

NONPROFIT FORUM

Some Reflections on the Liability of  
Universities for Sexual Harassment

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## I. Introduction

Sexual harassment is a topic of much current concern. Allegations are frequent as are large and well publicized damage (and attorney fee) awards. No less than their for-profit counterparts, non-profit employers, large and small (and their counsel), must ponder the circumstances which might give rise to liability for the actions of their employees and indeed myriad others who have reason to come onto their premises, such as students, patients, gallery patrons and football spectators.

As the general counsel of a complex university, I would like to focus the bulk of my "nugget" on an easily stated problem. Let's imagine that the Dean of the Zenith Medical School engages in unwelcome sexual advances toward his secretary (forcible kissing and fondling and requests for dates). After the second such episode in the space of one week, she writes to the President of Zenith University. The President promptly calls in the Dean who admits his misconduct. Should institutional liability be imposed if the President immediately fires the Dean?

To set the stage for our discussion of this problem (and its easily imagined variations), I have subdivided Section II into four parts in order to give some chronological perspective to the developments in case law on employer liability from the key Supreme Court decision in Meritor Savings Bank V. Vinson in 1986 to the present.

Section III adds some perspective regarding claims by students of sexually hostile environments on college campuses

alleged to have been created, not only by employees of the institution, but by other students or campus visitors as well.

## II. Title VII and the Liability of Employers

### A. Meritor and Harris: First Principles

The Supreme Court has recognized that two distinct forms of sexual harassment may affect "compensation, terms, conditions or privileges of employment" and therefore give rise to liability under Title VII of the Civil Rights Act of 1964.<sup>1</sup> In Meritor Savings Bank v. Vinson,<sup>2</sup> the plaintiff brought suit for alleged sexual harassment by her supervisor. After an eleven day bench trial, the district court ruled in favor of the bank.<sup>3</sup> However, the Court of Appeals recognized that liability could arise despite an absence of impact on an employee's economic benefits and remanded for an analysis of potential liability for a hostile environment.<sup>4</sup> In addition, the court stated that an employer would be absolutely liable for a supervisor's sexual harassment, whether or not the employer knew or should have known about the misconduct. Relying on Title VII's definition of "employer" which included "any agent of such a person," the court held that

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<sup>1</sup> 42 U.S.C. §2000e-2 [hereinafter Title VII].

<sup>2</sup> 477 U.S. 57 (1986).

<sup>3</sup> Vinson v. Taylor, 23 FEP Cases 37, 38-39, n.1 (D. D.C. 1980).

<sup>4</sup> 753 F.2d 141 (1985). The court believed that the district court had not considered this type of violation in its decision. Id. at 145.

a supervisor is an "agent" for these purposes, even if he lacks authority to hire, fire, or promote, since "[t]he mere existence--or even the appearance--of a significant degree of influence in vital job decisions gives any supervisor the opportunity to impose upon employees."<sup>5</sup>

The Supreme Court "affirm[ed] but for different reasons."<sup>6</sup> As had the Court of Appeals, it recognized that Title VII embraces claims for both quid pro quo and hostile environment sexual harassment.<sup>7</sup> It specifically rejected, however, the Court of Appeal's conclusion "that employers are always automatically liable for sexual harassment by their supervisors."<sup>8</sup> It instructed the lower federal courts to find guidance by using, to the degree appropriate, common law principles of agency.

We therefore decline the parties' invitation to issue a definitive rule on employer liability, but we do 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 limit on the acts of employees for which employers under Title VII are to be held responsible. For this reason, we hold that the Court of Appeals erred in concluding that employers are always automatically liable for sexual harassment by their supervi

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<sup>5</sup> Id. at 150.

<sup>6</sup> Meritor, 477 U.S. at 63.

<sup>7</sup> Id. at 67.

<sup>8</sup> Id. at 72.

sors. See generally Restatement (Second) of Agency §§219-237 (1958).<sup>9</sup>

The Court also rejected the notion that an absence of notice to an employer would always absolve it of liability, especially in cases of quid pro quo harassment. In this type of harassment "a supervisor exercises the authority actually delegated to him by his employer, by making or threatening to make decisions affecting the employment status of his subordinates."<sup>10</sup> Since the harasser is deemed to wield the employer's authority, liability is imputed to the employer.<sup>11</sup> Finally, the Court rejected the notion that "the mere existence of a grievance procedure and a policy against discrimination, coupled with [a plaintiff's] failure to invoke that procedure" would always insulate an employer from liability. In Meritor, the procedure on its face seemed to require a victim to complain first to the very supervisor who was the alleged harasser.<sup>12</sup>

In Harris v. Forklift Systems, Inc.,<sup>13</sup> the Court attempted to give greater clarity to the issue of how "severe or pervasive" the conduct must be so as to create a hostile environment giving rise to liability. At the district court level, the Magistrate had found that Harris' boss, Hardy, the company president, had

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<sup>9</sup> Id.

<sup>10</sup> Id. at 70 (citing the EEOC's amicus curiae brief and apparently adopting its position).

<sup>11</sup> Id.

<sup>12</sup> Id. at 72.

<sup>13</sup> 114 S. Ct. 367 (1993).

often insulted her because of her gender and often made her the target of unwanted sexual innuendoes.<sup>14</sup>

The District Court ruled in the defendant's favor, focusing on a lack of evidence that the harassment had seriously affected Harris' psychological well-being or lead her to suffer injury.<sup>15</sup> The Sixth Circuit affirmed in a brief unpublished opinion.<sup>16</sup> The Supreme Court unanimously reversed and remanded, setting a standard which "takes a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury."<sup>17</sup> Liability will attach where the work environment "would, reasonably be perceived, and is perceived, as hostile or abusive."<sup>18</sup> Relevant factors in this determination "may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or

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<sup>14</sup> Id. at 369. In the presence of other employees Hardy said on several occasions, "You're a woman, what do you know" and "We need a man as the rental manager"; at least once, he told her she was "a dumb ass woman" and suggested in the presence of others that the two of them go to a hotel "to negotiate [Harris'] raise." Hardy asked Harris and other women employees to take coins from his front pants pocket; he threw objects on the ground in front of them and asked them to pick the objects up and made sexual innuendoes about their clothing. In reference to a customer, Hardy asked Harris, "What did you do, promise the guy . . . some [sex] Saturday night?" Id.

<sup>15</sup> Id. at 369-70.

<sup>16</sup> Id. at 370.

<sup>17</sup> Id.

<sup>18</sup> Id. at 371 (citing Meritor, 477 U.S. at 67).

humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."<sup>19</sup>

Concurring, Justice Scalia lamented the lack of clarity in the Court's holding and the degree of unguided discretion given to juries.

"Abusive" (or "hostile," which in this context I take to mean the same thing) does not seem to me a very clear standard--and I do not think clarity is at all increased by adding the adverb "objectively" or by appealing to a "reasonable person's" notion of what the vague word means. Today's opinion does list a number of factors that contribute to abusiveness, but since it neither says how much of each is necessary (an impossible task) nor identifies any single factor as determinative, it thereby adds little certitude. As a practical matter, today's decision lets virtually unguided juries decide whether sex-related conduct engaged in (or permitted by) an employer is egregious enough to warrant an award of damages. One might say that what constitutes "negligence" (a traditional jury question) is not much more clear and certain than what constitutes "abusiveness." Perhaps so. But the class of plaintiffs seeking to recover for negligence is limited to those who have suffered harm, whereas under this statute "abusiveness" is to be the test of whether legal harm has been suffered, opening more expansive vistas of litigation.<sup>20</sup>

While he would have preferred a test sharply focused on whether the conduct unreasonably interfered with work performance, Justice Scalia acknowledged that Congress had written a statute

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<sup>19</sup> Id. at 371.

<sup>20</sup> Id. at 372 (Scalia, J. concurring) (citation omitted).

which looked not solely at work impairment, but on discriminatory workplace conditions.<sup>21</sup>

The Court added no new insights into the question of how principles of agency law should be applied to determine employer liability.

**B. 1986 - 1993**

While the Meritor Court instructed the lower courts to "look to agency principles" for guidance on the question of employer liability, the absence of any more specific guidance on how to apply agency law resulted in some continuing uncertainty.<sup>22</sup>

Under a "rule of reason" approach adopted in several circuits, and based on principles of negligence, the employer is said to be liable only if it "knew or, in the exercise of reasonable care should have known" about the hostile environment and failed to take prompt and appropriate corrective action.<sup>23</sup>

For acts done by co-workers, the employer will be considered to have actual notice of the harassment when an employee at a high enough level in the company knows of it, as well as when an

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<sup>21</sup> Id.

<sup>22</sup> Meritor, 477 U.S. at 72.

<sup>23</sup> EEOC v. Hacienda Hotel, 881 F.2d 1504, 1516 (9th Cir. 1989). For application of the same standard see also Andrews v. City of Philadelphia, 895 F.2d 1469, 1486 (3d Cir. 1990); Steele v. Offshore Shipbuilding, Inc., 867 F.2d 1311, 1316 (11th Cir. 1989); Hall v. Gus Construction Co., 842 F.2d 1010, 1015 (8th Cir. 1988); Swentek v. USAir Inc., 830 F.2d 552 (4th Cir. 1987); Rabidue v. Osceola Refining Co., 805 F.2d 611, 621 (6th Cir. 1986), cert. denied, 481 U.S. 1041 (1987).



actual complaint has been filed.<sup>24</sup> Similarly, when the conduct has been so severe or pervasive that a reasonable employer would have known of the harassment, knowledge will be imputed to the employer.<sup>25</sup>

Upon sufficient notice, the employer has a duty to take corrective action. The remedial measures should be "reasonably calculated to end the harassment."<sup>26</sup> As long as the employer makes a "prompt and appropriate" response, it should be absolved of liability for the co-worker's harassment.<sup>27</sup>

But, what if the harassment has been committed by a person who is not merely a co-worker, but by someone of a higher authority than the victim, perhaps even her direct supervisor, such as

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<sup>24</sup> See, e.g., Hacienda Hotel, 881 F.2d 1504. The actual or constructive knowledge of an employee with sufficient authority, at a level high enough to be considered an agent, will be imputed to the employer. See, e.g., Bennett v. Corroon and Black Corp., 845 F.2d 104, 106 (5th Cir. 1988) (company CEO saw sexually harassing objects).

<sup>25</sup> See, e.g., Hacienda Hotel, 881 F.2d 1504 (harassment was so severe and pervasive that employer should have known of the conduct); Hall, 842 F.2d at 1016 (incidents were so numerous that employer was liable for failing to discover and remedy the harassment); Katz v. Dole, 709 F.2d 251, 255 (4th Cir. 1983) ("so pervasive that employer awareness may be inferred").

<sup>26</sup> Ellison v. Brady, 924 F.2d 872, 881 (9th Cir. 1991) citing Katz, 709 F.2d at 256. See also Guess v. Bethlehem Steel Co., 913 F.2d 463 (7th Cir. 1990) ("reasonably likely to prevent the misconduct from recurring").

<sup>27</sup> See, e.g., Saxton v. American Tel. & Tel. Co., 10 F.3d 526, 535 (7th Cir. 1993) (imposing no liability on employer where an investigation began the day after the complaint was filed and the alleged harasser was transferred away from the complainant). Compare, Ellison, 924 F.2d 872 (employer could be found liable because offending co-worker was only given one counselling session and the harassment did not stop).

our hypothetical example of the Dean of the Zenith Medical School? In such circumstances, is the question of notice relevant? If the perpetrator is at a high enough level, the employer, through that individual, may be said to be on notice already.<sup>28</sup> More importantly, assuming that knowledge of the behavior has been acquired by company management not involved in the conduct, is there a defense to liability if the company takes prompt corrective action? (E.g., the President demands and receives the resignation of the Dean (who may or may not insist on keeping his tenured faculty appointment and his hospital admitting privileges)).

It is on this critical question that the lower federal court decisions do not appear to be altogether consistent. Several circuit courts have ruled that liability is avoided even where the conduct is committed by a high level person with significant authority over the plaintiff.<sup>29</sup> For example, in Kauffman v.

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<sup>28</sup> Horn v. Duke Homes, Div. of Windsor Mobile Homes, Inc., 755 F.2d 599, 604 (7th Cir. 1985) (notice requirement may be necessary for co-worker harassment, but not for supervisor harassment).

<sup>29</sup> See, e.g., Lipsett v. Univ. of Puerto Rico, 864 F.2d 881 (1st Cir. 1988) ("employers are not always automatically liable"); Kauffman v. Allied Signal, 970 F.2d 178, 184 (6th Cir. 1992) (employer's response was prompt and adequate, so it avoided liability when it immediately fired the harassing supervisor), cert denied, 113 S. Ct. 831 (1992); Steele v. Offshore Shipbuilding, Inc., 867 F.2d 1311, 1316 (11th Cir. 1989) (employer not liable for vice president and general manager's harassment of secretary when company took prompt remedial action); Swentek v. USAir Inc., 830 F.2d 552, 558-59 (4th Cir. 1987) (corporation defendant was not liable for sexual harassment of flight attendant by pilot when employer dealt with the conduct quickly and effectively); Hirschfeld v. New Mexico Corrections Dept., 916 F.2d 572 (10th Cir. 1990) (employer not liable when it

Allied Signal,<sup>30</sup> the Sixth Circuit upheld the district court's dismissal of the plaintiff's hostile environment claim.<sup>31</sup> The court determined that although the plaintiff's supervisor sexually harassed her when he created a hostile work environment, the employer's response was "prompt and adequate."<sup>32</sup> Therefore, the court did not find the employer liable for the supervisor's actions. While the court considered the standard of employer liability for harassment by supervisors to have different foundations from that of co-worker harassment,<sup>33</sup> it seems to have ruled that the resultant non-liability following appropriate corrective action was the same.

Other decisions, however, seemed to carry a suggestion that employer liability for a hostile environment created by supervisors would be virtually automatic. For example, in Sparks v. Pilot Freight Carriers,<sup>34</sup> the Eleventh Circuit reasoned that a supervisor can be deemed the "agent" of the employer and the employer can be held directly liable for harassment by its

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responded with immediate corrective action).

<sup>30</sup> 970 F.2d 178 (6th Cir. 1992), cert denied, 113 S. Ct. 831 (1992).

<sup>31</sup> Id. at 184.

<sup>32</sup> Id. One day after the plaintiff brought her complaint to the company, the employer confronted and fired the supervisor. Id. at 181.

<sup>33</sup> Id. at 183.

<sup>34</sup> 830 F.2d 1554 (11th Cir. 1987).

"agent."<sup>35</sup> Under this theory, notice of the harassment is not required to be given.<sup>36</sup> If liability can occur without notice to someone other than the offending agent of the employer, there is obviously no opportunity to take corrective action. But what if company management learns of the employer conduct and does take corrective action? The cases offer little guidance.

Employers may also be liable for sexual harassment of its employees by non-employees. The applicable law, although not very extensive, seems to apply the same standard as it does to the harassment perpetrated by co-workers.<sup>37</sup>

On the question of how "severe or pervasive" conduct must be before it gives rise to liability, the lower federal courts, both before and after Harris, have wrestled with the difficult question of when a prima facie case has been proven, entitling the plaintiff to place the question of liability in the hands of a

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<sup>35</sup> Id. at 1557-59.

<sup>36</sup> Id. at 1558. The court stated that the "plaintiff need not establish that she gave anyone notice of the harassment" since "the supervisory employee is deemed to be the employer itself and thus notice to the supervisor that he is engaging in unwelcomed harassment is notice to the employer." Id. at 1560 n.10. See also Horn, 755 F.2d at 604 (it is irrelevant whether the employer knew or should have known of harassing actions by its supervisor).

<sup>37</sup> See, e.g., Powell v. Las Vegas Hilton Corp., 841 F. Supp. 1024, 1027 (D. Nev. 1992) (employer will be liable for non-employees' actions "where the employer . . . knows or should have known of the conduct and fails to take immediate and appropriate corrective action."), quoting E.E.O.C. Guidelines, 29 C.F.R.1604.11(e). See also EEOC v. Sage Realty Corp., 507 F. Supp. 599 (S.D.N.Y. 1981) (employer held liable where employee was harassed by non-employees after her employer forced her to wear a sexually provocative uniform as a requirement of the job).

jury. The generalizations are easy to state,<sup>38</sup> but difficult to apply. One illustrative example of a plaintiff's failure to present a prima facie case may be found in Cosgrove v. Sears, Roebuck & Co.,<sup>39</sup> where the Second Circuit held that offensive remarks made by two male co-workers, in addition to a sexually explicit anonymous note, did not constitute sufficiently "severe or pervasive conduct" so as to satisfy a prima facie case for a hostile environment claim.<sup>40</sup>

**C. Kotcher, Karibian and the Elusive Quest for Controlling Principles of Agency Law**

As seen above, the passage of time since the decision in Meritor has not yielded consistent principles for determining the liability of an employer for a supervisory employee's creation of a hostile work environment. A more detailed look at two recent Second Circuit cases is instructive as to why.

In Kotcher v. Rosa and Sullivan Appliance Center, Inc.,<sup>41</sup> the district court, after a bench trial, found that the branch

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<sup>38</sup> See, e.g., Kotcher v. Rosa and Sullivan Appliance Ctr., Inc., 957 F.2d 59, 62 (2d Cir. 1992) ("The incidents must be repeated and continuous; isolated acts or occasional episodes will not merit relief."); Carrero v. New York City Hous. Auth., 890 F.2d 569, 577-78 (2d Cir. 1989) ("Whether the sexual harassment constitutes a Title VII violation is determined from the totality of the circumstances. . . . The offensiveness of the individual actions complained of is also a factor to be considered in determining whether such actions are pervasive.").

<sup>39</sup> 9 F.3d 1033 (2d Cir. 1993).

<sup>40</sup> Id. at 1042.

<sup>41</sup> 957 F.2d 59 (2d Cir. 1992).

manager of an appliance store had created a hostile environment by repeated episodes of vulgar comments and gestures.<sup>42</sup> But the court also concluded that the company should not be held liable because: (a) it had provided its employees with a reasonable opportunity to complain about discrimination; (b) it had prominently posted notices and telephone numbers, informing employees that the head office was available to receive any grievances; and (c) once the plaintiff (and another female employee at the same branch) reported their allegations, the company started an investigation within 24 hours and quickly transferred and demoted the offending branch manager.<sup>43</sup>

The Second Circuit, troubled by the reinstatement of the branch manager five months after his transfer and by a lack of clarity on the facts surrounding plaintiff's departure from work (was there retaliation?) reversed and remanded for further factual findings.<sup>44</sup>

Of greater doctrinal significance, however, was the court's statements regarding employer liability.

At some point, even under the [Meritor] dichotomy between quid pro quo claims and hostile work environment claims, the actions of a supervisor at a sufficiently high level in the hierarchy would necessarily be imputed to the company. But we do not think that this

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<sup>42</sup> Id. at 61. The conduct included comments about the plaintiff's body and the manager pretending to masturbate and ejaculate while her back was turned. Id.

<sup>43</sup> Id. at 63.

<sup>44</sup> Id. at 64-65.

case presents such a situation, and the district court could reasonably have found that the company, whose main office was in Rochester, did not have constructive notice of [the branch manager's] behavior in Oswego.<sup>45</sup>

The paragraph seems to say: (a) that despite the fact that the branch manager was the highest employee in the Oswego store, the company would not automatically be held vicariously liable for his actions as it would be in a quid pro quo case; and (b) the company's failure to take action any earlier than it did was excusable for lack of notice. Entirely unexpressed are the common law principles of agency which lead to this result or which, in another case, would lead to a contrary result.

Less than two years later, the Second Circuit had occasion to revisit the issue of employer liability in Karibian v. Columbia University.<sup>46</sup> In the District Court, Columbia had won summary judgment on both quid pro quo and hostile environment claims brought by an administrative employee engaged in annual alumni fundraising against the head of her immediate office (Urban), his supervisor, and the University.<sup>47</sup> Karibian alleged that she had been coerced into a violent sexual relationship by Urban who said she "owed him" for all that he was doing for her as her supervisor.<sup>48</sup>

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<sup>45</sup> Id. at 64.

<sup>46</sup> 14 F.3d 773 (2d Cir. 1994), cert denied, 114 S. Ct. 2693 (1994).

<sup>47</sup> Id. at 775.

<sup>48</sup> Id. at 776.

In granting summary judgment to Columbia on the hostile environment claim, the district court relied heavily on Kotcher. It held that Columbia was not liable to Karibian because it did not have notice of Urban's harassment and had provided a reasonable avenue for harassment complaints. The Second Circuit reversed and remanded (trial is scheduled for September, 1995).

The basis upon which Kotcher is distinguished is far from clear.

[W]e held in Kotcher, that the employer was not liable for the hostile work environment caused by the plaintiff's supervisor absent notice or the failure to provide a reasonable avenue for complaint. We went on to caution, however, that we were not dealing in absolutes and that the Kotcher rule would not necessarily apply in all cases; we noted, for example, that '[a]t some point . . . the actions of a supervisor at a sufficiently high level in the hierarchy would necessarily be imputed to the company.'<sup>49</sup>

To the extent that this passage is meant to suggest that Urban was at a higher level in the hierarchy of Columbia than the branch manager in Kotcher, there is simply no factual support advanced for it and the proposition seems dubious.

The Court continued in dramatic, but regrettably condensed, fashion:

We have not yet had occasion to address the proper standard of employer liability where, as here, the plaintiff's supervisor created a discriminatorily abusive work environment through the use of his delegated authority. Common law principles of agency suggest that in such circumstances the employer's liability is absolute.

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<sup>49</sup> Id. at 780 (citations omitted).



The Restatement of Agency notes that an employer will be liable for the torts of its employees committed 'while acting in the scope of their employment,' or, if not acting in the scope of employment, if the employee '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(1) & (2)(d) (1958). Hence, when a supervisor makes employment decisions based on an employee's response to his sexual overtures, it is fair to hold the employer responsible because 'the supervisor is acting within at least the apparent scope of the authority entrusted to him by the employer.'

We hold that an employer is liable for the discriminatorily abusive work environment created by a supervisor, if the supervisor uses his actual or apparent authority to further the harassment, or if he was otherwise aided in accomplishing the harassment by the existence of the agency relationship.<sup>50</sup>

These three paragraphs raise a host of interesting questions. First, how does one actually describe the circumstances under which a supervisor will be considered to be actually "using his delegated authority" to create a hostile environment? When would he be considered to have been aided in accomplishing the tort by the existence of the agency relationship? No less than Urban at Columbia, the branch manager in Kotcher clearly had physical proximity to and a supervisor's power over Kotcher, which in some sense can be said to have helped him to create the abusive environment. Second, if therefore, as seems to be the case, a supervisor will almost always have proximity and power, will absolute liability of the employer for a hostile environment

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<sup>50</sup> Id. at 780 (citations omitted).

become the general rule contrary to the Supreme Court's reluctance to adopt that view in Meritor? Third, what is the analytical significance of the phrase in the middle paragraph "Hence, when a supervisor makes employment decisions based on an employee response to his sexual overtures . . ." ? The words might be read as qualifying the entire holding of the Court and limiting its applicability to cases, like Karibian itself, in which the plaintiff has alleged quid pro quo harassment as well as hostile environment. Under this view, Urban's use of his actual or apparent authority to demand a continued sexual relationship with Karibian and his readiness to use her responses as a basis for favorable or unfavorable treatment become the basis for distinguishing Kotcher and sharply limiting the scope of automatic vicarious liability for hostile environment claims.

**D. Post-Karibian Case Law and the Continuation of Uncertainty**

Since the Second Circuit decision in Karibian in January, 1994, it has been frequently cited, but not embraced. Three circuit court decisions are of particular interest.

Perhaps of greatest analytic significance is the Third Circuit's decision in Bouton v. BMW of North America, Inc.,<sup>51</sup> sustaining on appeal the district court's ruling after trial that

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<sup>51</sup> 29 F.3d 103 (3rd Cir. 1994), reh'g denied, \_\_\_ F.3d \_\_\_ (1994).

BMW was not liable for a hostile environment.<sup>52</sup> The court identified (and thereafter rejected the applicability of) three separate theories of liability described in the Restatement (Second) of Agency §219.

Section 219(1) holds employers liable for torts committed by their employees within the scope of their employment. The court noted that while this theory is commonly used to hold employers liable in quid pro quo cases (citing Karibian), "liability should not be imputed under §219(1) without use of actual authority" because "the harasser is not explicitly raising the mantle of authority to cloak the plaintiff in an unwelcome atmosphere."<sup>53</sup>

Section 219(2)(b) embodies a negligence principle and holds employers liable for their own failure to take remedial action upon notice of harassment. "Conversely, under negligence principles, prompt and effective action by the employer will relieve it of liability."<sup>54</sup> The court notes, citing Meritor, that an "employer could escape liability if its complaint procedure was sufficiently effective."<sup>55</sup> The trial testimony of multiple witnesses, including the company President, established that BMW

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<sup>52</sup> 29 F.3d 103. A jury trial was not available in Title VII actions when the lawsuit was filed in July, 1990. The Civil Rights Act of 1991 amended Title VII to make jury trials available. The Supreme Court held in Landgraf v. USI Film Products, 114 S. Ct. 1483 (1994) that the jury trial provision should not be applied to cases already pending on the effective date of the new statute, November 26, 1991.

<sup>53</sup> Bouton, 29 F.3d at 107.

<sup>54</sup> Id.

<sup>55</sup> Id.

had an "open-door policy" for reporting grievances which enabled a complaint to be lodged with any of the supervisor's peers or superiors or the Human Resources Department; the policy was "continuously advertised;" the plaintiff knew of its existence and had utilized each of its several avenues on certain occasions; and the company's judgment in conducting or declining to conduct an investigation in any given instance was found to be appropriate.

Section 219(2)(d) holds a master liable under two circumstances: (i) where the servant purports to act or speak on behalf of the principal and there is reliance upon his apparent authority; and (ii) where the servant is aided in accomplishing the tort by the existence of the agency relation. The court rejected any liability under the first prong because BMW had "an effective grievance procedure"--known to the victim and which, when invoked, stopped the harassment. "A policy known to potential victims also eradicates [the] apparent authority the harasser might otherwise possess."<sup>56</sup>

Finally, the court rejects any liability under the second prong of Section 219(2)(d). It notes first that an agency relationship can aid a perpetrator by providing proximity to the victim. But proximity is also created by an employer in cases of co-worker harassment and these, the court observes, are adjudicated on negligence principles. The agency relationship can also

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<sup>56</sup> Id. at 110.

aid the tort "by giving the harasser power over the victim."<sup>57</sup> But the court characterizes the power problem as one of "apparent authority" and, relying on a spectrum of lower court decisions and its own precedent in the area of agency law, rejects liability in a case such as the one before it "when the employee could not have [reasonably] believed (or at least did not believe) harassment was the employer's policy."<sup>58</sup> The plaintiff, the court observes, "did not believe acts or harassment were BMW policy--she believes she had a remedy by speaking to [her supervisor's] boss, the president of the company."<sup>59</sup> Notwithstanding a "supervisor's influence or control over hiring, job performance evaluation, work assignments, or promotions," liability can be negated by "put[ting] in place strong policies and procedures that effectively belie the appearance of . . . authority [to harass]."<sup>60</sup>

Policy considerations, argues the court, support the choice to permit effective grievance procedures to alleviate liability under section 219(2)(d). While automatic liability would give employers an incentive "to recruit, train, and supervise their managers to prevent hostile environments,"<sup>61</sup>

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<sup>57</sup> Id. at 108.

<sup>58</sup> Id. at 109.

<sup>59</sup> Id. at 108.

<sup>60</sup> Id. (quoting *Watts v. New York City Police Dept.*, 724 F.Supp. 99, 106 n.6 (S.D.N.Y. 1989)).

<sup>61</sup> Id. at 110.

[t]he marginal reduction in the incentive that occurs if employers can rely on an internal grievance procedure may be justified by the concomitant decrease in litigation. This rationale is supported by the statutory policy that requires complaint to the EEOC and a conciliation process before a complainant has a right to sue. See 42 U.S.C. §2000e-5.<sup>62</sup>

Of some additional comfort post-Karibian to employers is Baskerville v. Culligan Intl. Co.,<sup>63</sup> where the Seventh Circuit reversed a jury verdict against the employer, on the grounds that the facts were not sufficient to establish actionable sexual harassment.<sup>64</sup> The court also ruled in the alternative that even if the harassment was actionable, the employer "took all reasonable steps" to protect Baskerville, a secretary, from her boss, Hall, a regional manager.<sup>65</sup>

The court continued by stating that "[a]n employer is not strictly liable for sexual harassment . . . unless, perhaps, the

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<sup>62</sup> Id.

<sup>63</sup> 50 F.3d 428, 1995 U.S. App. LEXIS 5533 (7th Cir. Mar. 20, 1995).

<sup>64</sup> Id. at \*1. The court explained that nine instances of "merely vulgar and mildly offensive" comments spread over seven months "could [not] reasonably be thought to add up to sexual harassment" since they would not be sufficiently "severe or pervasive" as to satisfy the test for a hostile environment claim. Id. at \*2-4.

<sup>65</sup> Id. at \*7. Once Baskerville properly complained to the company's human resources department, the matter was "promptly investigated" and Hall was warned "that his offensive behavior must cease immediately." In addition, Hall was "placed on probation and a salary increase was held up for several months." Following the company's actions, there were no recurring episodes of "harassment." Id. at \*9-10.

harassment takes the form . . . of an abuse of authority,"<sup>66</sup> and reasoned that "abuse of authority" type of harassment was not alleged (or proved).<sup>67</sup> The court also avoided taking on Karibian when it discussed the legal duty of the employer "in relation to employees victimized by co-workers' sexual harassment,"<sup>68</sup> ignoring the fact that Baskerville was a secretary and Hall a regional manager. Since "the employer took 'prompt and appropriate remedial action[,]'" it was able to discharge its duty and avoid liability.<sup>69</sup>

Of potential significance in expanding employer liability is Pierce v. Commonwealth Life Insurance Co.<sup>70</sup> The plaintiff was a former agency manager and supervisor of three offices for the defendant company, who had engaged in exchanges of sexually oriented cartoons and banter with Kennedy, the administrator of one of the offices.<sup>71</sup> He had been demoted, transferred and had his pay decreased for violating the company's sexual harassment

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<sup>66</sup> Id. at \*7. The court stated that "the criterion for when an employer is liable for sexual harassment is negligence." Id. at \*8.

<sup>67</sup> Id. at \*7-8. The court stated that since it was not alleged nor proved, it did not need to decide the issue. Id.

<sup>68</sup> Id. at \*11-12 (emphasis applied).

<sup>69</sup> Id. at \*10 (citation omitted).

<sup>70</sup> 40 F.3d 796 (6th Cir. 1994).

<sup>71</sup> Id. at 799.

policy.<sup>72</sup> Meanwhile, Kennedy, a seemingly willing participant in the conduct at issue, was not sanctioned.<sup>73</sup>

The plaintiff sued under state law claiming, in part, to have been discriminated against on the basis of gender because of the disparate treatment he had received in comparison with Kennedy. In affirming summary judgment for the company, the court noted that the disparate treatment was based not on gender difference but rather on the fact that Pierce was a supervisor and Kennedy was not. As such, it declared, the company ran a greater risk of future employer liability under Title VII for repetition of the offending behavior by Pierce than it did for Kennedy.

Its explanation for this observation is, however, ultimately confusing since the prior case law in the Sixth Circuit seemed to allow an employer to avoid liability when it responded effectively to a notice of a hostile environment, whether created by a supervisor or a co-worker. The court alludes to Karibian in a footnote, noting that it represents a case which does not afford "employers an opportunity to avoid liability by effectively responding to the sexual harassment actions of their supervisors," but makes no overt use of the case, perhaps because on the facts there was little room to find that Pierce had abused his actual or apparent authority vis-a-vis Kennedy. The Court then concludes

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<sup>72</sup> Id. at 799-800.

<sup>73</sup> Id. at 800.



If Commonwealth were to allow Pierce--who would very likely be considered its "agent" under Title VII--to continue as supervisor, it faced the risk that he might again violate its sexual harassment policy, though without its specific knowledge. Because of the complaints by Kennedy, Commonwealth could be liable for such a future incident, irrespective of whether it knew or should have known about it.<sup>74</sup>

The court, without explanation, seems to imply that having once been warned by Kennedy about Pierce's misbehavior as a supervisor, the company would be absolutely liable in the future for any repetition of it, regardless of any corrective action, short of firing, which it might have taken in the instant case. And, it seems, without regard to any abuse of actual or apparent authority by the supervisor in the future case. Has Karibian been extended sub-silentio?

### III. Title IX

#### A. Hostile Environment Claims Under Title IX

Title IX of the Education Amendments of 1972<sup>75</sup> made applicable to universities the employment discrimination provisions of Title VII and other non-discrimination rules.<sup>76</sup> Title IX prohibits a university from discriminating in its educational program

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<sup>74</sup> Id. at 804.

<sup>75</sup> 20 U.S.C. §1681 [hereinafter Title IX].

<sup>76</sup> Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60 (1992). The Supreme Court stated that it "believe[d] the same rule [as it held in Meritor when 'a supervisor sexually harasses a subordinate because of the subordinate's sex'] should apply when a teacher sexually harasses and abuses a student." Id. at 75 (citations omitted).

on the basis of sex.<sup>77</sup> In particular, 20 U.S.C. § 1681(a) provides:

"No person in the United States shall, on the basis of sex, be excluded from participation in, be deprived the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ."

In Lipsett v. University of Puerto Rico,<sup>78</sup> the First Circuit held that a hostile environment sexual harassment claim could be brought under Title IX by a student employee.<sup>79</sup> The Lipsett court applied Title VII's "knew or should have known" standard to the claim against the university.<sup>80</sup> However, the court specified that it was restricting its decision to employment-related harassment and was not considering harassment of the plaintiff in her capacity as a student.<sup>81</sup>

Four years later, the Supreme Court first considered harassment of a student. In Franklin v. Gwinnett County Public

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<sup>77</sup> 20 U.S.C. § 1681(a) (1990). As the Second Circuit noted in Yusuf v. Vassar College, 35 F.3d 709, 714 (2d Cir. 1994), Title IX is enforceable through an implied private right of action, Cannon v. Univ. of Chicago, 441 U.S. 677 (1979), for monetary damages as well as injunctive relief. Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60 (1992).

<sup>78</sup> 864 F.2d 881 (1st Cir. 1988).

<sup>79</sup> Id. at 901.

<sup>80</sup> Id. Accord Mabry v. State Bd. of Community Colleges and Occupational Educ., 813 F.2d 311, 316 n.6 (10th Cir. 1987) (courts should apply Title VII standards when they assess sex discrimination under Title IX) cert. denied, 484 U.S. 849 (1987).

<sup>81</sup> Lipsett, 864 F.2d at 901. Lipsett was considered both an employee and a student, since she was a surgical resident at the time of the alleged harassment. Id. at 897.

Schools,<sup>82</sup> a high school student brought a Title IX action for damages against her school board for alleged intentional sexual harassment by a teacher.<sup>83</sup> The Court reversed the lower courts' rejection of the student's damage claim and held that courts could grant monetary awards for intentional violations of Title IX.<sup>84</sup> Quoting relevant language from Meritor, the Court suggests that, at least in teacher-perpetrated harassment suits, it will apply Title VII law to Title IX cases.<sup>85</sup>

Franklin involved alleged misconduct that, by any standard, would be considered "severe or pervasive."<sup>86</sup> In addition, the harassing actions were perpetrated by a person under the educational institution's control and, although the harassment was known by the institution, it was not remedied.<sup>87</sup>

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<sup>82</sup> 503 U.S. 60 (1992).

<sup>83</sup> Id. at 63-64. Franklin sought relief under both quid pro quo and hostile environment sexual harassment theories. Id. at 64.

<sup>84</sup> Id. at 76.

<sup>85</sup> The Court stated that "'when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor discriminate[s] on the basis of sex.' We believe the same rule should apply when a teacher sexually harasses and abuses a student." Id. at 75 (quoting Meritor, 477 U.S. at 64).

<sup>86</sup> Among other allegations, over a one year period, the teacher allegedly "engaged [the student] in sexually-oriented conversations," "forcibly kissed her on the mouth," and "subjected her to coercive intercourse." Id. at 63.

<sup>87</sup> Id. It was uncontested that the school district knew of the alleged harassment. The school district investigated the harassment charges, but did not take any action. Id. See also Doe v. Petaluma City Sch. Dist. 830 F. Supp. 1560, 1576 (N.D. Cal. 1993) ("inaction (or insufficient action) in the face of complaints of . . . sexual harassment" may be sufficient to

Although the Franklin Court did not address when hostile environment claims would be cognizable in the educational setting, subsequent district court decisions have.<sup>88</sup> In Patricia H. v. Berkeley Unified School District,<sup>89</sup> the District Court, denying cross-motions for summary judgment, sustained a cause of action under Title IX for sexual harassment based on a theory of hostile environment.<sup>90</sup> The court left for a jury determination, the question of whether a hostile environment existed, based on the physical presence in a high school of a teacher who had sexually molested two female students years earlier, off-school premises, when they were ages ten and twelve.<sup>91</sup> In response to complaints by the mother about her daughters' fears, the school was alleged to have done no more than to suggest that the family relocate the students to another school district.<sup>92</sup> School

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establish a Title IX hostile environment claim).

<sup>88</sup> The court stated that "[t]he issue of sexual harassment in an educational setting as a form of sex discrimination has been [in]frequently before the courts . . . and the viability of a sex discrimination claim based on hostile environment sexual harassment under Title IX is a novel question." Patricia H. v. Berkeley Unified Sch. Dist., 830 F. Supp. 1288, 1290 (N.D. Cal. 1993).

<sup>89</sup> 830 F. Supp. 1288 (N.D. Cal. 1993).

<sup>90</sup> Id. at 1297. See also Serda v. Hancock, 842 F. Supp. 1315 (D. Kan 1993) (question of fact exists on whether school is liable for alleged sexual harassment of student by director of school). Compare Bougher v. Univ. of Pittsburgh, 713 F. Supp. 139 (W.D. Pa. 1989), (no hostile environment sexual harassment claim under Title IX) aff'd, 882 F.2d 74 (3d Cir. 1989).

<sup>91</sup> Patricia H., 830 F. Supp. at 1294-96.

<sup>92</sup> Id. at 1297.

district officials described their conduct as a reasonable response, claiming to believe that they had insufficient grounds to fire the teacher, who had already served a thirty-day suspension of his teaching license, based on the earlier misconduct.<sup>93</sup> As the Supreme Court had done in Meritor under Title VII, the court saw no basis in Title IX for limiting sexual harassment claims to those of the quid pro quo type.<sup>94</sup>

#### B. Claims Based on Non-Employee Conduct

Less certain is the degree to which Title IX should permit claims by students for sexual harassment by fellow students and other campus visitors. In Doe v. Petaluma City School District,<sup>95</sup> a junior high school student brought an action seeking money damages against her school district for its failure to end alleged sexual harassment perpetrated by her classmates.<sup>96</sup> Although the district court expressly stated that "hostile

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<sup>93</sup> Id. The school had suspended the teacher, Hamilton, when formal charges were first filed against him. Id.

<sup>94</sup> Id. The court held that the school district could be liable for the Title IX violation, since "liability . . . is conditioned on both a finding of hostile environment and [a] knowing failure to act." It explained that the school would be held liable if it "failed to take reasonable steps" to remedy the situation. Id.

<sup>95</sup> 830 F. Supp. 1560 (N.D. Cal. 1993).

<sup>96</sup> Id. at 1564. "Most of the harassment was verbal, in the form of statements about Jane having a hot dog in her pants or that she had sex with hot dogs." Id.

environment . . . claims may be brought under Title IX,"<sup>97</sup> it explicitly rejected the application of Title VII liability principles to harassment perpetrated by fellow students.<sup>98</sup>

Relying on the Supreme Court's decisions in Guardians Ass'n v. Civil Service Commission of New York<sup>99</sup> and Franklin, the court held that a plaintiff must show discriminatory intent on the part of a school district employee before recovering compensatory damages.<sup>100</sup> "Agency principles are inapplicable to the relationship between the school district and its students."<sup>101</sup> "[I]t is not enough that the institution knew or should have known of the hostile environment and failed to take appropriate action to end it."<sup>102</sup> The inaction must be the result of intentional discrimination.<sup>103</sup>

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<sup>97</sup> Id. at 1563, 1583. Compare Davis v. Monroe Cty. Bd. of Educ., 862 F. Supp. 363 (M.D. Ga. 1994) ("no basis for such a cause of action in Title IX").

<sup>98</sup> Petaluma, 830 F. Supp. at 1575-76.

<sup>99</sup> 463 U.S. 582 (1983). (Title VI of the Civil Rights Act of 1964 dealing with allegations of racial discrimination requires discriminatory intent to obtain compensatory damages).

<sup>100</sup> Petaluma, 830 F. Supp. at 1571, 1575-76. See also Seamons v. Snow, 864 F. Supp. 1111 (D. Utah 1994). However, a person may obtain an injunctive remedy when unintentional actions allow the harassment to occur. Petaluma, 830 F. Supp. at 1573. Accord, Guardians Ass'n, 463 U.S. 582. In this case, and many similar cases, the plaintiff would not benefit by receiving an injunction because, at the time of trial, she did not attend school in the district. Petaluma, 830 F. Supp. at 1576.

<sup>101</sup> Petaluma, 830 F. Supp. at 1576 n.11.

<sup>102</sup> Id. at 1571.

<sup>103</sup> Id. at 1575-76.

Where actions are brought, especially those for declaratory and injunctive relief where discriminatory intent need not be alleged, interesting questions arise concerning the nature and adequacy of notice to a university and what would constitute a prompt and effective response. In Murray v. New York University College of Dentistry,<sup>104</sup> the district court granted judgment on the pleadings to the university. The plaintiff was a twenty-eight year old dental student who had failed eight of her second year courses and upon review by the academic standards committee was informed that to continue her enrollment she would have to retake the failed courses. One month later she alleged, for the first time, that her academic failure was caused by a sexually hostile environment created by one of the male patients in the public dental clinic operated by the College (not her own patient), who (according to her pleadings) had engaged in "staring at [the plaintiff], commenting on her appearance and asking her for dates," "asking her for dates and professing his love for her," "following her around the clinic, into elevators into other parts of the school and outside of the school," "on several occasions" following the plaintiff "to a friend's home and wait[ing] outside for her," and "staring" at the plaintiff.

The plaintiff alleged that she had notified one of her professors after one of the incidents (that a male patient was "distracting" her) and that he told her to "grow up" and took no

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<sup>104</sup> No. 94-9085, 1994 U.S. Dist. LEXIS 13880 (S.D.N.Y. Sept. 29, 1994), \_\_\_ F.3d \_\_\_ (2d Cir. 1995) (sub judice, argued April 14, 1995).

further action. The plaintiff did not complain to the university's equal opportunity office until over one year after the alleged harassment began and over five months after it was alleged to have ended, and she never brought any complaint to the university officer designated in the university sexual harassment policy, printed in the College of Dentistry's student handbook.

After noting some continuing uncertainty regarding the viability of claims of sexual harassment by hostile environment under Title IX, the court found no need to resolve the issue, ruling that the complaint failed to state a claim under either Title VII ("knew or should have known") or Title IX "actual knowledge" standards. Examining each of the incidents which the plaintiff argued constituted notice to the university, the court found that neither the facts alleged nor any reasonable inferences in plaintiff's favor supported a finding of notice to the university until some four or five months after the putative harassment had ended and a month after the plaintiff had already been advised of the effects of her academic failures.

Filing an amicus brief in the Second Circuit in support of the plaintiff, the NOW Legal Defense and Education Fund ("NOW-LDEF") has urged reversal. As a matter of doctrine, it has urged the court explicitly to adopt Title VII workplace standards of liability to make a university responsible where the university "(or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate



and appropriate corrective action."<sup>105</sup> It urges a rejection of any standard more lenient to universities, such as one requiring "actual knowledge." The lower court had suggested such a standard for Title IX cases because of the independent requirement already imposed by law on universities, under 34 C.F.R. §§ 106.8 and 106.9, to have in place complaint procedures for sex discrimination. NOW-LDEF points out that Meritor expressly rejected such an exculpatory theory for complaint procedures voluntarily adopted in the workplace.

The brief goes on to argue that sexual harassment claims should be cognizable under Title IX even if the perpetrator is not an agent of the defendant, relying on employment discrimination decisions holding employers liable in certain instances for harassment committed by non-workers<sup>106</sup> and EEOC regulations imposing liability for a failure to take remedial measures where an employer has actual or constructive knowledge of sexual harassment by "fellow-employees" or "non-employees."<sup>107</sup> The brief also insists that the complaint, properly read on a motion to dismiss, has pleaded adequate facts to establish that the university had actual and constructive knowledge of sexual harassment of the plaintiff by the patient and that it failed to take appropriate responsive measures.

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<sup>105</sup> Citing EEOC Regulation 29 C.F.R. §1604.11(d).

<sup>106</sup> See, e.g., EEOC v. Sage Realty Corp., 507 F. Supp. 599 (S.D.N.Y. 1981), supra note 37.

<sup>107</sup> 29 C.F.R. §§ 1604.11(d)-(e).

Should the complaint be reinstated with subsequent discovery and possible trial?

Many of us who convene at the Nonprofit Forum spend our days on the premises of universities. Is it sound policy that we be made to litigate through a full blown trial every allegation that academic performance on an exam was adversely affected by the unwelcome attention during the semester of a member of the opposite sex of which it is claimed, a professor was on constructive notice?<sup>108</sup> Should universities be considered to be on notice of possible sexual harassment if a student makes a complaint to a member of the faculty for conduct not occurring in his or her classroom? Or can we rely on language in our student handbooks which instruct students / graduate students / professional students on where to file harassment complaints so as to limit, at least presumptively, claims that we were on notice? What does "severe or pervasive" mean when the conduct is attributed to a fellow student who lives in the same dormitory or shares a class with the complainant? What are the "effective remedial measures" which will reduce or eliminate contacts between a student and a fellow-student or clinical patient? How "promptly" are we able to apply any measures at all if the facts are in dispute and we

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<sup>108</sup> I leave for another day the separate, difficult and fascinating question of how to deal with allegations that a professor's course content or teaching style creates a sexually hostile educational environment. For those who would like a brief glimpse, see *Silva v. Univ. of New Hampshire*, 1994 U.S. Dist LEXIS 13281 (D. N.H. Sept. 15, 1994) (preliminary injunction issued reinstating professor suspended for introducing arguably gratuitous sexual analogies into his classroom presentation).

follow our institutional regulations calling for full due process hearings?

These extremely difficult questions are not resolved, but perhaps they should give courts some pause before too readily applying Title VII standards to Title IX claims.