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EMPLOYERS' LIABILITY FOR FAILURE TO PREVENT SEXUAL HARASSMENT

*Paroline v. Unisys Corporation*¹

Since the 1986 decision of *Meritor Savings Bank v. Vinson*,² sexual harassment victims have been able to use Title VII as a foundation for their claims regardless of whether there is an economic injury.³ The underlying policy for this action balances the need to protect those citizens least able to protect themselves against the desire not to hold employers strictly liable for the sexual harassment of its employees. The Supreme Court recognized sexual harassment as another act of discrimination which Title VII prohibits.⁴ Following *Meritor*, lower courts have attempted to determine exactly how far the Supreme Court meant to extend liability in these cases.⁵ *Paroline v. Unisys Corp.* is

1. 879 F.2d 100 (4th Cir. 1989).

2. 477 U.S. 57 (1986).

3. *Id.* at 65.

4. *Id.*

5. So far it appears that all of the federal circuits interpret *Meritor* in much the same way. The following is a list of cases from each circuit dealing with the issue of sexual harassment after *Meritor*:

D.C. Circuit: *Palmer v. Shultz*, 815 F.2d 84 (D.C. Cir. 1987); *Broderick v. Ruder*, 685 F. Supp. 1269 (D.D.C. 1988).

First Circuit: *Lipsett v. Univ. of Puerto Rico*, 864 F.2d 881 (1st Cir. 1988); *Hallquist v. Local 276, Plumbers & Pipefitters Union*, 843 F.2d 10 (1st Cir. 1988); *Del Valle Fontanez v. Aponte*, 660 F. Supp. 145 (D.P.R. 1987).

Second Circuit: *Lopez v. S.B. Thomas, Inc.*, 831 F.2d 1184 (2d Cir. 1987); *Carrero v. New York Hous. Auth.*, 668 F. Supp. 196 (S.D.N.Y. 1987), *aff'd in part, remanded in part*, 890 F.2d 569 (2d Cir. 1989).

Third Circuit: *Miller v. Aluminum Co. of Am.*, 679 F. Supp. 495 (W.D. Pa. 1988), *aff'd*, 856 F.2d 184 (3d Cir. 1988); *Howard v. Pine Forge Academy*, 678 F. Supp. 1120 (E.D. Pa. 1987); *Porta v. Rollins Envtl. Servs. (NJ) Inc.*, 654 F. Supp. 1275 (D.N.J. 1987), *aff'd*, 845 F.2d 1014 (3d Cir. 1988).

Fourth Circuit is discussed *infra*.

Fifth Circuit: *Valdez v. Church's Fried Chicken, Inc.*, 683 F. Supp. 596 (W.D. Tex. 1988); *Ross v. Double Diamond, Inc.*, 672 F. Supp. 261 (N.D. Tex. 1987).

Sixth Circuit: *Yates v. Avco Corp.*, 819 F.2d 630 (6th Cir. 1987); *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611 (6th Cir. 1986); *Shrout v. Black Clawson Co.*, 689 F. Supp. 774 (S.D. Ohio 1988); *Jackson-Colley v. Army Corps of Eng'rs.*, 655

another step in this process. *Paroline* extends the liability of employers for failing to prevent sexual harassment from occurring in certain situations, but not to the degree of holding employers strictly liable.⁶ Previously, employers were required only to take prompt and adequate remedial measures after the sexual harassment occurred.⁷

In *Paroline*, Elizabeth M. Paroline sued her former employer, Unisys Corporation (Unisys), and a current employee of Unisys, Edgar L. Moore, for sexual harassment.⁸ Paroline asserted claims of sexual harassment and constructive discharge under Title VII of the Civil Rights Act of 1964.⁹

I. FACTS OF *PAROLINE*

The events that spawned this action began in the fall of 1986 when Paroline applied for a job as a word processor for Unisys.¹⁰ During her interview, Moore asked Paroline how she would respond to sexual harassment.¹¹ After Paroline was hired, Moore began making sexually suggestive remarks to Paroline which she found offensive.¹² On one

F. Supp. 122 (E.D. Mich. 1987).

Seventh Circuit: *Volk v. Coler*, 845 F.2d 1422 (7th Cir. 1988); *Scott v. Sears, Roebuck & Co.*, 798 F.2d 210 (7th Cir. 1986); *Dockter v. Rudolf Wolff Futures, Inc.*, 684 F. Supp. 532 (N.D. Ill. 1988).

Eighth Circuit: *Hall v. Gus Constr. Co., Inc.* 842 F.2d 1010 (8th Cir. 1988).

Ninth Circuit: *Jordan v. Clark*, 847 F.2d 1368 (9th Cir. 1988), *cert. denied*, 109 S. Ct. 786 (1989); *Froyd v. Cook*, 681 F. Supp. 669 (E.D. Cal. 1988).

Tenth Circuit: *Sahs v. Amarillo Equity Investors, Inc.*, 702 F. Supp. 256 (D. Colo. 1988); *Haehn v. City of Hoisington*, 702 F. Supp. 1526 (D. Kan. 1988).

Eleventh Circuit: *Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311, *reh'g denied*, 874 F.2d 821 (11th Cir. 1989); *Huddleston v. Roger Dean Chevrolet, Inc.*, 845 F.2d 900 (11th Cir. 1988); *Silverstein v. Metoplex Communications, Inc.*, 678 F. Supp. 863 (S.D. Fla. 1988).

6. *Paroline*, 879 F.2d at 107.

7. See *Hall v. Gus Constr. Co., Inc.*, 842 F.2d 1010 (8th Cir. 1988); *Swentek v. USAir Inc.*, 830 F.2d 552 (4th Cir. 1987); *Yates v. Avco Corp.*, 819 F.2d 630, 636 (6th Cir. 1987); .

8. *Paroline*, 879 at 103.

9. 42 U.S.C. §§ 2000e-2000e-17 (1982). She also asserted pendent state law claims for intentional infliction of emotional distress against both defendants. In addition, she brought a claim for assault and battery against Moore and a claim for negligent failure to warn and reckless endangerment against Unisys. *Paroline*, 879 F.2d at 102.

10. *Paroline*, 879 F.2d at 103.

11. *Id.*

12. *Id.*

occasion Moore rubbed his hands on her back while she was working, even though she indicated that she wished he would stop.¹³

On January 22, 1987, due to a severe snowstorm, Paroline was forced to accept a ride home from Moore.¹⁴ During the trip he made sexually suggestive remarks, kissed her, and persistently tried to hold her hand.¹⁵ Moore insisted on entering her apartment (despite her objections).¹⁶ Inside the apartment, Moore grabbed and kissed Paroline against her will.¹⁷ She eventually convinced him to leave.¹⁸

The following day Paroline reported the event to Peterson, the supervisor of that Unisys office.¹⁹ According to Paroline, Peterson indicated that he was aware of other complaints of sexual harassment involving Moore.²⁰ After an investigation, Unisys revoked Moore's security clearance²¹ and warned him that if there were any more incidents, the office would terminate his employment.²² Because Paroline had not received her security clearance yet, she feared the revocation of Moore's clearance would put her into more frequent contact with him.²³ If his security clearance was revoked before Unisys cleared Paroline, they both would be restricted to a limited area where nonsecurity-cleared personnel worked. Although she was asked to stay, Paroline quit on February 15, 1987.²⁴ She filed this action in the United States District Court for the Eastern District of Virginia.²⁵

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* Paroline claimed that when her harassment by Moore was reported to Peterson he replied, "Oh no, not again." *Id.* at 108.

21. *Id.* at 103. Unisys had a Sensitive Compartmented Intelligence Facility which required a special security clearance for entrance. New employees must receive clearance through the Government Defense Investigative Service. The amount of time required for investigation is unclear but was implied to be more than two weeks. *Id.* at 109.

22. *Id.* at 103.

23. *Id.* at 104.

24. *Id.*

25. *Id.* at 103-04.

Paroline argued under the Civil Rights Act of 1964²⁶ that Moore was her employer in the sense that he was an agent of Unisys.²⁷ She claimed he had sufficient supervisory capacity over her in that he was involved in her interview and recommendation for hire and personally gave her work assignments on at least one occasion.²⁸ Conversely, Unisys suggested that Moore "had no authority regarding her hiring, performance reviews, promotions or decisions related to discipline or termination."²⁹

Paroline's sexual harassment claim stated that the harassment created a hostile work environment under Title VII.³⁰ To succeed in this claim she needed to prove that the harassment interfered with her ability to work and her psychological well-being and that it would do so to a reasonable person in her position.³¹ In other words, the conduct must be significantly severe and pervasive to accomplish this result.³² Unisys argued that Paroline failed to produce evidence of the severity or pervasiveness of the claim and there was no basis for holding Unisys liable for Moore's conduct.³³ Paroline advanced *two* theories imputing liability to Unisys. First, she argued that Unisys took inadequate remedial action after she lodged her complaint.³⁴ Second, she advanced the theory that Unisys had a duty to prevent her harassment because the corporation knew Moore previously had sexually harassed other females in the office.³⁵

The district court granted summary judgment in favor of the defendants on both the issue whether Moore was an "employer" under

26. 42 U.S.C. § 2000e(b) (1982). The definition of employer includes "a person engaged in an industry affecting commerce who has fifteen or more employees . . . and any agent of such person." *Id.*

27. *Paroline*, 879 F.2d at 104. There was no disagreement as to whether Unisys fell within the statutory definition of employer.

28. *Id.*

29. *Id.*

30. *Id.* at 104-05. Section 2000e-2(a)(1) of Title VII provides:

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise 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) (1982).

31. *Paroline*, 879 F.2d at 105.

32. *Id.*

33. *Id.* at 105.

34. *Id.* at 106.

35. *Id.*

Title VII and on the issue of sexual harassment.³⁶ The court held that Unisys and Moore could not be held liable because Unisys took prompt remedial action and Paroline quit before the remedial measures Unisys activated had a chance to become effective.³⁷

The court of appeals reversed the summary judgment in favor of the defendants by stating there were genuine issues of fact involved and a fact finder could reasonably conclude in favor of Paroline. In reversing the summary judgment on the sexual harassment claim, the court of appeals recognized both of Paroline's theories.³⁸ When an employer, who anticipates or reasonably should anticipate that the plaintiff will become a victim of sexual harassment, fails to take action to reasonably prevent the harassment in a hostile environment claim under Title VII, a court will allow a plaintiff to state a claim against the employer for failing to prevent the sexual harassment regardless of whether any remedial action was taken.³⁹

II. LEGAL BACKGROUND

While some circuits already were beginning to recognize that sexual harassment violated Title VII of the Civil Rights Act, the Supreme Court in *Meritor Savings Bank v. Vinson*,⁴⁰ ratified these decisions and gave precedent to those circuits which had not yet recognized this cause of action. The *Meritor* court stated that "[n]othing in Title VII suggests that a hostile environment based on discriminatory sexual harassment should not be likewise prohibited."⁴¹ Before the *Meritor* decision, the Eastern District of Missouri was headed in this direction with *Harrison v. Reed Rubber Co.*⁴² The court stated that sexual harassment could amount to discrimination but it did not recognize that sexual harassment alone was enough to violate Title VII.⁴³ In *Moylan v. Maries*

36. *Id.* The district court also granted summary judgment against Paroline's claims of reckless endangerment, constructive discharge and intentional infliction of emotional distress. *Id.* at 113.

37. *Id.* at 102. Unisys notified Paroline on January 29, 1987 of the measures taken against Moore. Unisys then offered her two weeks leave. Paroline quit on February 15, 1987. *Id.* at 104.

38. *Id.* at 106.

39. *Id.*

40. 477 U.S. 57 (1986). See *Moylan v. Maries County*, 792 F.2d 746 (8th Cir. 1986); *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982); *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981).

41. 477 U.S. at 66.

42. 603 F. Supp. 1457 (E.D. Mo. 1985).

43. *Id.* at 1461.

County,⁴⁴ for the first time the Eighth Circuit considered whether a claim of sexual harassment stated a cause of action under Title VII.⁴⁵ The court held that a sexually hostile work environment did indeed constitute a violation of the Act.⁴⁶ Since the *Meritor* decision, the Eighth Circuit has not hesitated to apply this cause of action. In *Minteer v. Auger*,⁴⁷ a female prison guard brought a claim of sexual harassment. The court applied the standards of *Meritor* and found the harassing conduct did not rise to the level of severity required and the defendants responded adequately to her complaints. Even though they found against the plaintiff, they followed the precedent established by *Meritor*.⁴⁸ In the later case of *Jones v. Wesco Investments, Inc.*⁴⁹ the court found the plaintiff had met the level of severity required to establish a sexually hostile work environment.⁵⁰

According to *Meritor*, employers are liable for their own sexual harassment of employees.⁵¹ Also, employers are held liable for a co-worker's sexual harassment if the employer has "actual or constructive" knowledge of the hostile environment and does not take action.⁵² This action must be "reasonably calculated to end the harassment."⁵³ In *Paroline*, the previous incidents of harassment gave Unisys knowledge of this kind.

One of the disputed elements of a Title VII⁵⁴ claim is whether the defendant is an "employer" within the meaning of the act.⁵⁵ To hold Moore liable along with Unisys and to help impute knowledge to Unisys, Paroline had to prove Moore was an "employer." "Employer" is defined as "a person engaged in an industry affecting commerce who has fifteen

44. 792 F.2d 746 (8th Cir. 1986).

45. *Id.* at 749.

46. *Id.* at 750.

47. 844 F.2d 569 (8th Cir. 1988).

48. *Id.* at 570-71.

49. 846 F.2d 1154 (8th Cir. 1988).

50. *Id.* at 1156; *see also* *Staton v. Maries County*, 868 F.2d 996, 998 (8th Cir. 1989); *Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1014-15 (8th Cir. 1988).

51. *Meritor*, 477 U.S. at 66; *see* *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1557 (4th Cir. 1987).

52. *Katz v. Dole*, 709 F.2d 251, 255 (4th Cir. 1983). The court stated that such knowledge may be proved by showing a complaint was lodged with the employer or "that the harassment was so pervasive that employer awareness may be inferred." *Id.*

53. *Id.* at 256.

54. 42 U.S.C. § 2000e (1982).

55. *Id.* § 2000e(b); *cf.* *Blasedell v. Mobil Oil Co.*, 708 F. Supp. 1408, 1419 (S.D.N.Y. 1989) ("We know of no authority . . . that precludes liability . . . when the perpetrator is merely a fellow employee and not a supervisor.").

or more employees . . . and any agent of such a person."⁵⁶ An individual will qualify as an agent if he or she is "a supervisory or managerial employee to whom employment decisions have been delegated by the employer."⁵⁷ This does not mean the agent must have the power to hire and fire personnel, as long as the agent participates in managerial decisions.⁵⁸ Clearly, the term employer is construed liberally by including all agents, supervisors, and managers.⁵⁹

Once a party either establishes that the defendant is an employer for Title VII purposes or can impute knowledge to an employer, the party must show that the sexual harassment created a hostile environment.⁶⁰ The Supreme Court in *Meritor* recognized that sexual harassment can create a hostile environment.⁶¹ Sexual harassment is defined in the Code of Federal Regulations⁶² as "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature."⁶³ To prove this claim, a party must demonstrate that the conduct was unwelcome, was based on sex, was pervasive or severe enough to create a hostile workplace, and that there is a basis for holding the employer liable.⁶⁴ In proving the severity of the conduct the plaintiff has the burden of showing that the defendant's conduct would interfere with a *reasonable person's* performance and would affect the "psychological well-being of a reasonable employee."⁶⁵ The plaintiff must also in fact be affected.⁶⁶ Thus, for the most part, it is an objective test.⁶⁷

56. 42 U.S.C. § 2000e(b) (1982).

57. See *Hamilton v. Rodgers*, 791 F.2d 439, 443 (5th Cir. 1986); *York v. Tennessee Crushed Stone Ass'n*, 684 F.2d 360, 362 (6th Cir. 1982).

58. *Tafoya v. Adams*, 612 F. Supp. 1097, 1104-05 (D. Colo. 1985).

59. See *Duva v. Bridgeport Textron*, 632 F. Supp. 880, 882 (E.D. Pa. 1985) ("In light of the Act's remedial purpose, the term employer should be given a liberal interpretation . . ."); see also *Hall v. Gus Const. Co.*, 842 F.2d 1010 (8th Cir. 1988) (road construction company and supervisors both liable under Title VII for harassment against female workers by crew members); *Tafoya v. Adams*, 612 F.2d 1097 (D. Colo. 1985) (supervisor for the City Department of Parks and Recreation held an "employer" under Title VII).

60. *Paroline*, 879 F.2d at 104-05.

61. *Meritor*, 477 U.S. at 66.

62. 29 C.F.R. § 1604.11(a) (1986).

63. *Id.*

64. *Meritor*, 477 U.S. at 67, 70; see also *Swentek v. USAIR, Inc.*, 830 F.2d 552, 557 (4th Cir. 1987).

65. *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 620 (6th Cir. 1986).

66. *Id.* at 626.

67. *Bristow v. Daily Press, Inc.*, 770 F.2d 1251, 1255 (4th Cir. 1985) ("An employee may not be unreasonably sensitive to his working environment.") (quoting *Johnson v. Bunny Bread Co.*, 646 F.2d 1250, 1256 (8th Cir. 1981)).

To hold an employer liable, the plaintiff must show that the employer knew of or should have known of the harassment and failed to take adequate remedial measures.⁶⁸ In *Yates v. Avco Corp.*⁶⁹ the Sixth Circuit Court of Appeals held that the duty to correct the problem or at least inquire arose when the initial reports of harassment by previous employees were made, and not merely when the plaintiffs complained.⁷⁰ The court hinted at the possibility of holding an employer liable for failing to prevent sexual harassment when there has been notice that an individual previously had harassed another employee. *Yates* involved a supervisory employee of 28 years who had an eight year history of harassing women.⁷¹ The plaintiffs in *Yates*, though, did not predicate their claims on the employer's anticipation of harassment; their claim rested on the lack of an adequate remedy.⁷² For example, the company asked the plaintiffs not to go to the Equal Employment Opportunity Commission (EEOC), gave the harasser an administrative leave of absence, and told the plaintiffs to take sick leave which resulted in a record of excessive absenteeism. The company never re-instated the sick leave even after it found the harasser guilty and demoted him with a drastic reduction in pay. The *Yates* plaintiffs used the agency theory of *Meritor* to bind the company by the harasser's actions.⁷³ The court looked at the effect *Meritor* had on the EEOC regulations, stating:

an employer . . . is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence.⁷⁴

Because of the previous incidents and complaints, the court held that the company knew or should have known of the harassment of the plaintiffs.⁷⁵ Knowledge of previous harassment, however, was merely

68. See *Ross v. Double Diamond, Inc.*, 672 F. Supp. 261, 273 (N.D. Tex. 1987).

69. 819 F.2d 630 (6th Cir. 1987).

70. *Id.* at 636.

71. *Id.*

72. *Id.* at 631.

73. *Id.* at 633-34. In *Meritor* the Supreme Court had declined to pronounce a definitive rule on employer liability. Instead it stated that common law agency principles should be applied. However, the Court stated that employers were not strictly liable for the acts of their employees. Neither were employers automatically absolved of liability due to lack of notice. *Meritor*, 477 U.S. at 72.

74. *Yates*, 819 F.2d at 634 (quoting 29 C.F.R. § 1604.11(c) (1986)).

75. *Id.* at 636.

a factor in determining if the employer's remedial actions were adequate.⁷⁶ The court did not mention a necessity to prevent sexual harassment.

III. *PAROLINE'S* LEGAL REASONING

In deciding whether the district court erred in granting summary judgment, the court of appeals in *Paroline* first applied the facts as alleged by Paroline to the question whether Moore was an "employer" under Title VII.⁷⁷ To be an employer, one must serve in a supervisory position and exercise substantial control over the plaintiff's employment.⁷⁸ Paroline's evidence showed that Moore was involved in her interview and recommended her for hire.⁷⁹ In addition, he personally gave her work assignments instead of delegating work through her immediate supervisor.⁸⁰ The court held that whether this was sufficient to make him an employer under Title VII was an issue for the fact finder, therefore, summary judgment was inappropriate.⁸¹ A reasonable jury could take all the inferences in favor of Paroline and find in her favor.⁸²

To satisfy the *Meritor* test, the court had to find that the conduct was unwelcome, that it was based on sex, that it was sufficiently pervasive to create a hostile work environment, and there was some basis for imputing liability to Unisys.⁸³ Paroline easily met the first two requirements, at least for purposes of summary judgment.

The court addressed the severity or pervasiveness of the harassment.⁸⁴ Paroline needed to present evidence that her ability to work or her psychological well-being was affected by the harassment. Paroline stated that she feared coming to work because of Moore and that he had adversely affected her ability to concentrate.⁸⁵ Others stated in depositions which Paroline had prepared that she "appeared upset, even visibly shaken, by Moore's conduct."⁸⁶ In addition, she was prepared to present the testimony of her psychologist who concluded

76. *Id.*

77. *Paroline*, 879 F.2d at 103.

78. *Id.* at 104; *see also York*, 684 F.2d at 362.

79. *Paroline*, 879 F.2d at 104.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 105; *see also Swentek*, 830 F.2d at 557.

84. *Paroline*, 879 F.2d at 105.

85. *Id.*

86. *Id.*

Moore caused Paroline to suffer a "depressive neurosis."⁸⁷ Based upon this evidence, the court held that a reasonable fact finder could conclude that Paroline's well-being and work performance were adversely affected. This evidence could be used to prove that a reasonable person in Paroline's position would be reasonably affected. Paroline knew of Moore's past record, had suffered the attack at her apartment in spite of Unisys' orders that he desist from the harassment, and she held a lower rank in the company.⁸⁸ By showing she was affected and that a reasonable person in her position would be affected, Paroline presented sufficient evidence to overcome a summary judgment motion.⁸⁹ The court of appeals ruled that it was error to hold that as a matter of law Paroline had not shown sufficiently severe or pervasive harassment.⁹⁰

Furthermore, the court held that under either theory of liability,⁹¹ Paroline presented adequate evidence to survive the motion for summary judgment.⁹² Paroline's first theory was that after her complaint, Unisys did not take adequate remedial action.⁹³ It is not controverted that her complaint gave notice to the company of the harassment by Moore.⁹⁴ The reprimands previously given to Moore had failed to deter him from harassing Paroline, therefore she had a valid argument that the present remedy would have no effect.⁹⁵ In addition, she presented evidence that the revocation of Moore's security clearance increased her chances of encountering him in the office.⁹⁶ Paroline also introduced evidence that the head of the Unisys office and the male employees at Unisys openly joked about the harassment of the female employees.⁹⁷ The court stated this sent a message to the male employees that the company was not serious in its efforts to stop the harassment.⁹⁸ Taking all inferences in favor of Paroline, the court concluded that "summary judgment was inappropriate because a fact

87. *Id.*

88. *Id.* at 105-06.

89. *Id.* at 106.

90. *Id.*

91. Paroline argued: (1) Unisys did not take adequate remedial action and (2) Unisys had a duty to prevent her harassment. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* Unisys argued that it did indeed take prompt and adequate action when it received the notice. *Id.*

95. *Id.* at 106-07.

96. *Id.*

97. *Id.* at 107.

98. *Id.*

finder could reasonably conclude that Unisys' remedy was inadequate under the circumstances.⁹⁹

The court adopted the logic of *Katz v. Dole*,¹⁰⁰ to hold an employer liable for not preventing sexual harassment.¹⁰¹ In *Katz*, the court stated that the plaintiff must make a prima facie showing of harassment and show that the employer knew or should have known of the harassment, yet failed to take "effectual action to correct the situation."¹⁰² Furthermore, the *Katz* court stated that to avoid liability, an employer with knowledge of harassment must do more than just implement or point to an existing policy against sexual harassment.¹⁰³ The *Katz* decision did not state what more was required of an employer to avoid liability. The *Paroline* court added the *Katz* duty to do more than just implement a procedure to deal with sexual harassment complaints with the concept in *Yates* of when this duty arises.¹⁰⁴ Under this combined reasoning, the Fourth Circuit imputed liability for failing to prevent the harassment.¹⁰⁵ The court took the reasoning behind constructive knowledge and went a step further stating that knowledge of previous harassment can be used in deciding the employer's liability.¹⁰⁶ The Fourth Circuit broadened the employer's liability and held that knowledge of previous harassment could create a duty on the part of the employer to prevent any foreseeable sexual harassment.¹⁰⁷ The court did set out some guidelines in *Paroline*. The victim must be foreseeable, the harasser must have harassed others before this victim, and the employer must have had knowledge of the prior harassment.

99. *Id.*

100. 709 F.2d 251 (4th Cir. 1983).

101. *Paroline*, 879 F.2d at 107.

102. *Katz*, 709 F.2d at 256.

103. *Id.*

104. *Paroline*, 879 F.2d at 107. The *Yates* court stated that a duty to inquire arises when an employer receives the initial reports of harassment. *Yates*, 819 F.2d at 636.

105. *Paroline*, 879 F.2d at 107. "In a hostile environment case under Title VII, we will impute liability to an employer who anticipated or reasonably should have anticipated that the plaintiff would become a victim of sexual harassment in the workplace and yet failed to take action reasonably calculated to prevent such harassment." *Id.*

106. Both *Katz* and *Yates* use the language "know or should have known" when discussing employer's knowledge of harassment. See *Yates v. Avco Corp.*, 819 F.2d 630, 636 (6th Cir. 1987); *Katz v. Dole*, 709 F.2d 251, 256 (4th Cir. 1983).

107. *Katz*, 709 F.2d at 256.

IV. FUTURE APPLICATIONS AND IMPLICATIONS OF *PAROLINE*

The *Paroline* holding does not directly contradict any previous holding concerning sexual harassment. The court in *Yates* seemed to be heading in this direction when it discussed the relevance of previous incidents of harassment involving women other than the plaintiff and the relevance of the employer's knowledge of these incidents.¹⁰⁸ This is consistent with *Katz*. The court held that an employer must show more than mere procedures for handling harassment claims. Courts appear to follow the plaintiffs' argument that the protection of victims in the workplace was not adequate and that employers should do more to remedy this situation.¹⁰⁹

Meritor and cases following it, however, state that employers should not be held strictly liable for sexual harassment by their employees.¹¹⁰ The Supreme Court in *Meritor* held that notice is not required to make an employer liable.¹¹¹ Between these two broad parameters falls the *Paroline* case. Its reasoning seems to be that notice is not required to hold an employer liable for the sexual harassment of its employees, and employers with notice are held to a higher standard. *Paroline's* recognition of a claim for failure to prevent harassment does not mean employers are strictly liable; *Paroline* requires some sort of knowledge on the part of the employer. As such, it is clearly within the *Meritor* parameters.

Policy considerations play a significant role in the area of sexual harassment. Sexual harassment claims are a burden on the private sector because of the costs of litigation and the implementation of working policies. Set against this backdrop is the policy government pursues in trying to protect the rights of its citizens. The policy behind Title VII is to assure equal employment opportunities by eliminating discrimination on the basis of race, color, religion, national origin, or sex.¹¹² It is designed to protect those least able to protect themselves.¹¹³ In holding an employer liable for failure to prevent sexual

108. *Yates*, 819 F.2d at 636.

109. See *Swentek v. USAIR Inc.*, 830 F.2d 552, 558 (4th Cir. 1987); *Yates v. Avco Corp.*, 819 F.2d 630, 636 (6th Cir. 1987); *Katz v. Dole*, 709 F.2d 251, 255-56 (4th Cir. 1983).

110. *Meritor*, 477 U.S. at 72.

111. *Id.*

112. See 42 U.S.C. § 2000e-2000e-17 (1982); see also *Garret v. Mobil Oil Corp.*, 395 F. Supp. 117, 124 (W.D. Mo. 1975), *aff'd*, 531 F.2d 892 (8th Cir.), *cert. denied*, 429 U.S. 848 (1976) (citing *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974)).

113. *Willis v. Chicago Extruded Metals Co.*, 375 F. Supp. 362, 365 (N.D. Ill. 1974).

harassment, the *Paroline* court holds that the present remedies are not meeting this public policy. Now employers are required not only to discourage harassment and to set up programs to facilitate victims' claims, but also, in certain circumstances, to prevent the harassment from occurring. This places a heavy burden on employers. Congress showed its willingness to impose a burden on employers and place greater importance on the rights of individuals in the workplace when it promulgated Title VII.

Paroline is just a small step beyond the already recognized cause of action holding an employer liable for the harassment of which he has constructive knowledge and takes no prompt remedial action. In other areas of law, when special relationships exist (such as property owners and guests, product manufacturers and buyers), there is a duty to take steps to prevent injury. Usually a warning is adequate. The *Paroline* court did not state what action is necessary to prevent the harassment or fulfill the duty of employers to employees. Whether a warning to the employee would be adequate to prevent the harassment or fulfill the duty is unknown. The court did state that if a male employee previously had harassed women of a certain age or category it might be unreasonable to hold an employer liable for failing to prevent the harassment of a plaintiff who is not in that category.¹¹⁴

The results of the *Paroline* decision are not entirely clear. One result might be the termination of employees after one incident of harassment by them to prevent any future liability. This seems to be a harsh answer. Another alternative is to restrict a harasser's access to members of the protected class. In many situations practical considerations could make this impossible. Furthermore, how many incidents of harassment must take place before an employer has knowledge—either actual or constructive?¹¹⁵ Employers should focus on procedures that will both prohibit and prevent harassment. Employers cannot sit and wait for the injury but must actively seek out the source of the harassment and take steps to eliminate it.

While *Paroline* does present some difficult questions, this has not stopped courts before in allowing new causes of action. An example of this is the willingness of the Supreme Court in 1986 to allow claims of sexual harassment to be brought under Title VII. If the questions are impossible to answer, however, the Supreme Court will have to look at this cause of action and reverse. In placing such a heavy burden on

114. 879 F.2d at 107.

115. In *Ross v. Double Diamond, Inc.*, 672 F. Supp. 261, 273 (N.D. Tex. 1987), the court apparently held that one previous incident is enough to place the employer on notice that employees may have been sexually harassing employees. *Paroline* may also make this prospective notice. See also *Swentek v. USAIR, Inc.*, 830 F.2d 552, 558 (4th Cir. 1987).

employers, the Court may have set them a Sisyphean task.¹¹⁶ Unless the Supreme Court reverses, employers should scrutinize their harassment complaint procedures to find ways of preventing sexual harassment to guard against liability.

BECKY LEAMON

116. Sisyphus was the king of Corinth who in Greek mythology was doomed in Hades to roll a stone uphill which always rolled down again.