No. 97-282

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1997

BETH ANN FARAGHER,
Petitioner,

v.

CITY OF BOCA RATON,
a political subdivision of the State of Florida,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF RESPONDENT

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF RESPONDENT

The Equal Employment Advisory Council (EEAC) respectfully submits this brief as *amicus curiae*.[1] Letters of consent from all parties have been filed with the Clerk of the Court. The brief urges this Court to affirm the decision below, and thus supports the position of Respondent the City of Boca Raton before this Court.

[1] Counsel for EEAC authored the brief in its entirety. No person or entity, other than EEAC, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief.

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its members include over 300 of the nation's largest private sector corporations. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

All of EEAC's members are employers subject to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.* ("Title VII"), as well as other equal employment statutes and regulations. As employers, and as potential respondents to discrimination charges, EEAC's members will be directly affected by the Court's determination as to when an employer can be held liable under Title VII for "hostile environment" sexual harassment by a supervisor.

Thus, the issues presented in this case are extremely important to the nationwide constituency that EEAC represents. Pursuant to this Court's direction in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986), a majority of the Eleventh Circuit sitting *en banc* applied agency principles to determine that, under the facts of this case, the employer could not be held liable under Title VII for environmental sexual harassment by two low-level supervisors. Using interpretations of agency principles

that are consistent with those applied by most other circuit courts of appeals, the court below concluded that "employers are not automatically liable for hostile environment sexual harassment by their employees," Pet. App. 9a, but may be held "indirectly, or vicariously liable" for hostile environment sexual harassment: (1) when a harasser is acting within the scope of his employment in perpetrating the harassment, and (2) when a harasser is acting outside the scope of his employment, but is aided in accomplishing the harassment by the existence of the agency relationship. *Id.* at 10a (internal citations and footnotes omitted). In all other circumstances, the court below held, employers may be held directly liable only if they "knew, or upon reasonably diligent inquiry should have known of the harassment and failed to take immediate and appropriate corrective action." *Id*. at 7a. Applying these principles to the facts of this case, the court below concluded that the City was not liable for the acts of environmental sexual harassment committed by the supervisors in this case.

Petitioner challenges not the general principles articulated by the court below, but the way in which the court applied them. The interpretations advocated by Petitioner and her *amici*, taken together, construct a box that has the consequence of automatic liability for an employer. Petitioner also seeks to convert the existence of a sexual harassment policy and complaint procedure from a defense to an affirmative requirement, absent which an employer will be charged with constructive knowledge of sexual harassment anywhere in its organization.

EEAC's members have a strong interest in maintaining workplaces that are free from sexual harassment. EEAC's member companies long ago recognized that sexual

harassment in the workplace is bad business, causing employees to be less productive, less satisfied with their jobs, and ultimately less likely to stay with the company. Likewise, EEAC's member companies are committed to maintaining a work environment that is free from discrimination, and are well aware that sexual harassment that creates a hostile work environment is sexual discrimination.

Accordingly, EEAC's members have followed this Court's guidance in *Meritor* for eliminating and combating sexual harassment by adopting policies expressly forbidding supervisors and employees from engaging in sexually harassing conduct; by publicizing in employee manuals and notices an employee's right to be free from sexual harassment in the workplace; and by training supervisors and employees to recognize and halt harassment in the workplace. In addition, EEAC's members have implemented formal anti-harassment procedures that allow aggrieved employees to seek redress from higher management authorities, or even bring internal complaints against supervisors or co-workers who have engaged in harassment in the workplace. These policies call for prompt and effective remedial action by the employer, including discipline and, where appropriate, discharge of the offender.

Because of its interest in the application of the nation's fair employment laws, EEAC has filed briefs as *amicus curiae* in numerous cases before this Court, the United States Courts of Appeals, and various state supreme courts. As part of this activity, EEAC participated as *amicus curiae* in *Meritor* and other cases in this Court addressing sexual harassment issues. *E.g.*, *Harris v. Forklift Sys., Inc*., 510 U.S. 17 (1993) (holding that hostile environment harassment need not cause psychological damage to

be actionable); *Oncale v. Sundowner Offshore Servs., Inc.*, 83 F.3d 118 (5th Cir. 1996), *cert. granted*, 117 S. Ct. 2430 (1997) (same-sex harassment).

In addition, EEAC participated in several cases in the courts of appeals regarding the precise issues presented in this case. *E.g., Jansen v. Packaging Corp. of Am.*, 123 F.3d 490 (7th Cir. 1997), *petition for cert. filed sub. nom. Burlington Indus. v. Ellerth*, 66 U.S.L.W. 3283 (U.S. Sept. 29, 1997) (No. 97-569), and *Ellerth v. Burlington Indus.*, 66 U.S.L.W. 3364 (U.S. Nov. 10, 1997) (No. 97-799); *Sims v. Brown & Root Indus. Servs., Inc.*, 78 F.3d 581 (5th Cir. 1996) (table case); *Kotcher v. Rosa & Sullivan Appliance Ctr.*, 957 F.2d 59 (2d Cir. 1992) Thus, EEAC has an interest in, and a familiarity with, the issues and policy concerns involved in this case.

EEAC seeks to assist the Court by highlighting the impact its decision in this case may have beyond the immediate concerns of the parties to the case. Accordingly, this brief brings to the attention of the Court relevant matter that has not already been brought to its attention by the parties. Because of its experience in these matters, EEAC is well situated to brief the Court on the relevant concerns of the business community and the significance of this case to employers.

STATEMENT OF THE CASE

Petitioner Beth Ann Faragher worked intermittently as a lifeguard for the City of Boca Raton, Florida's Parks and Recreation Department Marine Safety Section between September 1985 and June 1990. Pet. App. 2a. Under the Section's chain of command, lifeguards reported to Marine Safety lieutenants and then to captains, who reported to the Chief of the Marine Safety Section, who reported to the Recreation

Superintendent, who reported to the Director of Parks and Recreation, who reported to the City Manager. *Id.* at 3a.

Faragher resigned in June 1990 to attend law school. *Id.* at 3a. In April 1990, two months before Faragher resigned, Nancy Ewanchew, a former lifeguard who had resigned in April 1989 to take a better job, wrote to the City's Personnel Director complaining that during her tenure with the City, she and other female lifeguards had been sexually harassed by two supervisory employees. *Id.* at 4a. The City investigated, and concluded that David Silverman, a Marine Safety lieutenant, and Bill Terry, the Chief of Marine Safety, had engaged in inappropriate conduct. *Id.* The City disciplined both Silverman and Terry. *Id.*

Faragher sued the City in 1992 for sexual harassment under Title VII of the Civil Rights Act of 1964, 42 U.S.C §2000e *et seq.*, and Terry and Silverman under 42 U.S.C. §1983. She also brought a number of pendent state law claims, suing Terry for battery, and the City for negligent retention and supervision of Terry. *Id.* Following a non-jury trial, the district court entered judgment in Faragher's favor on her Title VII claim, and awarded her $1 in nominal damages. *Id.* The court also found in Faragher's favor on her §1983 and battery claims, and awarded her $10,000 in compensatory damages and $500 in punitive damages respectively on those claims. *Id.* at 69a-104a. Both parties appealed. An Eleventh Circuit panel reversed the judgment for Faragher on her Title VII claim, but affirmed the rest of the district court's ruling. *Id.* at 41a-68a. The Eleventh Circuit vacated the panel opinion and granted rehearing *en banc*. The

Eleventh Circuit *en banc* reversed the district court's judgment in favor of Faragher on her Title VII claim, affirming the ruling in all other respects. *Id.* at 18a.

SUMMARY OF ARGUMENT

The court of appeals properly applied agency principles, as directed by this Court in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986), to hold that an employer is not liable for environmental sexual harassment by a supervisor, unless the supervisor had apparent authority to harass, or the employer had notice of the conduct and failed to act promptly to stop it. An employer is not automatically liable for environmental sexual harassment by a supervisor. *Meritor*, 477 U.S. at 72. Sexual harassment is virtually always outside of the scope of a supervisor's employment. *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437 (10th Cir.), *petition for cert. filed*, 66 U.S.L.W. 3137 (Aug. 6, 1997) (No. 97-232); *Torres v. Pisano*, 116 F.3d 625, 634 n.10 (2d Cir.), *cert. denied*, 118 S. Ct. 563 (1997); *Bouton v. BMW of N. Am.*, 29 F.3d 103 (3d Cir. 1994); *Andrade v. Mayfair Mgmt., Inc.*, 88 F.3d 258, 261 (4th Cir. 1996).

Accordingly, as the court below correctly held, an employer may be held vicariously liable for a supervisor's environmental sexual harassment only where the employer has affirmatively conferred apparent authority to commit harassment, and the victim reasonably believes such authority exists, and the supervisor actually uses that authority in committing the harassment. The lack of a policy against sexual harassment does not create apparent authority by negative inference.

Absent an exercise of actual or apparent authority, an employer can be held liable only if the employer itself was negligent; *i.e.*, it knew or had reason to know the harassment was occurring and failed to take prompt action to stop it. A finding of notice to the employer requires notice to someone sufficiently high in the employer organization; notice to, or harassment by, a lower-level supervisor will not suffice.

Although the absence of a formal policy against sexual harassment will not in and of itself create liability for the employer, the existence of a well-communicated, express policy against harassment, together with an adequate complaint procedure, should shield an employer from liability for a supervisor's sexual harassment where the victim fails to invoke the policy, and where the employer takes prompt, appropriate action in response to a complaint.

ARGUMENT

I. THE COURT OF APPEALS PROPERLY APPLIED AGENCY PRINCIPLES, AS DIRECTED BY THIS COURT IN *MERITOR,* TO HOLD THAT AN EMPLOYER IS NOT LIABLE FOR ENVIRONMENTAL SEXUAL HARASSMENT BY A SUPERVISOR UNLESS THE SUPERVISOR USED ACTUAL OR APPARENT AUTHORITY OR THE EMPLOYER FAILED TO ACT DESPITE NOTICE OF THE HARASSMENT

A. An Employer Is Not Automatically Liable For Environmental Sexual Harassment

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*, makes it unlawful for an employer to discriminate "against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such

individual's race, color, religion, sex, or national origin . . . ." 42 U.S.C. §2000e-2(a)(1). In *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986), this Court concluded that, "plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment." 477 U.S. at 66. *See also Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993) (establishing standards for determining when an environment is sufficiently hostile or abusive to be actionable).

Title VII does not render employers automatically liable for sexual harassment. *Meritor*, 477 U.S. at 72. While this Court in *Meritor* "decline[d] the parties' invitation to issue a definitive rule," *id.*, it did reject an automatic liability standard, holding that, "the Court of Appeals erred in concluding that employers are always automatically liable for sexual harassment by their supervisors." *Id.*

Instead, this Court stated that:

> [W]e agree with the EEOC that Congress wanted courts to look to agency principles for guidance in this area. While such common-law principles may not be transferable in all their particulars to Title VII, Congress' decision to define "employer" to include any "agent" of an employer, 42 U.S.C. §2000e(b), surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible. . . . See generally Restatement (Second) of Agency §§219-237 (1985). For the same reason, absence of notice to an employer does not necessarily insulate that employer from liability.

Id.

Since *Meritor*, the courts of appeals have adapted agency principles, as this Court directed, to determine whether and when an employer can be held responsible for environmental sexual harassment created by an employee with supervisory

responsibilities. The *en banc* decision of the court below reflects a consensus of the majority of these courts as to *how* agency principles properly are applied.

Common law agency principles establish that "[a] master is subject to liability for the torts of his servants committed while acting in the scope of their employment." Restatement (Second) of Agency §219(1) (1958). Conversely,

> A master is not subject to liability for the torts of his servants acting outside the scope of their employment unless:
>
> (a) the master intended the conduct or the consequences, or
>
> (b) the master was negligent or reckless, or
>
> (c) the conduct violated a non-delegable duty of the master, or
>
> (d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

Restatement (Second) of Agency §219(2) (1958).

The decision below is representative of the way in which the courts of appeals have extrapolated these principles to apply in environmental sexual harassment cases. The court below concluded that employers may be held "directly" liable for environmental sexual harassment by a supervisor where they "knew, or upon reasonably diligent inquiry should have known of the harassment and failed to take immediate and appropriate corrective action." Pet. App. at 7a. Where the employer had no such knowledge, it still can be "indirectly, or vicariously liable" for hostile environment sexual harassment: (1) when a harasser is acting within the scope of his employment in perpetrating the harassment, and (2) when a harasser is acting outside the scope of his employment, but is aided in accomplishing the harassment by the

existence of the agency relationship. Pet. App. at 10a (internal citations and footnotes omitted).

B. Sexual Harassment Is Virtually Always Outside of the Scope of a Supervisor's Employment

A supervisor generally acts within the scope of employment when he or she hires, fires, disciplines, promotes, or directs the day-to-day work of the employees he or she supervises.[2/] Under agency principles, sexual harassment is not within the scope of employment, so that employers rarely are held liable under §219(1).

According to the Restatement, "[c]onduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master." Restatement (Second) of Agency § 228(2) (1958). In Policy Guidance issued by the Equal Employment Opportunity Commission, the federal agency having enforcement authority over Title VII, the agency noted that "[i]t will rarely be the case that an employer will have authorized a supervisor to engage in sexual harassment." Policy Guidance on Current Issues of Sexual Harassment, No. N-915-050, *reprinted in*, EEOC Compliance

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[2/] The Restatement defines "scope of employment" as follows:

> Conduct of a servant is within the scope of employment if, but only if:
>
> (a) it is of the kind he is employed to perform;
> (b) it occurs substantially within the authorized time and space limits;
> (c) it is actuated, at least in part, by a purpose to serve the master; and
> (d) if force is intentionally used by the servant against another, the use of force is not unexpectable by the master.

Restatement (Second) of Agency § 228(1) (1958).

Manual (BNA), N:4031, 4055 (Mar. 19, 1990) ("EEOC Policy Guidance"). Similarly, sexual harassment cannot be said to "serve the purposes" of the employer; precisely the opposite is true. Sexual harassment — or any form of harassment, for that matter — is likely to be distracting, demoralizing, and ultimately debilitating to an employee's productivity. An employee who has to "run a gauntlet of sexual abuse," *Henson v. Dundee*, 682 F.2d 897, 902 (11th Cir. 1982) (quoted in *Meritor*, 477 U.S. at 67), likely will have difficulty focusing on the work for which she is paid. Thus, if anything, sexual harassment is antithetical to the purposes of the employer.

For this reason, numerous courts of appeals have concluded that under normal circumstances, an employer is not liable for sexual harassment on the ground that a supervisor was acting within the scope of his employment. The court below correctly observed that "an agent is not acting within the scope of his employment when he is 'going on a frolic of his own'." Pet. App. 10a (citation omitted). As the Tenth Circuit has pointed out, "§219(1) is rarely applicable in hostile work environment cases because '[s]exual harassment simply is not within the job description of any supervisor or any other worker in any reputable business'." *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1444 (10th Cir. 1997). *See also Torres v. Pisano*, 116 F.3d 625, 634 n.10 (2d Cir.) (quoting *Harrison*), *cert. denied*, 118 S. Ct. 563 (1997). Similarly, the Third Circuit has concluded that "in a hostile environment case, the harasser is not explicitly raising the mantle of authority to cloak the plaintiff in an unwelcome atmosphere. Employer liability should not be imputed under §219(1) without use of actual authority." *Bouton v. BMW of N. Am.*, 29 F.3d 103 (3d Cir. 1994). *Accord Andrade v. Mayfair Mgmt., Inc.*, 88

F.3d 258, 261 (4th Cir. 1996) (noting that Fourth Circuit "precedent rests on the presumption that illegal sexual harassment is an illegitimate corporate activity, beyond the scope of supervisors' employment).[3]

Where there is any doubt, the fact that an employer has specifically forbidden an act is, under traditional agency principles, evidence that an act is outside the scope of employment.[4/] An example offered by the Restatement explains, "where a person employs another to make collections, a specific direction by such employer that servants shall not use force in seeking to collect debts is a factor tending to show that an assault made by the servant to enforce collection is not within the scope of employment." Restatement (Second) of Agency § 230 cmt. c. (1958). Thus, where there is any doubt whether a supervisor's creation of a sexually hostile working environment is within the scope of his employment, the existence of a company policy forbidding sexual harassment is evidence that it is not.

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[3] The Sixth Circuit's contrary view is not creditable. In the Sixth Circuit, the determination of whether environmental sexual harassment was within the scope of a supervisor's employment depends upon "when the act took place, where it took place, and whether it was foreseeable." *Yates v. Avco, Corp.*, 819 F.2d 630, 636 (6th Cir. 1987). In the Sixth Circuit's view, harassment at the workplace during working hours by someone with authority to hire and fire occurs within the scope of that supervisor's employment. *Id.* In addition, the existence of a policy prohibiting sexual harassment hurts rather than helps the employer's position, since it serves as evidence that harassment was foreseeable. *Id.* The Sixth Circuit's view, which is not supported by any reasoning other than repetition of the general reference to the Restatement of Agency sections cited in *Meritor*, is simply illogical and should not be followed by this Court.

[4/] Restatement (Second) of Agency § 230 cmt. c. (1958) states in pertinent part:

> Prohibition to do any acts except those of a certain class may indicate that the scope of employment extends only to acts of that class. Furthermore, the prohibition by the employer may be a factor in determining whether or not, in an otherwise doubtful case, the act of the employee is incidental to the employment; it accentuates the limits of the servant's permissible action and hence makes it more easy to find that the prohibited act is entirely beyond the scope of employment.

Environmental sexual harassment is virtually always outside the scope of a supervisor's employment, so that such cases are not subject to analysis under §219(1). Accordingly, the Court of Appeals ruled correctly that the accused supervisors were not acting within the scope of their employment, and that the City therefore was not liable for their conduct under that theory.

C. Liability of an Employer Under an "Apparent Authority" Theory Is Limited to Situations Where the Victim Reasonably Believed That the Supervisor Had Apparent Authority and the Supervisor Actually Used That Authority

Most of the circuit courts of appeals will consider an employer potentially liable for a supervisor's creation of environmental sexual harassment under §219(2)(d), of the Restatement, which imputes liability when "the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation." *Bouton v. BMW of N. Am.*, 29 F.3d 103, 108 (3d Cir. 1994). In general, these courts are willing to consider liability under §219(d)(2) because, unlike situations involving mere co-workers, supervisors have at least some degree of greater control over the workplace that co-workers lack.[5]

Courts using this theory, including the court below, have applied it very narrowly, staying close to the relevant agency principles. According to the Restatement, "apparent authority to do an act is created as to a third person by written or spoken words or any other conduct of the principal which, reasonably interpreted, causes the

[5] As the Brief of the United States points out, the courts of appeals agree that the appropriate standard in environmental sexual harassment case involving co-workers is whether "the employer knew or should have known of the harassment and failed to take appropriate action." *Br. for the United States & the Equal Employment Opportunity Commission as Amici Curiae Supporting Pet.* at 16.

third person to believe that the principal consents to have the act done on his behalf by the person purporting to act for him." Restatement (Second) of Agency § 27 (1958). Applying this principle to sexual harassment cases requires the purported victim to show both that she had a reasonable belief that the perpetrator had apparent authority to commit the harassment, and that some affirmative act of the employer created such apparent authority.

1. For Apparent Authority to Exist, the Victim's Belief that the Perpetrator Had the Authority Must Be Reasonable

An employer cannot be liable under an "apparent authority" theory unless the victim reasonably believed that the perpetrator indeed had such authority. As the Third Circuit has explained, "Our agency precedent requires the belief in the agent's apparent authority to be reasonable before the principal will be bound." *Bouton*, 29 F.3d at 109. *Accord Gary v. Long*, 59 F.3d 1391, 1398 (D.C. Cir.), *cert. denied sub nom. Gary v. Washington Metro. Area Transit Auth.,* 116 S. Ct. 569 (1995) (citing *Bouton*). *See also* Restatement (Second) of Agency §8 cmt. c. ("apparent authority exists only to the extent that it is reasonable for the third person dealing with the agent to believe that the agent is authorized).

In our society, there is increasing awareness that sexual harassment is inappropriate and frequently unlawful. Press reports on sexual harassment cases and other media attention to the issue have disseminated information to the extent that few workers in the United States today have any doubt that workplace sexual harassment is against the law. If anything, the common perception of what type of behavior constitutes hostile environment "sexual harassment" is broader than the legal definition.

Against this background, common sense dictates that a victim asserting a belief in a perpetrator's authority to harass her must make some affirmative showing that her belief was reasonable under the circumstances.

2. Absence of an Anti-Harassment Policy Does Not Automatically Confer Apparent Authority

Undoubtedly, one of the most effective ways for an employer to negate any reasonable belief that an employee has authority to commit sexual harassment is to have an explicit, well-communicated policy forbidding harassment coupled with an effective complaint procedure. *Bouton*, 29 F. 3d at 110 ("A policy known to potential victims also eradicates apparent authority the harasser might otherwise possess."). *See also* Policy Guidance on Current Issues of Sexual Harassment, No. N-915-050, *reprinted in*, EEOC Compliance Manual (BNA), N:4031, 4056 (Mar. 19, 1990) ("EEOC Policy Guidance") ("[A]n employer can divest its supervisors of this apparent authority by implementing a strong policy against sexual harassment and maintaining an effective complaint procedure. When employees know that recourse is available, they cannot reasonably believe that a harassing work environment is authorized or condoned by the employer.").

Under agency principles, the creation of apparent authority requires an *affirmative* act on the part of the principal. *See generally*, Restatement (Second) of Agency §27. Thus, apparent authority cannot be created by negative inference. For this reason, neither the lack of an anti-harassment policy, nor the failure to disseminate a policy widely, nor the failure to conduct an adequate investigation, nor the failure to

take prompt and effective action, creates apparent authority in a supervisor to create a sexually hostile working environment.

3. Apparent Authority Confers Liability Only If the Perpetrator Actually Uses the Authority To Commit the Harassment

Moreover, in order to impute liability to an employer under §219(d)(2), a plaintiff must show not only that there was apparent authority, but that the supervisor actually *used* that authority in carrying out the harassment. *Harrison*, 112 F.3d at 1446 (citing *Hirschfeld v. New Mexico Corrections Dep't*, 916 F.2d 572 (10th Cir. 1990) (holding that employer cannot be liable under §219(2)(d) absent evidence that supervisor "invoked [his] authority in order to facilitate his harassment of plaintiff). "[I]n order to establish liability on the theory that the supervisor exploited the agency relationship in committing the harassment, a plaintiff 'must allege facts which establish a nexus between the supervisory authority' and the harassment." *Torres v. Pisano*, 116 F.3d 625, 635 (2d Cir. 1997) (quoting *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1306 (2d Cir. 1995). *See also Karibian v. Columbia Univ.*, 14 F.3d 773, 708 (2d Cir.), *cert. denied*, 512 U.S. 1213 (1994) (distinguishing cases in which supervisor did not actually use authority to further the harassment).

Where a supervisor with the authority to make employment decisions ties submission to sexual demands "to the grant or denial of an economic *quid pro quo*," *Meritor*, 477 U.S. at 65, the misuse of authority is more apparent. There, the supervisor acts on the authority he has been delegated, albeit in an unauthorized manner. *Henson v. City of Dundee*, 682 F.2d 897, 910 (11th Cir. 1982).

Absent an economic *quid pro quo*, an employer may be liable for sexual misconduct by a supervisor only under a "hostile environment" theory. Where the supervisor involved does not have ultimate authority to hire and fire, there must be some showing that the supervisor in some way abused the authority he *does* have. *Compare Karibian,* 14 F.3d 773 (2d Cir. 1994) (holding employer liable for "hostile environment" harassment where supervisor with actual authority to alter plaintiff's work schedule and give promotions and raises, and apparent authority to fire, abused that authority by intimidating plaintiff into granting sexual favors) *with Kotcher,* 957 F.2d 59 (2d Cir. 1992) (employer not liable absent notice where branch manager with some decisional authority engaged in egregious sexual behavior not involving fear of adverse employment consequences).

Similarly, courts evaluating whether the perpetrator was "aided by the agency relationship" require something more than merely some degree of control by the supervisor over the workplace. "In a sense, a supervisor is always 'aided in accomplishing the tort by the existence of the agency' because his responsibilities provide proximity to, and regular contact with, the victim." *Gary v. Long*, 59 F.3d 1391, 1397 (D.C. Cir. 1995). As the District of Columbia Circuit explained, however, "such a reading of section 219(2)(d) 'argues too much.'" *Id.* (quoting *Barnes v. Costle*, 561 F.2d 983, 996 (D.C. Cir. 1997) (MacKinnon, J., concurring.)). *Accord Torres*, 116 F.3d at 635 (citing *Gary*) ("But that proves too much, as it would allow the exception to swallow the rule.") "The commentary to the Restatement suggests that this exception embraces a narrower concept that holds the employer liable only if the tort was

accomplished by an instrumentality, or through conduct associated with the agency status." *Gary*, 59 F.3d at 1397 (internal quotations omitted).[6] Using established agency principles, the District of Columbia Circuit explained:

> Thus a telegraph company may be held liable for a tort committed by a telegraph operator who sends a false telegraph message, as may the undisclosed principal of a store whose manager cheats a customer. In such cases, "[l]iability is based upon the fact that the agent's position facilitates the consummation of the [tort], in that from the point of view of the third person *the transaction seems regular on its face and the agent appears to be acting in the ordinary course of the business confided to him.*"

Id. (quoting Restatement §219 cmt. e) (emphasis added).

It is highly unlikely that hostile environment sexual harassment will "seem[] regular on its face" or that the supervisor creating such an environment would "appear[] to be acting in the ordinary course of the business. . . ." Accordingly, imputing liability to the employer based solely on a lower-level supervisor's minimal managerial responsibilities would be the same as imposing automatic liability on the employer. An individual with any supervisory responsibilities arguably will have *some* degree of authority over some aspect of the work environment. If the second clause of §219(2)(d) is applicable in hostile environment cases, it requires at the very least that the supervisor be "aided by the existence of the agency" in a sense that he was delegated sufficient authority that could actually be used to create a hostile work environment.

[6] In *Harrison v. Eddy Potash, Inc.,* 112 F.3d 1437 (10th Cir. 1997), the Tenth Circuit criticized the District of Columbia Circuit's approach in *Gary* on the grounds that it "effectively merges the first and second clauses of §219(d)(2). *Id.* at 1445. Even so, however, the Tenth Circuit noted that "this interpretation does not allow liability to attach where the harasser's agency relationship merely provided him with proximity to plaintiff."

D. Absent an Employee's Reasonable Belief in a Supervisor's Apparent Authority to Commit Sexual Harassment and the Supervisor's Actual Use of Such Authority, an Employer That Is Unaware of a Supervisor's Misconduct and Therefore Unable to Halt The Harassment of an Employee Should Not Be Liable for Environmental Sexual Harassment

1. "Negligence" Is The Appropriate Standard for Determining an Employer's Liability For Environmental Sexual Harassment by a Supervisor

Under §219(b)(2) of the Restatement, an employer is liable for its own negligence where it knew or should have known of an agent's misconduct and failed to take action to stop it. *Andrade v. Mayfair Mgmt., Inc.*, 88 F.3d 258, 261 (4th Cir. 1996). Virtually all of the courts of appeals have found, as did the court below, that a "negligence" standard under §219(2)(b) is appropriate for determining an employer's liability in environmental sexual harassment cases involving supervisors.

In the Fifth, Seventh and Eighth Circuits, it is the *only* proper standard. *Nash v. Electrospace Sys., Inc.*, 9 F.3d 401, 404 (5th Cir. 1993) ("An employer becomes liable for sexual harassment only if it knew or should have known of the harassment and failed to take prompt remedial action."); *Jansen v. Packaging Corp. of Am.,* 123 F.3d 490, 495 (7th Cir. 1997) (per curiam), ("the standard for employer liability in cases of hostile-environment sexual harassment by a supervisory employee is negligence, not strict liability"), *petition for cert. filed sub nom. Burlington Indus. v. Ellerth*, 66 U.S.L.W. 3283 (U.S. Sept. 29, 1997) (No. 97-569); *Davis v. Sioux City*, 115 F.3d 1365 (8th Cir. 1997) (reversing jury verdict where district court failed to instruct the jury that the employer can be liable only if it knew or should have known of the supervisor's harassment and failed to take prompt and appropriate action).

Liability under §219(2)(b) requires actual or constructive notice to the employer, and a subsequent failure to act.

2. "Notice" to an Employer Requires Knowledge By Someone Sufficiently High in the Organization That His Acts Are Effectively Those of the Company

Actual or constructive notice of environmental sexual harassment occurs when a someone who is sufficiently far up in the management hierarchy to constitute notice to the employer acquires knowledge of the conduct. *Cf. EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1516 (9th Cir. 1989) (articulating proper standard as what "management-level employees" knew or should have known).

Knowledge by a low-level supervisor does not suffice. As the Second Circuit explained in *Torres v. Pisano*, 116 F.3d 625, 636-37 (2d Cir. 1997), notice to an employee can be imputed to an employer only where the employee "is at a sufficiently high level in the company's management hierarchy to qualify as a proxy for the company" or "where the person who gained notice of the harassment was the supervisor of the harasser (*e.g.*, had the authority to hire, fire, discipline, or transfer him), [so that] knowledge will be imputed to the employer on the ground that the employer vested in the supervisor the authority and the duty to terminate the harassment." *See also Andrews v. Philadelphia*, 895 F.2d 1469 (3d Cir. 1990) (holding that notice to "middle management" triggered the employer's duty to act).

For the same reasons, an employer is not automatically liable under the "negligence" theory even though the harasser is himself a supervisor. "[A]n employer will not be charged with constructive notice merely because a supervisor is the

perpetrator of the harassment." *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1444 (10th Cir. 1997). *See also Kotcher v. Rosa & Sullivan Appliance Ctr., Inc.*, 957 F.2d 59 (2d Cir. 1992) (declining to impute knowledge of environmental harassment by branch store manager to company although manager had "decision-making capacity"); *Andrade v. Mayfair Mgmt., Inc.*, 88 F.3d 258, 262 (4th Cir. 1996) ("Although a supervisor, . . .[the perpetrator] was not a proprietor, partner, or corporate officer, and his conduct can be imputed to [the employer] only if [the employer] knew or should have known of it and failed to take prompt and adequate remedial action."); *Nash v. Electrospace Sys., Inc.*, 9 F.3d 401, 404 (5th Cir. 1993) (holding that "company hierarchy" had no notice until victim complained, even though harasser was a supervisor).

A contrary holding would effectively impose automatic liability. In any company, many relatively low-level employees have some degree of managerial or supervisory responsibility. A "team leader" may direct the activities of a work group in a manufacturing plant. A "crew chief" may be the titular head of a maintenance crew. Frequently there will be a "lead person" in a two-person truck. These leaders may have some degree of control over when, how and by whom work is performed, and may even have some input into hiring decisions and discipline. But they are unlikely to have ultimate decisionmaking authority. Imputing notice to such employees to the employer, in effect, would impose automatic liability.

In the instant case, the district court specifically found that none of the supervisors involved — Terry, Silverman or Gordon — qualified as "higher

management", Pet. App. at 71a, so that the City did not have actual knowledge of the conduct at issue. *Id.* at 92a. While Ewanchew spoke with the Recreation Supervision several times about work-related issues, she did not raise the issue of sexual harassment. *Id.* at 81a. Accordingly, the court below correctly ruled that the City could not be held liable for negligence based on actual notice of environmental sexual harassment.

3. Constructive Notice Based on the Pervasiveness of the Harassment Requires That The Conduct Be Sufficiently Pervasive That Individuals at a Higher Level Should Have Known Of It

An employer also may have notice if a sexually hostile work environment is sufficiently pervasive that the employer has constructive knowledge. Pet. App. 15a. "Pervasiveness," however, also is a necessary element of a hostile environment claim in the first instance. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993) (quoting *Meritor*, 477 U.S. at 67). "Pervasiveness" for constructive knowledge purposes necessarily is a separate inquiry.

Charging an employer with constructive knowledge of environmental sexual harassment based on the "pervasiveness" of the harassment makes sense only if the conduct is sufficiently severe that employees with actual management responsibility should be aware of it. The applicable standard should be functionally the same as the standard applicable when actual notice can be imputed to the employer, *i.e.*, that an employee with "the authority and duty to terminate the harassment" is aware of it.

In the instant case, the court below properly distinguished between the "pervasiveness" necessary to establish an actionable hostile environment, and the "pervasiveness" necessary to establish constructive notice.

II. A WELL-COMMUNICATED EXPRESS POLICY AGAINST SEXUAL HARASSMENT, COUPLED WITH AN ADEQUATE GRIEVANCE PROCEDURE, SHOULD SHIELD AN EMPLOYER FROM LIABILITY FOR SEXUAL HARASSMENT

In *Meritor*, this Court rejected the view that "the *mere existence* of *a* grievance procedure and *a* policy against discrimination, coupled with [a victim's] failure to invoke that procedure, must insulate [an employer] from liability." 477 U.S. at 72 (emphasis added). The Court criticized the employer's policy in *Meritor* on several grounds: that the policy merely addressed discrimination generally and did not expressly address sexual harassment, and that the complaint procedure required a victim to complain first to her supervisor, who in *Meritor* was also the harasser. *Id.* at 72-73. The Court observed that "[the employer's] contention that [the victim's] failure should insulate it from liability might be substantially stronger if its procedures were better calculated to encourage victims of harassment to come forward." *Id.* at 73.

Under any of the agency principles that have been adapted for use in environmental sexual harassment cases, the existence of an express, well-communicated policy against discrimination, coupled with an accessible complaint procedure that leads to prompt and effective action where harassment is found, shield the employer from liability.

A. A Policy Forbidding Sexual Harassment and an Adequate Complaint Procedure Preclude a Finding of Liability Against an Employer on a Negligence Theory.

As noted above, the most common theory used by the courts of appeals to evaluate an employer's liability for sexual harassment is one of "negligence," *i.e.* that the employer knew or should have known that the conduct was occurring and failed to take prompt and effective action. Where an employer has in place a policy expressly forbidding workplace sexual harassment, and a procedure that both encourages reporting of harassment and takes prompt steps to eliminate harassment where it is found, the employer cannot be found liable for harassment on a negligence theory.

1. The Employer Cannot Be Held Liable Where The Victim Fails To Invoke the Complaint Procedure

Many employers have adopted express policies prohibiting sexual behavior in the workplace. Under many of these policies, sexual conduct may warrant discipline even though it falls short of actionable sexual harassment under Title VII.

These policies usually are tied to complaint procedures that encourage victims to come forward, and that provide more than one avenue of approach, to avoid the possibility exemplified in *Meritor* that a potential victim's only option might be to complain to the harasser. These procedures will provide for a prompt investigation of the complaint, and for appropriate action based on the outcome of the investigation.

When a defendant has in place a policy and procedure meeting these standards, allowing a Title VII recovery to a plaintiff who has failed to report harassing conduct is tantamount to absolute liability. Where the affected employee does not make use of an anti-harassment policy, the employer has no reason to know that

harassing behavior is occurring, unless the conduct is so pervasive that it creates constructive knowledge. Lacking any notice, the employer is unable to take steps to protect the victim. Yet the employer cannot be said to have acted negligently or recklessly, and thus cannot be held liable under a negligence theory. *E.g.*, *Perry v. Harris Chernin, Inc.*, 126 F.3d 1010 (7th Cir. 1997) (employer who published policies and pamphlets against sexual harassment, encouraging employees to come forward, and addressed the issue at employee meetings, not liable for conduct occurring before employee complained).

2. An Employer That Takes Prompt and Effective Action Upon Learning of Sexual Harassment Cannot Be Held Liable on a Negligence Theory

Likewise, an employer with an express policy and effective procedure cannot be held liable under a negligence theory where it takes prompt and effective action in response to a complaint. An employer who can show that upon receiving a harassment complaint it conducted a thorough investigation, reached a rational conclusion and took appropriate action is shielded from liability. *E.g.*, *Bouton v. BMW of N. Am., Inc.*, 29 F.3d 103, 107 (3d Cir. 1994) ("under negligence principles, prompt and effective action by the employer will relieve it of liability"); *Andrade v. Mayfair Mgmt., Inc.*, 88 F.3d 258, 261 (4th Cir. 1996) ("where an employer implements timely and adequate corrective measures after harassing conduct has come to its attention, vicarious liability should be barred regardless of the specific motivation for the wrongdoing or the particular cause of action").

B. A Policy Forbidding Sexual Harassment and an Adequate Complaint Procedure Preclude a Finding of Apparent Authority

As noted above, the EEOC has stated that a strong policy against sexual harassment coupled with an effective complaint procedure eliminates any apparent authority a supervisor might conceivably have to engage in sexual harassment. *See* Policy Guidance on Current Issues of Sexual Harassment, No. N-915-050, *reprinted in*, EEOC Compliance Manual (BNA), N:4031, 4056 (Mar. 19, 1990) ("EEOC Policy Guidance"). The circuit courts that make an "apparent authority" theory available in sexual harassment cases agree. *E.g.*, *Bouton v. BMW of N. Am.*, 29 F.3d 103, 110 (3d Cir. 1994) ("A policy known to potential victims also eradicates apparent authority the harasser might otherwise possess."); *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1444 (10th Cir. 1997) (where employer has policy against harassment and complaint procedure, "the victim is likely aware the harassment is not authorized and reliance on apparent authority will be difficult to establish.

CONCLUSION

For the foregoing reasons, the *amicus curiae* Equal Employment Advisory Council respectfully submits that the decision below should be affirmed.

Respectfully submitted,

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