

Spring 2010

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Recommended Citation

Lawrence S. Hall, *Corporations Beware: The Eighth Circuit Announces New Criteria for Parent Corporation Liability and Constructive Notice of Harassment*, 75 MO. L. REV. (2010)
Available at: <https://scholarship.law.missouri.edu/mlr/vol75/iss2/9>

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Corporations Beware: The Eighth Circuit Announces New Criteria for Parent Corporation Liability and Constructive Notice of Harassment

*Sandoval v. American Building Maintenance, Incorporated*¹

I. INTRODUCTION

In today's corporate environment, businesses face many sources of potential litigation, including products liability, employment issues, and harassment in the workplace, just to name a few. Large corporations can limit this liability by forming subsidiary corporations that insulate the parent corporation from liability with respect to the acts of its subsidiary.² Without this protection, investments in parent corporations would suffer because of the increased exposure to liability.³ Under the limited liability doctrine, parent corporations can exercise a normal level of control over their subsidiaries without being held liable for their subsidiaries' actions.⁴ However, courts are willing to look behind this corporate veil if the parent corporation exercises a high level of control beyond the normal parent-subsidiary relationship.⁵

One of the primary sources of potential liability for corporations involves a variety of harassment claims under Title VII.⁶ For a corporation to be liable for harassment, the plaintiff employee must show that whatever entity she is attempting to hold responsible, whether it be a parent or subsidiary corporation, either knew or should have known about the harassment.⁷ If the employer knew about incidents of harassment, then it is said to have actual notice of the harassment.⁸ Moreover, if the harassment was so pervasive and widespread that the employer should have known about the harassment,

1. 578 F.3d 787 (8th Cir. 2009).

2. *Johnson v. Flowers Indus., Inc.*, 814 F.2d 978, 980 (4th Cir. 1987).

3. *Id.*

4. *Id.*

5. *Id.* at 981. "A parent company is the employer of a subsidiary's personnel only if it controls the subsidiary's employment decisions or so completely dominates the subsidiary that the two corporations are the same entity." *Id.* at 980.

6. 42 U.S.C. §§ 2000e to 2000e-17 (2006). Title VII covers many types of claims, including "sexual harassment, hostile workplace, and other employment-related actions." *Sandoval*, 578 F.3d at 790. See also, e.g., *Brown v. Fred's, Inc.*, 494 F.3d 736 (8th Cir. 2007); *Frank v. U.S. West, Inc.*, 3 F.3d 1357 (10th Cir. 1993); *Baker v. Stuart Broad. Co.*, 560 F.2d 389 (8th Cir. 1971).

7. *Watson v. Blue Circle, Inc.*, 324 F.3d 1252, 1259 (11th Cir. 2003).

8. *Id.*

then the employer is deemed to have been on constructive notice of the harassment.⁹ Unless the plaintiff proves actual or constructive notice, the claim will fail as a matter of law.¹⁰

Two major issues for parent corporations are how to treat subsidiaries when forming harassment policies and how to deal with complaints of harassment relating to their subsidiary corporations. A parent corporation has two options.¹¹ First, it may take a hands-on approach and exert control over the subsidiary, thus making the parent more likely to be held liable for any damages caused by the subsidiary. Second, it may take a completely hands-off approach and hope to avoid liability for any unlawful activities that take place at one or more of its subsidiaries. While control in the area of harassment may not prove determinative when deciding whether a parent corporation sufficiently dominates its subsidiary, it is certainly a factor that the court is likely to consider.¹²

In *Sandoval v. American Building Maintenance Inc.*, the United States Court of Appeals for the Eighth Circuit announced two very important principles affecting corporations in regard to harassment liability.¹³ First, in looking at parent-subsidiary corporate relationships, the court re-established a four-factor test, which was vacated by the Eighth Circuit in 2007, that determines whether a parent corporation can be held liable for the acts of its subsidiaries.¹⁴ Second, when looking at a hostile work environment claim, the Eighth Circuit held that events involving harassment at multiple locations of which the defendant corporation was aware can be admitted to show that harassment was sufficiently severe and pervasive to put the company on constructive notice of the harassment.¹⁵

II. FACTS AND HOLDING

Eleven plaintiffs brought sexual harassment, hostile workplace, and other employment-related claims against American Building Maintenance Industries, Inc. (ABMI), alleging violations under Title VII of the Civil Rights Act¹⁶ and the Minnesota Human Rights Act.¹⁷ Additionally, the plaintiffs

9. *Id.*

10. *See id.*

11. *See* discussion *infra* Part V.

12. *See id.*

13. 578 F.3d 787 (8th Cir. 2009).

14. *Id.* at 795-96.

15. *Id.* at 802.

16. 42 U.S.C. §§ 2000e to 2000e-17 (2006).

17. *Sandoval*, 578 F.3d at 790; *see also* MINN. STAT. §§ 363A.01 to 363A.41 (2004).

brought an identical claim against American Building Maintenance of Kentucky (ABMK), a subsidiary corporation of ABMI.¹⁸

The plaintiffs alleged that they experienced sexual harassment, discrimination, highly offensive sexual comments, and inappropriate touching.¹⁹ They claimed that these actions by their direct supervisors had a material effect on the terms and conditions of the plaintiffs' employment.²⁰ The plaintiffs further alleged that the defendants had actual and constructive notice of such harassment but allowed it to continue.²¹

The United States District Court for the District of Minnesota dismissed the eight original plaintiffs' amended complaint that added the subsidiary corporation as a defendant because, although the plaintiffs were made aware that subsidiary ABMK was actually their employer, they failed to make a timely motion to amend; however, the plaintiffs who were added to the suit in the amended complaint were allowed to proceed against the subsidiary ABMK.²² ABMK filed a motion for summary judgment arguing that there was not sufficient evidence to move forward with the claims of sexual harassment, hostile workplace, or any other employment-related claims.²³ ABMI also filed a motion for summary judgment, arguing that, as the parent corporation, it was not the employer of any of the plaintiffs and therefore was not responsible for any damages resulting from the alleged harassment.²⁴ The district court granted both ABMI's and ABMK's summary judgment mo-

18. *Sandoval*, 578 F.3d at 790. ABMI was able to get some of the original claims as to ABMK dismissed because the claims were filed more than ninety days after the Equal Employment Opportunity Commission (EEOC) issued right-to-sue letters. *Id.* However, because some of the later added plaintiffs' claims were timely, the Eighth Circuit was able to reach the merits of the claim. *Id.*

19. *Sandoval v. Am. Bldg. Maint. Indus., Inc.*, 552 F. Supp. 2d 867, 899-906 (D. Minn. 2008).

20. *See id.* at 906.

21. *Sandoval*, 578 F.3d at 800.

22. *See id.* at 790. On May 2, 2006, the eight original plaintiffs were issued right-to-sue letters by the EEOC, allowing them to proceed against parent ABMI. *Id.* at 791. In the original complaint, ABMK was not named as a defendant. *Id.* Defense counsel notified plaintiffs' counsel that ABMI was not the plaintiffs' employer and informed them that their employer was ABMK. *Id.* The plaintiffs sent defense counsel a proposed stipulation that subsidiary ABMK was the plaintiffs' employer, to which defense counsel agreed. *Id.* However, despite the agreement with the stipulation on August 11, 2006, counsel for the plaintiffs chose to wait to file the amended complaint until three additional plaintiffs received their right-to-sue letters from the EEOC. *Id.* Although defense counsel had suggested that the amendment be made immediately in August, plaintiffs' counsel filed both amendments on September 15, 2006, more than one month after the ninety-day limit had expired for the original plaintiffs. *Id.*

23. *Id.*

24. *Id.*

tions.²⁵ The district court held that ABMI did not exercise enough control over ABMK to be considered an employer of the plaintiffs.²⁶ Further, the lower court found that there was insufficient evidence to proceed on any type of sexual harassment, hostile workplace, or any other employment-related claims against ABMI or ABMK.²⁷

In holding that ABMI was not the plaintiffs' employer, the district court looked to *Brown v. Fred's, Inc.*, where the Eighth Circuit had previously held, "[T]here is a strong presumption that a parent company is not the employer of its subsidiary's employees, and the courts have found otherwise only in extraordinary circumstances."²⁸ Applying *Brown*, the court held that in order for a parent company to be responsible for the acts of its subsidiary under Title VII the court must find that "(1) the parent company so dominates the subsidiary's operations that the two are one entity and therefore one employer" or that "(2) the parent company is linked to the alleged discriminatory action because it controls individual employment decisions."²⁹ Consistent with the rationale in *Brown*, the court held that ABMI did not exercise sufficient control to be held liable as an employer under Title VII.³⁰

With respect to ABMK, the district court found that there was insufficient evidence to move forward with any of the employment-related claims.³¹ In relation to the hostile work environment claims, the district court stated that the plaintiffs had to prove that unwelcome harassment was "sufficiently severe or pervasive enough as to affect a term, condition, or privilege of em-

25. *Id.* at 791-92.

26. *Id.*

27. *Id.* at 792.

28. *Sandoval v. Am. Bldg. Maint. Indus., Inc.*, 552 F. Supp. 2d 867, 884 (D. Minn. 2008) (quoting *Brown v. Fred's, Inc.*, 494 F.3d 736, 739 (8th Cir. 2007)).

29. *Id.* The district court, in following *Brown*, cited but refused to follow a test the Eighth Circuit had previously used as set forth in *Baker v. Stuart Broadcasting Co.*, which "adopted a four-part test treating related but distinct entities as an integrated enterprise based on (1) interrelations of operations, (2) common management, (3) centralized control of labor relations, and (4) common ownership or financial control." *Sandoval*, 578 F.3d at 793. The *Brown* court laid out a much more general test holding that a "parent corporation can only be considered the employer of its subsidiary's employees if the parent dominates the subsidiary's operations, or was directly involved in the alleged unlawful action." *Brown*, 494 F.3d at 739.

30. *Sandoval*, 552 F. Supp. 2d at 891-92 ("ABMI's lack of day-to-day control over AMB Kentucky's employment decisions, is fatal to plaintiffs' contention that ABMI should be held liable for the actions of ABM Kentucky, particularly given the strong presumption that a parent company is not the employer of its subsidiary's employees."). The district court explored two theories of liability for ABMI: (1) that ABMI so dominated ABMK's daily operations that it was effectively one entity constituting one employer and (2) that ABMI was linked to the alleged harassment because it controlled individual employment decisions. *Id.* The court found both theories inadequate and dismissed the claims against ABMI. *Id.*

31. *Sandoval*, 578 F.3d at 791-92.

ployment by creating an objectively hostile or abusive environment.”³² The court recognized that the alleged harassment should be looked at not alone but in the context of the larger circumstances and facts.³³ The court also ruled that the plaintiffs could not rely on the incidents of harassment of which they were not aware in order to prove that the harassment was severe and pervasive.³⁴ With respect to notice, the district court found that “the pattern-or-practice method of proving discrimination” was not available to these plaintiffs.³⁵ The court concluded that the evidence presented fell short of showing that the harassment was sufficiently severe and pervasive.³⁶ The plaintiffs appealed the district court’s grant of the defendants’ summary judgment motions, both as to the claims for lack of timely pleading and for the substantive complaints of harassment.³⁷

The Eighth Circuit affirmed in part and reversed in part the ruling of the district court.³⁸ Notably, the Eighth Circuit applied and re-established a four-factor test outlined in *Baker v. Stuart Broadcasting Co.* that the district court had declined to follow.³⁹ The Eighth Circuit stated that the four-pronged integrated enterprise test set forth in *Baker* should be used when determining whether parent companies are responsible for the acts of their subsidiary corporations under Title VII.⁴⁰ Applying the *Baker* test,⁴¹ the court found that ABMI’s relationship with ABMK was sufficient to establish a genuine issue of material fact as to whether ABMI was the plaintiffs’ employer, and, thus,

32. *Sandoval*, 552 F. Supp. 2d at 906.

33. *Id.*

34. *Id.* at 907.

35. *Id.* at 916.

36. *Id.* at 907.

37. *Sandoval v. Am. Bldg. Maint., Inc.*, 578 F.3d 787, 792 (8th Cir. 2009).

38. *Id.* at 803. The Eighth Circuit affirmed the ruling of the district court with respect to the dismissal of the untimely claims, as well as dismissal of the timely plaintiffs’ retaliation, sex discrimination, and quid pro quo sexual harassment claims. *Id.*

39. *Id.* at 796. The district court stated that “[t]he Eighth Circuit has not used the *Baker* four-factor analysis to determine whether a parent is liable for the actions of its subsidiary” *Sandoval v. Am. Bldg. Maint. Indus., Inc.*, 552 F. Supp. 2d 867, 884 n.18 (D. Minn. 2008). The Eighth Circuit had previously used the *Baker* test but for some time had used other standards when determining whether a parent corporation would be held liable for the acts of its subsidiaries. *See, e.g.*, *Brown v. Fred’s, Inc.*, 494 F.3d 736, 739 (8th Cir. 2007).

40. *Sandoval*, 578 F.3d at 796 (citing *Baker v. Stuart Broad. Co.*, 560 F.2d 389 (8th Cir. 1977)). As authority for why the *Baker* test should be used, the court cited the EEOC Compliance Manual. *Id.* at 793.

41. In *Baker* the court held that “the standard to be employed to determine whether consolidation of separate entities is proper are the standards promulgated by the National Labor Relations Board: (1) interrelation of operations, (2) common management, (3) centralized control of labor relations; and (4) common ownership or financial control.” *Baker v. Stuart Broad. Co.*, 560 F.2d 389, 392 (8th Cir. 1977).

the issue should be decided at trial.⁴² According to the Eighth Circuit, the *Baker* test is determinative in deciding whether a parent corporation will be held responsible for the acts of its subsidiary.⁴³ As to proving harassment, the Eighth Circuit held that evidence of widespread harassment can put a corporation on constructive notice.⁴⁴

III. LEGAL BACKGROUND

In order to understand the significance of the *Sandoval* decision, it is important to look at prior decisions from the Eighth Circuit and other circuits involving these issues. When will parent corporations be liable for the acts of their subsidiaries? When will companies be put on constructive notice of sexual harassment?

A. Parent Corporation Liability

The integrated enterprise test was first recognized by a federal court in the 1972 decision *Williams v. New Orleans Steamship Ass'n*.⁴⁵ The United States District Court for the Eastern District of Louisiana cited a decision from the Equal Employment Opportunity Commission (EEOC)⁴⁶ as support for why the integrated enterprise test should be used.⁴⁷ The *Williams* court concluded that “courts ought to . . . give great weight to an agency’s interpretation of the statute that it administers.”⁴⁸ Although the court did not set out a specific test, it concluded that it would look at the interchange of employees, centralized control of labor relations, and other standards that are used by the National Labor Relations Board (NLRB) in order to determine whether the enterprise was sufficiently integrated to create overarching liability.⁴⁹ The court looked at New Orleans Steamship Association’s control over employment decisions and policies and its direct control over its subsidiaries and found that it could be considered an employer in an action brought under Title VII, even where the actor was one of its subsidiaries.⁵⁰

42. *Sandoval*, 578 F.3d at 800.

43. *Id.* at 796.

44. *See id.* at 803.

45. 341 F. Supp. 613 (E.D. La. 1972).

46. EEOC Decision, No. 71-1537 (Mar. 31, 1971).

47. *Williams*, 341 F. Supp. at 615.

48. *Id.*

49. *Id.*

50. *Id.* at 616.

1. The *Baker* Test

The Eighth Circuit first adopted the integrated enterprise test in 1977 when deciding *Baker v. Stuart Broadcasting Co.*⁵¹ In *Baker*, the plaintiff brought a claim alleging that a radio station, two broadcasting companies, and three individuals discriminated against her on the basis of sex in violation of Title VII.⁵² The defendant companies in *Baker* argued that they could not be held liable for any harassment because each entity individually did not employ enough people to be held liable under Title VII.⁵³ The issue on appeal was whether the defendants could be joined for the purpose of the action under Title VII to meet the requisite employee requirements under Title VII.⁵⁴ When reviewing the issue, the court looked to prior precedent, including *Williams*, in determining whether the entities could be treated as one.⁵⁵

The *Baker* court held that, because Congress intended for Title VII to be given liberal treatment, four factors should be used to determine whether consolidation of separate entities is proper: “(1) interrelation of operations, (2) common management, (3) centralized control of labor relations; and (4) common ownership or financial control.”⁵⁶ *Baker* established that the four factors should be weighed to determine who may be considered an employer and therefore be held liable for an action brought under Title VII; however, no one factor was meant to be controlling.⁵⁷

51. 560 F.2d 389 (8th Cir. 1977).

52. *Id.* at 390-91.

53. *See id.* at 391.

54. *Id.* Under 42 U.S.C. § 2000e(b) the employer is required to have “15 or more employees for each working day on each of 20 or more calendar weeks for the current or preceding calendar year.” *Id.* at 391.

55. *Id.* at 391-92; *see also Williams v. New Orleans Steamship Ass’n*, 341 F. Supp. 613 (E.D. La. 1972).

56. *Baker*, 560 F.2d at 392. The court in this case cited *Hassell v. Harmon Foods, Inc.*, 336 F. Supp. 432 (W.D. Tenn. 1971), *aff’d*, 454 F.2d 199 (6th Cir. 1972), where the Western District of Tennessee was affirmed by the Sixth Circuit’s holding that there was no identifiable reason to treat two corporations as one for purposes of 42 U.S.C. § 2000 because there was nothing in the legislative history or any precedent to support that contention. *Id.* at 391. The Eighth Circuit went on to cite many cases from different courts all around the United States that held that, because of the remedial purposes of Title VII, the four-factor test should be established. *Id.* (citing *Williams v. New Orleans Steamship Ass’n*, 341 F. Supp. 452 (M.D. Fla. 1972); *United States v. Local 638, Enter. Ass’n of Steam, Hot Water, Hydraulic Sprinkler, Pneumatic Tube, Compressed Air, Ice Mach., Air Conditioning, & Gen. Pipefitters*, 360 F. Supp. 979 (S.D.N.Y. 1973), *modified*, 501 F.2d 622 (2d Cir. 1974); *Black Musicians of Pittsburgh v. Local 60-471, Am. Fed’n of Musicians*, 375 F. Supp. 902 (W.D. Pa. 1974)).

57. *Id.* (quoting *NLRB v. Welcome-American Fertilizer Co.*, 443 F.2d 19, 21 (9th Cir. 1971)) (“No one of these factors is controlling, but emphasis is placed on the first three as they tend to show operational integration.”).

2. After *Baker*

Following *Baker*, precedent in other circuits around the country influenced which tests and factors the Eighth Circuit looked at when determining when a parent corporation would be held liable for the acts of its subsidiary.⁵⁸ Some circuits have taken a more narrow approach in an effort to limit the liability of parent corporations by insulating them from the acts of their subsidiaries.⁵⁹ The United States Court of Appeals for the Fourth Circuit, for example, has established precedent in favor of corporations based on policy considerations concerning the potential harm to investors and business development resulting from increased corporate liability.⁶⁰ This rationale was illuminated in *Johnson v. Flowers Industries, Inc.*, in which the Fourth Circuit held that there was nothing irregular about the relations between the parent and subsidiary corporations and that, therefore, the parent corporation was not liable.⁶¹

In *Johnson*, the plaintiffs claimed that the parent corporation replaced its older employees with younger ones in violation of the Age Discrimination in Employment Act (ADEA).⁶² The plaintiffs, who were former routemen, were laid off upon the closing of a plant operated by a subsidiary of Flowers Industries.⁶³ Another subsidiary of Flowers Industries re-opened the plant shortly after it was closed and hired younger employees.⁶⁴ The net effect of these actions was that the same plant was open but had younger employees.⁶⁵ The court concluded that the plaintiffs failed to show that the relationship between Flowers Industries and its subsidiary was anything other than a normal relationship.⁶⁶ The plaintiffs failed to produce enough evidence to show that Flowers Industries had excessively interfered with the operations of its subsidiary, and therefore Flowers was not responsible for any damages.⁶⁷ The court pointed out that if parent corporations are held responsible for the acts of their employees in a normal parent-subsidary relationship, the shareholders of the parent corporation are in turn injured through the lowering of their investment.⁶⁸

58. See, e.g., *Frank v. U.S. West, Inc.*, 3 F.3d 1357 (10th Cir. 1993); *Johnson v. Flowers Indus., Inc.*, 814 F.2d 978 (4th Cir. 1987).

59. See *Johnson*, 814 F.2d 978; *Frank*, 3 F.3d 1357.

60. See *Johnson*, 814 F.2d at 980.

61. *Id.* at 981.

62. *Id.* at 979.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* at 981.

67. *Id.* at 981-82.

68. *Id.* at 980.

The Fourth Circuit also highlighted the fact that many business decisions depend on limited liability for the parent corporation.⁶⁹ If courts hold parent corporations responsible for liabilities of their subsidiary corporations, it could result in less business development.⁷⁰ The *Johnson* court further noted that the benefits of limited liability should not be lost when a parent corporation exercises limited control over its subsidiary.⁷¹ According to the Fourth Circuit, upholding limited liability for parent corporations fosters stability in commerce by upholding assumptions that are in place when business decisions are made.⁷² While the Fourth Circuit acknowledged the four factors established in *Baker*, the court ultimately decided it was not necessary to adopt such a test because those factors are relevant to every inquiry in a parent-subsidiary relationship and the importance of each factor will vary depending on the factual situation.⁷³

The Fourth Circuit is not the only circuit to show a strong preference for sheltering parent corporations from liability when a plaintiff tries to hold the parent corporation liable for the acts of its subsidiaries; the United States Court of Appeals for the Tenth Circuit has adopted a similar line of reasoning. The Tenth Circuit examined the integrated enterprise test in the 1993 case of *Frank v. U.S. West, Inc.* and found the reasoning used by the Fourth Circuit to be persuasive.⁷⁴ When examining whether the parent corporation would be liable for the acts of its subsidiaries, the *Frank* court cited *Johnson* and concluded that there should be a strong presumption against finding the parent corporation liable for the action of its subsidiaries.⁷⁵

In *Frank*, the plaintiffs, who worked for Northwestern Bell, a subsidiary of U.S. West Incorporated, claimed that they were denied financial benefits and were the victims of defamatory comments in violation of state and federal law.⁷⁶ The court found that, while U.S. West did establish some written personnel policies for its subsidiaries, each subsidiary implemented and administered the policies independently.⁷⁷ The plaintiffs were unable to show that the defendant “participate[d] in the routine personnel decisions such as hiring, transferring, promoting, discharging and disciplining Northwestern Bell employees.”⁷⁸

69. *Id.*

70. *See id.*

71. *Id.*

72. *Id.*

73. *Id.* at 981 n.1.

74. 3 F.3d 1357 (10th Cir. 1993).

75. *Id.* at 1362.

76. *Id.* at 1360-61. The plaintiffs alleged that the defendant violated “Title VII of the Civil Rights Act of 1964 . . . , 42 U.S.C. §§ 2000e-2000e-17, the Age Discrimination in Employment Act . . . , 29 U.S.C. §§ 621-634, and various state laws.” *Id.*

77. *Id.* at 1360.

78. *Id.*

The Tenth Circuit did not expressly adopt the integrated enterprise test used by the Fourth Circuit but found that it applied to the facts and circumstances of the case.⁷⁹ The court concluded that three other tests could have been used: the agency theory, the alter ego test, or the instrumentality test.⁸⁰ After applying the integrated enterprise test, the Tenth Circuit found that the defendant companies were not integrated.⁸¹

In addition, the Eighth Circuit's approach to determining which corporate entities may be deemed the employer of plaintiff employees had become murky in recent years, and *Baker* had been narrowed by many recent decisions.⁸² For instance, in 2004, in *Brown v. Freds, Inc.*, the Eighth Circuit examined the liability of a parent corporation for the acts of its subsidiary in relation to a claim brought under the ADEA and held that domination of the subsidiaries *or* control of day-to-day employment decisions would be necessary to find liability for a parent corporation, and this would be present only in extraordinary circumstances.⁸³ Thus, the court in *Brown* did not look at the situation broadly, as required by the four-factor test set forth in *Baker*, but instead held that a very specific showing that the parent company exercised a great amount of control over either the management of the subsidiary corporation or the control of day-to-day employment decisions must be made in order to hold the parent corporation liable.⁸⁴ Therefore, it required a significantly stronger showing by a plaintiff in order to hold a parent corporation liable for the acts of its subsidiaries.

Moreover, the Eighth Circuit in *Brown* cited both *Frank* and *Johnson*, stating, "There is a 'strong presumption that a parent company is not the employer of its subsidiary's employees, and the courts have found otherwise

79. *Id.* at 1362.

80. *Id.* at 1362 n.2.

(1) the agency theory under which the plaintiff must establish that the parent exercised a significant degree of control over the subsidiary's decision-making . . . (2) the alter ego test which is founded in equity and permits the court to pierce the corporate veil "when the court must prevent fraud, illegality, or injustice, or when recognition of the corporate entity would defeat public policy or shield someone from liability for a crime," . . . (3) the instrumentality test under which the plaintiff must establish that the parent exercises extensive control over the acts of the subsidiary giving rise to the claim of wrongdoing

Id.

81. *Id.* at 1362.

82. *See Brown v. Fred's, Inc.*, 494 F.3d 736 (8th Cir. 2007).

83. *Id.* at 739-40 (In this case, the court acknowledged that any time parent corporations drive employment decisions and approve the sale of certain branches and entities in the larger company they will be held liable for the acts of their subsidiaries.).

84. *See id.*

only in extraordinary circumstances.”⁸⁵ As a result, the *Brown* court found the test provided by the Fourth Circuit to be determinative and declined to use the looser test established in *Baker*.⁸⁶ When looking at the parent corporation’s liability, the court in *Brown* stated,

A parent company may employ its subsidiary’s employees if (a) the parent company so dominates the subsidiary’s operations that the two are one entity and therefore one employer, . . . or (b) the parent company is linked to the alleged discriminatory action because it controls ‘individual employment decisions.’⁸⁷

B. Hostile Work Environment Claims and Notice

The Eighth Circuit has previously established that, in order for a claim of hostile work environment to prevail, the harassment must be found to be sufficiently pervasive after examining all of the relevant circumstances.⁸⁸ The Eighth Circuit voiced this standard in *Bowen v. Missouri Department of Social Services*, which was a racial discrimination case, by holding that in order for an employer to be held liable for harassment under Title VII, the discriminatory harassment must be “sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment.”⁸⁹ The Eighth Circuit had ruled in an earlier decision that a determination about harassment should be made “by looking at all the circumstances, including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.”⁹⁰

In order to make a prima facie case for sexual harassment under Title VII, a plaintiff must demonstrate that “(1) she was a member of a protected group; (2) she was subjected to unwelcome harassment; (3) the harassment was based on sex; and (4) the harassment was sufficiently severe or pervasive

85. *Brown*, 494 F.3d at 739; see *Johnson*, 814 F.2d 978; *Frank v. U.S. West, Inc.*, 3 F.3d 1357 (10th Cir. 1993). In *Frank*, the court found that the defendants did not meet the requirements to be declared employers and, therefore, could not be held responsible for the act of a subsidiary. *Frank*, 3 F.3d at 1364. In this case the court also used a four-factor test that took into account “(1) interrelation of operations, (2) centralized control of labor relations, (3) common management, and (4) common ownership or financial control.” *Id.* at 1362.

86. *Brown*, 494 F.3d at 739.

87. *Id.*

88. *Bowen v. Mo. Dep’t of Soc. Servs.*, 311 F.3d 878, 883-84 (8th Cir. 2002).

89. *Id.* at 883.

90. *Breeding v. Arthur J. Gallagher & Co.*, 164 F.3d 1151 (8th Cir. 1999) (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998)).

enough to affect a term, condition, or privilege of employment.”⁹¹ Additionally, the Eighth Circuit has held that if the harassment came from a non-supervisory source, then evidence must be presented to show that an employer knew or should have known about the harassment but failed to take appropriate action.⁹² If the harassment came from a supervisory source, the employer is presumed to have been on notice about the harassment.⁹³

One issue that has proven to be controversial in any harassment or Title VII claim is whether plaintiffs can offer proof of harassment of which they were not personally aware in an attempt to prove that the harassment was severe or pervasive at their place of employment.⁹⁴ This issue was examined in *Williams v. ConAgra Poultry Co.*, where the Eighth Circuit considered whether evidence of other episodes of racial discrimination of which the plaintiff was not aware should be admitted as evidence to prove that the plaintiff was discriminated against.⁹⁵ The court found that if the harassment came from a non-supervisory source, evidence must be presented to show that an employer knew or should have known about the harassment but failed to take appropriate action.⁹⁶ The court ruled that other employees could testify about harassment from their supervisors, even though the plaintiff was not aware of all the incidents.⁹⁷ Yet the court held that in order to establish damages and prove a prima facie case, the harassment directed toward the plaintiff and of which the plaintiff was aware must be unlawfully hostile.⁹⁸

However, the precedent set forth in *Williams* appears to have been narrowed in 2006 in *Cottrill v. MFA, Inc.*, where the Eighth Circuit examined, among other claims, a claim that the actions of a manager created a hostile work environment for the female plaintiffs.⁹⁹ The Eighth Circuit held that in order to be successful the only evidence that a Title VII plaintiff may rely on is evidence of harassment of which she was aware during the time she was allegedly exposed to a hostile work environment.¹⁰⁰ Support for this proposition stemmed from a Tenth Circuit ruling that an employee could not subjectively perceive a co-worker’s behavior as creating a hostile work environment unless she was aware of such harassment.¹⁰¹ The Eighth Circuit adopted this Tenth Circuit rule in *Cottrill*, holding that evidence of harassment of which

91. *Cottrill v. MFA, Inc.*, 443 F.3d 629, 636 (8th Cir. 2006).

92. *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 794-95 (8th Cir. 2004).

93. *See id.* at 794-95.

94. *See, e.g., Williams*, 378 F.3d at 795.

95. *Id.*

96. *Id.* at 794-95.

97. *Id.* at 794.

98. *Id.* at 795-96.

99. 443 F.3d 629 (8th Cir. 2006).

100. *Id.* at 636 (citing *Hirase-Doi v. U.S. West Commc’ns, Inc.*, 61 F.3d 777, 782 (10th Cir. 1995)).

101. *Id.*

the plaintiff was not aware could not be considered when determining whether the work environment was hostile.¹⁰²

At the district court level, the plaintiffs in *Sandoval* argued that the court should take into account the harassment of other employees, regardless of whether the specific plaintiffs were aware or had knowledge of such events.¹⁰³ The district court cited the Eighth Circuit's ruling in *Cottrill* and held that when plaintiffs bring a claim for hostile work environment, they can only rely on evidence relating to harassment that they were aware of during the time they were allegedly harassed.¹⁰⁴ Based on *Cottrill*, the district court focused only on the events of which each plaintiff was aware and held that the plaintiffs failed to demonstrate conduct showing that workplace harassment was severe and pervasive enough to create an abusive working environment.¹⁰⁵ Additionally, the district court found that ABMK was not put on sufficient notice because the plaintiffs failed to prove that ABMK knew or should have known about the alleged harassment while it was occurring.¹⁰⁶

IV. INSTANT DECISION

In re-adopting the old *Baker* standard in *Sandoval v. American Building Maintenance, Inc.*, the Eighth Circuit overturned the district court ruling and found that ABMI could be held to be the plaintiffs' employer and, additionally, that the plaintiffs could use harassment at other subsidiary locations (of which they were not aware) to help show that the inappropriate actions were severe and pervasive when establishing their harassment claims.¹⁰⁷

In *Sandoval* the plaintiffs argued that the district court erred in finding that ABMI was not the plaintiffs' employer.¹⁰⁸ The court did not overrule the two-pronged test used in *Brown*; however, it concluded that when trying to

102. *Id.*

103. *Sandoval v. Am. Bldg. Maint. Indus., Inc.*, 552 F. Supp. 2d 867, 907 (D. Minn. 2008).

104. *Id.* In *Cottrill*, the Eighth Circuit also distinguished a case cited by the appellants, *Liberti v. Walt Disney Co.*, where a district court allowed evidence of an inappropriate video that was taken even though the victims were not subjectively aware of the videotaping at the time it was being performed. *Cottrill*, 443 F.3d at 637. The Eighth Circuit distinguished *Cottrill* from the circumstances in *Liberti* because the Walt Disney employees in *Liberti* became aware of the inappropriate actions at some point, and even after notice was given harassment still occurred; however, in this case the plaintiff claimed to have no knowledge of the peeping by Adkins. *Id.*

105. *Sandoval*, 552 F. Supp. 2d at 907-08.

106. *Id.* at 908. There were three plaintiffs who brought timely actions for a hostile work environment. *Id.* at 910. The district court additionally found that, once ABMK did become aware of the harassment, its response was prompt and adequate. *Id.*

107. 578 F.3d 787, 793, 800, 803 (8th Cir. 2009).

108. *Id.* at 792.

prove that a parent corporation sufficiently dominates a subsidiary's obligations the *Baker* test should be determinative.¹⁰⁹ The four factors of the *Baker* test include "1) interrelation of operations, 2) common management, 3) centralized control of labor relations, and 4) common ownership or financial control."¹¹⁰ The court concluded that, because Congress had used this four-factor test "to extend to U.S. citizens employed abroad by American employers, or by foreign affiliates controlled by such employers, the same protections from discrimination they would enjoy at home. . . . , it plainly intended the term 'employer' be interpreted in accord with the four-factor integrated enterprise test."¹¹¹ To further this goal, the court stated that these four factors could be used to overcome the "strong presumption" mentioned in *Brown* and that this decision was merely clarifying earlier decisions.¹¹²

Once the court determined it would apply the *Baker* test to decide whether ABMI was liable, the court looked at a variety of facts related to the factors.¹¹³ First, the court pointed out that ABMI and ABMK shared many officials, including the chief executive officer, chief financial officer, treasurer, secretary, and vice president of finance.¹¹⁴ Further, the top officials from ABMI and ABMK approved the appointments for the top officers of ABMK.¹¹⁵ ABMI also owned and controlled both the issued and outstanding shares of ABMK stock.¹¹⁶

The Eighth Circuit then proceeded to thoroughly outline the services provided by ABMI to ABMK, which it found to illustrate the existence of more than a normal parent-subsidiary relationship.¹¹⁷ The services provided included accounting services, administrative services, electronic services, employee benefits, human resources, insurance, legal services, safety advice, and treasury services.¹¹⁸ The court found that the sharing of these services indicated that the companies were highly interrelated.¹¹⁹ Subsidiary ABMK

109. *Id.* at 795-96. In *Brown*, the two factors the court examined were whether "(a) the parent company so dominates the subsidiary's operations that the two are one entity and therefore one employer, . . . or (b) the parent company is linked to the alleged discriminatory action because it controls individual employment decisions." *Id.* at 795.

110. *Id.* at 793.

111. *Id.* at 795.

112. *Id.* at 796.

113. *Id.*

114. *Id.*

115. *Id.* (ABMI top officials approved the executive vice president, vice president of finance, secretary, and the board of directors for ABMK.).

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

paid parent ABMI one percent of its gross operating revenue in exchange for the services and followed guidelines provided by ABMI.¹²⁰

ABMI also purchased certain insurance and other services for ABMK and provided it with necessary functions, including motor vehicle checks and the drafting of certain forms.¹²¹ In addition, ABMK employees had access to a sexual harassment hotline, the terms of which were negotiated by ABMI, where they could report sexual harassment, discrimination, retaliation, theft, or safety concerns in the workplace.¹²² ABMI was also responsible for conducting training on sexual harassment and diversity for ABMK's human resources and safety professionals.¹²³ Moreover, ABMI required that certain non-harassment documents be attached to every paycheck of ABMK employees,¹²⁴ and ABMI implemented additional policies in an effort to prevent harassment at ABMK.¹²⁵

Based upon these facts, the court held that the plaintiffs established that ABMI exercised significant control over ABMK, particularly in the areas affecting labor and human resources.¹²⁶ The court also mentioned measures taken by ABMI to ensure that ABMK was complying with corporate policies prescribed by ABMI.¹²⁷ These services involved interaction between ABMI and ABMK employees while performing monitoring and investigative services.¹²⁸ In sum, using the four-factor *Baker* test, the court found ABMI's involvement in the operations of ABMK to be sufficient to create a genuine issue of material fact in regard to ABMI's liability to and notice of the harassment occurring at its subsidiary.¹²⁹

The Eighth Circuit also reversed the district court's decision regarding an insufficiency of evidence for two of the plaintiffs' hostile work environment claims.¹³⁰ The court highlighted the following elements that must be proven for a hostile workplace claim to succeed: (1) the plaintiff must be part of a protected class, (2) the plaintiff must be subject to unwelcome harassment that was based on sex, and (3) the harassment affected his or her employment.¹³¹ Additionally, the plaintiff must show that the employer knew or should have known about the harassment.¹³² Actual notice is shown when the

120. *Id.* at 797.

121. *Id.*

122. *Id.* (Complaints would be forwarded to ABMI, who would then forward them to ABMK's human resources department.).

123. *Id.*

124. *Id.*

125. *Id.* at 797-98.

126. *Id.* at 798.

127. *Id.* at 799.

128. *Id.*

129. *Id.* at 800.

130. *Id.* at 800-01.

131. *Id.* at 801.

132. *Id.* at 802.

evidence offered demonstrates that the employee took proper steps to place the employer on notice of the harassment.¹³³ To show constructive notice, the incidents must rise to the standard of being “severe or pervasive” enough to establish that the employer knew or should have known of the harassment.¹³⁴ The court admitted that there is no bright-line standard, such that it must look at the “totality of the circumstances.”¹³⁵

Applying the hostile workplace test set out above, the district court concluded that the plaintiffs’ complaints to their supervisors were not enough to put ABMK on notice of the harassment, especially considering the effort that the corporation put into preventing such incidents.¹³⁶ The Eighth Circuit, however, found that the lower court erred by refusing to consider evidence that could have shown that ABMK “knew or should have known” that sexual harassment was pervasive throughout the company, giving it constructive notice.¹³⁷ The court noted that, even if an employer does not have actual notice of harassment, it can still be held negligent if it is placed on constructive notice.¹³⁸ The Eighth Circuit focused on the plaintiffs’ argument that ABMK was made aware of nearly one hundred incidents of harassment during the plaintiffs’ employment with the company, which the district court refused to consider, such that these other events should have put ABMK on constructive notice.¹³⁹

While it is apparent that complaints at other locations did not put the corporation on actual notice of the harassment these plaintiffs were experiencing, the instant court found that complaints from multiple locations could be used to establish constructive notice that harassment was taking place throughout the corporation.¹⁴⁰ “Constructive notice . . . is established when the harassment was so severe and pervasive that management reasonably should have known of it.”¹⁴¹ The court concluded that an employer may be deemed to be on constructive notice when the harassment so permeated the workplace “that it must have come to the attention of someone authorized to do something about it.”¹⁴² In reaching its decision, the court cited precedent from the United States Court of Appeals for the Third Circuit finding that an

133. *Id.*

134. *Id.* at 802.

135. *Id.* at 801. The court also stated that “[t]he factors we look to include the frequency of the behavior, its severity, whether physical threats are involved, and whether the behavior interferes with a plaintiff’s performance on the job.” *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* at 801-02. The court followed with a discussion of actual notice, ruling out the possibility since there was not sufficient evidence to establish that management knew of the harassment. *See id.*

140. *Id.* at 803.

141. *Id.* at 802.

142. *Id.*

employer put on constructive notice can be held liable under Title VII.¹⁴³ While the court noted that the lower court refused to consider sexual harassment claims brought by other employees because prior Eighth Circuit precedent stated that plaintiffs were limited to presenting only evidence of harassment of which the plaintiff was aware,¹⁴⁴ it ultimately held that such evidence was improperly excluded because “the evidence is highly probative of the type of workplace environment” the plaintiffs were subjected to and whether the employer should have reasonably discovered the harassment.¹⁴⁵

The Eighth Circuit cited *Hall v. Gus Construction Co.*, stating that the circuit has long considered harassment directed toward other employees as relevant and admissible for consideration when addressing harassment claims.¹⁴⁶ The court also reviewed *Williams v. ConAgra Poultry Co.*, where it held that, while evidence of other employees’ complaints is irrelevant to the plaintiffs’ subjective perception of their workplace, such evidence is considered highly relevant to prove the type of workplace environment to which employees were being subjected.¹⁴⁷ The court concluded that, while “the evidence cannot be used to prove the timely plaintiffs found their workplace

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* at 802-03. In *Hall v. Gus Construction Co.*, three female workers brought suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, and various state laws alleging that the defendant failed to protect them from unwanted harassment directed at them by co-workers. 842 F.2d 1010, 1011-12 (8th Cir. 1988). All three of the women were “flag persons” or traffic controllers for the construction company. *Id.* at 1012. The women claimed that they were subjected to both verbal and physical attacks at the hands of their co-workers, forcing them to leave the company. *Id.* The Eighth Circuit held that, even though one plaintiff was not subjected to the verbal and physical harassment, evidence of harassment directed at other employees was relevant to show a hostile work environment. *Id.* at 1015.

147. *Sandoval*, 578 F.3d at 803; *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 794 (8th Cir. 2004). In *Williams*, the plaintiff claimed that his employer, the defendant, subjected him to a hostile work environment and terminated his employment due to his race. *Williams*, 378 F.3d at 792. After the plaintiff quarreled with one of his supervisors, the defendant chose to terminate his employment with the company. *Id.* at 792-93. Prior to this suit, another former employee of the defendant had successfully sued the company for employment discrimination. *Id.* at 793. The plaintiff wanted to use evidence from the earlier trial of incidents of harassment alleged by other employees of which the plaintiff was not aware, but the defense argued on appeal that evidence of harassment of which the plaintiff was not aware should not be admissible in order to prove harassment. *Id.* The court agreed with the plaintiff and stated that “evidence of racial bias in other employment situations could permissibly lead to the inference that management was similarly biased in the case of Mr. William’s firing.” *Id.* at 794.

subjectively hostile, it is highly relevant to prove the sexual harassment was severe and pervasive and that ABMK had constructive notice."¹⁴⁸

Judge Gruender wrote a dissenting opinion with respect to the court's decision allowing the plaintiffs to use evidence of other harassment claims to prove that their workplace was sufficiently hostile.¹⁴⁹ In his opinion, the plaintiffs should have been required to show that ABMK knew or should have known of the harassment and failed to take prompt remedial action.¹⁵⁰ Judge Gruender pointed out that the complaints spoken of by the plaintiffs involved numerous sexual harassment complaints concerning different victims at different locations of employment and highlighted the fact that ABMK has more than four hundred locations, and, while the plaintiffs pointed to at least eighty-five other reported incidents, only one instance of harassment involved the alleged harasser in this case.¹⁵¹ The dissenting judge believed that this evidence was insufficient to support a claim that ABMK had any notice, constructive or otherwise, of harassment occurring at the locations where the plaintiffs worked.¹⁵² Moreover, Judge Gruender explained that, while the Eighth Circuit has previously considered evidence of harassment of which the plaintiff was not aware, it has never considered notice of harassment for employees at one location based on the harassment of employees at another location.¹⁵³ The dissenting judge believed that this evidence was properly excluded at trial and that, therefore, summary judgment should have been upheld.¹⁵⁴

V. COMMENT

The decision in *Sandoval* represents another change in direction for the Eighth Circuit when determining who will be considered an employer for the purposes of a lawsuit brought under Title VII. With this decision, the Eighth Circuit departed from recent precedent and re-established how parent-subsidiary relationships will be evaluated. In 2007, the Eighth Circuit was very clear in *Brown v. Fred's, Inc.* when it held that there is a strong presumption against employment of subsidiary company employees by parent companies that must be overcome.¹⁵⁵ The presumption can be overcome in

148. *Sandoval*, 578 F.3d at 803.

149. *Id.* at 804 (Gruender, J., concurring in part and dissenting in part). Judge Gruender agreed with the majority affirming summary judgment in favor of the defense on the plaintiffs' claims of retaliation, sex discrimination, and quid pro quo sexual harassment. *Id.* at 803-04. Because these holdings are not significant to this Note, they are only mentioned in this footnote.

150. *Id.* at 804.

151. *Id.*

152. *Id.* at 805.

153. *Id.*

154. *Id.*

155. 494 F.3d 736, 739 (8th Cir. 2007).

two ways: by showing either “(a) the parent company so dominates the subsidiary’s operations that the two are one entity and therefore one employer, or (b) the parent company is linked to the alleged discriminatory action because it controls ‘individual employment decisions.’”¹⁵⁶ The *Brown* court did not cite the four-pronged *Baker* test and instead merely applied the two-pronged test and found that the parent corporation in that case did not exercise sufficient control to be held responsible under Title VII.¹⁵⁷

Sandoval may cause much consternation for large companies trying to decipher the current state of the law. Making it easier for large corporations with multiple subsidiaries to be held liable for harassment puts these corporations between a rock and a hard place. They could be faced with two equally unattractive options: either hire new employees in an effort to monitor harassment-related issues, not only within the parent corporation but also within subsidiary corporations, or take a completely hands-off approach with their subsidiaries. Each strategy contains its own problems and pitfalls. If a company chooses to hire additional employees and monitor the actions of its subsidiaries, the parent corporation will most likely be deemed an employer in a Title VII harassment suit concerning the subsidiary corporations. On the other hand, if the parent corporation chooses to take a completely hands-off approach in an attempt to not be held liable, the employees and the image of the corporation may suffer. And, in the event that a parent corporation is held liable, the damages could be major.

While “parental domination,” in this case, did not appear to hinge on how active a role the parent corporation ABMI played in monitoring harassment at its subsidiary corporations, it certainly was a factor the Eighth Circuit considered.¹⁵⁸ The Eighth Circuit pointed to the fact that “ABMI . . . dictated mandatory sexual harassment and diversity training and provided the training to ABMK’s human resources and safety professionals.”¹⁵⁹ It certainly appears that, in any area where a parent corporation chooses to try to exercise control, even if for a worthwhile purpose, such an act will make that company more likely to be held liable for any type of liability created by its subsidiary.

With the decision in *Sandoval*, the court appears to be backing away from the strong presumption against corporate liability promoted in *Brown*. Under the new approach, the Eighth Circuit is not explicitly stating that it is lowering the bar to hold parent corporations liable for the acts of their subsidiaries; however, by reversing the district court’s ruling, which appeared to properly apply *Brown* in finding for the defendants, the Eighth Circuit is effectively adopting a pro-plaintiff stance.

While a more pro-plaintiff stance may initially appear to encourage more responsible behavior, another possibility is that increased liability will

156. *Id.*

157. *See id.* at 739-40.

158. *See Sandoval*, 578 F.3d at 796-98.

159. *Id.* at 797.

cause large corporations to take a completely hands-off approach with their subsidiaries. Although taking a hands-off approach creates risks of its own, it may prove determinative with respect to the lack of parental domination that will prevent the parent corporation from being liable for the acts of its subsidiaries. A parent corporation's interactions with its subsidiaries in attempting to prevent and deal with harassment is only one factor a court will examine, but it would be hard to dispute that taking an active role, even with respect to one area, may expose a parent company to liability. While the *Sandoval* court claims to announce no new standard and instead claims merely to set out clear precedent that should be considered, the court's opinion is indicative of its willingness to take a more expansive look at parent-subsidiary liability, thereby forcing corporations to make difficult decisions.

The Eighth Circuit's use of the *Baker* test when determining parent-subsidiary liability puts it at odds with many other circuits. The Fourth Circuit has held that, while the *Baker* factors are important when making the relevant inquiries, they are not necessarily determinative and will vary from case to case.¹⁶⁰ The Tenth Circuit adopted the same standard as the Fourth Circuit in *Frank v. U.S. West, Inc.*¹⁶¹ At this early stage, it is unclear what effect adopting the *Baker* test will have on cases within the Eighth Circuit. Because many of the other circuits use the *Baker* factors and feel no need to make them determinative,¹⁶² the Eighth Circuit may not deviate too far from the norm. However, if the *Baker* test is applied rigidly to adopt a more generous standard for plaintiffs, the Eighth Circuit could become an outlier in holding parent corporations liable for the acts of their subsidiaries.

The *Sandoval* decision may have its biggest impact on future cases in the precedent it sets in determining when a company will be deemed to have constructive notice of a hostile work environment. In *Sandoval*, the dissenting judge pointed out that the majority found that the district court erred when it disregarded the evidence of claims from other sites.¹⁶³ With this decision, the court allowed evidence of eighty-five complaints of similar treatment at the four hundred locations where ABMK provided janitorial services.¹⁶⁴ Further, Judge Gruender noted in his dissent that only one other complaint was registered against the same person accused of harassing the plaintiffs in this case, as the other complaints involved other employees or took place at other locations.¹⁶⁵ Allowing plaintiffs to introduce evidence of harassment at other

160. See *Johnson v. Flowers Indus., Inc.*, 814 F.2d 978, 981 (4th Cir. 1987).

161. See 3 F.3d 1357, 1362 (10th Cir. 1993).

162. For example, the Fourth Circuit has held that it "need not adopt such a mechanical test in every instance; the factors all point to the ultimate inquiry of parent domination. The four factors simply express relevant evidentiary inquiries whose importance will vary with the individual case." *Johnson*, 814 F.2d at 981 n.*.

163. *Sandoval*, 578 F.3d 787 (Gruender, J., concurring in part and dissenting in part).

164. *Id.*

165. *Id.*

locations without a defined boundary leaves the lower courts with little direction in terms of how constructive notice is to be applied in future cases where plaintiffs assert claims under Title VII.

The dissenting judge accurately pointed out that there is really no prior precedent to support the instant holding that these types of claims can put a company on constructive notice that the workplace is sufficiently hostile. The Eighth Circuit cited *Williams v. ConAgra Poultry Co.* to support the proposition that evidence of harassment of which the plaintiff was not aware can be used to prove that the harassment was pervasive or severe.¹⁶⁶ However, *Williams* is distinguishable from the facts in *Sandoval* because in that case all of the incidents used to prove that the harassment was widespread involved harassment at one location.¹⁶⁷

Thus, through its decision in *Sandoval* the Eighth Circuit has established new precedent concerning whether employers have constructive notice that they are subjecting employees to a hostile work environment. What is unclear is how far the court is willing to expand on this ruling. In *Sandoval* there were approximately eighty-five complaints at the locations, which numbered over four hundred.¹⁶⁸ How far is the court willing to extend this logic? Would a company that had ten complaints at four hundred locations be deemed to be on constructive notice of a hostile work environment? While the court claims that the instant decision cannot be used to prove the severity of the harassment,¹⁶⁹ by deeming the notice prong of the test satisfied the court has greatly aided the plaintiffs

In the *Sandoval* case, the dissenting judge highlighted the fact that only one incident of reported harassment involved the alleged harassers of the plaintiffs.¹⁷⁰ The majority opinion did not discuss this fact, and it seems like a stretch to say that one complaint could make harassment in a workplace pervasive and severe. The Eighth Circuit cited no authority, either within its own circuit or in other circuits, supporting the contention that harassment at multiple locations can be used to prove constructive harassment. Thus, this decision appears to be one of first impression.

To complicate matters, by keeping accurate records of harassment incidents corporations appear to be contributing to their own demise. Without accurate record keeping of harassment issues, plaintiffs will face a tough, if not impossible, task of discovering harassment of other employees of which they were not aware. Just as with deciding whether to play an active role in harassment-related training and policies, record keeping also becomes a major decision for parent corporations. They are faced with two options: (1) keep track of all incidents so that they can try to take corrective measures and

166. *Id.* at 803 (majority opinion).

167. *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 795 (8th Cir. 2004).

168. *Sandoval*, 578 F.3d at 804.

169. *Id.* at 803.

170. *Id.* at 804 (Gruender, J., concurring in part and dissenting in part).

prevent future harassment or (2) attempt to keep no official records so that when litigation is brought against them the acts of which the plaintiff was not aware will be nearly impossible to discover. Both options present pitfalls for corporations. If they choose to keep track of all the incidents and there are a significant number of complaints, corporations could be essentially conceding that they had constructive notice of harassment. If corporations choose not to keep any records, they may be doing a disservice to their employees and allowing a potentially toxic workplace to develop if harassment is not addressed.

This decision will force executives at larger companies to take a serious look at hostile workplace complaints at all of their locations. A common criticism is that harassment procedures ought to place more responsibility on the employer not only to respond to harassment but also to prevent it.¹⁷¹ It can also be said that, by focusing on the individual harasser and victim, a court essentially turns harassment into a tort-like dispute, failing to appropriately acknowledge the organization's role in allowing the harassment to continue and its role in fostering an environment where harassment is allowed.¹⁷²

However, the Eighth Circuit's opinion in *Sandoval* arguably puts more pressure on the employer. No longer must an employee show that he or she was aware that such incidents of harassment occurred. If it can be shown that harassment existed at some corporate level, somewhere, the employer will be deemed to be on constructive notice. Ultimately, the impact of the *Sandoval* case will be determined by future decisions of the court and the actions of corporations.

VI. CONCLUSION

The Eighth Circuit's decision in *Sandoval* establishes strict criteria for future cases looking at parent-subsidiary relationships. Corporations' reactions to this ruling and courts' responses to any actions taken by parent corporations will prove interesting in future Eighth Circuit litigation. Whether the *Baker* four-pronged test will cause the Eighth Circuit to veer further off

171. Anne Lawton, *The Bad Apple Theory in Sexual Harassment Law*, 13 GEO. MASON L. REV. 817, 826 (2005).

Thus, the current liability framework for workplace harassment is flawed in at least two respects. First and foremost, there is no theory of direct liability for the employer's role in creating or fostering a hostile work environment. An employer may be held directly liable for failing to respond once an employee reports the harassing conduct. However, holding an employer liable for its failure to respond to harassment is not the same as making the employer responsible for its role in creating the hostile work environment in the first instance.

Id.

172. *Id.* at 821.

course from how other circuits have handled these complaints is yet to be seen. *Sandoval* may have the most impact with regard to sexual harassment claims. With this precedent, corporations with multiple locations will be found to be on constructive notice of severe and pervasive harassment even if the claims of harassment occurred at different locations and involved different employees.

Arguably, the Eighth Circuit was wise to re-adopt its *Baker* four-pronged test, despite the fact that it puts the court at odds with some of its sister circuits. While factual situations will vary, it is important that the standards to which corporations are held remain consistent. Work environments free from harassment serve society as a whole, but whether this precedent will lead to a workable standard that is fair to employees and employers alike will be determined by how this case is interpreted and applied in the future.

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