Employment Law: Sexual Harassment

Allison H. Lee

Follow this and additional works at: https://digitalcommons.du.edu/dlr

Recommended Citation

This Article is brought to you for free and open access by the Denver Law Review at Digital Commons @ DU. It has been accepted for inclusion in Denver Law Review by an authorized editor of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu,dig-commons@du.edu.
INTRODUCTION

Sexual harassment claims stir up a range of emotions and create some of the most contentious and impassioned lawsuits in our justice system. Statistics gauging the extent of the problem vary widely, but one thing is clear: no one is immune to accusation. Allegations of sexual harassment have found their way into the United States Senate, congressional hearings for Supreme Court nominees, and even the office of the President of the United States.

The Supreme Court has recognized a claim of sexual harassment under Title VII, but has left many important issues to the circuits. This Survey reviews four Tenth Circuit decisions addressed Title VII sexual harassment claims handed down from September 30, 1994, through September 30, 1995. These four cases address three recurrent issues in Title VII jurisprudence. After Part I provides a general background, Part II of this Survey examines the principles upon which a court will hold both employers and their employees liable for established sexual harassment claims. Part III looks at the

2. 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 n.3 (1994) (comparing an article in The Journal of Psychology estimating that between 42% and 90% of women have been sexually harassed in the workplace, to a poll conducted by the Roper Org., Inc. indicating that most Americans believe that sexual harassment in the workplace is not a problem).
4. 137 CONG. REC. S14,951-01 (daily ed. Oct. 22, 1991) (statement of Sen. Deconcini) (referring to Professor Anita Hill's charges of sexual harassment against then Judge Clarence Thomas as extremely serious and speculating that both of them would be scarred for life).
7. In addition to the four cases covered in this Survey, the Tenth Circuit heard two other cases involving sexual harassment claims. See Cox v. Phelps Dodge Corp., 43 F.3d 1345 (10th Cir. 1994) (involving a claim for sexual harassment that was dismissed on mootness grounds); Noland v. McAdoo, 39 F.3d 269 (10th Cir. 1994) (addressing a sexual harassment claim asserted under 42 U.S.C. § 1983). Constitutional claims under § 1983 for sexual harassment are beyond the scope of this Survey. For an excellent article discussing this type of claim, see George Likourezos, Sexual Harassment by a Public Official Gives Rise to a Section 1983 Claim: A Legal Argument, 6 HASTINGS WOMEN'S L.J. 93 (1995).
I. GENERAL BACKGROUND

Title VII of the Civil Rights Act of 1964 proscribes sexual harassment as a form of gender discrimination in employment. As originally drafted, Title VII’s discrimination prohibitions did not include a reference to gender. After a rather peculiar debate in the House, however, an amendment to include the word “sex” among the list of protected classes passed by a narrow margin, thus it became illegal for employers to discriminate on the basis of sex. By 1976, courts began recognizing sexual harassment as a form of gender discrimination under Title VII.

Equal Employment Opportunity Commission (EEOC) guidelines define sexual harassment generally as unwelcome sexual conduct that: (1) is a term or condition of employment; (2) affects employment decisions about the target individual; or (3) unreasonably interferes with the individual’s job performance. Two types of sexual harassment claim developed in the case law. The first type, “quid pro quo” harassment, occurs when an employer demands sexual favors in exchange for job benefits.

A second type of harassment, “hostile work environment,” also developed in case law. In 1986, the Supreme Court recognized this form of harassment in Meritor Savings Bank v. Vinson. To prevail under Meritor, a plaintiff must show that gender related conduct (harassment) was severe or pervasive and altered the conditions of employment, thereby creating an abusive working environment.

---

10. Id. at 725-26 (stating that the amendment passed by a margin of 168 to 133, and noting that the amendment’s sponsor spoke of a woman’s right to a husband to justify the bill, but failed to give any reason why ending employment discrimination might meet that end).
11. See Williams v. Saxbe, 413 F. Supp. 654, 657 (D.D.C. 1976) (“[R]etalitiatory actions of a male supervisor, taken because a female employee declined his sexual advances, constitutes sex discrimination within the definitional parameters of Title VII.”). Professor Catharine MacKinnon has explained the link between harassing behavior and discriminatory behavior. CATHARINE A. MACKINNON, THE SEXUAL HARASSMENT OF WORKING WOMEN 32 (1979) (detailing the theoretical basis for treating sexual harassment as a form of sexual discrimination warranting protection under Title VII).
13. Buff, supra note 9, at 727-28 (stating that quid pro quo harassment occurs when an “employee is fired, demoted, or otherwise denied employment benefits for refusing sexual advances”).
15. See, e.g., Henson v. City of Dundee, 682 F.2d 897, 902 (11th Cir. 1982) (stating that a hostile environment, standing alone, can constitute a violation of Title VII).
17. Meritor, 477 U.S. at 67. For a discussion of the application of the hostile work environment test, see infra part III.
II. HOW AND AGAINST WHOM DOES TITLE VII LIABILITY ATTACH?

A. Background

The inquiry into liability cuts to the core of a sexual harassment claim. Without legal principles upon which to base the liability of an employer or employee, the substantive issues are meaningless. Title VII explicitly prohibits discrimination in the workplace based on sex and allows monetary damages and injunctive relief. It does not, however, specify exactly who may be sued. Two questions arise in this dilemma. First, under what circumstances will courts hold employers vicariously liable for the acts of their employees? Second, will courts hold the harassing employees personally liable? For claims of quid pro quo sexual harassment, courts have generally held employers strictly liable for the acts of their supervisory employees. Courts have not, however, established clear or uniform guidelines for imposing employer liability in hostile work environment claims. The Supreme Court addressed this issue in Meritor Savings Bank v. Vinson, but declined, on the facts

18. See Hannah K. Vorwerk et al., Special Project, Current Issues in Sexual Harassment Law, 48 VAND. L. REV. 1009, 1105 n.10 (1995). As counsel for the respondent in Meritor, Patricia Barry and Catharine MacKinnon argued that liability "is not an abstract contest over whether sexual harassment is sex discrimination, which is undisputed. . . . [Rather] it is a concrete conflict over whether sexual harassment will be treated as if it is sex discrimination: whether the employer will be responsible so that its victims receive relief." Id. (quoting Respondent's Brief at 26, Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986) (No. 84-1979)). 19. 42 U.S.C. § 2000e-5(g) (1988); see Scott B. Goldberg, Comment, Discrimination by Managers and Supervisors: Recognizing Agent Liability Under Title VII, 143 U. PA. L. REV. 571, 572 (1994) (noting that Title VII expressly provides both injunctive relief and damages for victims). The 1991 Amendments to the Civil Rights Act of 1964 create a right to recover compensatory and punitive damages for certain violations of Title VII. Landgraf v. USI Film Prods., 114 S. Ct. 1483, 1488 (1994). In Landgraf, the Supreme Court held that these amendments would not apply retroactively. Id. at 1508. Therefore, only Title VII claimants alleging conduct occurring after the enactment of the amendments may recover these types of damages. Id. The Tenth Circuit acknowledged this Supreme Court ruling in Manard v. Fort Howard Corp., 47 F.3d 1067, 1067 (10th Cir. 1995) (denying money damages to the plaintiff because the action arose prior to the 1991 amendments).

20. Goldberg, supra note 19, at 572.

21. See, e.g., Meritor, 477 U.S. at 70-71 (discussing the circumstances under which employers will be liable for sexual harassment perpetrated by their employees); Paroline v. Unisys Corp., 879 F.2d 100, 104 (6th Cir. 1986) (analyzing the conditions under which individual employees may be sued for sexual harassment under Title VII). A third question regarding liability concerns whether employers may be liable when third parties, such as clients or customers, harass employees. For a thorough discussion of this doctrine, see David S. Warner, Note, Third-Party Sexual Harassment in the Workplace: An Examination of Client Control, 12 HOFSTRA LAB. L.J. 361 (1995); Peter J. Honigsberg et al., When the Client Harasses the Attorney—Recognizing Third Party Sexual Harassment in the Legal Profession, 28 U.S.F. L. REV. 715 (1994); see also 29 C.F.R. § 1604.11(e) (1995) (stating that employers "may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace").

22. See Meritor, 477 U.S. at 70-71 (noting that "courts have consistently held employers liable for the discriminatory discharges of employees by supervisory personnel, whether or not the employer knew, should have known, or approved of the supervisor's actions"); Peter M. Panken et al., Sexual Harassment in the Workplace: Employer Liability for the Sins of the Wicked, in C874 ALI-ABA 386, 392 (1993) (discussing the Supreme Court's decision in Meritor).


presented, to make a definitive rule regarding employer liability. In Meritor, the Court refused to impose strict liability on an employer on the facts presented. The Court agreed with EEOC guidelines that Congress intended for courts to utilize agency principles in determining employer liability. Conversely, the Court noted that under agency principles the district court erred in requiring actual notice before imposing liability; conversely, the court of appeals erred in finding strict liability. The Court thus remanded the issue of liability to the trial court for a determination in light of agency principles.

In subsequent decisions, the circuit courts have looked to section 219 of the Restatement (Second) of Agency. Under the Restatement, employers may be liable for acts of their employees in one of three scenarios: where the employee (1) acted within the scope of his or her employment; (2) has apparent authority and purports to act or speak on the employer's behalf or is aided by the agency in accomplishing the sexual harassment; or (3) commits sexual harassment with respect to which the employer was negligent or reckless.

Application of this test has brought widely divergent results among the circuits. Courts addressing the issue of a hostile work environment created by a non-supervisory co-worker, however, usually require that the employer knew or should have known of the harassment and did not take proper remedial action.

Title VII does not directly address whether the alleged harassers may be personally sued. In addition, the EEOC has not promulgated guidelines on this issue. Though the circuits are split, a majority will not allow defendants to be sued in their personal capacities. The Tenth Circuit, in Sauers v. Salt

26. Id.
27. Id. The Court's agreement with EEOC guidelines did not seem to rise to the level of a direct holding that courts employ specific agency principles in addressing liability. Id. To explain his reasoning for applying agency principles from the Restatement to sexual harassment claims, Justice Rehnquist noted that "Congress' decision to define 'employer' to include any 'agent' of an employer . . . surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible." Id.
28. Id. Rather than issue a specific holding as to the standard of liability to be used, the Court merely held that standards at both extremes were inappropriate. Id.
29. Id. at 73.
30. See, e.g., Hicks v. Gates Rubber Co., 833 F.2d 1406, 1417 (10th Cir. 1987) (stating that liability attaches to an employer for an employee's tort while acting in the scope of employment).
31. See RESTATEMENT (SECOND) OF AGENCY § 219 (1958); Hirase-Doi v. U.S. West Communications, Inc., 61 F.3d 777, 783 (10th Cir. 1995) (setting out principles of agency law from the Restatement to guide the liability analysis).
32. See Lutner, supra note 25, at 599 ( canvassing the circuits and finding negligence, foreseeability, scope of employment, and other tests used in interpreting Meritor).
33. See, e.g., Lipsett v. University of P.R. 864 F.2d 881, 901 (1st Cir. 1988) (requiring notice before an employer may be liable for sexual harassment under Title IX); Jones v. Flagship Int'l, 793 F.2d 714, 719-20 (5th Cir. 1986) (directing that an employer will not be liable unless the employer knew or should have known of the harassment and did not take prompt remedial action); see also 29 C.F.R. § 1604.11(d) (1995) (describing guidelines for sex discrimination).
34. See 42 U.S.C. § 2000e(b) (1988); Ball v. Renner, 54 F.3d 664, 666 (10th Cir. 1995) (noting Title VII's silence on the issue of individual liability).
35. See 29 C.F.R. § 1604.11 (1995) (establishing guidelines for sex discrimination but failing to discuss whether individuals may be held liable).
Lake County, held that Title VII does not allow individual capacity suits. The court's recent reading of Sauers in Ball v. Renner, however, indicates that perhaps the Tenth Circuit has not entirely settled the question. Recently, the Supreme Court denied certiorari on Fifth and Ninth Circuit cases that squarely addressed the issue of individual liability under Title VII. In both cases, the circuit court had held that there was no such individual liability under Title VII. Thus, individual employee liability remains a live issue among the circuits, including the Tenth Circuit, until such time as the Supreme Court addresses it.

B. Tenth Circuit Decisions


   a. Facts

   The plaintiff alleged that Kenneth Coleman, a directory assistance operator for U.S. West, had, in the span of his first four months on the job, made sexually offensive remarks and requests for sex to as many as eleven different female co-workers, including his female supervisor and the plaintiff. Some of the women reported Coleman's behavior to his supervisor and a union representative; others did not. Plaintiff Hirase-Doi, a co-worker of Coleman's, observed the harassment of other women and was herself subjected to sexually offensive remarks, both written and verbal. Coleman also

   (following the weight of authority in the circuits that employees may not be sued under Title VII); Gary v. Long, 59 F.3d 1391, 1399 (D.C. Cir.) (agreeing with the Ninth Circuit that Congress obviously included agents under Title VII in order to ensure respondeat superior liability), cert. denied, 116 S. Ct. 569 (1995); Grant v. Lone Star Co., 21 F.3d 649, 653 (5th Cir.) (concluding that Title VII does not allow liability for the actions of employees unless they meet the statutory definition of "employer"), cert. denied, 115 S. Ct. 574 (1994); Sauers v. Salt Lake County, 1 F.3d 1122, 1125 (10th Cir. 1993) (finding that Title VII provides a remedy against employers, not individual employees); Miller v. Maxwell's Int'l Inc., 991 F.2d 583, 587 (9th Cir. 1993) (stating that the statutory scheme of Title VII indicates that Congress did not intend personal liability), cert. denied, 114 S. Ct. 1049 (1994); Busby v. City of Orlando, 931 F.2d 764, 772 (11th Cir. 1991) (proclaiming that plaintiffs must properly recover through the employer, not the employee) with Paroline v. Unisys Corp., 879 F.2d 100, 104 (4th Cir. 1989) (holding that a supervisory individual may qualify as an "employer" under Title VII) and Jones v. Continental Corp., 789 F.2d 1125, 1231 (6th Cir. 1986) (stating that a plaintiff may properly seek recovery against individuals under Title VII).

37. 1 F.3d 1122 (10th Cir. 1993).
38. See infra note 78.
39. 54 F.3d 664 (10th Cir. 1995).
40. For a discussion of the Ball opinion and its implications, see infra notes 59-100 and accompanying text.
41. See Grant, 21 F.3d at 653; Miller, 991 F.2d at 587.
42. See Grant, 21 F.3d at 653 (finding no personal liability under Title VII); Miller, 991 F.2d at 587 (holding that supervisors could not be sued personally under Title VII).
43. 61 F.3d 777 (10th Cir. 1995).
44. Hirase-Doi, 61 F.3d at 780-81.
45. Id. at 781. One of the women asked Coleman to stop; another told Hirase-Doi, but not the supervisor, about Coleman's behavior; and a third simply avoided Coleman. Id. One of the incidents involving a non-plaintiff included an attempt to kiss her and touch her breast. Id.
46. Id.
attempted to touch Hirase-Doi's breast.\footnote{Id.} Hirase-Doi reported Coleman's behavior to a union vice-president, a procedure specified in the U.S. West employee policy manual.\footnote{Id. at 785.} Some time after the report, Coleman "grabbed [Hirase-Doi between her legs]."\footnote{Id.} She reported the incident on July 15, which resulted in Coleman's prompt suspension, followed by his resignation.\footnote{Id. at 783.} The district court granted summary judgment to U.S. West, finding that Coleman had not acted within the scope of his employment.\footnote{Id. at 781-82.} The court reasoned that Coleman was a co-worker and not in a management or supervisory position. Therefore, U.S. West could only be liable if it knew or should have known of the situation and failed to remedy it.\footnote{Id. at 784.}

b. Decision

The Tenth Circuit reversed, finding a genuine issue of material fact as to whether U.S. West knew or should have known about Coleman's alleged conduct.\footnote{Id. at 784.} In analyzing the liability issue, the court reaffirmed its earlier holding in \textit{Hicks v. Gates Rubber Co.},\footnote{Id. at 781.} in which it applied agency principles\footnote{Id. at 781-82.} from the \textit{Restatement (Second) of Agency}.\footnote{Id. at 785-86.} Under one element of the \textit{Hicks} test, liability attaches to an employer for any tort committed by an employee in which the employer was negligent or reckless.\footnote{Id.} The Tenth Circuit found that a reasonable finder of fact might conclude that U.S. West knew or should have known of Coleman's alleged conduct based on: (1) the reports of two women to Coleman's supervisor; (2) the report of another woman to her union representative; (3) allegations that the supervisor herself was harassed; (4) the overall pervasiveness of complaints regarding Coleman; and (5) Hirase-Doi's report to the union vice-president.\footnote{Id. at 785-86.}
2. Ball v. Renner

a. Facts

In a second case addressing liability under Title VII, Ball v. Renner, the Tenth Circuit directly addressed the issue of an employee's personal liability. Sharon Ball, a former police dispatcher for the Cheyenne Police Department, brought a claim of hostile work environment sexual harassment against both Sergeant David Renner and the City of Cheyenne, Wyoming. Ball presented evidence of harassment by Renner, as well as substantial evidence suggesting that Renner had supervisory authority over her. The district court entered summary judgment for both defendants. The district court granted summary judgment for Renner individually because the plaintiff failed to name him in her EEOC complaint and because Renner was not an "employer" within the meaning of Title VII. Ball appealed only that part of the order dismissing her complaint against Renner individually.

b. Decision

Ultimately, the Tenth Circuit decided that Renner was not individually liable because he was not Ball's supervisor. The court did not resolve the question of individual liability for supervisors, but analyzed both sides of the question, indicating agreement with courts finding that liability attaches to individual supervisors.

59. 54 F.3d 664 (10th Cir. 1995).
60. Ball, 54 F.3d at 664.
61. Id.
62. Id. at 665. Ball alleged that Renner had followed her home from work in the middle of the night numerous times, had twice accosted her in a dark closet, and had "placed his crotch on [her] right leg just below the knee." Id.
63. Id. at 668. Ball's affidavit asserted that:
   5. Through my training and my experience, it was my understanding that, as a dispatcher and a communication coordinator, my direct supervisor on night shift was the patrol sergeant on duty . . . .
   6. It was my understanding that, due to the fact that the patrol sergeant on duty was the only available person above me in the chain-of-command, the patrol sergeant on duty was in charge of the radio room.
   7. The patrol sergeant on duty has supervisory authority over all dispatchers including the dispatch supervisor.
   8. As the communications coordinator on duty and being in control of the radio room, the patrol sergeant on duty could, in fact, send me home if he believed it was necessary.
   9. As the communications coordinator on duty, my chain-of-command was through the patrol sergeant and this was made clear to me through my training.
   10. As commissioned supervisor, the patrol sergeant on duty had authority over all civilian personnel.
   11. In the Spring of 1991, Sgt. David Renner was assigned to night shift as a patrol sergeant on duty and had supervisory authority over me.

Id.
64. Id. at 664. The opinion did not discuss the grounds for the district court's grant of summary judgment for defendant, the City of Cheyenne, because plaintiff did not appeal this issue. Id.
65. Id. at 664-65.
66. Id. at 664.
67. Id. at 668.
68. Id. at 667 (stating that it "makes good sense" to limit liability to those who "wield em-
At the outset, the Tenth Circuit acknowledged that Title VII itself is silent on the question of employee liability. Title VII refers to legal action against "employers"; the definition of "employers" includes agents.

In determining the meaning attached to the word "agent," the court identified two discrete theories of interpretation. The first broadly construes the word "agent" to increase the number of potential defendants, and imposes liability on discriminatory supervisors along with their employers. The second approach views "agent" in a way that imputes an employee's discriminatory conduct to his employer through the doctrine of respondeat superior.

Judge Shadur, a visiting judge writing for the panel, opined that the first approach was far more rational. The second approach, in his view, created a redundancy and was analytically flawed.

The court noted that opinions diverge about whether employees may be held personally liable under Title VII. According to Judge Shadur, Tenth Circuit cases treating personal liability did not present a clear picture. Those
circuits finding personal liability under Title VII restricted such liability to supervisory personnel, an approach that the court found sensible.

The Tenth Circuit characterized Ball’s evidence regarding Renner’s supervisory capacity as too generalized. The court reasoned that Renner, a co-worker, could not be liable under any theory of personal liability. Because the facts of this case did not squarely present the question of the personal liability of supervisors, the court deliberately and explicitly left the question unresolved.

C. Analysis

Technically, the Supreme Court has not spoken definitively to the issue of employer liability for either supervisors or co-workers under Title VII. In Meritor, the Court held that for hostile work environment claims, employers would be neither always strictly liable nor always insulated from liability by absence of notice. Both Hirase-Doi and Ball reflect an expansion of federal protection for victims of sexual harassment, but a narrow definition of supervisory capacity might severely limit those to whom the court will extend liability.

In Hirase-Doi, the Tenth Circuit followed the Supreme Court’s suggestion in Meritor to apply agency principles. The Tenth Circuit confirmed that agency principles (specifically, the “knew or should have known” standard) govern the question of employer liability for acts of co-workers in hostile work environment claims. The court applied these principles even though Meritor involved a harassment claim against a supervisory employee, and Hirase-Doi involved a claim against a co-worker.

The Supreme Court also has not addressed the issue of individual liability under Title VII. The Tenth Circuit clearly will not impose individual liability when the harasser is only a co-worker of the plaintiff. Several district courts in the Tenth Circuit have interpreted Sauers as firmly holding that individuals may not be personally sued for Title VII violations. Ball, however,

79. Ball, 54 F.3d at 667 (noting that all courts imposing personal liability distinguish between co-workers and supervisors and limit liability to those who wield “employer-like authority”).
80. Id.
81. Id. at 668; see supra note 63 (specifying Ball’s evidence of Renner’s supervisory capacity).
82. Ball, 54 F.3d at 668 (stating that nothing “demonstrate[s] the existence of employer-like power in Renner”).
83. Id. at 667. Note that Ball, a police dispatcher for the City of Cheyenne, was a public employee. Had she brought her claim for sexual harassment under 42 U.S.C. § 1983, Renner could clearly have been sued in his personal capacity. See 42 U.S.C. § 1983 (1988); Starrett v. Wadley, 876 F.2d 808, 814 (10th Cir. 1989) (holding that sexual harassment by public employees violates the Equal Protection Clause of the Fourteenth Amendment).
84. Meritor, 477 U.S. at 72.
85. Hirase-Doi, 61 F.3d at 783.
86. Id. at 781.
87. Id.
88. Ball, 54 F.3d at 667 (limiting liability to those who wield employer-like authority).
89. See, e.g., Davidson, 878 F. Supp. at 188 (describing a square holding against personal
describes the question of personal liability in the Tenth Circuit as open and unresolved. Although the Ball court does not reach the question of personal liability under Title VII for supervisors, its dicta specifically eschews the reasoning of courts which do not extend personal liability to supervisors. The court implies that it may impose personal liability on supervisors in the future. Note, however, that the court rejected a fair amount of evidence that Renner acted as Ball's supervisor. Thus, Ball establishes a high threshold of proof for demonstrating supervisory capacity.

The Tenth Circuit may remain open to arguments regarding personal liability under Title VII. A literal reading of Title VII's language supports a finding of individual liability. The Ninth Circuit, however, found that by using the word "agent" in the statute, Congress plainly intended to create respondeat superior liability for employers. The Ninth Circuit also reasoned that because Title VII does not cover small employers, Congress could not have intended to treat individuals differently from small employers. Policy arguments against personal liability include an alleged "chilling effect" on employees and economic inefficiency. On the other hand, the broad objectives of Title VII, to eradicate discrimination and provide redress for victims, militate in favor of imposing personal liability. Individual liability may further congressional goals of deterrence. Also, plaintiffs may have no other recourse if an employer is bankrupt or is not found liable under agency theories.

liability); see supra note 78.
90. Ball, 54 F.3d at 667-68. The court compares Brownlee to Sauers to demonstrate that confusion exists regarding individual liability. Id. at 667. This is a peculiar reference by the court, as Brownlee is an age discrimination suit brought under ADEA, not Title VII, and merely alludes to the possibility of personal liability under ADEA. Brownlee, 15 F.3d at 978.
91. See Ball, 54 F.3d at 666-67; supra text accompanying note 76.
92. See supra note 63 (detailing the evidence).
93. See Goldberg, supra note 19, at 575. As Goldberg points out, liability turns on who is an employer. Id. Goldberg defines an employer as a person engaged in industry and agents of such a person. Id. Therefore, it would follow that agents may be held liable. Id.
94. Miller v. Maxwell's Int'l Inc., 991 F.2d 583, 587 (9th Cir. 1993) (concluding that the "obvious purpose of [including 'agent' in the definition of employer] was to incorporate respondeat superior liability into the statute"), cert. denied, 114 S. Ct. 1049 (1994).
95. Id.
96. See Goldberg, supra note 19, at 590.
97. Id. at 591.
98. Id. at 580-81.
99. Id. at 590.
100. Id. at 591. An extreme example of the legal quagmire plaintiffs may face regarding liability is found in the case of Gary v. Long, 59 F.3d 1391 (D.C. Cir.), cert. denied, 116 S. Ct. 1049 (1995). In Gary, the court accepted as true, for purposes of summary judgment, that the plaintiff was subjected to severe harassment over a period of two to three years culminating in a rape. Id. at 1393-94. Because of the employer's well-established grievance procedures, the court rejected all theories of employer liability through agency principles. Id. at 1398. The D.C. Circuit did not hold the harasser liable because it adhered to the "respondeat superior" interpretation for personal liability of agents. Id. at 1399; see discussion supra part II.B.2.b. The court denied the plaintiff any recovery under Title VII. Gary, 59 F.3d at 1400.
D. Other Circuits

Some circuits interpret *Meritor* in conjunction with Title VII to impose strict liability in hostile work environment claims. Others, before imposing employer liability, require a finding that the employer had actual or constructive notice and failed to remedy the situation.

The Fourth and Sixth Circuits have imposed individual liability under Title VII. In contrast, the Third, Ninth, and D.C. Circuits have refused to impose individual liability. In addition, the Fifth Circuit held that only supervisors in charge of staffing and assignments may be held liable.

In circuits which have not decided this issue, the decisions of the district courts have been inconsistent.

III. DEFINING THE HOSTILE WORK ENVIRONMENT

A. Background

The Eleventh Circuit first acknowledged a hostile work environment claim in 1982 in *Henson v. City of Dundee*. Although the analysis in *Henson* closely mirrored the established "quid pro quo" analysis, the new theory did not require the plaintiff to show loss of a tangible job benefit such as firing or demotion. Thus, the court required that the harassing conduct be gender-motivated and affect a "term, condition or privilege" of a victim's employment. The *Henson* court borrowed language from a Title VII racial discrimination case to assert that an employee's psychological well-being is a "term, condition or privilege" of employment.

In 1986, the Supreme Court decided *Meritor Savings Bank v. Vinson*, affirming that non-economic, hostile work environment claims are actionable

---

101. See Horn v. Duke Homes, 755 F.2d 599, 605 (7th Cir. 1985) (stating that "sex discrimination can best be eradicated by enforcing a strict liability rule that ensures compensation for victims and creates an incentive for the employer to take the strongest possible affirmative measures to prevent the hiring and retention of sexist supervisors").

102. See Jones v. Flagship Int'l, 793 F.2d 714, 719-20 (5th Cir. 1986) (requiring "that the employer knew or should have known of the harassment in question and failed to take prompt remedial action"), cert. denied, 479 U.S. 1065 (1987); Vorwerk et al., *supra* note 18, at 1061.

103. See Paroline v. Unisys Corp., 879 F.2d 100, 104 (4th Cir. 1989); Jones v. Continental Corp., 789 F.2d 1225, 1231 (6th Cir. 1986).

104. See Sheridan v. E.I. duPont de Nemours & Co., 74 F.3d 1439, 1443 (3d Cir. 1996); Gary, 59 F.3d at 1399; Miller, 991 F.2d at 587.

105. See Hamilton v. Rodgers, 791 F.2d 439, 442-43 (5th Cir. 1986).

106. See Ball, 54 F.3d at 667.

107. 682 F.2d 897, 901 (11th Cir. 1982).

108. *Henson*, 682 F.2d at 902.

109. *Id.* The court in *Henson* listed five elements necessary for a hostile work environment claim: (1) the employee is a member of a protected class; (2) the employee did not invite the harassment; (3) the employee was harassed because of [his or her sex]; (4) the harassment affected a term, condition, or privilege of employment; and (5) a respondeat superior relationship existed between the employer and employee. *Id.* at 903-05.

110. *Id.* at 901 (citing Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972)).

111. 477 U.S. 57 (1986).
under Title VII. Meritor noted with approval both the EEOC guidelines and Henson in affirming this cause of action. While Henson listed five elements necessary to establish a claim of hostile work environment discrimination, the Court in Meritor did nothing to establish or clarify the standards for evaluating this claim. The Court did state that the conduct must be "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" Subsequently, the circuits have disagreed on exactly what constitutes a hostile work environment.

In 1993, the Supreme Court again addressed the issue of hostile work environment sexual harassment in Harris v. Forklift Systems, Inc. In Harris, the Court specifically held that actual psychological injury was not required. Justice O'Connor purported to strike a middle path between merely offensive conduct and conduct resulting in a discernable psychological injury. The Court articulated a two-part, objective/subjective test, requiring courts to determine whether a reasonable person would perceive the environment to be hostile and whether the plaintiff actually perceived it as such. Following Harris, the circuits returned to the difficult task of defining a hostile work environment.

B. Tenth Circuit Decisions


   a. Facts

   Patricia Gross worked as a water truck driver for Burggraf Construction, a road construction company, for two May-to-October seasons in 1989 and 1990. In September of 1993, she filed a Title VII gender discrimination claim alleging ten instances of harassing conduct by her supervisor. The alleged conduct included calling Gross a "cunt," asking a male employee over a CB radio within Gross's hearing, "'Mark, sometimes, don't you just want to smash a woman in the face?'' as well as a series of vulgar criticisms of

112. Meritor, 477 U.S. at 67-68.
113. Id. at 65-67.
114. See supra note 109.
115. See Buff, supra note 9 (noting that while Meritor is the source of the oft-quoted language that conduct must be "sufficiently severe or pervasive" to alter working conditions, the Court neglected to define a clear test for hostile work environment harassment).
116. Meritor, 477 U.S. at 67 (quoting Henson, 682 F.2d at 904) (bracketed text in original).
117. Compare Ellison v. Brady, 924 F.2d 872, 877 (9th Cir. 1991) (stating that "employees need not endure sexual harassment until their psychological well-being is seriously affected to the extent that they suffer anxiety and debilitation") with Brooms v. Regal Tube Co., 881 F.2d 412, 418 (7th Cir. 1989) (requiring conduct to be both pervasive and psychologically debilitating).
119. Harris, 114 S. Ct. at 370.
120. Id.
121. 53 F.3d 1531 (10th Cir. 1995).
122. Gross, 53 F.3d at 1535. Gross did not dispute that at the end of each season she was laid off for lack of further work. Id.
123. Id. at 1535-36.
Gross's work. The district court granted summary judgment to Burggraf, and Gross appealed.

b. Decision

In analyzing the claim, the Tenth Circuit acknowledged the objective/subjective test set forth in *Harris*, but then focused on prior Tenth Circuit decisions to resolve the issue. The first case that the court examined held that harassment occurring only because of an employee's gender may be actionable under Title VII. The second case explained that regardless of the unpleasantness of the workplace, no sex discrimination occurs unless the harassing conduct is based on gender. Interestingly, the court analyzed the merits of Gross's claim by first "examining her work environment" with specific reference to the construction industry. The court stated, "In the real world of construction work, profanity and vulgarity are not perceived as hostile or abusive. Indelicate forms of expression are accepted or endured as normal human behavior." The court, quoting a Sixth Circuit decision, said that standards for harassment will vary depending upon the nature of the work environment. "[I]n some workplaces . . . [s]exual jokes, sexual conversations and girlie magazines may abound. Title VII was not meant to—or can—change this."

The Tenth Circuit then explained that *Bolden v. PRC, Inc.*, a Title VII racial discrimination case, contained the controlling test for gender discrimination. To prevail under the *Bolden* test, as set forth in *Gross*, a plaintiff must prove that the "alleged conduct was: (1) pervasive or severe enough to alter the terms, conditions or privileges of employment; and (2) whether the admissible evidence demonstrates that the words used were gender based or stemmed from sexual animus."

The court refused to consider Gross's supervisor's use of the word "cunt" because of hearsay concerns. Furthermore, the court dismissed all of the

124. Id. at 1536 (detailing each specific allegation).
125. Id.
126. Id. at 1537.
127. Id.
128. Id. (citing Hicks v. Gates Rubber Co., 833 F.2d 1406, 1415 (10th Cir. 1987)).
129. Id. (citing Stahl v. Sun Microsystems, Inc., 19 F.3d 533, 538 (10th Cir. 1994)).
130. Id.
131. Id. Deposition testimony from Gross indicated that she also used profanity on the job. Id. at 1538.
133. Id. (quoting Rabidue, 584 F. Supp. at 430).
134. 43 F.3d 545 (10th Cir. 1994).
135. Gross, 53 F.3d at 1539.
136. Id.
137. Id. at 1539-42. Gross submitted testimony that she had been told by co-worker Ed Durfee that her boss, George Anderson, had said to him, "I hate that fucking cunt." Id. at 1539 (internal quotations omitted). Gross offered no exception to the hearsay rule in support of admission of this evidence and the court found no applicable exception. Id. at 1541-42. Gross also offered testimony of a co-worker that someone had told him that Anderson had called Gross a cunt. Id. at 1539-40. The court rejected Gross's unexplained assertion that as an admission by a party
alleged instances of verbal harassment as "crude and rough comments used by
a construction boss in reprimanding or motivating his employees." The
court described the terms used, such as "dumb," "ass," and other epithets, as
being gender-neutral. With regard to the supervisor's remark about want-
ing to smash a woman in the face, the court held, citing Meritor, that this
single incident would not sufficiently affect the conditions of Gross's employ-
ment to sustain a Title VII claim.


a. Facts

Hirase-Doi and her co-worker, Coleman, were directory assistance opera-
tors at U.S. West. Hirase-Doi alleged that her co-worker, Coleman, ha-
rassed her by making verbal and written offensive remarks, attempting to
touch her breast, and grabbing her between the legs. She also alleged that
Coleman harassed other women at the company. The district court granted
summary judgment for the defendant because it found that Coleman had not
acted within the scope of his employment and there was no viable evidence
that the company knew or should have known of the harassment. Thus,
the district court never reached the issue of whether a hostile work environ-
ment existed at U.S. West.

b. Decision

On appeal, U.S. West raised the issue of hostile work environment as an
alternative basis for affirming the district court's grant of summary judg-
ment. In analyzing this issue, the Tenth Circuit first addressed U.S. West's
contention that Hirase-Doi could not use Coleman's alleged harassment of
others as evidence of a hostile work environment for Hirase-Doi. Citing
their decision in Hicks v. Gates Rubber Co., the court found that Hirase-
Doi could indeed use this evidence to bolster her claim.

opponent, this statement was an exception to the hearsay rule. Id. at 1542.
138. Id. at 1547.
139. Id. at 1543.
140. Id. at 1542-43.
141. 61 F.3d 777 (10th Cir. 1995).
142. Hirase-Doi, 61 F.3d at 780. For a discussion setting forth the facts of Hirase-Doi, see
supra notes 43-52 and accompanying text.
143. Hirase-Doi, 61 F.3d at 781.
144. Id. (describing the actual incidents of harassment directed at other women).
145. Id.
146. Id. at 782.
147. Id.
148. Id.
149. 833 F.2d 1406 (10th Cir. 1987).
150. Hirase-Doi, 61 F.3d at 782 (citing Hicks, 833 F.2d at 1415-16). Hirase-Doi could only
use evidence of Coleman's harassment of others of which she was aware during the time she was
subjected to harassment by Coleman. Id. This requirement satisfied the subjective prong of the
Harris test. Id.
EMPLOYMENT LAW

The court applied the two-part objective/subjective test from *Harris v. Forklift Systems*,
emphasizing that Hirase-Doi must have been aware of
the harassment of others in order to use it in her claim. The Tenth Circuit
found that the alleged harassment of Hirase-Doi, coupled with the alleged
harassment of others, were sufficient for her claim to survive U.S. West's
motion for summary judgment. In addition, the court stated that the evidence
of harassment of Hirase-Doi alone would have sufficed to preclude
summary judgment on the issue of a hostile work environment.

C. Analysis

In defining hostile work environment, the Tenth Circuit adheres to the
two-part objective/subjective test set out in *Harris*. The Tenth Circuit will also
consider, however, the nature of the industry in which the plaintiff works. Discrimination actionable under Title VII must be "gender-based." This "gender-
based" requirement may mean that no claim will lie if men are also subjected
to harassment in an industry, like construction, where higher levels of abuse
may pervade the workplace.

This lenient standard may give considerable latitude to companies in certain industries. Under the *Bolden* test, courts may only consider gender-specific remarks. In *Gross*, the Tenth Circuit found that the women were not subjected to gender-specific vulgarities and the gender-neutral terms used were acceptable in the construction industry context. This holding raises two issues. First, to support the notion that a higher degree of abuse was acceptable in the context of *Gross*’s facts, the court cites *Rabidue v. Osceola Refining Co.*, in which even gender-specific harassment—sexual jokes and girlie magazines—was deemed tolerable in that specific work environment. Thus, the court in *Gross* appears to be setting the stage for companies to argue that because sexual harassment is common and ostensibly accepted in certain industries, proving interference with work may be more difficult for employees. Ironically, as a result, where an industry as a whole has exhibited a

---

152. *Hirase-Doi*, 61 F.3d at 782.
153. Id. at 783.
154. Id. at 782-83.
155. Adjusting the view of reasonable behavior in accordance with what is tolerated in the particular environment raises several intriguing questions. What data will the court use to evaluate a work environment and determine whether higher levels of abuse are reasonable? In *Gross*, the court reproduced deposition testimony indicating that the plaintiff had herself used profanity and possibly told "off-color" jokes to support its broader conclusions about the construction industry. *Gross*, 53 F.3d at 1537-38. Additionally, what constitutes a work environment? Will the court look at entire industries, such as construction, or might certain companies be able to demonstrate this type of environment and qualify for different treatment? May large companies argue that the work environment in the mail room is different from that in executive offices?
157. The EEOC has issued policy guidance indicating that it agrees with the dissent in *Rabidue* that a traditionally abusive work environment will rarely be relevant. Jollee Faber, *Expanding Title IX of the Education Amendments of 1972 to Prohibit Student to Student Sexual Harassment*, 2 UCLA WOMEN'S L.J. 85, 133-34 (1992). The policy guidance goes on to assert that
historical pattern of discrimination through harassment, the companies within
that industry may enjoy relative immunity from Title VII claims.

Second, the court did not consider whether the plaintiff was subjected to a
high level of abuse, gender-neutral or otherwise, because of her sex. The
Tenth Circuit has previously held that harassing behavior under Title VII need
not be overtly sexual in nature. In Gross the court did note that numerous
vulgar epithets directed at a woman because of her gender could establish a
claim under Title VII. The total number of incidents in Gross, including
the gender-neutral remarks, may not have been sufficient to alter the plaintiff’s
working environment; however, the court considered only the gender-specific
remark and did not analyze the possibility that the gender-neutral remarks
were directed towards women with greater frequency because of their gender.
The Bolden test, requiring “a steady barrage of opprobrious racial [or sexual]
comments,” does not capture the notion of a particular gender singled out
for “generic” abuse.

In Hirase-Doi, the plaintiff alleged sufficient evidence of harassment to
survive summary judgment. The court reaffirmed that a plaintiff may use
harassment of others to bolster a Title VII claim, but pointed out that Hirase-
Doi alleged sufficient evidence of harassment against herself. Thus, the court
left open the possibility of proving a hostile work environment entirely upon
showing pervasive harassment of others of which she was aware. This type of
claim, of course, would represent a significant expansion of the hostile work
environment claim.

D. Other Circuits

Most circuits agree that conduct need not be “overtly sexual” to support a
hostile work environment claim. This is true despite language in the
EEOC guidelines that harassing conduct includes “[u]nwelcome sexual ad-
vances, requests for sexual favors, and other verbal or physical conduct of a
sexual nature.” In contrast, some circuits have held that evidence of con-
duct that is not overtly sexual may not be as persuasive.

Title VII’s exact purpose is to prevent the behavior common in these types of environments. Id. For a detailed and informative indictment of the reasoning in Rabidue, see Nancy S. Ehrenreich, Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law, 99 YALE L.J. 1177, 1193-234 (1990).

158. Hicks v. Gates Rubber Co., 833 F.2d 1406 (10th Cir. 1987). In Hicks, the harassing
behavior, while not overtly sexual, was physically aggressive. Id. at 1415.

159. Gross, 53 F.3d at 1539 (citing Burns v. McGregor Elec. Indus., 989 F.2d 959, 965 (8th
Cir. 1993)). Gross indicates that harassment “that would not occur but for the sex of the employ-
see . . . may, if sufficiently patterned or pervasive, comprise an illegal condition of employment
under Title VII.” Id. at 1537 (quoting Hicks, 833 F.2d at 1415). EEOC policy guidance specifically
cites Hicks for the proposition that “sex-based harassment—that is, harassment not involving
sexual activity or language—may also give rise to Title VII liability.” Faber, supra note 157.

160. Gross, 53 F.3d at 1539.

161. See, e.g., Oram v. Lamson & Sessions Co., 49 F.3d 466, 474 (8th Cir. 1995); Intlekofer
v. Turnage, 973 F.2d 773, 775 (9th Cir. 1992); Andrews v. City of Philadelphia, 895 F.2d 1469,
1485 (3d Cir. 1990); Lipsett v. University of P.R., 864 F.2d 881, 905 (1st Cir. 1988); Bell v.
Crackin' Good Bakers, Inc., 777 F.2d 1497, 1503 (11th Cir. 1985).

162. 29 C.F.R. § 1604.11(a) (1995).

163. See, e.g., DeAngelis v. El Paso Mun. Police Officers Ass’n, 51 F.3d 591, 596 (5th Cir.
Few courts have directly addressed whether a plaintiff may use evidence of the harassment of others in the workplace to bolster a hostile work environment claim. In Vinson v. Taylor,\(^{164}\) however, the District of Columbia Circuit stated that “[e]ven a woman who was never herself the object of harassment might have a Title VII claim if she were forced to work in an atmosphere where such harassment was pervasive.”\(^{165}\)

IV. WHAT CONSTITUTES APPROPRIATE REMEDIAL ACTION?

A. Background

Generally, for a court to impose employer liability in a hostile work environment claim, the plaintiff must prove that the employer knew or should have known about the conduct and failed to take appropriate remedial action.\(^{166}\) Most circuits have held that remedial action must be “reasonably likely” or “calculated” to stop the harassment.\(^{167}\) Courts differ widely as to what types of employer actions satisfy this requirement. For example, the Fourth Circuit has found sufficient an employer’s written notice to the alleged harasser to refrain from offensive conduct or contact with the alleged victim.\(^{168}\) Yet, the Sixth Circuit has imposed liability on an employer who had a policy against sexual harassment and conducted an internal investigation because the court found the procedures did not function effectively.\(^{169}\)

The Supreme Court, in Meritor Savings Bank v. Vinson,\(^{170}\) noted that the “mere existence of a grievance procedure and a policy against discrimination, coupled with [the victim’s] failure to invoke that procedure,” will not insulate an employer from liability.\(^{171}\) The Court required thorough procedures designed to encourage victims to come forward.\(^{172}\) Many of the cases

---


\(^{165}\) Vinson, 753 F.2d at 146.

\(^{166}\) 29 C.F.R. § 1604.11(d) (1995) (stating that an employer is liable for sexual harassment where it “knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action”). See generally Jana H. Carey & Theresa C. Mannion, New Developments in the Law of Sexual Harassment from Meritor to Harris, Karibian and Steiner, in Sexual Harassment Litigation 1995 (PLI Litig. & Admin. Prac. Course Handbook Series No. 524, 1995).

\(^{167}\) See, e.g., Bouton v. BMW of N. Am., 29 F.3d 103, 110 (3d Cir. 1994) (holding that “an effective grievance procedure—one that is known to the victim and that timely stops the harassment—shields the employer from Title VII liability for a hostile environment”); Kotcher v. Rosa & Sullivan Appliance Ctr., 957 F.2d 59, 64 (2d Cir. 1992) (requiring remedial procedures to be more than a mere sham or pretext); Ellison v. Brady, 924 F.2d 872, 882 (9th Cir. 1991) (setting forth the court’s belief that remedies should be “reasonably calculated to end the harassment”).

\(^{168}\) Swentek v. USAir, 830 F.2d 552, 558 (4th Cir. 1987).

\(^{169}\) Yates v. Avco Corp., 819 F.2d 630, 635 (6th Cir. 1987) (finding inefficient procedures where accused harasser was a first level supervisor responsible for rectifying harassment).


\(^{171}\) Meritor, 477 U.S. at 72.

\(^{172}\) Id. at 72-73. The Court found that Meritor’s procedures were severely lacking and not
addressing remedial action center around the nature and effectiveness of an employer’s discrimination policy. Transfer of either the victim or the harasser to another department or location often constitutes proper remedial action.

B. Buchanan v. Sherrill

1. Facts

Shoney’s restaurant, one of the defendants, employed Juanita Buchanan as a waitress from October of 1989 until September of 1990, when she took a leave of absence after falling at work in June of 1990. After returning to work in May of 1991, Buchanan complained that she was sexually harassed and received poor treatment because of her worker’s compensation claim. Additionally, an African-American cook at the restaurant accused Buchanan of directing a racial slur toward him. Because of these complaints, the management transferred Buchanan to another location. She declined the transfer and resigned in August of 1991 bringing, among other claims, a Title VII sexual harassment claim. The district court granted summary judgment for the defendant on the Title VII claim.

2. Decision

On appeal, the Tenth Circuit conducted an extremely brief analysis of the Title VII issue and failed to detail any evidence of harassment. The court found that the plaintiff’s transfer ended the alleged harassment. It concluded that the transfer was reasonably likely to prevent further harassment; therefore, the defendant engaged in appropriate remedial action and no liability was designed to encourage victims to come forward. Id.


174. For a list of cases where transfer constituted “proper remedial action”, see supra note 172; see also Gary v. Long, 59 F.3d 1391, 1398-99 (D.C. Cir. 1995) (explaining that alleged victim transferred at her request); Bouton, 29 F.3d at 108 (noting that the alleged victim was promptly transferred to another supervisor); Saxton v. AT&T, 10 F.3d 526, 535-36 (7th Cir. 1993) (stating that the alleged harasser was promptly transferred, eliminating contact with alleged victim); Nash v. Electrospace Sys., 9 F.3d 401, 404 (5th Cir. 1993) (finding that without corroborating evidence of harassment, alleged victim was transferred to another department with no loss of pay or benefits); Guess v. Bethlehem Steel Corp., 913 F.2d 463, 465 (7th Cir. 1990) (stating that the transfer of alleged victim was proper where the victim was only on temporary assignment).

175. 51 F.3d 227 (10th Cir. 1995). Named defendant Penny Sherrill was an owner of the holding company for Shoney’s, Inc., also named as a defendant. Buchanan, 51 F.3d at 227.

176. Id. at 229.

177. Id.

178. Id.

179. Id. It appears from the court’s opinion that Shoney’s considered both Buchanan’s complaints and the complaints of the African-American cook in making the transfer decision. Id.

180. Id.

181. Id. at 228.

182. Id. at 229 (stating that the evidence of harassment was irrelevant in view of the remedial action taken by defendant).
In reaching this conclusion, the court relied upon *Saxton v. AT&T*, in which the Seventh Circuit held that transfer of the alleged harasser constituted proper remedial action. The court added that Buchanan offered no evidence that the harassment would continue at the new location.

C. Analysis

The court’s opinion did not describe the evidence offered in support of the plaintiff’s Title VII claim. The court may have found the evidence lacking or credited the testimony concerning the plaintiff’s racial slur. In any event, the court did not hesitate to find the plaintiff’s transfer to be a satisfactory remedy to the situation. The Seventh Circuit’s decision in *Saxton* is unpersuasive because it involved transferring the alleged perpetrator, not the victim. The Seventh Circuit acknowledged the importance of this distinction, finding that victim transfer may indeed be an inadequate remedial measure if the transfer reduces the victim’s privileges in any way.

The Tenth Circuit found the transfer adequate, regardless of whether Buchanan was indeed a victim of sexual harassment. The court focused on the plaintiff’s refusal to leave the objectionable workplace, but did not consider whether the new location presented problems for her. At least two problems with the new location could exist. First, the opinion does not report whether Buchanan’s transfer required her to move or greatly increase her commute. Second, the court made no mention of the need for an employer to investigate whether its employee was sexually harassing the plaintiff. If no internal investigation whatsoever is required of employers when employees claim sexual harassment, can employees reliably assume that a new location will be free from harassing behavior? An employer’s failure to investigate claims of sexual harassment raises the specter that employees will suffer from increased disamenities [sic] of work, or impair her prospects for promotion makes the victim worse off. Therefore such a transfer is an inadequate discharge of the employer’s duty of correction. According to *Guess*, [a] remedial measure that makes the victim of sexual harassment worse off is ineffective per se. A transfer that reduces the victim’s wage or other remuneration, increases the disamenities [sic] of work, or impairs her prospects for promotion makes the victim worse off. Therefore such a transfer is an inadequate discharge of the employer’s duty of correction.

---

184. *Id.*
185. 10 F.3d 526 (7th Cir. 1993).
187. *Buchanan*, 51 F.3d at 229. The constructive retaliatory discharge claim failed as well. *Id.*
188. *Guess v. Bethlehem Steel Corp.*, 913 F.2d 463, 465 (7th Cir. 1990). According to *Guess*, [a] remedial measure that makes the victim of sexual harassment worse off is ineffective per se. A transfer that reduces the victim’s wage or other remuneration, increases the disamenities [sic] of work, or impairs her prospects for promotion makes the victim worse off. Therefore such a transfer is an inadequate discharge of the employer’s duty of correction.
189. *Id.*
190. *Id.*
191. It is possible that either no hardship to the plaintiff existed or that she failed to plead facts to support hardship.
192. The court may have assumed that the fact of transfer indicated that some type of investigation took place. However, the court said absolutely nothing about the need for, much less the adequacy of, such an investigation.
sexual harassment increases the possibility that harassers, whether themselves transferred or left in place while victims are transferred, will continue their illegal behavior. There is much at stake concerning both alleged victims and accused harassers. A 1994 California court awarded a plaintiff almost $10,000,000 in a case where an employer failed to conduct a thorough investigation, and a 1988 New Mexico decision awarded $1,000,000 to a discharged and falsely-accused co-worker.

D. Other Circuits

Promptly transferring either the alleged victim or the alleged perpetrator generally operates to shield an employer from Title VII liability. In the Fifth Circuit, transferring the victim was sufficient when the employer investigated the allegations and could not corroborate them. However, the Fifth Circuit requires some investigation of the complaint; transfer of the victim alone will not always suffice. The Third and Sixth Circuits have both held that prompt transfer of the victim will prevent liability. In the District of Columbia Circuit, transfer of the victim at her request as part of the grievance procedure was sufficient. Finally, in the Ninth Circuit, transfer of the victim to a new shift was inadequate, and the court suggested that either transfer or outright termination of the harasser was warranted.

CONCLUSION

Agency principles from the Restatement (Second) determine employer liability for a hostile work environment created by a non-supervisory co-worker. Personal liability of supervisors for a hostile work environment under Title VII may be an open question. The Tenth Circuit suggests that the reasoning of

---

193. The determination of whether an employer has engaged in appropriate remedial action assumes that illegal and otherwise actionable behavior has, in fact, occurred. Thus, this concept amounts to a legal defense which allows employers to escape liability for proven sexual harassment. Ostensibly, the reason we allow employers to escape liability for proven sexual harassment is to encourage good faith efforts to rid the workplace of a hostile sexual environment. See Samuel E. McCargo, Responding to the Hostile Sexual Environment: Cure or Legal Defense?, 74 MICH. B.J. 1168, 1168-72 (1995) (explaining that the doctrine of appropriate remedial action is a legal defense and questioning the capabilities of employers to remedy hostile sexual environments).
199. Bouton, 29 F.3d at 108; Kent County Sheriff's Ass'n v. County of Kent, 826 F.2d 1485, 1495 (6th Cir. 1987).
200. Gary, 59 F.3d at 1398-99. The court was impressed with the thoroughness and effectiveness of the company's grievance procedures in finding the employer not liable. Id. at 1399. There was no discussion of whether a victim transfer would have been a satisfactory remedial action if it had not come at the request of the victim. Id.
other circuits upholding supervisor liability is sound. Plaintiffs may not, how-
ever, personally sue co-workers for sexual harassment.

Plaintiffs may find it more difficult to sustain hostile work environment
claims brought against defendants in an industry historically perceived as
tolerating a higher degree of vulgarity and abuse. Plaintiffs may bolster a
hostile work environment claim with evidence of harassment against others of
which they were aware. Furthermore, the court leaves open the possibility that
a plaintiff might sustain a hostile work environment claim entirely upon show-
ing the harassment of others of which she was aware. Finally, the Tenth Cir-
cuit will likely consider that prompt transfer of the victim constitutes remedial
action sufficient to negate employer liability.

The past year's decisions have brought a mixed-bag for plaintiffs and
defendants in the Tenth Circuit. The range of incidents plaintiffs may use to
support a hostile work environment claim widened, while the nature of allow-
able incidents narrowed.\footnote{The narrowing occurs either by virtue of looser
standards for certain industries or as a result of a refusal to consider “gender-neutral” remarks.} The court made it easier to impute liability to
employers when co-workers harass fellow employees. These employers, how-
ever, may ultimately escape liability if they take proper remedial action. The
court shows a willingness to allow employers to exercise discretion in this re-
gard.

Allison H. Lee