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What Is It Good For? Absolutely Nothing: Eliminating Disparate Treatment of Third Party Sexual Harassment and All Other Forms of Third Party Harassment

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What Is It Good For? Absolutely Nothing: Eliminating Disparate Treatment of Third Party Sexual Harassment and All Other Forms of Third Party Harassment

I. INTRODUCTION

II. HISTORY OF FEDERAL HARASSMENT LAW
   A. Legal Basis for Sexual Harassment
   B. Sexual Harassment: The Doctrine Explained
      1. The Contribution of the EEOC
      2. Elements: Protected Category, Unwelcome Conduct, Based on Sex
      3. Types of Harassment: Quid Pro Quo and Hostile Environment
      4. Employer Liability
         a. Where Supervisors Sexually Harass Employees
         b. Where Co-Workers Sexually Harass Employees
   C. Other Forms of Harassment—Striking Similarity
      1. Racial Harassment
      2. Religious and National Origin Harassment

III. THIRD PARTY SEXUAL HARASSMENT
   A. The History of Third Party Sexual Harassment
   B. Arguments in Favor of and Against Employer Liability for Third Party Sexual Harassment
   C. Landmark Cases: The Doctrine Developed

IV. EXTENDING THIRD PARTY SEXUAL HARASSMENT
   A. Close Calls and Failed Adoptions
      1. EEOC Proposed Amendment
      2. Rosenbloom: A Third Party Racial Harassment Case
   B. California as a Case in Point
   C. Promoting Consistency Between the Law and the Spirit of the Law

V. CONCLUSION
Laura, a colleague of mine, worked as an administrative assistant at a well-known law firm. Her job consisted of answering phones, dealing with paperwork, greeting the clients, and helping the attorneys in various matters. For the last few years she worked at the firm, she endured sexually charged comments made by a consultant from a government agency who came into the firm to aid the attorneys in certain cases. He would send Laura emails after the workday was over, commenting on her appearance that day—"That sweater looked really good on you," and "You looked beautiful today." He also made more overt comments at work, such as "You have a great body" and "I'd love to have a better look at it later." The comments were ongoing, occurring almost daily, and they made her feel extremely uneasy. But because the firm viewed him as important to the success of the cases, and consequently the law firm, Laura never felt comfortable complaining. She felt that if the firm had to choose between her and the consultant, it would invariably pick the consultant.

Now imagine that Laura is a Muslim woman originally from Saudi Arabia. She has a noticeable accent and wears traditional garb, including a birkah. Regardless, the firm takes on a client whom it knows to have a bias against people from the Middle East, and especially people of the Islamic faith. Every time the client comes into the firm, he makes derogatory comments about Laura's religion and national origin, making sure that she hears. He repeatedly says that "Middle Eastern people smell bad," "Saudis are crazy camel jockeys," and "Americans have not forgotten that Saudis take hostages to further their Muslim crusade." This time, Laura does complain to her supervisor at the firm, and in return she is terminated. She wants to file a discrimination and harassment suit against her employer, but

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1. The name has been changed to protect the privacy of the individual.
2. Had Laura filed a suit for third party sexual harassment, she most likely would not have prevailed. In order to have a successful claim, the plaintiff must establish that the employer knew or should have known about the harassment. Because Laura did not complain, the employer most likely did not have the requisite knowledge to be held liable for third party sexual harassment. See, e.g., Magnuson v. Peak Technical Servs., Inc., 808 F. Supp. 500, 512-13 (E.D. Va. 1992).
3. These facts are reminiscent of a third party racial harassment case which took place in England. See Burton v. De Vere Hotels, 1997 I.C.R. 1 (Employment App. Trib. 1996). A local civic group invited a comedian to perform for them at a hotel. Id. at 4. The hotel manager knew the comedian was coming and also knew the comedian was likely to make sexually explicit jokes. Id. During the comedian's show, he made sexual comments to two black waitresses, employed by the hotel, who were just trying to serve customers. Id. The comedian also made jokes about the sexual abilities of black men and women and used terms such as "nigger" and "sambo." Id. The English court found that the manager had control over the event and should have asked his assistants to keep an eye on the comedian and withdraw the waitresses if things became unpleasant. Id. at 11. Therefore, the employer was held strictly liable for the harassing conduct of the comedian, a third party. Id. at 13. For a more detailed discussion of this case, see Robert E. Wone, Comment, How Free is Harassment Free? Employer Liability for Third-Party Racial Harassment, 2 U. PA. J. LAB. & EMP. L. 179, 179, 197-98 (1999).
she is told by her attorney that there is no remedy under law for this type of harassment.

It is easy to conceive of a customer at a coffee shop tapping a waitress's behind as she walks past. Or a male client, once part of the good ol’ boys’ club, making inappropriate comments of a sexual nature to a female associate. This is known among the legal community as third party sexual harassment, and employers may be held liable for it.4

But doesn’t it seem just as easy to conceive of a customer or client making racially-charged comments to an employee? Demeaning an employee based on color, religion or sexual orientation? Unfortunately, the law as it stands now protects one but not the other. Employers are liable for the sexual harassment of an employee by a third party, such as a customer, client or vendor.5 However, if the same third party harasses an employee based on anything other than sex, the employer is not held responsible.

Title VII6 was enacted to eliminate all discrimination and harassment based on sex, race, color, national origin and religion from the workplace.7 It has been utilized to advance workplace equality and to maintain the dignity of all employees.8 The standards set forth concerning all forms of harassment, ostensibly to further these goals, are extremely similar.9 Indeed, the Supreme Court has advocated harmonizing these standards.10 Because third party harassment on the basis of race, religion and national origin is comparable to third party sexual harassment, Title VII should be construed so as to prohibit all third party harassment.

This article will trace federal harassment law, highlighting the similarities between the various standards. Part II encompasses the history of sexual harassment, which is followed by a discussion of racial, religious and national origin harassment. After addressing the similarities between these forms of harassment, the doctrine of third party sexual harassment is examined through various federal cases in Part III. The argument section

4. See discussion infra Part III.
5. The term “third party” denotes any person who is not directly related to the workplace in that he or she is not a supervisor or co-worker. It includes a customer, client, supplier, vendor and any non-employee. See Robert J. Aalberts & Lorne H. Seidman, Sexual Harassment of Employees by Non-Employees: When Does the Employer Become Liable?, 21 PEPP. L. REV. 447, 449 (1994).
7. See discussion infra Part II(A).
8. King v. Hillen, 21 F.3d 1572, 1582 (Fed. Cir. 1994) (“The purpose of Title VII is to . . . liberate the workplace from the demeaning influence of discrimination, and thereby to implement the goals of human dignity and economic equality in employment.”)
9. See discussion infra Part II.
10. See Faragher v. City of Boca Raton, 524 U.S. 775, 787 n.1 (1998); see also infra text accompanying note 164.
follows in Part IV, in which it is suggested that employer liability should be extended to all third party harassment, and the standard for such liability is proposed. Finally, in Part V, this article concludes that, along with the extension of employer liability to all forms of third party harassment, prevention is the best tool to eliminate harassment and discrimination in the workplace.

II. HISTORY OF FEDERAL HARASSMENT LAW

A. Legal Basis for Sexual Harassment

Sexual harassment law owes its origin to Title VII, which was enacted in 1964. The Title delineates unlawful employment practices, making it illegal for employers 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." However, sexual harassment was not recognized as a cause of action under Title VII until 1986 in Meritor Savings Bank, FSB v. Vinson. In Meritor, a bank employee was consistently subjected to sexual harassment by the Vice President of the bank during her four years of employment. The Court acknowledged that "when a supervisor sexually harasses a
subordinate because of the subordinate’s sex, that supervisor ‘discriminate[s]’ on the basis of sex.”15 In addition, any sexual harassment which affects the “terms, conditions, or privileges of employment” violates Title VII.16 Although Meritor was vital in verifying that sexual harassment is a form of sex-based discrimination, it did not fully elucidate the doctrine.17 Later cases were handed down, however, which would give lower courts more guidance.18

B. Sexual Harassment: The Doctrine Explained

1. The Contribution of the EEOC

The decision in Meritor was partly based on the guidelines set forth by the Equal Employment Opportunity Commission (EEOC).19 The EEOC was created as the agency which enforces Title VII.20 It receives, investigates, evaluates, pursues and authorizes the private pursuit of charges of unlawful employment practices.21 The EEOC also publishes guidelines, which, “while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.”22

Courts have generally adopted the EEOC’s definition of sexual harassment, and use it to determine whether sexual harassment has occurred.23 The elements of sexual harassment recognized by the majority of courts are: 1) the plaintiff belongs to a protected category; 2) unwelcome

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15. Id. at 64.
17. The Supreme Court did not lay out the specifics of sexual harassment as far as the necessary elements or the basis for employer liability. See id.
18. For a discussion of these cases and the sexual harassment doctrine, see infra Part II(B).
19. Meritor, 477 U.S. at 65. The EEOC guidelines, set forth in 1980, asserted that harassment on the basis of sex is a violation of Title VII. See id. (quoting 29 C.F.R. § 1604.11(a) (1985)).
21. Id. § 2000e-5(b). In order to prevail in federal court, the plaintiff must have filed a claim with the EEOC within 180 days, or 300 days if the employee has already filed with a state or local agency, of the incident in an effort to exhaust all administrative remedies. Id. § 200e-5(e)(1). Otherwise, the defendant has a procedural affirmative defense. See Gantt v. Security, USA, Inc., 356 F.3d 547, 551 (4th Cir. 2004).
23. 29 C.F.R. § 1604.11(a) (2004).
conduct of a sexual nature; 3) based on sex; 4) affecting a term or condition of employment; and 5) employer liability.

2. Elements: Protected Category, Unwelcome Conduct, Based on Sex

The first element, that the plaintiff belongs to a protected category, in this case 'sex,' is easily satisfied. The only requirement is that the plaintiff be either a man or a woman. The second element—the sexual conduct was unwelcome—is often the hardest to prove. Sexual conduct can range from the very obvious and explicit, such as propositions or sexist comments, to the implicitly offensive, like requests for a date or unexpected gifts. However, the "gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome.'" A relationship may be voluntary while still constituting "unwelcome," but the voluntary nature of the relationship increases the difficulty of proving that the harassment was actually unwelcome. The third element is that the harassment is based on sex—that it would not have occurred but for the sex of the employee.

3. Types of Harassment: Quid Pro Quo and Hostile Environment

The conduct must also meet a certain standard of harassment—it must affect a term or condition of employment. There are two types of harassment originally set forth in the EEOC guidelines:

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either

24. See Henson v. City of Dundee, 682 F.2d 897, 903-05 (11th Cir. 1982); see also Swentek v. USAIR, Inc., 830 F.2d 552, 557 (4th Cir. 1987) (stating the elements required to prove a claim that sexual harassment has created a hostile or abusive work environment).


26. Both the EEOC guidelines and the courts require the harassment to be unwelcome. 29 C.F.R. § 1604.11(a) (2004).


29. Id. In Meritor, the Court held that even though Vinson and Taylor's relationship was initially voluntary, the voluntary nature of the sex-related conduct was not a defense to a sexual harassment suit. Id. The correct inquiry is whether the conduct was unwelcome. Id. The Court pointed out that this would likely introduce problems of proof and elevate credibility issues in sexual harassment cases. Id.


390
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.\(^3\)

The first two situations are examples of quid pro quo harassment while the last constitutes hostile environment harassment.\(^3\)

Quid pro quo occurs when a supervisor or someone in a position of authority uses the acceptance or rejection of sexual advances as a basis for an employment decision.\(^4\) The classic example is the cliché “Have sex with me or you are fired.” Because pay, promotions, bonuses and even employment are involved, quid pro quo harassment generally results in economic or tangible losses if the employee refuses the supervisor’s advances.\(^3\)

Hostile environment harassment, however, generally does not involve economic or tangible losses.\(^3\) The conduct need not even affect the employee’s psychological well-being or cause the employee to suffer injury.\(^3\) A hostile environment results when the harassing conduct unreasonably interferes with an individual’s work performance or creates an intimidating, hostile, or offensive work environment.\(^3\) In *Harris v. Forklift Systems, Inc.*,\(^3\) a manager was often insulted because of her gender by, and endured unwanted sexual innuendos from, the president of the company.\(^4\)

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32. 29 C.F.R. § 1604.11(a) (2004).
34. See id. at 65.
35. See, e.g., *Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311, 1315 (11th Cir. 1989) (noting that quid pro quo harassment often occurs “when an employer alters an employee’s job conditions as a result of the employee’s refusal to submit to sexual demands”).
36. *Merit*, 477 U.S. at 64. The Court found the basis for hostile environment harassment in Title VII because the congressional intent of the law was to “‘strike at the entire spectrum of disparate treatment of men and women’ in employment, which includes requiring people to work in a discriminatorily hostile or abusive environment.” *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (quoting *Merit*, 477 U.S. at 64).
37. *Harris*, 510 U.S. at 21. The Court resolved a conflict among circuits as to whether the employee must be psychologically injured in order to prevail on a hostile environment claim by concluding that it is not necessary. Id. at 20-21.
40. Id. at 19. The president made statements such as, “You’re a woman, what do you know,” and “We need a man as the rental manager.” Id. He also suggested to Harris, in the presence of
The Court utilized this case in order to set forth the standard to prove hostile environment.\(^4\)

First, the Court addressed the question of what type of behavior qualifies as hostile environment harassment.\(^4\) Only conduct “sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment” can qualify as such harassment.\(^4\) In addition, the harassment not only must be severe or pervasive enough to create an objectively hostile environment so that a reasonable person would find it hostile or abusive, but the victim must also subjectively perceive the environment to be abusive.\(^4\) Therefore, in order for the conduct to qualify as hostile environment harassment, the behavior must be both objectively and subjectively severe or pervasive.\(^4\)

The Court also considered a test to determine whether an environment is hostile or abusive.\(^4\) It rejected a precise test in favor of a totality of the circumstances approach.\(^4\) In deciding whether an environment was actually hostile or abusive, courts should look at all the circumstances, including the “frequency of the discriminatory conduct; its severity; whether it is

other employees, that they “go to the Holiday Inn to negotiate [her] raise.” \(^{1d}\) Finally, he threw objects on the ground and asked her and other female co-workers to pick them up. \(^{1d}\)

41. See \(^{1d}\) at 20-23.
42. See \(^{1d}\) at 21-22.
43. \(^{1d}\) at 21 (reaffirming the standard introduced in \(^{4}\) Meritor, 477 U.S. at 67). The Meritor Court was careful to advise that not all workplace conduct which affects the terms, conditions, or privileges of employment is actionable under Title VII. \(^{4}\) Meritor, 477 U.S. at 67. For instance, the “mere utterance of an... epithet which engenders offensive feelings in an employee” is not sufficiently severe or pervasive to constitute hostile environment harassment. \(^{1d}\) (quoting Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971), superseded by statute on other grounds, \(^{4}\) Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (amending Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, § 706(a), 78 Stat. 241), as recognized in \(^{4}\) EEOC v. Shell Oil Co., 466 U.S. 54 (1984)). The conduct must be either severe (one major incident, such as fondling or rape) or pervasive (repeated minor incidents, such as jokes, offensive comments and propositions).

44. \(^{4}\) Harris, 510 U.S. at 21. The subjective requirement is essential because if the employee did not perceive the environment to be abusive, then the conditions of employment were not altered, a necessary part of the Title VII claim. See \(^{1d}\). The objective requirement is also necessary to prevent easily offended persons from abusing the judicial system. See \(^{1d}\); see also \(^{4}\) Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81 (1998) (advising that courts should look to the context of the behavior so that “ordinary socializing” does not become actionable). \(^{4}\) Oncale is also noteworthy for concluding that same-sex harassment is actionable under Title VII. See \(^{1d}\) at 82.
45. \(^{4}\) Harris, 510 U.S. at 22. “So long as the environment would reasonably be perceived, and is perceived, as hostile or abusive,” the employee has a hostile environment harassment cause of action under Title VII. \(^{1d}\) (citing \(^{4}\) Meritor, 477 U.S. at 67).

46. \(^{1d}\) at 23.
47. \(^{1d}\). The EEOC also advanced such a test:

In determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case by case basis.

29 C.F.R. § 1604.11(b) (2004).

392
physically threatening or humiliating, or a mere offensive utterance . . . whether it unreasonably interferes with an employee’s work performance,” and the effect on the employee’s psychological well-being.\textsuperscript{48}

4. Employer Liability

\textit{a. Where Supervisors Sexually Harass Employees}

While the terms quid pro quo and hostile environment are useful in establishing whether a Title VII violation has occurred, they are not applicable in determining employer liability, which is the final element of a sexual harassment cause of action.\textsuperscript{49} The more pertinent inquiry is whether there has been any tangible employment action. For instance, an employer is strictly liable if the employee can show that he or she suffered economic injury through a tangible employment action.\textsuperscript{50} A tangible employment action is essentially a significant change in employment status, such as hiring, firing, or failing to promote.\textsuperscript{51}

Supervisor conduct which does not produce a tangible employment action still results in vicarious liability; however, an affirmative defense may be available, possibly allowing the employer to elude responsibility.\textsuperscript{52} In

\textsuperscript{48} Harris, 510 U.S. at 23.
\textsuperscript{49} Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 753-54 (1998).
\textsuperscript{50} See Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 76 (1986); see also Ellerth, 524 U.S. at 760-61 (adopting the conclusion of every federal court of appeals that the discriminatory actions of a supervisor resulting in a tangible employment action place strict liability on the employer).
\textsuperscript{51} See Ellerth, 524 U.S. at 761. Other forms of tangible employment actions include: reassignment with significantly different responsibilities, a decision causing a significant change in benefits, a decrease in wage or salary, or a less distinguished title. \textit{Id.; see Crady v. Liberty Nat’l Bank & Trust Co. of Ind.,} 993 F.2d 132, 136 (7th Cir. 1993). \textit{But see Koessis v. Multi-Care Mgmt., Inc.,} 97 F.3d 876, 886 (6th Cir. 1996) (demotion without change in pay, benefits, or duties not enough); Flaherty v. Gas Research Inst., 31 F.3d 451, 456 (7th Cir. 1994) (a bruised ego is not enough); Harlston v. McDonnell Douglas Corp., 37 F.3d 379, 382 (8th Cir. 1994) (reassignment to a more inconvenient job is insufficient).
\textsuperscript{52} This holding is from both \textit{Ellerth,} 524 U.S. at 765 and \textit{Faragher v. City of Boca Raton,} 524 U.S. 775, 806-07 (1998), which were decided on the same day.
Burlington Industries, Inc. v. Ellerth, a salesperson was subjected to constant sexual harassment by her supervisor, but she failed to inform anyone in authority about the harassment. The Court reasoned that because the employer had a policy against sexual harassment and the employee did not report the harassment, the employer should be able to assert an affirmative defense.

Hence, an employer is subject to vicarious liability when a supervisor creates a hostile environment without taking tangible employment action, but the defending employer may invoke an affirmative defense. The defense is comprised of two essential elements: (1) "that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior," and (2) "that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."

54. Id. at 748. Ellerth's supervisor made comments about her breasts, rubbed her knee, and threatened not to promote her because she was not "loose enough." Id. Although she did receive the promotion, Ellerth later quit because of her supervisor's continuous behavior. Id. Despite knowing about Burlington's policy against harassment, she never reported the harassment to anyone in authority. Id.
55. See Ellerth, 54 U.S. at 765. This reasoning stems from the deterrence aspect of Title VII. See id. at 764. Title VII is partly "designed to encourage the creation of antiharassment policies and effective grievance mechanisms." Id. If an employer who had a strong policy against harassment and an excellent reporting system in place were held strictly liable, what would be the incentive to have such policies?
56. This holding was adopted "in order to accommodate the agency principles of vicarious liability for harm caused by misuse of supervisory authority, as well as Title VII's equally basic policies of encouraging forethought by employers and saving action by objecting employees." Ellerth, 524 U.S. at 764; see also supra note 50.
57. See Ellerth, 524 U.S. at 765; Faragher, 524 U.S. at 807. The Court, in imposing this duty on employers, is following the EEOC guidelines on the matter:
   prevention is the best tool for the elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned.
   29 C.F.R. § 1604.11(f) (2004). Any of these actions would aid in proving that the employer exercised reasonable care. See Faragher, 524 U.S. at 806.
58. See Ellerth, 524 U.S. at 765; Faragher, 524 U.S. at 807. The employee who has been harassed has "a duty 'to use such means as are reasonable under the circumstances to avoid or minimize the damages' that result from violations of the statute." Faragher, 524 U.S. at 806 (quoting Ford Motor Co. v. EEOC, 458 U.S. 219, 231, n.15 (1982)). Therefore, if the employer has put a good system in place for reporting and resolving sexual harassment complaints, and the employee fails to utilize that system, the employee should not recover damages. Id. at 806-07.

However, a victim employee's failure to report harassment does not always shield the employer from responsibility. The employer must have a successful reporting system because the "absence of notice to an employer does not necessarily insulate that employer from liability." Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 72 (1986). For example, if, under an employer's reporting system, only one person is designated as the person who receives complaints, and that person happened to be the harasser, the employer could not claim the affirmative defense even though the employee did not report the harassment. The employee would most likely not feel
The same holding was reached in *Faragher v. City of Boca Raton*,\(^{59}\) the companion case to *Ellerth*.\(^{60}\) In that case, an employee was similarly harassed, but the employee, Faragher, reported the harassment, a complaint which fell upon deaf ears.\(^{61}\) Applying the new rule, the Court found that the affirmative defense would most likely not be available to the City because it entirely failed to disseminate its policy against sexual harassment and did not keep track of complaints.\(^{62}\) In short, while the City claimed to have had a policy against harassment and a sufficient system in place, it did not, in reality, exercise reasonable care to prevent the supervisor’s harassing conduct.\(^{63}\)

b. *Where Co-Workers Sexually Harass Employees*

Employer liability is still a necessary element when a co-worker, rather than a supervisor, harasses an employee, but the analysis varies somewhat. Instead of vicarious liability, employers are held to a negligence standard. According to the EEOC guidelines and most courts, “[w]ith 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.”\(^{64}\)

An employer may shield itself from liability for sexual harassment by co-workers if it imposes a remedy which is “reasonably calculated to end the harassment.”\(^{65}\) Examples of taking prompt remedial action include fully investigating, reprimanding the harasser for inappropriate conduct, and warning the harasser that a repeat incident will result in suspension or comfortable complaining about the harassment to his or her harasser, so the failure to report the harassment is actually reasonable. If the reporting system is flawed, the employer may still be liable. For an example of this situation, see *id.* at 72-73.

60. *Id.* at 807.
61. *See id.* at 780-83. Faragher was a lifeguard who endured uninvited and offensive touching and lewd remarks from her supervisors. *Id.* at 780. She and other female lifeguards reported the behavior to another supervisor, who in turn ignored the complaints, commenting that “the City just [doesn’t] care.” *Id.* at 782-83.
62. *Id.* at 808.
63. *Id.*
64. 29 C.F.R. § 1604.11(d) (2004) (emphasis added).
65. *See, e.g.*, Scarberry v. Exxonmobil Oil Corp., 328 F.3d 1255, 1259-60 (1oth Cir. 2003); Jackson v. Quanex Corp., 191 F.3d 647, 663 (6th Cir. 1999); Skidmore v. Precision Printing & Packaging, Inc., 188 F.3d 606, 615 (5th Cir. 1999); Ellison v. Brady, 924 F.2d 872, 881 (9th Cir. 1991).
termination. Basically, an employer should impose sufficient penalties to assure a workplace free from sexual harassment by persuading individual harassers to discontinue unlawful conduct.

C. Other Forms of Harassment—Striking Similarity

1. Racial Harassment

Title VII protects employees from discrimination not only on the basis of sex, but also on the basis of race, color, religion, and national origin. In fact, racial harassment was a problematic issue in the workplace long before sexual harassment, and the sexual harassment doctrine was even developed using the framework from early racial harassment cases. In Rogers v. EEOC, a court first recognized a cause of action for hostile environment racial harassment when a Hispanic woman working at an optician’s office was abused by her co-workers and her supervisors segregated the patients. The court set out the theory that a discriminatory atmosphere could be an unlawful employment practice under Title VII. The Supreme Court relied

66. See Ellison, 924 F.2d at 881-82; Barett v. Omaha Nat’l Bank, 726 F.2d 424, 427 (8th Cir. 1984).
67. Ellison, 924 F.2d at 882. The particular penalty should depend on the facts of the case, ensuring that the remedy is proportionate to the seriousness of the offense. Id. Although “Title VII requires more than a mere request to refrain from discriminatory conduct,” it does not require employers to fire all harassers. Id. (citing DeGrace v. Rumsfeld, 614 F.2d 796, 805 n.5 (1st Cir. 1980)). It is important to note that employers should not impose a remedy that will in any way adversely affect the employment of the complaining party, like requiring the employee to work in a less desirable location or to work different hours. See id. at 881 (adhering to the standard set forth by the EEOC).
69. See, e.g., Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65-66 (1986) (discussing hostile environment racial harassment cases and noting that “[n]othing in Title VII suggests that a hostile environment based on discriminatory sexual harassment should not be likewise prohibited”); see also Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 769 n.2 (1998) (setting forth cases in which various courts “relied on racial harassment cases when analyzing early claims of discrimination based upon a supervisor’s sexual harassment”).
71. See id. at 236. The employee, Josephine Chavez, claimed that because she was a Hispanic working with seven Caucasian women, those women abused her. See id. Even though her boss stated her work was fine, he ultimately fired her because of that “friction.” Id.
72. See id. at 238. The court found that the phrase “terms, conditions, or privileges of employment” from Title VII is “an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination.” Id. The court further reasoned: “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 I think [Title VII] was aimed at the eradication of such noxious practices.” Id.
on this decision when it first held that an employer could be liable for hostile environment sexual harassment in *Meritor Savings Bank, FSB v. Vinson.*

The elements of a hostile environment racial harassment claim are extremely similar to those of sexual harassment claims. First, the employee must belong to a protected group or class, namely race. The employee must be subject to unwelcome racial harassment, and the same objective and subjective standards from sexual harassment cases apply. In most circuits, in order to prove an unwelcome hostile environment, the employee must have actually found the harassment offensive, and a reasonable member of the group would have also found it offensive. In addition, the harassment must have been based on race, which results in the plaintiff employee having the burden of showing that "but for" his race . . . he would not have been the victim" of harassment.

Similarly, the racial harassment must have been sufficiently severe or pervasive so that it affected a term, condition or privilege of employment by creating a hostile environment. Courts are careful to mention that the "mere utterance of an ethnic or racial epithet which engenders offensive 

75. See, e.g., Childress v. City of Richmond, 134 F.3d 1205, 1207 (4th Cir. 1998). In that case, white police officers could not bring a Title VII hostile environment claim for discrimination directed at black police officers, because the white officers were not members of the group being harassed. See id. However, that does not denote that a white person cannot sue successfully under Title VII. See Huckabay v. Moore, 142 F.3d 233, 237 (5th Cir. 1998) (finding hostile environment racial harassment by a black elected official against a white public employee because the official "stated that 'blacks had suffered for two hundred years, and now it was the whites' turn' and "tolerated and helped to foster an atmosphere in which whites were called 'honkeys' and were made the subject of ridicule and harassment on account of race").
77. "Racially motivated comments or actions may appear innocent or only mildly offensive to one who is not a member of the targeted group, but in reality be intolerably abusive or threatening when understood from the perspective of a plaintiff who is a member of the targeted group." McGinest v. GTE Serv. Corp., 360 F.3d 1103, 1116 (9th Cir. 2004). But see Watkins v. Bowden 105 F.3d 1344, 1356 (11th Cir. 1997) (upholding "reasonable person" standard rather than "reasonable African American or woman").
feelings in an employee” is not enough to give rise to a claim under Title VII, but there are many cases in which racist comments have led to actionable hostile working environment claims. Sufficiently severe or pervasive harassment can include conduct ranging from consistently referring to black employees as “one of them” and “all of you” to co-workers hanging a noose in a workshop entrance.

Finally, there must be some basis for employer liability. The Ellerth and Faragher standard of supervisor liability is generally used for racial harassment cases. As long as no tangible employment action is taken, the employer is vicariously liable for supervisor harassment, but it has an affirmative defense if it was reasonable in preventing or correcting harassment and the employee did not take advantage of the employer’s corrective measures. Similarly, with co-worker racial harassment, employers are held to a negligence standard—they are liable only if they


82. Aman, 85 F.3d at 1082. These inherently racist comments, along with the white employees regularly insulting other black employees with “don’t touch anything” and “don’t steal,” constituted a hostile environment. Id. The court noted that “[w]hile Title VII does not prohibit racist thoughts, the law does require that employers prevent such views from affecting the work environment either by influencing employment decisions or creating a hostile work environment. This is true no matter what form the discrimination takes—overt, subtle or otherwise.” Id. at 1087. But see Brown v. Coach Stores, Inc., 163 F.3d 706 (2d Cir. 1998). The plaintiff alleged that her supervisors told her that they “seek[] to hire and promote people who have a ‘Coach look’—the examples to whom her supervisors referred were young non-minority persons.” Id. at 709. The court acknowledged that while these “alleged comments are despicable and offensive, they fail to constitute discriminatory behavior that is sufficiently severe or pervasive to cause a hostile environment.” Id. at 713. See also Nguyen v. Benson Toyota, Inc., No. 96-2644, 1997 WL 159521, at *3-*4 (E.D. La. Apr. 2, 1997) (holding that a Vietnamese-American plaintiff being called a “rice-eating gook” once by a co-worker was “exactly the kind of ‘mere utterance’ that should not, by itself, support an actionable claim for hostile work environment”).

83. See West v. Phila. Elec. Co., 45 F.3d 744, 749 n.1 (3d Cir. 1995) (finding hostile environment racial harassment present). But see Carter v. Ball, 33 F.3d 450, 460-61 (4th Cir. 1994) (holding that a single incident, involving the “display of a poster with a picture of a gorilla and the motto ‘I wouldn’t mind being a NOBODY if I could only get A LITTLE RECOGNITION once in a while’” was not sufficiently severe to constitute hostile environment racial harassment).

84. See discussion supra Part II(B)(4)(a).

85. See, e.g., Hrobowski v. Worthington Steel Co., 358 F.3d 473, 475 (7th Cir. 2004) (failing to find employer liability for supervisors calling the employee “nigger” frequently because the employer was not on notice of the harassment). For the various circuits which apply the Ellerth/ Faragher standard of employer liability, see Spriggs v. Diamond Auto Glass, 242 F.3d 179, 186 n.9 (4th Cir. 2001); Jackson v. Ark. Dep’t of Educ., 272 F.3d 1020, 1024 (8th Cir. 2001); Walker v. Thompson, 214 F.3d 615, 626 (5th Cir. 2000); Allen v. Mich. Dep’t of Corr., 165 F.3d 405, 411 (6th Cir. 1999); Caridad v. Metro-North Commuter R.R., 191 F.3d 283, 294 (2d Cir. 1999); Wright-Simmons v. City of Okla. City, 155 F.3d 1264, 1270 (10th Cir. 1998).
knew or should have known of the harassment and failed to take adequate remedial steps.  

2. Religious and National Origin Harassment

Perhaps just as important in the workplace today is the dramatic increase in reported incidents of harassment based on national origin and religion since the September 11th attacks. Religion and national origin are protected categories under Title VII, so discrimination and harassment based on either of these are also unlawful employment practices. National origin is defined as an individual’s country of origin or the physical, cultural or linguistic characteristics of a national origin group, while religion is broadly defined to include “all aspects of religious observance and practice, as well as belief.”

The basic framework for a national origin or religious hostile environment claim is very similar to that of sexual or racial harassment. The employee must be a member of any religion or from a foreign country.

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86. See Reedy v. Quebecor Printing Eagle, Inc., 333 F.3d 906 (8th Cir. 2003). An employee endured frequent racist remarks and graffiti in the workplace. See id. at 909. However, when “his name was written below the phrase ‘kill all niggers’ on the bathroom handrail,” he complained to his supervisor. Id. The supervisor’s response, that he “got it off once. What do you want me to do, tear the wall down?” and his failure to remove the graffiti until after the plaintiff quit, was “anything but a prompt and effective remedial action.” Id. at 909-10; see also Williams v. Waste Mgt. of Ill., 361 F.3d 1021, 1029 (7th Cir. 2004) (applying the negligence standard for co-worker harassment).

87. See EEOC, EEOC Provides Answers about Workplace Rights of Muslims, Arabs, South Asians and Sikhs (May 15, 2002), http://www.eeoc.gov/press/5-15-02.html. As of May 2002, the EEOC had already received 488 claims of such national origin discrimination, with 194 of these charges involving harassment. Id. In addition, 497 charges of religious harassment were filed by Muslims, while only 193 claims were filed during the same time period the prior year. Id.


90. 42 U.S.C. § 2000e(j) (2000). The employer has a potential defense to religious discrimination if the employer “demonstrates that he is unable to reasonably accommodate to an employee’s or prospective employee’s religious observance or practice without undue hardship on the conduct of the employer’s business.” Id.

91. See Gibson v. Finish Line, Inc., 261 F. Supp. 2d 785, 790 (W.D. Ky. 2003) (setting forth the same five elements of sexual and racial hostile environment and applying them to religious hostile environment).

92. As far as national origin goes, the employee could potentially be a native of the United States and still have a national origin Title VII claim if he or she is discriminated against on the basis of being from the United States. See 42 U.S.C. § 2000e-2(a) (2000). In addition, the religion need not be what is normally considered an organized religion, as long as the plaintiff can explain the religion and the particular religious practices at issue. See Redmond v. GAF Corp., 574 F.2d 897, 900-01 (7th Cir. 1978) (holding that a belief qualifies as religious, even when it is eccentric, as long as it is motivated by religion). The employer is free, however, to disregard the religious claim if he thinks it is bogus, but he would do so at the risk of a Title VII lawsuit. See McCrory v. Rapides Reg’l Med. Ctr., 635 F. Supp. 975, 979 (W.D. La. 1986) (finding the employer not liable for discharging two
The harassing conduct must be unwelcome—an element which is usually met, especially when the remarks are “uninvited . . . intrusive, [touch] upon the most private aspects of [the employee’s] life . . . delivered in an intimidating manner . . . and . . . unrelenting.” To meet the unwelcome standard, the employee must find the conduct subjectively offensive and a reasonable person must also find it offensive. In addition, the harassment must be based on the employee’s religion or national origin, rather than a legitimate business reason.

Once again, for a hostile work environment to arise, the harassment must be sufficiently severe or pervasive to alter the terms or conditions of employment. Being “out of the loop” of a clique based on a certain nationality does not qualify as sufficiently severe or pervasive but being called derogatory names like “brown boy,” “spic,” and “wetback” along with graffiti commanding that the employee “Go Back to Mexico” created a hostile work environment. A similar standard exists with religious hostile environment claims—constant statements to an employee by a supervisor that the employee must become saved and spiritually whole constitute a

employees whose extramarital affairs with coworkers were disruptive, on the grounds that their “religious belief” that they had the right to commit adultery did not warrant Title VII protection).

93. Venters v. City of Delphi, 123 F.3d 956, 976 (7th Cir. 1997). The plaintiff employee met the unwelcome element because the remarks were offensive to her and a reasonable person would have found the environment hostile and offensive. See id.

94. See id.; see also Gibson, 261 F. Supp. 2d at 787-88. The plaintiff employee claimed that after her supervisor found out that she had converted to the Nation of Islam, he told others that her religion was worse than the Ku Klux Klan and that he did not feel comfortable working with her. See Gibson, 261 F. Supp. 2d at 788. The court rejected the employee’s claim because she did not subjectively regard her working environment as abusive, as is evidenced by her view that the supervisor’s actions were silly and immature. See id. at 791.

95. See Kosereis v. Rhode Island, 331 F.3d 207, 217 (1st Cir. 2003). A Turkish-born Muslim claimed that he endured a hostile work environment when his students called him “turkey,” fellow teachers teased him about his ethnic food, and his supervisors yelled at him for being tardy. Id. at 209-10, 217. The court found, however, that the frequent reprimands by his supervisor did not create a hostile work environment because they were stimulated by his tardiness, and not by his national origin or religion. See id. at 217; see also Merheb v. Ill. State Toll Highway Auth., 267 F.3d 710, 712-13 (7th Cir. 2001) (noting that “[f]iring him for threatening behavior was not treating him differently from how any other employee would have been treated.”).

96. Holtz v. Rockefeller & Co., 258 F.3d 62, 84 (2d Cir. 2001). The plaintiff employee was of English-German national origin, and she claimed that “her supervisor and several co-workers formed ‘a little clique of Irish people and they would talk about being Irish a lot.’” Id. The court held that the allegations fell short of a change in the terms and conditions of employment. Id.

97. Cerros v. Steel Techs., Inc., 288 F.3d 1040, 1042-45 (7th Cir. 2002) (holding that the harassment was sufficiently severe or pervasive by considering the totality of the circumstances and that “unambiguously racial [epithets fall] on the ‘more severe’ end of the spectrum”); see also Butler v. MBNA Tech., Inc., No. Civ. 3:02-CV-1715-H, 2003 WL 22479215, *1-*2, *5 (N.D. Tex. Oct. 31, 2003) (recognizing that discriminatory comments, such as that Iranians smell bad, put dirty laundry on their heads and take hostages, are sufficiently severe and pervasive to create a hostile work environment).
hostile environment, but a single comment made outside an employee's presence was not sufficiently severe or pervasive.

Lastly, there must be some basis for employer liability. Most courts follow the Ellerth/Faragher standard of supervisor liability. When co-worker harassment is implicated, employers are held to a negligence standard. For example, when a teacher was teased by his students and fellow teachers about his Turkish ethnic food, the supervisor met with the children and staff to address the problem. If the employer takes reasonable action to prevent or correct the harassment, just as in sexual and racial harassment, he is shielded from liability.

The vital aspect of these comparisons is the striking similarity between the doctrinal progeny of the Title VII protected categories. All seem to give relatively the same protection to employees, with some limits, and to impose liability on those employers who aided in or turned a blind eye to the harassment around them. These similarities have been used to support the harmonization of standards in all areas of harassment, including third party sexual harassment.

III. THIRD PARTY SEXUAL HARASSMENT

A. The History of Third Party Sexual Harassment

Third party sexual harassment is where a person other than a supervisor or co-worker, basically a non-employee, harasses an employee. A third party can be a customer, client, delivery person, vendor, temporary worker, independent contractor, repair person, or a member of the general

98. Venters, 123 F.3d at 962-63. This case is interesting because it also presents a rare instance of religious quid pro quo harassment. See id. at 977. The employee's supervisor implied that if she did not pay attention when people were ministering to her and did not become saved, he would dismiss her. See id. at 963, 977.
100. See discussion supra Part I(B)(4)(a).
101. See Kosereis v. Rhode Island, 331 F.3d 207, 216-17 (1st Cir. 2003).
103. Temporary workers and independent contractors qualify as third parties, for whose harassing conduct employers may be liable, but they are not protected against harassment themselves. So a permanent employee is allowed relief when he or she is a victim of harassment, but the temporary employee sitting right next to him or her is not. See Joseph M. Kelly & Adele Sinclair, Sexual Harassment of Employees by Customers and Other Third Parties: American and British Views, 31 TEX. TECH. L. REV. 807, 833-34 (2000).
This type of harassment falls under hostile environment because the harassing conduct can unreasonably interfere with an individual's work and create an abusive working environment. In fact, "[t]he environment in which an employee works can be rendered offensive to an equal degree by the acts of supervisors, coworkers, or even strangers to the workplace." The locations at which third party sexual harassment occurs vary. It was originally thought only to be present in the sales and service industries, "where pleasing the customer is paramount—and where taking rudeness in stride traditionally has been part of the job." Some scholars divide these industries into high and low risk levels of third party sexual harassment. Entertainment establishments, bars, restaurants like Hooters, strip clubs and casinos comprise the former, whereas banks, retail stores, national/family-type restaurants like Denny's, and business, medical and law offices are "low risk" places where employees would not expect to encounter harassment by customers or third parties. The important point, though, is that third party sexual harassment has expanded to all forms of employment and all occupations. Third party sexual harassment has become pervasive enough for the EEOC to include it in its guidelines. They state that, in addition to liability for the harassing conduct of its employees, "[a]n employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer (or its

104. See Aalberts & Seidman, supra note 5, at 449.
108. See Kelly & Sinclair, supra note 103, at 818-23.
110. See Kelly & Sinclair, supra note 103, at 818-823. The authors go on to advocate that employer liability for third party sexual harassment should not extend to the "high risk" workplaces, those which are "prone to sexual innuendos and sexual behavior from customers," because the employees assume the risk. Id. at 823. But see Lea B. Vaughn, The Customer is Always Right..., Not! Employer Liability for Third Party Sexual Harassment, 9 MICH. J. GENDER & L. 1, 49-50 (2002) (rejecting the argument that employees in certain occupations should tolerate a greater degree of harassment); Id. at 84 (equating such an argument to the rejected standpoint in the rape context, that "she asked for it."); Thoreson v. Penthouse Int'l, Ltd., 563 N.Y.S.2d 968, 976 (1990) (noting that accepting a job which exploits sexuality does not waive the right to work in an environment free from sexual harassment).
111. See Vaughn, supra note 110, at 20 (explaining that third party sexual harassment occurs across a "wide spectrum of businesses and occupations" and that "[n]o one is immune.")
112. 29 C.F.R. § 1604.11(e) (2004).
agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action. 113 This is the definition of third party sexual harassment which most courts have adopted. 114

B. Arguments in Favor of and Against Employer Liability for Third Party Sexual Harassment

Some people, employers in particular, argue against employer liability for third party sexual harassment. These employers wonder how, because they have no control over third parties, they could possibly be held liable for the conduct of such third parties. The answer lies in the guidelines set forth by the EEOC and followed by courts which recognize third party sexual harassment: the court will factor in the amount of control the employer has over the third party when determining employer liability. 115 In addition, employers complain that if they enforce their sexual harassment policies against customers or clients, they may lose valuable business. 116 This is certainly a risk, but it generally pales in comparison to the monetary losses an employer may experience during a sexual harassment lawsuit. 117 Furthermore, there are options for employers in which they may be able to avoid a sexual harassment suit and avoid losing the client—they can either politely ask the client to refrain from the conduct or put someone else on the account. 118

Proponents of liability for third party sexual harassment maintain, and courts generally agree, that there are sufficient safeguards built into the rule. 119 The standards of liability are certainly manageable; for example, the employer is not liable if it had no notice of the sexual harassment. 120

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113. Id.
114. See discussion infra Part III(C). See, e.g., Lockard v. Pizza Hut, Inc., 162 F.3d 1062 (10th Cir. 1998); Rodriguez-Hernandez v. Miranda-Velez, 132 F.3d 848 (1st Cir. 1998); Folkerson v. Circus Circus Enters., Inc., 107 F.3d 754 (9th Cir. 1997); Crist v. Focus Homes, Inc., 122 F.3d 1107 (8th Cir. 1997).
115. 29 C.F.R. § 1604.11(e) (2004).
117. See Mathews, supra note 27, at 999 (“The big financial liabilities make it worth a company’s time to create an effective sexual harassment policy... and to comply with both the EEOC guidelines and Title VII.”)
118. See Warner, supra note 107, at 387-88.
119. See Mathews, supra note 27, at 999.
120. See, e.g., Lockard v. Pizza Hut, Inc., 162 F.3d 1062, 1074 (10th Cir. 1998); Magnuson v. Peak Technical Servs., Inc., 808 F. Supp. 500, 513 (E.D. Va. 1992). The exception, of course, is if
Employers are also shielded from liability if they take adequate steps to remedy the harassment. Finally, a plaintiff must still prove the prima facie case of sexual harassment, including the aspect that the harassment was sufficiently severe or pervasive.

C. Landmark Cases: The Doctrine Developed

The first case to deal with third party sexual harassment had to do with an employer requiring an employee to wear a revealing uniform. In EEOC v. Sage Realty Corporation, a lobby attendant at a Manhattan office building was required to wear a “Bicentennial uniform,” essentially a skimpy poncho with an American flag design. Because the poncho was open at the sides and her employer would not permit her to wear a shirt or blouse underneath, she was subject to sexual harassment from people walking by on the street. After numerous complaints to her manager, who took no steps to remedy the situation, she refused to wear the uniform and was soon discharged.

In requiring her to wear the revealing uniform, the employer made her acquiescence to sexual harassment by the public a prerequisite of employment. In order for the employer to be liable, though, the court insisted that the plaintiff employee still prove the prima facie case of sexual harassment. The court found the employer liable because it imposed on its employee a condition of employment (requiring her to wear the uniform) which interfered with her ability to perform the job.

The court in Powell v. Las Vegas Hilton Corporation also required the employee to prove all of the elements of hostile environment harassment, including that the conduct was sufficiently severe or pervasive. In that

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124. Id.
125. Id. at 604.
126. See id. at 605. The lobby attendant, Margaret Hasselman, received a number of propositions and endured lewd gestures and comments. See id. One passer-by even said, “I'll run it up the flag pole any time you want to.” Id. at 605 n.11.
127. See id. at 605-06.
128. See id. at 609-10.
129. See id. at 607. The court found that Hasselman did prove the prima facie case, albeit using different elements than those which have been the standard since Meritor. See id.
130. See id. at 608, 611.
132. See id. at 1028-29; see also Hallberg v. Eat'n Park, No. 94-1888, 1996 WL 182212 (W.D. Pa. Feb. 28, 1996) (granting the employer's motion for summary judgment since the employee failed
case, a casino blackjack dealer attempted to do her job amidst screams of “great tits” and “great legs.”\textsuperscript{133} When Powell complained to her supervisors, at first she was ignored, and then she was told to “take it as a compliment.”\textsuperscript{134}

Since the case was one of first impression in the district, the court decided to look to the EEOC guidelines for assistance in determining whether third party sexual harassment should be actionable, and if so, what the standard should be for employer liability.\textsuperscript{135} The court reasoned that, “[b]ecause Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult... in the appropriate case, an employer could be liable for the sexual harassment of employees by nonemployees, including its customers.”\textsuperscript{136} In addition, the court adopted the EEOC guidelines, finding that if an employer knew or reasonably should have known about the third party harassment, it had a duty to take immediate and appropriate corrective action, or otherwise face liability.\textsuperscript{137} In this case, although Hilton had a policy against sexual harassment and a grievance procedure, the management ignored Powell’s complaints.\textsuperscript{138} Because the policy was not enforced and the procedure was inadequate, Hilton failed to take appropriate action to remedy the situation.\textsuperscript{139}

Similarly, in \textit{Magnuson v. Peak Technical Services, Inc.},\textsuperscript{140} a different district court handed down the same holding.\textsuperscript{141} Following repeated sexual harassment by a supervisor at Volkswagen, where Magnuson was sent by her employer to work for a time, she notified her supervisors.\textsuperscript{142} A female

\begin{footnotesize}
\textsuperscript{133} \textit{Id.} at 1025.

\textsuperscript{134} \textit{Id.} One evening, Powell had had enough. After a customer had stared at her and made gestures continually for ten to twenty minutes, she told him as he was leaving that “now you can stare at someone else.” \textit{Id.} at 1025-26. Hilton terminated her, citing rudeness to customers as the cause. \textit{Id.} at 1025.

\textsuperscript{135} \textit{See id.} at 1027 (reasoning that since the Supreme Court accepted the EEOC guidelines in examining hostile environment claims, the Powell court should as well).

\textsuperscript{136} \textit{Id.} at 1028 (citations omitted).

\textsuperscript{137} \textit{Id.} at 1030.

\textsuperscript{138} \textit{Id.}

\textsuperscript{139} \textit{Id.}


\textsuperscript{141} \textit{See id.} at 513.

\textsuperscript{142} \textit{Id.} at 505-06. The Volkswagen manager put a hand on her leg and often made lewd and offensive comments concerning her body. \textit{Id.} at 505. He went so far as to comment that she “looked so good” that he would have to “go back into the restroom” to masturbate. \textit{Id.} The court went into a lengthy discussion concerning which entity was actually Magnuson’s employer. \textit{See id.}
\end{footnotesize}
supervisor told her to “put up with it for the sake of Volkswagen,” and tried to explain the conduct away, saying harassment was normal in the automotive sales business. Needless to say, no corrective measures were taken, and Magnuson was terminated for being “too cute.” After reviewing the EEOC guidelines on the subject, the court held that an employer is liable if it, (1) knew or should have known of the harassment, and (2) “failed to take any corrective actions to remedy the situation.” More specifically, the plaintiff employee must prove the employer had “actual or constructive knowledge of the existence of a sexually hostile working environment and took no prompt and adequate remedial action.”

Employer liability for third party sexual harassment is based on a negligence standard—that the employer knew or should have known about the harassment. To meet this element, the employer can have either actual or constructive knowledge. Actual knowledge generally occurs when the employee notifies the employer, or its supervisors, about the harassment. After the employee complains, the employer has actual knowledge which prompts the duty to take remedial action. The employer can also learn of the harassment through constructive knowledge, which is established “by showing the pervasiveness of the harassment.”

Liability is imposed on an employer when it fails to take corrective measures within its control once it knows or has reason to know of the non-employee’s conduct. Imagine a couple of customers, who are friends of

at 508-10. It determined that Peak was her primary employer, so the Volkswagen supervisor was technically a third party. Id.

143. Id. at 506. This is actually a rather typical response—employers do not want to lose their clients, and they expect their employees to do whatever it takes to retain the client. See Warner, supra note 107, at 387-88.

144. Magnuson, 808 F. Supp. at 506. After being notified of her termination, Magnuson contacted a Volkswagen manager who explained her discharge by saying that she was “too cute” for the position—the same sexual harassment would just happen at other dealerships. Id.

145. Id. at 512-13.

146. Id. at 513 (quoting Katz v. Dole, 709 F.2d 251, 255 (4th Cir. 1983)); see Warner, supra note 107, at 374, 389-90.

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

148. Id. (citing Bundy v. Jackson, 641 F.2d 934, 943 (D.C. Cir. 1981)).

149. See, e.g., Ligenza v. Genesis Health Ventures of Mass., Inc., 995 F. Supp. 226 (D. Mass. 1998) (holding that, without knowledge, there is no duty to take corrective action); Magnuson, 808 F. Supp. at 513-14 (suggesting employer liability because, after complaints were lodged, the employer had actual knowledge and failed to take action).

150. Henson, 682 F.2d at 905 (citing Taylor v. Jones, 653 F.2d 1193, 1199 (8th Cir. 1981)). Pervasive harassment gives rise to an inference of knowledge. Id. In order to prove constructive knowledge, it must be shown that the employer has some measure of control over the situation. For example, for sales representatives, reporters, repair people and other occupations which require traveling away from the employer’s workplace, the harassment occurs outside the workplace. In these situations, the employer has no means to witness the pervasiveness of the harassment, and so would not have constructive knowledge. Employers are held liable, though, for harassment which occurs outside the workplace when the employee gives notice of the third party sexual harassment. See Mathews, supra note 27, at 991-92.

151. EEOC Decision No. 84-3 (1984).
the restaurant owner, sexually harassing a waitress by making grabbing gestures toward her breasts and squeezing her buttocks. In this situation, the EEOC pointed out that because the harassers were friends of the employer, the employer had some measure of control and was “in an especially advantageous position to address the [waitress’s] specific complaints.” According to the Commission in this case, the owner had two appropriate measures available to him: either inform the customers that further harassment would not be tolerated or relieve the waitress of her duty to wait on these customers in the future. If corrective measures such as these are taken, the employer is relieved of liability.

These standards were applied in Lockard v. Pizza Hut, Inc. Rena Lockard was continuously harassed by two rowdy male customers. After each offensive comment or gesture, and especially after one man grabbed her by her hair, Lockard informed her manager of the conduct and that she did not like waiting on these men. The manager denied her request to stop waiting on them and did nothing. Lockard continued waiting on them until one customer pulled her to him by her hair, grabbed her breast and put his mouth on her breast.

The court, after finding that this single incident was sufficient to prove severity for a hostile environment claim, acknowledged that “[a]n employer who condones or tolerates the creation of such an environment should be held liable regardless of whether the environment was created by a co-employee or a nonemployee, since the employer ultimately controls the conditions of the work environment.” Once Lockard notified her

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152. Id.
153. Id.
154. Id. The Commission found that the restaurant owner’s total failure to address the complaint was sufficient to subject him to liability. See id. The Commission commented further on the employer’s duty, explaining that “immediate and appropriate corrective action by an employer is not limited to action required to stop sexual harassment that is presently occurring; it includes action addressing sexual harassment that has already occurred to ensure against its recurrence.” Id. at n.4.
155. See, e.g., Hallberg v. Eat’n Park, No. 94-1888, 1996 WL 182212, at *11 (W.D. Pa. Feb. 28, 1996) (telling the customer that he would be barred from the restaurant if there were any similar complaints in the future constituted immediate and effective action).
156. 162 F.3d 1062 (10th Cir. 1998). Technically, the franchisor Pizza Hut was found not to be an employer for Title VII purposes, so it was not liable for third party sexual harassment. But A & M Food Service, the franchisee, was an employer and was held liable. Id. at 1069-71.
157. Id. at 1067.
158. Id.
159. Id. His response was to command her to “wait on them. You were hired to be a waitress. You waitress.” Id.
160. Id. Immediately thereafter, she quit. Id.
161. Id. at 1073-74. In response to Pizza Hut’s claim that this one incident was not sufficiently severe to constitute a hostile environment, the court deemed that the conduct of the customers was
manager, the employer’s “obligation to respond adequately and promptly was triggered.”\textsuperscript{162} The manager’s failure to alter conditions which were in his control, such as asking the customers to leave or having a waiter take over at the table, placed Lockard in danger and therefore subjected the employer to liability.\textsuperscript{163}

IV. EXTENDING THIRD PARTY SEXUAL HARASSMENT

“Although racial and sexual harassment will often take different forms, and standards may not be entirely interchangeable, we think there is good sense in seeking generally to harmonize the standards of what amounts to actionable harassment.” —Justice Souter\textsuperscript{164}

There have been many comparisons between racial and sexual harassment, and the courts have found and adopted countless parallels.\textsuperscript{165} If the standards are so similar in supervisor and co-worker harassment and the Supreme Court advocates that such standards should be harmonized, then the prohibition against third party harassment should be extended to all forms of harassment, not just sexual harassment. This section will pose the argument that, in order for the law and the legislative intent behind the law to be consistent, all third party harassment must become unlawful.

A. Close Calls and Failed Adoptions

1. EEOC Proposed Amendment

In 1993, the EEOC published a set of proposed rules, basically guidelines on harassment based on race, color, religion, gender, national

\textsuperscript{162} ID. at 1072.

\textsuperscript{163} See id. at 1074-75. The court used a negligence standard: an employer is liable if it fails to remedy or prevent a hostile work environment of which management-level employees knew, or in the exercise of reasonable care should have known. \textit{id.} at 1074. Even though Lockard had notified her manager over and over again of the harassment, he still placed her in an “abusive and potentially dangerous situation, although he clearly had both the means and the authority to avoid doing so by directing a male waiter to serve these men, waiting on them himself, or asking them to leave the restaurant.” \textit{id.} at 1075. Because the manager had notice of the customer’s harassing conduct and failed to correct it, the employer is liable for the manager’s failure. \textit{id.}

\textsuperscript{164} Faragher v. City of Boca Raton, 524 U.S. 775, 787 n.1 (1998). The majority was explaining its reliance on racial harassment cases in holding that hostile environmental sexual harassment claims are actionable under Title VII and developing the standard of severity necessary to constitute actionable harassment. See \textit{id.} at 786-87.

\textsuperscript{165} See infra notes 251, 256 and accompanying text.
origin, age, or disability. The Commission insisted that these guidelines were necessary for two reasons. First, the EEOC determined that it would be “useful to have consistent and consolidated guidelines that set forth the standards for determining whether conduct in the workplace constitutes illegal harassment.” Second, “because of all the recent attention on the subject of sexual harassment, the Commission believes it important to reiterate and emphasize that harassment on any of the bases covered by the Federal antidiscrimination statutes is unlawful.”

The first portion of the proposed rules deals with the standards to be used in determining whether there was a hostile environment based on an individual’s race, color, religion, gender or national origin. Not surprisingly, these standards are the same as those used by most courts in determining the same question for all forms of harassment. Employer liability is then examined, and again, the EEOC sets forth the same standards for supervisor and co-worker liability for all types of harassment.

Proposed section 1609.2(c) is the most relevant to this discussion because it places liability on the employer for all harassing conduct, even that of non-employees, if the employer knew or should have known of the harassment. The EEOC bases this extension of liability on the fact that “an employer is obligated to maintain a work environment free of

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166. Guidelines on Harassment Based on Race, Color, Religion, Gender, National Origin, Age, or Disability, 58 Fed. Reg. 51266-01 (proposed Oct. 1, 1993) (to be codified at 29 C.F.R. §§ 1609.1(a)-1609.2(d)). Discrimination on the basis of age is prohibited by the Age Discrimination in Employment Act, while disability discrimination is outlawed by the Americans with Disabilities Act. Because this article focuses on Title VII, these two protected categories will not be discussed further.

167. See id. at 51266-67.

168. Id. at 51267

169. Id. (emphasis added).

170. See id. at 51267-68 (describing the proposed 29 C.F.R. § 1609.1(b)-(e)). The harassing conduct must create an “intimidating, hostile, or offensive work environment,” and unreasonably interfere with an employee’s work performance, or otherwise adversely affect the individual’s employment opportunities. Id. at 51267 (describing the proposed 29 C.F.R. § 1609.1(b)). In addition, the conduct must be sufficiently severe or pervasive to alter the conditions of employment, and the standard is whether a reasonable person in similar circumstances would find the conduct abusive. See id. (describing the proposed 29 C.F.R. § 1609.1(c)). “[C]onsideration is to be given to the perspective of individuals of the claimant’s race, color, religion, gender, or national origin,” because otherwise “[h]arassers could continue to harass merely because a particular discriminatory practice was common.” Id. (quoting Ellison v. Brady, 924 F.2d 872, 878 (9th Cir. 1991)). Finally, in determining whether there was a hostile environment, the EEOC will look at the totality of the circumstances. See id. at 51268 (describing the proposed 29 C.F.R. § 1609.1(c)).

171. See discussion supra Part II(B)(1)-(3), Part II(C)(1)-(2).

172. See Guidelines on Harassment, 58 Fed. Reg. at 51268 (setting forth the Ellerth/Faragher standard for supervisor liability and a negligence standard for co-worker liability to be included in the proposed 29 C.F.R. § 1609.2(a)-(b)).

173. Id. (describing the proposed 29 C.F.R. § 1609.2(c))
harassment." The amendment provides that "an employer may be responsible for the acts of non-employees with respect to environmental harassment of employees where the employer, its agents, or supervisory employees knew or should have known of the conduct and failed to take immediate and appropriate corrective action, as feasible." Unfortunately, these proposed amendments were never enacted. Essentially all of the theories except the one extending employer liability to all third party harassment have already been well established in various cases, and so the government most likely saw the codification of these sections to be superfluous. Additionally, the EEOC guidelines prohibiting third party harassment on the basis of national origin and finding employers liable for such harassment in some cases were codified. Possibly Congress was not ready to acknowledge all third party harassment in 1993, but as the incidence of such harassment increases, hopefully the Legislature and the Judiciary will take notice and hearken back to these guidelines set forth by the EEOC.

2. Rosenbloom: A Third Party Racial Harassment Case

Maryland Rosenbloom is an African-American male who was employed by Senior Resource as a program coordinator at a senior center. Roger Kolb "hung out" at the senior center, and occasionally volunteered at a different company to serve meals there. One day, Kolb approached Rosenbloom and threatened "flicking nigger, I'm going to kill you." After bystanders asked Kolb to leave, Rosenbloom submitted a memo to his supervisor in which he described the incident and requested that Kolb not be allowed back into the center. There were several more incidents involving Kolb, who was repeatedly escorted off the premises and finally kept off with a restraining order. Throughout this ordeal, and indeed throughout his
employment, Rosenbloom endured racial harassment from some of the Senior Resource clients who called him "nigger, Sambo, and zebra," and wrote these terms on tables in the senior center. 182

Rosenbloom's supervisor at Senior Resource responded to his complaint by issuing a memo stating that Kolb was not to be allowed into the senior center, and if he did appear, the police should be called immediately. 183 In addition, "Senior Resource distributed anti-racism posters and notices that racism was not acceptable" at the senior center. 184 However, because he felt that "Senior Resource ignored his complaints regarding racist comments by clients," Rosenbloom found his employer's response inadequate. 185 He sued under a third party racial harassment theory, alleging that he had been subjected to a racially hostile work environment. 186

The court struggled with the fact that there was no case law suggesting that "an employer may be liable for acts of third parties that create a racial hostile work environment if the employer fails to take steps to remedy the harassment once it becomes known to the employer." 187 In order to determine whether such a cause of action should exist, the court looked to comparable cases, cases which dealt with third party sexual harassment. 188 The court split the cases into two categories—cases where an employee is placed in a situation where the third party exercises control over the

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182. Id. at 741. The comments were apparently fueled by Caucasian clients' fears that minority clients of Senior Resource would "take over." Id.
183. Id. This memo went out a few days before the incident in which Kolb bumped into Rosenbloom. Because Kolb was allowed to remain at the senior center for about twenty minutes, Rosenbloom was angry that the police were not called sooner. Id.
184. Id. Apparently, Senior Resource had "historically encountered difficulty encouraging diversity at [the senior center]. Although Senior Resource discussed the problem at staff meetings, at least some employees felt that little was done in the form of policies or clear direction to prevent racism from occurring" at the center. Id.
185. Id. at 742.
186. See id. at 741-44. Rosenbloom's other claims, including aiding and abetting, negligent retention and supervision, constructive discharge, assault and battery, and defamation, failed on the merits. See id. at 744-46.
187. Id. at 743. This was a question of first impression within the Eighth Circuit and, indeed, within the federal courts.
188. Id. The court considered the opinion of a commentator who noted that third party sexual harassment is a novel expansion which has come into play contrary to the Supreme Court's implied warning "against unsubstantiated judicial extensions of employer liability not contemplated within" Title VII. See Warner, supra note 107, at 392 n.102 (1995) (quoting Meritor Sav. Bank, FSB v. Vinton, 477 U.S. 57 (1986)). This argument is tenuous at best since Warner bases his theory on the fact that third party sexual harassment is not explicitly addressed in Title VII. Id. If discrimination law were limited to the literal language of Title VII, harassment in general would not even be prohibited!
employee and cases in which the employer imposes a policy or dress code upon an employee which makes the employee susceptible to sexual harassment. The court also acknowledged, however, that several courts have gone beyond these two categories by suggesting that "employers have a broad duty to protect their employees from sexual harassment, even when an employer does not directly benefit from the harassment."

In Rosenbloom, the court did not find the employer liable, partly because there was "no evidence Senior Resource benefitted from Kolb's disruptive behavior or from the racist slurs by its clients." Unfortunately, the court did not have the benefit of looking to Lockard v. Pizza Hut, Inc. in making its decision, because Lockard was decided after this decision was handed down. In Lockard, a waitress was severely sexually harassed by customers whom she was serving. The Tenth Circuit was not troubled that the employer did not benefit in any way from the harassment—it asserted that the creation of a hostile environment by customers coupled with the negligence of the employer in failing to correct the situation were certainly sufficient to impose liability on the employer.

In deciding against employer liability in Rosenbloom, the court also looked to the actions of the employer, actions the court found to be reasonable. In his argument, Rosenbloom claimed that "by failing to keep Kolb from returning to [the senior center], and by not instituting a policy to deal with racial slurs, Senior Resource ratified the racist behavior." The court disagreed, finding that Senior Resource was not only concerned about the incidents with Kolb and attempted to take rapid measures to correct the situation, it also "took steps to educate its clients by posting notices and posters regarding racism." Because Rosenbloom's employer took prompt and adequate steps to remedy the situation, it is not liable even though a hostile work environment may have existed. The court was careful to note that "[b]y so ruling, the Court does not intend to minimize Kolb's behavior..."
or the racist statements. No individual should have to tolerate the comments and threats directed at Rosenbloom.’’

Although the court did not find for the plaintiff in this case, it did not discount third party racial harassment as a cause of action in all cases. The court concluded that “[j]ust as in sexual hostile work environment cases, there may be circumstances where an employer can be held liable for the racial hostile work environment created by a third party.” Indeed, in an early third party sexual harassment case where the plaintiff’s claim was successful, the court noted that an employer should be liable only for the sexual harassment of employees by nonemployees “in the appropriate case.” Rosenbloom did not signify that all third party harassment is not actionable; instead, it stands for the proposition that a plaintiff claiming third party harassment may someday prevail.

B. California as a Case in Point

The California legislature has recently enacted an amendment to state law under the Fair Employment and Housing Act (FEHA). The amendment imposes liability for third party sexual harassment on employers. The revised statute mirrors the EEOC guidelines by stating that, in addition to liability for supervisor and co-worker harassment,

[a]n employer may also be responsible for the acts of nonemployees, with respect to sexual harassment of employees, applicants, or persons providing services pursuant to a contract in the workplace, where the employer, or its agents or supervisors, knows or should have known of the conduct and fails to take immediate and appropriate corrective action.

The law goes on to limit employer liability by specifying that “[in] reviewing cases involving the acts of nonemployees, the extent of the employer’s control and any other legal responsibility which the employer

199. Id.
200. Id. at 743-44.
201. Id.
203. An Act to Amend Section 12940 of the Government Code, Relating to Unlawful Employment Practices, CAL. GOV’T CODE § 12940(j)(1) (West 2005). This amendment to the FEHA is referred to as Assembly Bill 76 (AB 76).
204. Id.
205. CAL. GOV’T CODE § 12940(j)(1) (West 2005); see 29 C.F.R. § 1604.11(e).
may have with respect to the conduct of those nonemployees shall be considered."\(^{206}\)

The first case to apply the amendment was *Salazar v. Diversified Paratransit, Inc.*\(^ {207}\) A bus driver, Raquel Salazar was repeatedly and severely sexually harassed by a disabled passenger, Rocha, who often rode on her bus route.\(^ {208}\) The harassment began with Rocha touching Salazar’s hair, staring at her, calling her “bonita,” and grabbing her purse.\(^ {209}\) Salazar reported these problems to her supervisor, asked for a different route and filed written reports of various incidents, none of which received any response from her employer.\(^ {210}\) Rocha’s conduct soon escalated, culminating in an attack in which he exposed his genitals to her, touched her all over, and tried to put his hands under her shirt and shorts.\(^ {211}\) Salazar quit two days later and filed suit against her employer for sexual harassment.\(^ {212}\) The amendment, Assembly Bill 76 (AB 76), was “adopted swiftly after this controversy arose.”\(^ {213}\)

The question which surfaced in the *Salazar* case after the amendment was enacted was whether the amendment was just a clarification of existing law, so as to apply to the case, or a new aspect of the law which could not then be applied retroactively.\(^ {214}\) The court held that the amendment was “nothing more than a clarification of section 12940 . . . [and] it applies to this case.”\(^ {215}\) It is interesting to note how the court asserted that “AB 76 clarified the statute to expressly hold an employer liable for [any] harassment by a nonemployee;” not solely for sexual harassment by a nonemployee.\(^ {216}\)

However, this ruling was later overturned by *Carter v. California Department of Veterans Affairs,*\(^ {217}\) which not only held that the amendment does not apply retroactively, but also clarified that the amendment applies only to sexual harassment by nonemployees.\(^ {218}\) In *Carter,* a nurse who worked at a veterans’ residence facility alleged hostile environment sexual

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\(^{206}\) CAL. GOV’T CODE § 12940(j)(1) (West 2005).

\(^{207}\) 11 Cal. Rptr. 3d 630 (Ct. App. 2004).

\(^{208}\) See id. at 632-34.

\(^{209}\) Id. at 633.

\(^{210}\) See id.

\(^{211}\) See id. at 633-34.

\(^{212}\) See id. at 634.

\(^{213}\) See id.

\(^{214}\) See id. at 635. The amendment could be construed as simply clarification, since the previously existing statute made it unlawful for an employer “or any other person” to harass an employee. Id. (quoting CAL. GOV’T CODE § 12940(j)(1) (West 2003)).

\(^{215}\) Id. at 637.

\(^{216}\) Id. at 636. This could be indicative of an initial belief by the court that the amendment outlawed all forms of third party harassment, not just third party sexual harassment.

\(^{217}\) 17 Cal. Rptr. 3d 674 (Ct. App. 2004)

\(^{218}\) See id. at 692. In fact, almost every time the court mentions the amendment, it emphasizes the word “sexual” in “sexual harassment.” Id. at 677, 680, 687, 689, 690.
harassment created by one of the patient-residents of the facility. The veteran, Brown, told Helga Carter that he wanted to sleep with her, and that if she didn't sleep with him he would tell everyone that he had slept with her to ruin her reputation. When she still refused, he left derogatory sexual messages on her answering machine. The jury originally found that Carter was "subjected to hostile environment harassment, the employer knew or should have known of the harassment, and the employer failed to take immediate and appropriate steps to correct the situation."

On appeal, the Carter court discussed whether FEHA, before the amendment was adopted, imposes employer liability for client or customer harassment. Both the plaintiff, Carter, and the defendant employer found different sources within the FEHA to support their respective views. Carter looked to the preamble of FEHA, which states that the policy of California is "to prohibit harassment and discrimination in employment on the basis of any protected classification." The legislature also explained that employers are required to establish affirmative programs "so that their worksites will be maintained free from prohibited harassment by their agents, administrators, and supervisors as well as by their nonsupervisors and clientele." The employer, on the other hand, looked to the literal language of the former section 12940(j)(1), which only imposed liability on employers for harassment by supervisors and nonsupervisory employees.

219. See id. at 676. At first, Helga Carter viewed the veteran's remarks such as "You've got nice breasts" and "You've got a nice ass" as inappropriate but harmless comments. Id. at 677-78.

220. Id. at 678.

221. See id. Brown also chased her in the hall with his scooter and tried to ram her with it. See id. At some point, Carter reported this conduct to her supervisor who then asked Brown to leave her alone. See id. Although the Veterans' Home had a code of conduct for the residents which prohibited sexual harassment, the violation of which could lead to eviction, the supervisors did nothing but issue Carter a walkie-talkie to call for security if Brown harassed her. They also sent Brown to speak to a counselor. See id. at 678-79.


223. See Carter, 17 Cal. Rptr. 3d at 680-92.

224. See id. at 681-82.

225. Id. (quoting Fair Employment and Housing Act, ch. 1754, § 1, 1984 Cal. Stat. 6403-04). The protected categories of California are more expansive than those of federal law. They include not only race, religion, color, national origin, sex, age and disability, but also ancestry, marital status, sexual orientation and gender identity. See CAL. GOV'T CODE § 12940(j)(1) (West 2005).

226. Carter, 17 Cal. Rptr. 3d at 682 (quoting Fair Employment and Housing Act, ch. 1754, § 1, 1984 Cal. Stat. 6403-04). The court agreed with the plaintiff's assertion that "an uncodified preamble is fully part of the statutory law of this state, it is simply uncodified." Id.

227. See id.
After a detailed dissection of the language in the old statute and an acknowledgment that the California legislature once rejected a proposed amendment which would have made an employer liable for any acts of harassment by customers and clients, the court concluded that the former FEHA section did not impose liability on employers for third party harassment. Because of that conclusion and the fact that the legislature chose to limit third party liability solely to sexual harassment in the recent amendment, the court found that AB 76 did not clarify the existing law, but rather changed the law. Therefore, the law should not be applied retroactively to Carter’s case, resulting in the failure of her sexual harassment case.

California law states that it is unlawful for an employer to harass an employee “because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation.” The legislature made it clear that its main goal in enacting FEHA was to “prohibit harassment... in employment on the basis of any protected classification.” Yet, as the law stands now, harassment on the basis of race, religious creed, color, national origin and ancestry, marital status and sexual orientation, is not prohibited if the harassing conduct comes from a nonemployee. Although the law claims that an employer “shall take all reasonable steps to prevent harassment from occurring...,” it does not impose liability upon an employer who fails to take action to prevent third parties from harassing employees belonging to a protected category other than sex. There is something wrong here—a gaping chasm between the law and the purpose behind that law.

228. See id. at 685-86. In 1984, the legislature rejected a proposed amendment which stated that “[h]arassment of an employee or applicant by any person 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.” Id. Before the amendment was adopted, the legislature replaced “any person” with “an employee,” which demonstrates that it had an opportunity to expand harassment law but chose not to do so. Id. at 685-86. Finally, the court in Carter reasons that because the legislature rejected the amendment, “the final statute as enacted should not be construed to include the omitted provision.” Id. at 686.

229. See id. at 685-86.

230. See id. at 688. The court also looked to other factors, including differences in the language of the existing statute and the amendment. The existing statute imposed liability for all forms of harassment on labor organizations, employment agencies and apprenticeship programs as well as employers, whereas the amendment restricts liability for third party harassment to employers and imposes liability only for sexual harassment. See id. at 689 (discussing AB 76 as it was initially proposed, prohibiting all harassment of employees by any person). Therefore, the amendment “is not merely declaratory of existing law, but has effected a substantial change in the law.” Id. at 689-90.

231. See id. at 692.


233. See Carter, 17 Cal. Rptr. 3d at 682.

234. § 12940(j)(1).
C. Promoting Consistency Between the Law and the Spirit of the Law

The same problems that plague California's harassment law exist with regard to federal law. Title VII was enacted in order to reach certain goals: the Legislature wanted to work toward workplace equality and workplaces free from all discrimination. Title VII "affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult." But if employees are being harassed on the basis of race, religion, sex or national origin, even if the harassment stems from a third party, their workplaces are not free from such intimidation, ridicule, and insult. Therefore, in order to come closer to attaining these aspirations, either the Legislature should extend Title VII to include all third party harassment or the federal courts should interpret Title VII as prohibiting such harassment.

Some commentators may contend that employees do not need protection from all third party harassment. They claim that sexual harassment is different—it is more pervasive, more insidious than any other form of harassment. Because of the inherent nature of sexual harassment, that it is the natural manner in which men and women interact, employees need more protection from it than other forms of harassment. In addition, they claim that extra protection is needed because sexual harassment is more subtle and often tolerated: an employer is much more likely to ask a customer to leave who has called the employee a racial epithet than one who made sexual comments to the employee.

235. "[T]he very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion, or national origin offends Title VII's broad rule of workplace equality." Harris v. Forklift Sys., Inc., 510 U.S. 17, 22 (1993). The Court was concerned not only with tangible effects of a hostile work environment, such as the environment affecting employees' psychological well-being, detracting from their job performance and discouraging them from staying at the job, but also with the theoretical effects that abusive work environments would have on Title VII. See id.


237. See Warner, supra note 107, at 361-62.


239. 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 (1985) (Program Director of Working Women's Institute calls sexual harassment the most subtle, all-too-readily tolerated, accepted, and ignored form of misbehavior faced by women in the work force).
However, if this rationale were adopted, then why should harassment on the basis of race, religion, and national origin by supervisors and co-workers be prohibited at all under Title VII? Why not have "sex" as the only protected category? The EEOC commented on the singling out of sexual harassment, stating that it "continues to be addressed in separate guidelines because it raises issues about human interaction that are to some extent unique in comparison to other harassment and, thus, may warrant separate emphasis."²⁴⁰ Separate emphasis, yes, but that certainly does not mean that the other forms of harassment should not be prohibited.

In addition, opponents of extending employer liability for third party harassment would most likely point out that, in California, the legislature did not want third party liability to extend to forms of harassment other than sexual.²⁴¹ And in the federal courts, a third party harassment suit involving other types of harassment has never been successful.²⁴² However, courts have repeatedly advocated that Title VII should be interpreted broadly.²⁴³ When deciding whether to extend sexual harassment to include same-sex harassment, the Supreme Court noted that "male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils . . ."²⁴⁴ The Court went on to say that we must look to the actual language of the laws rather than the concerns of the legislators, and because Title VII prohibits discrimination on the basis of sex, same-sex harassment is unlawful.²⁴⁵

The Fifth Circuit also noted:

[The language of Title VII] evinces a Congressional intention to define discrimination in the broadest possible terms. Congress chose neither to enumerate specific discriminatory practices, nor to elucidate in extenso the parameter of such nefarious activities.

²⁴⁰ Guidelines on Harassment Based on Race, Color, Religion, Gender, National Origin, Age, or Disability, 58 Fed. Reg. 51266-01, 51267 (proposed Oct. 1, 1993) (to be codified at 29 C.F.R. §§ 1609.1(a)-1609.2(d)).
²⁴¹ See supra note 228 and accompanying text.
²⁴² The only federal case to date involving third party harassment not based on a sexual hostile work environment theory resulted in a failed claim for the plaintiff. See Rosenbloom v. Senior Res., Inc., 974 F. Supp. 738 (D. Minn. 1997). However, the court in that case acknowledged that a third party racial harassment claim could be actionable under the right circumstances, such as the failure of the employer to quickly remedy the situation. See id. at 743-44.
²⁴³ See, e.g., infra note 246 and accompanying text.
²⁴⁵ See id. Same-sex harassment is prohibited because it meets the statutory requirement—unwelcome harassment on the basis of sex which alters the terms and conditions of employment. See id. It makes no difference that a man sexually harasses another man, it is still harassment based on that person's sex. See id.
Rather, it pursued the path of wisdom by being unconstrictive, knowing that constant change is the order of our day . . . .

Because "[o]ne can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of . . . workers," Title VII "should be accorded a liberal interpretation in order to effectuate the purpose of Congress to eliminate the inconvenience, unfairness, and humiliation of ethnic discrimination." Harassment by a third party on the basis of race, religion and national origin can easily cause such a hostile work environment: it is a "comparable evil" to third party sexual harassment. Employees should be protected unconditionally from all such noxious conduct.

Extension of employer liability for all third party harassment would fit in with both the language of Title VII and the legislative aspirations for the law because it would go toward eliminating all discrimination from the workplace. In order to harmonize the standards of harassment law, courts should treat all third party harassment exactly the same as they treat third party sexual harassment. This model falls in line with the many court decisions which imposed the same standards for all types of harassment.

Employers may complain that extending their liability to include all third party harassment imposes too harsh a burden on them. But with a negligence standard in place, this argument would not hold up. An employer should only be liable for third party harassment when it knows or should have known of the harassment and has the requisite amount of control over the third party in order to effectuate a change, then fails to take appropriate corrective actions. In my opinion, and according to Title VII,

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247. Id. The Fifth Circuit believes that the principles underlying Title VII should be "elucidated and explicated by experience, time, and expertise." Id.

248. See supra note 244 and accompanying text.

249. See discussion supra Part II(C).

250. See Audrey C. Tan, Employer Liability for Racist Hate Speech by Third-Parties: Comparison of Approaches in Great Britain and the United States, 20 LOY. L.A. INT’L & COMP. L. REV. 873, 905 (1998). Employer complaints would make more sense if courts were to impose a strict liability standard as they do in Great Britain, but a negligence standard is much more reasonable and manageable. See id.

251. This is the same standard which courts use to decide third party sexual harassment claims. See, e.g., 29 C.F.R. § 1604.11(e) (2004); Lockard v. Pizza Hut, Inc., 162 F.3d 1062, 1074-75 (10th Cir. 1998); Magnuson v. Peak Technical Servs., Inc., 808 F. Supp. 500, 512-13 (E.D. Va. 1992); Powell v. Las Vegas Hilton Corp., 841 F. Supp. 1024, 1030 (D. Nev. 1992); see also Wone, supra note 3, at 203 (advocating employer liability for third party racial harassment and urging the courts
employers have a legal and moral duty to eliminate harassment when it is in their power to do so, and that is exactly what this law would mandate.

V. CONCLUSION

In order to truly further the policy goals of Title VII in eliminating all harassment and discrimination, courts should interpret the law so as to place liability on employers for all third party harassment. As a California judge pointed out before the FEHA amendment was adopted to extend employer liability to third party sexual harassment, it "makes no sense to have a comprehensive scheme protecting employees in the workplace from discrimination, with a huge gap leaving employees unprotected when the harasser is a nonemployee." 252 Similarly, it makes no sense to protect employees from sexual harassment by third parties while leaving them vulnerable to all other forms of harassment by nonemployees.

It is true that the focus of Title VII law for the past twenty years has been sexual harassment. 253 But it was a necessary focus, instituted in order to fight the pervasiveness of sexual harassment 254 and to ensure that men and women were equal in the workplace. 255 When creating sexual harassment doctrine, the courts looked to racial harassment and attempted to find parallels. 256 The Eleventh Circuit sought to compare sexual inequality to racial inequality in Henson v. City of Dundee, stating that:

Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make

in such cases to see if the employers have acted reasonably, observe how the policy and procedures were followed, and assess the effectiveness of the employer's remedial actions).


254. See Warner, supra note 107, at 361-62 (laying out results of various surveys on the incidence of sexual harassment); see also Deborah Zalesne, Sexual Harassment Law: Has It Gone Too Far, Or Has the Media?, 8 TEMP. POL. & CIV. RTS. L. REV. 351, 352 (1999) ("[R]ecent events, both in the courts and outside, have brought the term 'sexual harassment' into our vernacular and people are more conscious than ever about their interactions with others in the workplace.").


256. One commentator has noted that:

While it seems inevitable that racial and sexual harassment law develop at different paces, the courts should not want the doctrines to diverge significantly. It is ironic that racial harassment law, the first context in which hostile work environment claims were accepted, must look to its sexual harassment cousin for guidance on third-party harassment questions.

Wone, supra note 3, at 197.
a living can be as demeaning and disconcerting as the harshest of racial epithets.\textsuperscript{257}

Then, surely, the harshest of racial epithets espoused by a customer or client can be as demeaning and disconcerting as sexual harassment by a customer or client. As the Fifth Circuit foretold in \textit{Rogers} while arguing for a broad interpretation of Title VII, "the seemingly reasonable practices of the present can easily become the injustices of the morrow."\textsuperscript{258} Tomorrow is here, and we cannot allow the injustices of harassment on the basis of race, religion and national origin by third parties to continue.

Jamie C. Chanin\textsuperscript{259}

\textsuperscript{257} 682 F.2d 897, 902 (11th Cir. 1982).
\textsuperscript{259} J.D. Candidate, 2006, Pepperdine University School of Law; B.A. in History, 2003, Columbia University. The author would like to thank Professor Karen Gabler for her insight and encouragement.