ERADICATING TITLE VII SEXUAL HARASSMENT BY RECOGNIZING AN EMPLOYER'S DUTY TO PROHIBIT SEXUAL HARASSMENT

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INTRODUCTION

"Wearing those clothes, she was asking for it." "Boys will be boys." "I was only kidding."[1] These are common cliches formerly accepted in defense of on-the-job Title VII[2] sexual harassment. Modern courts and investigative agencies[3] are increasingly less tolerant of such comments.[4] Employers[5] should, therefore, actively concentrate on eradicating sexual harassment

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1. Machlowitz, *How to Handle Sexual Harassment Claims*, 35 PRAC. LAW. 29, 33 (1989).

2. Pursuant to its authority under the Commerce Clause of the United States Constitution, Congress enacted the Civil Rights Act of 1964. Title VII of that Act [hereinafter Title VII], 42 U.S.C. §2000e-1 to §2000e-17 (1964), provides in part:

> (a) **Employer Practices.** It shall be an unlawful employment practice for an employer—
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> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin; or
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> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a).

3. The Equal Employment Opportunity Commission (EEOC) is the federal government agency responsible for the enforcement of Title VII. A sexual harassment victim must file a charge with the EEOC, within 180 days of the discrimination, before she can institute a civil action. If the victim's state has established a parallel state agency, the victim must file her claim with it first, and the EEOC will defer its investigation and any other action until that agency has reviewed the claim. Filing a claim with a state agency extends the time for making an EEOC complaint to within 300 days of the harassment.

Upon receipt of a completed claim, the EEOC will investigate and, if necessary, initiate an informal process designed to eliminate the illegal activity. If this process fails, the EEOC or the aggrieved party can bring a civil action against the employer. *See* 29 C.F.R. § 1601 (1989).

4. *But see* Staton v. Maries County, 868 F.2d 996 (8th Cir. 1989) (court held female harassment victim may have invited harassment and rape); Waltman v. Int'l Paper Co., 875 F.2d 468 (5th Cir. 1989) (manager told victim of physical, visual and verbal sexual harassment that she should "expect such behavior working with men").

5. An employer is defined as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar

problems in the workplace. This effort will prove enormous if all sexual harassment victims come forward.

There are two types of sexual harassment:[6] "quid pro quo" and "hostile environment." Quid pro quo harassment occurs when an employee is tempted with some tangible economic job benefit in exchange for acquiescence to a sexual request or is threatened with tangible economic damage if she does not acquiesce. The courts hold employers strictly liable for this type of harassment,[7] and this Note will therefore not address it. Hostile environment sexual harassment, however, does not involve a direct economic effect on one's job. Instead, it is characterized by inappropriate sexual conduct that alters the victim's employment conditions and creates an offensive work environment.[8]

This Note begins by briefly discussing the scope and gravity of the sexual harassment problem. It then traces the historical development of hostile environment harassment claims through *Meritor Savings Bank v. Vinson*,[9] the only United States Supreme Court treatment of the issue. This Note then briefly describes two similar duties: the modern duty to prohibit sexual harassment in the workplace that has resulted from Title VII and subsequent case law, and the traditional, preexisting duty to maintain a safe work environment, which encompasses the first. The Note then focuses on the modern duty in the context of numerous recent court decisions. Finally, it discusses the scope of the duty to prohibit sexual harassment and the importance of recognizing it as part of the larger duty to maintain a safe and healthy work environment.

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weeks in the current or preceding calendar year, and any agent of such a person but such term does not include ... the government of the United States." 42 U.S.C. § 2000e(b) (1988).

6. Sexual harassment is defined at 29 C.F.R. § 1604.11 (1985), within the EEOC's Guidelines on Discrimination on the Basis of Sex, and has been incorporated nearly verbatim into case law. The definition provides:

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

29 C.F.R. § 1604.11 (1985).

Though not denominated as separate types of harassment, the separate definitional sections have evolved into the two distinct types of sexual harassment. Generally, § 1604.11(a)(1) and (2) concern "quid pro quo" harassment, while § 1604.11(a)(3) refers to "hostile environment" sexual harassment. 29 C.F.R. § 1604.11 (1985).

7. Strict liability for quid pro quo harassment is imposed because a supervisor using his authority to affect an employee's professional status is necessarily acting within the scope of his employment. *See infra* notes 50-52 and accompanying text for further discussion of scope of employment and related agency principles.

8. Not all sexually inappropriate conduct is actionable as illegal harassment. *See infra* notes 39-49 and accompanying text (discussing Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986)).

9. 477 U.S. 57 (1986).

SCOPE AND GRAVITY OF THE PROBLEM

Women are the most frequent victims of sexual harassment,[10] and typically are harassed by men. Reports indicate that between forty-two and ninety percent of working women have been sexually harassed at work.[11] The 1981 Merit System Survey (*Survey*) provides the most extensive study of the incidence and nature of workplace sexual harassment. The *Survey* looked at the experiences of federal government employees based on over 20,000 completed questionnaires,[12] as did its update (*Update*), based on over 8,500 completed questionnaires.[13] Forty-two percent of the women answering the *Survey* and the *Update* had suffered on-the-job sexual harassment in their previous two years of employment.[14] A surprisingly large fifteen percent of the men had also experienced it.[15] The results would probably not have significantly differed had the private sector been surveyed. Most of the survey participants said they perceived no disparity in the frequency of harassment between the public and private employment sectors.[16] Because the survey was limited to the participants' last two years of employment, the actual number who *ever* experienced sexual harassment can only be higher.

The typical victim of harassment works simply to survive. Researchers Morse and Furst estimated in 1982 that two-thirds of working women must work, and half of all working women provide the sole or major financial support for their families.[17] In addition, women typically occupy positions that pay less than those of men.[18] Their need to work, coupled with the scarcity of high-paying jobs, prevents most women from leaving unsatisfactory employment. Many women simply endure the harassment.[19] This undesirable state of economic affairs prompted one court to refer to such working women as "economic prisoners."[20] In addition to contributing to women's tolerance of sexual harassment, their weak economic position may spotlight them as

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10. Although this Note refers to sexual harassment victims in the feminine and perpetrators in the masculine for convenience, men are also victims of sexual harassment perpetrated by both men and women.

11. C. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 26-32 (1979).

12. U.S. MERIT SYSTEM BOARD, OFFICE OF MERIT SYSTEMS REVIEW AND STUDIES, SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: IS IT A PROBLEM? (1981) [hereinafter SURVEY].

13. U.S. MERIT SYSTEM BOARD, OFFICE OF MERIT SYSTEMS REVIEW AND STUDIES, SEXUAL HARASSMENT IN THE FEDERAL GOVERNMENT: AN UPDATE (1988) [hereinafter UPDATE]. The employees were selected for the surveys by stratified random sample. *Id.* at 9.

14. SURVEY, *supra* note 12, at 34-36; UPDATE, *supra* note 13, at 2, 11.

15. SURVEY, *supra* note 12, at 34-36; UPDATE, *supra* note 13, at 2, 11 (14% of the men surveyed for the UPDATE, one percent less than that in the SURVEY, experienced on-the-job sexual harassment).

16. SURVEY, *supra* note 12, at 39-40. UPDATE, *supra* note 13, at 11.

17. D. MORSE & M. FURST, WOMEN UNDER STRESS 260 (1982).

18. *See generally* W. PEPPER & F. KENNEDY, SEX DISCRIMINATION IN EMPLOYMENT 13-16 (1981).

19. 52% of female sexual harassment victims who participated in the SURVEY and UPDATE studies simply ignored the unwelcome behavior or did nothing about it. UPDATE, *supra* note 13, at 24.

20. Phillips v. Smalley Maintenance Serv., 435 So. 2d 705, 711 (Ala. 1983).

targets for abuse by those with superior economic strength. One commentator analogizes this economic power to the force element of rape.[21]

The most serious effects of sexual harassment may be psychological. A victim is likely to feel alone, fearful, embarrassed, powerless, intimidated and demeaned.[22] She may also experience severe physical effects, including irritability, nausea, headaches, loss of concentration, dizzy spells, stomach aches, fatigue, muscle spasms, hypertension and psychogenic pain.[23] Victims' family lives can be disrupted or wrecked. Husbands may become angry or suspicious.[24] One alleged victim's father was so upset with the judge who ruled against his daughter that he murdered the judge and then committed suicide.[25]

More disturbing than the individual suffering of women and their families is the impact of harassment on the female work force as a whole. A victim of sexual harassment receives a symbolic message that her work is not taken seriously, but that her body or her sexuality is. Faced with the reality that her work is of secondary importance, she will often lose enthusiasm and reduce her efforts.[26] This is a vicious circle wherein poorly paid women endure sexual harassment, become disgusted with their careers and opportunities, perform below their potential, consequently fail to advance and remain "economic prisoners." Until sexual harassment is eliminated, women will be frustrated in their efforts to function in the market with the professional dignity and respect they have so diligently sought to achieve.[27]

Finally, the cost to employers attributable to sexual harassment is substantial. In a recent two-year period, sexual harassment cost the federal government, as an employer, an estimated $267 million.[28] Litigation and adverse judgments are expensive. Employers must pay for victims' sick leave, train new workers to replace those who leave their jobs due to the intolerable conditions, and suffer from decreased productivity. The decrease in productivity stems in part from the lowered moral of female employees and from the overburdening of coworkers of harassment victims that results when a disturbed victim is no longer able or willing to maintain the appropriate workload. Employers may also suffer non-monetary damage to good will and reputation.

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21. C. MACKINNON, *supra* note 11, at 217-18.

22. Bursten, *Psychiatric Injury in Women's Workplaces*, 14 BULL. AM. ACAD. PSYCHIATRY & L. 245, 248 (1986).

23. *Id.* at 249.

24. *Id.*

25. Kandel, *Sexual Harassment: Persistent, Prevalent, But Preventable*, 14 EMPLOYMENT REL. L.J. 439, 440-41 (1988) (referring to Koster v. Chase Manhattan Bank, 687 F. Supp. 848 (S.D.N.Y. 1988)).

26. *See generally* D. RUSSELL, SEXUAL EXPLOITATION (1984).

27. *See* Bennett v. Corroon & Black Corp., 845 F.2d 104 (5th Cir. 1988) (opinion by Judge Reavley). The plaintiff in that case was the brunt of crude and obscene drawings posted in the men's bathroom. Judge Reavley writes, "[a]ny reasonable person would have to regard these cartoons as highly offensive to a woman who seeks to deal with her fellow employees and clients with professional dignity and without the barrier of sexual differentiation and abuse." *Id.* at 106.

28. UPDATE, *supra* note 13, at 39-41.

HISTORICAL BACKGROUND

Sexual harassment on the job was largely ignored prior to the enactment of Title VII.[29] Relief was available only in the criminal law and common law tort arenas. Neither was a likely vehicle for success, however, and both featured legal doctrines ill-equipped to handle the types of injuries involved.[30] This section briefly discusses post-Title VII[31] federal court activity leading to the single United States Supreme Court treatment of hostile environment sexual harassment, *Meritor*, and looks at agency principles as recommended by *Meritor*.[32]

Hostile Environment Sexual Harassment Before Meritor

From the adoption of Title VII, when the word "sex" was hastily added to the statute in what many believe was an overt attempt by opponents to defeat its passage,[33] the fight against sex discrimination in employment has been an uphill battle. At first, sexual harassment claims of any type were rejected.[34] The courts held that the complained-of sexual conduct was unrelated to employment, frequently viewing it as a "personal proclivity" of the harasser.[35] Sexual harassment was not treated as sexual discrimination

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29. W. PEPPER & F. KENNEDY, *supra* note 18, at 37.

30. For an excellent analysis of current non-Title VII opportunities for recovery in sexual harassment cases, see Dworkin, Ginger & Mallor, *Theories of Recovery for Sexual Harassment: Going Beyond Title VII*, 25 SAN DIEGO L. REV. 125 (1988). *See also* Dolkart & Malchow, *Sexual Harassment in the Workplace: Expanding Remedies*, 23 TORT & INS. L.J. 181 (1987-88).

31. Despite greatly improved prospects for success, and a more tailored legal doctrine under Title VII, the harassment victim is not made whole. Federal courts uniformly hold that only equitable remedies such as reinstatement, behavior injunction or backpay are available under Title VII, although the statute does not specifically disallow non-equitable remedies. It does allow for attorney's fees. 42 U.S.C. §2000e-5(k) (1988). Without punitive damages, or at least compensatory damages, a victim may be left physically or psychologically damaged with no method to pay for her rehabilitation. Thus, a Supreme Court reversal of precedent or a legislative amendment to Title VII is required to correct this situation. Other writers similarly urge amending the statute. *See, e.g.*, Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV. L. REV. 1449, 1466-67 (1984); Note, *Legal Remedies For Employment-Related Sexual Harassment*, 64 MINN. L. REV. 151, 179 (1979); Note, *Employer Liability For Coworker Sexual Harassment Under Title VII*, 13 N.Y.U. REV. L. & SOC. CHANGE 83, 122 (1984-85); Note, *A Theory of Tort Liability For Sexual Harassment in the Workplace*, 134 U. PA. L. REV. 1461, 1495 (1986). *But see* Irvin Investors v. Superior Ct., 166 Ariz. 113, 800 P.2d 979 (Ariz. App. 1990) (worker's compensation only appropriate remedy in sexual harassment case involving employer negligence).

32. *See infra* notes 39-49 and accompanying text.

33. 110 CONG. REC. 2581 (1964) (statement of Rep. Greene).

34. For an argument that expanding Title VII to include sexual harassment was improper, see Note, *Sexual Harassment and Title VII- A Better Solution*, 30 B.C.L. REV. 1071 (1989). The author believes that the focus on sexual issues was never intended by Congress and, more importantly, deflects attention from important gender issues, such as withholding supervisor's privileges from a female supervisor while her male counterparts enjoy them. She does not advocate ignoring sexual harassment, however, and suggests that Congress enact new legislation specifically addressing the impropriety of sexual harassment at the workplace. *Id.*

35. *See, e.g.*, Corne v. Bausch & Lomb, Inc., 390 F. Supp. 161, 163 (D. Ariz. 1975).

actionable under Title VII until *Williams v. Saxbe*,[36] a quid pro quo harassment case. A hostile work environment harassment claim under Title VII was first recognized in a racial harassment context.[37] The hostile environment analysis was applied to all other forms of Title VII discrimination before it was finally applied to sex discrimination in 1981 in *Bundy v. Jackson*.[38]

Mechele Vinson Goes to the Supreme Court

The Supreme Court provided guidance on the hostile environment sexual harassment issue in *Meritor Savings Bank v. Vinson*,[39] in 1986. The Court unanimously validated the lower courts' uniform holding[40] that a Title VII violation may be established by proving that discriminatory actions based on sex created a hostile or abusive work environment.[41]

During her employment with Capital City Savings and Loan Association, Ms. Vinson allegedly was forced to submit to sexual advances, assaults and rape by her direct supervisor, Sidney L. Taylor, both during and after banking hours. She further alleged that Taylor exposed himself to her, caressed her on the job and followed her into the rest room when she went there alone. The district court, making an erroneous evidentiary ruling, disallowed her proffered testimony concerning Taylor's harassment of other female employees, as inappropriate for her case-in-chief.[42] The court of appeals concluded that the district court had not properly considered whether the evidence supported a claim for hostile environment sexual harassment,[43] considering instead only quid pro quo harassment.

The Supreme Court agreed with the court of appeals that Vinson's allegation required consideration in a hostile environment context, holding that for sexual harassment to be actionable, the acts must be sufficiently severe or pervasive "to alter the conditions of [the victim's] employment and create an

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36. 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). The *Williams* court found the plaintiff was subjected to sexual advances from her tormentor because she was a woman. The heterosexual supervisor would not have made such advances to a man. A case involving a bisexual actor behaving in an inappropriate sexual manner towards both sexes has not arisen. Presumably, the victims of such an actor's conduct would not be protected under Title VII because the actor would annoy both sexes equally, discriminating against neither. Dicta in many cases suggests bisexual harassment is not actionable under Title VII. *See, e.g.*, Jones v. Flagship Int'l, 793 F.2d 714, 720 n.5 (5th Cir. 1986), *cert. denied*, 479 U.S. 1065 (1987); Rabidue v. Osceola Refining Co., 805 F.2d 611, 620 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987); Vinson v. Taylor, 760 F.2d 1330, 1333 n.7 (D.C. Cir. 1985) (Bork, J., dissenting); Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982); Bundy v. Jackson, 641 F.2d 934, 942 n.7 (D.C. Cir. 1981); Barnes v. Costle, 561 F.2d 983, 990 n.55 (D.C. Cir. 1977).

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

38. 641 F.2d 934 (D.C. Cir. 1981). For fact patterns held actionable as hostile environment sexual harassment since *Bundy*, see Note, *Discrimination Law — Defining the Hostile Environment Claim of Sexual Harassment Under Title VII*, 11 W. NEW ENG. L. REV. 143 (1989).

39. 477 U.S. 57. The Supreme court has not spoken on the issue since *Meritor*.

40. *Id.* at 66.

41. *Id.*

42. Vinson v. Taylor, 753 F.2d 141, 143-44 (D.C. Cir. 1985).

43. *Id.* at 145.

abusive working environment."[44] It also held that the district court erroneously focused on the voluntary aspect of the victim's participation in the alleged sexual activity because the gravamen of any sexual harassment claim is whether the alleged sexual advance is welcome, not whether the victim's participation was voluntary.[45]

Unfortunately, the Court declined to answer the question of when an employer is liable for hostile environment sexual harassment,[46] but it did provide some clues. For example, unlike other Title VII scenarios,[47] employers are not automatically liable for sexual harassment perpetrated by their supervisors.[48] Instead, the Court held that Congress intended that the judiciary look to agency principles for guidance in this area.[49]

Pertinent Agency Principles

Courts generally do not hesitate to hold an employer liable for the wrongdoing of its employees committed while acting within the scope of their employment.[50] Though cast in the dated language of master and servant, the Restatement (Second) of Agency reflects this.[51] Problems with imputing liability to an employer usually arise when it is difficult to determine whether a servant is acting within the scope of his employment.[52] Yet even if the harassing employee acts entirely outside the scope of his employment, an

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44. 477 U.S. at 67 (citing *Henson*, 682 F. 2d at 904).

45. *Id.* at 68 (quoting 29 C.F.R. § 1604.11(a) (1985)).

46. *Id.* at 72 (the Court declined to reach this issue because the record was incomplete due to the trial court's improper focus on voluntary participation and its failure to apply the hostile environment standard).

47. *Id.* at 77-78 (Marshall, J., concurring). *See also* Note, *Employer Liability For Sexual Harassment: Inconsistency Under Title VII*, 37 CATH. U. L. REV. 245, 276 (1987).

48. *Meritor*, 477 U.S. at 72.

49. *Id.*

50. RESTATEMENT (SECOND) OF AGENCY §§ 228-37 (1958) [hereinafter RESTATEMENT 2D]. An employee acts within the scope of his employment if his conduct is the kind he is employed to perform, if it occurs substantially within his authorized work time and space limits and if it is actuated at least in part by a purpose to serve his master. For a comprehensive review of common law agency principles related to this subject, see generally RESTATEMENT 2D §§ 219-37, and Comment, *When Should an Employer Be Liable For The Sexual Harassment by a Supervisor Who Creates a Hostile Work Environment? A Proposed Theory of Liability*, 19 ARIZ. ST. L.J. 285 (1987).

51. RESTATEMENT 2D § 219(2) reads in full:

> (2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless
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> (a) the master intended the conduct or the consequences, or
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> (b) *the master was negligent or reckless*, or
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> (c) the conduct violated a non-delegable duty of the master, or
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> (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.

Id. (emphasis added).

52. Justice Marshall's plea for an expanded, broader view of "scope of employment" is persuasive. *See Meritor*, 477 U.S. at 76 (Marshall, J., concurring). Justice Marshall suggests that because a supervisor is charged with the day-to-day supervision of the work environment, not just with hiring and firing employees, that abuse of authority in that context should also result in employer liability. *Id. See also* Note, *Employer Liability under Title VII for Sexual*

employer can be held liable for its own negligence.[53] Because a finding of independent negligence requires proof of a duty to the victim and subsequent breach of that duty, the relevant inquiry in hostile environment cases becomes whether the employer owes a duty to its employees to provide a workplace free from sexual harassment. Most modern courts have responded with a resounding yes.

TWO DUTIES

The Evolving Duty to Provide a Safe, Harassment-Free Work Environment

Recent cases[54] almost uniformly hold employers liable for the sexual harassment of their supervisory and, significantly, their non-supervisory employees if the employer knew, or in the exercise of reasonable care should have known, of the harassment. This translates into widespread agreement that employers are responsible for the work environments they control. This responsibility is indicated by the courts' language. For example, *should*, an auxiliary verb, is nearly always used to indicate a duty. Likewise, the words "reasonable care," which permeate tort law, connote the existence of a duty. In short, the language and results of recent decisions clearly suggest that courts recognize a duty to maintain a work environment free from sexual harassment.[55] Savvy employers should no longer act without considering their responsibility for severe or pervasive sexual harassment that occurs in the workplace.

The reasons supplied by the courts for adopting this "duty to prohibit sexual harassment" are vague at best. Some do not even purport to directly follow agency principles. This Note scrutinizes five recent cases that illustrate this emerging duty. First, however, this Note highlights the employer's already existing duty to maintain a safe work environment, which should encompass the duty to prohibit sexual harassment. Yet, no court has applied this larger duty to the sexual harassment context, and no court to date has labeled sexual harassment as a dangerous work condition. This Note contends, however, that by adopting the duty to prohibit sexual harassment, courts are impliedly utilizing the previously existing duty to provide a safe work environment. Moreover, courts should acknowledge the connection because doing so would send a clearer message of probable liability to employers who already understand their duty to furnish a safe and healthy place to work.

Harassment After Meritor Savings Bank v. Vinson, 87 COLUM. L. REV. 1258 (1987); Comment, *supra* note 50.

53. RESTATEMENT 2D § 219(2)(b).

54. Although this Note focuses on language in the most recent cases, discussed below, similar language can be found in some earlier cases. *See, e.g.*, Katz v. Dole, 709 F.2d 251, 255 (4th Cir. 1983); Tompkins v. Pub. Serv. Elec. & Gas Co., 568 F.2d 1044, 1048-49 (3rd Cir. 1977). Significantly, this pre-*Meritor* language has been recognized as plainly adopting an ordinary negligence standard. *See* 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 (1988).

55. *See infra* notes 63-90 and accompanying text.

The Duty of an Employer to Furnish a Safe Workplace

Employees and courts both expect an employer to furnish a safe workplace. Courts have long held that an employer has a positive duty to provide a safe place for its employees to work.[56] Similarly, Congress has declared its policy to "assure so far as possible every working man and woman in the Nation safe and healthful working conditions"[57] because "personal injuries and illnesses arising out of work situations impose a substantial burden upon ... interstate commerce."[58] Employers have a statutory duty to furnish a workplace free from recognized hazards likely to cause death or serious physical harm.[59] As yet, however, Congress has not passed occupational safety or health standards[60] relating to health detriments caused by sexual harassment.

A safe workplace does not inherently diminish the health of its occupants. The health of an individual undeniably includes both physical and mental health. A workplace can not be safe, therefore, if any characteristic of the place, *including its known occupants*,[61] diminishes the mental or physical health of an employee. Past cases utilizing both the common law and statutory duties, however, almost uniformly dealt solely with the physical aspects of health.[62]

Sexual harassment damages the victims' mental and physical health. Therefore, a duty to prohibit sexual harassment should be included in the wider duty to maintain a safe work environment, at least insofar as sexual harassment is a physical injury. It may be viewed as a natural and appropriate extension of the wider duty insofar as sexual harassment is a psychological injury.

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56. *See* Barnette v. Doyle, 622 P.2d 1349 (Wyo. 1981) (employer held responsible for an employee's injury caused when a truck's brakes failed because the employer neglected to have them repaired); Siragusa v. Swedish Hosp., 60 Wash. 2d 310, 373 P.2d 767 (1962) (employer-hospital held liable when a low protruding hook on a door in the hospital injured someone standing in front of it at a wash basin).

57. 29 U.S.C. § 651(b) (1988).

58. 29 U.S.C. § 651(a) (1988).

59. 29 U.S.C. § 654(a) (1988).

60. 29 U.S.C. § 655 (1988 & Supp. 1989) (authority given to the Secretary of Labor to promulgate occupational safety and health standards); 29 C.F.R. § 1910 (resulting standards).

61. The ancient "fellow servant" tort rule provided that an employee assumed the risk of injury from his coworkers. Due in large part to workers' compensation, this "rule" has been abolished. Also, modern courts tend to require a subjective appreciation of a particular risk for it to be an "assumed risk." The assumed risk doctrine relieves employers of liability completely in most pure negligence jurisdictions and merely reduces employees' recoveries in comparative negligence jurisdictions. Jurisdictions applying comparative negligence standards use fault or assumption of the risk attributable to an injured party to limit recovery. *See* D. DOBBS, TORTS AND COMPENSATION 251-65 (1985). *See also* General Dynamics Corp. v. Occupational Safety and Health Review Comm'n, 599 F.2d 453 (1st Cir. 1979) (employer must do all it feasibly can to prevent foreseeable hazards, including halting dangerous conduct by its employees).

62. *See, e.g.*, Am. Textile Mfrs. Inst. v. Donovan, 452 U.S. 490 (1981) (statutory duty); Indus. Union Dep't v. Am. Petroleum Inst., 448 U.S. 607 (1980) (statutory duty); *Barnette*, 622 P.2d 1349 (common law duty); *Siragusa*, 60 Wash. 2d 310, 373 P.2d 767 (common law duty).

RECENT CASES ILLUSTRATING THE DUTY TO PROHIBIT SEXUAL HARASSMENT

The following cases are representative of hundreds of recent court decisions. Each was decided within the last two years and involves the issue of employer liability under Title VII for hostile environment sexual harassment. Each powerfully illustrates that courts consistently impose on employers a duty to prohibit sexual harassment.

Lipsett v. University of Puerto Rico (1988)

In *Lipsett v. University of Puerto Rico*,[63] the plaintiff, Anabelle Lipsett, was one of five women in a thirty-six person surgical residency program. She alleged that she was the target of numerous unwelcome sexual advances and was subjected to regular verbal and written sexually demeaning material, such as a posted list of sexually charged nicknames, of which the plaintiff's was Selastraga ("she swallows them whole"), and a posted sexually explicit drawing of her body. She also claimed she was treated less favorably than her male counterparts,[64] was forced to view *Playboy* centerfolds each day in the eating area, and frequently was told that women like herself did not belong in the surgical profession.[65] The plaintiff alleged that she was fired because she openly complained about her treatment.

The First Circuit Court of Appeals reversed the lower court's grant of summary judgment against Ms. Lipsett because she had made a *prima facie* showing of sexual harassment. It was willing to hold her employers liable for the illegal harassment if "an official representing that institution knew, or in the exercise of reasonable care, should have known, of the harassment's occurrence"[66] and remanded the case for this factual inquiry.

Before reaching its decision, the court considered the *Meritor* Court's instruction to "look to agency principles" for guidance in the employer liability area. It nevertheless declined to tie its holding to any specific agency principle, declaring instead that "the gist of [the *Meritor*] Court's holding is not to be gleaned from strict adherence to agency principles."[67]

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63. 864 F.2d 881 (1st Cir. 1988). Although this case arose under Title IX because of the educational setting, the court held that Title VII standards apply in a Title IX case involving sexual harassment. *Id.* at 897.

64. Harassment taking non-sexual forms may more appropriately be termed "gender discrimination." For an analysis of the differences between sex and gender discrimination, and an argument for their similar legal treatment, see *supra* note 36.

65. *Lipsett*, 864 F.2d at 886-94. Many other circumstances illustrated this prevalent, poor attitude toward women in the program. For example, no man had been discharged from the program for personality problems in the ten years prior to the suit, but three women including the plaintiff had been so discharged in the five years prior to the suit. *Id.* at 888.

66. *Id.* at 901.

67. *Id.* at 900. The court further stated:

> [W]e think it significant that the Court defined the parameters of such liability by further holding that an employer could be liable *even* when the employee alleging hostile environment harassment fails to notify the employer of his or her complaint, and *even* when such an employee fails to invoke an existing grievance procedure to protest the alleged harassment.

The *Lipsett* court then adopted the language, "knew or in the exercise of reasonable care should have known", citing *Katz v. Dole*,[68] a pre-*Meritor* case, as its source. *Katz* cites as its source two other pre-*Meritor* cases[69] (which arguably do not use this language) and a federal regulation.[70] Significantly, the Supreme Court did not approve this regulation's language in *Meritor*, though it existed and already had been used by some courts. In addition, the regulation does not expressly rely on any specific agency law principle.

The court in *Katz* refers to the language as "some theory of *respondeat superior*."[71] *Black's Law Dictionary* defines this term as a doctrine where the master is responsible for the want of care of his servant toward someone the master owes a duty.[72] Thus, profound question-begging seems to be occurring in *Lipsett*:

Q_1. Is the employer responsible?

A_1. Look to agency principles and/or the theory of *respondeat superior*.

Q_2. What do they say?

A_2. The master is liable if he owes a duty to the injured person.

Q_3. Well, does he owe a duty?

A_3. See A_1.

This renders it necessary to view the entire issue of employer liability pragmatically by asking whether the courts are imposing a duty on employers to prohibit sexual harassment, as the *Lipsett* court did. Finally, the *Lipsett* court held that if the institution took appropriate steps to halt the harassment (fulfilled its duty to prohibit sexual harassment when the need presented itself) it could be relieved of liability.[73]

Waltman v. International Paper Co. (1989)

In *Waltman v. International Paper Co.*,[74] the Fifth Circuit also found a duty, using an approach strikingly similar to the *Lipsett* court. It held that Susan Waltman made a prima facie showing of employer liability for sexual harassment. The fifth and final part of the court's five-part test for determining whether a plaintiff has established a prima facie case of sexual harass-

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Id. at 900-01 (emphasis in original).

68. 709 F.2d 251, 256 (4th Cir. 1983).

69. *Bundy*, 641 F.2d at 943; Henson v. City of Dundee, 682 F.2d 897, 905 (11th Cir. 1982) (citing *Bundy*). *Bundy* stated that an employer is liable for sexual harassment in the workplace if it knew or should have known of the conduct but clearly held that an employer is automatically liable for sexual harassment by a supervisor, which *Meritor* expressly refutes. *Bundy*, 641 F.2d. at 943.

70. 29 C.F.R. § 1604.11(d) (1980). This regulation, however, uses this language (employer is responsible for the acts of harassment occurring the workplace if it knew or should have known of them) in the context of fellow employees only.

71. 709 F.2d at 255.

72. BLACK'S LAW DICTIONARY 1179 (5th ed. 1979).

73. *Lipsett*, 864 F.2d at 901 (citing *Katz*, 709 F.2d at 256).

74. 875 F.2d 468 (5th Cir. 1989).

ment[75] addressed employer liability, stating that liability may be established if "the employer knew or should have known of the harassment in question and failed to take prompt remedial action."[76] On remand, the district court was instructed to decide whether the employer knew or should have known of the following factual allegations (whether there was a breach of the duty to prohibit sexual harassment): that Ms. Waltman was roughly grabbed on her breasts; that she was pinched on the rear with pliers; that she had obscenities about her broadcast over a loudspeaker system; that she received over thirty pornographic notes in her locker; and that she had to work in a physical environment containing sexually explicit graffiti, some of which was directed at her.[77]

The *Waltman* court noted much uncertainty in the law as to the type and quantity of employer notice required to sustain a Title VII sexual harassment claim.[78] But it explicitly declined to resolve the uncertainty because the question before it was merely whether the record contained sufficient evidence to demonstrate an issue existed as to notice.[79] The lower court was left to decide whether the employer knew or should have known of the harassment. With no other guidelines as to when an employer *should* have known something, a lower court can not escape using its own subjective judgement as to what is *reasonable.* In this way the appellate court adopted an ordinary negligence standard and imposed its corresponding duty.

Paroline v. Unisys Corp. (1989)

The *Paroline v. Unisys Corp.*[80] court described the duty to prohibit sexual harassment somewhat differently than the *Lipsett* and *Waltman* courts. It held that an employer has an affirmative duty, under certain circumstances, to take effective steps to *prevent* a victim's initial harassment.[81] Absent these preventative steps, the court will impose liability. It is unclear, however, what particular circumstances require an employer to prevent initial sexual

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75. The five elements necessary to establish a *prima facie* case are:
(1) [t]he employee belongs to a protected group...;
(2) [t]he employee was subject to unwelcome sexual harassment, i.e., sexual advances, requests for sexual favors, and other verbal and physical conduct of a sexual nature that is unwelcome in the sense that it is unsolicited or unincited and is undesirable or offensive to the employee;
(3) [t]he harassment complained of was based upon sex...;
(4) [t]he harassment complained of affected a "term, condition or privilege of employment," i.e., the sexual harassment must be sufficiently severe as to alter the conditions of employment and create an abusive working environment;
(5) [r]espondeat superior, i.e., that the employer knew or should have known of the harassment in question and failed to take prompt remedial action.
Id. at 477 (citing Jones v. Flagship Int'l, 793 F.2d 714, 719-20 (5th Cir. 1986), *cert. denied*, 479 U.S. 1065 (1987) (quoting *Henson*, 682 F.2d at 903-05)).

76. 875 F.2d at 477.

77. The case contains numerous additional allegations. *See id.* at 470-73.

78. *Id.* at 478.

79. *Id.*

80. 879 F.2d 100 (4th Cir. 1989).

81. *Id.* at 107. The court described two alternate theories that would subject Unisys to liability if proven; the one described in the text or Unisys's actual knowledge of the harassment and its subsequent failure to take remedial action "reasonably calculated" to end the harassment.

harassment.[82] Ms. Paroline specifically alleged that her employer knew that a former female employee was sexually harassed by Ms. Paroline's tormentor,[83] and the court deemed this fact to be highly relevant.[84]

Paroline, like *Lipsett*, does not refer to any specific agency principle underlying its decision. Like *Lipsett*, it cites *Katz* as authority for its holding that actual or constructive knowledge of sexual harassment coupled with inadequate or untimely remedial action results in employer liability.[85]

EEOC v. Hacienda Hotel (1989)

The Ninth Circuit, on the other hand, imposes a similar duty on *any* employer, not just one who was alerted to previous harassment perpetrated by a particular individual. In *EEOC v. Hacienda Hotel*,[86] it held that "employers are liable for failing to remedy or *prevent* a hostile or offensive work environment of which management-level employees knew, or in the exercise of reasonable care should have known."[87] In adopting this standard, the court acknowledged that the validity of the previous Ninth Circuit *respondeat superior* rule, which held employers liable for the harassing acts of their supervisory personnel despite contrary company policy, was questionable after *Meritor*. It further recognized that, post-*Meritor*, the appellate courts had difficulty with the issue of employer liability, and declared that it was adopting the prevailing trend of the case law.[88]

In this case, the plaintiffs were subjected to vulgar sexual slurs alluding mainly to their pregnancies. They were told, "that's what you get for sleeping without your underwear," that "women get pregnant because they like to suck men's dicks" and that they were "too fat to clean rooms."[89] One supervisor said that she did not like "stupid women who have kids".[90] The plaintiffs were also routinely called names such as "slut," "whore" and "dog," and were subjected to such offensive remarks as "[y]ou have such a fine ass. It's a nice ass to stick a nice dick into. How many dicks have you eaten?"[91]

The district court's finding of illegal sexual harassment and related liability was upheld based on the employer's actual and constructive knowledge of the gross harassment perpetrated by supervisors and co-workers.[92]

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82. *Id.* at 107. The court indicated that an employer who actually anticipated or should have anticipated harassment will be held liable, and that previous harassment or complaints of harassment will often prove highly relevant in determining whether an employer should have anticipated the harassment.

83. *Id.* at 103. In fact, it was alleged that Moore harassed many different women. His habits apparently included sexual innuendo and unwelcome touching of female employees. The final straw for Paroline was Moore's forcibly kissing her and rubbing her back when he gave her a ride home during a rainstorm.

84. *Id.* at 107.

85. *Id.* at 106.

86. 881 F.2d 1504 (9th Cir. 1989).

87. *Id.* at 1515-16 (emphasis added).

88. *Id.* at 1515.

89. *Id.* at 1507-08.

90. *Id.*

91. *Id.*

92. *Id.* at 1516.

The employer failed miserably in its duty to maintain a harassment-free work environment.[93]

Brooms v. Regal Tube Co. (1989)

In *Brooms v. Regal Tube Co.*,[94] the Seventh Circuit dealt with both racial and sexual harassment of Helen Brooms, a black female employee. On different occasions Ms. Brooms' supervisor showed her pornographic photographs of black women engaged in bestiality or sodomy. He told her she was hired for the purpose depicted in one of the pictures. He also grabbed her arm and threatened to kill her when she attempted to grab a photocopy of one of the photos.[95] He also frequently subjected her to sexual and racial slurs, and directly propositioned her.[96]

The court adopted a standard similar to those of other circuits, casting its holding in terms of a reasonable employer and a reasonable employee. It held that a court may impose liability on an employer for violating Title VII only upon a showing that the harassing conduct would interfere with a reasonable person's work performance and well-being and that it so affected the specific employee.[97] The court held that a reasonable employee[98] in Ms. Brooms' predicament would be offended and a reasonable employer would respond differently to the situation.[99] Employers in the Seventh Circuit will be held to a duty to protect employees from sexual harassment. Thus, the Seventh Circuit also adopted an ordinary negligence standard as opposed to relying on an agency principle as recommended by *Meritor*.

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93. *Id.* The employer was also held culpable for illegally terminating employees based on their pregnancies, failing to accommodate employees' religious beliefs, and illegally retaliating for the plaintiffs' opposition to the widespread discriminatory employment practices.

94. 881 F.2d 412 (7th Cir. 1989).

95. *Id.* at 417.

96. *Id.* at 416-17.

97. *Id.* at 419.

98. A clearer, more appropriate standard for cases involving harassment of a female would be the reasonable woman standard. It makes little sense to ask whether a reasonable *man* would be offended by conduct insulting to his femininity. Likewise, a reasonable man standard could be used if the victim were a man. *See* Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV. L. REV. 1449, 1459-60 (1984) (by adopting a woman's point of view as the norm, courts can heighten sensitivity to the effects of offensive behavior in the workplace); C. MACKINNON, *supra* note 11, at 167.

99. *Brooms*, 881 F.2d at 419 (reasonable employee), 421 (reasonable employer). The court did not indicate exactly how a reasonable employee acts. It did indicate, however, that the determination should be made case-by-case. "An employer's response to alleged instances of employee harassment must be reasonably calculated to prevent further harassment *under the particular facts and circumstances of the case at the time the allegations are made.*" *Id.* at 421 (emphasis added). In this case the response consisted only of initial interviews with the accused and the accuser, a postponement of the accused's merit increase and a verbal reprimand. The court seemed to place significance on the fact that the employer did not conduct follow-up interviews. *Id.* at 421 n.5.

SCOPE AND IMPORTANCE OF THE MODERN DUTY

Inherent Limits on the Modern Duty

Recent case law indicates that the courts finally are providing ammunition to sex-discrimination opponents. The duty the courts are imposing, however, is not boundless. There are inherent limits on the employer's duty to prohibit sexual harassment. One limit, articulated in *Meritor Savings Bank v. Vinson*,[100] is that the offending employee's conduct must be "sufficiently severe or pervasive" to alter the conditions of the complainant's work environment.[101] An employer that knowingly allows its employees to be hurt and harassed because of immutable characteristics like sex, race, religion or national origin is blameworthy, as is one that remains negligently ignorant of severe or pervasive harassment.[102] Because an employer is "unlikely to know or have reason to know of casual, isolated, and infrequent slurs,"[103] it follows that it will not be held culpable for failing to discover and take remedial action for such acts.[104] Claims which do not allege the required standard of severity or pervasiveness will fail,[105] and an employer will not be held to a duty to prevent less severe or pervasive conduct. Thus, an employer will not be responsible for the most difficult type of harassment to detect, that which is not egregious or frequent. It is true that a more extensive rule or duty might have a chilling effect on communications and friendships among the sexes or on the hiring of women. By its terms this duty prevents misconduct, however, which seldom secures friendships or meaningful communications, and is seldom expected to do so by the perpetrator.

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100. 477 U.S. 57.

101. *Id.* at 67.

102. This author suggests the following factual inquiries to help attorneys determine whether an employer's duty to prohibit sexual harassment has been reasonably accomplished:

(1) Were there physical, visible signs of sexually offensive conduct or material on the premises?
(2) Was sexually offensive speech permitted to continue when heard by or reported to any supervisory personnel?
(3) Were there any signs of an unwelcome physical relationship?
(4) Were there any direct employee complaints to the employer?
(5) Had there been any previous complaints of a sexually offensive environment from former employees, and, if so, were the conditions existing when those complaints were received changed in any substantial way?
(6) Did the employer have a written policy prohibiting its employees from engaging in any harassing behavior based on sex? If so, was it enforced?
(7) Were employees, especially supervisory employees, trained to recognize behavior qualifying as sexual harassment?
(8) Was there an accessible, effective grievance procedure for employee-victims of harassment?

103. Hunter v. Allis-Chalmers Corp., 797 F.2d 1417, 1422 (7th Cir. 1986).

104. *Id.*

105. Many have already failed on this ground. *See, e.g.*, Dwyer v. Smith, 867 F.2d 184 (4th Cir. 1989) (inappropriate language referring to sex not at level to qualify as sexual harassment); Bennett v. Corroon & Black Corp., 845 F.2d 104 (5th Cir. 1988) (record provided meager proof of the conditions required by *Meritor*, but was decided on other grounds); Ebert v. Lamar Truck Plaza, 878 F.2d 338 (10th Cir. 1989) (record did not clearly justify overruling the lower court's finding that the conduct had not reached the level of pervasiveness or severity required by *Meritor*).

The other major limit on employer liability is the fulfillment of the employer's duty to keep the workplace free of sexual harassment through post-conduct remedial action. Case law and fairness to employers mandate that if an employer promptly does all that is reasonable after actual or constructive notice of an unsafe environment, it can not be held liable. Courts have already refused to hold employers liable in such situations.[106]

Some fear that too much emphasis on quick and efficient remedial action might prompt employers to fire the accused perpetrator first and ask questions later.[107] But employers investigate other job-related complaints without great fear of mistake. There is no reason to think they will act rashly in this context. Furthermore, failing to take prompt corrective action when appropriate might expose the harassment victim to further injury.

Importance of Employer Duty

Numerous public policy reasons support holding employers liable for harassment of their employees on the job. First, an employer is best able to aid in eradicating the harassment. If employers are serious about eliminating harassment, their employees know it. Nearly everyone needs to work, and few are willing to jeopardize their job by harassing coworkers. Employees are a captive audience for a serious anti-harassment message. Employers are able to reach the greatest number of people.

Judge Jones, in her *Waltman*[108] dissent, argues that it is unfair to hold an employer to a duty to police the workplace because there is "so little social consensus in sexual mores nowadays."[109] It may be that certain visual and auditory stimuli, once taboo, are more easily accessible and accepted today. It does not follow, however, that an employee should be forced to view or listen to such stimuli just because she must work. Further, many sexual acts in the workplace are still unquestionably improper.

Second, employers can best afford to implement methods for doing away with harassment. Employers are understandably wary of additional expenses. But they profit from their employees' work, and eliminating harassment will not constitute such a hardship as to force an employer out of business or severely decrease his profits. It is more likely that increased productivity of employees, especially female ones, will result from the improved environment and outweigh the minimal costs of the improvement. Indeed such costs are normal business expenses[110] and employers can most efficiently spread the costs.

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106. *See, e.g.*, Steele v. Offshore Shipbuilding Inc., 867 F.2d 1311 (11th Cir. 1989) (employer not liable when sexual harassment ended immediately after remedial action taken against perpetrator of harassment); *Bennett*, 845 F.2d at 106 (employer's actions, providing plaintiff with all the relief to which she would be entitled under Title VII, were "appropriate remedial action" in any sense).

107. *See, e.g., Paroline*, 879 F.2d at 115 (Wilkinson, J., dissenting in part) (only safe recourse left open to employer is to act on accusation).

108. 875 F.2d at 468, 462 (Jones, J., dissenting).

109. *Id.* at 484.

110. For a similar argument urging courts to adopt a "risk of business" approach, see Note, *supra* note 52, at 1277.

Finally, because people spend a huge portion of their lives working, healthy attitudes present in a work environment will carry over somewhat into their everyday leisure lives.[111]

Employers thus play the starring role in ending sexual discrimination. It follows that they must recognize the burdens placed upon them if they are to perform well. Employers instinctively understand their responsibility to maintain safe and healthy working conditions, whether or not they diligently adhere to it. Optimally, Congress will enact occupational safety and health standards relating to the health dangers of sexual harassment. Absent such legislation, employers are subject to the strictures of Title VII, and it is becoming clear that courts hold employers to a duty to prohibit sexual harassment.[112] Therefore, if employers treat sexual harassment as an unsafe and unhealthy work condition, they will more effectively limit its incidence and be able to more accurately predict liability.

CONCLUSION

Sexual harassment is a societal disease without a cure. Treatment is available, however. The legal system's increasingly sophisticated treatment of the problem has somewhat paralleled society's growing sophistication in dealing with the overall treatment of women. Indeed, sexual harassment is due in large part to a prevailing poor perception of women. Ironically, the same harassment that is a product of low esteem for women can diminish women's perceptions of themselves.

The courts already attack the problem by imposing liability on employers who allow harassment to occur or continue when they know or should know of the conduct. This whole approach, focusing on what *should* have been known, strongly suggests a responsibility: a duty. When modern courts appropriately hold employers to a duty to eradicate sexual harassment, they are not doing anything rash or new. Indeed, it is conceptually part of the long-existing duty to maintain a safe work environment. Sexual harassment should be treated like the dangerous employment condition it is, like a protruding metal hook on a door. Optimal progress can not be made until all concerned treat harassment as a safety and health problem and recognize an employer's duty to prevent it at the workplace. Employers have an obvious financial interest in realizing that this duty is being readily recognized. Lawsuits cost money and troubled employees are unproductive employees. When all employers accept their responsibility to eradicate harassment in their domains, it will perish.

111.

> In essence, while Title VII does not require an employer to fire all "Archie Bunkers" in its employ, the law does require that an employer take prompt action to prevent such bigots from expressing their opinions in a way that abuses or offends their co-workers. By informing people that the expression of racist or sexist attitudes in public is unacceptable, people may eventually learn that such views are undesirable in private, as well. Thus Title VII may advance the goal of eliminating prejudices and biases in our society.

Davis v. Monsanto Chem. Co., 858 F.2d 345, 350 (6th Cir. 1988), *cert. denied*, 490 U.S. 1110 (1989).

112. *See supra* notes 63-93 and accompanying text.