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Young v. Bayer Corp.: When is Notice of Sexual Harassment to an Employee Notice to the Employer?

I. INTRODUCTION

Beth Ann Faragher and Nancy Ewanchew were both working as lifeguards for the City of Boca Raton, Florida in the Parks and Recreation Department's Marine Safety Section when they were subjected to sexual harassment by their supervisors.¹ Faragher testified that a supervisor touched her shoulders and waist numerous times, "patted her thigh" and "slapped her on the rear end."² Ewanchew alleged "two specific incidents where [the same supervisor] touched her in a sexually offensive manner."³ Both women informed one of their supervisors, Marine Safety Lieutenant and Training Captain Robert Gordon, of the harassment.⁴ Gordon told no one, despite the fact that other female lifeguards had complained about harassing behavior too.⁵ Faragher sued the city for sexual harassment under Title VII⁶ and won.⁷ On appeal the Eleventh Circuit reversed, stating, inter alia, that Gordon's knowledge of the sexual harassment could not be imputed to Boca Raton

1. *See* Faragher v. City of Boca Raton, 111 F.3d 1530, 1533 (11th Cir. 1997), cert. granted, 118 S. Ct. 438 (1997).

2. *Id.*

3. *Id.*

4. *See id.*

5. *See id.*

6. *See infra* note 28 and accompanying text.

7. *See Faragher*, 111 F.3d at 1534. To win on a sexual harassment claim a plaintiff must demonstrate that "(1) she belongs to a protected group, (2) she was subject to unwelcome sexual harassment, (3) the harassment was based on sex, (4) the harassment affected a 'term, condition, or privilege' of employment, and (5) the employer knew or should have known of the harassment in question and failed to take remedial action." Hall v. Gus Constr. Co., 842 F.2d 1010, 1013 (8th Cir. 1988). The fifth element will change depending on the standard for finding employer liability in the particular circuit. *See, e.g.,* Kauffman v. Allied Signal, Inc., 970 F.2d 178, 183 (6th Cir. 1992) (changing the fifth element to "the existence of respondeat superior liability" then going on to explain what that means in a supervisor-created hostile environment sexual harassment claim). For the employer liability standard in the Eleventh Circuit, see *infra* note 51.

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because Gordon “did not rank as higher-management in the City.”⁸ Therefore, the city had no duty to act on Gordon’s knowledge and was not liable for its failure to do so.⁹

Consider too the case of Karen Van Zant. Hasan King, Van Zant’s co-worker, regressed over a period of months from flirting with Van Zant to “making lewd sexual remarks to her.”¹⁰ Van Zant’s supervisor, Emily Browne, apparently knew of the situation (as did a supervisor from another department)¹¹ but took no action until Van Zant reported that King exposed himself to her.¹² Browne then reported the incident to the employer’s personnel director.¹³ Van Zant sued for sexual harassment under Title VII, alleging her employer should be liable for not responding sooner to Browne and the other department supervisor’s knowledge of the harassment.¹⁴ The Second Circuit rejected that argument, ruling that Browne and the other supervisor were too “low-level” to impute knowledge to the employer.¹⁵

Finally, consider the case of Terri Nichols. Deaf and mute, Nichols could only communicate via sign language with Ron Francisco, the highest ranking supervisor on her shift.¹⁶ Francisco subjected Nichols to six months of extreme sexual harassment resulting in myriad personal problems for Nichols.¹⁷ Nichols finally reported Francisco’s harassment and instigated a sexual harassment suit under Title VII against her employer, the United States Postal Service.¹⁸ Correcting the

8. *Faragher*, 111 F.3d at 1538. Even if Gordon had been considered “higher management,” the Eleventh Circuit might not have imputed his knowledge to the city because the court felt that “Gordon did not receive that information as the City’s agent; he received it as a friend held in high repute by his colleagues.” *Id.* at 1538 n.9.

9. *See id.* at 1538-39.

10. *Van Zant v. KLM Royal Dutch Airlines*, 80 F.3d 708, 710-11 (2d Cir. 1996).

11. *See id.* at 711, 715.

12. *See id.* at 711.

13. *See id.*

14. *See id.* at 710, 715.

15. *See id.* at 715-16.

16. *See Nichols v. Frank*, 42 F.3d 503, 506-07 (9th Cir. 1994).

17. *See id.* at 507. Francisco repeatedly conditioned employment benefits on Nichols’ willingness to perform oral sex. This prolonged sexual harassment caused Nichols to suffer depression, anxiety, irritability, sleeping and eating difficulties, weight loss, a suicide attempt, and finally divorce. *See id.*

18. *See id.* Francisco is still employed by the Postal Service, at the same office, because the Merit System Protection Board reversed the decision to terminate him.

district court, the Ninth Circuit stated the proper test for determining employer liability was “what management level employees knew or should have known.”¹⁹ Under this test the Postal Service was not liable.²⁰

As illustrated by the foregoing examples, under current law,²¹ the determination of which employee’s²² notice of sexual harassment can be deemed notice to the employer is often the key to determining employer liability for Title VII hostile environment sexual harassment claims.²³ A finding of employer liability is important because it plays a central role in providing relief to the victim²⁴ and achieving the equality-by-deterrence

See id. at 507 n.1.

19. *Id.* at 508.

20. *See id.* However, the Post Office was held liable for quid pro quo sexual harassment. *See infra* note 33-42 and accompanying text for a discussion of hostile environment and quid pro quo sexual harassment.

21. *See infra* Part II for a detailed look at the current state of Title VII sexual harassment law.

22. In this context “employee” includes everyone employed by the employer regardless of position in the corporate hierarchy.

23. *See infra* note 51 and accompanying text. Although other grounds exist for finding employer liability, what the employer knew is key for several reasons. First, it is the only basis common to every circuit (it is the *only* basis for half the circuits). Second, even in those circuits with multiple grounds for imposing employer liability, the employer’s knowledge will generally be the only basis upon which the plaintiff can realistically hope to win. The other grounds for imposing liability are almost never, or at least relatively less, applicable. For example, five circuits (the Third, Sixth, Tenth, Eleventh, and D.C.) purport to impose employer liability if the harasser was acting within the scope of his employment. However, four of those circuits acknowledge that sexual harassment would rarely, if ever, be considered within the scope of one’s employment. *See Harrison v. Eddie Potash, Inc.*, 112 F.3d 1437, 1446 (10th Cir. 1997); *Faragher v. City of Boca Raton*, 111 F.3d 1530, 1536-37 (11th Cir. 1997), *cert. granted*, 118 S. Ct. 438 (1997); *Gary v. Long*, 59 F.3d 1391, 1397 (D.C. Cir. 1995) (implicitly discounting scope of employment as a basis for employer liability); *Bouton v. B.M.W. of N. Am., Inc.*, 29 F.3d 103, 106-07 (3d Cir. 1994). And the Sixth Circuit would excuse the employer from liability if it responded adequately to notice of the harassment. *See Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 803 (6th Cir. 1994). The other grounds for imposing employer liability (besides employer knowledge) are likewise limited in their applicability. *See infra* note 51 for the other employer liability standards and the respective cited cases for how those standards are limited in their applicability.

24. *See Glen Allen Staszewski, Note, Using Agency Principles for Guidance in Finding Employer Liability for a Supervisor’s Hostile Work Environment Sexual Harassment*, 48 VAND. L. REV. 1057 (1995).

Any victim of sexual harassment seeking redress for the wrong committed against her must establish that sexual harassment occurred. This showing, however, may not resolve the issue in the victim’s favor. For the victim to receive full recovery, the court must hold the employer liable for

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purposes²⁵ of Title VII. Thus, deciding the circumstances under which an employee's notice can be treated as employer notice is immensely important.

Despite the importance of this issue it has not received the scholarly attention it deserves. Commentators typically focus, instead, on the overall state of sexual harassment law (critiquing current, and proposing new, grounds for imposing employer liability). Though useful, these commentaries have failed to adequately address the narrower but important question of which employee's knowledge of sexual harassment may be imputed to the employer.²⁶

This Note examines the approaches courts have taken in determining which employees' knowledge of sexual harassment can be imputed to the employer. In particular, this Note analyzes the approach taken in *Young v. Bayer Corp.*,²⁷ a recent Seventh Circuit decision. Part II discusses the current state of the law for employer liability under Title VII, more fully revealing why the question of imputing knowledge to the employer is an important, if not the most crucial, inquiry in every circuit. Part III presents the facts of *Young* and reviews the reasoning behind the *Young* decision. Part IV compares the novel approach taken in *Young* with the two alternative approaches currently used in other circuits. This section also analyzes whether the *Young* rule more effectively achieves the purposes of Title VII than do the other more widespread approaches. It also discusses potential application problems the *Young* rule may have compared to the alternative approaches. Part V concludes that because the *Young* rule best achieves the

the sexual harassment. If the court refuses to make this finding, the victim's relief may be substantially diminished or even eviscerated by the fact that individual supervisors are not as well-situated as are their employers to provide the make-whole relief contemplated by Title VII.

Id. at 1059 (citations omitted).

25. See *Jansen v. Packaging Corp. of Am.*, 123 F.3d 490, 495 (7th Cir. 1997) (asserting that the primary purpose of Title VII is to promote equality in the workplace by encouraging employers to deter harassing behavior), *cert. granted in part Burlington Indus., Inc. v. Ellerth*, No. 97-569, 1998 WL 21891 (U.S. Jan. 23, 1998).

26. See, e.g., David Benjamin Oppenheimer, *Exacerbating the Exasperating: Title VII Liability of Employers For Sexual Harassment Committed by Their Supervisors*, 81 CORNELL L. REV. 66, 97-98 (1995) (devoting only one page in an 84 page article to discussion of an employer's negligence liability based on what was known).

27. 123 F.3d 672 (7th Cir. 1997).

purposes of Title VII, although it admittedly will be more difficult to apply, it should be the approach used in every circuit.

II. BACKGROUND

Although Title VII of the Civil Rights Act of 1964 prohibits employer sex-based discrimination,²⁸ most courts initially found that sexual harassment fell outside the scope of Title VII protection.²⁹ By 1980, though, several circuit courts began ruling that “employment decisions conditioned on supervisory sexual demands [i.e. quid pro quo sexual harassment] constituted sexual harassment in violation of Title VII.”³⁰ Finally, in 1986, the Supreme Court ruled that “hostile environment” sexual harassment also violates Title VII.³¹

The following two subparts add detail to the synopsis just given of the current state of Title VII sexual harassment law by discussing: (a) the two types of actionable sexual harassment, and (b) the standards of employer liability under both. This background information is necessary to understand the question of imputing knowledge to the employer and its importance, and will help frame and focus the discussion of *Young v. Bayer Corp.*

A. *The Types of Actionable Sexual Harassment Under Title VII*

As indicated above, courts have come to recognize two types of actionable sexual harassment claims under Title VII: quid pro quo³² and hostile environment.

28. See 42 U.S.C. § 2000e-2 (1994).

Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; . . .

Id.

29. See Oppenheimer, *supra* note 26, at 110.

30. *Id.* at 112.

31. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 73 (1986).

32. While this Note's focus is on hostile environment harassment, as the question of employer notice is irrelevant to finding employer liability for quid pro quo

1. *Quid pro quo*

Quid pro quo sexual harassment is where an employer, or one of the employer's supervisors, conditions a tangible job benefit on an employee's response to sexual advances.³³ An example of this kind of sexual harassment may occur when a supervisor authorized to grant time off requires sexual favors before granting the request to an employee.³⁴ The key to quid pro quo sexual harassment claims, and the purported reason why the standard of employer liability is different than with hostile environment claims,³⁵ is that the "supervisor must have wielded the authority entrusted to him to subject the victim to adverse job consequences as a result of her refusal to submit to an unwelcome sexual advances."³⁶

2. *Hostile environment*

Hostile environment sexual harassment is, perhaps, less susceptible to a practical ("mathematically precise"³⁷) definition than quid pro quo harassment. Nonetheless, the Supreme Court, borrowing heavily from the Equal Employment Opportunity Commission's (EEOC) Guidelines on

harassment, a brief overview of quid pro quo is included to provide a complete picture of the sexual harassment field.

33. See *Gary v. Long*, 59 F.3d 1391, 1395-96 (D.C. Cir. 1995) ("[T]he gravamen of a *quid pro quo* claim is that a tangible job benefit or privilege is conditioned on an employee's submission to sexual black-mail and that adverse consequences follow from the employee's refusal."); see also 29 C.F.R. § 1604.11(a) (1997), which states:

(a) Harassment on the basis of sex is a violation of section 703 of title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual

Id. (footnote omitted).

34. See *Nichols v. Frank*, 42 F.3d 503, 508-09 (9th Cir. 1994).

35. See *infra* Part II.B.1.

36. *Long*, 59 F.3d at 1396.

37. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993).

Discrimination Because of Sex,³⁸ characterizes hostile environment sexual harassment as

“[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature[,]” . . . whether or not it is directly linked to the grant or denial of an economic *quid pro quo*, where “such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.”³⁹

Whether a hostile environment exists depends on the “totality of all the circumstances” surrounding the alleged sexual harassment.⁴⁰

An example would be where a supervisor and co-workers repeatedly ask to see the results of the victim’s breast enlargement surgery.⁴¹ In another case, a court found that a hostile environment was created when a supervisor spread rumors that the victim is an adulteress, followed her to the restroom to ensure she talks to no men, called another department head to see if she is talking to men from that department, and commented on the inappropriateness of the victim’s attire.⁴²

38. See 29 C.F.R. § 1604.11(a) (1997):

(a) Harassment on the basis of sex is a violation of section 703 of title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when . . . (3) such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.

Id. (footnote omitted). Justifying its reliance on the EEOC guidelines the Supreme Court noted, “As an ‘administrative interpretation of [Title VII] by the enforcing agency,’ these guidelines, ‘while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.’” *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986) (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971) and *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

39. *Meritor Sav. Bank*, 477 U.S. at 65 (citations omitted) (quoting 29 C.F.R. § 1604.11(a) (1997)).

40. *Harris*, 510 U.S. at 23 (noting that relevant circumstances may include: “[T]he 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.”).

41. See *Kauffman v. Allied Signal, Inc.*, 970 F.2d 178, 180-81 (6th Cir. 1992) (detailing the supervisor and co-worker’s comments and actions).

42. See *Davis v. City of Sioux City*, 115 F.3d 1365, 1365-66 (8th Cir. 1997).

*B. Employer Liability for Quid Pro Quo and Hostile
Environment Sexual Harassment*

Consistent with distinguishing between these two types of sexual harassment, federal courts have developed different standards for determining when there is employer liability for quid pro quo harassment versus when there is employer liability for hostile environment harassment. While the employer liability standard for quid pro quo harassment is well-settled, the standard for hostile environment cases is not.

1. Employer liability for quid pro quo harassment

In cases of quid pro quo harassment courts routinely hold the employer strictly liable for the sexual harassment committed by the employer's supervisor.⁴³ Courts apply strict liability because the quid pro quo harasser necessarily exercises the authority granted him by the employer to effectuate the sexual harassment.⁴⁴ Hence, liability can be imputed to the employer under the "apparent authority" rationale of the Restatement (Second) Agency section 219(1) and (2)(d).⁴⁵

43. See *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1443 (10th Cir. 1997); see also *Mentor Sav. Bank*, 477 U.S. at 76 (Marshall, J., concurring) ("[E]very Court of Appeals that has considered the issue has held that sexual harassment by supervisory personnel is automatically imputed to the employer when the harassment results in tangible job detriment to the subordinate employee."); Staszewski, *supra* note 24, at 1059-60 ("[C]ourts uniformly hold employers strictly liable for quid pro quo sexual harassment.")

44. See *Harrison*, 112 F.3d at 1443 (reasoning that the imposition of strict liability "rests upon the fact that the supervisor was acting within the scope of his actual or apparent authority" or because he was aided by the agency relationship with his employer in accomplishing the harassment (quoting *Karibian v. Columbia Univ.*, 14 F.3d 773, 777 (2d Cir. 1994))).

45. See RESTATEMENT (SECOND) OF AGENCY § 219 (1958) [hereinafter AGENCY § 219].

Section 219. When Master is Liable for Torts of His Servants

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

2. *Employer liability for hostile environment sexual harassment*

When it comes to determining employer liability for hostile environment sexual harassment courts typically distinguish between co-worker and supervisor-created harassment and many apply a different standard accordingly.

a. Co-worker-created hostile environment sexual harassment. Courts hold the employer liable for co-worker-created hostile environment sexual harassment if the employer knew or should have known of the harassment and failed to take appropriate action.⁴⁶ This standard seems to go along with the “negligence” rationale of the Restatement (Second) Agency section 219(2)(b)⁴⁷ and with the EEOC Guidelines.⁴⁸ The crux of this standard is what the employer knew and when.

b. Supervisor-created hostile environment sexual harassment. While the Supreme Court declined to prescribe a “definitive rule on employer liability”⁴⁹ for supervisor-created hostile environment harassment, the Court did direct lower courts to “look to agency principles for guidance in this area.”⁵⁰ Due in part to the Supreme Court’s unwillingness to issue a definitive rule, the circuit courts have created nonuniform standards. At present, the standards range from the knew-or-should-have-known standard used in co-worker harassment cases (used in the First, Fourth, Fifth, Eighth, and Ninth Circuits) to different variations of section 219 of the agency restatement (used in the Second, Third, Sixth, Tenth, Eleventh, and District of Columbia Circuits).⁵¹ The Seventh Circuit’s

accomplishing the tort by the existence of the agency relation.

Id.

46. See Staszewski, *supra* note 24, at 1061.

47. See AGENCY § 219, *supra* note 45.

48. See 29 C.F.R. § 1604.11(d) (1997) (“(d) With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.”).

49. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 72 (1986).

50. *Id.* In directing lower courts to seek guidance from the law of agency the court made special reference to RESTATEMENT (SECOND) OF AGENCY §§ 219-237. *Id.* Section 219 is of particular importance, see *supra* note 45.

51. Following is the employer liability standard for Title VII supervisor hostile

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environment sexual harassment in each circuit.

First Circuit: employer is liable if he "knew, or . . . should have known, of the harassment's occurrence, unless that official can show that he or she took appropriate steps to halt it." *Morrison v. Carleton Woolen Mills, Inc.*, 108 F.3d 429, 437 (1st Cir. 1997) (quoting *Lipsett v. University of P.R.*, 864 F.2d 881, 901 (1st Cir. 1988)).

Second Circuit: employer is liable if

- a) the supervisor was at a sufficiently high level in the company, or
- b) the supervisor used his actual or apparent authority to further the harassment, or was otherwise aided in accomplishing the harassment by the existence of the agency relationship, or
- c) the employer provided no reasonable avenue for complaint, or
- d) the employer knew (or should have known) of the harassment but unreasonably failed to stop it.

Torres v. Pisano, 116 F.3d 625, 634 (2d Cir. 1997) (footnotes omitted), *cert. denied*, 118 S. Ct. 563 (1997).

Third Circuit: employer is liable if: 1) the supervisor was acting within scope of employment, 2) the employer is negligent (failure to act upon notice), and 3) if the victim relied on the apparent authority of the harasser or the harasser was aided by the agency relationship. *See Bouton v. BMW of N. Am., Inc.*, 29 F.3d 103, 106 (3d Cir. 1994).

Fourth Circuit: employer is liable "only if the employer knew or should have known of the illegal conduct and failed to take prompt and adequate remedial action." *Andrade v. Mayfair Mgmt., Inc.*, 88 F.3d 258, 261 (4th Cir. 1996).

Fifth Circuit: employer is liable "only if it knew or should have known of the harassment and failed to take prompt remedial action." *Nash v. Electrospace Sys., Inc.*, 9 F.3d 401, 404 (5th Cir. 1993).

Sixth Circuit: employer liability is based on "1) whether the supervisor's harassing actions were foreseeable or fell within the scope of his employment and 2) even if they were, whether the employer responded adequately and effectively to negate liability." *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 803 (6th Cir. 1994).

Seventh Circuit: A majority of the bench believes that "negligence is the only proper standard of employer liability in cases of hostile-environment sexual harassment even if as here the harasser was a supervisor rather than a coworker of the plaintiff." *Jansen v. Packaging Corp. of Am.*, 123 F.3d 490, 494 (7th Cir. 1997) (en banc) (per curiam), *cert. granted in part Burlington Indus., Inc. v. Ellerth*, No. 97-569, 1998 WL 21891 (U.S. Jan. 23, 1998).

Eighth Circuit: employer liability is based on the "knew or should have known standard." *Davis v. City of Sioux City*, 115 F.3d 1365, 1368 (8th Cir. 1997).

Ninth Circuit: "The proper analysis for employer liability in hostile environment cases is what management-level employees knew or should have known . . ." *Nichols v. Frank*, 42 F.3d 503, 508 (9th Cir. 1994).

Tenth Circuit: employer is liable if: 1) the supervisor/harasser acted within scope of employment, 2) the employer knew or should have known of harassment and failed to respond, 3) there was reliance by victim on apparent authority of harasser, and 4) the harasser had delegated authority to control victim's work environment and harasser used that authority to facilitate the harassment. *See Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1446 (10th Cir. 1997).

Eleventh Circuit: employer liable if: 1) he knew or should have known and failed to adequately respond, 2) the harassment occurred within the scope of employment, and 3) the harasser is aided by an agency relationship with the employer. *See Faragher v. City of Boca Raton*, 111 F.3d 1530, 1535 (11th Cir. 1997), *cert. granted*, 118 S. Ct. 438 (1997).

newly announced negligence standard perhaps falls somewhere in between these two broad categories.⁵² Irrespective of the standard applied, however, an important, if not the most crucial question in determining employer liability remains the question of *when* the employer knew of the harassment. In fact, determining when an employer had notice of the sexual harassment is unimportant only under the strict liability standard,⁵³ which the EEOC presently advocates⁵⁴ but which no circuit has adopted.⁵⁵

3. *Current approaches for determining when notice to an employee is notice to the employer*

Given the importance of the employer's knowledge, courts have necessarily fashioned rules to determine when an employee's knowledge of harassment can be imputed to the employer. With two exceptions,⁵⁶ all of the current approaches employed by the circuit courts can be placed in one of two camps. Some circuits say nondescriptly that "management level" employees must know of the harassment in order to impute knowledge to the employer,⁵⁷ while the other circuits

D.C. Circuit: employer liable pursuant to "common law principles of agency." Gary v. Long, 59 F.3d 1391, 1397 (D.C. Cir. 1995) (suggesting that employer will be liable if 1) supervisor/harasser acted within scope of employment, 2) harassment was intended, 3) employer was negligent (i.e., knew or should have known), and 4) victim relied on harasser's apparent authority or harasser was aided by the agency relationship (citing to AGENCY § 219 (2) (a)-(d))).

52. See *Young v. Bayer Corp.*, 123 F.3d 672, 674-75 (7th Cir. 1997).

53. The Supreme Court rejected a strict liability standard in this situation (employer liability for supervisor hostile environment sexual harassment). See *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986).

54. See 29 C.F.R. § 1604.11(c) (1997).

[A]n 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.

Id.

55. See *supra* note 51.

56. The two exceptions are *Young v. Bayer Corp.*, 123 F.3d 672 (7th Cir. 1997), and *Torres v. Pisano*, 116 F.3d 625 (2d Cir. 1997), *cert. denied*, 118 S. Ct. 563 (1997) (suggesting that an employer could be liable for notice gained through someone other than a managerial or higher-management level employee).

57. See *Andrade v. Mayfair Mgmt., Inc.*, 88 F.3d 258, 262 (4th Cir. 1996) (suggesting that somebody "responsible" must be informed of the harassment); *Nichols v. Frank*, 42 F.3d 503, 508 (9th Cir. 1994) (stating that the proper test is what

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say that “higher-management” must be on notice to impute knowledge to the employer.⁵⁸ *Young v. Bayer Corp.* is important because it expressly outlines a new approach, roughly suggested in *Torres v. Pisano*,⁵⁹ to determine when an employee’s knowledge of sexual harassment equals employer knowledge.

III. *YOUNG V. BAYER CORP.*A. *The Facts*

Yolanda Young worked for Bayer Corporation in a chemical manufacturing plant where her foreman sexually harassed her.⁶⁰ Over the course of three years, Young complained at least five times to her foreman’s immediate supervisor, who managed a department of sixty employees (including the plaintiff).⁶¹ The department head never reported the harassment to the personnel director pursuant to company policy, but did speak to the foreman about his behavior.⁶² In the face of continued harassment, Young complained to another supervisor, the department head’s subordinate, who relayed the complaints to the personnel director.⁶³ Although the personnel director took

“management-level employees knew”); *Kauffman v. Allied Signal, Inc.*, 970 F.2d 178, 185 (6th Cir. 1992) (finding employer liability based on negligence where the employer failed to act given knowledge of harassment by “management-level” employees); *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1486 (3d Cir. 1990) (declaring that plaintiff must prove “that management-level employees had actual or constructive knowledge about” the harassment); *Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1015 (8th Cir. 1988) (declaring that the “company will be liable if management-level employees knew”).

58. *See Reynolds v. CSX Transp., Inc.*, 115 F.3d 860, 866 (11th Cir. 1997) (plaintiff must show she complained to “higher management”); *Morrison v. Carleton Woolen Mills, Inc.*, 108 F.3d 429, 437 (1st Cir. 1997) (notice must be to someone “representing the institution” being sued); *Van Zant v. KLM Royal Dutch Airlines*, 80 F.3d 708, 715 (2d Cir. 1996) (notice must be to someone “at a sufficiently high level in the [company] hierarchy” (quoting *Kotcher v. Rosa & Sullivan Appliance Ctr., Inc.*, 957 F.2d 59, 64 (2d Cir. 1992))); *Waltman v. International Paper Co.*, 875 F.2d 468, 478 (5th Cir. 1989) (plaintiff must show she complained to “higher management”).

59. 116 F.3d 625 (2d Cir. 1997) (suggesting the approach adopted in *Young v. Bayer Corp.*), *cert. denied*, 118 S. Ct. 563 (1997).

60. *See Young v. Bayer Corp.*, 123 F.3d 672, 673 (7th Cir. 1997). The harassment included “offensive touchings,” “leers,” “lewd comments and solicitations.” *Id.*

61. *See id.*

62. *See id.*

63. *See id.*

some action, the harassment continued.⁶⁴ Subsequently, Young filed charges with the EEOC and took six months unpaid sick leave for harm allegedly caused by the harassment.⁶⁵

During the pretrial phase the district court judge addressed the question of Bayer's knowledge and held that, following the Second Circuit's rationale in *Van Zant*,⁶⁶ "notice to the department head was not notice to [Bayer]"⁶⁷ because the department head was not in upper-management and had no duty to investigate or handle sexual harassment charges. Accordingly, the district court granted summary judgment for Bayer⁶⁸ because it found that once the company had notice of the harassment, via the personnel director, it responded "promptly and responsibly."⁶⁹ Young appealed this ruling to the Seventh Circuit.⁷⁰

B. The Court's Reasoning

On appeal, Young argued that Bayer should be strictly liable for the harassment of its supervisors.⁷¹ Chief Judge Posner easily laid that argument aside based on the circuit's recent decision in *Jansen v. Packaging Corporation of America*,⁷² which held that negligence is the only applicable standard in hostile environment sexual harassment cases.⁷³ Accordingly, Bayer's liability depended on "whether the company was negligent in failing to act promptly on [the plaintiff's] complaints."⁷⁴ The answer to that inquiry hinged on "whether notice to the plaintiff's department head was notice to the company."⁷⁵

64. *See id.* The actions taken by the personnel director are not specified in the case. *See id.*

65. *See id.*

66. *See Van Zant v. KLM Royal Dutch Airlines*, 80 F.3d 708, 715 (2d Cir. 1996).

67. *Young*, 123 F.3d at 673.

68. *See id.* at 672.

69. *Id.* at 673.

70. *See id.* at 672.

71. *See id.* at 673.

72. 123 F.3d 490 (7th Cir. 1997) (en banc), *cert. granted in part Burlington Indus., Inc. v. Ellert*, No. 97-569, 1998 WL 21891 (U.S. Jan. 23, 1998).

73. *See id.* at 495.

74. *Young*, 123 F.3d at 673.

75. *Id.*

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The court began its analysis by noting the different standards (management or higher-management)⁷⁶ used in the circuits for determining the “important question” of the minimum level in a company hierarchy at which notice to an employee is notice to the employer.⁷⁷ Un satisfied with either of these standards, the court then laid out the standard suggested by the Second Circuit in *Torres v. Pisano*:⁷⁸ for employee knowledge to be imputed to the employer, knowledge of the sexual harassment must either

- (1) come to the attention of someone who (a) has under the terms of his employment, or (b) is reasonably believed to have, or (c) is reasonably charged by law with having, a duty to pass on the information to someone within the company who has the power to do something about it; or (2) come to the attention of such a someone.⁷⁹

The court approved of this approach for two reasons. First, the court noted that while most companies appoint a designated person to receive harassment charges, not all do, and not all facilitate access to the designated person.⁸⁰ But even in a case where the company has failed to appoint such a person, or failed to identify or facilitate access to such a person, this standard allows judicial inquiry into “who in the company the complainant *reasonably believed* was authorized to receive and forward (or respond to) a complaint of harassment.”⁸¹ Thus, an employer cannot immunize itself against knowing of harassment simply by having ineffective or poorly publicized complaint channels. If an employer attempts this, the court will then look at who the victim reasonably thought could help.⁸²

Second, the court preferred the practicality of this approach to asking (and having a bright line rule that decides) at what management level in the company an employee “is the corporation.”⁸³ Chief Judge Posner reasoned,

76. *See supra* notes 57-58 and accompanying text.

77. *See Young*, 123 F.3d at 672-73.

78. 116 F.3d 625 (2d Cir. 1997), *cert. denied*, 118 S. Ct. 563 (1997).

79. *Young*, 123 F.3d at 674 (citing *Torres*, 116 F.3d at 636-38).

80. *See id.*

81. *Id.*

82. *See id.* at 674-75.

83. *Id.* at 675.

Except in some closely held corporations, no single employee is the corporation (and anyway a corporation with only one employee would be exempt from Title VII . . .), so the approach we are criticizing is in quest of something that does not exist, making it “metaphysical” in a pejorative sense. What is possible to identify is who has the authority to terminate the harassment of which the plaintiff is complaining and did the plaintiff complain to someone who could reasonably be expected to refer the complaint up the ladder to the employee authorized to act on it.⁸⁴

In light of this standard, the court ruled that the department head’s knowledge of Young’s complaints was imputable to Bayer.⁸⁵ This result seemed particularly fair to the court because Bayer’s company policy authorized employees to inform department heads of harassment, so it must have expected that the department heads would take care of the problem themselves or relay the complaints to someone who could.⁸⁶

IV. ANALYSIS

In the context of Title VII litigation, two appropriate standards by which to ascertain the value of a rule are whether the rule helps achieve the results for which it is intended, and whether the rule can be applied without undue difficulty.⁸⁷ Part

84. *Id.* (citations omitted).

85. *See id.*

86. *See id.* Bayer argued “absurdly, in the teeth of its own policies as well as of good sense, that in a corporation the size of Bayer the head of a department of ‘only’ 60 workers is too far down the corporate ladder to count [as employer knowledge].” *Id.* Posner responded,

Most companies do not have as many as 60 workers. A company does not buy effective immunity from the duties that Title VII places on employers merely by growing to a point at which it has many layers of supervisory employees or by slotting in additional layers, so that whereas in a company with 60 employees notice to the president would clearly suffice as notice to the company, in a company of 20,000 employees notice to a supervisor of 300 employees might not be enough because there were several supervisory layers between himself and the president or board of directors. Very small companies are exempted from Title VII. This is the first time we’ve heard it argued that very large ones are, too.

Id. (citations omitted).

87. For example, see *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 531 (1985) where the Supreme Court overruled *National League of Cities*

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A will discuss how effectively the *Young* rule achieves the purposes of Title VII, especially as compared to the two predominate alternative approaches. Part B will discuss potential application difficulties that the *Young* rule poses.

A. *Achieving the Purposes of Title VII*

Congress' goal in passing Title VII of the Civil Rights Act "was to achieve equality in employment opportunities through the eradication of discriminatory barriers."⁸⁸ Congress chose employer liability as the means to achieve Title VII's eradication ends, reasoning that the fear of liability would deter Title VII violations.⁸⁹ Even though the amendments to Title VII allowing victim recovery of compensatory and punitive damages can be read to expand the statute's goals, the primary focus of Title VII remains the prevention of discriminatory employer behavior via the deterrent effect of employer liability.⁹⁰ Accordingly, this analysis of *Young v. Bayer Corp.* will focus on how effectively its approach is in deterring/preventing employer sex-based discrimination. This will be followed by an analysis of the *Young* rule's ability to promote the secondary objectives of Title VII: victim relief and private enforcement.⁹¹

v. Usery, 426 U.S. 833 (1976), because, in part, its test for finding 10th Amendment infringements was "unworkable."

88. *Jansen v. Packaging Corp. of Am.*, 123 F.3d 490, 495 (7th Cir. 1997), *cert. granted in part* *Burlington Indus., Inc. v. Ellerth*, No. 97-569, 1998 WL 21891 (U.S. Jan. 23, 1998).

89. *See id.* ("To further the goals of the Civil Rights Act . . . the imposition of liability under Title VII seeks to deter harassment . . .").

90. *See id.*; H.R. REP. NO. 102-40(I), at 64-70 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 602-08 (commenting on the merits of the 1991 Civil Rights Act (amending the 1964 act) which now allows plaintiffs to collect compensatory and punitive damages under Title VII sexual harassment actions, the House Report noted that "[t]he Committee also finds that permitting the recovery of such damages would enhance the effectiveness of Title VII by making victims of intentional discrimination whole for their losses, by *detering future acts of discrimination* and by encouraging private enforcement" (emphasis added)); *see also Jansen*, 123 F.3d at 510 (Posner, C.J., concurring in part and dissenting in part) ("The payment of damages in the usual case of sexual harassment is an instrument for deterring future incidents of such harassment rather than for restoring lost earnings or for financing expensive curative or rehabilitative measures."); 29 C.F.R. § 1604.11(f) (1997) ("Prevention is the best tool for the elimination of sexual harassment.").

91. *See supra* note 90.

1. How employer liability acts as a deterrent

As an initial matter, this Note must focus on how employer liability acts as a deterrent to Title VII violations. It may be best explained by a cost/benefit analysis. The employer's costs are the efforts and expenditures necessary to try to prevent sexual harassment by his employees. These efforts could include: employee training and/or seminars, creation and dissemination of a sexual harassment policy, employment of persons to effectuate the policy, and more careful hiring practices (to weed out potential harassers).⁹² The corresponding benefits would be reduced instances of liability (along with the subsequent litigation and damages costs) and, assuming reduced sexual harassment, a happier and more productive work force.⁹³ As long as the benefits outweigh the costs, the employer will be motivated to prevent sexual harassment.⁹⁴ This helps explain why strict liability is a less effective standard for deterring sexual harassment.⁹⁵ If employers were always liable for the sexual harassment committed by their employees, the costs of trying to eliminate all harassment would probably outweigh the benefits gained.⁹⁶ Employers would have little incentive to act preventively if their reasonable actions (costs) could no longer shield them from liability (benefits).⁹⁷ Instead, they might save the expenditures

92. The EEOC suggests the following deterrent-producing costs should be used: An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned.

29 C.F.R. § 1604.11(f) (1997).

93. See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993) ("A discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers.").

94. This is one of the reasons Congress passed the amendment allowing plaintiff recovery for compensatory and punitive damages. It effectively increases the employer's benefit for not being liable and so provides more incentive to prevent sexual harassment in the workplace. See H.R. REP. NO. 102-40(I) at 64-70.

95. See *Jansen*, 123 F.3d at 511 (Posner, C.J., concurring in part and dissenting in part).

96. See *id.*

97. See *id.*

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earmarked for prevention in order to pay the inevitable liability costs. Or worse, the employer could just keep the prevention money and pass the strict liability costs on to the consumers.⁹⁸

In sum, to the degree that Title VII works, it is because the deterrent-inducing benefits outweigh the required deterrent-producing costs. We now must ask, however, if the *Young* rule creates similar deterrents.

2. *Employer incentives to deter under Young v. Bayer Corp.*

The issue in *Young* is when employee notice of harassment equals employer notice.⁹⁹ Given the purpose of Title VII and the preceding cost/benefit analysis, it is easy to see why the *Young* court chose not to adopt either the “management” or “higher management” tests used in other circuits.¹⁰⁰ Under either of those standards, an astute employer could organize the company, or designate the employee titles, in such a way that very few employees count as management or higher-management.¹⁰¹ The fewer the number of employees that can receive knowledge as “the employer” the less likely it becomes that the employer will have notice of harassment. In this way, the employer could largely insulate himself¹⁰² from knowledge of any harassment and would thereby escape liability. The problem is obvious. While the management/higher-management rule offers the benefit of no liability, it does not require costs that effectively deter sexual harassment behavior.

The *Young* rule, on the other hand, effectively deters sexual harassment. The *Young* rule asks if the notice of harassment came to either a person who, pursuant to company policy, should act on the information, or to someone who the victim reasonably believed would act on the information.¹⁰³ So, in the case of the employer that tries to insulate himself from notice, the *Young* test then looks to whether an employee knew who

98. *See id.*

99. *See Young v. Bayer Corp.*, 123 F.3d 672, 672-73 (7th Cir. 1997).

100. *See supra* notes 57-58 and accompanying text.

101. *See supra* note 86. Note how Bayer was essentially trying to argue something akin to this.

102. I refer to the employer as male and the victim as female because, in the sexual harassment context, the harasser is generally male and the victim is generally female.

103. *See Young*, 123 F.3d at 674-75.

“could reasonably be expected to refer the complaint up the ladder to the employer authorized to act on it.”¹⁰⁴ Where such an employee knows of the harassment, that knowledge will be imputed to the employer for liability purposes.

Under the *Young* test, then, the employer cannot escape liability by eliminating or restricting avenues for receiving notice. The employer that tries to do so (by limiting the number of “management” employees or obfuscating lines of communication) will only find that the question of which of his employees’ knowledge can be imputed to him is taken out of his control and placed in the hands of the “reasonable” employee, as determined by the court. Knowing he cannot control, in the face of a poor (nonpreventive) harassment policy, the question of who imputes knowledge to the company necessitates that an employer become aware of sexual harassment via *any and all* reasonable avenues of complaint in order to respond appropriately and thereby escape liability.

In concrete terms, this means that under the *Young* rule employers have a strong incentive to maintain an unequivocal and effective sexual harassment reporting policy. In particular, the *Young* rule will motivate employers to make absolutely sure that every employee knows to whom they should direct sexual harassment complaints. In this way, so long as the employer-designated person is a reasonable choice, the employer maintains relative control over which employees can impute knowledge to him because it would necessarily be *unreasonable* for a harassment victim to complain to anyone else. Thus, the *Young* rule encourages creating unequivocal sexual harassment reporting policies and accessible, well-publicized avenues for complaint.

In sum, under either the management or higher-management standards, the employer can escape liability without enacting any effective harassment-detering policies. In contrast, the *Young* test better realizes the deterrent goals of Title VII because the employer is required to expend deterrent-producing costs (clear, accessible lines of complaint) in order to gain the benefits (no liability) sought.

104. *Id.* at 675.

3. *Does the Young approach promote private enforcement?*

One of the goals in amending Title VII to allow for compensatory and punitive damages was to foster private enforcement.¹⁰⁵ At this early stage, it is unclear whether the *Young* rule will significantly increase private enforcement. There are good arguments as to whether *Young* may or may not help in this regard. On the one hand, because *Young* potentially analyzes the question of employer knowledge through the perspective of the reasonable employee, the average employee may have more reason to believe that her complaint of harassment, reasonably placed, will be acted on, or else the employer could face liability. This belief that a complaint will be acted on may provide more incentive for victims, and witnesses, to come forward with complaints. On the other hand, the number of employees aware of the *Young* rule and the incentive it provides to privately enforce Title VII is probably not substantial. Hence, the numbers of employees the *Young* rule actually motivates to privately enforce Title VII is limited to the relatively few who are aware of its existence and ramifications. At the very least, while the *Young* rule may or may not increase private enforcement in practice, there does not appear to be any basis to assert that it will somehow decrease private enforcement below current levels. In this regard, the *Young* test will at least be no less successful in encouraging private enforcement than the management or higher-management tests currently used in other circuits.

Noting that the *Young* rule is theoretically better, and at least as good in practice, than current approaches does not end the analysis. Something also needs to be said concerning possible consequences should the *Young* rule end up actually increasing private enforcement. To the extent the *Young* rule may actually encourage private enforcement, the amount of sexual harassment litigation may also increase. Increased sexual harassment litigation has consequences that are worth mentioning because they need to be factored into any assessment of the *Young* rule.

105. See H.R. REP. NO. 102-40(I), at 64-70 (1991), reprinted in 1991 U.S.C.C.A.N. 549, 602-08.

On the positive consequence side, increased litigation “heightens the profile of an issue,” which may “make men more aware of conduct that women find offensive.”¹⁰⁶ This increased awareness could help “narrow the gender gap over where to draw the line between harmless interaction and offensive harassment.”¹⁰⁷ Fear of a lawsuit could “deter men from engaging in the kind of conduct that creates a hostile working environment for female colleagues and employees.”¹⁰⁸ Professionalism and mutual respect will likely increase in the work place.¹⁰⁹ More litigation might also decrease the stigma associated with harassment complaints and thereby encourage victims to come forward.¹¹⁰ Finally, increased litigation initially, may lead to decreased litigation overall in the future by encouraging companies to act preventively toward sexual harassment.¹¹¹

On the negative consequences side, increased litigation takes a toll on the courts and the litigants.¹¹² Furthermore,

[s]ome defendants will be unfairly slandered. Some suits will

be brought merely for their settlement value. The private lives and personal affairs of many citizens will be increasingly opened to public scrutiny. The discovery process in sexual harassment litigation will frequently entail inquiry into the private sexual lives of both the accused harasser and the plaintiff herself. Moreover, fear of liability on the part of employers might lead them to censor controversial comments on the part of employees, thus resulting in a net reduction in the right of free expression. Fear of litigation arising both from the workplace and from social interactions could well deepen feelings of distrust and anxiety between the sexes, and

106. J. Harvie Wilkinson III, *The Promise and Problems of Sexual Harassment Litigation*, 18 HARV. J.L. & PUB. POL'Y 475, 477 (1995) (noting the pros and cons that an increase in sexual harassment litigation will bring).

107. *Id.*

108. *Id.*

109. *See id.*

110. *See id.*

111. *See id.*

112. *See id.* at 476. Although the author is commenting on the problems of increased sexual harassment litigation due to the broad definition of sexual harassment, the negative consequences mentioned will attend any increase in sexual harassment litigation, no matter the cause.

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discourage what are nothing more than genuine gestures of friendship between men and women.¹¹³

While it may be too early to tell the true effect the *Young* rule will have, *Young* seems to provide incentives to privately enforce Title VII. These incentives, however, will be limited to the relative few who are even aware of the rule and its ramifications. To the extent *Young* fosters more litigation, it is important to keep the consequences of increased sexual harassment litigation in mind; it may be that the negative effects will outweigh the positive.

4. *Does the Young rule promote victim relief?*

Another purpose of Title VII employer liability is to provide for victim relief.¹¹⁴ Because the *Young* rule makes it easier for an employer to have notice of harassment, it increases the opportunities where an employer can be liable. Increased opportunities for finding notice of harassment may increase findings of employer liability, depending on how the employer responds to the notice, and so more victims than at present will have opportunities to obtain the necessary relief.

For example, consider the different outcomes that may have occurred in the cases mentioned in this Note if the courts would have applied the *Young* rule. First, consider the case of Yolanda Young herself. Initially she was denied relief because the district court ruled that the department head, who knew of the harassment, was not higher-management.¹¹⁵ But the Seventh Circuit applied the *Young* standard and found that the department head's knowledge was imputable to Bayer. The case was remanded to determine the adequacy of Bayer's response to the department head's knowledge.¹¹⁶ Clearly, Ms. Young has a better chance of getting relief under the *Young* standard as opposed to a higher-management standard.

Second, consider the case of Beth Ann Faragher and Nancy Ewanchew.¹¹⁷ Both were denied relief because they reported the

113. *Id.* (footnotes omitted).

114. *See* H.R. REP. NO. 102-40(I), at 64-70 (1991), *reprinted in*, 1991 U.S.C.C.A.N. 549, 602-08.

115. *See Young v. Bayer Corp.*, 123 F.3d 672, 673 (7th Cir. 1997).

116. *See id.* at 675.

117. *See Faragher v. City of Boca Raton*, 111 F.3d 1530 (11th Cir. 1997), *cert.*

harassment to their supervisor, Gordon, who was not in higher-management. The court, therefore, deemed the notice inadequate to impute knowledge.¹¹⁸ Had the court applied the *Young* test, however, it could have imputed knowledge to the city if the notice given Gordon would have satisfied the reasonableness prong of the *Young* standard (i.e., that Gordon was a reasonable choice for the victims to lodge their complaint with and expect him to handle the problem or relay it to someone else who could). Under the *Young* standard,¹¹⁹ notice to Gordon probably could have been imputed to the city and the court could have provided the necessary relief to the plaintiffs.

Finally, Karen Van Zant¹²⁰ could have obtained needed relief had the court used the *Young* standard. Rather than looking at the hierarchical position of the supervisor to whom Van Zant complained,¹²¹ a court applying *Young* would have considered the reasonableness of complaining to that supervisor and the expectation that the supervisor should ensure that proper persons became aware of the harassment. Given the reasonableness of complaining to a supervisor and the lack of responding remedial action taken by anyone, the employer could well have been held liable and Van Zant would have probably been afforded relief.

In sum, the *Young* rule better promotes victim relief than does the management/higher-management test. *Young* increases the opportunities wherein employee notice of sexual harassment becomes notice to the employer, which in turn increases the likelihood of employer liability. Increased instances of employer liability means more victims of sexual harassment will be afforded relief.

B. Some Application Concerns

Besides the ability to achieve the results for which a rule is intended, another measure of the worth of a rule is the relative ease of its application. No matter how appealing a rule is in

granted, 118 S. Ct. 438 (1997); see also *supra* notes 1-5, 7-9 and accompanying text.

118. See *Faragher*, 111 F.3d at 1538.

119. See *id.* at 1533.

120. See *Van Zant v. KLM Royal Dutch Airlines*, 80 F.3d 708 (2d Cir. 1996); see also *supra* notes 10-15 and accompanying text.

121. See *Van Zant*, 80 F.3d at 715-16.

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theory, if it proves too difficult to apply to real cases it loses its usefulness.¹²² The *Young* rule raises some potential application concerns, especially as compared to the management/higher-management rules used in the other circuits.

1. *Applying the management and higher-management rules*

The management and higher-management tests simply ask whether someone in management or higher-management in the company had notice of the sexual harassment.¹²³ If so, that knowledge is imputed to the employer.¹²⁴ The advantage of this test, in application, is that it is a relatively objective bright-line rule. Either an employee is part of management or he is not. Generally, it will not be a hard determination to make. The rule is relatively straightforward and easy for any court to apply to any sexual harassment claim.

2. *Applying the Young rule*

The *Young* rule asks whether notice was given to someone who had a duty, or, in the absence of anyone with a duty, to someone who was *reasonably* believed to have a duty, to inform the employer of the sexual harassment.¹²⁵ Determining whether the employee who receives initial notice of harassment has a duty to alleviate the problem or inform someone who can will likely be an easy inquiry. Usually, the court need not look beyond the company's sexual harassment policy. If there is no designated person, however, to whom the victim could complain, the court must decide whether the victim reasonably believed she complained to an appropriate employee. This reasonableness test is far more difficult for a court to apply than the management/higher-management tests because reasonableness questions are typically more context dependent. What is reasonable may depend, among other things, on the circumstances surrounding the alleged harassment and the adequacy of the employer's sexual harassment policy. In addition, and perhaps most difficult of all, the court must choose whether to use a reasonable man, reasonable person, or

122. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

123. See *supra* notes 57-58 and accompanying text.

124. See *id.*

125. See *Young v. Bayer Corp.*, 123 F.3d 672, 674-75 (7th Cir. 1997).

reasonable woman standard,¹²⁶ each one presenting difficult issues for a court to wade through.¹²⁷

The comparative increase in difficulty of applying the reasonableness prong of the *Young* rule as opposed to the management or higher-management rules, is offset, however, by the fact that it normally only comes in to play in the absence of an adequate company complaint procedure,¹²⁸ courts are already accustomed to dealing with a reasonableness standard in their courtrooms,¹²⁹ and the *Young* rule's superiority in achieving Title VII objectives.

V. CONCLUSION

Employer liability is the primary means used by Title VII to achieve its non-discrimination purpose. What the employer knew and when he knew it is often the key factor, in every circuit, for determining employer liability. So the question of

126. The Supreme Court has employed the reasonable person standard for sexual harassment cases. *See Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) ("Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview."). One commentator, however, suggests that judges do not follow the Supreme Court's gender-neutral lead in this area. Instead, judges likely consider the victim's gender to some degree. *See George Rutherglen, Sexual Harassment: Ideology or Law?*, 18 HARV. J.L. & PUB. POL'Y 487, 496-97 (1995); *see also* 29 C.F.R. § 1609.1(c) (1997) (stating that the reasonable person standard includes consideration of the alleged victim's gender).

The choice between using the reasonable man or person standard or using the reasonable woman standard could be critical to the outcome of the case. Given the dramatic differences in the reactions of men and women to potentially harassing behavior, *see Rutherglen, supra* at 497, it seems plausible that who a man thinks it would be reasonable to complain to after being harassed might also be different than who a female victim thinks it would be reasonable to complain to. For example, after being harassed by a man, a female may reasonably not wish to then complain to another male, whereas a male victim would not care. So under the *Young* rule, whether or not the person complained to was a reasonable choice could depend on whether reasonableness is judged from a male or female perspective.

127. *See generally* Robert S. Adler and Ellen R. Peirce, *The Legal, Ethical, and Social Implications of the "Reasonable Woman" Standard in Sexual Harassment Cases*, 61 FORDHAM L. REV. 773 (1993) (noting the development of the reasonable woman standard as an alternative to the reasonable man and reasonable person standards. While the authors focus on the concerns raised by implementation of a reasonable woman standard, problems and concerns surrounding the reasonable man and reasonable person standards are necessarily discussed).

128. *See Young*, 123 F.3d at 674-75.

129. *See JOHN W. WADE ET AL., PROSSER, WADE, AND SCHWARTZ'S CASES AND MATERIALS ON TORTS*, 143-69 (9th ed. 1994) (giving many examples of how the reasonableness standard is used in tort law).

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when notice to an employee of sexual harassment constitutes notice to the employer is crucial. Despite the nationwide importance of the issue it has received little attention from commentators. This Note brought its importance to the forefront while discussing the current approaches to the question.

The approach taken in *Young v. Bayer Corp.*, wherein the court asks if the knowledge of harassment has come to the knowledge of one who has, or is reasonably believed to have, or is charged by law with having a duty to inform the employer is a well-reasoned approach to the problem. The *Young* approach is not only more realistic than the does-management/higher-management-know approach used in other circuits, it also encourages the employer to expend costs that effectively deter harassment in order to gain the benefit of no liability. The *Young* approach also better promotes private enforcement of Title VII and better facilitates victim relief than does either the management or higher-management tests. Although the *Young* rule will be harder to apply than the more objective management/higher-management standard, it should not prove impractical. Besides, the increased application difficulty is more than offset by *Young*'s ability to better achieve Title VII objectives.

For these reasons, it is imperative that either the Supreme Court¹³⁰ or every circuit¹³¹ independently adopt the *Young* rule

130. Since the writing of this Note, the Supreme Court granted certiorari to *Faragher v. City of Boca Raton*, 111 F.3d 1530 (11th Cir. 1997), *cert. granted*, 118 S. Ct. 438 (1997). This case provides the Court an opportunity to implement the *Young* standard nationwide. One of four of the questions presented asks: "II. May a fact-finder infer notice to an employer of hostile-environment sexual harassment: . . . C. Through actual notice to an intermediate supervisor, who reports it no further?" Questions Presented, October Term 1997, p. 23, available from the Supreme Court of the United States, Washington, D.C. Whether or not the Supreme Court will actually rule on this issue is unknown. One can only wait and see.

131. Since the *Young* decision, it has been cited twice outside the Seventh Circuit. But neither case cites *Young* for what it is worth. Both cases instead cite it, one perhaps incorrectly, in support of propositions that are fairly standard in every circuit. *See Bonenberger v. Plymouth Township*, No. 97-1047, 1997 WL 772842, at n.7 (3d Cir. Dec. 17, 1997) (citing *Young* for the proposition that when two employees charged with the duty to investigate sexual harassment claims fail to do so, employer liability will exist); *Deters v. Equifax Credit Info. Serv., Inc.*, No. 96-2212-JWL, 1997 WL 688744, at *4 (D. Kan. Oct. 3, 1997) (citing *Young* in secondary support of the court's conclusion that someone was a "managerial agent" of the employer because he had authority over hiring and firing).

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for determining when notice to an employee of sexual harassment is notice to the employer. Until that happens, the goals of Title VII will remain unaccomplished throughout much of the country.

Stanford Edward Purser