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I. INTRODUCTION

Sexual harassment of employees by their fellow employees and supervisors is one of the most publicized and discussed topics in the United States.[1] This is particularly true in the wake of the Clarence

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1. The amount of scholarly research in the past five years on the topic of sexual harassment is voluminous. *See generally* Todd B. Adams, *Universalism and Sexual Harassment*, 44 OKLA. L. REV. 683 (1991); Robert S. Adler & Ellen R. Peirce, *The Legal, Ethical, and Social Implications of the "Reasonable Woman" Standard in Sexual Harassment Cases*, 61 FORDHAM L. REV. 773 (1993); Dawn D. Bennett-Alexander, *Hos-*

Thomas Supreme Court confirmation hearings which succeeded in propelling this issue into the nation's consciousness.[2] Sexual harassment is

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tile Environment Sexual Harassment: A Clearer View, 42 LAB. L.J. 131 (1991); Eileen M. Blackwood, *The Reasonable Woman in Sexual Harassment Law and the Case for Subjectivity*, 16 VT. L. REV. 1005 (1992); Cynthia G. Bowman, *Street Harassment and the Informal Ghettoization of Women*, 106 HARV. L. REV. 517 (1993); Maria M. Carrillo, *Hostile Environment Sexual Harassment by a Supervisor Under Title VII: Reassessment of Employer Liability in Light of the Civil Rights Act of 1991*, 24 COLUM. HUM. RTS. L. REV. 41 (1992-93); Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777 (1988); Dana S. Connell, *Effective Sexual Harassment Policies: Unexpected Lessons from* Jacksonville Shipyards, 17 EMPLOYEE REL. L.J. 191 (1991); Stacy J. Cooper, *Sexual Harassment and the Swedish Bikini Team: A Reevaluation of the "Hostile Environment" Doctrine*, 26 COLUM. J.L. & SOC. PROBS. 387 (1993); Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177 (1990); David S. Hames, *An Actionable Condition of Work-Related Sexual Harassment*, 43 LAB. L.J. 430 (1992); Rachael A. Hetherington & Barbara C. Wallace, *Recent Developments in Sexual Harassment Law*, 13 MISS. C. L. REV. 37 (1992); Ken Jennings & Melissa Clapp, *A Managerial Tightrope: Balancing Harassed and Harassing Employees' Rights in Sexual Discrimination Cases*, 40 LAB. L.J. 756 (1989); William L. Kandel, *Mixed Motives, Sexual Harassment and the Civil Rights Act of 1991*, 17 EMPLOYEE REL. L.J. 635 (1992); David A. Larson, *What Can You Say, Where Can You Say It, and To Whom? A Guide to Understanding and Preventing Unlawful Sexual Harassment*, 25 CREIGHTON L. REV. 827 (1992); Anne C. Levy, *The Change in Employer Liability for Supervisor Sexual Harassment After* Meritor: *Much Ado About Nothing*, 42 ARK. L. REV. 795 (1989); Thomas J. Piskorski, *Reinstatement of the Sexual Harasser: The Conflict Between Federal Labor Law and Title VII*, 18 EMPLOYEE REL. L.J. 617 (1993); Lisa A. Blanchard, Note, *Sexual Harassment in the Workplace: Employer Liability for a Sexually Hostile Environment*, 66 WASH. U. L.Q. 91 (1988); Deborah S. Brenneman, Comment, *From a Woman's Point of View: The Use of the Reasonable Woman Standard in Sexual Harassment Cases*, 60 U. CIN. L. REV. 1281 (1992); Jolynn Childers, Note, *Is There a Place for a Reasonable Woman in the Law? A Discussion of Recent Developments in Hostile Environment Sexual Harassment*, 42 DUKE L.J. 854 (1993); Penny L. Cigoy, Comment, *Harmless Amusement of Sexual Harassment?: The Reasonableness of the Reasonable Woman Standard*, 20 PEPP. L. REV. 1071 (1993); Ann C. Juliano, Note, *Did She Ask For It?: The "Unwelcome" Requirement in Sexual Harassment Cases*, 77 CORNELL L. REV. 1558 (1992); Tina Kirstein-Ezzell, Note, *Eradicating Title VII Sexual Harassment by Recognizing an Employer's Duty to Prohibit Sexual Harassment*, 33 ARIZ. L. REV. 383 (1991); P.J. Murray, Comment, *Employer: Beware of "Hostile Environment" Sexual Harassment*, 26 DUQ. L. REV. 461 (1989); Joshua F. Thorpe, Note, *Gender-Based Harassment and the Hostile Work Environment*, 1990 DUKE L.J. 1361; Bonnie B. Westman, Note, *The Reasonable Woman Standard: Preventing Sexual Harassment in the Workplace*, 18 WM. MITCHELL L. REV. 795 (1992); Note, *Pornography, Equality, and a Discrimination-Free Workplace: A Comparative Perspective*, 106 HARV. L. REV. 1075 (1993).

2. The Clarence Thomas Supreme Court confirmation hearings generated an intense amount of press coverage and commentary. *See generally* Marlene Cimons, *The Click! Heard 'Round the Nation*, L.A. TIMES, Oct. 18, 1991, at E1; Derrick Z. Jackson, *After the Thomas Affair, Progress—or Silence?* BOSTON GLOBE, Oct. 20, 1991, at A37; Anthony Lewis, *Abroad at Home: Wages of Cynicism*, N.Y. TIMES, Oct. 11, 1991, at A31; *The Thomas Nomination: Excerpts from Senate's Hearings on the Thomas*

also extensively litigated and is becoming an ever-increasing concern to business managers fearful of its financial consequences and embarrassing publicity.[3] Conversely, one aspect of sexual harassment which has received very little attention occurs when the harasser is not a fellow employee or supervisor but is instead a non-employee such as a customer, supplier or client.[4]

According to a *Wall Street Journal* article, observers of this kind of sexual harassment claim that "such third party harassment is rampant."[5] Unfortunately for the victims, almost always women, the harassment is seldom reported.[6] Many women, constrained by the economic pressures of sustaining an ongoing relationship with a client, customer, or supplier, simply endure it.[7] Other victims are reluctant to report the harassment for fear of being perceived as unable to cope in the workplace.[8]

This brand of sexual harassment is not only common, but the impact it has on its victims may be even greater than fellow employee sexual harassment. This is due to the fact that much of it occurs outside the traditional office or factory where it is not as visible and, therefore, less easily prevented.[9] Consequently, female professionals and sales representatives, who often must meet on their customers' premises or in restaurants and drinking establishments to conduct business, are vulnerable targets.[10]

Nomination, N.Y. TIMES, Oct. 12, 1991, at A12; James Warren, *Coverage Offers Class on Sexual Harassment*, CHI. TRIB., Oct. 12, 1991, at C1.

3. The fear is probably justified. One article estimates that from 42% to 90% of women in the workplace have been victims of sexual harassment. *See* David E. Terpstra & Douglas A. Baker, *A Hierarchy of Sexual Harassment*, 121 J. PSYCHOL. 599 (1987). *But see* The Roper Org. Inc., *Most Americans Say Sexual Harassment At Work Not a Problem*, Roper Reps. No. 92-1 (1992) (analyzing a poll that contradicts the perception that sexual harassment in the workplace is widespread).

4. *See* Joseph G. Allegretti, *Sexual Harassment by Nonemployees: The Limits of Employer Liability*, 9 EMPLOYEE REL. L.J. 98 (1983) (discussing non-employee sexual harassment in view of specific and analogous case law and commentary).

5. L.A. Winokur, *Harassment of Workers by 'Third Parties' Can Lead Into Maze of Legal, Moral Issues*, WALL ST. J., Oct. 26, 1992, at B1.

6. *Id.*

7. *Id.*

8. *Id.* (discussing a Pulitzer prize winning journalist who refused to report incidents of harassment for fear of being labeled "a woman who can't hold her own").

9. *Id.*

10. *Id.*

Indeed, sexual harassment in any setting continues to be poorly understood. Men, almost always the harassers, may not necessarily intend to offend.[11] Often their concept of harassment is narrower than a woman's.[12] This discrepancy in perception is likely to be even greater when the harasser is a customer, client, or supplier. Such parties might avail themselves of such a situation because they perceive that the victim is "working for them." Therefore, the third parties feel they can impose themselves on the employee due to their relatively powerful position.[13] Others may feel that because the victim is fortunate enough to have the harasser's business, she is obligated to tolerate his manner of handling relationships.[14]

Employers are also unprepared to deal with harassment by non-employees. They do not want to rile a valued business customer, client, or supplier.[15] In addition, in many cases, the employer is not physically present or is unable to control the conduct of non-employees. In some situations, employers find it more expedient to alter the employee's duties or even fire the victimized employee.[16] A case in point is an employee of a New York advertising agency. She was terminated after repeated complaints about being harassed by a senior vice president of TWA, an influential client.[17] She subsequently filed suit against her former employer, TWA, and the TWA employee.[18]

Presently, there are few reported cases involving sexual harassment by non-employees.[19] This is likely to change, however, as victimized

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11. *See, e.g.*, Adler & Peirce, *supra* note 1, at 803-04 (citing commentaries and research to illustrate the contentiousness of the issue of whether men intend to sexually harass women in the workplace). *See also* Ronni Sandroff, *Sexual Harassment: The Inside Story*, WORKING WOMAN, June 1992, at 47 (quoting a woman who expresses the view that sexual harassers are seeking to victimize women and exert power). *But see* Ellison v. Brady, 924 F.2d 872, 878-79 (9th Cir. 1991) (discussing how men do not always view their conduct the same way as women and often do not intend or consider their conduct to be sexual harassment).

12. Adler & Peirce, *supra* note 1, at 811. Adler and Peirce maintain that sexual harassment consists of not only conduct which both the reasonable woman and men view as sexual harassment, but also certain conduct that the reasonable woman, but not men, would consider harassment. *Id.* The authors contend that, although there are other points of view, this model reflects the current research and commentary on the issue. *Id.*

13. *See, e.g.*, CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 1 (1979) (arguing that sexual harassment is created when a relationship of unequal power occurs in the workplace).

14. Winokur, *supra* note 5, at B1.

15. *Id.*

16. *Id.*

17. *Id.* ("When I was dismissed, the agency told me, in so many words, that it was either me or the account.").

18. *Id.*

19. *See, e.g.*, Powell v. Las Vegas Hilton Corp., No. 91-359 (D. Nev. filed May 14,

employees become increasingly aware of the conduct's illegality and are no longer fearful of reprisal or being perceived as weak.[20]

The purpose of this article is to discuss the relevant law regarding sexual harassment by third parties. The article will also examine how courts in the future might judge what is sexual harassment, taking into account the type of job involved as well as the particular harassment alleged. Lastly, a policy will be proposed for preventing and handling this type of employee sexual harassment.

II. SEXUAL HARASSMENT BY NON-EMPLOYEES: THE RELEVANT LAW

A. Provocative Dress Cases

One form of sexual harassment committed by non-employees, which has been the subject of litigation and, indeed, constitutes analogous legal precedent to the kind described above, is that involving provocative dress codes imposed only on female employees. The first such case to address the issue was *EEOC v. Sage Realty Corp.*[21] In this case, the victim was compelled to wear a short, poncho-like uniform that exposed her thighs and portions of her buttocks.[22] She was subsequently propositioned sexually and was the target of obscene comments and gestures.[23] After she refused to wear the uniform, she was discharged.[24] The district court ruled that the employer violated Title VII of the Civil Rights Act of 1964[25] by requiring the employee to wear a sexually provocative uniform as a condition of employment.[26] The court added that it was foreseeable that requiring the employee to wear

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1991) (plaintiff prevailed in a motion for summary judgment on the issue of whether an employer could be liable for the sexual harassment of an employee by a customer). In a subsequent trial, the jury rendered a verdict in favor of the defendant. *See* Powell v. Las Vegas Hilton Corp., No. 91-359 (D. Nev. filed Jan. 8, 1993).

20. Winokur, *supra* note 5, at B1.

21. 507 F. Supp. 599 (S.D.N.Y. 1981).

22. *Id.* at 604.

23. *Id.* at 605.

24. *Id.* at 606.

25. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-17 (1988 & Supp. II 1990) [hereinafter Title VII] prohibits employment discrimination and will be discussed below in greater detail.

26. *Sage Realty*, 507 F. Supp. at 611.

the uniform would result in the employee being sexually harassed by customers.[27]

Shortly after the *Sage Realty* decision, a federal district court in *Marentette v. Michigan Host, Inc.*[28] concurred in dicta with the *Sage Realty* court's holding. The *Marentette* court similarly asserted that an employer who exposes an employee to sexual harassment because of its requirement that she wear sexually alluring dress violates Title VII.[29]

Several years later, in *EEOC v. Newtown Inn Ass'n*,[30] the plaintiffs, all female cocktail waitresses, were likewise required to comply with their employer's marketing scheme, which was intended "to project an air of sexual availability to customers through the use of provocative outfits."[31] This included revealing dress for thematic events such as "Bikini Night," "P.J. Night," and "Whips and Chains Night."[32] The plaintiffs contended that as a result of this required attire, they became "subjected to unwelcome sexual proposals and both verbal and physical abuse of a sexual nature."[33] In a subsequent administrative hearing, which was upheld by the district court, the EEOC determined that the plaintiffs were reassigned to less desirable shifts in retaliation for their complaints.[34]

Finally, in *Priest v. Rotary*,[35] a district court ruled that the plaintiff had established a prima facie case when she proved that she was dismissed from her job as a cocktail lounge waitress for refusing to wear a sexually suggestive dress after having been sexually harassed.[36] The court explained that requiring such attire violated Title VII if it was a condition of employment.[37]

One common thread that often runs through these cases is the employer's defense that he has the right to impose a grooming and dress code.[38] This argument has been generally rejected by the courts.

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27. *Id.* at 608.
28. 506 F. Supp. 909 (E.D. Mich. 1980).
29. *Id.* at 912.
30. 647 F. Supp. 957 (E.D. Va. 1986).
31. *Id.* at 958.
32. *Id.*
33. *Id.*
34. *Id.* at 958-59.
35. 634 F. Supp. 571 (N.D. Cal. 1986).
36. *Id.* at 581.
37. *Id.*
38. *See, e.g.*, EEOC v. Sage Realty Corp., 507 F. Supp. 599, 608-09 (S.D.N.Y. 1981) ("The prerogative to impose reasonable grooming and dress requirements . . . does not mean that an 'employer has the unfettered discretion . . . to require its employees to wear any uniform the employer chooses, including uniforms which may be characterized as revealing and sexually provocative.'") (quoting EEOC v. Sage Realty Corp., 87 F.R.D. 365, 371 (S.D.N.Y. 1980)).

In Title VII cases in general, the courts have found that the imposition of certain dress policies on one sex only violates that Act's provisions if the additional requirement involves "immutable characteristics; characteristics which consist of fundamental rights, even if they are not immutable (i.e., having children or marrying); and characteristics which, although not immutable, significantly affect the employment opportunities or the terms and conditions of employment afforded one sex."[39] Clearly, the last scenario applies to *Sage Realty* and its progeny.[40]

B. *Employer Liability for Sexual Harassment by Non-Employees in General*

The cases discussed above demonstrate that employers can be held liable for sexual harassment by non-employees. In these cases, the employers not only allowed the harassment to occur but, in most circumstances, encouraged the sexual harassment by requiring their female employees to wear provocative attire.[41] Their actions, in turn, significantly affected the plaintiffs' terms and conditions of employment.[42] Moreover, the employers only imposed the sexually provocative dress requirements on their female employees.[43]

Such cases are factually distinguishable from other types of sexual harassment by non-employees, including those where the victims are sales representatives or other similar professionals. In those situations, the victim's dress is not imposed by the employer and is not meant to provoke a sexual response. Thus, the foregoing line of cases is distinguishable because it does not fully probe the legal or ethical parameters of the issue. In the following discussion, the relevant law concerning this issue will be reviewed, including provisions of Title VII, EEOC Guidelines, and applicable case law. It will then be demonstrated that although there is presently no published case law directly on point,[44]

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39. BARBARA L. SCHLEI & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 412 (2d ed. 1983).

40. *See supra* notes 21-27 and accompanying text.

41. *See, e.g., Sage Realty*, 507 F. Supp. at 604.

42. *See, e.g., id.* at 605.

43. *See generally supra* notes 21-37. In these cases, all the plaintiffs were female employees and no comparable revealing attire was ever required of male employees.

44. *See* Powell v. Las Vegas Hilton Corp., No. 91-359 (D. Nev. filed May 14, 1991). The court wrote, "Because 'Title VII affords employees the right to work in an environment free of discriminatory intimidation, ridicule, and insult,' this court holds that, in the appropriate case, an employer could be liable for the sexual harassment of

there is enough analogous law and dicta to indicate how the courts will resolve this issue when it is raised—and it will be raised.

C. *Title VII and Sexual Harassment by Non-Employees*

The legal source of employers' liability for sexual harassment is Title VII of the Civil Rights Act of 1964.[45] Title VII provides that it is an "unlawful employment practice for an *employer* . . . to discharge any individual, or otherwise to discriminate against any individual with respect to . . . terms, conditions, or privileges of employment because of such individual's race, color, religion, *sex*, or national origin."[46]

Considering the literal meaning of the statutory language of Title VII, it would be difficult to argue that liability can be imposed on an employer for non-employee sexual harassment.[47] The most obvious obstacle is that Title VII's usage of the word "employer" indicates that the employer actually must be the party committing the harassment.[48] Although it is well settled that employers can be liable for the sexual harassment of their employees by the employees' supervisors and fellow employees,[49] it can be argued that the necessary control an employer exercises over these parties is absent when compared to non-employees.[50] As will be discussed later, the EEOC and the courts, including the Supreme Court in *Meritor Savings Bank v. Vinson*,[51] have imposed, under Title VII, a duty on employers to maintain a workplace that is free of sexual harassment.[52] By implication, this will almost certainly include harassment by non-employees.

Title VII also provides that an employer violates the statute when an employer or supervisor demands sexual consideration from an employee in exchange for job benefits. Such instances of sexual harassment

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employees by nonemployees, including its customers." *Id.* (quoting Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986)).

45. 42 U.S.C. § 2000e-17 (1988 & Supp. II 1990).

46. *Id.* § 2000e-2(a)(1) (1988) (emphasis added).

47. Allegretti, *supra* note 4, at 100-04.

48. *Id.* at 100.

49. In Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986), the Supreme Court apparently approved of holding an employer liable for sexual harassment committed by supervisors. *Id.* at 70. The Court held that "where a supervisor exercises the authority actually delegated to him by his employer, by making or threatening to make decisions affecting the employment status of his subordinates, such actions are properly imputed to the employer whose delegation of authority empowered the supervisor to undertake them." *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 65 ("Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult.").

have become known as "quid pro quo" cases.[53] To recover damages, the victim must suffer a real economic loss. A common example of this kind of case is where an employee is fired for refusing to submit to the sexual overtures made by her supervisor.[54]

Another theory of sexual harassment has developed under Title VII as a result of the *Meritor* case.[55] Under the "hostile environment" line of cases, actionable sex discrimination occurs when the terms and conditions of the employee's work environment become altered due to the severe and pervasive nature of sexual harassment.[56] In these cases, an employee does not have to suffer an actual economic loss but is harassed by sexual innuendo, fondling, and other such conduct which she has not welcomed and which detrimentally alters her work environment.[57]

Although the *Sage Realty* case, discussed earlier, was decided five years before *Meritor*,[58] it is interesting to speculate as to whether it could have been decided on the hostile environment theory. For example, in *Priest v. Rotary*,[59] decided only four months before *Meritor*, the court cited *Henson v. City of Dundee*[60] for the elements of a prima facie hostile environment case.[61] *Henson*, as discussed below, subsequently influenced the Supreme Court's decision in the landmark

53. Williams v. Saxbe, 413 F. Supp. 654 (D.D.C. 1976), *rev'd on other grounds sub nom.* Williams v. Bell, 587 F.2d 1240 (D.C. Cir. 1978); *see also* Equal Employment Opportunity Commission Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a)(2) (1992) [hereinafter EEOC Guidelines] (defining quid pro quo sexual harassment).

54. *See generally* Adler & Peirce, *supra* note 1, at 770-80 (discussing quid pro quo sexual harassment).

55. *Meritor*, 477 U.S. at 67 ("For sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'") (alteration in original) (quoting Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).

56. *See generally* Adler & Peirce, *supra* note 1, at 778-79; *see also* EEOC Guidelines, 29 C.F.R. § 1604.11(a)(2) (defining hostile environment sexual harassment).

57. Adler & Peirce, *supra* note 1, at 793; *see also* Equal Employment Opportunity Commission, Policy Guidance on Current Issues of Sexual Harassment, N-915-050 (BNA) 89, 102 (March 1, 1990).

58. In *Sage Realty*, the court ruled that an employer violated Title VII by requiring, as a condition of employment and on the basis of an employee's sex, that an employee wear sexually provocative attire which knowingly resulted in sexual harassment. EEOC v. Sage Realty Corp., 507 F. Supp. 599, 611 (S.D.N.Y. 1981).

59. 634 F. Supp. 571, 581 (N.D. Cal. 1986).

60. 682 F.2d 897 (11th Cir. 1982).

61. *See infra* notes 106-09 and accompanying text.

Meritor case.[62] The *Priest* case also involved the sexual harassment of a female employee by customers caused by the provocative dress that her employer forced her to wear.[63]

This strongly suggests that other sexual harassment by non-employee cases could advance similarly under the hostile environment theory. For example, if a female sales representative were subjected to highly objectionable sexual conduct in a pervasive and severe manner by one of her customers, this would significantly alter the terms and conditions of her work. As a result, she might be reluctant to approach her harassing customer, who she now finds reprehensible. This would create a hostile environment case because her customer's place of business is a part of her workplace. Moreover, if she were to react by ceasing any dealings with the customer, she would lose a valuable account which would affect her income and advancement.

Indeed, if this happens and the employee is subsequently demoted or fired by an employer who knows or should know about the harassment, the employee, like the plaintiff in *Sage Realty*,[64] may be able to prove discrimination and consequent economic loss. In addition, if the employer's actions can be characterized as intentional discrimination on the basis of the salesperson's gender, the employer may be liable not only for economic loss but also compensatory and punitive damages under the Civil Rights Act of 1991 if the behavior could be characterized as malicious or reckless.[65]

Although courts may interpret Title VII to include incidents of sexual harassment by non-employees, the fact remains that the relevant language of the Act does not specifically prohibit non-employee sexual harassment. The following sources of legal authority, although not legally binding, expressly address this issue.

D. EEOC Guidelines on Sexual Harassment by Non-Employees

EEOC Guidelines indicate the path that courts will likely take on the issue. The EEOC Guidelines, promulgated in 1980, provide the following:

> An *employer* may also be responsible for the acts of *non-employees*, with respect to sexual harassment of employees in the workplace, where the employer

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62. *See infra* notes 109-120 and accompanying text.

63. *Priest*, 634 F. Supp. at 581.

64. *Sage Realty*, 507 F. Supp. at 613 (ruling that because the plaintiff was wrongfully discharged, she was entitled to back pay, pension contributions, and the benefits she would have received had she not been fired).

65. Civil Rights Act of 1991, 42 U.S.C. § 1981a (1992). Under the 1991 Act, damages will be capped based on the number of employees working for the defendant. *Id.* § 1981b(3).

> (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing these cases the Commission will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees.[66]

It is noteworthy that the Supreme Court has afforded considerable weight to the foregoing EEOC Guidelines. In *General Electric Co. v. Gilbert*, the Court stated that any rulings, interpretations, and opinions by the EEOC under Title VII constitute a "body of experience and informed judgment to which courts and litigants may properly resort for guidance."[67] However, the Court stopped short of asserting that the foregoing EEOC pronouncements would be controlling in such cases. Later, in the landmark case of *Meritor*, the Court cited the same guidelines for scrutinizing hostile environment cases of sexual harassment in the workplace.[68]

The EEOC Guidelines clarify the issue in several ways. First, they provide that employers can be liable for sexual harassment by non-employees. This expands the language of Title VII, which appears to support an action based solely on employer sexual harassment. Secondly, the Guidelines refer to "acts" of non-employees. This may apply to acts which result in an economic loss, such as in quid pro quo cases, as well as acts which create a hostile environment. Finally, the Guidelines explicitly state that an employer can be liable if he "knows or should have known of the conduct and fails to take immediate and appropriate corrective action."[69] However, with employees such as sales representatives and other professionals, the EEOC will probably consider the ability of the employer to respond and the amount of control the employer can assert over the employee. This results from the constraints placed on the employer in gaining knowledge of the harassment due to less structure and supervision over the employee's activities.

E. Court Cases and Dicta

In addition to the EEOC Guidelines, at least three federal circuit courts and one district court have stated in dicta that employees can be sexual-

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66. 29 C.F.R. § 1604.11(e) (1992) (emphasis added).

67. 429 U.S. 125, 141-42 (1976) (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).

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

69. EEOC Guidelines, 29 C.F.R. § 1604.11(e) (1992).

ly harassed by non-employees. In *Whitaker v. Carney*,[70] a former city employee attempted to enforce a request for access to sexual harassment claims filed against him by female employees of the city.[71] The Fifth Circuit indicated in dicta that an employer has a duty to take actions against non-employees for sexual harassment of his or her employees.[72] Similarly, in *Garziano v. E.I. Du Pont de Nemours & Co.*,[73] the Fifth Circuit again implied that sexual harassment by non-employees is actionable, citing the specific EEOC Guidelines presented above when discussing the duties that an employer owes his employees in protecting them from sexual harassment.[74]

In the now famous case of *Henson v. City of Dundee*,[75] which involved the hostile environment sexual harassment of employees by fellow employees, the Eleventh Circuit pointed out that a supervisor, a co-worker, or "*even strangers to the workplace*" can cause sexual harassment.[76]

Lastly, in *Moffett v. Gene B. Glick Co.*,[77] in which a subordinate allegedly sexually harassed a superior, a district court made it clear that any number of parties can be held liable for sexual harassment. The court again noted, "[T]he environment in which an employee works can be rendered offensive in equal degrees by the acts of supervisors, co-workers, *or even strangers to the workplace.*"[78]

F. Possible Defenses: Reasonable Dress Code Standards and BFOQ

Employers may be able to assert possible defenses in cases involving the imposition of certain sexually provocative dress. As discussed, employers can, in general, require their employees to adhere to reasonable grooming and dress code standards.[79] However, if grooming standards

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70. 778 F.2d 216 (5th Cir. 1985).

71. *Id.* at 221.

72. *Id.* (quoting 29 C.F.R. § 1604.11(e)).

73. 818 F.2d 380 (5th Cir. 1987).

74. *Id.* at 387 (quoting 29 C.F.R. § 1604.11(e)).

75. 682 F.2d 897 (11th Cir. 1982).

76. *Id.* at 910 (quoting EEOC v. Sage Realty Corp., 507 F. Supp. 599, 609-10, 601 n.16 (S.D.N.Y. 1981); 29 C.F.R. § 1604.11(e)).

77. 621 F. Supp. 244 (N.D. Ind. 1985).

78. *Id.* at 272 (emphasis added) (citing EEOC v. Sage Realty Corp., 507 F. Supp. 599, 609-10, 610 n.16 (S.D.N.Y. 1981); Friend v. Leidinger, 588 F.2d 61, 68 (4th Cir. 1978); Compston v. Borden, Inc., 424 F. Supp. 157, 160-61 (S.D. Ohio 1976); 29 C.F.R. § 1604.11(e)).

79. *See generally* Allegretti, *supra* note 4; SCHLEI & GROSSMAN, *supra* note 39; Michael L. Sirota, *Sex Discrimination: Title VII and the Bona Fide Occupational Qualification*, 55 TEX. L. REV. 1025 (1977); Peter F. Ziegler, Note, *Employer Dress and Appearance Codes and Title VII of the Civil Rights Act of 1964*, 46 S. CAL. L.

or dress codes disparately impact one sex and detrimentally affect the ability of employees of that sex to perform their jobs, they become unreasonable and actionable under Title VII.[80] Accordingly, in *Carroll v. Talman Federal Savings & Loan Ass'n*,[81] the Seventh Circuit ruled that an employer violated the Act by requiring female employees to wear uniforms, while permitting men to wear business suits.[82] In another case, *Laffey v. Northwest Airlines*,[83] a district court found that the defendant's policy of forcing female employees to wear contact lenses but allowing its male employees to wear either glasses or contact lenses similarly violated the Act.[84] The court maintained that the distinction in the policy sustained the stereotype of women as sex objects.[85] In light of these cases, it is not surprising that sexually provocative dress required of only female employees could not survive as a defense in applying the *Sage Realty* line of cases discussed previously.[86]

There may, however, be a bona fide occupation qualification (BFOQ) defense available in narrow instances involving sexually provocative dress. According to the Supreme Court in *Dothard v. Rawlinson*,[87] the BFOQ defense is intended to be narrowly applied.[88] In *Diaz v. Pan American World Airways*,[89] the Fifth Circuit stated that a BFOQ can only be utilized "when the *essence* of the business operation would be undermined by not hiring members of one sex exclusively."[90] Hence, in *Diaz*, the court refused to accept the argument that hiring males as flight attendants would undermine the essence of travel on the defendant's airline.[91]

Despite the narrowness of the defense, it remains unresolved whether an employer may impose on female employees a provocative and sexy

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REV. 965 (1973).

80. *See, e.g.*, SCHLEI & GROSSMAN, *supra* note 39, at 415.

81. 604 F.2d 1028 (7th Cir. 1979).

82. *Id.* at 1033 ("[W]hen some employees are uniformed and others not there is a natural tendency to assume that the uniformed women have a lesser professional status than their male colleagues attired in normal business clothes.").

83. 366 F. Supp. 763 (D.D.C. 1973), *vacated and remanded in part and aff'd in part*, 567 F.2d 429 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978).

84. *Id.* at 790.

85. *See id.*

86. *See supra* notes 21-40 and accompanying text.

87. 433 U.S. 321 (1977).

88. *Id.* at 334.

89. 442 F.2d 385 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971).

90. *Id.* at 388 (emphasis in original).

91. *Id.* at 388-89.

attire for a job in which "sex appeal" constitutes the "essence of the business operation." There is support for the proposition that this can occur in isolated instances. For example, the authors of an informal EEOC publication[92] state that "jobs may be restricted to members of one sex . . . in jobs in the entertainment industry for which sex appeal is an essential qualification."[93] According to at least one commentator, this includes topless and striptease dancers.[94] However, it would be more difficult to justify the requirement that cocktail waitresses in some establishments must wear sexually enticing attire. In these cases, it becomes necessary to determine whether the primary function or essence of the business is one of serving drinks and entertainment or one of sex appeal.[95] In at least one case, *Guardian Capital Corp. v. New York State Division of Human Rights*,[96] a state court ruled that a restaurant could not discriminate against its waiters, who were fired and replaced by scantily dressed waitresses, by advancing a BFOQ based on sex appeal.[97] However, in *St. Cross v. Playboy Club*,[98] an appeal board ruled that employment as a "bunny" did give rise to a successful BFOQ defense.

The BFOQ defense, although possibly effective in limited situations, will have little impact on sexual harassment cases by non-employees in general. As stated, the provocative dress cases likely represent only a portion of the instances in which the harassment occurs. Obviously, it does not apply to many other conditions of employment that were discussed earlier. However, even in circumstances where female employees work in establishments which rely primarily on the business of "sex appeal," an employer is liable if an employee is sexually harassed. In-

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92. Sirota, *supra* note 79, at 1066 (discussing EEOC publication entitled TOWARD JOB EQUALITY FOR WOMEN (1969)). Because the ten page booklet was apparently written for informal use by the general public, it should not be considered a legitimate medium for declaring a new BFOQ category. *See id.* at 1060 n.213.

93. *Id.* at 1066.

94. *Id.*

95. *Id.* This issue was being litigated in Las Vegas, as of September, 1993, in a suit against the Rio Suite Hotel and Casino. The "Ipanema Girls," dressed in three-inch high heels and costumes that expose virtually all of their buttocks, filed sexual harassment claims with the Nevada Equal Rights Commission, arguing that the attire caused them to be objects of ridicule and sexual comments. Their attorney claims that the requirement that females only wear the costume is actionable by itself. Since the Rio Suite Hotel is primarily a casino, it likely cannot sustain an argument that its primary function is sex appeal. *See* John L. Smith, *Tradition, Changing Times Collide in Sex Harassment Case*, LAS VEGAS REVIEW-JOURNAL, July 29, 1993, at B1.

96. 360 N.Y.S.2d 937 (N.Y. App. Div. 1974), *appeal dismissed*, 369 N.Y.S.2d 1027 (N.Y. App. Div. 1975).

97. *Id.* at 938.

98. Appeal No. 773, State Human Rights Appeal Board (N.Y. 1971). *See* Sirota, *supra* note 79, at 1067-68.

deed, a striptease dancer can be sexually harassed by a customer. A discussion of a policy to contain sexual harassment by non-employees follows.

III. STANDARDS FOR JUDGING SEXUAL HARASSMENT BY NON-EMPLOYEES: EMPLOYEE ANALOGY

Apart from the *Sage Realty* line of cases and some instances described in the popular press,[99] the authors are unaware of any reported cases in which a court has ruled on the issue of sexual harassment of employees by non-employees. Consequently, well-established standards for judging what sexual harassment by non-employees might encompass do not exist. However, a great number of cases and commentaries have focused on how to assess sexual harassment by supervisors and fellow employees. In the following discussion, the authors, will briefly discuss how the various circuits view sexual harassment. The focus will be on the so-called "hostile environment" type of sexual harassment,[100] as opposed to the "quid pro quo" type.[101] The reason for this emphasis is that hostile environment cases are more difficult to define.[102] The judgment required in determining whether sexual harassment and its resultant legal problems exist are not present. Moreover, the authors believe that the predominate cases that will arise in the future regarding non-employee sexual harassment will be based on a hostile environment scenario.

A. Hostile Environment and Sexual Harassment

Hostile environment sexual harassment cases have their jurisprudential roots in the case of *Rogers v. EEOC.*[103] *Rogers* involved a Hispanic employee who was subjected to ethnic slurs.[104] The Fifth Circuit held that

99. *See generally* Smith, *supra* note 95; Winokur, *supra* note 5; *see also* Powell v. Las Vegas Hilton, No. 91-359 (D. Nev. filed May 14, 1991).

100. *See supra* notes 55-63 and accompanying text; *infra* notes 103-125 and accompanying text.

101. *See supra* notes 53-54 and accompanying text.

102. *See generally* Adler & Peirce, *supra* note 1, at 798-818 (discussing the evolution of hostile environment cases and the legal and ethical problems with defining a hostile environment).

103. 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972).

104. *Id.* at 235.

Title VII covers not only economic harm but psychological harm as well if it interferes with job performance.[105]

In 1980, the EEOC issued its Guidelines on sexual harassment[106] which were followed by several circuit courts. The District of Columbia Circuit ruled, in *Bundy v. Jackson*,[107] that a Title VII harassment analysis based on race, religion, or ethnicity also applies to harassment based on sex, even if the victim did not lose any tangible job benefits.[108]

A year later, the Eleventh Circuit, in *Henson v. City of Dundee*,[109] expanded the hostile environment concept. Restating the *Bundy* reasoning, the court set forth five elements for proving a hostile environment: (1) the employee must belong to a protected class; (2) the employee must be subjected to unwelcome sexual harassment, including sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature; (3) the harassment complained of must be based on gender; (4) the harassment complained of must affect a "term, condition or privilege" of employment; and (5) the employer must be liable under the doctrine of respondeat superior.[110]

Under the *Henson* approach, the victim must not solicit or incite the conduct, and the defendant's conduct must be "undesirable and offensive."[111] The court also stated that gender-based harassment must be "sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment."[112]

The hostile environment claim of the type involved in *Bundy*[113] and *Henson*[114] was ultimately sanctioned as the law of the land in the landmark Supreme Court case of *Meritor Savings Bank v. Vinson*.[115] Even in the wake of *Meritor*, however, the circuit courts continue to interpret "hostile environment" in myriad ways. Some circuits, including the First Circuit,[116] the Second Circuit,[117] the Fourth Circuit,[118] the Fifth Cir-

105. *Id.* at 238.
106. EEOC Guidelines, 29 C.F.R. § 1604.11(a)(2) (1992).
107. 641 F.2d 934 (D.C. Cir. 1981).
108. *Id.* at 943-44.
109. 682 F.2d 897 (11th Cir. 1982).
110. *Id.* at 903-04.
111. *Id.* at 903.
112. *Id.* at 904.
113. *See supra* text accompanying notes 107-08.
114. *See supra* notes 109-12 and accompanying text.
115. 477 U.S. 57 (1986).
116. Lipsett v. University of P.R., 864 F.2d 881 (1st Cir. 1988).
117. Carrero v. New York City Hous. Auth., 890 F.2d 569 (2d Cir. 1989).
118. Spencer v. General Elec. Co., 894 F.2d 651 (4th Cir. 1990).

cuit,[119] the Sixth Circuit,[120] the Seventh Circuit,[121] the Tenth Circuit,[122] the Eleventh Circuit,[123] and the District of Columbia Circuit[124] have adopted the *Henson* elements.

However, not all circuits have followed the *Henson* approach. For example, in *Andrews v. City of Philadelphia*,[125] the Third Circuit departed from *Henson* by not requiring proof of unwelcomeness by the victim. Rather, the court focused on the objective and subjective effect the harassing conduct had on the plaintiff.[126]

B. Reasonable Woman Standard

Another departure from *Henson* involves the so-called "reasonable woman" standard. This standard, which was first introduced in a commentary,[127] was judicially recognized in a famous dissent.[128] The EEOC later embraced the "reasonable woman" standard.[129] The concept of a reasonable woman standard, however, was not widely accepted until the Ninth Circuit case of *Ellison v. Brady*.[130] In that 1991 case, the court

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119. Wyerick v. Bayou Steel Corp., 887 F.2d 1271 (5th Cir. 1989).

120. Dabish v. Chrysler Motors Corp., 902 F.2d 32 (6th Cir. 1990).

121. Trautwetter v. Quitch, 916 F.2d 1140 (7th Cir. 1990).

122. *See, e.g.*, Hirschfeld v. New Mexico Corrections Dep't, 916 F.2d 572 (10th Cir. 1990) (quoting Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982); Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986)).

123. Huddleston v. Roger Dean Chevrolet, Inc., 845 F.2d 900 (11th Cir. 1988).

124. Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981).

125. 895 F.2d 1469 (3d Cir. 1990).

126. *Id.* at 1483-84 (ruling that the subjective viewpoint demonstrates that the purported conduct injured the specific victim while the objective standard protects the defendant from the hyper-sensitive plaintiff).

127. Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV. L. REV. 1449, 1459 (1984) (arguing that the reasonable woman standard protects women from hostile and offensive behavior).

128. Rabidue v. Osceola Ref. Co., 805 F.2d 611, 626 (6th Cir. 1986) (Keith, J., dissenting) (arguing that the reasonable victim standard "simultaneously allows courts to consider salient sociological differences as well as shield employers from the neurotic complainant"), *cert. denied*, 481 U.S. 1041 (1987).

129. Equal Employment Opportunity Commission, Policy Guidance on Current Issues of Sexual Harassment, N-915-050 (BNA) 89 (March 1, 1990) ("In determining whether harassment is sufficiently severe or pervasive to create a hostile environment, the harasser's conduct should be evaluated from the objective standpoint of a 'reasonable person.'" The Guidelines further state that the objective standard should take into account "the victim's perspective and not stereotyped notions of acceptable behavior.").

130. 924 F.2d 872 (9th Cir. 1991); *see also* Yates v. Avco Corp., 819 F.2d 630, 637

held that a plaintiff was required to prove "conduct which a *reasonable woman* would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment."[131] The Eighth Circuit recently approved of this standard in *Burns v. Macgregor Electronic Industries.*[132]

C. *Sexual Harassment by Non-Employees: Applying the* Ellison *Approach*

The federal circuits have adopted various approaches to determine whether a plaintiff has proven "unwelcomeness" under *Henson.*[133] The circuits have addressed whether a plaintiff has proven that a "reasonable person"[134] or "reasonable woman"[135] would find that conduct detrimentally altered the conditions of employment. In addition, it is necessary to establish a standard for judging the act or acts in non-employment harassment cases. The *Ellison* court's standard for determining sexual harassment is particularly useful and may offer an effective means of judging sexual harassment by non-employees. To prove a prima facie hostile environment case under *Ellison,* the plaintiff must show "conduct which a reasonable woman would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment."[136] Thus, under *Ellison,* a showing of "unwelcomeness" is not required to prove that the plaintiff has been sexually harassed.[137] However, despite the difference between the *Henson* court's "unwelcomeness" approach and the *Ellison* court's "reasonable woman" approach, the outcome under both approaches will be virtually the same. After all, a workplace that is "abusive" would certainly be "unwelcome."

The approach taken by the *Ellison* court has a number of positive aspects. First, the *Ellison* court adopted a reasonable woman standard in judging sexual harassment.[138] The court argued that this standard is

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(6th Cir. 1987); Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1523 (M.D. Fla. 1991).

131. Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991) (emphasis added).

132. 989 F.2d 959, 962 n.3 (8th Cir. 1993) ("We note and agree with commentary that suggests, in hostile environment litigation under Title VII, the appropriate standard is that of a reasonable woman under similar circumstances.").

133. Henson v. City of Dundee, 682 F.2d 897, 903 (11th Cir. 1982).

134. *See, e.g.,* Hirschfeld v. New Mexico Corrections Dep't, 916 F.2d 572, 580 (10th Cir. 1990); Morgan v. Massachusetts Gen. Hosp., 901 F.2d 186, 193 (1st Cir. 1990); Rabidue v. Osceola Ref. Co., 805 F.2d 611, 620 (6th Cir. 1986).

135. *Ellison,* 924 F.2d at 879; Yates v. Avco Corp., 819 F.2d 630, 637 (6th Cir. 1987); Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1524 (M.D. Fla. 1991).

136. *Ellison,* 924 F.2d at 879.

137. *See id.*

138. *Id.* at 878 ("We therefore prefer to analyze harassment from the victim's per-

preferable to the reasonable person standard used in several other circuits[139] because the reasonable person standard tends to reinforce "stereotyped notions of acceptable behavior."[140] Thus, the reasonable person standard, the court explained, would allow harassers to continue to harass "merely because a particular discriminatory practice was common, and victims of harassment would have no remedy."[141]

The court reasoned that the reasonable person standard caters to a male bias, thus overlooking the experiences of women.[142] Under a reasonable person standard, which is said to be dominated by how males view various acts with a sexual content, men could perceive certain acts as relatively harmless.[143] Women, however, could view the same situation as offensive.[144] The court believed that women's historic subjection to sexual assault explains the perception differential:

> [B]ecause women are disproportionately victims of rape and sexual assault, women have a stronger incentive to be concerned with sexual behavior. Women who are victims of mild forms of sexual harassment may understandably worry whether a harasser's conduct is merely a prelude to violent sexual assault. Men, who are rarely victims of sexual assault, may view sexual conduct in a vacuum without a full appreciation of the social setting or the underlying threat of violence that a woman may perceive.[145]

Second, the *Ellison* court requires that the plaintiff demonstrate that the sexually harassing conduct be "sufficiently severe and pervasive to alter the conditions of . . . employment and create an abusive work environment."[146] However, the severity of the conduct shall be considered to "var[y] inversely with the pervasiveness or frequency of the conduct."[147] Thus, one act may be sufficient if it is particularly severe, while less objectionable incidents may be sufficient if they occur frequently. This requirement is beneficial because it would excuse one isolated act unless it was highly repugnant. At the same time, a series of small but festering incidents of sexual harassment do not go unpunished under this analysis.

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spective.").

139. *See supra* note 134 and accompanying text.
140. *Ellison*, 924 F.2d at 878.
141. *Id.*
142. *Id.* at 879.
143. *Id.* at 878.
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.*

In addition, this analysis examines the incidents from the perspective of a reasonable woman.

The reasonable woman standard, therefore, accounts for the reactions of a hyper-sensitive victim. Because a reasonable woman in the victim's place could have had a similar reaction, the *Ellison* court did not view the victim's reaction as either "hyper-sensitive" or "idiosyncratic."[148]

One last aspect of *Ellison* merits discussion. The court asserted that a harasser can be liable even if he does not intend to harass.[149] Even "well-intentioned compliments"[150] are actionable as long as "a reasonable victim of the same sex as the plaintiff would consider the comments sufficiently severe or pervasive to alter a condition of employment and create an abusive working environment."[151] The court noted that Title VII focuses on the remedying effects of sexual harassment rather than the motivation behind it.[152] Moreover, the court stated that if intent became a defense, it would trivialize the effects of sexual harassment on a reasonable woman.[153]

D. Totality of the Circumstances Test: Applications to Non-Employee Sexual Harassment

In its 1985 Guidelines on Sexual Harassment, the EEOC provided that the trier of fact should determine whether sexual harassment occurred after considering the "totality of the circumstances."[154] This includes the "nature of the sexual advances" as well as "the context in which the alleged incidents occurred."[155]

In considering the totality of the circumstances, the courts, including the Supreme Court in the *Meritor* case, have stated that evidence of a plaintiff's speech and dress are "obviously relevant."[156] Thus, the average reasonable woman who dresses or speaks in a certain way might expect to be treated by men in different ways as well. Although a good argument can be made that, like rape cases, the blame is being put on

148. *Id.* at 880.
149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.* at 879-80. *But see* Lipsett v. University of P.R., 864 F.2d 881, 899 (1st Cir. 1988) (stating that the harasser's conduct should be considered from the perspective of both the harasser and the victim). *See also* Jennings v. D.H.L. Airlines, 101 F.R.D. 549, 551 (N.D. Ill. 1984) (stating that sexual harassment should be derived by viewing the harasser's conduct, not the victim's perception).
154. 29 C.F.R. § 1604.11(b) (1993).
155. *Id.*
156. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 69 (1986).

the victim rather than the victimizer, the circumstances surrounding certain jobs cannot be realistically ignored.[157] For example, a woman who works as a cocktail waitress in a revealing costume in a workplace which focuses on sex appeal and a woman who works in a conventional bookstore wearing very conservative clothes should not expect the same reactions from their customers.[158]

As a result of the special relationship between an employee and her clients or customers, sexual harassment by non-employees should, in particular, be viewed in its proper context. It is arguably more important to view non-employee sexual harassment in its context primarily because many jobs require different kinds of attire that are aimed at creating a certain reaction from customers but not from co-workers.

On the other hand, it has been argued that the employee's attire should not be considered at all in the case where a female employee is sexually harassed by a fellow worker or supervisor. This is because, as one commentator argues, what is "sexually enticing" is subjective.[159] Hence, a woman may be wearing clothing that she considers conservative but that a certain man might consider alluring. This same argument cannot be made about many types of jobs where the employee's costume is intended to elicit a certain amount of customer attention.[160]

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157. Ann C. Juliano, Note, *Did She Ask For It?: The "Unwelcome" Requirement in Sexual Harassment Cases*, 77 CORNELL L. REV. 1558, 1576 (1992) ("In the past, a victim of rape had to explain her dress (miniskirts, tight pants, etc.), her behavior (walking alone late at night), and her past sexual conduct.").

158. The woman working in a bookstore will almost certainly not be wearing garments that are meant to entertain a customer or to radiate sex appeal. On the other hand, the costumed cocktail waitress, working in a business attempting to create an atmosphere of sexual appeal for its customers, may very well be exposed to behavior that would not be characterized as sexual harassment in that context but would if she were subjected to it while working in a bookstore. Of course, the cocktail waitress can be sexually harassed if the average reasonable woman in her situation would find that the complained of conduct detrimentally affects the terms and conditions of her employment.

159. Juliano, *supra* note 157, at 1576.

160. For example, cocktail waitresses do not usually have the luxury of choosing what they wear. Because their attire is imposed by the employer, reactions to the costume should be judged in a different context. *But see* EEOC v. Sage Realty Corp., 507 F. Supp. 599 (S.D.N.Y. 1981); *supra* notes 21-27 and accompanying text. In *Sage Realty*, an employer intentionally required only female employees to wear enticing clothing, making it foreseeable that the situation would provoke sexually harassing conduct from customers. *Id.* at 611. In such a situation, the employer may be violating Title VII simply by the disparate treatment he is exacting on the female employees. *See id.* Thus, in determining whether there is a violation of Title VII, it might be

A second argument made is that a woman may dress in a certain way not to attract a man's attention but instead to bolster her self-esteem.[161] Society, one commentator contends, should not "require women to dress like nuns in order to avoid sending unknown and unintended messages."[162] Again, certain employees, like the cocktail waitress, cannot make this argument. The cocktail waitress is not dressing primarily for purposes of self-esteem, but rather because she consents to the costume as part of her job. Likewise, she is not sending out unintended messages. The intent of dressing her in such eye-catching attire is obvious. However, if she does not consent to her dress or the establishment is not primarily engaged in sex appeal, her situation may be actionable under the distinguishable cases discussed at the beginning of this article.[163]

Lastly, it is argued that a woman's attire should not be taken into consideration because a woman may dress in a manner designed to be attractive but only to a particular person.[164] Again, the situation is different for the cocktail waitress. She is clearly not intentionally dressing in an attractive manner for one person. Instead, she is dressed to be attractive as a part of the overall sexual ambience being projected. Therefore, dress and behavior, in certain circumstances, should be considered in determining whether a reasonable woman would view conduct as sexual harassment.

E. Model Test for Judging Sexual Harassment by Non-Employees

The foregoing discussion, borrowing heavily from sexual harassment cases in general and the *Ellison* case in particular, is intended to create a model for judging sexual harassment of employees by non-employees. The following are suggested as factors for proving such a case.

First, the conduct must be viewed from the perspective of the average reasonable woman.[165] This approach is not sex-biased like the average reasonable person standard. It also controls the problem of the hyper-sensitive plaintiff. Additionally, the circumstances surrounding the working environment are to be considered. In cases involving sexual harassment by non-employees, this standard is particularly effective inasmuch as victims will find themselves in numerous situations in which an

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determinative whether the attire was sexually enticing or whether the business' primary function is "sex appeal." *See supra* notes 92-98 and accompanying text.

161. Juliano, *supra* note 157, at 1585.

162. *Id.*

163. *See supra* notes 21-40 and accompanying text; *see also supra* text accompanying note 160.

164. Juliano, *supra* note 157, at 1585-86.

165. Ellison v. Brady, 924 F.2d 872, 878 (9th Cir. 1991); *see also supra* notes 133-53 and accompanying text (discussing the *Ellison* standard).

objective standard will provide a useful gauge for judging sexual harassment. For example, the average reasonable woman who works in revealing attire in an establishment that touts itself for its sex appeal would have to consider the specific environment in determining what detrimentally alters the terms and conditions of her work environment.

Second, the conduct must be "sufficiently severe or pervasive to alter a condition of employment and create an abusive working environment."[166] Under this element, one particularly offensive incident might be enough to prove a case. However, even if the individual episodes are not highly offensive, they may still be actionable if cumulatively they become severe.[167] Again, certain kinds of conduct by non-employees may be considered harassment in some contexts but not in others. As a result of these differences, the severity and pervasiveness must again be considered. Pervasive staring by a patron in a topless bar could not be considered sexual harassment. However, such behavior by a customer in a retail establishment could.

Third, the intent of the harasser should not be considered. If intent is factored in, offensive behavior could be trivialized by the offender simply by stating that he did not mean any harm and it was all just "innocent fun."[168] A customer or client may think that he can have "fun" at the victim's expense simply because the victim is working for him or is lucky enough to have his account in a competitive business. Moreover, the introduction of intent would foster its use as a defense by anyone accused of sexual harassment.

Fourth, the trier of fact must look at the "totality of the circumstances."[169] The physical context of the alleged sexual harassment is very important in non-employee sexual harassment. The requirements of dress and tolerated behavior of different jobs may vary greatly and cause customers to react to employees in many ways. These differing reactions must be considered. However, it should be emphasized that a woman's consent to work in a "risky" workplace, such as a topless bar, does not constitute a waiver of her legal protections under Title VII.[170] Thus, utilizing the objective standards discussed above, certain acts would be sexual harassment even to a topless dancer.

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166. *Id.* at 880.
167. *Id.*
168. *Id.*
169. *See supra* notes 154-64 and accompanying text.
170. *See supra* notes 21-40 and accompanying text.

Fifth, an employer incurs liability for sexual harassment by non-employees if he knew or should have known about the conduct but fails to take prompt remedial action.[171] An employee should not be required to endure sexual harassment for an unreasonable time, taking into account the employer's ability to become aware and control the relationship in question.[172] Obviously, an employer will have difficulty gaining awareness and controlling what happens to a salesperson who is rarely in the office. Conversely, the supervisor of a cocktail waitress has the opportunity to be vigilant and react quickly.

F. Remedial Action

There is no clear body of case law or any other guidelines that informs managers when third party sexual harassment has occurred. Similarly, there are no guidelines that specify appropriate remedial action. However, the EEOC Guidelines discussed earlier make it clear that an employer who knows or should have known about the harassing conduct will be vicariously liable should he fail to react to it promptly.[173]

One obvious issue is discerning the perspective of a reasonable victim in the context of employer-employee relations. As stated in *Ellison*, it appears that the standard applied when non-employees are involved must be keyed to the reasonable expectations of the employee in her particular employment environment. It should also be noted that "if sexual comments or sexual advances are in fact welcomed by the recipient they, of course, do not constitute sexual harassment."[174]

G. High Risk Occupations

Thus, following the *Ellison* principle, a court would likely conclude that a topless female dancer would reasonably expect stares, but not physical contact, from her audience. If she were the object of physical contact, the employer would reasonably be expected to intervene. Clearly, the failure to act would violate *Ellison's* reasonable woman standard.

A second issue is the immediacy of the response. In *Dornhecker v. Malibu Grand Prix Corp.*,[175] the Fifth Circuit noted that "[s]ince the demise of the institution of dueling, society has seldom provided instantaneous redress for dishonorable conduct."[176] In cases of battery by a customer upon an employee, "seldom" is the operative word. Although

171. *See supra* notes 66-69 and accompanying text.
172. Henson v. City of Dundee, 682 F.2d 897, 909 (11th Cir. 1982).
173. *See supra* text accompanying notes 66-69.
174. Ellison v. Brady, 924 F.2d 872, 880 n.13 (9th Cir. 1991).
175. 828 F.2d 307 (5th Cir. 1987).
176. *Id.* at 309.

an employer cannot "examine a charge of sexual harassment based on one side of the story, in a vacuum,"[177] in high risk situations where battery is likely, an employer's instantaneous reaction should be expected.

A third and related issue becomes vigilance by the employer. Case law involving hostile work environment issues clearly holds that employers are liable for what they know or should have known.[178] Subjecting employees to high-risk activities demands careful and virtually continuous supervision.

H. Mid-Level Risk Occupations

Following the reasonable woman test specified in *Ellison*, it could reasonably be expected that a court would acknowledge mid-level risk occupations. A cocktail waitress in a conventional lounge would be an example. Some degree of sexual aggression is foreseeable where a waitress serving alcohol might be attractively, but not provocatively, dressed. Again, the question arises as to what a reasonable woman would expect. Certainly, some attention and perhaps an occasional, but uncalled for, compliment would not severely alter conditions of employment.

I. Low Risk Occupations

Finally, in studying a three-tier level of examples, the example of a low-risk environment would be a female employee in a conventional bookstore. Here, conservatively dressed in a relatively sophisticated setting, little or no risk of sexual harassment is expected. The employer in this workplace must be most protective and respond to even mild provocation. The average reasonable woman would expect nothing less. Indeed, a worker in this kind of environment should, in all probability, anticipate fewer sexually hostile acts from customers than what might be expected from a fellow employee in the workplace.

It is normal and routine and, therefore, reasonable to anticipate that fellow employees will become well-acquainted with each other at work. Hence, they may feel they have more freedom to probe the outer limits of their relationships. The EEOC, in one of its policy guidelines, suggests that sexual flirtation, innuendo and even vulgar language might not be sexual harassment between employees.[179] This would not be true, how-

177. *Id.* at 310.
178. *See, e.g.*, Yates v. Avco Corp., 819 F.2d 630, 636 (6th Cir. 1987).
179. Equal Employment Opportunity Commission, Policy Guidance on Current Issues

ever, if it were directed by a customer to our hypothetical female sales clerk in a bookstore.

IV. POLICY FORMULATION

Given the almost infinite variety of positions occupied by men and women in the workforce, the difficulty of formulating a sexual harassment policy using the *Ellison* doctrine is demonstrably present. At the same time, the need for effective policy becomes apparent.

Case law provides no direct help, but factors emerge in analogous cases as likely considerations. Most helpful is the classic case of *Robinson v. Jacksonville Shipyards, Inc.*,[180] in which male employees of the shipyard created a hostile working environment for their few female co-workers. In doing so, a district court rejected a policy adopted by the shipyard during pendency of the litigation.[181] Its reasons are instructive.

One factor the court considered was that the shipyard's policies were adopted unilaterally without consulting or bargaining with the female employees.[182] As noted in *Ellison*, "courts should consider the victims' perspective and not stereotyped notions."[183] It becomes apparent that the first step in policy formulation should be employee involvement. The issue thus becomes: what degree of protection do topless dancers and bookstore clerks actually expect? Protective policy must first and foremost be written outside a vacuum which is littered with assumptions by those who are just guessing about how victims wish to be treated.

The second reason the shipyard's policy was rejected related not to its content but to the fact that it "was distributed solely through posting on the bulletin boards in the shops."[184] As a result, the court concluded that the newly stated policy, in reality, had "little or no impact on the sexually hostile working environment."[185] Thus, another rule that evolves from this case is that the policy must be generally known and incorporated in basic rule books, such as the affirmative action plan of an organization.[186]

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of Sexual Harassment, N-915-050 (BNA) (March 1, 1990).

180. 760 F. Supp. 1486, 1494 (M.D. Fla. 1991).

181. *Id.* at 1517.

182. *Id.*

183. Ellison v. Brady, 924 F.2d 872, 878 (9th Cir. 1991).

184. *Robinson*, 760 F. Supp. at 1518.

185. *Id.*

186. *Id.*

Finally, the court cited a third reason for rejecting the company plan: limited access to relief.[187] Only one company representative was designated to hear complaints.[188] Clearly, in the case of complaints involving transient customers or other third parties, time is of the essence and dispute resolution will require immediate access to some source of authority. Thus, a policy must provide access to an available supervisor while the complaining employee is on the job. Concluding that the company plan was inadequate, the court proceeded to grant the plaintiff's request for injunctive relief and forced the shipyard to adopt an "effective and enforced sexual harassment policy."[189]

Quite obviously, courts will not settle for "lip service" to brush aside problems associated with fellow employee hostile work environment cases. There is no reason to expect less in comparable non-employee harassment cases. This is further reflected by the very detailed statement of policy the court finally and specifically directed in *Robinson*. The court noted that the policy must "describe with specificity the behaviors that constitute harassment."[190] At this point, consultation with employees would be critical. Especially in a male dominated organization which has female employees, the reaction of a reasonable female employee under a variety of circumstances must be open for discussion.[191] Indeed, the *Ellison* case strongly stated the argument that a reasonable person standard was ineffectual because it tended to be male-biased.[192]

In line with the foregoing, in a model policy, employees must be advised that sexual harassment may result from the behavior of third parties. While the *Robinson* case specifically covered co-workers and superiors, the need to transition the analysis to third party harassment is apparent.

A model plan must provide "a number of avenues through which a complaint may be initiated."[193] This element is essential in a sexual harassment plan concerned with third party issues. Providing prompt dispute resolution is critical and, in certain high-risk situations (for example, the topless dancer), the employer must be vigilant and prepared for an almost instantaneous response. It follows that an immediate supervi-

187. *Id.* at 1519.
188. *Id.* at 1518.
189. *Id.*
190. *Id.* at 1519.
191. *Id.*
192. *Ellison*, 924 F.2d at 879.
193. *Robinson*, 760 F. Supp. at 1519.

sor must have the training to recognize offensive conduct along with the authority to intervene and eliminate third party harassment.

Finally the employer must attempt to provide confidentiality to protect the employee and witnesses from retaliation.[194] In certain circumstances, anonymity may be impossible. Clearly, however, the employer must be able to assure employees that they will not be adversely impacted by asserting complaints of sexual harassment by non-employees.

The actual plan imposed on the Jacksonville Shipyards is extreme in its detailed description of prohibited conduct, penalties and procedures.[195] It would be wise for employers to avoid the imposition of such a burdensome scheme by immediately implementing a voluntary plan following the guides stated above, the thrust of which is an informed employer, informed employees, and avenues for prompt, effective dispute resolution which will not directly or indirectly penalize the victim.

V. CONCLUSION

A new and complex body of law protecting employees in the workplace is developing. These laws will impose a significant burden on unaware employers in the form of damages and legal expenses.

An alert employer will start now by becoming aware that reasonable employees have sensitivities. There are limits to what employees should have to endure. Courts will cope with determining these limits and will almost certainly be compelled to struggle with a moral issue when interpreting the message in an employee's appearance.

Courts will recognize that women may not entirely voluntarily place themselves in what are termed "high-risk" vocations. Their choices may well have been limited by social or economic conditions. As in the past, it is reasonable to believe that courts will treat these women's plight with understanding. Although distinctions may be made between dancers and clerks by following the previously discussed adaption of the *Ellison* approach, vast differences are not anticipated or advocated.

In addition, complex issues remain to be addressed. A change in the nature of employment is an example. The conventional cocktail lounge that unexpectedly initiates a "Chains Nite" policy, which would subject the staff to a new clientele, may certainly expose its employees to an atmosphere that was never initially expected.

An alert employer should take action once he becomes aware of changing law, employee expectations, and the complexity of issues. One

194. *Id.*
195. *Id.* at 1541-45.

company plans to deal with third party harassment by authorizing self-help. A memorandum was issued after the chief executive learned that, during a party, his saleswomen were offended by "wandering, and probably inebriated hands" of male clients. It read, "In the future, I would urge you to make your feelings known to such people immediately. If that doesn't work, a good whack—client or not—would make us all feel better."[196]

For reasons best left to a discussion of tort liability and respondeat superior, this scheme is not recommended. The proposal, which advocates an informed employer and employee, and avenues for efficient dispute resolution which do not penalize the victim, is suggested as a more reasonable means of accomplishing the policy goals of protecting employees from sexual harassment by non-employees.

196. Winokur, *supra* note 5, at B8.