 (11th Cir. 1989).

25 *Id.* at 1313.

26 *Id.*

27 *Id.*

28 *See, e.g., Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 66 (1986) ("[C]ourts have uniformly held, and we agree, that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment."); *see also Harris v. Forklift Sys., Inc.*, 114 S. Ct. 367 (1993) (reaffirming the standard used in *Meritor*).

the guidelines adopted by the Equal Employment Opportunity Commission (EEOC) in 1980,²⁹ imposed absolute vicarious liability on the employer when an employee was harassed by a supervisor.³⁰ Recent cases, however, have limited strict employer liability to “quid pro quo” harassment,³¹ in which a sexual demand is made a condition of employment. In “hostile work environment” cases, in which the incidents of sexual harassment render the workplace sufficiently hostile or offensive as to interfere with an employee’s ability to perform her work, employer liability is uncertain.³² Currently, a federal court hearing a sexual harassment claim under Title VII will not likely hold an employer vicariously liable for its employee’s harassing acts in the absence of a “quid pro quo” sexual demand. The court will hold the employer company liable only if the company’s own wrongful acts satisfy the requirements of direct, rather than vicarious, liability.

This Article examines and criticizes the courts’ failure to uniformly impose vicarious liability on employers in cases involving sexual harassment by supervisors, and considers the confusing rules applied by the federal courts and the EEOC when determining employer liability for sexual harassment. It then compares federal law to the state law of California, which imposes absolute vicarious liability on employers for all on-the-job sexual harassment by supervisors (the “California Rule”). This Article concludes that the federal courts should adopt the California Rule as the proper application of Title VII. Should the courts fail to do so, Congress should amend Title VII to require the California Rule.

²⁹ The guidelines are found at 29 C.F.R. § 1604.11(c) (1995). The EEOC was created by Title VII to investigate and prosecute alleged violations of the Act and to issue rules and regulations for its enforcement. See 42 U.S.C. §§ 2000e-5, 2000e-12 (1988 & Supp. V 1993).

³⁰ See *infra* part III.A. Although sexual harassment actions may be brought by or against either women or men, most sexual harassment actions are brought by women against men. Therefore, I regularly use the words “she” and “her” when referring to the plaintiff in a sexual harassment suit, and “he” and “his” when referring to the harasser. I also use the neutral pronoun “it” when referring to the employer company.

³¹ See, e.g., *Gary v. Long*, 59 F.3d 1391 (D.C. Cir. 1995) (facts insufficient to constitute “quid pro quo” harassment may support a claim of hostile environment harassment); *Carero v. New York City Hous. Auth.*, 890 F.2d 569 (2d Cir. 1989) (identifying quid pro quo and hostile work environment harassment as the only cognizable sexual harassment claims under Title VII).

³² The distinction between “quid pro quo” and “hostile work environment” harassment was first discussed by Professor MacKinnon in her book *Sexual Harassment of Working Women*. See CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 32 (1979). The Court later utilized the distinction in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986). There is little controversy regarding the effect of “quid pro quo” harassment by supervisors; in “quid pro quo” harassment cases, courts readily impose liability on the employer without regard to the agency issues discussed herein.

Part I discusses the common-law principles that govern employer liability for employee torts.³³ It then describes how those principles apply to workplace sexual harassment. As explained in Part I, the common law of agency imposes liability on employers for employees' wrongful conduct applying four distinct theories. Three of these theories impose vicarious liability; the fourth imposes direct liability.

The principal mechanism used to impose vicarious liability is the doctrine of *respondent superior*. The doctrine provides that even when an employer has policies prohibiting its employees from engaging in wrongful acts, the employer may nevertheless be legally responsible for the conduct of its employees if the acts occur within the scope of the employment.

A second theory of liability permits imposition of vicarious liability when an employee engages in wrongful conduct outside the scope of employment, if the employee took advantage of his position with the employer to commit the act. A third theory of liability provides that an employer may be vicariously liable because public policy prohibits an employer from delegating to others its duty to protect its employees from harm.

A fourth theory of liability holds that when an employee commits wrongful acts for which an employer is not subject to vicarious liability, the employer may nonetheless be held directly liable for the wrongful acts. Direct liability is imposed when an employer itself acts wrongfully—for example, when it is negligent or reckless in the selection and training of its supervisors, or its supervision of its workplace or employees. The circuit courts have held that once an employer is put on notice of harassment, it is required to take appropriate remedial steps or face direct liability for its failure to act.

The concepts of agency, *respondent superior*, and vicarious and direct liability are ripe for confusion when applied to sexual harassment law. Part of the problem derives from the breadth of agency law—although it defines the responsibility of employers for employees' torts, agency law also defines a set of duties governing commercial relationships. Therefore, when applying agency law to sexual harassment occurring in the workplace, caution must be exercised to apply

³³ On the question of whether a violation of Title VII is a tort, see *Price Waterhouse v. Hopkins*, 490 U.S. 228, 264 (1989) (O'Connor, J., concurring) (referring to Title VII as creating an employment "tort"). See also *Hirschfeld v. New Mexico Corrections Dep't*, 916 F.2d 572 (10th Cir. 1990) (same); *Baker v. Weyerhaeuser Co.*, 903 F.2d 1342 (10th Cir. 1990) (treating sexual harassment as a tort). See generally Cheryl Kause Zelman, *The After-Acquired Evidence Defense to Employment Discrimination Claims: The Privatization of Title VII and the Contours of Social Responsibility*, 46 STAN. L. REV. 175, 196-97 (1993) (discussing the wide acceptance of Title VII violations as torts).

only those rules of agency intended to govern employment and not those intended to govern general commercial relationships.³⁴

Moreover, *respondeat superior* is usually applied in cases involving employers' liability for torts committed against non-employees; use of the doctrine in situations in which employees commit torts against other employees is relatively infrequent. When applying the law of agency to employers' liability for sexual harassment, then, it is important to focus not only on the duties a master owes a stranger, but also on the duties a master owes a servant. Furthermore, the phrases "scope of authority" and "scope of employment" as used in the doctrine of *respondeat superior* have a broader meaning than their common-sense meaning might suggest. As a result, the courts' failure to apply these concepts correctly in harassment cases causes considerable confusion.

The array of federal court decisions addressing the relationship between agency law and sexual harassment by supervisors reveals an exasperating problem. Federal courts routinely misapply the law of agency. The prevailing line of cases requires employees to prove not only that the harassing supervisor was acting within the scope of his employment (vicarious liability), but also that the employer was reckless or negligent in its supervision (direct liability). Under common-law theories of agency, proof of either (not both) should be sufficient to impose liability on the employer. Yet federal courts routinely and erroneously require the plaintiff to prove both vicarious and direct liability, and just as routinely and erroneously describe this standard as a rule of common-law agency.

Part II describes the process by which the courts' erroneous analysis developed. It outlines the legal development of the right to be free from improper harassment under Title VII, beginning with a series of racial, religious, and ethnic harassment cases brought in the late 1960s and early 1970s.³⁵ In a few of these early cases, a distinction arose between harassment committed by nonsupervisor co-employees and harassment committed by supervisors. In cases of co-employee harassment, liability was imposed on the employer only when the employer was directly liable due to negligent or reckless conduct, or

³⁴ In their hornbook on agency law Reuschlein and Gregory argue that the critical issue in agency law is distinguishing principal/agent relationships from master/servant relationships. The former is a contractual relationship in which "the principal will not incur liability for torts committed by the agent." The latter is an employment relationship in which "[t]he servant, qua servant, has no power to bind [the] master in contract." HAROLD GILL REUSCHLEIN & WILLIAM A. GREGORY, *THE LAW OF AGENCY AND PARTNERSHIP* §§ 48-50, at 101-02 (2d ed. 1990). Thus, where courts use contract principals of agency to analyze *respondeat superior* liability, confusion reigns.

³⁵ This Part, as well as the first section of Part III, draws on a portion of an earlier article of mine, David B. Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899, 945-67 (1993).

when the employer ratified the harassment after it occurred. In cases of harassment by supervisors, the courts correctly applied the law of agency to hold employers vicariously liable.

Beginning in the mid-to-late 1970s, courts applied the reasoning in the racial, religious, and ethnic harassment cases, with considerable controversy, to the problem of sexual harassment. When applying Title VII to sexual harassment, the federal courts regularly faced the defense that when one employee harassed another, the employer should not be liable, regardless of the harasser's position, unless the employer had authorized or ratified the harassment. The first appellate courts to consider the question—the Third, Ninth, and D.C. Circuits—imposed vicarious liability (sometimes termed “strict” liability or “per se” liability), holding the employer liable for the acts of all of its supervisory employees, regardless of whether the employer itself was at fault.³⁶ But in the early 1980s, the Eleventh and Fourth Circuits rejected the application of vicarious liability, requiring proof of direct liability on the part of the employer.³⁷ Their test required the employee to prove that she complained to the employer about harassment, or that the employer otherwise learned of the harassment, and that the employer thereafter failed to take appropriate steps to prevent its recurrence.³⁸

Part III describes the Supreme Court's treatment of the problem. In 1986 the Court addressed the question in *Meritor Savings Bank v. Vinson*.³⁹ In ill-considered dicta, the Court criticized the application of vicarious liability in hostile work environment cases. Demonstrating the confusion over agency law that marks sexual harassment cases, the Court simultaneously rejected basic theories of agency law while explaining that “Congress wanted courts to look to agency principles for guidance in this area.”⁴⁰ Had the Court actually endorsed the application of agency law, it would have imposed vicarious liability in all

³⁶ See, e.g., *Miller v. Bank of Am.*, 600 F.2d 211 (9th Cir. 1979); *Tomkins v. Pub. Serv. Elec. & Gas Co.*, 568 F.2d 1044 (3d Cir. 1977); *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977).

³⁷ See *Katz v. Dole*, 709 F.2d 251, 256 (4th Cir. 1983) (“[T]he plaintiff must show that the employer knew or should have known of the harassment, and took no effectual action to correct the situation.”); *Henson v. City of Dundee*, 682 F.2d 897, 905 (11th Cir. 1982) (The employee “must show that employer knew or should have known of the harassment in question and failed to take prompt remedial action.”).

³⁸ The test is described as a rule of “notice liability.” See J. Hoult Verkerke, *Notice Liability in Employment Discrimination Law*, 81 VA. L. REV. 273 (1995) (analyzing the difference between strict vicarious liability and notice liability in sexual harassment cases and suggesting the application of notice liability in all individual employment discrimination cases). Verkerke notes that “courts regularly confuse elements of strict and notice liability,” and that “[o]ne of the most common distortions occurs when courts describe respondent superior as a standard that requires notice to the employer.” *Id.* at 282 n.24.

³⁹ 477 U.S. 57 (1986).

⁴⁰ *Id.* at 72.

cases—quid pro quo *and* hostile work environment—in which employees were sexually harassed by supervisors.

The *Vinson* Court adopted the position expressed in an *amicus curiae* brief filed by the Solicitor General on behalf of the EEOC at the urging of its then-Chairman, Clarence Thomas. In that brief, the EEOC disavowed a portion of its 1980 Sexual Harassment Guidelines.⁴¹ In the Guidelines, the EEOC had endorsed the imposition of strict liability for all sexual harassment by supervisors.⁴² By disavowing the Guidelines, the EEOC helped create the confusion which reigns today.

Part IV discusses the application of the *Vinson* dicta. The courts of appeals attempting to apply it have exhibited considerable confusion. The courts have frequently applied a rule which they label “*respondeat superior*,” but which is actually a rule of direct liability. These decisions require the employee to prove both that the harasser-supervisor was acting within the scope of employment and that the employer was directly liable for the harassment.

Part V criticizes these decisions for failing to apply agency law properly. Moreover, that Part suggests a number of theories explaining why federal courts have so consistently misapplied agency principles. To begin with, the law in this area is confusing; judges and lawyers not accustomed to applying agency principles, or accustomed to applying agency principles only in other situations, may easily confuse them in this context. The error is particularly understandable given the early sexual harassment decisions, which used the language of agency law while misapplying its substance. The error of these early decisions was exacerbated by the EEOC’s abandonment of its 1980 Guidelines in its *Vinson* brief, and by the Court’s dicta in *Vinson*, which created a false distinction between strict liability for the acts of supervisors, and agency liability. A related theory is that the courts are mistakenly applying agency rules for assessing punitive damages as if they were the rules for imposing liability. For punitive damages, unlike compensatory damages, direct liability is properly required. Another possibility is that the federal courts’ frequent exposure to civil rights cases in which government employers enjoy limited sovereign immunity, has contributed to an incorrect understanding of the usual relationship between a supervisor’s wrongful acts and his employer’s liability. The analogy between the public employer defendant in a civil rights action and the employer defendant in a sexual harassment action is logical, but the immunities that apply to claims against the

⁴¹ See *infra* part III.B.2. The Guidelines are found at 29 C.F.R. § 1604.11 (1995). The California Rule derives from the Guidelines. See discussion *infra* text accompanying notes 437-56.

⁴² See 29 C.F.R. § 1604.11(c) (1995).

government have no application in Title VII cases. Another possible explanation is that gender bias by male judges, in cases in which plaintiffs have been uniformly female and defendants nearly uniformly male, has affected the imposition of liability.⁴³ Finally, those who believe that Justice Thomas himself committed sexual harassment in the 1980s may conclude that he acted in self interest in disavowing the EEOC's 1980 Guidelines. These theories are neither exhaustive nor mutually exclusive.

In light of the federal courts' misapplication of agency law, this Article poses a central question: Should we ever conclude that a harasser-supervisor is acting so far outside his role as a supervisory employee that his on-the-job harassment is not the responsibility of his employer? For a number of reasons, I conclude that the answer to this question must be "no." First, applying the traditional rules of agency law appropriate to wrongful conduct by supervisors against employees, employers are almost always properly subject to absolute vicarious liability under the doctrine of *respondeat superior*. The application of *respondeat superior* recognizes the supervisor's effect on the work environment, which is so closely connected with the authority he exercises as a supervisor that his acts of harassment within the workplace can almost never be independent of his authority as an agent of the employer. Second, a harassing supervisor almost certainly uses his position as a supervisor to aid his harassment. Third, the statutory duty imposed on employers to protect their employees from improper harassment should be recognized as nondelegable. As a result, all harassment by supervisors should be attributed to the employer. Fourth, the failure of the federal courts to correctly apply agency rules, and their focus on whether employers are directly liable for harassment by their supervisors, has created a quagmire. It has turned the focus of Title VII sexual harassment cases from essential matters—whether harassment occurred and, if so, what remedy is appropriate—to collateral ones—the relationship between the supervisor and his employer. Moreover, it has left an important area of law unclear and unpredictable.

Part VI discusses California's adoption of the 1980 EEOC Guidelines' vicarious liability rule. The Fair Employment and Housing Act,⁴⁴ as amended by the California Legislature, imposes absolute vicarious liability for all harassment by supervisors.⁴⁵ As a result, questions

⁴³ Susan Estrich, *Sex At Work*, 43 STAN. L. REV. 813, 856 (1991) (arguing that courts impose a higher standard of proof in hostile work environment cases than in quid pro quo cases because they perceive hostile work environment harassment as less serious).

⁴⁴ CAL. GOV'T CODE §§ 12900-12996 (hereinafter FEHA) (West 1994).

⁴⁵ See *infra* notes 441-47 and accompanying text.

subject to uncertainty under federal law are settled under California law.

In the Conclusion, I argue that the *Vinson* decision does not require the federal courts to abandon the law of agency, but instead compels them to apply it properly. Properly applied, the common law of agency imposes vicarious liability on employers for sexual harassment by their supervisors. The Supreme Court should take the first opportunity to so hold. If the federal courts continue to interpret *Vinson* as requiring the abandonment of common-law agency principles, Congress should amend Title VII, as the California Legislature has amended the FEHA, to impose vicarious liability for supervisory sexual harassment.

I

THE EXASPERATING PROBLEM OF APPLYING THE COMMON LAW OF MASTER AND SERVANT IN ASSESSING LIABILITY FOR WORKPLACE INJURIES

When an employee is injured on the job by another employee, the problem of assessing liability requires consideration of the employer's liability both for its own acts or omissions and for those of its employees. One branch of agency law is concerned with liability arising from the relationship between the employer and the employee who causes the injury; it examines whether the employee's wrongful acts were sufficiently related to the employment relationship to impose liability on the employer. Another branch of agency law is concerned with liability stemming from the relationship between the employer and the injured employee; it considers whether the injury was one from which the employer was obligated to protect the employee. A third branch focuses on policy justifications for liability; it looks to risk allocation and foreseeability to determine when vicarious liability should be imposed.

Given the two relationships implicated in an action against an employer for sexual harassment by a supervisor—the relationship between the employer and the harassed employee and the relationship between the employer and the harasser—a discussion of employer liability for sexual harassment of employees by supervisors must first distinguish between vicarious and direct liability. The portion of agency law labeled “master and servant” governs an employer's vicarious liability for the acts of its employees, for the employer's failure to fulfill its special duties to protect those employees,⁴⁶ and for the employer's direct liability for its own wrongful acts.⁴⁷

⁴⁶ See RESTATEMENT (SECOND) OF AGENCY § 2 (1957) (definitions of “master,” “servant,” and “independent contractor”).

⁴⁷ See *id.* § 219 (describing when a master is liable for the torts of its servants).

Under the doctrine of *respondeat superior*, the master-servant relationship may result in a master's vicarious liability for the wrongful acts of its servants.⁴⁸ Numerous rationales have been offered in support of the doctrine.⁴⁹ Some courts and commentators focus on the nature of the authority delegated by the master to the servant, imposing liability when the servant's wrongful act is "within the scope of [his] employment." These observers reason that when an employer authorizes an employee to act on the employer's behalf, the law should hold the employer responsible for the consequences of that delegation of authority.⁵⁰ The Restatement (Second) of Agency adopts this rationale.⁵¹

Other courts and commentators approach the problem from a policy perspective. They attempt to determine the proper allocation of risk for workplace injuries, holding employers responsible for wrongful acts by their employees in order to: (1) spread the risk of harm most efficiently, treating it as a necessary cost of business; (2) insure that injured employees have an available source of compensation; and (3) deter improper workplace activity by placing the onus

⁴⁸ *Respondeat superior* derives from the Latin phrase "let the superior respond." The origins of the rule are obscure and in dispute. See William O. Douglas, *Vicarious Liability and Administration of Risk I*, 38 YALE L.J. 584 (1929) (history of the rule uncertain). Compare Oliver Wendell Holmes, Jr., *Agency*, 4 HARV. L. REV. 345, 350 (1891) (origin found in Roman law rule of "*patria potestas*") and Young B. Smith, *Frolic and Detour I*, 23 COLUM. L. REV. 444 (1923) (same) with T. BATY, VICARIOUS LIABILITY 9 (1916) (origin found in eighteenth century English common law); RICHARD A. EPSTEIN, CASES AND MATERIALS ON TORTS 819 (5th ed. 1990) (origin found in religious duties of vicar); G. EDWARD WHITE, TORT LAW IN AMERICA 51 (1980) (origin found in English common law of household employment); and John H. Wigmore, *Responsibility for Tortious Acts*, 7 HARV. L. REV. 315 (1894) (origin found in Germanic law).

⁴⁹ For a comprehensive summary of the sources and applications of the diverse theories of *respondeat superior*, see Rochelle Rubin Weber, Note, "*Scope of Employment*" Redefined: Holding Employers Vicariously Liable for Sexual Assaults Committed By Their Employees, 76 MINN. L. REV. 1513 (1992).

⁵⁰ See *infra* part I.A.

⁵¹ Section 219 of the RESTATEMENT (SECOND) OF AGENCY (1957) reads:

When A Master is Liable for Torts of His Servants

(1) A master is subject to liability for the torts of his servants committed while acting in the scope of their employment.

(2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:

(a) the master intended the conduct or the consequences, or

(b) the master was negligent or reckless, or

(c) the conduct violated a non-delegable duty of the master, or

(d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

RESTATEMENT (SECOND) OF AGENCY § 219 cmt. a (1957) provides in relevant part:

The conception of the master's liability to third persons appears to be an outgrowth of the idea that within the time of service, the master can exercise control over the physical activities of the servant. From this, the idea of responsibility for the harm done by the servant's activities followed naturally.

for corrective action on the employer, as the party best able to control the work environment.⁵² Still other courts and commentators focus on the issue of foreseeability.⁵³ They hold employers responsible for workplace injuries that the employers should have reasonably foreseen.

The master-servant relationship may also give rise to liability for the master's breach of duties owed the injured servant. Three theories explain how an employer may be liable for an employee's injury. First, an employer may be directly liable to an injured employee because the employer acted wrongfully toward her. For example, the employer may have acted negligently by breaching its duty to protect her from harm, its duty to hire competent supervisors, its duty to train employees in matters of safety, or its duty to investigate and remedy dangerous conditions.⁵⁴ Second, the employer may have adopted or ratified a wrongful act of another employee, thus assuming responsibility for the harm caused.⁵⁵ Third, even when an employer has acted properly toward an employee, that employer's obligation to protect its employees is, under certain circumstances, nondelegable. Thus, even when the employer is not at fault, vicarious liability may result when one employee is harmed by another.⁵⁶

This Part explains how the law of master and servant should apply to the problem of sexual harassment committed by supervisors. It focuses on those cases that apply agency law to hold employers responsible for acts analogous to sexual harassment.⁵⁷ Subsequent Parts examine how courts have failed to correctly apply agency doctrine in sexual harassment cases, thereby creating confusion in this volatile area of law.

⁵² See *infra* part I.B.

⁵³ See *infra* part I.B.

⁵⁴ See Alfred G. Feliu, *Workplace Violence and the Duty of Care: The Scope of Employer's Obligation to Protect Against the Violent Employee*, 20 EMPL. REL. L.J. 381 (1994-1995).

⁵⁵ See *infra* part I.C.2.

⁵⁶ See *infra* part I.C.1.

⁵⁷ This Part will also discuss cases that support the position that employer liability should not be imposed for sexual harassment. In my view, however, it is the cases in which liability is imposed that correctly apply agency principles.

- A. Vicarious Liability Based on the Relationship Between the Employer and the Harasser
 1. *Liability Based on Harassment Within the Scope of the Supervisor's Authority*
 - a. *The Requirement that the Servant Be Exercising the Authority Delegated by the Master*

Under traditional *respondeat superior* analysis, liability for the wrongs of the servant may extend to the master because agency law dictates that the principal is responsible for acts of its agents within the agents' delegated authority. An agent may be vested with actual authority or apparent authority to act on behalf of the principal. An agent's actual authority to bind the principal may be created expressly or by reasonable implication from the circumstances.⁵⁸ An agent's apparent authority is established when, based on the principal's words or conduct, the agent reasonably appears to others to be acting on behalf of the principal.⁵⁹

Actual authority is the express or implied delegation of powers by words, conduct, or acquiescence. In the employment setting, it is the employer's delegation of power to the employee to supervise the workplace. To create actual authority, an employer need not specifically limit or provide a list of duties for the supervisor to perform. The supervisor possesses actual authority to perform all acts reasonably necessary to his supervision of the workplace.⁶⁰ More generally, the supervisor possesses actual authority when he reasonably infers that he is acting pursuant to the instructions of his employer, even though the conduct, in actuality, is not consistent with his employer's intent.⁶¹ Actual authority by implication may then be created by the employer's manifestation of consent to the supervisor to conduct the employer's business.⁶²

Accordingly, a supervisor's actual delegated authority is broad. Employers, with the exception of sole proprietorships, often act only through the actions of their supervisors. Supervisors act as the eyes, ears, and, most importantly, voice of the employer in all interactions with employees. Supervisors give instructions, oversee operations, provide and interpret regulations, mediate interactions between employees, evaluate and report on employee performance, and generally influence—and at times determine—the working environment of nonsupervisory employees.

⁵⁸ RESTATEMENT (SECOND) OF AGENCY § 7 cmt. c (1957); see WARREN A. SEAVEY, THE LAW OF AGENCY § 8(B), at 11-13 (1964).

⁵⁹ RESTATEMENT (SECOND) OF AGENCY § 8 cmt. a, illus. 1-4 (1957).

⁶⁰ *Id.* § 7 cmt. c.

⁶¹ *Id.* § 7 cmt. b.

⁶² *Id.* § 7 cmt. c.

Apparent authority, unlike actual authority, views the delegation of authority from the perspective of a third person, rather than that of the agent. Apparent authority exists when a third-party observer, based upon existing facts and conditions, believes or has reason to believe that the agent possesses authority to act on behalf of the master.⁶³ It is irrelevant that the agent may not in fact possess the power or know that he has it.⁶⁴ The principal's manifestation of consent may be made directly to the third person, but explicit consent is not necessary.⁶⁵ The principal may manifest his consent to a community of persons in a variety of ways, including continuously employing the agent.⁶⁶ In the employment context, the supervisor may possess broad apparent authority simply because of the title, privileges, or responsibilities conferred upon him by his employer.

When an employer's words and conduct create the reasonable impression that its supervisors are responsible for supervising the decorum of the workplace, the supervisor's acts become the acts of the employer. Because of his position, conferred on him by the employer, the supervisor has unique powers to influence the work environment. His power and authority make it far more difficult for the employee to influence his behavior than the behavior of a friend, acquaintance, or stranger. Thus, even where a supervisor is given very limited actual authority, to the extent that employees reasonably see him as acting as the representative of the employer, he is legally exercising his apparent authority as the representative of his employer.

b. *The Requirement that the Servant Be Acting Within the Scope of Employment*

The law of agency determines whether a servant is acting within the master's delegated authority by determining whether his act falls within the "scope of employment." Generally, an employee's wrongful conduct is within the scope of employment if it is the kind of conduct he is employed to perform and if the conduct substantially adheres to the authorized time and space limits of the work assignment.⁶⁷ Some courts further require that the conduct be motivated, at least in part, by a business purpose,⁶⁸ although the growing trend is to substitute a requirement that the misconduct be foreseeable.⁶⁹

⁶³ *Id.* § 8 cmt. a.

⁶⁴ *Id.* § 7 cmt. b.

⁶⁵ *Id.* § 8 cmt. b.

⁶⁶ *Id.*

⁶⁷ *Id.* § 228; see also SEAVEY, *supra* note 58, § 87(A)-(G), at 148-52; Smith, *supra* note 48, at 717.

⁶⁸ RESTATEMENT (SECOND) OF AGENCY § 228(1)(c) (1957).

⁶⁹ See, e.g., *Ira S. Bushey & Sons, Inc. v. United States*, 398 F.2d 167 (2d Cir. 1968) (substituting foreseeability test for business-purpose test); see also Verkerke, *supra* note 38,

Conduct may be within the scope of employment even when it is an intentionally wrongful act.

- i. *The requirement that the wrongful conduct be the kind of conduct the employee is employed to perform, occurring substantially within the time and space limits of the employment*

This Article assumes that employers typically do not employ supervisors to sexually harass employees,⁷⁰ or to commit other wrongful acts. Thus, one might assume that sexual harassment falls outside the scope of a supervisor's employment, rendering the theory of vicarious liability inapplicable. However, the doctrine of *respondeat superior* focuses on the relationship between the supervisor's job responsibilities and the wrong he committed; it mandates that the "kind of conduct" inquiry consider not the authority to harass, but the authority to supervise. This element of *respondeat superior* has generated a great deal of confusion. Many courts and commentators have fundamentally erred by assuming that the relevant authority is the authority to harass.⁷¹ As numerous cases and the Restatement illustrate, this view is simply wrong.

For example, the Restatement provides that "[a]n act, although forbidden, or done in a forbidden manner, may be within the scope of employment."⁷² It also states that "[a]n act may be within the scope of employment although consciously criminal or tortious."⁷³ In *Doe v. Samaritan Counseling Center*,⁷⁴ the Alaska Supreme Court relied on such reasoning in reversing an order of summary judgment for a counseling center whose pastoral counselor allegedly initiated a sexual relationship with a patient. The court found that although the counselor's acts were unauthorized, and led to his termination, the acts were within the scope of employment because the harassment arose from and was "reasonably incidental to the employee's legiti-

at 311 ("The present trend is toward more expansive interpretations of the scope of employment.").

⁷⁰ *But see* Thoreson v. Penthouse Int'l Ltd., 563 N.Y.S.2d 968 (Sup. Ct. N.Y. County 1990), *aff'd*, 583 N.Y.S.2d 213 (App. Div. 1992), *aff'd*, 606 N.E.2d 1369 (N.Y. 1992) (plaintiff employed, in part, to provide sex to employer's customers, states claim for sexual harassment under New York law); Dorchen A. Leidholdt, *Pimping and Pornography as Sexual Harassment: Amicus Brief in Support of Plaintiff-Respondent in Thoreson v. Penthouse Int'l Ltd.*, 1 MICH. J. OF GENDER & L. 107, 108 (1993) (employee hired to "sexually service" employer).

⁷¹ *See, e.g.*, Michael J. Phillips, *Employer Sexual Harassment Liability Under Agency Principles: A Second Look at Meritor Sav. Bank, FSB v. Vinson*, 44 VAND. L. REV. 1229, 1242-43 (1991); Note, *Sexual Harassment and Title VII: The Foundation for the Elimination of Sexual Cooperation as an Employment Condition*, 76 MICH. L. REV. 1007, 1026 (1978).

⁷² RESTATEMENT (SECOND) OF AGENCY § 230 (1957).

⁷³ *Id.* § 231.

⁷⁴ 791 P.2d 344 (Alaska 1990).

mate work activities."⁷⁵ The Court of Appeal of Louisiana, in *Samuels v. Southern Baptist Hospital*,⁷⁶ also adopted the Restatement's position and affirmed a judgment against the hospital where a nurse's assistant raped a patient. The court reasoned:

Ensuring a patient's well-being from others, including staff, while the patient is helpless in a locked environment is part of the hospital's normal business. Taking care of the patient's well-being is part of the duties of a nursing assistant. The tortious conduct committed by Stewart was reasonably incidental to the performance of his duties as a nurse's assistant although totally unauthorized by the employer and motivated by the employee's personal interest. Further, Stewart's actions were closely connected to his employment duties so that the risk of harm faced by the young female victim was fairly attributable to his employer, who placed the employee in his capacity as a nurse's assistant and in a position of authority and contact with the victim.⁷⁷

Similarly, in *Lyon v. Carey*,⁷⁸ the employer was held vicariously liable under *respondeat superior* when its delivery person raped a woman to whom he was delivering furniture.⁷⁹ In *Carr v. Wm. C. Crowell Co.*,⁸⁰ the employer was held vicariously liable under *respondeat superior* when its carpenter hit another worker in the head with his hammer. In *Rogers v. Kemper Construction Co.*,⁸¹ the employer of two heavy equipment operators was held vicariously liable under *respondeat superior* when its employees, four hours after completing their work, changing, and drinking three or four beers each, assaulted another worker at the job

⁷⁵ *Id.* at 348; *see also* *Simmons v. United States*, 805 F.2d 1363 (9th Cir. 1986) (similar holding on similar facts); *Turner v. State of Louisiana*, 494 So. 2d 1292 (La. Ct. App. 1986) (holding state vicariously liable for national guard recruiting sergeant's unauthorized physical examinations of female applicants). *But see* *Andrews v. United States*, 732 F.2d 366, 370 (4th Cir. 1984) (finding a government hospital not vicariously liable under South Carolina law for therapist's "seduction" of a patient because the therapist was not furthering his employer's business, but holding the hospital directly liable for its negligent failure to supervise its employee).

⁷⁶ 594 So. 2d 571 (La. Ct. App. 1992).

⁷⁷ *Id.* at 574.

⁷⁸ 533 F.2d 649 (D.C. Cir. 1976) (reversing JNOV for defendant and reinstating jury verdict).

⁷⁹ *See also* *White v. County of Orange*, 166 Cal. App. 3d 566 (Cal. Ct. App. 1985) (county may be held vicariously liable when deputy sheriff kidnapped plaintiff and threatened to rape and murder her unless she agreed to go out with him that weekend); *Applewhite v. City of Baton Rouge*, 380 So. 2d 119 (La. Ct. App. 1979) (city may be held vicariously liable when police officer detains and rapes pedestrian).

⁸⁰ 171 P.2d 5 (Cal. 1946).

⁸¹ 50 Cal. App. 3d 608 (Cal. Ct. App. 1975).

site.⁸² In *Ira S. Bushey v. United States*,⁸³ a drunken sailor decided to open three large intake valves at a dry dock, causing his ship to sink. The Second Circuit held that the government was vicariously liable under *respondeat superior*; the sailor's acts, although unauthorized, were of the type he was employed to perform and were thus within the scope of his employment.⁸⁴ In the context of sexual harassment, where a supervisor's harassment of an employee occurs on the work-site, during working hours,⁸⁵ and within the supervisor-subordinate relationship, it meets the scope of authority standards for *respondeat superior* imposed by the Restatement. The fact that the employer has not authorized the supervisor to harass the employee is irrelevant.

- ii. *The requirement that the employee be motivated, at least in part, by a purpose to serve the master*

The Restatement takes the position that in order to apply *respondeat superior*, the employee must be motivated, at least in part, by an intent to serve the employer.⁸⁶ Where this rule is retained, the courts accept any connection between the motivation for the wrongful act and the employee's work as sufficient to bring the conduct within the scope of employment. Accordingly, in *Chesterman v. Barmon*,⁸⁷ the Oregon Supreme Court reversed a grant of summary judgment for an employer whose employee broke into a house and sexually assaulted

⁸² As further examples, see *Fields v. Sanders*, 180 P.2d 684 (Cal. 1947) (affirming jury verdict against employer where its employee, a truck driver, hit a motorist in the head with a wrench in the course of an argument following an accident); *Frederick v. Collins*, 378 S.W.2d 617 (Ky. Ct. App. 1964) (affirming wrongful death verdict against employer where its clerk, despite instructions not to resist robbery attempts, shot and killed a customer pretending to hold up store).

⁸³ 398 F.2d 167 (2d Cir. 1968) (Friendly, J.).

⁸⁴ *Id.* at 170-73.

⁸⁵ See, e.g., *Capital City Foods, Inc. v. Superior Court*, 5 Cal. App. 4th 1042 (Ct. App. 1992) (employer not liable for supervisor's rape of employee occurring off premises during non-work hours).

⁸⁶ RESTATEMENT (SECOND) OF AGENCY §§ 228(1)(c), 235, 236 (1957). However, many states have rejected this position. See, e.g., *Ira S. Bushey & Sons v. United States*, 398 F.2d 167, 171-72 (2d Cir. 1968) (discarding motivation-to-serve-master test in favor of test of foreseeability of conduct); *Mary M. v. City of Los Angeles*, 814 P.2d 1341, 1344 (Cal. 1991) (observing that acts need not benefit the employer for the courts to impose *respondeat superior* liability); *Marston v. Minneapolis Clinic of Psychiatry*, 329 N.W.2d 306, 311 (Minn. 1983) (discarding motivation-to-serve-master test in favor of inquiry into whether the act at issue was related to the employee's duties). *But cf.* *Doe v. Samaritan Counseling Center*, 791 P.2d 344, 347-48 (Alaska 1990) (reaffirming that conduct reasonably incidental to the performance of job duties is within the scope of employment); *Turner v. State*, 494 So. 2d 1292, 1295 (La. Ct. App. 1986) (stating that conduct is within the scope of employment if it is "so closely connected in time, place, and causation to . . . employment duties"). See generally Verkerke, *supra* note 38, at 300 n.71 (citing *Lange v. Nat'l Biscuit Co.*, 211 N.W.2d 783 (Minn. 1973), and its observation that as of 1973, Mississippi, California, Kentucky, Illinois, Alabama, Connecticut, and Montana had repudiated the business-purpose test).

⁸⁷ 753 P.2d 404 (Or. 1988).

the occupant while hallucinating under the influence of mescaline. The court concluded that the facts raised sufficient evidence of a claim of *respondeat superior* to deny summary judgment because the employee claimed he had ingested the mescaline to give him energy to work.

In all but the most remarkable circumstances, a supervisor engaging in sexual harassment will have some personal purpose other than serving the interests of the employer. But even when the business-purpose test is applied, the existence of a personal motive does not alone relieve the employer of liability. The Restatement finds that conduct may be within the scope of employment, even when the motivation is largely to serve the employee's private interests.⁸⁸ The Comment to § 236 explains:

The fact that the predominant motive of the servant is to benefit himself or a third person does not prevent the act from being within the scope of employment. If the purpose of serving the master's business actuates the servant to any appreciable extent, the master is subject to liability if the act otherwise is within the service⁸⁹

The Restatement illustrates the purpose-to-serve-the-master principle by using the example of a speeding delivery person.⁹⁰ The purpose of employment is to deliver goods, not to speed. In fact, the employer may specifically direct the driver not to speed. However, the driver may speed in order to finish early, or to win a race—reasons independent from serving the employer.⁹¹ Nonetheless, the speeding is within the scope of the delivery person's employment.⁹² Thus, if the driver's speeding causes an accident, the employer is vicariously liable.

The California Supreme Court, in adopting this position, has explained:

[W]here the employee is combining his own business with that of his employer, or attending to both at substantially the same time, no nice inquiry will be made as to which business he was actually engaged in at the time of the injury.⁹³

⁸⁸ RESTATEMENT (SECOND) OF AGENCY § 236 (1957).

⁸⁹ *Id.* § 236 cmt. b.

⁹⁰ *Id.* § 236 cmt. a, illus. 2.

⁹¹ *See id.*

⁹² *Id.*

⁹³ *Perez v. Van Groningen & Sons, Inc.*, 719 P.2d 676, 680 (Cal. 1986) (quoting *Lockheed Aircraft Corp. v. Industrial Accident Comm'n*, 172 P.2d 1 (Cal. 1946). *But see* *Noah v. Ziehl*, 759 S.W.2d 905, 912 (Mo. Ct. App. 1988) (reversing a judgment against an employer after the employer's nightclub bouncer assaulted a patron who patted the bouncer's girlfriend on the rear, reasoning that the assault "exceeded reasonable bounds of the scope and course of employment" and that it was not foreseeable because it was for personal rather than business reasons).

The comparison of a hypothetical harassing supervisor to the speeding delivery person is helpful in determining whether the supervisor's harassment falls within the scope of his employment. The driver's business purpose is to deliver goods, and the supervisor's business purpose is to oversee the work of subordinate employees. As long as the supervisor's conduct mixes work-related and non-work-related functions, his sexual harassment is incidental to the performance of the job. Just as the delivery driver's speeding is within the scope of his employment, the supervisor's interactions with subordinate employees, including his harassment, are incidental to, and thus within the scope of, his employment. Therefore, unless the non-work-related interactions can be surgically separated so as to have no relation to the supervisor-subordinate relationship, all of the supervisor's harassment of subordinates falls within the scope of his employment. As one commentator has explained, "the employer is vicariously liable for faults that are risks of his business, whether or not they further his business. Thus, even practical jokes and horseplay occurring on the job that originate from job-related contacts and associations are within the scope of employment."⁹⁴

iii. *The inclusion of intentional wrongful acts*

The fact that harassment may be intentional and consciously wrongful will not prevent the application of *respondeat superior*. As is evident from many of the cases described *supra*, the employer's liability under *respondeat superior* extends to willful and malicious torts, as well as negligence.⁹⁵ For example, in *Agarwal v. Johnson*,⁹⁶ the California Supreme Court upheld a verdict against an employer whose supervisor fired an employee shortly after calling him a "black nigger, member of an inferior race."⁹⁷ The court explained that "the rule in this state is that the employer is liable for the wilful misconduct of his employees acting in a managerial capacity. The reason for the imposi-

⁹⁴ Katherine S. Anderson, *Employer Liability Under Title VII For Sexual Harassment After Meritor Savings Bank v. Vinson*, 87 COLUM. L. REV. 1258, 1273 (1987) (citing Fleming James, Jr., *Vicarious Liability*, 28 TUL. L. REV. 161, 182, 191-92 (1954)).

⁹⁵ See RESTATEMENT (SECOND) OF AGENCY §§ 231, 245 (1957); *id.* § 247 (explaining that the master is vicariously liable for the servant's defamation if it was within the scope of employment). Moreover, where courts are limited by the substantive law of their jurisdiction to assessing vicarious liability only for negligence, they will take an expansive view of the term "negligence." See, e.g., *Jamison v. Encarnacion*, 281 U.S. 635, 641 (1930) (under FELA provision limiting employers' vicarious liability to acts of employee negligence, an assault and battery of a sailor by his supervisor, although in excess of the supervisor's authority, constitutes negligence attributable to the employer).

⁹⁶ 603 P.2d 58 (Cal. 1979).

⁹⁷ *Id.* at 64.

tion of liability is to encourage careful selection and control of persons placed in important management positions."⁹⁸

In *Dilli v. Johnson*⁹⁹ a restaurant manager responded to a customer's complaint about a hamburger by striking him in the head with a nightstick. The D.C. Circuit affirmed a judgment for the plaintiff against the restaurant, explaining that once the employer placed the manager in charge of its operation, it could not escape liability simply because the manager went beyond the ordinary line of duty or temperament.¹⁰⁰ And in *Munick v. City of Durham*,¹⁰¹ the court held the city liable when the office manager of its waterplant assaulted a customer and called him a "God damned Jew" even though the manager had no authority to insult or assault customers.¹⁰²

In *Leonbruno v. Champlain Silk Mills*,¹⁰³ Justice Cardozo advanced what could be called the "boys will be boys" theory of employer liability for intentional wrongful acts. An employee threw an apple at another employee, blinding him in one eye. The court held that the accident arose in the "course of employment"¹⁰⁴ because such roughhousing should be expected by "men and boys" in the workplace.¹⁰⁵ Similarly, in *Carr v. Wm. C. Crowell Co.*,¹⁰⁶ Justice Traynor reversed a directed verdict in favor of the employer of a carpenter who intentionally hit another worker in the head with his hammer. He explained the reasoning behind the "boys will be boys" theory as follows:

Men do not discard their personal qualities when they go to work. Into the job they carry their intelligence, skill, habits of care and rectitude. Just as inevitably they take along also their tendencies to carelessness and camaraderie, as well as emotional makeup. In bringing men together, work brings these qualities together, causes frictions between them, creates occasions for lapses into carelessness, and for fun-making and emotional flareup. Work could not go on if men became automatons repressed in every natural expres-

⁹⁸ *Id.* at 67 (citations omitted).

⁹⁹ 107 F.2d 669 (D.C. Cir. 1939).

¹⁰⁰ *Id.* at 670.

¹⁰¹ 106 S.E. 665 (N.C. 1921).

¹⁰² *Id.* at 666; *see also* *Ledman v. Calvert Iron Works, Inc.*, 89 S.E.2d 832 (Ga. Ct. App. 1955) (holding employer vicariously liable when its foreman assaulted an employee who complained that his termination was unjust).

¹⁰³ 128 N.E. 711 (N.Y. 1920).

¹⁰⁴ The term "course of employment" is used in workers' compensation cases. It is closely related to the "scope of employment" test of *respondeat superior*.

¹⁰⁵ 128 N.E. at 711. For further cases on point, *see*, for example, *Hartford Accident & Indem. Co. v. Cardillo*, 112 F.2d 11 (D.C. Cir. 1940) (injury found to have occurred in the course of employment where claimant was struck in the face by his supervisor after mutual namecalling); *Burns v. Merritt Eng'g Co.*, 96 N.E.2d 739 (N.Y. 1951) (injury found to have occurred in the course of employment where a "practical joke" resulted in an employee drinking carbon tetrachloride believing that it was gin).

¹⁰⁶ 171 P.2d 5 (Cal. 1946).

sion. . . . These expressions of human nature are incidents inseparable from working together. They involve risks of injury and these risks are inherent in the working environment.¹⁰⁷

Just as the risk of injury from roughhousing, practical jokes and flare-ups was an inherent risk in the workplace in the 1940s, the risk of injury from harassment is an inherent risk in today's workplace.

Recognition of the supervisor's harassment as within the scope of employment depends to some extent on the point of view of the observer. From the point of view of the employer, the supervisor's harassment may bear no relation to the job the supervisor was hired to perform. The employer may thus view the harassment as not simply outside the scope of employment, but as a completely private matter between the supervisor and employee, in which the existence of an employee-supervisor relationship is irrelevant.¹⁰⁸ From the viewpoint of the supervisor himself, he may or may not consciously regard his ability to subject the employee to his unwanted conduct as a privilege of his employment position. But from the employee's point of view, the supervisor's ability to harass her is created precisely by the agency relationship, which affords the supervisor the authority to call her into his presence, to retain her in his presence over her objections, to use his responsibility to act as the voice of the employer to place her in a compromising position, and to take liberties with her personal privacy beyond the reach of a co-equal acquaintance, or a stranger.¹⁰⁹ The authority that the employer has given him to supervise leaves her vulnerable to his wrongful acts.

2. *Vicarious Liability Based on Harassment in Which the Supervisor is Aided by the Agency Relationship*

The Restatement treats certain wrongful acts of servants as falling outside the scope of employment, but within the scope of vicarious liability. The Restatement imposes vicarious liability on the employer for the acts of its employees, although committed outside the scope of employment, if the employee "was aided in accomplishing the tort by the existence of the agency relation."¹¹⁰ Such liability is properly viewed as vicarious, not direct, since it is imposed without considering the fault of the employer. The employer may be blameless; it is nonetheless liable.

¹⁰⁷ *Id.* at 7-8 (quoting *Cardillo*, 112 F.2d at 15) (internal quotation marks omitted).

¹⁰⁸ Most of the early Title VII decisions on sexual harassment advanced this view, rejecting plaintiffs' claims that sexual harassment violated the Act. The cases are discussed, *infra*, at part II.B.1.

¹⁰⁹ Verkerke argues that "it may be more difficult to harass strangers than to harass one's coworkers. A would-be harasser has substantially less information about strangers than about coworkers." Verkerke, *supra* note 38, at 310.

¹¹⁰ RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (1957).

The imposition of vicarious liability for wrongful acts committed outside the employee's "scope of employment" is based upon the principle that the employee is vested with "power" by the employer, a concept the Restatement distinguishes from "authority."¹¹¹ An agent's power to bind the principal derives from the very existence of the agency relationship; it is thus sometimes called "inherent authority." The Restatement explains:

The rules designed to promote the interests of these enterprises are necessarily accompanied by rules to police them. It is inevitable that in doing their work, either through negligence or excess of zeal, agents will harm third persons or will deal with them in unauthorized ways. It would be unfair for an enterprise to have the benefit of the work of its agents without making it responsible to some extent for their excesses and failures to act carefully. The answer of the common law has been the creation of special agency powers or, to phrase it otherwise, the imposition of liability upon the principal because of unauthorized or negligent acts of his servants and other agents.¹¹²

Given the process by which harassment occurs in the workplace, the supervisor's opportunity to engage in sexual harassment necessarily arises from the existence of the agency relationship. Certainly, from the employee's point of view, the supervisor's ability to harass her arises precisely because the agency relationship affords her supervisor the authority to call her into his presence, to retain her in his presence over her objections, to place her in a compromising position, and to a large extent encroach upon her personal privacy. Harassment occurs when there is an imbalance of power in the workplace—an imbalance arising from a relationship in which the supervisor, empowered by the principal, oversees the disempowered subordinate employee.¹¹³ Even when the harassment is unrelated to job functions, the level of trust and authority conferred upon the supervisor by the employer affords the supervisor with opportunities de-

¹¹¹ *Id.* § 8A; see also SEAVEY, *supra* note 58, § 8(F), at 15-17.

¹¹² RESTATEMENT (SECOND) OF AGENCY § 8A cmt. a (1957).

¹¹³ See *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1463 (9th Cir. 1994) (supervisor used sexual harassment to disempower female employees), *cert. denied*, 115 S. Ct. 733 (1995); *Ellison v. Brady*, 924 F.2d 872, 878-79 (9th Cir. 1991) (discussing that men are rarely victims of sexual assault whereas women are frequently victims of rape and sexual assault resulting from inequality and coercion); *Waltman v. International Paper Co.*, 875 F.2d 468, 471-72, 482 (5th Cir. 1989) (discussing male employees' use of sexual harassment to demean female co-employee). See generally CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 122-23 (1989) (discussing the significance of power and dominance in rape and sexual harassment); Estrich, *supra* note 43; Barbara A. Gutek, *Understanding Sexual Harassment at Work*, 6 NOTRE DAME J.L. ETHICS & PUB. POL'Y 335 (1992); Maria L. Ontiveros, *Three Perspectives on Workplace Harassment of Women of Color*, 23 GOLDEN GATE U. L. REV. 817 (1993); Joan Vermeulen, *Employer Liability Under Title VII for Sexual Harassment by Supervisory Employees*, 10 CAP. U. L. REV. 499 (1981).

nied other employees or strangers. When the supervisor abuses that trust and authority by harassing a subordinate, the law of vicarious liability holds the employer responsible.

B. Vicarious Liability Based on Public Policy

Contemporary courts and scholars are less likely to rely on the delegation of authority to justify the imposition of *respondeat superior*. Some focus on the issue of foreseeability; they argue that when a wrongful act is foreseeable, it is one of the risks of doing business which the enterprise must bear.¹¹⁴ Others argue that the doctrine furthers three distinct policy objectives which should be satisfied before imposing liability on the employer.¹¹⁵ The first consideration is deterrence: Will the imposition of vicarious liability create an incentive for employers to prevent such wrongs from occurring in the future? The second is risk shifting: Will the imposition of vicarious liability increase the likelihood that the injured party will be compensated. The final objective is risk spreading: Is the employer in a better position than the injured party to spread the risk among the beneficiaries of the enterprise, to treat the cost of such injuries as part of the cost of doing business, and to insure against the risk? When the three objectives are satisfied, *respondeat superior* is imposed.¹¹⁶

To illustrate, Judge Friendly of the Second Circuit relied upon foreseeability to impose *respondeat superior* liability on the government

¹¹⁴ See generally Weber, *supra* note 49.

¹¹⁵ See *Doe v. Samaritan Counseling Ctr.*, 791 P.2d 344, 349 (Alaska 1990) (stating that the purpose of *respondeat superior* is to "include in the costs of operation inevitable losses to third persons incident to carrying on an enterprise, and thus distribute the burden among those benefitted by the enterprise"); *Mary M. v. City of Los Angeles*, 814 P.2d 1341, 1343, 1347-49 (Cal. 1991) (listing three policy objectives of *respondeat superior* in finding county liable for rape of motorist by deputy sheriff). See generally *Perez v. Van Groningen & Sons, Inc.*, 719 P.2d 676 (Cal. 1986); WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 471 (3d ed. 1964); Maria M. Carrillo, *Hostile Environment Sexual Harassment by a Supervisor Under Title VII: Reassessment of Employer Liability in Light of the Civil Rights Act of 1991*, 24 COLUM. HUM. RTS. L. REV. 41, 84-91 (1992).

¹¹⁶ Verkerke argues:

[L]iability for harms creates an incentive to invest to prevent those harms. Employers may therefore be induced to screen their employees more carefully, to train and supervise them closely, and to discharge any employee who seems likely to cause harms for which the employer will be liable. Second, liability compensates victims for the consequences of tortious acts, and employers may be able to spread the cost of this compensation, a form of insurance, among many individuals by including it in the price of their products and services. Third, liability influences the scale of the employer's enterprise. As more costs are internalized, the employer's cost of doing business increases. Higher costs imply higher prices and higher prices mean less demand for the product or service. The employer's activity level will thus vary inversely with the extent to which costs are internalized.

Verkerke, *supra* note 38, at 308.

when a drunken Coast Guard seaman inexplicably opened the intake valves of a drydock, sinking his ship and damaging the drydock.¹¹⁷ The government contended that because the seaman's acts were not motivated by an intent to benefit his employer, they were outside the scope of employment. The court rejected the argument as outmoded. Relying on authority from workers' compensation decisions by Justices Rutledge and Cardozo, *respondeat superior* decisions by Justice Traynor of the California Supreme Court, and commentary on *respondeat superior* and workers' compensation by Harper & James, the court explained that an employer should be aware that the employment of laborers will give rise to certain risks. When those risks are reasonably foreseeable, the court reasoned, the enterprise should bear the risks as part of the cost of operation.¹¹⁸ As applied in *Bushey*, the court held that it was foreseeable that seamen would get drunk and commit acts of negligence or even intentional torts. Thus, the court concluded that the opening of the valves, although unauthorized and not motivated by the employer's interests, were within the seaman's scope of employment.¹¹⁹

With respect to vicarious liability for sexual harassment, it cannot be seriously argued that sexual harassment in employment is unforeseeable conduct. Polling data indicates that somewhere between forty and ninety percent of all women in the United States workforce have experienced some form of sexual harassment on the job.¹²⁰ Ninth Circuit Judge Alex Kozinski recently wrote "[i]t is a sobering revelation that every woman—every woman—who has spent substantial time in the work force in the last two decades can tell at least one story

117 *Ira S. Bushey & Sons, Inc. v. United States*, 398 F.2d 167 (2d Cir. 1968).

118 *Id.* at 171-72.

119 *Id.*

120 See BARBARA A. GUTEK, *SEX AND THE WORKPLACE* 46 (1985) (survey reporting that 53.1% of women have experienced sexual harassment); UNITED STATES MERIT SYSTEMS PROTECTION BOARD, *SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE—IS IT A PROBLEM?* (1981) (survey finds that of 23,000 federal employees, 42% of women report some form of sexual harassment); UNITED STATES MERIT SYSTEMS PROTECTION BOARD, *SEXUAL HARASSMENT IN THE FEDERAL GOVERNMENT: AN UPDATE* (1988) (follow up survey disclosing no significant change); WORKING WOMEN'S INSTITUTE, *SEXUAL HARASSMENT ON THE JOB: RESULT OF A PRELIMINARY SURVEY* Research Series Report No. 1 (1975) (70% of women respondents stating that they had been sexually harassed); Gutek, *supra* note 113, at 343-46 (citing WOMEN'S LEGAL DEFENSE FUND, *SEXUAL HARASSMENT IN THE WORKPLACE* (1991), discussing report showing that two-thirds of the women serving in the military have been sexually harassed); Matthew C. Hesse & Lester J. Hubble, Note, *The Dehumanizing Puzzle of Sexual Harassment: A Survey of the Law Concerning Harassment of Women in the Workplace*, 24 WASHBURN L.J. 574, 575-76 nn.4-10 (1985); Eliza G.C. Collins & Timothy B. Blodgett, *Sexual Harassment: Some See It . . . Some Won't*, 59 HARV. BUS. REV. 81, Mar.-Apr. 1981, at 81 (stating that 52% of women managers disagreed with the proposition that the amount of sexual harassment at work is greatly exaggerated); Claire Safran, *What Men do to Women on the Job: A Shocking Look at Sexual Harassment*, REDBOOK, Nov. 1976, at 149, 217 (reporting that nearly 9 out of 10 women have experienced unwanted attention on the job).

about being the object of sexual harassment."¹²¹ A recent California Court of Appeal decision took judicial notice of the fact that sexual harassment on the job is foreseeable conduct.¹²² In short, sexual harassment on the job is indisputably foreseeable.

On the broader question of imposing *respondeat superior* liability for reasons of public policy, Dean Prosser states:

[T]he modern justification for vicarious liability is a rule of policy, a deliberate allocation of a risk. The losses caused by the torts of employees, which as a practical matter are sure to occur in the conduct of the employer's enterprise, are placed upon that enterprise itself, as a required cost of doing business. They are placed upon the employer because, having engaged in an enterprise which will, on the basis of all past experience, involve harm to others through the torts of employees, and sought to profit by it, it is just that he, rather than the innocent injured plaintiff, should bear them; and because he is better able to absorb them, and to distribute them, through prices, rates or liability insurance, to the public, and so to shift them to society, to the community at large.¹²³

Law-and-economics writers, addressing the policy justifications for vicarious liability have argued that it is particularly relevant in sexual harassment cases because it is doubtful that sexual harassment will systemically vanish absent the imposition of vicarious liability.¹²⁴ Richard Posner argues that "the most efficient method of discouraging sexual harassment may be by creating incentives for the employer to police the conduct of its supervisory employees, and this is done by making the employer liable."¹²⁵ Alan Sykes argues that because employers may easily replace an injured employee at little or no cost, the employer bears no financial risk when an employee is sexually harassed, and correspondingly, no incentive to prevent harassment.¹²⁶ Absent the imposition of vicarious liability, employers are unlikely to adopt policies to discourage harassment. Only when they bear the costs of the harassment caused by their business enterprise will employers be motivated to take steps to eradicate it.¹²⁷

¹²¹ Alex Kozinski, *Foreword* to BARBARA LINDEMANN & DAVID D. KADUE, *SEXUAL HARASSMENT IN EMPLOYMENT LAW*, at v (1992).

¹²² *Capitol City Foods, Inc. v. Superior Court*, 5 Cal. App. 4th 1042, 1048 (Ct. App. 1992).

¹²³ PROSSER, *supra* note 115, at 471.

¹²⁴ Richard A. Posner, *An Economic Analysis of Sex Discrimination Laws*, 56 U. CHI. L. REV. 1311, 1332 (1989); Alan O. Sykes, *The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines*, 101 HARV. L. REV. 563, 605-08 (1988).

¹²⁵ Posner, *supra* note 124, at 1332.

¹²⁶ Sykes, *supra* note 124, at 605-06.

¹²⁷ See ALAN F. WESTIN & ALFRED G. FELIU, *RESOLVING EMPLOYMENT DISPUTES WITHOUT LITIGATION* 7 (1988) (claiming that two out of three companies surveyed are attempting to improve complaint systems because of legal costs, awards, and settlements); Sykes, *supra*

Imposition of vicarious liability, then, may be the most cost effective and efficient manner of preventing and eradicating sexual harassment.¹²⁸ The employer, rather than the supervisor or employee, is in the best position to prevent the harm from occurring because the employer controls the workplace. The master (employer) selects the servant (supervisor), controls the servant's responsibilities, and promulgates workplace policy.

Vicarious liability also dramatically increases the likelihood that the victim will be compensated for her injuries.¹²⁹ Absent employer liability, the employee may seek relief from: (1) the harasser, who is likely to be judgment-proof; (2) her own insurance, but only to the extent that she had insured against her injury; or (3) the state, through welfare and social insurance programs. These alternative recovery schemes are likely to be both arbitrary and unsatisfactory. A few victims will be able to piece together adequate compensation, but many more will find that they alone must bear the loss. Such uncertainty serves no significant social goal, does nothing to reduce the incidence of sexual harassment, and masks the true costs borne by the victims.

The benefits of shifting risks from injured employees to their employers is apparent throughout the tort compensation system—a characteristic providing strong support for the imposition of *respondeat superior*. Two reasons make the doctrine particularly appropriate in the case of sexual harassment. First, unlike most other types of tortious conduct, sexual harassment and related discrimination have, through the enactment of Title VII, been singled out by the Congress for special protection. Sexual harassment is not merely a common-law tort, such as assault, battery, defamation, or intentional infliction of emotional distress; it is also a statutory wrong for which Congress has provided free government investigations, federal jurisdiction, and attorneys' fees as well as legal damages.

Second, without risk-shifting, women will bear virtually all the risk associated with sexual harassment. Because men presumably benefit as much, if not more, than women from the employment system, men

note 124, at 605-08 (arguing that absent vicarious liability, employers will have no incentive to prevent sexual harassment); James G. Frierson, *Reduce the Costs of Sexual Harassment*, PERSONNEL J., Nov. 1989, at 79 (describing a 1987 Bureau of National Affairs survey showing that 77% of the relevant firms had adopted anti-harassment policies for legal reasons); Ronni Sandroff, *Sexual Harassment in the Fortune 500*, WORKING WOMAN, Dec. 1988, at 69, 70 (reporting that 76% of 160 Fortune 500 firms surveyed have written policies banning sexual harassment as of 1988 and another 16% ban harassment through their antidiscrimination policies; 66% of those surveyed said EEOC Guidelines prompted their policies, and 54% said general fear of legal exposure also contributed to this decision).

¹²⁸ Sykes, *supra* note 124, at 605-06. *But cf.* Verkerke, *supra* note 38 (arguing that it is inefficient to impose strict vicarious liability in any individual discrimination case).

¹²⁹ *Mary M. v. City of Los Angeles*, 814 P.2d 1341, 1343, 1348-49 (Cal. 1991).

should bear a proportionate share of the cost of injuries imposed by that system.¹³⁰ *Respondeat superior* spreads the risk of harm among men as well as women, rather than leaving it on those women upon whom it arbitrarily falls.¹³¹

In the case of sexual harassment, employers are clearly the most efficient risk spreaders and minimizers. They can either insure (or self-insure) against vicarious liability for harassment¹³² or incorporate the cost in their pricing and compensation. That is, employers can treat vicarious liability for sexual harassment as a cost of doing business. As explained above, there are significant advantages to employers treating sexual harassment damages as a part of the cost of doing business. It increases employers' incentives to control improper conduct, and insures that the full cost of harassment is reflected in the cost of goods and services. Here too, the fact that harassment is largely suffered by women is relevant. Absent risk spreading, women as a class will suffer disproportionately from the cost of harassment, while men will not pay their fair share. Such a distribution is not only inequitable, it is inefficient. It discourages men from taking full account of the costs of harassment in planning their activities. By forcing employers to assume the risks of sexual harassment, *respondeat superior* more equitably distributes the costs of injury between men and women, and substantially increases the efficiency of the system.

C. Liability Based on the Relationship Between the Employer and the Harassed Employee

1. Vicarious Liability Based on the Employer's Non-Delegable Duty to Prevent Harassment

The law of agency imposes vicarious liability on principals for wrongful acts committed by agents acting outside the scope of their authority where the principal has a duty which is deemed nondelegable.¹³³ A nondelegable duty is any duty for which the principal retains absolute responsibility,¹³⁴ and generally arises where a special relationship exists which requires a heightened duty of care.

¹³⁰ Arguably, since men are more likely to be the perpetrators of sexual harassment, and women are more likely to be the victims, the cost of injuries attributable to sexual harassment should be shifted largely to men. To the extent that men are more likely than women to have an ownership interest in employing entities, an even greater justification exists for risk shifting.

¹³¹ Cf., *Mary M.*, 814 P.2d at 1343, 1347-50.

¹³² Employers may be precluded from insuring against direct liability for intentional harassment but should not be precluded from insuring against vicarious liability, where the liability is imposed without fault. See *Coit Drapery Cleaners, Inc. v. Sequoia Ins. Co.*, 18 Cal. Rptr. 2d 692 (Ct. App. 1993); Sean W. Gallagher, Note, *The Public Policy Exclusion and Insurance for Intentional Employment Discrimination*, 92 MICH. L. REV. 1256 (1994).

¹³³ RESTATEMENT (SECOND) OF AGENCY § 214 (1957).

¹³⁴ *Id.* § 214 cmt. a.

Two illustrations from the Restatement are useful in understanding the scope of liability created by nondelegable duties:

Illustration 1: When a train conductor assaults a passenger, the employer railroad is subject to liability, even if the conductor acts outside the scope of employment and without any fault by the railroad.¹³⁵ The railroad, as a common carrier, has a nondelegable, special duty to protect its passengers from harm.

Illustration 2: When an innkeeper hires an employee whom the innkeeper reasonably believes to be honest, the innkeeper is liable if the employee steals a guest's clothes.¹³⁶ The special duty the innkeeper owes to the guest is nondelegable.

Nondelegable duties also arise by statutory enactment. For example, the Fair Housing Act¹³⁷ prohibits property owners from discriminating on the basis of race, color, religion, sex, or national origin in the sale or rental of property. When the owner's agent discriminates, even in the face of a directive not to discriminate, the owner is subject to vicarious liability.¹³⁸ The duty not to discriminate is nondelegable because of the important national policy of providing fair housing throughout the United States.¹³⁹

The Restatement provides that employers have a nondelegable duty to take affirmative steps to make the workplace safe for their employees, and to warn them of risks to their well-being that they might not otherwise recognize.¹⁴⁰ The Restatement compares the employer's duty to provide a safe workplace for its employees with the landowner's duty to protect an invitee or business guest from dangerous conditions on the landowner's premises.¹⁴¹ More substantial than the duty owed the general public, the employer's duty requires the employer either to make the workplace reasonably safe or to warn of dangers of which the employer is or ought to be aware.¹⁴²

The California Supreme Court applied this principle in *Alcorn v. Ambro Engineering, Inc.*, a racial harassment case brought as a common-

¹³⁵ *Id.* illus. 3.

¹³⁶ *Id.* illus. 5.

¹³⁷ Civil Rights Act of 1968 §§ 801-812, 42 U.S.C. §§ 3601-3619 (1988).

¹³⁸ *United States v. Youritan Constr. Co.*, 370 F. Supp. 643, 649 (N.D. Cal. 1973), *modified on other grounds*, 509 F.2d 623 (9th Cir. 1975). *Accord* *Harrison v. Otto G. Heinzeroth Mortg. Co.*, 430 F. Supp. 893, 896-97 (N.D. Ohio 1977); *Williamson v. Hampton Management Co.*, 339 F. Supp. 1146, 1149 (N.D. Ill. 1972); *cf.* *General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 395-97 (1982) (employers who did not participate in discrimination by union did not owe a nondelegable duty under 42 U.S.C. § 1981 to prevent the union from discriminating against applicants for employment).

¹³⁹ 42 U.S.C. § 3601 (1988).

¹⁴⁰ RESTATEMENT (SECOND) OF AGENCY § 492 (1957).

¹⁴¹ *Id.* introductory note preceding § 492.

¹⁴² *Id.* § 492.

law tort action.¹⁴³ In *Alcorn*, an employee who had been called a “nigger” by his supervisor sued the employer for intentional infliction of emotional distress. Overruling a demurrer, the California Supreme Court noted that the “plaintiff’s status as an employee should entitle him to a greater degree of protection from insult and outrage than if he were a stranger to defendants.”¹⁴⁴

The Restatement further provides that the employer’s non-delegable duty to provide a safe workplace includes the duty to provide employees with competent supervisors in order to prevent exposing employees to undue risk of harm.¹⁴⁵ Moreover, any duty to protect its employees imposed on the employer by statute is nondelegable.¹⁴⁶ Thus, when a supervisor receives notice of the breach of a nondelegable duty or the existence of a dangerous condition, the employer is itself deemed to have received notice.¹⁴⁷

In the context of sexual harassment, the employer-employee relationship creates a nondelegable duty. Like the inn guest or railway passenger, an employee cedes a degree of personal autonomy in exchange for the right to enter into an economic relationship. To illustrate, a railway passenger puts herself into the hands of the railway company, trusting it to convey her to her destination safely. The railway passenger cannot control the train, but relies on railway employees to operate the vehicle responsibly. An inn guest puts herself into the care of the innkeeper, trusting that the innkeeper will insure the safety of her person and effects. Similarly, an employee places herself in the hands of the employer, giving up many aspects of individual autonomy. The employer places the employee under the direction of a supervisor. In return, the employee relies on the employer, through its agents, to protect her from foreseeable risks.¹⁴⁸

¹⁴³ *Alcorn v. Anbro Eng’g, Inc.*, 468 P.2d 216, 218-19 (Cal. 1970).

¹⁴⁴ *Id.* at 218 n.2.

¹⁴⁵ RESTATEMENT (SECOND) OF AGENCY § 507 (1957).

¹⁴⁶ *Id.* § 520.

¹⁴⁷ *Id.* § 496.

¹⁴⁸ The Restatement recognizes two related defenses to conduct that would otherwise breach the employer’s special duty to its employees—assumption of risk and the fellow-servant rule. Assumption of risk is available where the employee, knowing of and understanding the risks, voluntarily enters into or continues in the employment. RESTATEMENT (SECOND) OF AGENCY § 521 (1957). However, the defense is not available if the wrongful act is prohibited by a statute. *Id.* §§ 521, 524. Since Title VII prohibits sexual harassment, the assumption of risk defense is inapplicable.

The second defense, the fellow-servant rule, provides that an employer “is not liable to a servant or subservant who, while acting within the scope of his employment or in connection therewith, is injured solely by the negligence of a fellow servant in the performance of acts not involving a violation of the master’s non-delegable duties.” *Id.* § 474. Fellow servants are those who work in sufficient proximity to one another that “there is a special risk of harm to one of them if the other is negligent.” *Id.* § 475.

The fellow-servant rule may provide a partial defense for employers whose employees have sexually harassed other employees. But the common law limits this defense to wrong-

In sum, employers owe a duty to protect their employees from workplace harms, including sexual harassment. The source of this duty is both the common law of agency, which imposes obligations on employers to protect their employees, and the 1964 Civil Rights Act, which prohibits sexual harassment in employment. Because the duty is based on the special relationship between an employer and employee, and because it is afforded statutory protection, it is nondelegable. Pursuant to this nondelegable duty, the employer must (1) protect employees from improper harassment, when the employer or its supervisors know or ought to know that the employee is at risk; (2) hire and properly train competent supervisors, who will neither harass employees nor permit their harassment by others; and (3) establish and enforce internal rules prohibiting harassment which are likely to be effective.

2. *Direct Liability Based on the Employer's Negligence*

In addition to vicarious liability, the law of agency also provides a direct basis for employer liability. A negligent or reckless master is subject to liability for the torts of his servants, even when the servants act outside the scope of their employment.¹⁴⁹

Specifically, under Restatement section 213 direct liability arises where the master is

negligent or reckless:

(a) in giving improper or ambiguous orders [or] in failing to make proper regulations;¹⁵⁰ or

(b) in the employment of improper persons or instrumentalities in work involving risk of harm to others;¹⁵¹ or

ful conduct by nonsupervisors. Supervisors are excepted from the fellow-servant rule by the "superior servant" or "vice-principal" exception. *Id.* § 476 cmt. a; see also HAROLD GILL REUSCHLEIN AND WILLIAM A. GREGORY, *THE LAW OF AGENCY AND PARTNERSHIP* §§ 149-53, at 219-24 (1990); Comment, *The Creation of a Common Law Rule: The Fellow Servant Rule, 1837-1860*, 132 U. PA. L. REV. 579 (1984). This exception provides that a negligent supervisor is an agent of the employer, and thus not a fellow servant.

Even if the fellow-servant rule applied to sexual harassment by supervisors, it would be risky to give it much weight. The rule was largely repudiated by the universal adoption of workers' compensation statutes in the early twentieth century. Although the fellow-servant rule is still codified in the Restatement, it has been largely moribund, with no opportunity to grow, develop, or die.

¹⁴⁹ RESTATEMENT (SECOND) OF AGENCY § 219(2)(b) (1957).

¹⁵⁰ See, e.g., *Cutter v. Town of Farmington*, 498 A.2d 316, 320 (N.H. 1985) (city held directly liable for injuries sustained by a civilian who was improperly handcuffed by a police officer because the city provided the officer with the handcuffs without any training or supervision in their use).

¹⁵¹ An agent, although otherwise competent, may be incompetent because of his reckless or vicious disposition, and if a principal, without exercising due care in selection, employs a vicious person to do an act which necessarily brings him in contact with others while in the performance of a duty, he is subject to liability for harm caused by the vicious propensity.

- (c) in the supervision of the activity; or
- (d) in permitting, or failing to prevent, negligent or other tortious conduct by persons,¹⁵² whether or not his servants or agents, upon premises or with instrumentalities under his control.¹⁵³

The relevance of this rule to sexual harassment is readily apparent. Properly applied, agency law should impose direct liability when an employer: (1) unreasonably fails to instruct its employees to refrain from sexual harassment; (2) unreasonably fails to adopt rules, policies, and regulations designed to prevent harassment from occurring; (3) unreasonably employs people it knows or should know to be engaged in sexual harassment of other employees; (4) fails to properly supervise its employees to prevent harassment from occurring; (5) stands by and does nothing when it knows, or should know, that harassment is occurring; or (6) fails to prevent harassment that it could have reasonably prevented. In such cases, the law of master and servant holds the employer directly liable for the harm caused by the employer's breach of duty. Moreover, when an employer ratifies an act of harassment, it adopts the act as its own.¹⁵⁴ Thus, when an employer fails to disapprove of harassment in an appropriate manner, it may be held directly liable.

D. Summary of Common-Law Theories of Employer Liability

Four common-law doctrines derived from agency law impose liability on employers when supervisors harass nonsupervisory employees:

1. Vicarious liability arises under the doctrine of *respondeat superior* when the supervisor acts within the scope of his employment. If the act occurs within the general process of supervising employees or communicating with employees over whom he has authority, the conduct should be viewed as incidental to his employment, and thus within its scope. The fact that the harassment may be termed an intentional, willful, or malicious wrong does not excuse the employer's liability.

2. Vicarious liability may arise even when the harassment falls outside the scope of employment if the existence of an agency relationship aided the supervisor's ability or opportunity to harass his subordinate. A supervisor inherently obtains this power when charged with supervising other employees.

RESTATEMENT (SECOND) OF AGENCY § 213 cmt. d (1957).

¹⁵² See, e.g., *Destefano v. Grabrian*, 763 P.2d 275, 287-88 (Colo. 1988) (plaintiff stated valid claim under Restatement § 213 against diocese for negligent supervision where priest entered sexual relationship with plaintiff's wife while counseling couple on marital problems, since diocese knew of similar, past misconduct by the priest).

¹⁵³ RESTATEMENT (SECOND) OF AGENCY § 213 (1957).

¹⁵⁴ See *id.* § 82.

3. Vicarious liability may arise from the employer's breach of a nondelegable duty, such as the duty to protect employees from sexual harassment.

4. Direct liability may arise from an employer's own wrongdoing in failing to take reasonable steps to prevent harassment from occurring or in permitting harassment to occur after receiving actual or constructive notice of the harassment.

The common law of agency, then, provides substantial authority for the proposition that liability should result whenever supervisors harass their subordinates. As the next three Parts demonstrate, however, courts have failed to properly apply the law of agency in assessing liability for sexual harassment, thereby exacerbating an already exasperating problem.

II

EARLY HARASSMENT LAW UNDER TITLE VII

A. The Development of Title VII's Prohibition of Racial, Religious, and Ethnic Harassment

Title VII provides that employers may not "fail or refuse to hire or to discharge any individual or otherwise . . . 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."¹⁵⁵ The legislative history evidences no discussion of whether a person's terms, conditions, or privileges of employment included a right to be free from improper harassment. Rather, the congressional debates focused on discrimination in hiring and compensation and the racial segregation of workers common at that point in our nation's history.

Soon after the Act took effect, the federal courts and the EEOC began to grapple with the problem of on-the-job harassment. Beginning with racial and ethnic harassment cases in the early 1970s, a doctrine of unlawful harassment developed that required courts to determine when employers were liable for harassment by employees. A number of courts invoked two agency law doctrines. First, the courts recognized a statutory duty on the part of employers to protect their employees from harassment—a nondelegable duty created by a special relationship. Second, although some courts found employer liability without discussing its theoretical basis, those courts that addressed the question of vicarious liability applied the doctrine of *respondeat superior*.

¹⁵⁵ 42 U.S.C. § 2000e-2(a)(1) (Supp. V 1993).

1. *The Emergence of a Right to Be Free from Harassment*

Employer liability in the context of harassment first arose in administrative decisions of the EEOC. In the late 1960s and early 1970s, the agency began to impose a duty on employers to prevent harassment. Employers who permitted the workplace to become "polluted"¹⁵⁶ by harassment were held responsible if harassment led to the discharge of a harassed employee. In the first of these cases, the EEOC considered whether there was reasonable cause to find a Title VII violation where an African American employee was discharged because of his inability "to get along with" white co-employees who had subjected him to racial insults. Finding a Title VII violation, the Commission explained that an "[e]mployer is required to maintain a working environment free of racial intimidation—by positive action where necessary."¹⁵⁷

A series of similar opinions followed. For example, the Commission suggested that Title VII would be violated where a white employee is fired after complaining about racial harassment targeting his African American co-workers. The Commission explained that the employer was "obliged under this Act to maintain a working atmosphere free of racial intimidation or insult. Failure to take steps reasonably calculated to maintain such an atmosphere violates the Act."¹⁵⁸ The Commission employed similar language where a supervisor used racial epithets to refer to an African-American employee.¹⁵⁹ Where an employer was charged with tolerating an atmosphere in which ethnic and racial "jokes" were told, the Commission concluded that "the . . . failure to take reasonable steps to eliminate such actions or to remedy their effects discriminates against" members of the targeted ethnicity or race and violates Title VII.¹⁶⁰

These EEOC decisions make no reference to the theories of vicarious or direct liability, but the reasoning in each case is consistent with both doctrines. For example, the employer's obligation is cast as a special duty, imposed by statute, to protect employees from harass-

¹⁵⁶ The term, borrowed from concern about the environment, was apparently first used in *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972).

¹⁵⁷ EEOC Dec. No. YSF 9-108, 1 Fair Empl. Prac. Cas. (BNA) 922 (1969).

¹⁵⁸ EEOC Dec. No. 71-909, 3 Fair Empl. Prac. Cas. (BNA) 269 (1970).

¹⁵⁹ "Title VII requires an employer to maintain a working environment free of racial intimidation. That requirement includes positive action where positive action is necessary to redress or eliminate employee intimidation." EEOC Dec. No. 72-0779, 4 Fair Empl. Prac. Cas. (BNA) 317, 318 (1971).

¹⁶⁰ EEOC Dec. No. 72-1561, 4 Fair Empl. Prac. Cas. (BNA) 852 (1972); *see also* EEOC Dec. No. 74 05, 6 Fair Empl. Prac. Cas. (BNA) 834 (1973) (finding violation where employer did not take steps to eliminate racial "kidding" by supervisors and co-employers with Spanish-surnamed employees); EEOC Dec. No. CL 68-12-431EU, 2 Fair Empl. Prac. Cas. (BNA) 295 (1969) (finding violation when employer tolerated "Polish jokes" and physical harassment in the workplace).

ment. Pursuant to this duty, an employer must prevent harassment and remedy it when it occurs. Upon breach of this duty, an employer might find itself vicariously liable, based on its responsibility for the acts of its servants or the breach of a nondelegable duty owed to its employees, or directly liable, based on the breach of its own duty of care.

In *Rogers v. EEOC*,¹⁶¹ the first reported appellate decision to address on-the-job harassment,¹⁶² the Fifth Circuit adopted the EEOC's view that Title VII created a duty to prevent workplace harassment. After losing her job with an optical service, plaintiff filed a complaint with the EEOC alleging that her supervisor told her she was being fired not because of her work performance, but because abusive behavior by white employees directed toward her had created friction in the workplace.¹⁶³ When the EEOC sought discovery from the employer regarding the work environment, the employer resisted, maintaining that Ms. Chavez's claim was not actionable.¹⁶⁴ The district court agreed and denied the discovery request.¹⁶⁵ The Fifth Circuit reversed. Judge Goldberg explained:

[Title VII] sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination. . . . One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers, and . . . Title VII was aimed at the eradication of such noxious practices.¹⁶⁶

Consistent with the EEOC decisions, the court implicitly applied the agency law principle that an employer shares a special relationship with its employees and thereby possesses a heightened duty to protect the employees from harm. However, the court did not indicate whether the employer was directly liable for its own breach of that duty, or vicariously liable because the duty breached by its employees was within the scope of employment or was nondelegable.

In *Rogers*, Ms. Chavez's termination, not her harassment, formed the basis of a Title VII action.¹⁶⁷ The question soon arose whether

¹⁶¹ 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972).

¹⁶² *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1986).

¹⁶³ The plaintiff also alleged that the employer had harmed her by segregating its patients by race. 454 F.2d at 236.

¹⁶⁴ *Rogers v. EEOC*, 316 F. Supp. 422, 423-24 (E.D. Tex. 1970), *rev'd*, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972).

¹⁶⁵ *Id.* at 425-26.

¹⁶⁶ 454 F.2d at 238.

¹⁶⁷ *Id.* at 236; *see also* *United States v. City of Buffalo*, 457 F. Supp. 612, 631-35 (W.D.N.Y. 1978) (existence of racial harassment by co-employees and failure of police commissioner to take strong stand against harassment supported finding of pattern and practice of discrimination in terminations), *modified and aff'd*, 633 F.2d 643 (2d Cir. 1980);

harassment itself was actionable in the absence of a tangible discriminatory employment decision. A number of early decisions so held, extending the *Rogers* decision to include harassment unaccompanied by economic damages.¹⁶⁸

2. *Applying the Doctrine of Respondeat Superior to the Right to be Free from Harassment*

In the wake of *Rogers*, courts began to distinguish between cases involving harassment by supervisors and those involving harassment by nonsupervisor co-employees. Agency law became an explicit and decisive factor in the determination of liability. In cases involving harassment by supervisors, the courts generally imposed liability on the employer.¹⁶⁹ It was rarely clear, however, whether the underlying theory was: (1) direct liability for the employer's own breach of its duty to protect against harassment; (2) vicarious liability for the supervisor's breach of the employer's nondelegable duty to protect against harassment; or (3) *respondeat superior* vicarious liability for the supervisor's commission of a wrongful act within the scope of his employment.

In cases involving harassment by nonsupervisory co-employees, the question of liability was less certain. In these cases, the knowledge and/or response of the employer played a critical role. When management knew or should have known that the harassment was occurring and failed to take appropriate steps, courts imposed direct liability for the employer's negligence.¹⁷⁰ In contrast, when the em-

Murry v. American Standard, Inc., 373 F. Supp. 716, 717-18 (E.D. La. 1973) (harassment used as evidence that plaintiff's termination was motivated by racial bias), *aff'd*, 488 F.2d 529 (5th Cir. 1973).

¹⁶⁸ See, e.g., *Compston v. Borden, Inc.*, 424 F. Supp. 157, 160-62 (S.D. Ohio 1976) (holding that verbal religious harassment violates Title VII, and that in absence of adverse employment action or economic damages, employee is entitled to nominal damages); *United States v. Lee Way Motor Freight, Inc.*, 7 Fair Empl. Prac. Cas. (BNA) 710, 748 (W.D. Okla. 1973) (holding that it is an independent violation of Title VII for employer "to allow its hiring or supervisory personnel to refer to [minority employees] in a manner derogatory to their race or national origin"); cf. *Gray v. Greyhound Lines, East*, 545 F.2d 169, 176 (D.C. Cir. 1976) (holding that current employees have standing to bring action alleging discrimination in hiring because resulting workforce will have an impact on the work environment and because Title VII "grants an employee the right to 'a working environment free of racial intimidation'" (citations omitted)).

¹⁶⁹ See, e.g., *EEOC v. Murphy Motor Freight Lines, Inc.*, 488 F. Supp. 381, 385-86 (D. Minn. 1980) (holding that harassment by supervisors contributed to finding of violation); *Compston*, 424 F. Supp. at 163; *United States v. Lee Way Motor Freight, Inc.*, 7 Empl. Prac. Dec. (CCH) ¶ 9066, at 6499 (W.D. Okla. 1973) ("It is a prima facie violation of Title VII, therefore, for an employer . . . to allow its hiring or supervisory personnel to refer to [applicants or employees] in a manner derogatory to their race or national origin.").

¹⁷⁰ See, e.g., *De Grace v. Rumsfeld*, 614 F.2d 796, 804-05 (1st Cir. 1980) (holding that supervisor's culpable neglect is ground for Title VII violation); *Murphy Motor Freight Lines*, 488 F. Supp. at 386. *Anderson v. Methodist Evangelical Hospital, Inc.*, 4 Fair Empl. Prac. Cas. (BNA) 33, 35 (W.D. Ky. 1971), *aff'd*, 464 F.2d 723 (6th Cir. 1972), provides another

ployer or its supervisors were not on notice of harassment by non-supervisory employees, courts generally refrained from imposing liability on the employer. In these cases, the nonsupervisory co-employees' wrongful acts fell outside the scope of their employment. And when the employer received no notice of the incidents, it could not be subject to direct liability.¹⁷¹ Furthermore, even when the employer was given notice of the harassment, prompt remedial action would absolve the employer of responsibility for the wrongful acts.¹⁷²

- a. *Cases Denying Liability Because the Harassment Was Committed by Nonsupervisor Co-Employees and the Employer Was Either Unaware of the Harassment or Acted Properly to Protect the Harassed Employee*

The most influential early harassment case to discuss the issue of liability in terms of agency law was *Fekete v. United States Steel Corp.*¹⁷³ The plaintiff, a Hungarian refugee, complained that co-employees harassed him because of his national origin, calling him derogatory

example of such direct liability. In this case, the plaintiff, an African-American woman, was fired because she "could not get along with" a racist co-employee. 4 Fair Empl. Prac. Cases at 33-34. The court found that although the supervisors making the decision to terminate did not themselves have a racist motivation, two of them knew of the racial animosity of the white coworker toward the plaintiff, thus putting the employer on notice of the harassment: "Such notice to them, as supervisory agents of the corporation, constitutes notice to it. A corporation speaks through its agents." 4 Fair Empl. Prac. Cases at 35. *Cf. Croker v. Boeing Co. (Vertol Division)*, 437 F. Supp. 1138, 1191-92 (E.D. Pa. 1977) (liability denied where "upper level management" was unaware of harassment by lower level supervisors, but imposed where upper level management should have known of the harassment but failed to act), *modified and aff'd*, 662 F.2d 975 (3d Cir. 1981).

¹⁷¹ See, e.g., *Silver v. KCA, Inc.*, 586 F.2d 138, 142 (9th Cir. 1978) (holding that discharge of employee for opposition to discriminatory act of coworker was not a violation of Title VII because the employer did not authorize the act); *Clark v. South Cent. Bell Tel. Co.*, 419 F. Supp. 697, 706, 708 (W.D. La. 1976) (holding that racial harassment by co-employees without knowledge of supervisors is not a violation of Title VII); *cf. Higgins v. Gates Rubber Co.*, 578 F.2d 281, 283 (10th Cir. 1978) (without a finding that the employer knew or should have known of an atmosphere of harassment, it should not be held liable); *Croker*, 437 F. Supp. at 1191-92 (liability denied where "upper level management" unaware of harassment by lower level management, but imposed where upper level management should have known of the harassment but failed to act).

¹⁷² See, e.g., *Friend v. Leidinger*, 588 F.2d 61, 67 (4th Cir. 1978) (finding no violation where employer disciplined officers and employees who had engaged in harassment and discrimination); *Bell v. St. Regis Paper Co.*, 425 F. Supp. 1126, 1137 (N.D. Ohio 1976) (no violation where employer "responded swiftly and reasonably" to harassment claims); *Howard v. National Cash Register Co.*, 388 F. Supp. 603, 606 (S.D. Ohio 1975) (no liability where co-employees engaged in offensive and prejudicial conduct where supervisory personnel took steps to prevent and correct harassment); *Fekete v. United States Steel Corp.*, 353 F. Supp. 1177, 1186-87 (W.D. Pa. 1973) (no liability because employer took steps to prevent and correct ethnic animosity once it became aware of the situation); see also *Roberts v. St. Louis S.W. Ry. Co.*, 329 F. Supp. 973, 978 (E.D. Ark. 1971) (racial harassment by co-employees not attributed to employer where employees did not control policy of employer and supervisors intervened to attempt to eliminate harassment).

¹⁷³ 353 F. Supp. 1177 (W.D. Pa. 1973).

names, urging him, in graffiti, to go "home," and posting pictures of chimpanzees, labeled "Hungarians."¹⁷⁴ On the question of employer liability, the court held that because any harassment that occurred¹⁷⁵ was perpetrated by nonsupervisory co-employees, and because the company's management prohibited harassment and took steps to prevent and stop the harassment whenever it was made aware of it, the employer bore no liability.¹⁷⁶ By implication, had supervisors been responsible for the harassment, and had no steps been taken to remedy the situation, the employer would have been liable.

The court's rationale rested on a straightforward application of agency principles. If supervisors had been responsible for the wrongful conduct, their acts as agents would bind their employer. The scope of their authority as supervisors included an obligation to adequately supervise the employees, to establish and enforce proper rules, and to maintain a safe work environment. Their failure to do so constituted a breach of a legal duty falling within the authority delegated to them as supervisors, either by actual delegation, or by their apparent or inherent authority as supervisors. But nonsupervisory co-employees possess no such authority. Thus, their wrongful acts do not bind the employer unless the employer was directly liable for negligence or recklessness by permitting the harassment to occur, or by ratifying it.

Other courts quickly adopted the *Fekete* approach. In *Howard v. National Cash Register Co.*,¹⁷⁷ the plaintiff, National Cash Register's only African-American plant guard, complained to his supervisors about thirty-two acts of harassment committed by coworkers over a five-year period. The court found a dozen acts to be racially motivated.¹⁷⁸ The acts included "jokes" and "references" to black people, use of the term "nigger," and an incident in which the plaintiff was confronted with a hangman's noose.¹⁷⁹

The court held that management responded appropriately to each incident.¹⁸⁰ It investigated the complaints, and met with the plaintiff's coworkers to warn them that the company would not tolerate harassment and discrimination.¹⁸¹ The court found no violation of Title VII.¹⁸²

¹⁷⁴ *Id.* at 1183-84.

¹⁷⁵ The court found that the harassment was motivated by the plaintiff's personality and his derogation of the United States. The discussion of the theory of nonliability is thus dicta. *Id.* at 1185-86.

¹⁷⁶ *Id.* at 1186-87.

¹⁷⁷ 388 F. Supp. 603 (S.D. Ohio 1975).

¹⁷⁸ *Id.* at 604.

¹⁷⁹ *Id.* at 604-05.

¹⁸⁰ *Id.* at 606.

¹⁸¹ *Id.* at 605.

¹⁸² *Id.* at 607.

Similarly, in *Bell v. St. Regis Paper Co.*,¹⁸³ co-employees harassed a white coworker because she was married to a black man.¹⁸⁴ The harassment consisted of "name-calling, anonymous phone calls [and] threatening messages."¹⁸⁵ The plaintiff's supervisors responded to each complaint by investigating the charge and reminding the employees that harassment was prohibited.¹⁸⁶ As a result, the court found no employer liability under Title VII.¹⁸⁷

The Fourth Circuit followed the *Fekete* view in *Friend v. Leidinger*.¹⁸⁸ In *Friend*, African-American firefighters employed by the city of Richmond, Virginia, complained about numerous acts of racial harassment by white firefighters.¹⁸⁹ The court found no liability for two reasons: (1) the acts were isolated, and thus not sufficiently pervasive to constitute harassment; and (2) management employees took appropriate steps when they became aware of the wrongful acts.¹⁹⁰

The employers in *Fekete*, *Howard*, *Bell*, and *Friend* avoided liability by taking sufficient steps to remedy reported incidents of harassment. *Silver v. KCA, Inc.*¹⁹¹ extended this reasoning to cases in which management employees were unaware of the harassment, and thus unable to act. In *Silver*, a white employee named Warrington referred to a black coworker as a "jungle bunny."¹⁹² Silver, a white coworker, demanded that Warrington apologize.¹⁹³ Warrington offered an apology, but Silver was later fired.¹⁹⁴ On Silver's action for unlawful retaliation for her "opposing an unlawful employment practice,"¹⁹⁵ the court concluded that Warrington, a nonsupervisor, was not an agent of KCA, and that KCA had no knowledge of the harassment.¹⁹⁶ Thus, his actions were not unlawful under Title VII.¹⁹⁷ Because Silver's objection was premised on conduct not violative of Title VII, the employer's retaliation could not have been based on her having op-

183 425 F. Supp. 1126 (N.D. Ohio 1976).

184 *Id.* at 1128.

185 *Id.*

186 *Id.* at 1129-30.

187 *Id.* at 1137.

188 588 F.2d 61 (4th Cir. 1978).

189 *Id.* at 63-64.

190 Judge Butzner, in a concurring and dissenting opinion, concluded that supervisors participated in the harassment, and thus, again consistent with *Fekete*, that liability should be assessed. *Id.* at 67-69.

191 586 F.2d 138 (9th Cir 1978).

192 *Id.* at 140.

193 *Id.*

194 *Id.*

195 See 42 U.S.C. § 2000e-3(a) (1988).

196 *Silver*, 586 F.2d at 141-42.

197 *Id.* at 141.

posed "an unlawful employment practice." Therefore, Silver's termination did not violate Title VII.¹⁹⁸

b. *Cases Imposing Liability Because the Employer Failed to Act to Protect its Employees From Known Harassment Committed by Nonsupervisory Co-Employees*

By contrast, courts imposed liability when management failed to take sufficient steps after receiving notice of harassment by co-employees. In *EEOC v. Murphy Motor Freight Lines*,¹⁹⁹ the court found the employer liable for racial harassment where supervisors both engaged in harassment and knew of co-employee harassment, but failed to act.²⁰⁰ However, the court did not premise its holding on a theory of vicarious liability; rather, it imposed direct liability on the employer for the supervisors' failure to protect the employees.²⁰¹

Similarly, in *DeGrace v. Rumsfeld*,²⁰² co-workers, with the knowledge of supervisors, harassed a black civilian firefighter in the Navy. When, as a result of the harassment, the plaintiff refused to continue working, the Navy terminated his employment. The district court held that although the Navy had condoned an atmosphere of racial harassment, the plaintiff was not justified in walking off the job.²⁰³ The First Circuit reversed and held that because the Navy supervisors had known of the harassment and had failed to respond properly, the plaintiff could establish a violation of Title VII by showing a causal connection between the harassment and his refusal to continue working.²⁰⁴ Thus, although the supervisors themselves did not harass the plaintiff, they breached their duty to remedy the situation, rendering the Navy liable.

c. *Cases Considering Liability for Harassment by Supervisors*

In cases in which supervisors engaged in harassment, the district courts were divided on the question of liability. The courts deciding *United States v. Lee Way Motor Freight, Inc.*,²⁰⁵ *EEOC v. Murphy Motor Freight Lines*,²⁰⁶ and *Compston v. Borden, Inc.*²⁰⁷ followed the implied holding of *Fekete*. In *Compston*, a supervisor directed unwarranted criti-

¹⁹⁸ *Silver* was later limited to its facts by *EEOC v. Crown Zellerbach Corp.*, 720 F.2d 1008, 1013 (9th Cir. 1983).

¹⁹⁹ 488 F. Supp. 381 (D. Minn. 1980).

²⁰⁰ *Id.* at 386.

²⁰¹ The court also suggested, in dicta, that where the harassment was sufficiently severe, constructive notice could be inferred. *Id.*

²⁰² 614 F.2d 796 (1st Cir. 1980).

²⁰³ *Id.* at 802-03.

²⁰⁴ *Id.* at 803-04.

²⁰⁵ 7 Empl. Prac. Dec. (CCH) ¶ 9066 (W.D. Okla. 1973).

²⁰⁶ 488 F. Supp. 381 (D. Minn. 1980).

²⁰⁷ 424 F. Supp. 157 (S.D. Ohio 1976).

cisms toward an employee, using epithets like “Christ-killer” and “god-damn Jew.”²⁰⁸ The court assessed liability against both the employer and the supervisor, who, as an agent of the employer, was found to be a proper defendant under Title VII.²⁰⁹ In *Crocker v. Boeing Co. (Vertol Div.)*,²¹⁰ however, a district court purportedly relied on agency principles to deny liability to a class of African-American employees despite evidence of widespread racial harassment by supervisors. The court held that only “upper level management” could bind the company,²¹¹ and that class liability thus required proof that harassment was “the company’s standard operating procedure—the regular rather than the unusual practice.”²¹²

Crocker’s narrow reading of *respondeat superior*, limiting the agency relationship to upper level management instead of extending it to all supervisors, marked the beginning of a growing misinterpretation of the law of agency. It has contributed to a substantial line of cases which require a sexual harassment plaintiff to prove not only that her harasser was acting as an agent of the employer, but also that another agent of the employer in an upper management position had actual or constructive knowledge of the harassment.²¹³ This interpretation represents a substantial departure from the common law of agency by requiring a plaintiff to prove both vicarious and direct liability. In other words, a plaintiff must prove both harassment by an agent acting within the scope of his employment, and authorization, ratification, or negligence by the principal, when either one alone satisfies the requirements of agency law.

d. *Assessing Liability for Supervisor Harassment While Denying Liability for Nonsupervisor Co-Employee Harassment Pursuant to the Law of Agency*

Although disagreement about how to apply the law of agency persisted, in examining the harassment cases of the 1970s, virtually all were in accord with the general proposition that agency law should be

²⁰⁸ *Id.* at 158.

²⁰⁹ *Id.* at 160. See generally 42 U.S.C. § 2000e(b) (1988) (Title VII defines “employer” as including all “agents of employers,” but does not define “agent.”).

²¹⁰ 437 F. Supp. 1138 (E.D. Pa. 1977), *modified and aff’d*, 662 F.2d 975 (3d Cir. 1981).

²¹¹ *Id.* at 1191; see also *United States v. United States Steel Corp.*, 371 F. Supp. 1045, 1054 (N.D. Ala. 1973) (generally discussing concern that acts of lower echelon supervisors such as foremen should not result in employer liability when in conflict with established company policies, but noting that discrimination by a foreman acting within the scope of his employment violates Title VII).

²¹² 437 F. Supp. at 1192 (quoting *United States v. International Brotherhood of Teamsters*, 431 U.S. 324, 336 (1977)). The court determined that two of the class representatives had proven individual claims of racial harassment because their harassment by supervisors was so pervasive that upper management knew or should have known of it. *Id.* at 1193-94.

²¹³ See discussion *infra* part IV.A.

applied to determine employer liability for improper harassment. Most cases held employers vicariously liable for all harassment by supervisors.²¹⁴ Harassment by nonsupervisors subjected employers only to the threat of direct liability.

Limiting vicarious liability to incidents of supervisory harassment is an improper application of the law of agency. Many circumstances occur in which the workplace interaction of nonsupervisory co-employees leads to improper harassment. If an employee's actions injure another employee, the injury should be deemed incidental to, and thus well within, the scope of the harasser's employment. Therefore, vicarious liability should result.²¹⁵

Turning again to the analogy of a business that employs drivers as delivery persons, the prudent employer will select its drivers carefully and will instruct them to drive in a safe manner. The employer may even provide special training and offer incentives for safe driving records. Nonetheless, the drivers will, from time to time, cause injuries to others while making deliveries. Whether negligent or intentional, the drivers' conduct subjects the employer to vicarious liability under the doctrine of *respondeat superior*. The same analysis should hold true in cases of sexual harassment by nonsupervisory employees.

The line dividing supervisory from nonsupervisory harassment may be explained by the fellow-servant rule.²¹⁶ This rule protects employers from liability for harassment by co-employee fellow servants, unless the co-employees were supervisors.²¹⁷ Absent reliance on the fellow-servant rule, the cases following *Fekete* may be criticized for absolving employers of liability for harassment by nonsupervisors when agency principles clearly dictate a contrary outcome. In short, without the fellow-servant rule, the post-*Fekete* cases improperly deny harassment victims a remedy to which they are entitled under the law of agency.

Nonetheless, these cases have the advantage of setting forth a consistent and easy-to-follow rule with a clear demarcation. When a supervisor harassed an employee, the employer was liable. When a nonsupervisory co-employee harassed another employee, the employer was only liable if the employer knew or should have known of the harassment and allowed it to occur. The employer would also be liable if, after the fact, it failed to take appropriate remedial action.²¹⁸

²¹⁴ Or, in one case, upper level supervisors. See *supra* text accompanying notes 210-14 (discussing *Croker*).

²¹⁵ This is the conclusion suggested in *Miller v. Bank of America*, 600 F.2d 211 (9th Cir. 1979). See discussion *infra* text accompanying notes 245-48.

²¹⁶ See *supra* note 148.

²¹⁷ See *supra* note 148.

²¹⁸ Whether the racial harassment cases continue to impose strict vicarious liability for harassment by supervisors is open to dispute. Compare *Verkerke*, *supra* note 38, at 283 n.26

B. The Early Development of Title VII's Prohibition of Sexual Harassment

1. *The Emergence of a Right to be Free from Sexual Harassment*

Sexual harassment cases raised issues never confronted in racial, ethnic, and religious harassment cases. While deeming some conduct insufficiently offensive or pervasive to constitute harassment,²¹⁹ courts generally found it easy to recognize racial slurs, threats, and disparagements as unwanted and offensive.²²⁰

The question became more complicated when the problem was sexual harassment. Subjecting women to sexual slurs, intimidation, threats, and disparagement, or to suggestive physical touching, is analogous to the kind of racial harassment to which the courts were becoming accustomed.²²¹ But some sexual conduct was subjectively intended as nonoffensive and nonharassing, although it might nevertheless prove injurious.²²² Thus, sexual advances and sexually charged statements did not earn an initial presumption of harassment the way that almost all racially charged conduct did. Moreover, conditioning employment on sexual demands, and harassment through

(arguing that the only recent circuit court decision imposing strict liability is anomalous) with Rachel E. Lutner, Note, *Employer Liability for Sexual Harassment: The Morass of Agency Principles and Respondeat Superior*, 1993 U. ILL. L. REV. 589, 618 (arguing that recent circuit court decisions all impose strict vicarious liability on employers for racial harassment by supervisors).

²¹⁹ See, e.g., *Cariddi v. Kansas City Chiefs Football Club*, 568 F.2d 87, 87-88 (8th Cir. 1977) (occasional reference to plaintiff as a "dago" and to Italian Americans as the "Mafia" was insufficiently severe or pervasive to violate Title VII); *Kishaba v. Hilton Hotels Corp.*, 737 F. Supp. 549, 555 (D. Haw. 1990) (no hostile work environment existed where plaintiff failed to establish any objectively racially offensive conduct directed at herself or occurring in her presence), *aff'd*, 936 F.2d 578 (9th Cir. 1991); *Robertson v. Georgia Dep't of Corrections*, 725 F. Supp. 533, 538 (S.D. Ga. 1989) (plaintiff's allegation, without supporting evidence, that he was removed to an inferior office because of his race, combined with isolated racial slurs was insufficient to create a hostile work environment).

²²⁰ But see *Vaughn v. Pool Offshore Co.*, 683 F.2d 922, 926 (5th Cir. 1982) (where frequent racial slurs and epithets were exchanged between black plaintiff and white co-employees, plaintiff failed to establish hostility or racial animus).

²²¹ Some courts, however, have concluded that a different standard should apply to sexual harassment than racial harassment, implicitly concluding that racial harassment is a more serious problem. See, e.g., *Davis v. Monsanto Chem. Co.*, 858 F.2d 345, 348 n.1 (6th Cir. 1988) (justifying different standard for sexual, as opposed to racial, harassment based on different standards for equal protection analysis), *cert. denied*, 490 U.S. 1110 (1989). But see *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982) (equating injury resulting from sexual harassment with that resulting from racial harassment). The conflict is alluded to in Justice Ginsburg's concurring opinion in *Harris v. Forklift Systems, Inc.* 114 S. Ct. 367, 372 (1993) ("Davis [v. Monsanto Chemical Co.] concerned race-based discrimination, but that difference does not alter the analysis.").

²²² See generally *Ellison v. Brady*, 924 F.2d 872, 878 (9th Cir. 1991) (examining sexual harassment from victim's perspective). But see *Miranda Oshige*, Note, *What's Sex Got To Do With It?*, 47 STAN. L. REV. 565, 572 (1995) (arguing that there is no basis in gender discrimination for a distinction between sexual and nonsexual conduct and that hostile work environment sexual harassment should be reconfigured as gender-based disparate treatment).

sexual advances, had no ready analogue in existing employment discrimination law.

Beginning in the mid-1970s, a number of cases attempted to apply and expand the law of racial and ethnic harassment to the problem of sexual harassment. In most of these early cases, the district courts, although finding sexual harassment wrongful and potentially tortious, determined that it fell entirely outside the scope of Title VII.

Corne v. Bausch and Lomb, Inc.,²²³ the first reported decision to consider whether sexual harassment violates Title VII, concerned two women who were constructively discharged due to verbal abuse and sexual advances by their supervisor. The district court dismissed the action, finding that the supervisor had not engaged in the conduct as a matter of company policy, but rather as a "personal proclivity, peculiarity or mannerism . . . satisfying a personal urge."²²⁴ If such conduct was actionable, the court reasoned, there would be a "potential federal lawsuit every time any employee made amorous or sexually oriented advances toward another."²²⁵ Whether or not such behavior constituted misconduct, the court concluded, it was well outside the scope of Title VII.²²⁶

Similarly, in *Barnes v. Train*,²²⁷ the district judge found that although a supervisor had impermissibly fired an employee after she refused to have sex with him, his actions were outside the scope of Title VII. The Court explained: "Regardless of how inexcusable the conduct of the plaintiff's supervisor might have been, it does not evidence an arbitrary barrier to continued employment based on plaintiff's sex."²²⁸ In *Miller v. Bank of America*,²²⁹ a supervisor promised an employee a better job if she had sex with him. She refused and was terminated. The district court dismissed the employee's action because the employee failed to take advantage of an existing bank policy and grievance procedure.²³⁰ Finally, in *Tomkins v. Public Service Electric & Gas Co.*,²³¹ once again the plaintiff refused her supervisor's sexual advances. She alleged that in retaliation, she was transferred, subjected to unwarranted disciplinary layoffs, threats of demotion, and

²²³ 390 F. Supp. 161 (D. Ariz. 1975), *vacated*, 562 F.2d 55 (9th Cir. 1977).

²²⁴ *Id.* at 163.

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ 13 Fair Empl. Cas. (BNA) 123 (D.D.C. 1974), *rev'd sub nom.* *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977).

²²⁸ *Id.* at 124.

²²⁹ 418 F. Supp. 233 (N.D. Cal. 1976), *rev'd*, 600 F.2d 211 (9th Cir. 1979).

²³⁰ *Id.* at 235-36.

²³¹ 422 F. Supp. 553 (D.N.J. 1976), *rev'd*, 568 F.2d 1044 (3d Cir. 1977).

pay cuts, and was ultimately fired.²³² Consistent with *Corne, Barnes, and Miller*, the court dismissed the action.²³³

By the end of 1976, federal courts had clearly assumed a position of viewing sexual harassment as outside the scope of Title VII. But in *Williams v. Saxbe*,²³⁴ Judge Richie of the District Court for the District of Columbia rejected the reasoning of prior decisions and the arguments of the United States Department of Justice and found the plaintiff's retaliatory discharge claim within the ambit of Title VII. Ms. Williams had initiated the Title VII action alleging that she had been terminated by the Justice Department in retaliation for refusing her supervisor's sexual advances. The court reasoned that because male employees were not similarly subjected to retaliation for refusing the sexual advances of supervisors, the court could find gender discrimination.²³⁵ Title VII therefore properly applied.²³⁶

The academic community responded critically with a series of articles that articulated a theory of unlawful sexual harassment.²³⁷ Due in part to these criticisms, the tide turned. In 1977, the Fourth Circuit held that "an employer's policy or acquiescence in a practice of compelling female employees to submit to the sexual advances of their male supervisors" violated Title VII.²³⁸ Following the Fourth Circuit's lead, the District of Columbia Circuit reversed *Barnes*.²³⁹ The court reasoned that the decision to eliminate the plaintiff's job was sex discrimination because the supervisor's sexual demands were gender specific; the supervisor did not exact similar demands from male sub-

²³² *Id.* at 555.

²³³ *Id.* at 556.

²³⁴ 413 F. Supp. 654 (D.D.C. 1976), *rev'd on other grounds sub nom.* *Williams v. Bell*, 587 F.2d 1240 (D.C. Cir. 1978). On remand, the court again found a violation of Title VII. *Williams v. Civiletti*, 487 F. Supp. 1387, 1389 (D.D.C. 1980).

²³⁵ 413 F. Supp. at 659.

²³⁶ *Id.*

²³⁷ LIN FARLEY, *SEXUAL SHAKEDOWN: THE SEXUAL HARASSMENT OF WOMEN ON THE JOB* (1978); CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* (1979); Gilbert J. Ginsburg & Jean Galloway Koreski, *Sexual Advances by an Employee's Supervisor: A Sex-Discrimination Violation of Title VII?*, 3 EMPLOYEE REL. L.J. 83 (1977); William C. Seymour, *Sexual Harassment: Finding A Cause of Action Under Title VII*, 30 LAB. L.J. 139 (1979); Nadine Taub, *Keeping Women In Their Place: Stereotyping Per Se As A Form of Employment Discrimination*, 21 B.C. L. REV. 345 (1980); Joan Vermeulen, *Employer Liability Under Title VII For Sexual Harassment By Supervisory Employees*, 10 CAP. U. L. REV. 499 (1981); Comment, 51 N.Y.U. L. REV. 148 (1976); Note, *Legal Remedies for Employment Related Sexual Harassment*, 64 MINN. L. REV. 151 (1979); Jack J. McGee, Jr., Note, *Sexual Advances by Male Supervisory Personnel as Actionable under Title VII of the Civil Rights Act of 1964: Corne v. Bausch & Lomb, Inc., Williams v. Saxbe*, 17 S. TEXAS L.J. 409 (1976); Note, *Sexual Harassment and Title VII: The Foundation for the Elimination of Sexual Cooperation as an Employment Condition*, 76 MICH. L. REV. 1007 (1978).

²³⁸ *Garber v. Saxon Business Prods., Inc.*, 552 F.2d 1032 (4th Cir. 1977) (per curiam).

²³⁹ 561 F.2d 983 (D.C. Cir. 1977).

ordinates.²⁴⁰ The Third Circuit soon reversed *Tomkins*,²⁴¹ and the Ninth Circuit reversed *Miller*.²⁴² By the end of 1979, four circuits—the District of Columbia, Third, Fourth, and Ninth—had agreed that employment decisions conditioned on supervisorial sexual demands constituted sexual harassment in violation of Title VII.

2. *Applying the Law of Agency to the Right to be Free from Sexual Harassment*

Although the circuit courts imposed liability on employers for sexual harassment committed by supervisors, an important difference emerged in their respective applications of agency law. In *Barnes*, the D.C. Circuit followed the reasoning of *Fekete* and its progeny when it explained that “[g]enerally speaking, an employer is chargeable with Title VII violations occasioned by discriminatory practices of supervisory personnel.”²⁴³ In contrast, the *Tomkins* court limited its application of vicarious liability to upper level management, while the *Miller* court extended vicarious liability to include cases involving sexual harassment by nonsupervisor co-employees acting within the scope of employment.

The Third Circuit, in *Tomkins*, distinguished supervisors from the employer as an entity, explaining:

“[W]e conclude 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—evaluations, continued employment, promotion, or other aspects of career development—on a favorable response to those advances or demands, and the employer does not take prompt and appropriate remedial action after acquiring such knowledge.”²⁴⁴

Thus, the *Tomkins* court limited the employer’s liability to acts about which the employer had received actual or constructive knowledge. In other words, it diverged from *Fekete*-type racial harassment cases by imposing direct liability on the employer for its own negligence, but declining to impose vicarious liability for harassment committed by its supervisors. *Tomkins* thus fell short of *Fekete*, leading to a conflict between direct and vicarious liability that has emerged as the critical issue in determining employer liability for sexual harassment by supervisors.

²⁴⁰ *Id.* at 991.

²⁴¹ *Tomkins v. Public Serv. Elec. & Gas Co.*, 568 F.2d 1044 (3d Cir. 1977).

²⁴² *Miller v. Bank of Am.*, 600 F.2d 211 (9th Cir. 1979).

²⁴³ *Barnes*, 561 F.2d at 993.

²⁴⁴ *Tomkins*, 568 F.2d at 1048-49 (emphasis added).

In contrast to *Tomkins*, *Miller* evidenced the Ninth Circuit's willingness to go beyond the limitations of *Fekete*. The court's reasoning suggested that it would hold the employer vicariously liable for harassment by all employees acting within the scope of their employment, supervisors and nonsupervisors alike, and regardless of the knowledge of the employer or its supervisors.²⁴⁵ The *Miller* court saw the problem as a simple application of *respondeat superior*. Responding to the employer's argument that it could not be held liable for its supervisor's harassment because it had a policy prohibiting sexual relations between employees and an internal grievance procedure, the court stated:

"The doctrine of respondeat superior has long been routinely applied in the law of torts . . . It would be shocking to most of us if a court should hold, for example, that a taxi company is not liable for injuries to a pedestrian caused by the negligence of one of its drivers because the company has a safety training program and strictly forbids negligent driving. Nor would the taxi company be exonerated even if the taxi driver, in the course of his employment, became enraged at a jaywalking pedestrian and intentionally ran him down.

Title VII . . . define[s] wrongs that are a type of tort, for which an employer may be liable. There is nothing in [the Act] which even hints at a congressional intention that the employer is not to be liable if one of its employees, acting in the course of employment, commits the tort. Such a rule would create an enormous loophole in the statutes. Most employers today are corporate bodies or quasi-corporate ones such as partnerships. None of any size, including sole proprietorships, can function without employees. The usual rule, that an employer is liable for the torts of its employees, acting in the course of their employment, seems to us to be just as appropriate here as in other cases, at least where, as here, the actor is the supervisor of the wronged employee."²⁴⁶

Despite the analytical differences between *Barnes*, *Tomkins*, and *Miller*, *Tomkins* relies on *Barnes*,²⁴⁷ and *Miller* on both *Barnes* and *Tomkins*.²⁴⁸ All stand for the general proposition that employers are vicariously liable for harassment by their supervisors; however, *Tomkins* would treat low-level supervisors as if they were nonsupervisory co-employees, while *Miller* would consider treating nonsupervisors as agents under certain circumstances.

²⁴⁵ *Miller*, 600 F.2d at 213.

²⁴⁶ *Id.* (citations omitted).

²⁴⁷ *Tomkins*, 568 F.2d at 1048.

²⁴⁸ *Miller*, 600 F.2d at 213.

III

EXACERBATING THE EXASPERATING I—THE EEOC AND
MERITOR SAVINGS BANK V. VINSON

By the end of the 1970s, a liability rule for sexual harassment by supervisors was emerging from the circuit courts. Courts increasingly held employers vicariously liable for sexual harassment by their supervisors, regardless of the employers' degree of fault. Employer policies against sexual harassment and immediate response when incidents of harassment became known might limit the occurrence of harassment, but they would not constitute a defense to employer liability. Sufficient litigation and scholarship had been publicized to warrant the attention of the EEOC and the Supreme Court. The EEOC addressed the question first; the Court soon followed.

A. The Adoption of the EEOC Guidelines on Sexual Harassment

1. *The Guidelines Generally—Sexual Harassment Defined*

The EEOC addressed the issue of employer liability for supervisor harassment in 1980. In April of that year, the EEOC, under the direction of Eleanor Holmes Norton, published Interim Interpretive Guidelines on Discrimination Because of Sex.²⁴⁹ After the public comment period, the EEOC made amendments, then adopted the Final Guidelines on September 23, 1980.²⁵⁰ On November 3, 1980—one day before Ronald Reagan's election as President—Chairperson Norton signed the new regulations. The Guidelines took effect on November 10, 1980.²⁵¹

In its role as the regulatory agency charged with investigating discrimination claims, the EEOC concluded that sexual harassment violated Title VII. It set forth three alternative forms of unlawful sexual harassment. The first was harassment in the form of conditioning an offer of employment on submission to sexual demands.²⁵² For example, this form of harassment occurs when an employer refuses to hire an applicant unless the applicant has sex with him. The second form of harassment encompassed situations in which employment decisions are based on the submission to or the rejection of sexual demands.²⁵³ A typical example is the denial of a promotion to an employee because she refused to have sex with her supervisor.

²⁴⁹ 45 Fed. Reg. 25,024 (1980).

²⁵⁰ 45 Fed. Reg. 74,676 (1980) (codified at 29 C.F.R. § 1604.11 (1995)).

²⁵¹ 45 Fed. Reg. 74,677 (1980).

²⁵² 45 Fed. Reg. 74,677 (1980) (codified at 29 C.F.R. § 1604.11(a)(1) (1995)).

²⁵³ 45 Fed. Reg. 74,677 (1980) (codified at 29 C.F.R. § 1604.11(a)(2) (1995)).

The first and second forms of harassment relate to a specific employment decision in which the employee or applicant loses a tangible job benefit because she refused a sexual demand. Because the harassment involves a demand of sex in exchange for employment, it is referred to as "quid pro quo" sexual harassment.²⁵⁴ In interpreting Title VII to prohibit quid pro quo sexual harassment, the EEOC merely followed the analysis of the four circuit courts that had previously addressed the issue.

To formulate its third form of harassment, the EEOC followed the lead of feminist scholars like Catharine MacKinnon and Nadine Taub and of courts in cases involving racial, religious, and ethnic harassment.²⁵⁵ The EEOC's third form of harassment encompassed the type of conduct described in this Article's Introduction—unwelcome sexual conduct that "has the purpose or effect of unreasonably²⁵⁶ interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."²⁵⁷ Analogizing "hostile work environment" sexual harassment to racial harassment, the EEOC explained: "It is the Commission's position that sexual harassment, like racial harassment, generates a harmful atmosphere. Under Title VII, employees should be afforded a working environment free of discriminatory intimidation whether based on sex, race, religion, or national origin."²⁵⁸

The EEOC's view that "hostile work environment" sexual harassment violates Title VII was highly controversial at the time it was pro-

²⁵⁴ See CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 32-40 (1979). The courts first used this term in *Henson v. City of Dundee*, 682 F.2d 897, 908 (11th Cir. 1982), and later in *Katz v. Dole*, 709 F.2d 251, 254-55 (4th Cir. 1983), and *Meritor Saving Bank v. Vinson*, 477 U.S. 57, 65 (1986).

²⁵⁵ These cases include *EEOC v. Murphy Motor Freight Lines Inc.*, 488 F. Supp. 381 (D. Minn. 1980); *Compston v. Borden, Inc.*, 424 F. Supp. 157 (S.D. Ohio 1976); and *Fekete v. United States Steel Corp.*, 353 F. Supp. 1177 (W.D. Pa. 1973). All of these cases are discussed *supra* part II.A.2; see also *Kyriazi v. Western Elec. Co.*, 461 F. Supp. 894, 934-35, 949-50 (D.N.J. 1978) (evidence that co-employees attempted to embarrass and humiliate the plaintiff through verbal remarks about her marital status and virginity, blocking her path, and placing obscene cartoons on her desk, and that her supervisors knew of the harassment and did nothing, supports finding of sex discrimination and of tort violations under the federal civil rights conspiracy laws and state tort laws). The theory was also advanced by the plaintiffs in *Tomkins*, but rejected by the district court. *Tomkins v. Public Serv. Elec. & Gas Co.*, 422 F. Supp. 553 (D.N.J. 1976), *rev'd*, 568 F.2d 1044 (3d Cir. 1977).

²⁵⁶ The term "unreasonably" replaced the Interim Guidelines' use of the term "substantially." Compare Interim Guidelines, 45 Fed. Reg. 25,024 (1980) with Final Interpretive Guidelines, 29 C.F.R. § 1604.11 (1995). Feminist critics of the Interim Guidelines considered the term "substantially" too rigorous. They argued that because "society will no longer tolerate a small amount of race discrimination on the job[,] it should not tolerate a small amount of sexual harassment, either." Joan Vermuelen, *Comments on the Equal Employment Opportunity Commission's Proposed Amendment Adding Section 1604.11, Sexual Harassment, to Its Guidelines on Sexual Discrimination*, 6 WOMEN'S RTS. L. REP. 285, 289 (1980).

²⁵⁷ 45 Fed. Reg. 74,677 (1980) (codified at 29 C.F.R. § 1604.11(a)(3) (1995)).

²⁵⁸ 45 Fed. Reg. 25,024 (1980).

posed. It was subject to numerous attacks during the public comment period.²⁵⁹ Soon after promulgation of the Guidelines, the decision to include "hostile work environment" was criticized in a report to President-elect Reagan from transition team member Clarence Thomas, who predicted that it would lead "to a barrage of trivial complaints against employers around the nation." The report advised that "[t]he elimination of personal slights and sexual advances which contribute to an 'intimidating, hostile or offensive working environment' is a goal impossible to reach. Expenditure of the EEOC's limited resources in pursuit of this goal is unwise."²⁶⁰ Despite the early criticism, however, the incorporation of "hostile work environment" into Title VII's scope gained wide acceptance.²⁶¹

2. *The Guidelines' Application of the Law of Agency to the Right to be Free from Sexual Harassment*

Having defined sexual harassment, the EEOC turned to the issue of employer liability for the acts of employees. Here, the EEOC combined the bright line test of *Fekete* and its progeny with the more sophisticated agency rationale of *Miller*,²⁶² distinguishing harassment committed by agents from harassment committed by non-agent, non-supervisory co-employees. Liability for nonsupervisory co-employee harassment was limited to direct liability—those situations in which the employer, including its agents and supervisory employees, knew or should have known of the harassment, yet failed to take immediate and appropriate corrective action. "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."²⁶³

²⁵⁹ In its "Supplementary Information" introducing the Final Amendment to Guidelines the EEOC commented:

A large number of comments referred to §1604.11(a) in which the Commission defines sexual harassment. These comments generally suggested that the section is too vague and needs more clarification. More specifically, the comments referred to subsection (3) of §1604.11(a) as presenting the most troublesome definition of what constitutes sexual harassment.

45 Fed. Reg. 74,676 (1980).

²⁶⁰ Paul Taylor, *Thomas's View of Harassment Said to Evolve; His Record at EEOC Is Source of Dispute*, WASH. POST, Oct. 11, 1991, at A10. The author asked the Reagan Library for a copy of the transition team report. The library declined to supply it, claiming it was the "personal property" of former President Reagan. See Letter from Reagan Library (Oct. 4, 1994) (on file with author).

²⁶¹ See generally *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986) (accepting hostile work environment sexual harassment theory); cf. *Harris v. Forklift Sys., Inc.*, 114 S. Ct. 367 (1993) (proof of hostile work environment sexual harassment does not require evidence that harassment affected plaintiff's psychological well-being).

²⁶² 600 F.2d 211 (9th Cir. 1979).

²⁶³ 45 Fed. Reg. 74,677 (1980) (codified at 29 C.F.R. § 1604.11(d) (1995)).

On the question of liability for harassment by supervisors, the EEOC, relying on *Miller* and the rule of agency law that a supervisor's wrongful acts were the responsibility of the employer, determined that an employer is vicariously liable when a supervisor or agent engages in harassment. The Guidelines clearly held an employer responsible "for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence."²⁶⁴

The EEOC thus attributed all harassment by supervisors to the employer, while holding the employer liable for harassment by non-supervisors only when the nonsupervisor acted as an agent—that is, when he was an employee acting within the scope of employment. This test provides a more sophisticated analysis than that of *Fekete* and its progeny, which drew a bright line distinction between supervisors and nonsupervisors.

Following publication of the Interim Guidelines, the EEOC received numerous critical comments from employer groups objecting to the imposition of vicarious liability for harassment by supervisors and agents.²⁶⁵ The EEOC responded in the introduction to the Final Guidelines:

[T]he strict liability imposed in §1604.11(c) is in keeping with the general standard of employer liability with respect to agents and supervisory employees. Similarly, the Commission and the courts have held for years that an employer is liable if a supervisor or an agent violates Title VII, regardless of knowledge or any other mitigating factor. Furthermore, a recent 9th Circuit case on sexual harassment imposed strict liability on the employer where a supervisor harassed an employee without the knowledge of the employer.²⁶⁶

What did the Commission mean by the term "agent"? The Guidelines give the term no special or peculiar meaning, stating that "[a]gent" is used in the same way here as it is used in §701(b) of Title VII, where "agent" is included in the definition of "employer."²⁶⁷ Section 701(b) of Title VII defines "employer" as "a person engaged in an

²⁶⁴ 45 Fed. Reg. 74,677 (1980) (codified 29 C.F.R. § 1604.11(c) (1995)).

²⁶⁵ 45 Fed. Reg. 74,676 (1980). There was also mixed review of the EEOC Guidelines by commentators. See Jan C. Leventer, *Sexual Harassment and Title VII: EEOC Guidelines, Conditions Litigation, and the United States Supreme Court*, 10 CAP. U. L. REV. 481, 484 (1981) (criticizing the EEOC Guidelines for promulgating two standards of employer liability); Nancy Fisher Chudacoff, Note, *New EEOC Guidelines on Discrimination Because of Sex: Employer Liability for Sexual Harassment Under Title VII*, 61 B.U. L. REV. 535, 537 (1981) (stating that the vicarious liability standard in the EEOC Guidelines represents a proper interpretation of Title VII).

²⁶⁶ 45 Fed. Reg. 74,676 (1980) (citations omitted).

²⁶⁷ *Id.*

industry affecting commerce who has fifteen or more employees . . . and any agent of such a person."²⁶⁸ The statute gives no further definition of "agent." One may assume then, that the statute retains the common-law definition of agency.

Although the term "agent" is not defined in Title VII, it at least appears in the Act. In contrast, Title VII never uses the term "supervisor." In the Guidelines, the EEOC states that it "will examine the circumstances of the particular employment relationship and the job functions performed by the individual in determining whether an individual acts in either a supervisory or agency capacity."²⁶⁹ This test generally mirrors the test applied under the National Labor Relations Act (NLRA) to determine whether an employee is a supervisor.²⁷⁰ The NLRA defines "supervisor" as:

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.²⁷¹

This definition has been read by the National Labor Relations Board and the courts to include anyone who exercises supervisory authority. The definition is not limited to employees who have express authority to act on behalf of the management; those with effective authority to recommend supervisory action, such that their recommendations will be carried out without independent investigation, are considered supervisors under the NLRA.²⁷²

Although the EEOC Guidelines did not explicitly adopt the NLRA definition of "supervisor," and although the NLRA definition cannot be applied in every instance to Title VII,²⁷³ the definition is

²⁶⁸ 42 U.S.C. § 2000e(b) (1988).

²⁶⁹ 29 C.F.R. § 1604.11(c) (1995).

²⁷⁰ 29 U.S.C. §§ 142, 152(11) (1988).

²⁷¹ *Id.* § 152(11).

²⁷² *Id.*

²⁷³ In some instances, a Title VII adoption of the NLRA test would merely drag the courts into a contentious dispute over whether certain employees should be permitted to organize despite possessing some of the authority of supervisors or whether they are sufficiently aligned with management. In its most recent pronouncement on the scope of the NLRA's managerial exclusion, *NLRB v. Health Care & Retirement Corp. of Am.*, 114 S. Ct. 1778, 1783 (1994), the Supreme Court rejected the NLRB's test for determining supervisory authority and held that nurses fall within the NLRA's managerial exclusion. *See also* *NLRB v. Yeshiva Univ.*, 444 U.S. 672 (1980) (holding that university faculty fall within the managerial exclusion). In *Health Care & Retirement Corp.*, Justice Ginsburg, joined by Justices Blackmun, Stevens, and Souter, dissented, arguing that the NLRA amendment that excluded supervisors also specifically included "professional employees," thus protecting employees such as nurses. 114 S. Ct. at 1787 (Ginsburg, J., dissenting).

nevertheless a useful starting point in distinguishing supervisors from nonsupervisors.

By adopting the "job functions and circumstances of the particular employment relationship" test to define supervisor, and by using the expansive phrase "a supervisor or an agent" in its commentary, the EEOC clearly intended to include all supervisors, regardless of title, and all other employees, who although not supervisors, are sufficiently vested with the employer's authority. Thus, the EEOC broadly construed employee acts attributable to the employer. For example, professional employees such as attorneys, librarians, social workers, and pharmacists, although excluded from the NLRA definition of supervisor,²⁷⁴ are often in a position to affect the work environment by their conduct. For this reason, such employees act as nonsupervisory agents, and their employers therefore must assume liability for their acts of sexual harassment.

3. *The Application of the Guidelines in the Courts*

The breadth of the Guidelines found mixed support in the circuit courts of appeal as the law of sexual harassment continued to develop. In cases involving *quid pro quo* sexual harassment, the courts adopted the Guidelines' position that an employer is strictly liable for harassment by its supervisors.²⁷⁵ The courts reasoned that when a supervisor demands sex in exchange for a job benefit, he uses the authority to hire, fire, or discipline that the employer delegated to him. Given this delegation of authority, the employer remained responsible for its misuse. But in cases involving a hostile work environment, courts remained reluctant to apply the Guidelines. Courts held that such harassment fell outside the scope of a supervisor's authority, and thus beyond an employer's vicarious liability. This view represents an unfortunate misunderstanding of the law of agency. The courts failed to recognize that in each case the harassment occurred within the scope of the supervisor-subordinate relationship, and that each case arose from the supervisor's authority to oversee the workplace.

In the first appellate decision following the issuance of the Guidelines, the D.C. Circuit reversed a grant of summary judgment for the

²⁷⁴ See, e.g., *Marymount College of Va.*, 280 N.L.R.B. 486, 489 (1986) (professional librarians not statutory supervisors); *Greater Framington Mental Health Ass'n*, 263 N.L.R.B. 1330, 1335 (1982) (supervising social workers not statutory supervisors); *Sav-On Drugs, Inc.*, 243 N.L.R.B. 859, 862 (1979) (pharmacy managers not statutory supervisors); *Neighborhood Legal Servs., Inc.*, 236 N.L.R.B. 1269, 1273 (1978) (attorneys not statutory supervisors).

²⁷⁵ See, e.g., *Horn v. Duke Homes*, 755 F.2d 599, 605 (7th Cir. 1985) ("Title VII demands that employers be held strictly liable for the discriminatory employment decisions of their supervisory personnel who are delegated the power to make such employment decisions.").

employer in *Bundy v. Jackson*,²⁷⁶ reasoning that employers are generally vicariously liable for sexual harassment by their supervisors.²⁷⁷ In dicta, however, the court stated that the “employer might be relieved of liability if the supervisor committing the harassment did so in contravention of the employer’s policy and without the employer’s knowledge, and if the employer moved promptly and effectively to rectify the offense.”²⁷⁸ In other words, even when not vicariously liable, an employer might be directly liable if it failed to respond to a known dangerous situation or condition.

Bundy did not squarely face the issue of whether the employer in that case responded appropriately. When the plaintiff complained to her supervisor’s supervisor of the harassment, he replied that “any man in his right mind would want to rape you,” and solicited her himself.²⁷⁹ Although the holding in *Bundy* appears consistent with the Guidelines, the dicta—absolving the employer of vicarious liability in the case of a quick and appropriate response—seems inconsistent. Under the Guidelines, an appropriate response by an employer could cure an act of nonsupervisor harassment, but could never absolve the employer of liability for harassment by a supervisor. The *Bundy* dicta later proved troublesome as other courts looked to the D.C. Circuit’s decision for guidance.

The *Bundy* dicta was adopted by the Eleventh Circuit in *Henson v. City of Dundee*.²⁸⁰ In *Henson*, the plaintiff, a police dispatcher, was sexually harassed with “numerous harangues of demeaning sexual inquiries and vulgarities” and repeated sexual solicitations by the chief of police.²⁸¹ The district court found for the defendant, holding that the chief’s “sexual habits and proclivities”²⁸² did not violate Title VII. The court of appeals reversed, but required that the plaintiff satisfy a direct liability test on remand. Mislabeling its holding as an application of *respondeat superior*, the court explained: “Where, as here, the plaintiff seeks to hold the employer responsible for the hostile environment created by the plaintiff’s supervisor or coworker, she must show that the employer knew or should have known of the harassment in question and failed to take prompt remedial action.”²⁸³ Although the court relied on the Guidelines elsewhere in its decision, it did not discuss them in its purported application of the law of agency.

²⁷⁶ 641 F.2d 934 (D.C. Cir. 1981).

²⁷⁷ *Id.* at 943, 947.

²⁷⁸ *Id.* at 943 (citing *Barnes v. Costle*, 561 F.2d 893, 993 (D.C. Cir. 1977)).

²⁷⁹ *Id.* at 940.

²⁸⁰ 682 F.2d 897, 899 (11th Cir. 1982).

²⁸¹ *Id.*

²⁸² *Id.* at 901.

²⁸³ *Id.* at 905.

The *Henson* court seriously erred by requiring the plaintiff to prove her employer's complicity in the supervisor's harassment. The holding ignored the harasser's status as an agent of the employer; it ignored his use of the agency relationship to carry out his harassment; and it ignored the employer's duty to protect its employees from harassment. Had the *Henson* court properly applied the law of agency and the EEOC Guidelines, it would have held the city liable for the on-the-job harassment committed by the chief of police.

The *Henson* court also erred when it described the applied standard as an application of the doctrine of *respondeat superior*.²⁸⁴ Under *respondeat superior*, the employer assumes responsibility for the acts of its agent unless the agent has acted entirely outside the scope of his employment. Moreover, the employer, in this case the city, can *only* act through its agents. Therefore, where, as here, a chief of police harasses a subordinate employee on the job, and where his position as chief permits him to exercise supervisory authority over the employee, proper application of *respondeat superior* would require the employer to take responsibility for the chief's wrongful acts. This misunderstanding of how agency law operates continued to plague the application of vicarious liability to sexual harassment thereafter. In case after case, the authority courts relied upon was *Henson v. City of Dundee*.

One year after the Eleventh Circuit's decision in *Henson*, the Fourth Circuit decided *Katz v. Dole*.²⁸⁵ *Katz*, an air traffic controller, was verbally harassed by several supervisors.²⁸⁶ The court explained:

This harassment took the form of extremely vulgar and offensive sexually related epithets addressed to and employed about *Katz* by supervisory personnel as well as by other controllers. The words used were ones widely recognized as not only improper, but as intensely degrading . . . [One of her supervisors] himself admitted that he had suggested to *Katz* that her problems with another controller, about whose sexual advances *Katz* was complaining, might be solved if *Katz* submitted to him.²⁸⁷

The Fourth Circuit reversed the district court's verdict for the FAA, finding the harassment to be so pervasive, and the employee's complaints to her supervisors so numerous, that the FAA must have known, or should have known, of the harassment.²⁸⁸ The court explained:

Except in situations where a proprietor, partner or corporate officer participates personally in the harassing behavior, the plaintiff will

²⁸⁴ *Id.*

²⁸⁵ 709 F.2d 251 (4th Cir. 1983).

²⁸⁶ *Id.* at 253-54.

²⁸⁷ *Id.* at 254.

²⁸⁸ *Id.* at 256.

have the additional responsibility of demonstrating the propriety of holding the employer liable under some theory of *respondeat superior*. 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 took no prompt and adequate remedial action.²⁸⁹

Here again, a court used the term "*respondeat superior*" while rejecting the proper application of agency liability. Under *respondeat superior*, any supervisor who had harassed Katz within the supervisor-subordinate relationship should have bound the employer. Instead, the court improperly required the plaintiff to prove direct liability on the part of the employer.

B. The *Vinson* Case and the Application of Agency Law to the Problem of Employer Liability for Sexual Harassment by Supervisors

By 1985, there was considerable disagreement within the courts regarding the scope of the hostile work environment theory of sexual harassment. A case brought by Mechelle Vinson, an assistant branch manager, against her employer, Meritor Savings Bank, and her supervisor, branch manager Sidney Taylor, provided the Supreme Court's first opportunity to address the issue. In *Vinson*, the Court considered whether sexual harassment violates Title VII, whether hostile work environment sexual harassment violates Title VII, and what standard of liability applies to employers for sexual harassment by their supervisors.

1. *The Vinson Case in the District Court and Court of Appeals*

Vinson alleged that after Taylor hired her, he compelled her to participate in a coercive sexual relationship by threatening to fire her if she did not cooperate.²⁹⁰ She testified that he assaulted and raped her at the bank on numerous occasions, that he frequently fondled her breasts and buttocks in public, and that he would enter the ladies restroom of the bank to expose himself to her.²⁹¹ Taylor denied that he had engaged in any sexual acts of any kind with Vinson.²⁹² He argued that a dispute over the proper training of a teller led Vinson to fabricate her claims "because she was seeking to get even with him."²⁹³ The bank disclaimed responsibility, regardless of whether any harass-

²⁸⁹ *Id.* at 255 (citing *Henson v. City of Dundee*, 682 F.2d 897, 905 (11th Cir. 1982)).

²⁹⁰ *Vinson v. Taylor*, 23 Fair Empl. Prac. Cas. (BNA) 37, 38 (D.D.C. 1980), *rev'd*, 753 F.2d 141 (D.C. Cir. 1985), *reh'g denied*, 760 F.2d 1330 (D.C. Cir. 1985) (per curiam), *aff'd in part, rev'd in part sub nom.* *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986).

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ *Id.* at 39.

ment had occurred, because Vinson failed to use its grievance procedures to complain about Taylor's conduct.²⁹⁴

The district court agreed that *quid quo pro* sexual harassment violates Title VII, but made no finding regarding hostile work environment harassment. The court declined to determine whether Vinson and Taylor had sexual relations, finding merely that if Vinson had sex with Taylor, it was voluntary on her part.²⁹⁵ Thus, any sexual relations between the two were unrelated to continued employment, advancement, or promotion, and thus outside the concern of Title VII.²⁹⁶ The court further reasoned that even if Vinson had been sexually harassed, the bank could not be liable for Taylor's acts because the bank had a policy against sexual harassment, it was unaware of the alleged harassment, and Vinson had not complained or otherwise given notice of the harassment.²⁹⁷ In the context of the EEOC Guidelines, the court treated Vinson's claim as a complaint against a nonsupervisory co-employee, such that the employer was responsible for its employee's sexual harassment only if it knew or should have known of the harassment and failed to take appropriate remedial action.

The Court of Appeals for the District of Columbia Circuit reversed, holding that the district court erred both in its definition of sexual harassment and in its failure to hold the employer responsible for the acts of its supervisor.²⁹⁸ Regarding the question of whether Vinson had been harassed, the court of appeals held that the district court erred by considering only the question of *quid pro quo* harassment. Construing Vinson's complaint as a charge of both *quid pro quo* and hostile work environment sexual harassment, the D.C. Circuit held that her allegations, if true, could establish that Taylor had made the workplace hostile through his unwelcome sexual conduct.²⁹⁹ Turning to the question of liability, the court held that under the EEOC Guidelines, if the supervisor engaged in sexual harassment, the employer was strictly liable for his acts.³⁰⁰ In approving the Guidelines, the court reasoned that all supervisors are agents for purposes of Title VII because their authority as supervisors gives them the "power to coerce, intimidate and harass."³⁰¹

The circuit court's decision was the first to endorse wholeheartedly, and to apply correctly, the EEOC Guidelines. The court could have relied on the Guidelines alone, or explained why the Guidelines

294 *Id.*

295 *Id.* at 42.

296 477 U.S. at 61.

297 23 Fair Empl. Prac. Cas. (BNA) at 43; 477 U.S. at 62 (describing facts).

298 753 F.2d at 144-45, 147.

299 *Id.* at 145-46.

300 *Id.* at 146-50.

301 *Id.* at 150.

were consistent with the common law of agency. Unfortunately, it instead erroneously described the Guidelines as being substantially broader than the common law, creating a "higher level of imputed responsibility than *respondeat superior* imposes,"³⁰² and thus permitting a court to impose liability where a court limited to common-law doctrine would be required to find no employer liability.³⁰³ The court's error stemmed from a fundamental misunderstanding of the breadth of *respondeat superior*. The court mistakenly believed that the scope-of-employment requirement would limit employer liability to cases in which the supervisor had been expressly authorized to sexually harass his employees.³⁰⁴

Following the circuit court's decision, the bank sought a rehearing *en banc*, which was denied in a *per curiam* opinion.³⁰⁵ Judge Bork, joined by Judges Scalia and Starr, filed a dissenting opinion. The dissenters expressed two major objections to the panel's decision. First, they were concerned that a voluntary sexual relationship could lead to a sexual harassment claim.³⁰⁶ Second, they objected to the panel's determination that evidence of the supervisor's suggestive behavior toward other employees was admissible, but that evidence of the plaintiff's suggestive behavior toward the supervisor was not.³⁰⁷

More significantly, Judge Bork questioned the court's imposition of vicarious liability in the sexual harassment context. He argued that the full Circuit should consider the question of whether the vicarious liability rules applied in race discrimination cases under Title VII should apply to sexual harassment cases,³⁰⁸ and described that panel decision as "at odds with traditional practice which was not to hold employers liable at all for their employee's intentional torts involving sexual escapades."³⁰⁹

2. *The Vinson EEOC Brief—A Shift in Position*

When the Supreme Court agreed to hear *Vinson*, EEOC Chairman Thomas successfully lobbied Solicitor General Charles Fried to submit an *amicus curiae* brief.³¹⁰ The Solicitor General's role in *Vinson*

³⁰² *Id.* at 151.

³⁰³ *Id.* at 150-52.

³⁰⁴ "Confining liability, as the common law would, to situations in which a supervisor acted within the scope of his authority conceivably could lead to the ludicrous result that employers would become accountable only if they explicitly require or consciously allow their supervisors to molest women employees." *Id.* at 151.

³⁰⁵ 760 F.2d 1330 (D.C. Cir. 1985).

³⁰⁶ *Id.* at 1330.

³⁰⁷ *Id.* at 1330-31.

³⁰⁸ *Id.* at 1331-32.

³⁰⁹ *Id.* at 1332.

³¹⁰ David G. Savage, *Thomas Fought Workplace Harassment*, L.A. TIMES, Oct. 10, 1991, at A6 ("Thomas set up a meeting with Solicitor General Charles Fried. 'He came to my office

marked a major shift in the government's interpretation of Title VII cases. *Vinson* constituted the thirty-ninth Title VII case heard by the Supreme Court in which the United States had submitted an *amicus* brief.³¹¹ In all but six of those cases, the Solicitor General had sided with the employee. The few exceptions included cases involving seniority rights in which the government sided with the employer against a union, thus benefitting minority employees.³¹² In *Vinson*, however, the Solicitor General sided with the employer. During the three years following *Vinson*, half the Solicitor General's Title VII *amicus* briefs would support the employer.³¹³

and made a very strong, very reasoned and powerful pitch,' Fried recalled . . ."); see also Transcript of Hearings before the Committee on the Judiciary, United States Senate, on the nomination of Clarence Thomas to be Associate Justice of the Supreme Court, Part 4, at 163 (responding to questions of Senator Hatch); Paul Taylor, *Thomas's View of Harassment Said to Evolve*, WASH. POST, Oct. 11, 1991, at A10 (describing letter from Fried to Senator Danforth in which Fried describes Thomas advocating the submission of an *amicus* brief). Although neither Professor Fried nor Senator Danforth has been able to locate this letter, Professor (now Justice) Fried has confirmed that Justice (then-Chairman) Thomas strongly lobbied him to submit the *amicus* brief.

³¹¹ Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501 (1986); Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986); Cooper v. Federal Reserve Bank of Richmond, 467 U.S. 867 (1984); Hishon v. King & Spalding, 467 U.S. 69 (1984); Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984); Anderson v. City of Bessemer City, N.C., 470 U.S. 564 (1985); W.R. Grace & Co. v. Local Union 759, Int'l Union of Rubber, Cork, Linoleum & Plastic Workers, 461 U.S. 757 (1983); Crown, Cork & Seal Co. v. Parker, 462 U.S. 345 (1983); Connecticut v. Teal, 457 U.S. 440 (1982); Kremer v. Chemical Constr. Corp., 456 U.S. 461 (1982); Pullman-Standard v. Swint, 456 U.S. 273 (1982); Zipes v. TransWorld Airlines, Inc., 455 U.S. 385 (1982); County of Washington v. Gunther, 452 U.S. 161 (1981); Northwest Airlines, Inc. v. Transport Workers Union, 451 U.S. 77 (1981); Carson v. American Brands, Inc., 450 U.S. 79 (1981); Mahasco Corp. v. Silver, 447 U.S. 807 (1980); New York Gaslight Club, Inc. v. Carey, 447 U.S. 54 (1980); Delaware State College v. Ricks, 449 U.S. 250 (1980); California Brewers Ass'n v. Bryant, 444 U.S. 598 (1980); Great Am. Fed. Sav. & Loan Ass'n v. Novotny, 442 U.S. 366 (1979); City of Los Angeles v. Manhart, 435 U.S. 702 (1978); Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978); East Texas Motor Freight Sys. Inc. v. Rodriguez, 431 U.S. 395 (1977); TransWorld Airlines Inc. v. Hardison, 432 U.S. 63 (1977); Liberty Mut. Ins. Co. v. Wetzel, 424 U.S. 737 (1976); Franks v. Bowman Transp. Co., Inc., 424 U.S. 747 (1976); McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976); General Elec. Co. v. Gilbert, 429 U.S. 125 (1976); International Union of Elec., Radio & Mach. Workers, Local 790 v. Robbins & Myers, Inc., 429 U.S. 229 (1976); Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974); Espinoza v. Farah Mfg. Co., Inc. 414 U.S. 86 (1973); Norwood v. Harrison, 413 U.S. 455 (1973); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Trfficante v. Metro. Life Ins. Co., 409 U.S. 205 (1972); Love v. Pullman Co., 404 U.S. 522 (1972); Griggs v. Duke Power Co., 401 U.S. 424 (1971); Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971).

³¹² See, e.g., Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501 (1986); Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984); W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber, Cork, Linoleum & Plastic Workers, 461 U.S. 757 (1983).

³¹³ The cases in which the Solicitor General's brief supported the employer include Wards Cove Packing Co., Inc. v. Antonio, 490 U.S. 642 (1989); Watson v. Fort Worth Bank and Trust, 487 U.S. 977 (1988); California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272 (1987).

Although the Solicitor General's *Vinson* brief purported to apply the EEOC Guidelines,³¹⁴ its analysis disavowed them.³¹⁵ The Solicitor General, on behalf of the EEOC, took the position that the district court correctly determined that *Vinson* had not been sexually harassed, and, further, that if the Court reached the issue of liability, it should hold that the court of appeals had erred in holding that employers were strictly liable for harassment by supervisors. To support its claim that there was insufficient evidence that *Vinson* had been harassed, the Solicitor General argued that *Vinson* had failed to complain until long after the alleged harassment occurred,³¹⁶ had declined opportunities to transfer to jobs away from the alleged harasser,³¹⁷ and had not appeared to others to be frightened of or hostile toward her alleged harasser.³¹⁸

Turning to the question of employer liability, the Solicitor General urged that the court reject any application of vicarious liability for hostile work environment sexual harassment. The Solicitor General's brief argued that supervisors committing hostile work environment sexual harassment do not rely on their delegated authority; thus, unless an employer knows or should know of the harassment, it should not be subject to liability for its employees' wrongful acts:

The court of appeals' theory of absolute employer liability is erroneous as a matter of statutory construction and ignores the special characteristics of "hostile environment" claims. In our view, an employer should not be liable unless it knew or had reason to know of the sexually offensive atmosphere. An employer without actual knowledge will have "reason to know" of sexual misconduct at [its] workplace if victims of sexual harassment have no reasonably available means of bringing complaints to the employer's attention and seeking redress. . . . [A]n employer in our view should generally be able to insulate itself from liability by publicizing a policy against

³¹⁴ Brief for the United States and the Equal Employment Opportunity Commission as Amici Curiae at 10-13, *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986) (No. 84-1979) [hereinafter EEOC Brief].

³¹⁵ *Id.* at 20-28.

³¹⁶ *Id.* at 18.

³¹⁷ *Id.* (describing "a pattern of decisionmaking difficult to reconcile with her charges").

³¹⁸ *Id.* (stating that "*Vinson's* long silence and her delay in asserting her claim well-nigh compelled the district court's findings either that no sexual activities took place [sic], or that, if any took place, *Vinson's* participation was consensual and voluntary"). It is difficult to read these arguments, submitted by then-Solicitor General Fried and then-EEOC Chairman Thomas, without being reminded of the similar defenses later raised on behalf of then-Judge Thomas in response to the allegations of sexual harassment made by his former employee Anita Hill. See JOHN C. DANFORTH, *RESURRECTION: THE CONFIRMATION OF CLARENCE THOMAS* 31-32 (1994) (describing the White House counsel's skeptical initial reaction to Anita Hill's allegations).

sexual harassment and implementing a procedure designed to resolve sexual harassment complaints.³¹⁹

The Solicitor General supported this proposition by seriously misstating the law of agency. Addressing the question of who is an agent under Title VII, the brief read:

When a Title VII charge is based on allegations of sexual harassment, the question whether a supervisor is acting as his employer's agent should turn primarily on the scope of authority delegated to the supervisor and on the character of the actions alleged.

. . . In general, harassment which affects tangible job benefits and is manifested in a supervisory employment decision—that is, “quid pro quo” harassment—will give rise to vicarious liability under the guidelines. That is because the authority to make or substantially influence such decisions is within the scope of authority that the employer has delegated to the supervisor. . . .

. . . .

Where a sexual harassment claim proceeds on a pure “hostile environment” theory, however, as Vinson’s claim now does, the usual basis for a finding of agency will often disappear. By definition, the supervisor in such circumstances is not exercising, or threatening to exercise, actual or apparent authority to make personnel decisions affecting the victim.³²⁰

This argument grossly oversimplifies the law of agency, which gives a far more expansive reading to the supervisor’s scope of employment and the liability of employers. To support its arguments, the Solicitor General’s brief relied on the common misunderstanding of the terms “scope of employment” and “scope of authority” found in the circuit courts’ decisions in *Vinson*, *Henson*, and *Katz*.³²¹ The brief relied, in part, on a section of the Restatement which is concerned with contract law, not tort law.³²² This error ignores the critical dis-

³¹⁹ EEOC Brief, *supra* note 314, at 6-7; see *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 70-72 (1986).

³²⁰ EEOC Brief, *supra* note 314, at 22-24.

³²¹ See discussion *supra* text accompanying notes 280-89, 298-304.

³²² “Nor, except in unusual cases, could it be demonstrated that the employer had authorized the supervisor to engage in sexual harassment per se, or that the supervisor’s sexually harassing conduct has furthered any business of his employer as principal.” EEOC Brief, *supra* note 314, at 24 & n.13.

Footnote 13 referred to comment C of section 165 of the Restatement, which reads: “If [a party] knows that the agent is acting for the benefit of himself or a third person, the transaction is suspicious upon its face, and the principal is not bound unless the agent is authorized.” RESTATEMENT (SECOND) OF AGENCY § 165 cmt. c (1957). Section 165 concerns principals’ liability for contracts entered into by agents without authority, not principals’ liability for torts committed by agents:

A disclosed or partially disclosed principal is subject to liability upon a contract purported to be made on his account by an agent authorized to make it for the principal’s benefit, although the agent acts for his own or other

inction between master-servant relationships and other principal-agent relationships.³²³ The latter is a contractual relationship in which "the principal will not incur liability for torts committed by the agent."³²⁴ The former is an employment relationship in which "[t]he servant, qua servant, has no power to bind his master in contract."³²⁵ Regrettably, the Solicitor General's brief was devoid of any discussion of the policies supporting the doctrine of *respondeat superior*. Most remarkably, nowhere did the brief admit that the Solicitor General's position represented a disavowal of the 1980 EEOC Guidelines.

Having abandoned the traditional application of vicarious liability for wrongful acts by employees, the government's brief recommended that employers be granted immunity from work environment sexual harassment suits as long as they had adopted a policy against harassment, except in those situations in which they knew of harassment and ignored it:

[W]e propose a rule that asks whether a victim of sexual harassment had reasonably available an avenue of complaint regarding such harassment, and, if available and utilized, whether that procedure was reasonably responsive to the employee's complaint. If the employer has an expressed policy against sexual harassment and has implemented a procedure specifically designed to resolve sexual harassment claims, and if the victim does not take advantage of that procedure, the employer should be shielded from liability absent actual knowledge of the sexually hostile environment (obtained, e.g., by the filing of a charge with the EEOC or a comparable state agency).

....

... [I]f the employer has implemented an effective procedure for resolving such claims, it will be in the employee's interest to use it, since failure to do so will create a presumption that the claimed harassment never took place.³²⁶

To understand the distinction between the 1980 EEOC view under Eleanor Holmes Norton and the 1986 EEOC view under Clarence Thomas, reference to a hypothetical case is useful. Consider a case in which an employee enters her supervisor's office to consult with him. Without making any explicit sexual demands, he asks her highly personal questions about her sex life and volunteers information about his own. He tells her of his interest in pornographic films,

improper purposes, unless the other party has notice that the agent is not acting for the principal's benefit.

Id. § 165.

³²³ See REUSCHLEIN & GREGORY, *supra* note 34, §§ 48-50, at 101-02.

³²⁴ *Id.* § 49 (Principal and Agent).

³²⁵ *Id.* § 50 (Master and Servant).

³²⁶ EEOC Brief, *supra* note 314, at 26, 30.

describing in detail the events depicted in such films. She cannot determine whether he wants to have sex with her, to embarrass her, to demonstrate his authority over her, or achieve some other purpose.³²⁷ Indeed, he may be equally clueless as to his motives. Regardless, the effect is that she is embarrassed and humiliated. In response to his conduct, she attempts to change the subject and extricate herself, but although the employer has a process for complaining about sexual harassment, she chooses not to complain. Why not? She may be worried about the consequences to her career.³²⁸ She may be worried that she will not be believed. She may believe that the fact-finding process that will follow the complaint will exacerbate the humiliation that she has already experienced. Or, just as he may be uncertain of his own motives in harassing her, she may be unsure of her reasons for not complaining.

This conduct, if judged sufficiently pervasive or severe to be experienced as hostile or abusive by a reasonable person in the employee's position, constitutes hostile work environment sexual harassment. Under the 1980 Guidelines, the employer is responsible for the supervisor's harassment. But under the view urged by the Solicitor General in *Vinson*, the employer is not liable.

3. *The Vinson Decision*

The Supreme Court unanimously endorsed the Guidelines' position that hostile work environment sexual harassment violates Title VII:

"[U]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature" . . . constitutes prohibited "sexual harassment," whether or not it is directly linked to the grant or denial of an economic *quid pro quo*, where "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."³²⁹

³²⁷ Regardless of his motives, his conduct constitutes sexual harassment. *EEOC v. Farmer Bros. Co.*, 31 F.3d 891, 897-98 (9th Cir. 1994) (sexual harassment illegal whether motivated by sexual desire or gender bias); *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1463 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 733 (1995) (supervisor used sexual harassment to humiliate and disempower women employees); *King v. Board of Regents of the Univ. of Wisconsin*, 898 F.2d 533, 539 (7th Cir. 1990) (same); *Waltman v. Int'l Paper Co.*, 875 F.2d 468, 471-72, 482 (5th Cir. 1989) (discussing male employees' use of sexual harassment to distress and demean female co-employee).

³²⁸ See BARBARA A. GUTK, *SEX AND THE WORKPLACE* 71 (1985) (30% of sexually harassed women thought that reporting the harassment would hurt them); Barbara A. Gutek, *Understanding Sexual Harassment at Work*, 6 NOTRE DAME J. L., ETHICS & PUB. POL'Y 335, 348-49 (1992) (many women "fear becoming victims of retaliation if they complain about the harassment").

³²⁹ 477 U.S. at 65 (citation omitted) (quoting 29 C.F.R. § 1604.11(a)(3)).

Moreover, the Court rejected the bank's position that "the mere existence of a grievance procedure and a policy against discrimination, coupled with [the victim's] failure to invoke that procedure, must insulate [the employer] from liability."³³⁰ But on the vicarious liability question, the Court closely divided in favor of the view urged by EEOC Chairman Thomas and the Solicitor General.³³¹ The lead opinion, by Justice Rehnquist, followed the reasoning, and often the language, of the Solicitor General's brief and the *Henson* decision. The opinion noted that the question was not necessary to the resolution of the case, and thus declined to issue a "definitive rule" on it.³³² Although only dicta, the language nonetheless made it clear that the Court agreed in principle with the new EEOC position:

[W]e do agree with the EEOC that Congress wanted courts to look to agency principles for guidance in this area. While such common-law principles may not be transferable in all their particulars to Title VII, Congress' decision to define 'employer' to include any 'agent' of an employer, 42 U. S. C. §2000e(b), surely evinces an intent to place some limits on the acts of employees 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. See generally Restatement (Second) of Agency §§219-237 (1958). For the same reason, absence of notice to an employer does not necessarily insulate that employer from liability. *Ibid.* . . . As to employer liability, we conclude that the Court of Appeals was wrong to entirely disregard agency principles and impose absolute liability on employers for the acts of their supervisors, regardless of the circumstances of a particular case.³³³

³³⁰ *Id.* at 72.

³³¹ On this question, Chief Justice Burger and Justices White, Powell, and O'Connor joined Justice Rehnquist. Justices Brennan and Blackmun joined Justice Marshall, concurring in the judgment. Justice Stevens joined both opinions, seeing no inconsistency between them.

³³² "This debate over the appropriate standard for employer liability has a rather abstract quality about it given the state of the record in this case. . . . We therefore decline the parties' invitation to issue a definitive rule on employer liability." 477 U.S. at 72.

³³³ *Id.* at 72-73. In his concurrence, Justice Marshall agreed that agency principles applied to the employer liability issue, but asserted that the standards articulated in the Guidelines were a proper application of the law of agency and should be followed.

A supervisor's responsibilities do not begin and end with the power to hire, fire, and discipline employees, or with the power to recommend such actions. Rather, a supervisor is charged with the day-to-day supervision of the work environment and with ensuring a safe, productive workplace. There is no reason why abuse of the latter authority should have different consequences than abuse of the former. In both cases it is the authority vested in the supervisor by the employer that enables him to commit the wrong: it is precisely because the supervisor is understood to be clothed with the employer's authority that he is able to impose unwelcome sexual conduct on subordinates. There is therefore no justification for a special rule, to be applied only in 'hostile environment' cases, that sexual harassment does

The *Vinson* decision illustrates why a court should avoid deciding issues unnecessary to the resolution of the particular dispute before it. Although the lead opinion correctly held that the question of employer liability for work environment sexual harassment turns upon the question of agency, the opinion failed to recognize that the court of appeals' opinion did not "entirely disregard agency principles."³³⁴ Rather, the court of appeals correctly applied the law of agency in determining that employers are responsible for hostile work environment sexual harassment by their supervisors.³³⁵ The Court assumed, without discussion, that a distinction should be drawn between the acts of supervisors and the acts of agents. The Court failed to recognize, however, that given the responsibilities that supervisors exercise over the workplace, they are agents.³³⁶ In the years following *Vinson*, this led to a great deal of unnecessary uncertainty and confusion in the law of sexual harassment.

IV

EXACERBATING THE EXASPERATING II—*VINSON* APPLIED

A. *Vinson* Applied by the Courts

In the wake of *Vinson*, the circuits have split on the proper test to apply to hostile work environment harassment by a supervisor. Ironically, however, they have uniformly rejected a proper application of *respondeat superior*. The Court's dicta in *Vinson*—that although Congress intended some form of agency liability to apply, strict vicarious liability for harassment by supervisors was not appropriate—spawned lower court decisions that are difficult to reconcile with the law of agency, the 1980 Guidelines, and the bulk of the *Vinson* decision.³³⁷

not create employer liability until the employee suffering the discrimination notifies other supervisors. No such requirement appears in the statute, and no such requirement can coherently be drawn from the law of agency.

Id. at 76-77.

³³⁴ *Id.* at 72-73.

³³⁵ *Vinson v. Taylor*, 753 F.2d 141, 149-50 (D.C. Cir. 1985).

³³⁶ The Court's reliance on authority from the law of agency is limited to a single citation to the Restatement: "[W]e hold that the Court of Appeals erred in concluding that employers are always automatically liable for sexual harassment by their supervisors. See generally RESTATEMENT (SECOND) OF AGENCY §§ 219-237 (1958)." 477 U.S. at 72. The sections cited are the compilation of the law of *respondeat superior* and direct employer liability. The Court makes no reference to the special obligations imposed on employers to protect their employees. See generally RESTATEMENT (SECOND) OF AGENCY §§ 492-520 (1957).

³³⁷ The *Vinson* decision has been the subject of much scholarly literature, some of which discusses the fundamental confusion regarding the law of agency. See, e.g., Maria M. Carrillo, *Hostile Environment Sexual Harassment by a Supervisor Under Title VII: Reassessment of Employer Liability in Light of the Civil Rights Act of 1991*, 24 COLUM. HUM. RTS. L. REV. 41, 58 (1992-1993) (stating that *Vinson* is primarily responsible for the divergence from vicarious liability of employers for supervisory sexual harassment); Estrich, *supra* note 44, at 826 (commenting that *Vinson* imposed restrictions on Title VII suits that reinforced demeaning

1. *Cases Requiring Both Vicarious Liability and Direct Liability*

Several courts applying *Vinson* have required the plaintiff to prove both vicarious and direct liability. For example, in *Kauffman v. Allied Signal*,³³⁸ the Sixth Circuit held that in a hostile work environment case, it is not enough that the plaintiff establish that a supervisor's harassment was within the scope of his employment. The plaintiff must also show that the employer failed to respond adequately and effectively when it learned of the harassment.³³⁹ As in *Henson*, this standard requires the employee to first prove that the employer is vicariously liable under agency standards, and then to prove that the employer is directly liable because of its own misconduct.

In *Kauffman*, the Sixth Circuit held that a supervisor acted within the scope of his employment when he harassed the plaintiff.³⁴⁰ However, the court also determined that the company's response was prompt and adequate, thereby relieving it of liability under the law of agency.³⁴¹ The court failed to explain the reasoning underlying its purported application of the law of agency. Indeed, the court's conclusion is mystifying. The central and basic rule of master-servant agency law is that if an employee commits a wrongful act within the scope of his employment, the employer is liable.³⁴² A company's swift response may absolve it of any direct liability and protect it from punitive damages, but a company's vicarious liability for the acts of its agents carried out within the scope of their agency is absolute. That the court would hold otherwise is bewildering. Although the court

sexual stereotypes of women); B. Glenn George, *The Back Door: Legitimizing Sexual Harassment Claims*, 73 B.U. L. REV. 1, 35-37 (1993) (arguing that employer should bear responsibility for its supervisor's sexual harassment); Michael J. Phillips, *Employer Sexual Harassment Liability Under Agency Principles: A Second Look at Meritor Savings Bank, FSB v. Vinson*, 44 VAND. L. REV. 1229, 1240 (1991) (arguing that the Court's application of agency law in sexual harassment cases is deeply flawed and has caused significant confusion); Katherine S. Anderson, Note, *Employer Liability Under Title VII for Sexual Harassment After Meritor Savings Bank v. Vinson*, 87 COLUM. L. REV. 1258, 1265 (1987) (stating that the *Vinson* Court did not resolve conflicts among the lower courts); Rachel E. Lutner, Note, *Employer Liability for Sexual Harassment: The Morass of Agency Principles and Respondeat Superior*, 1993 U. ILL. L. REV. 589, 607 (arguing that *Vinson* leaves courts with too much discretion when imposing employer liability); Marlisa Vinciguerra, Note, *The Aftermath of Meritor: A Search for Standards in the Law of Sexual Harassment*, 98 YALE L. REV. 1717, 1730 (1989) (stating that the Court's refusal to delineate the scope of employer liability for sexual harassment in *Vinson* assures the perpetuation of confusion).

³³⁸ 970 F.2d 178 (6th Cir.), cert. denied, 113 S. Ct. 831 (1992).

³³⁹ *Id.* at 184. The Sixth Circuit recently characterized its test in *Kauffman* as evaluating liability depending "on 1) whether the supervisor's harassing actions were foreseeable or fell within the scope of his employment and 2) even if they were, whether the employer responded adequately and effectively to negate liability." *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 803 (6th Cir. 1994).

³⁴⁰ *Kauffman*, 970 F.2d at 184-85.

³⁴¹ *Id.* at 185.

³⁴² See *supra* part I.A.

purportedly applied rules of vicarious liability, it insisted that the plaintiff prove the direct liability of the employer.

This direct liability standard was also adopted by the Third Circuit in *Andrews v. City of Philadelphia*.³⁴³ That case involved two female police officers harassed by their fellow officers and their sergeants with the complicity of their captain. The court correctly held that to apply the law of agency under *Vinson*, the trial court must apply *respondeat superior*.³⁴⁴ But the court incorrectly held that under *respondeat superior* the plaintiff must prove "that management-level employees had actual or constructive knowledge about the existence of a sexually hostile environment and failed to take prompt and adequate remedial action."³⁴⁵ Thus, where middle management employees knew of and acquiesced in the harassment, the employer must "demonstrate that its supervisory employees investigated [the] plaintiffs' complaints and took appropriate action."³⁴⁶

If middle-management employees acquiesced in the harassment, why should it matter that they thereafter took appropriate action? They had already, as agents of the employer, ratified the improper behavior. The court should have recognized that it was too late for the employer to escape liability. The *Andrews* rule, in essence, gives employers the right to permit harassment, with impunity, until after the employer receives notice. This, in fact, was the very argument made by the Government, and rejected by the Court, in *Vinson*.³⁴⁷

This basic misunderstanding of the law of agency has also been applied to harassment cases involving corporate officers and other high-level supervisors. In *Steele v. Offshore Shipbuilding, Inc.*,³⁴⁸—one of the three cases described in the Introduction—the Eleventh Circuit found that even harassment by a corporate vice president could not automatically be attributed to his employer. The district court found that the company's vice president and general manager³⁴⁹ was an agent of the employer, and thus an employer under Title VII.³⁵⁰ He was personally assessed nominal damages.³⁵¹ But because the person-

³⁴³ 895 F.2d 1469 (3d Cir. 1990). This rule was adopted by the First Circuit in *Klessens v. United States Postal Serv.*, 42 F.3d 1384 (1st Cir. 1994), discussed *supra*, text accompanying notes 16-22.

³⁴⁴ *Andrews*, 895 F.2d at 1486.

³⁴⁵ *Id.*

³⁴⁶ *Id.*

³⁴⁷ See *Vinson*, 477 U.S. at 72 (existence of grievance procedure and policy against sexual harassment does not insulate employer from liability).

³⁴⁸ 867 F.2d 1311 (11th Cir. 1989).

³⁴⁹ *Id.* at 1314.

³⁵⁰ See discussion *infra* text accompanying notes 367-77, 388-401 (discussing *Sparks v. Pilot*, 830 F.2d 1554 (11th Cir. 1987), and *Paroline v. Unisys Corp.*, 879 F.2d 100 (4th Cir. 1989), *vacated in part*, 900 F.2d 27 (1990)).

³⁵¹ *Steele*, 867 F.2d at 1314.

nel at corporate headquarters in New York, who were initially unaware of the harassment, reprimanded the vice president when notified, the court excused the company from liability.³⁵² The court of appeals affirmed, finding that the harassment, which included the supervisor's requests that employees "visit him on the couch in his office,"³⁵³ did not relate to his supervisory authority. Therefore, the law of agency, the court argued, provided no link between the company and its corporate officer.³⁵⁴

In two recent cases, the Ninth Circuit joined the First, Third, Sixth, Eighth, and Eleventh Circuits to require direct employer liability where *respondeat superior* should have applied. In *Steiner v. Showboat Operating Co.*,³⁵⁵ the court adopted a *Henson*-like analysis. A company vice president, Trenkle, verbally harassed the plaintiff, publicly referring to her as a "dumb fucking broad," "cunt," and "fucking cunt."³⁵⁶ When criticizing the plaintiff for giving free meals to certain customers, Trenkle suggested that she also "suck their dicks."³⁵⁷ Steiner, the plaintiff, lodged a complaint, and Trenkle was reprimanded. But Trenkle continued to harass Steiner for eleven months, until the company fired him for sexually harassing another employee.

The district court ordered summary judgment for the defendant. The court of appeals reversed, citing a case involving harassment by a nonsupervisory co-employee. That case held that an employee may

³⁵² *Id.*

³⁵³ *Id.* at 1313.

³⁵⁴ *Id.* at 1314, 1316-17. Similarly, in *Kotcher v. Rosa & Sullivan Appliance Center, Inc.*, 957 F.2d 59 (2d Cir. 1992)—another case discussed in the introduction—the Second Circuit held that harassment by a store manager need not be imputed to the store's owner. The Second Circuit recently distinguished the *Kotcher* decision in *Karibian v. Columbia University*, 14 F.3d 773 (2d Cir.), *cert. denied*, 114 S. Ct. 2693 (1994), but in doing so, failed to adopt a true agency test. In *Karibian*, a student-employee complained that she was coerced into entering a violent sexual relationship by her supervisor. When she complained about his conduct to the school's Equal Opportunity Coordinator, he urged her not to file a complaint, and the school did not investigate the supervisor's conduct. The district court granted summary judgment to the defendants, relying on *Kotcher*. On appeal, the circuit court reversed, explaining:

We hold that an employer is liable for the discriminatorily abusive work environment created by a supervisor if the supervisor uses his actual or apparent authority to further the harassment, or if he was otherwise aided in accomplishing the harassment by the existence of the agency relationship. In contrast, where a low-level supervisor does not rely on his supervisory authority to carry out the harassment, the situation will generally be indistinguishable from cases in which the harassment is perpetrated by the plaintiff's co-workers; consequently, the *Kotcher* standard of employer liability will generally apply, and the employer will not be liable unless "the employer either provided no reasonable avenue for complaint or knew of the harassment but did nothing about it."

14 F.3d at 780 (citations omitted).

³⁵⁵ 25 F.3d 1459 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 733 (1995).

³⁵⁶ *Id.* at 1461.

³⁵⁷ *Id.*

prevail if she can establish that the company failed to properly respond to her complaints of harassment.³⁵⁸ Thus, despite the fact that Trenkle was a vice president of the company, liability for his harassment would extend to the company only if the company itself failed to act appropriately following Steiner's complaint. In short, the court ignored Trenkle's role as an agent, absolving the company of any vicarious liability.

In a separate decision by the Ninth Circuit, *Nichols v. Frank*,³⁵⁹ a postal clerk was sexually harassed by her shift supervisor, Francisco. Francisco was the highest ranking manager on the plaintiff's shift.³⁶⁰ He had authority to direct employees' assignments, and to grant leave and overtime pay.³⁶¹ He was also the only supervisor who could communicate with Nichols, who is deaf and communicates through sign.³⁶² The district court found that Francisco continuously demanded that Nichols perform oral sex on him. It held the Postal Service liable for Francisco's harassment "under the 'principles of the law of agency'" because he was "acting within the 'scope of his employment.'"³⁶³

The Ninth Circuit affirmed, but only because it considered Francisco's conduct *quid pro quo* harassment.³⁶⁴ The court held that in a hostile work environment case the question is not whether the harasser was acting within the scope of employment, but whether the harassment was known to "management-level employees."³⁶⁵ Francisco, the court held, was not a management-level employee; therefore, the Postal Service was not liable under a theory of hostile work environment sexual harassment.³⁶⁶

³⁵⁸ *Id.* at 1464.

³⁵⁹ 42 F.3d 503 (9th Cir. 1994).

³⁶⁰ *Id.* at 506.

³⁶¹ *Id.* at 506-07.

³⁶² *Id.* at 507.

³⁶³ *Id.* at 508.

³⁶⁴ *Id.* at 508-09. The court relied on the 1980 EEOC Guidelines, but did not discuss their application to hostile work environment sexual harassment. *Id.* at 511.

³⁶⁵ *Id.* at 508. The court relied on its earlier decision in *EEOC v. Hacienda Hotel*, 881 F.2d 1504 (9th Cir. 1989), which in turn relied on *Vinson*. See 881 F.2d at 1515-16. Although each was a Ninth Circuit decision involving employer liability for work environment sexual harassment by a supervisor, *Steiner* did not cite *Hacienda*, nor did *Nichols* cite *Steiner*.

³⁶⁶ *Nichols*, 42 F.3d at 508. Ironically, when faced with the problem of applying agency law to assess employer liability for a supervisor's sexual harassment under *state* tort law, the Ninth Circuit has had no trouble resolving the issue by simply applying the rule of *respondet superior*. In *Dias v. Sky Chefs, Inc.*, 919 F.2d 1370, 1373 (9th Cir. 1990), *cert. denied*, 503 U.S. 920 (1992), the plaintiff was verbally sexually harassed by her general manager. When she complained about his conduct, she was transferred to another job, and then terminated. Rather than file a Title VII action, she sued her former employer under Oregon law for wrongful discharge and intentional infliction of emotional distress. The discharge was wrongful because it was in violation of Oregon's public policy protecting employees from

In each of the preceding cases, the courts of appeals have not, as they have claimed, applied the law of agency. Instead, they have rejected it. The courts are treating the problem of liability for sexual harassment as if it required proof of direct liability. If that were true, the Supreme Court, in *Vinson*, would not have referred to agency law at all. It would have instead held that all sexual harassment cases must be based entirely on the independent liability of an employer. Yet nothing in *Vinson* or the law of agency so provides.

2. *Cases Rejecting Strict Vicarious Liability While Adopting Some Elements of Agency Law*

Some cases have rejected strict vicarious liability while adopting other elements of agency law. In *Sparks v. Pilot Freight Carriers, Inc.*,³⁶⁷ the plaintiff, a secretary, was harassed by Long, her direct supervisor, who held the position of "terminal manager." As terminal manager, Long held the highest position in his geographical area, and "had authority to exercise virtually unfettered discretion over personnel matters."³⁶⁸ He physically and verbally sexually harassed the plaintiff in his office on a regular basis. He would, for example, rub her shoulders, "fool with" and smell her hair, and repeatedly inquire into her personal life.³⁶⁹ He also asked her if she could become pregnant; and, after she declined his request to take him to her home, he made threats against her, including one that the district court considered "too sexually explicit" to put on the record.³⁷⁰

The Eleventh Circuit, applying *Vinson*, reversed an order of summary judgment for the employer based on an agency analysis.³⁷¹ But the court declined to find the employer liable under *respondeat superior*.³⁷² It found instead that the employer could be liable only under a convoluted application of agency law under which the supervisor was treated as a statutory employer.³⁷³ The court found that Long was not only an employee, but also was an agent of the employer. As such,

sexual harassment. The harassment and the retaliation constituted intentional infliction of emotional distress. The court affirmed a jury verdict of \$625,000 over the defendant's assertion that it should not be held liable for its manager's conduct. *Id.* at 1376. The court held the defendant vicariously liable under Oregon law because the manager's conduct, although unauthorized, was within the scope of his employment. *Id.* at 1375-76. The court did not consider the question of whether the employer, as a separate entity, must itself have knowledge of the manager's wrongdoing. Rather, it correctly applied the law of agency, as other post-*Vinson* cases should, holding the employer vicariously liable for its agent's acts. *Id.*

³⁶⁷ 830 F.2d 1554 (11th Cir. 1987).

³⁶⁸ *Id.* at 1556.

³⁶⁹ *Id.*

³⁷⁰ *Id.*

³⁷¹ *Id.* at 1557-58, 1560.

³⁷² *Id.* at 1558-59.

³⁷³ *Id.* at 1557-58.

the court reasoned, he personally was Sparks's "employer" as defined by Title VII.³⁷⁴ Thus, if Long was acting as Pilot Freight's agent in harassing Sparks, and he personally was an employer as defined by Title VII, Pilot Freight was liable for his harassment.³⁷⁵ The court found he was an agent based on section 219(2)(d) of the Restatement (Second) of Agency, which imposes liability where an employee is "aided in accomplishing the tort by the existence of the agency relationship."³⁷⁶

The result in *Sparks* is unassailable, and the use of Restatement section 219(2)(d) is appropriate. But the determination that there was no *respondeat superior* liability under section 219(1) is bewildering. An employee may be acting within the scope of his employment even when engaging in acts prohibited by the employer.³⁷⁷ A corporation acts through its employees; and in *Sparks*, the highest ranking employee at the work-site engaged in the harassment. The acts of harassment occurred within the context of his supervision of the plaintiff as his secretary. If it means anything that an employee may bind the employer despite the employer's lack of fault, *Sparks* called for the application of *respondeat superior*.

In *Hicks v. Gates Rubber Co.*³⁷⁸ the Tenth Circuit adopted a position similar to the Eleventh Circuit in *Sparks*. In *Hicks*, the plaintiff's direct supervisor harassed her physically on at least two separate occasions.³⁷⁹ On one occasion he grabbed her buttocks; on another, he grabbed her breasts and, when she fell over, got on top of her.³⁸⁰ The district court granted summary judgment for the defendant, finding that the incidents, though "boorish,"³⁸¹ did not constitute sexual harassment in violation of Title VII.³⁸²

The court of appeals reversed and remanded on the question of whether the supervisor's sexual harassment could be attributed to the employer.³⁸³ Offering guidance to the trial court, the Tenth Circuit held that the employer could not be vicariously liable under *respondeat superior* because sexual harassment did not fall within his job descrip-

³⁷⁴ *Id.*

³⁷⁵ *Id.*

³⁷⁶ *Id.* at 1559.

³⁷⁷ RESTATEMENT (SECOND) OF AGENCY § 230 (1957); see discussion *supra* part I.A.

³⁷⁸ 833 F.2d 1406 (10th Cir. 1987).

³⁷⁹ *Id.* at 1410-11.

³⁸⁰ *Id.* at 1410. The supervisor also referred to African Americans as "niggers" and "coons," and, referring to the plaintiff, an African American, complained about "lazy niggers." The court inexplicably concluded that the supervisor's actions did not constitute racial harassment. *Id.* at 1409, 1412-13.

³⁸¹ *Id.* at 1411.

³⁸² *Id.* at 1411-12.

³⁸³ *Id.* at 1417-19.

tion.³⁸⁴ The court concluded that employer liability instead could arise under the principles of Restatement section 219(2) if: (1) the employer was negligent or reckless; (2) the employee relied on the supervisor's apparent authority; or (3) the supervisor was aided in his harassment by the existence of the agency relationship.³⁸⁵

Again, the court misconstrued the scope of agency law. By limiting the scope of an employee's employment to situations in which the employee is properly engaged in carrying out his specific job duties, the court rendered *respondeat superior* virtually meaningless. Employers rarely employ workers for the purpose of engaging in wrongful acts. Delivery drivers are instructed to drive carefully, yet their negligent, reckless, or even intentionally injurious driving is attributed to their employer.³⁸⁶ Store clerks are instructed to act courteously, yet their assaults on customers are the responsibility of the employer.³⁸⁷ The Tenth Circuit was correct to subject the employer to potential liability under Restatement section 219(2), but was wrong in failing to impose vicarious liability under *respondeat superior*.

The Fourth Circuit adopted a similar test in *Paroline v. Unisys Corp.*,³⁸⁸ where a supervisor's wrongful acts included making sexually suggestive remarks to the plaintiff, rubbing his hands over her back even as she asked him to stop, and grabbing and kissing her against her will.³⁸⁹ The district court granted summary judgment for the defendants on the grounds that the employer took appropriate remedial action and because the plaintiff terminated her employment before the employer's remedy could work.³⁹⁰

The court of appeals began its analysis by examining whether the supervisor, Moore, was an agent of Unisys. It adopted a test applied elsewhere to determine whether an employee could be named individually as an agent of an employer, and therefore qualify as a statutory employer under Title VII.³⁹¹ The court inquired whether the

³⁸⁴ *Id.* at 1417-18.

³⁸⁵ *Id.* at 1418.

³⁸⁶ See discussion *supra* text accompanying notes 90-94.

³⁸⁷ See discussion *supra* text accompanying notes 99-102.

³⁸⁸ 879 F.2d 100 (4th Cir. 1989), *vacated in part*, 900 F.2d 27 (4th Cir. 1990).

³⁸⁹ *Id.* at 103.

³⁹⁰ *Id.* at 102.

³⁹¹ *Id.* at 104. Early cases generally held that employees who are agents under Title VII are statutory employers and may be personally liable for violations of the Act. See, e.g., *Compston v. Borden, Inc.*, 424 F. Supp. 157, 158 (S.D. Ohio 1976) (supervisor in harassment case was an agent, and thus an employer liable in damages under Title VII); *Hutchinson v. Lake Oswego Sch. Dist.*, 374 F. Supp. 1056, 1059 (D. Or. 1974) (school board members, as agents, are personally liable under Title VII), *rev'd in part*, 519 F.2d 961 (9th Cir. 1975) (board members entitled to sovereign immunity), *vacated on other grounds*, 429 U.S. 1033 (1977). More recent cases have split on whether agent-employees may be personally liable under Title VII. Compare *Sauers v. Salt Lake County*, 1 F.3d 1122, 1125 (10th Cir. 1993) (supervisory employees not individually liable under Title VII but may be sued

individual defendant served in a supervisory position in which he exercised "significant control over the plaintiff's hiring, firing or conditions of employment."³⁹² This standard represents a workable, common-sense definition to determine which employees act as agents for Title VII purposes.³⁹³ It is consistent with the law of agency, the "job functions and circumstances of the particular employment relationship" test of the EEOC Guidelines, and the NLRA definition of supervisor. It represents substantial progress in applying the law of agency to the problem of employer liability for harassment by supervisors.

Rather than ending the analysis here, however, the *Paroline* court then went on to hold that if Moore was acting as an agent of Unisys in his harassment, Unisys might nonetheless escape liability by establishing that it took prompt and adequate remedial steps to deter Moore from further harassment.³⁹⁴ Again, as in *Henson*, *Sparks*, and *Hicks*, a court of appeals failed to properly apply the law of agency.³⁹⁵ Once

in their professional capacity for the purpose of recovering from the employer) and *Busby v. City of Orlando*, 931 F.2d 764, 772 (11th Cir. 1991) (supervisory employees may not be sued under Title VII in their individual capacities, but may be sued as agents for the purpose of recovering from the employer) with *Miller v. Maxwell's Int'l, Inc.*, 991 F.2d 583, 587 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1049 (1994) (no individual liability for supervisors' violations of Title VII even if they qualify as agents); *Bridges v. Eastman Kodak Co.*, 800 F. Supp. 1172, 1180 (S.D.N.Y. 1992) (stating that both individual and official liability may be imposed and that any narrow reading of Title VII has been undercut by the Civil Rights Act of 1991); *Kolb v. Ohio, Dep't of Mental Retardation & Dev. Disabilities*, 721 F. Supp. 885, 891 (N.D. Ohio 1989) (stating that individuals who are responsible for making and/or contributing to employment decisions may be liable as agents of the employer under Title VII); *McAdoo v. Toll*, 591 F. Supp. 1399, 1404-06 (D. Md. 1984) (individuals liable for discrimination under Title VII because they were charged with the responsibility—or contributing to—employment decisions for the employer). See generally the cases cited in *Miller*, 991 F.2d at 587. For additional reading see Scott B. Goldberg, Comment, *Discrimination by Managers and Supervisors: Recognizing Agent Liability Under Title VII*, 143 U. PA. L. REV. 571 (1994); Christopher Greer, Note, "Who, Me?": A Supervisor's Individual Liability For Discrimination in the Workplace, 62 *FORDHAM L. REV.* 1835 (1994); Phillip L. Lamberson, Comment, *Personal Liability for Violations of Title VII: Thirty Years of Indecision*, 46 *BAYLOR L. REV.* 419 (1994).

³⁹² *Paroline*, 879 F.2d at 104.

³⁹³ Similarly, the Sixth Circuit determines whether a harassing supervisor is acting within the scope of his employment, and thus as an agent, by examining where and when the harassment occurs; whether the action was foreseeable; and whether the harasser has the authority to hire, fire, promote, and discipline the plaintiff. See, e.g., *Kauffman v. Allied Signal*, 970 F.2d 178, 184, 186 (6th Cir. 1992); *Yates v. Avco Corp.*, 819 F.2d 630, 636 (6th Cir. 1987). In the Sixth Circuit, however, harassment by an agent is not attributed to the employer unless the employer is also directly at fault. See discussion *supra* text accompanying notes 338-42.

³⁹⁴ *Paroline*, 879 F.2d at 106.

³⁹⁵ The Eighth Circuit appears to make the same error. In *Davis v. Tri-State Mack Distribs., Inc.*, 981 F.2d 340 (8th Cir. 1992), the court affirmed the district court's finding of employer liability, holding that because the employee had complained to the branch manager, there was no need for her to prove notice to the corporate headquarters. *Id.* at 343. The *Davis* court failed to recognize that under a proper application of agency law,

the plaintiff has established that she was harassed by an agent of the employer—here a supervisory employee acting within the scope of his employment—the plaintiff should not need to prove some form of direct liability on the part of the employer.³⁹⁶

In its discussion of direct (as opposed to vicarious) liability, the *Paroline* court suggested a number of theories under which the plaintiff might recover. First, the plaintiff could persuade the trier of fact that the steps taken by the employer were inadequate and not reasonably calculated to prevent further harassment.³⁹⁷ This approach comports with *Henson*, and with the common-law agency doctrine of ratification—by failing to take effective acts to remedy the employee's harassment, the employer ratifies it, and thereby accepts responsibility.³⁹⁸ Second, the *Paroline* court suggested that the plaintiff could prevail by establishing that because Unisys knew in advance that Moore was harassing other women, there was a substantial risk that he would also harass Paroline unless the company took preventative measures.³⁹⁹ The court held that when employers are on notice of prior harassment, so that they reasonably should anticipate further harassment, they have a duty to take reasonable steps to prevent such harassment from occurring.⁴⁰⁰ This approach is consistent with the common law agency rule that employers have a duty to warn their employees of known, reasonably foreseeable, or reasonably knowable risks.⁴⁰¹ The employer's failure to prevent such foreseeable harm constitutes negligence.

In *Paroline*, *Hicks*, and *Sparks*, the circuit courts sought agency law solutions for the problem created by the *dicta* in *Vinson*. Nevertheless, the courts failed to identify the best solution—that proper application of *respondeat superior* is sufficient to hold an employer vicariously liable for harassment by its supervisors.

harassment by the service manager alone may be attributable to the employer, regardless of the knowledge of headquarters' personnel.

³⁹⁶ In *Kotcher*, the Second Circuit agreed with the *Sparks*, *Hicks*, and *Paroline* courts in holding that direct liability should result if an employer fails to adequately respond to a complaint of harassment. *Kotcher v. Rosa & Sullivan Appliance Ctr., Inc.*, 957 F.2d 59, 62-63 (2d Cir. 1992); cf. *Bouton v. BMW of N. Am., Inc.*, 29 F.3d 103, 110 (3d Cir. 1994) (“[W]e hold that an effective grievance procedure—one that is known to the victim and that timely stops the harassment—shields the employer from Title VII liability for a hostile environment.”).

³⁹⁷ *Paroline*, 879 F.2d at 106-07.

³⁹⁸ See RESTATEMENT (SECOND) OF AGENCY § 82 (1957).

³⁹⁹ *Paroline*, 879 F.2d at 107. The factual support for this determination included Moore's conduct during Paroline's employment interview—when he asked her how she would react to being sexually harassed on the job—and the fact that before Paroline was ever hired, Moore had been warned by his supervisor, Peterson, not to engage in sexual harassment, but that Peterson himself made jokes about prior claims of harassment. *Id.* at 103, 107-08.

⁴⁰⁰ *Id.* at 107.

⁴⁰¹ RESTATEMENT (SECOND) OF AGENCY § 492 (1957).

B. *Vinson* Applied by the EEOC

In 1993, following the election of President Clinton, the EEOC reexamined the circumstances under which it believed employers should be liable for sexual harassment by their employees. The EEOC proposed new Guidelines on harassment,⁴⁰² but subsequently withdrew them after critics attacked the predicted impact of the proposed regulations on cases involving religious harassment.⁴⁰³ Had the Guidelines been adopted, they undoubtedly would have helped to clarify the application of agency principles to sexual harassment law.

In particular, the proposed 1993 EEOC Guidelines rejected the vicarious-plus-direct liability standard applied by the circuit courts, and thus would have reestablished a true agency test as the relevant legal standard. The proposed Guidelines would have codified the *Vinson* Court's language in support of an agency test for employer liability when a supervisor engages in hostile work environment harassment:

(a) An employer is liable for its conduct and that of its agents and supervisory employees with respect to workplace harassment on the basis of race, color, religion, gender, national origin, age, or disability:

- (1) Where the employer knew or should have known of the conduct and failed to take immediate and appropriate corrective action; *or*
- (2) Regardless of whether the employer knew or should have known of the conduct, where the harassing supervisory employee is acting in an 'agency capacity.'⁴⁰⁴

This position correctly applies the law of agency to the law of sexual harassment. It is contrary, however, to recent decisions of the First, Second, Fourth, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits, which would have used the conjunction "and" rather than "or" between subparts (1) and (2).⁴⁰⁵

V

A CRITIQUE OF *VINSON* AND ITS PROGENY

A. Why Employers Should Be Vicariously Liable for Sexual Harassment by Supervisors

As *Vinson* properly recognized, the appropriate standards to determine vicarious liability are found in the common law of agency. These standards, the product of generations of experience, reflect the proper allocation of responsibility among employee, supervisor, and

⁴⁰² Guidelines on Harassment Based on Race, Color, Religion, Gender, National Origin, Age, or Disability, 29 C.F.R. § 1609 (1993) (issued Oct. 1, 1993; withdrawn Oct. 11, 1994).

⁴⁰³ 59 Fed. Reg. 51,396 (1994).

⁴⁰⁴ 58 Fed. Reg. 51,266, 51,269 (1993) (emphasis added).

⁴⁰⁵ See *supra* part IV.

employer. Unfortunately, Justice Rehnquist's opinion in *Vinson* erroneously distinguished between agency liability and vicarious liability for harassment committed by supervisors.⁴⁰⁶ The circuit courts compounded this error as they attempted to apply *Vinson*,⁴⁰⁷ leaving the area in chaos, especially in light of the contrary dictates of the 1980 EEOC Guidelines.

Many sound reasons support a return to an agency standard that comports with the bright-line rule announced in the 1980 Guidelines. First, the 1980 Guidelines reflect a proper application of agency law. Under the doctrine of *respondeat superior*, employers are vicariously liable for the wrongs of their employees, if committed while acting within the scope of their employment. In almost every circumstance, a rule establishing employer liability for wrongful acts by the employer's supervisors will result in the proper application of common-law *respondeat superior*.

By vesting supervisors with the authority to assign work to employees, to oversee their work, to hire, fire, or discipline them, or to recommend personnel decisions about them, employers give the supervisors they select authority to control the work environment. Thus, even when the employer has a policy against sexual harassment, and does all it can to enforce the policy, the law of agency holds the employer responsible for the wrongs of its supervisors. Like the employer of the dishonest hotel maid, or the employer of the violent train conductor, an appropriate response by the employer of a sexual harasser may be a reason to absolve it of punitive damages,⁴⁰⁸ but is not a reason to immunize it from responsibility for the actual harm caused by its agent, acting within the scope of his employment.

Moreover, the law of agency requires us to assess an employer's liability for sexual harassment with regard to the duties an employer owes its employees. Given the special relationship which exists between employers and employees, employers have special duties to protect their employees from harm. These duties, like other analogous special duties, should be recognized as nondelegable. It is not enough for employers to tell their supervisors to refrain from sexual harassment. The special relationship doctrine requires them to insure it, by accepting responsibility when their supervisors misbehave.

Second, a bright-line rule lends itself to ease of application. The line of cases after *Vinson* demonstrates the difficult task the federal courts face when grappling with the law of agency. Attempts to apply *Vinson* also encourage needless litigation—uncertainty about likely outcomes undoubtedly raises unnecessary barriers to early dispute res-

⁴⁰⁶ 477 U.S. at 72.

⁴⁰⁷ See *supra* part IV.A.

⁴⁰⁸ See discussion *infra* part V.B.

olution. By holding employers vicariously liable for all harassment committed by supervisors, employers and employees would have a clearer picture of their respective rights, responsibilities, and liabilities, rendering Title VII cases easier and less costly to resolve.

Reducing the uncertainties in Title VII sexual harassment litigation will also do much to effectuate the purposes of the statute. The Act is intended to accomplish the Herculean task of eliminating unlawful discrimination and harassment in the workplace. Yet it is enforced almost entirely by litigation in which an employee or former employee must battle against her better-funded employer. Any rule that reduces wrangling over legal issues thus helps alleviate this resource disparity by encouraging resolution before the initiation of full-fledged litigation.

In sum, the EEOC was wrong to disavow its 1980 Guidelines in *Vinson*. The Guidelines, which imposed vicarious liability for all sexual harassment by supervisors, effectuated the purposes of Title VII, effectively applied the common law of agency, and established a bright-line rule easy for employers and employees to follow. However, rather than apply the common law of agency, or the Guidelines that had adopted those common-law rules, the courts instead established a new rule, foreign to the law of agency, and placed an improper burden on the victims of sexual harassment.

B. The Growing Risk to Employment Discrimination Law Caused by *Vinson*

The misapplication of agency law in sexual harassment cases has now infected other areas of employment discrimination law. For example, in *North v. Madison Area Ass'n for Retarded Citizens Developmental Centers Corp.*,⁴⁰⁹ the Seventh Circuit attempted to apply *Vinson* in a termination case. The plaintiff offered evidence that the executive director of the defendant association was motivated by racial animus when he recommended to the board of directors that it fire the plaintiff. The court held that under *Vinson* the plaintiff was required to prove that the board itself was motivated by race. It rejected his argument that the executive director was an agent of the employer, finding that such a strict liability rule stood in conflict with *Vinson*: "While Meritor was limited in its facts to a claim of sexual harassment, the conclusions reached by the Court are, in our opinion, not so limited, but rather apply to any claim under Title VII in which employer liability is at issue."⁴¹⁰ This is a ridiculous result, and a dangerous one. It threatens all of employment discrimination law. But it is a logical develop-

⁴⁰⁹ 844 F.2d 401 (7th Cir. 1988).

⁴¹⁰ *Id.* at 407 n.7.

ment in light of the way in which the *Vinson* decision is being misapplied.⁴¹¹

Academics, too, seem willing to disavow the common-law rules adopted by the 1980 Guidelines. In a recent law review article, Professor Dennis Duffy argues that under *Vinson*, courts should not apply common-law vicarious liability to claims of intentional infliction of emotional distress. Instead, courts should seek proof that an employer took reasonable steps to prevent the infliction of distress and adopted prompt remedial measures upon learning of its occurrence.⁴¹²

In another article, Professor J. Hoult Verkerke advances a proposal⁴¹³ that, if adopted, would dramatically alter all of employment discrimination law. Although he argues that there is no principled basis for treating hostile work environment claims differently than *quid pro quo* claims of sexual harassment,⁴¹⁴ Professor Verkerke further suggests that for reasons of economic efficiency, the best solution would impose strict vicarious liability only in cases of systemic discrimination.⁴¹⁵ In all cases involving individual claims of discrimination, Professor Verkerke would immunize employers who had an internal complaint-filing process unless the employee had filed a complaint and the employer thereafter failed to take appropriate corrective action.⁴¹⁶ Under such a system, employers would effectively get one free act of discrimination or harassment, regardless of the status of the perpetrator.

Professor Verkerke's proposal would turn Title VII on its head, but it, too, is a logical outcome of the confusion arising from *Vinson*. The proposal is essentially the position taken by the Government in *Vinson*, in which the Solicitor General argued that where an employer adopted a proper complaint procedure, and the employee did not file a complaint, the employer should be immune from liability.⁴¹⁷ This was the issue in *Vinson* on which the Court's opinion was unanimous; the argument was rejected.⁴¹⁸ The argument is especially untenable

⁴¹¹ Cf. *Lam v. University of Hawaii*, 40 F.3d 1551 (9th Cir. 1994) (rejecting defendant's argument in a race, sex, and national origin hiring case that an evaluator's improper bias was insufficient to prove discrimination absent proof that the university knew or should have known of the bias).

⁴¹² Dennis P. Duffy, *Intentional Infliction of Emotional Distress and Employment at Will: The Case Against "Tortification" of Labor and Employment Law*, 74 B.U. L. REV. 387, 418-21 (1994).

⁴¹³ Verkerke, *supra* note 38.

⁴¹⁴ *Id.* at 275-77.

⁴¹⁵ *Id.* at 363-66.

⁴¹⁶ *Id.* at 279.

⁴¹⁷ See *infra* notes 319-28 and accompanying text.

⁴¹⁸ See *infra* notes 330-36 and accompanying text.

in light of the Civil Rights Act of 1991.⁴¹⁹ Before 1991, the primary remedy available in a hostile work environment Title VII case was corrective action. Absent an improper termination, money damages were not available—the only monetary remedy was back pay. But the 1991 amendments to Title VII enable an employee to recover compensatory damages for emotional distress, as well as punitive damages.⁴²⁰ There is no reason to conclude that Congress approved of these tort-like damage remedies while intending to restrict claims to plaintiffs who have suffered repeated injuries. Professor Verkerke's proposal that courts utilize the direct liability standard in all cases of individual discrimination illustrates the danger of the current confusion surrounding the application of agency law in employment discrimination cases. If the courts require proof of direct liability by the highest corporate officials in all individual Title VII cases, employers will be free to discriminate with near impunity.

C. Theories on Why the Federal Courts Have Failed to Properly Apply the Law of Agency in Determining Employer Liability for Sexual Harassment by Supervisors

The preceding discussion established that the federal courts have misapplied the law of agency in Title VII sexual harassment cases. Why did such fundamental errors occur? Many plausible theories present themselves as viable explanations.

One possibility is that counsel have failed to correctly and convincingly explain the operation of *respondeat superior*. Without proper guidance from the parties, courts may easily substitute an incorrect, albeit common-sense, understanding of an agent's authority, for the more exacting requirements imposed by the law of agency.

Any confusion in this regard is exacerbated by the early decisions of *Henson*⁴²¹ and *Katz*.⁴²² The errors made in the Government's *amicus* brief in *Vinson*, on which the majority of the Court relied, further compounded the problem. And, on a more fundamental level, "courts routinely disagree about the meaning of the basic terminology [of agency], thus impairing their ability to conduct an intelligent intercourt dialogue."⁴²³

Another possible explanation stems from the similarity between Title VII sexual harassment cases and constitutional harassment cases, involving issues such as police misconduct. Police harassment cases,

⁴¹⁹ Pub. L. No. 102-166, 105 Stat. 1074 (codified as amended at 42 U.S.C. § 2000-2 (Supp. V 1993)).

⁴²⁰ 42 U.S.C. § 1981(a)(1) (1988 & Supp. V 1993).

⁴²¹ 682 F.2d 897 (11th Cir. 1982) (discussed *supra* text accompanying notes 280-84).

⁴²² 709 F.2d 251 (4th Cir. 1983) (discussed *supra* text accompanying notes 285-89).

⁴²³ Verkerke, *supra* note 38, at 286.

often brought in federal court under 42 U.S.C. § 1983, frequently involve tort-like verbal and physical harassment by officers, readily analogous to sexual harassment in the workplace. But liability in § 1983 actions is subject to a significant limitation not applicable to Title VII actions.

When an officer commits a wrongful act of harassment resulting in a § 1983 action, his or her employer is unlikely to be subject to vicarious liability. If the officer is a state employee, the state is entitled to sovereign immunity under the Eleventh Amendment to the U.S. Constitution. The law permits damages actions against individual state employees, but not against state governments.⁴²⁴ If the officer is a local government employee, constitutionally imposed sovereign immunity does not apply;⁴²⁵ but the employer, the local government, is only subject to liability if the harassment occurred pursuant to its official policy or custom.⁴²⁶ As a result, few police harassment cases in federal court may be pursued against employers, even when the officer was acting as an agent under the law of vicarious liability.⁴²⁷ Courts accustomed to these limitations on liability may find it unusual, and counter-intuitive, to correctly apply the doctrine of *respondeat superior* in analogous Title VII sexual harassment cases.

Yet another theory suggests that courts assessing vicarious compensatory damages mistakenly apply the rules governing the imposition of vicarious punitive damages. Professor Dobbs, in his hornbook on remedies,⁴²⁸ explains:

It is ordinarily thought that there is no criminal liability without personal fault and accordingly vicarious criminal liability is based upon

⁴²⁴ Edelman v. Jordan, 415 U.S. 651 (1974).

⁴²⁵ Monell v. Department of Social Servs., 436 U.S. 658 (1978).

⁴²⁶ *Id.* at 694.

⁴²⁷ The Fifth Circuit's decision in Hamilton v. Rogers, 791 F.2d 439 (5th Cir. 1986), illustrates the limitations of such misconduct cases. The plaintiff, an African American firefighter, sued the City of Houston Fire Department for racial harassment by his supervisors. The court found no departmental liability under the Constitution, explaining:

Under § 1983, the Fire Department cannot be held vicariously liable for the actions of its employees; . . . "[T]he doctrine [of *respondeat superior*] has no application in an action under 42 U.S.C. § 1983." . . . Instead, liability under § 1983 can arise only "for a deprivation of rights protected by the Constitution or federal laws that is inflicted pursuant to official policy."

Id. at 443 (citations omitted). The court found that department policy did not encourage racial discrimination, but rather expressly prohibited it. Although the lack of a policy encouraging harassment could be overcome by proof of a widespread practice of harassment, the court found that a dozen incidents of racial harassment by supervisors within two-and-a-half years was insufficient to "warrant the imputation of constructive knowledge to high ranking officers of the Fire Department." *Id.* at 443. The court imposed liability under Title VII, correctly applying common-law agency principles to hold that the supervisors were agents of the department. *Id.* at 444.

⁴²⁸ DAN B. DOBBS, LAW OF REMEDIES: DAMAGES—EQUITY—RESTITUTION § 3.11(6) (2d ed. 1993).

conspiracy or ratification which shows participation in the crime by the person charged, or approval of it. To the extent that punitive damages are truly punitive in nature and thus to be assimilated to criminal responsibility, one would expect to find similar limits.

In line with this, the Restatements and a number of courts effectively exclude any pure vicarious liability for punitive damages. Under this rule, the principal may be held [liable for punitive damages] if he authorizes, ratifies or participates in the wrongdoing, but not otherwise. In the case of corporate principals, this means that managerial level employees must participate in or ratify the wrongdoing before punitive damages can be awarded. The principal may also be held for punitive damages if it is itself egregiously at fault, as by retaining an employee known to be dangerous; but in this case liability is personal, not vicarious.⁴²⁹

Dobbs's language should be familiar to any reader of the federal court decisions that deny vicarious liability for sexual harassment by supervisors. The similarity of the language used suggests that the unduly restrictive view of vicarious liability may derive, in part, from the misapplication of punitive damages law to the question of general liability.

Another possibility that warrants consideration is gender bias in the courts. Most federal court judges are men,⁴³⁰ as are most defendant supervisors. Similarly, most plaintiffs in such cases are women. Of the twenty sexual harassment circuit court opinions discussed in subparts II.B, III.A and IV.A of this Article,⁴³¹ fifty-six of the judges were men, while only four were women.⁴³² In every one of these

⁴²⁹ *Id.* § 3.11(6), at 495-96 (footnotes omitted).

⁴³⁰ As of late 1994, approximately 10% of all federal judges were women (219 women judges out of 2081 federal judges). BNA's DIRECTORY OF STATE AND FEDERAL COURTS, JUDGES, AND CLERKS 1994-95 ED. (1994).

⁴³¹ *Klessens v. United States Postal Serv.*, 42 F.3d 1384 (1st Cir. 1994); *Nichols v. Frank*, 42 F.3d 503 (9th Cir. 1994); *Bouton v. BMW of N. Am., Inc.* 29 F.3d 103 (3d Cir. 1994); *Steiner v. Showboat Operating Hotel*, 25 F.3d 1459 (9th Cir. 1994); *Karibian v. Columbia Univ.*, 14 F.3d 773 (2d Cir. 1994); *Davis v. Tri-State Mack Distribs.*, 981 F.2d 340 (8th Cir. 1992); *Kauffman v. Allied Signal*, 970 F.2d 178 (6th Cir. 1992); *Kotcher v. Rosa & Sullivan Appliance Ctr.*, 957 F.2d 59 (2d Cir. 1992); *Andrews v. City of Philadelphia*, 895 F.2d 1469 (3d Cir. 1990); *Paroline v. Unisys Corp.*, 879 F.2d 100 (4th Cir. 1989); *Steele v. Offshore Shipbldg., Inc.* 867 F.2d 1311 (11th Cir. 1989); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406 (10th Cir. 1987); *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554 (11th Cir. 1987); *Yates v. Avco Corp.*, 819 F.2d 630 (6th Cir. 1987); *Katz v. Dole*, 709 F.2d 251 (4th Cir. 1983); *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982); *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981); *Miller v. Bank of Am.*, 600 F.2d 211 (9th Cir. 1979); *Tomkins v. Public Serv. Elec. & Gas Co.*, 568 F.2d 1044 (3d Cir. 1977); *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977).

⁴³² The men, in the order of the cases appearing *supra* note 431 are: Bruce M. Selya, Frank M. Coffin, and Hugh H. Bownes (*Klessens*); Melvin T. Brunetti, Ferdinand F. Fernandez, and Stephen Reinhardt (*Nichols*); Timothy K. Lewis and Collins J. Seitz (*Bouton*); Alex Kozinski and Stephen S. Trott (*Steiner*); J. Daniel Mahoney, Joseph M. McLaughlin, and Gerald W. Heaney (*Karibian*); Richard S. Arnold, George G. Flaggs, and J. Smith Henley

cases, the plaintiffs were women—twenty-four in all. In every case, the alleged harassers were men, for a total of at least thirty-seven men.⁴³³ Professor Susan Estrich argues that sexual harassment law, like rape law, is one of the flash points that illustrate the gender bias of our legal system:

These very same doctrines, unique in the criminal law, are becoming familiar tools in sexual harassment cases. The rules and prejudices have been borrowed almost wholesale from traditional rape law. The focus on the conduct of the woman—her reactions or lack of them, her resistance or lack of it—reappears with only the most minor changes. The evaluative stance is distressingly familiar: One judges the woman's injury from a perspective which ignores women's views; or one compares her view to that of some ideal reasonable woman, or that of women afraid to speak out against harassment for fear of losing their jobs; and thus one applies a standard that the victim cannot and does not meet.⁴³⁴

Those who believe that Justice Thomas was himself committing hostile work environment sexual harassment in the early 1980s may voice yet another possible explanation.⁴³⁵ By criticizing the newly is-

(*Davis*); Danny J. Boggs, Alan E. Norris, and William O. Bertelsman (*Kauffman*); George C. Pratt, James L. Oakes, and Jon O. Newman (*Kotcher*); Edward R. Becker, Robert E. Cowen, and Max Rosenn (*Andrews*); Sam J. Ervin, Francis D. Murnaghan, Jr., and James Harvie Wilkenson, III (*Paroline*); Emmett Ripley Cox, Joseph W. Hatchett, and Frank M. Johnson, Jr. (*Steele*); William J. Holloway, Jr., Oliver Seth, and Sam A. Crow (*Hicks*); James C. Hill, and Elbert P. Tuttle (*Sparks*); David A. Nelson, Boyce F. Martin, Jr., and Harry W. Wellford (*Yates*); Sam Ervin, III, Robert F. Chapman, and James Dickson Phillips (*Katz*); Robert S. Vance and Thomas A. Clark (*Henson*), J. Skelly Wright, Aubrey E. Robinson, Jr., and Luther M. Swygert (*Bundy*); Walter T. McGovern, Ben Cushing Duniway, and John F. Kilkenny (*Miller*); Ruggero J. Aldisert, Max Rosenn, and Leonard I. Garth (*Tomkins*); and Spottswood W. Robinson, III, David L. Bazelon, and George E. MacKinnon (*Barnes*). The women, again in the order of the cases appearing *supra* note 431 are: Carol Los Mansmann (*Bouton*); Betty Fletcher (*Steiner*); and Phyllis A. Kravitch (*Sparks* and *Henson*).

⁴³³ We have only counted those men specifically identified. They are listed in the order of the cases as they appear *supra* note 431: William Russell and John Russell (*Klesens*); Ron Francisco (*Nichols*); Hans Duenzl and Carl Hooser (*Bouton*); Jack Trenkle and Dean Flurry (*Steiner*); Mark Urban and Mark Spillane (*Karibbean*); Butch Hogland (*Davis*); Donald R. Butts (*Kauffman*); Herbert Trageser (*Kotcher*); Frank Doyle and at least 3 unnamed officers (*Andrews*); Edgar L. Moore (*Paroline*); Anthony Bucknole (*Steele*); Mr. Holec and Mr. Gleason (*Hicks*); Dennis Long and Carl Connell (*Sparks*); Edwin Sanders (*Yates*); John Sullivan and at least 5 unnamed harassers (*Katz*); John Sellgren (*Henson*); Delbert Jackson, Arthur Burton, James Gainey, and Lawrence Swain (*Bundy*); unnamed harasser (*Miller*); unnamed harasser (*Tomkins*); and unnamed harasser (*Barnes*).

⁴³⁴ Estrich, *supra* note 43, at 815-16.

⁴³⁵ Anita Hill testified that Clarence Thomas began asking her out in late 1981, and that he began using "work situations to discuss sex" including "pornographic films involving such matters as women having sex with animals, . . . group sex or rape scenes, . . . materials depicting individuals with large penises or large breasts involved in various sex acts, [and] . . . of his own sexual prowess" in late 1981 or early 1982. *Hearings Before the Senate Comm. on the Judiciary*, 102d Cong., 1st Sess. 36-37 (1993) (testimony of Anita F. Hill, Professor of Law, University of Oklahoma). The harassment allegedly continued, intermittently, until the middle of 1983, when she left the EEOC. Former EEOC employee Angela

sued 1980 EEOC Guidelines as “unwise” and concerned with “trivial complaints,”⁴³⁶ and by using his position as Chair of the EEOC to urge the Supreme Court to ignore the Guidelines, now-Justice Clarence Thomas may have consciously or unconsciously allowed his own self-interest to play a role.

Whatever the reason, both the Government in its *amicus* brief and the Supreme Court majority in *Vinson* rendered a potentially clear issue of law confusing. With time, the confusion has only worsened.

VI

CALIFORNIA’S STATUTORILY IMPOSED ABSOLUTE LIABILITY FOR SUPERVISORIAL HARASSMENT—AN ALTERNATIVE APPROACH

California’s state employment discrimination law demonstrates that the confusion sown by *Vinson* and its progeny is unnecessary. As the federal courts continue to grapple with the question of whether, and when, an employer is vicariously liable for supervisorial hostile work environment harassment, California’s treatment of the issue is well settled. By codifying the 1980 EEOC Guidelines as state law, the California Legislature has provided, and the California courts have held, that employers are strictly liable for all sexual harassment committed by their supervisors.

Five years before the passage of the 1964 Civil Rights Act, California enacted its own employment discrimination statute, which was originally known as the Fair Employment Practice Act (FEPA).⁴³⁷ FEPA’s initial provisions closely paralleled those adopted in Title VII. Following a government re-organization in 1980, the Act has been known as the California Fair Employment and Housing Act (FEHA).⁴³⁸ Although FEHA’s underlying prohibitions are not identical to those of Title VII,⁴³⁹ both laws prohibit employment discrimina-

Wright submitted an affidavit to the Senate Judiciary Committee stating that Thomas harassed her from March of 1984 through April of 1985. See JANE MAYER & JILL ABRAMSON, *STRANGE JUSTICE, THE SELLING OF CLARENCE THOMAS* 131-35 (1994). Former EEOC employee Sukari Hardnett informed the Senate Committee that there was a “sexual dimension” to the attention Thomas paid her and other female employees during the period September 1985 through early 1986. *Id.* at 136-39. This was the period in which the Solicitor General and the EEOC were preparing the government’s brief in support of the employer in the *Vinson* case.

⁴³⁶ See *supra* note 260.

⁴³⁷ CAL. LAB. CODE §§ 1410-1433 (West 1989), *repealed by* 1980 Cal. Stat. 992 § 11, *re-enacted as* CAL. GOV’T CODE §§ 12900-12996 (West 1992 & Supp. 1995).

⁴³⁸ CAL. GOV’T CODE § 12900 (West 1992 & Supp. 1995).

⁴³⁹ The Act prohibits employment discrimination by employers of 5 or more persons, and harassment by employers of one or more persons, on the basis of race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, sex, age (over 40), or pregnancy. CAL. GOV’T CODE §§ 12926(c), 12940(h) (West 1992 & Supp. 1995).

tion, including harassment, on the basis of sex, race, religion, and national origin.

The development of an independent FEHA prohibition of sexual harassment began with the adoption of administrative regulations by California's equivalent of the EEOC, the Fair Employment & Housing Commission (FEHC), in 1980.⁴⁴⁰ The Regulations prohibit all harassment enumerated in FEHA, treating such conduct as a deprivation of equal terms, conditions, and privileges of employment.⁴⁴¹ Like the 1980 EEOC Guidelines, the Regulations divide harassment into environmental harassment and conditional harassment. Environmental harassment is defined to include: verbal epithets, derogatory comments, or slurs;⁴⁴² physical assaults, impeding or blocking movement, or physical interference with work;⁴⁴³ and visual forms of harassment, such as derogatory posters, cartoons, or drawings.⁴⁴⁴ Conditional harassment is specifically limited to situations in which unwanted sexual advances condition an employment benefit on performance of "sexual favors".⁴⁴⁵

The Regulations hold the employer liable for both conditional and environmental harassment committed by the employer's agents and supervisors.⁴⁴⁶ In the case of harassment by co-employees, the Regulations impose liability if the employer knows of the harassment and fails to take immediate and appropriate corrective action, or if the employer has constructive knowledge of the harassment. Constructive knowledge is inferred if the employer has not taken affirmative steps to prevent harassment from occurring.⁴⁴⁷ In these respects, the Regulations adopt the language of the 1980 EEOC Guidelines.

In 1982, the California Legislature amended FEHA⁴⁴⁸ to explicitly prohibit harassment on any basis covered by the Act, lifting parts

⁴⁴⁰ CAL. CODE REGS. tit. 2, § 7287 et seq. (1982).

⁴⁴¹ *Id.* § 7287.6.

⁴⁴² *Id.* § 7287.6(b)(1)(A).

⁴⁴³ *Id.* § 7287.6(b)(1)(B).

⁴⁴⁴ *Id.* § 7287.6(b)(1)(C).

⁴⁴⁵ *Id.* § 7287.6(b)(1)(D); *see also* § 7291.1(f)(1) (sexual harassment unlawful).

⁴⁴⁶ *Id.* § 7287.6(b)(2).

⁴⁴⁷ Harassment . . . is unlawful if the employer or other covered entity, its agents or supervisors knows of such conduct and fails to take immediate and appropriate corrective action. Proof of such knowledge may be direct or circumstantial. If the employer or other covered entity, its agents or supervisors did not know but should have known of the harassment, knowledge shall be imputed unless the employer or other covered entity can establish that it took reasonable steps to prevent harassment from occurring. Such steps may include affirmatively raising the subject of harassment, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under California law, and developing methods to sensitize all concerned.

Id. § 7287.6(b)(3).

⁴⁴⁸ The author assisted in the drafting of the amendment to the statute.

of its prohibition directly from the Regulations. The statute, as amended, provides that it is unlawful for employers, their agents, or other entities covered by the Act to engage in harassment of 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.⁴⁴⁹

Like the EEOC Guidelines, the amended FEHA requires employers to take precautionary measures to avoid liability in cases of harassment by nonsupervisors, but imposes vicarious liability when supervisors engage in harassment, regardless of the employer's diligence.

In the first reported sexual harassment decision under FEHA, *Fisher v. San Pedro Peninsula Hospital*,⁴⁵⁰ the California Court of Appeals held that the elements of an environmental sexual harassment case are those set forth in *Henson v. City of Dundee*,⁴⁵¹ including the requirement of *respondeat superior*. Unlike the federal court in *Henson*, however, the California court correctly applied the law of *respondeat superior*, holding that "an employer is 'strictly liable for the harassing conduct of its agents and supervisors'"⁴⁵² and harassment by non-supervisor co-employees only "where it, its agents or supervisors 'knows or should have known of this conduct and fails to take immediate and appropriate corrective action.'"⁴⁵³ The California court properly held that when the employee establishes that a supervisor sexually harassed her, the employer is vicariously liable despite its proper post-harassment conduct.

Fisher was applied in *Kelly-Zurian v. Wohl Shoe Company, Inc.*⁴⁵⁴ to affirm the grant of a plaintiff's motion for JNOV where a jury found the supervisor, but not the employer, liable for sexual harassment under FEHA. The trial court reasoned that if the supervisor was liable for sexual harassment, the employer must also have been liable because the statute holds the employer vicariously liable for any sexual

⁴⁴⁹ CAL. GOV'T CODE § 12940(h) (West 1992 & Supp. 1995) (originally enacted as 1982 Cal. Stat. 1184, § 1, and renumbered in 1987 Cal. Stat. 605, § 1(i)-(h)).

⁴⁵⁰ 262 Cal. Rptr. 842 (Cal. Ct. App. 1989).

⁴⁵¹ 682 F.2d at 903-05; see discussion *supra* part III.A.3.

⁴⁵² *Fisher*, 262 Cal. Rptr. at 851 n.6 (quoting *DFEH v. Bee Hive Answering Service*, FEHC No. 84-16, at 23 (1984)). The author, as director of the Boalt Hall Employment Discrimination Clinic, represented the DFEH in the *Bee Hive* case.

⁴⁵³ *Id.* (quoting *DFEH v. Madera County*, FEHC No. 88-11, at 22 (1988)). The author, as director of the Boalt Hall Employment Discrimination Clinic, represented the DFEH in the *Madera County* case.

⁴⁵⁴ 27 Cal. Rptr. 2d 457 (Cal. Ct. App. 1994).

harassment committed by the supervisor.⁴⁵⁵ The state court of appeals agreed, explaining that "harassment by a supervisor is unlawful regardless of whether the employer knows or should have known and fails to intervene."⁴⁵⁶

As these decisions illustrate, courts can easily apply the law of agency to the question of employer liability for sexual harassment by supervisors. With proper guidance from the Supreme Court or Congress, there is a simple solution to this exasperating problem.

CONCLUSION

To appreciate the significance of the vicarious liability problem to the resolution of sexual harassment cases, it is instructive to return once more to an illustrative hypothetical. A supervisor, on several occasions, describes his sexual exploits and fantasies to a subordinate employee and then asks her to do the same. She declines, asks him to stop, and then attempts to excuse herself from his presence, but his conduct continues. She tries to avoid contact with him and makes excuses to avoid being alone with him, but she does not complain to another supervisor or official. No specific adverse employment action has occurred; she has not been terminated, suspended, transferred, or otherwise disciplined. Nevertheless, her supervisor's conduct has altered the conditions under which she works, and she finds her job less satisfying and more stressful.

Under the common law of agency, the 1980 EEOC Guidelines, or California's FEHA, the employer would be vicariously liable for the employee's damages. Under Title VII as interpreted today, it probably would not. The employer could successfully argue in the Second Circuit, and perhaps in the Ninth Circuit, that if the supervisor is not an officer of the corporation, or an elected official of the government entity, the supervisor is not an agent as defined for purposes of Title VII sexual harassment.⁴⁵⁷ The employer could argue in the First,⁴⁵⁸

⁴⁵⁵ *Id.* at 465-66.

⁴⁵⁶ *Id.* at 466.

⁴⁵⁷ See *Kotcher v. Rosa & Sullivan Appliance Ctr., Inc.*, 957 F.2d 59, 64 (2d Cir. 1992) (discussed *supra* Introduction). *But see* *Karibian v. Columbia Univ.*, 14 F.3d 773, 780 (2d Cir. 1994) (discussed *supra* note 354).

⁴⁵⁸ See *Klessens v. United States Postal Serv.*, 66 Fair Empl. Prac. Cas. (BNA) 1630, 1634 (1st Cir. 1994) (discussed *supra* Introduction).

Third,⁴⁵⁹ Fourth,⁴⁶⁰ Sixth,⁴⁶¹ Eighth,⁴⁶² Ninth,⁴⁶³ Tenth,⁴⁶⁴ and Eleventh⁴⁶⁵ Circuits that even if the supervisor is an agent, the employee's failure to complain to the employer as an entity, instead of simply complaining to the harasser, immunizes the employer from liability. Even if she had complained, she could not recover for the damages she had already suffered if the employer had then acted to prevent further harassment.

Nothing in the language or purposes of Title VII supports such a result; nothing in the *Vinson* decision compels it. It violates the obligations traditionally imposed on employers under the law of agency and unduly complicates the litigation of Title VII actions. It singles out the victims of sexual harassment as less deserving of Title VII protection than victims of other types of discrimination or harassment and invites the diminution of other long-standing employment rights. The Supreme Court should take the first available opportunity to limit its *dicta* in *Vinson* and reinstate the 1980 EEOC Guidelines as a proper construction of the law of agency. If the Court fails to act, Congress should seek to amend Title VII in order to remain loyal to the law of agency and the purposes of the 1964 Civil Rights Act.

⁴⁵⁹ See *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1486 (3d Cir. 1990) (discussed *supra* part IV.A.1).

⁴⁶⁰ See *Paroline v. Unisys Corp.*, 879 F.2d at 106 (discussed *supra* part IV.A.2); *Katz v. Dole*, 709 F.2d 251, 255 (4th Cir. 1983) (discussed *supra* part III.A.3).

⁴⁶¹ See *Kauffman v. Allied Signal*, 970 F.2d 178, 185 (6th Cir.) (discussed *supra* part IV.A.1), *cert. denied*, 113 S. Ct. 831 (1992).

⁴⁶² See *Davis v. Tri-State Mack Distribs., Inc.*, 981 F.2d 340, 343 (8th Cir. 1992).

⁴⁶³ See *Nichols v. Frank*, 42 F.3d 503 (9th Cir. 1994) (discussion *supra* part IV.A.1).

⁴⁶⁴ See *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1411 (10th Cir. 1987) (discussed *supra* part IV.A.2).

⁴⁶⁵ See *Steele v. Offshore Shipbldg., Inc.*, 867 F.2d 1311, 1313 (11th Cir. 1989) (discussed *supra* part IV.A.1); *Sparks v. Pilot Fright Carriers, Inc.*, 830 F.2d 1554, 1558-59 (11th Cir. 1987) (discussed *supra* part IV.A.2), *Henson v. City of Dundee*, 682 F.2d at 904 (discussed *supra* part IV.A.1).