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NOTE

INTERNET PORNOGRAPHY IN THE LIBRARY: CAN THE PUBLIC LIBRARY EMPLOYER BE LIABLE FOR THIRD-PARTY SEXUAL HARASSMENT WHEN A CLIENT DISPLAYS INTERNET PORNOGRAPHY TO STAFF?

INTRODUCTION

On its website, the American Civil Liberties Union ("ACLU") provides answers to questions interested parties might pose regarding public library attempts to restrict access to Internet materials of a sexual nature, including the following:

Q: Would libraries that do not use blocking software be liable for sexual harassment in the library?

A: No. Workplace sexual harassment laws apply only to employees, not to patrons. The remote possibility that a library employee might inadvertently view an objectionable site does not constitute sexual harassment under current law.¹

The ACLU's emphatic assertion that a public library could not currently be subjected to liability based on staff exposure to Internet sexual content is likely incorrect. Stated more precisely, it is true under current law that the library may not be subject to liability only because no case has yet been filed.

¹ American Civil Liberties Union, American Civil Liberties Union Freedom Network, *Censorship in a Box* (visited Jan. 10, 1999) <<http://www.aclu.org/issues/cyber/box/html>> [hereinafter *Censorship in a Box*].

Public library staff exposure to Internet pornography² is not all inadvertent or remote. Evidence indicates that public library staff are being deliberately exposed to sexually graphic Internet images by some of their clients and that library policy, which often requires staff to assist clients with use of the Internet, is resulting in exposures to sexually graphic images.³ Current sexual harassment law authorizes suits brought by workers in customer service environments for harassing behavior by a customer toward a worker,⁴ for employer policies that

² Courts and legal commentators often refer to sexually explicit materials as "pornography" without any reference to a legal definition of that term. See, e.g., *Reno v. ACLU*, 117 S. Ct. 2329, 2337 (1997); Note, *Pornography, Equality, and a Discrimination-Free Workplace: A Comparative Perspective*, 106 HARV. L. REV. 1075, 1075 (1993) [hereinafter *Discrimination-Free Workplace*]. The term is likewise meant to be merely descriptive in this Note.

³ See, e.g., Filtering Facts, *Reports of Pornography in Libraries* (visited Dec. 20, 1998) <<http://www.filteringfacts.org.kidlib.html>> [hereinafter *Reports of Pornography*] (detailing instance where client repeatedly beckoned staff members for assistance with the Internet and left pornographic images on screen when staff approached, despite repeated requests to remove such images prior to working with staff; instances where clients repeatedly sent pornographic print requests to central printers administered by staff; and instances where clients repeatedly displayed Internet pornography on terminals visible to staff desks when other terminals were available). For a complete discussion of such evidence, see *infra* Part II. The Filtering Facts website ended its monitoring in late 1999 and now is maintained only as an archive. See *Reports of Pornography*, *supra*. While this Note centers on liability due to client display of online sexual content, it is likely that, for the same reasons, client behavior such as engaging a staff member in discussion of pornography would be actionable, perhaps even more so since it falls more under the rubric of traditional harassment behaviors.

⁴ Courts have recognized the viability of so-called third-party sexual harassment claims in at least sixteen cases. Recently, in *Lockard v. Pizza Hut, Inc.*, 162 F.3d 1062, 1073 (10th Cir. 1998), the Court of Appeals for the Tenth Circuit joined its "sister circuits," the First, Eighth, Ninth, and Eleventh Circuits, when it formally recognized such claims. In *Lockard*, the court of appeals held that a Pizza Hut waitress had established a hostile work environment claim against her franchise employer based on two customers "grabbing" her hair and breast "while she attempted to take their orders and serve their . . . beer." *Id.* at 1072, 1075. The waitress had previously asked a manager that she not serve these customers based on past rude behavior, but was forced by the manager to wait on them anyway, resulting in the "sexual assault." See *id.* at 1074-75. The court of appeals found that the manager had defied Pizza Hut's own policy manual guidelines on harassment by not asking the customers to desist from aggressive behavior or asking them to leave prior to forcing the waitress to serve them. See *id.* The term "third-party" in the context of a sexual harassment claim is a term of art which identifies claims brought against an employer for liability based on a worker being harassed by a customer or client, rather than a co-worker or supervisor. This is not to be confused with the use of that term in other areas of the law where "third-party" identifies a claim brought by an additional party other than a victim.

See, e.g., Amy Mathews, Comment, *The Sexual Harassment Revolution*, 65 UMKC L. REV. 977, 990 (1997) (identifying claims involving customer harassment of a worker as "third-party"); Karen Kaplowitz & Donald P. Harris, *Brief: Third Party Sexual Harassment: Duties and Liabilities of Employers*, 26-SPG BRIEF *32, *36 (1997), available in Westlaw.

For other cases in which courts have recognized this claim, see *Coates v. Sundor Brands, Inc.*, 164 F.3d 1361, 1366 (11th Cir. 1999) ("When an employee's ability to perform his or her job is compromised by . . . sexual harassment and the employer knows it, it is the employer that has the ability, and . . . the responsibility, to address the problem, whether the harasser is a supervisor, a co-worker, a client, or a subordinate." (emphasis added)); *Folkerson v. Circus Enterprise, Inc.*, 107 F.3d 754 (9th Cir. 1997) (recognizing third-party harassment but granting summary judgment to casino employer where mime employed as living doll failed to present any facts demonstrating that the casino ratified or acquiesced in harassment where a casino patron touched the mime as she was performing); *Crist v. Focus Homes, Inc.*, 122 F.3d 1107 (8th Cir. 1997) (reversing summary judgment in favor of employees subjected to inappropriate sexual conduct by residents of program for developmentally disabled where they worked); *Trent v. Valley Electric Ass'n*, 41 F.3d 524 (9th Cir. 1994) (recognizing employee's prima facie case of Title VII sex discrimination where she was subjected to sexually offensive remarks at a seminar employer required her to attend); *Ligenza v. Genesis Health Ventures*, 995 F. Supp. 226, 230-32 (D. Mass. 1998) (recognizing that under "limited" circumstances "employers can be held liable for sexually charged actions of non-employees toward employees," but granting summary judgment to nursing facility employer where patient care employee failed to apprise hospital of offensiveness of 69 year-old patient "looking up her blouse," thus failing to establish that hospital had requisite knowledge, despite widespread awareness in facility that patient routinely made inappropriate sexual comments to workers and would lie in his bed naked); *Mart v. Dr Pepper Co.*, 923 F. Supp. 1380 (D. Kan. 1996) (granting summary judgment to employer defendant only because sales manager employee's assertion that she had been subjected to vulgar language by manager of a soft drink bottling company client failed to state a sufficiently severe and pervasive third-party claim); *Hallberg v. Eat'n Park*, No. 94-1888, 1996 WL 182212 (W.D. Pa. Feb. 28, 1996) (granting summary judgment to restaurant employer because waitress's assertion of foul-mouthed and crude behavior by customer failed to state conduct directed toward her with enough specificity to establish sufficient severity); *Menchaca v. Rose Records, Inc.*, No. 94 C 1376, 1995 WL 151847 (N.D. Ill. Apr. 3, 1995) (denying summary judgment where record store clerk suffered groping and lewd comments by regular customer); *Hernandez v. Miranda Velez*, No. 92-2701, 1994 WL 394855 (D.P.R. July 20, 1994) (denying summary judgment to store employer where customer made sexual comments and tried to "grab" store cashier); *Otis v. Wyse*, No. 93-2349, 1994 WL 566943 (D. Kan. Aug. 24, 1994) (denying summary judgment to hospital employer because a doctor's status as an independent contractor was immaterial pursuant to the EEOC guidelines establishing third-party harassment where the doctor left sex-related articles on hospital employee nurse's desk, requested that she obtain sexual histories of patients, and left a lotion-filled condom on her desk); *Powell v. Las Vegas Hilton Corp.*, 841 F. Supp. 1024, 1026 (D. Nev. 1992) (denying summary judgment to hotel employer where customers told female casino worker she had "great tits" and a "nice body" and stared at her); *Magnuson v. Peak Technical Services*, 808 F. Supp. 500 (E.D. Va. 1992) (denying summary judgment where employee suffered advances, lewd

result in a worker being subjected to harassing conduct,⁵ and for a work environment in which a worker is exposed to "dirty pictures."⁶ Thus, under current law, public library workers⁷ may be able to prevail on claims against their employers that their exposure to Internet pornography by clients subjects them to a hostile work environment.

Since public libraries recently began providing access to the Internet,⁸ they have been embroiled in legal controversy

comments, and requests to check into a hotel with her from client company's general manager); *Sparks v. Regional Medical Center Board*, 792 F. Supp. 735 (N.D. Ala. 1992) (holding that the issue of whether an employer could be liable for sexually harassing conduct due to conduct by a subcontractor against an employee irrelevant because, under EEOC Guidelines, an employer could be responsible for acts by third parties in sexual harassment cases); *EEOC v. Newtown Inn Associates*, 647 F. Supp. 957, 958 (E.D. Va. 1986) (recognizing Title VII violation where employer required waitresses "to project an air of sexual availability to customers" by wearing provocative outfits and flirting and dancing with customers resulting in sexual proposals and verbal and physical abuse by customers and where employer reassigned complaining waitresses to less desirable shifts); and *EEOC v. Sage Realty Corp.*, 507 F. Supp. 599 (S.D.N.Y. 1981) (awarding back pay to lobby attendant employee for wrongful discharge where employer required her to wear a revealing outfit which prompted lewd comments and sexual propositions by passersby).

⁵ See Kelly Ann Cahill, *Hooters: Should There Be an Assumption of Risk Defense to Some Hostile Work Environment Sexual Harassment Claims?*, 48 VAND. L. REV. 1107, 1112-14 (1995) (discussing imposition of liability on employers for dress code policies); Mathews, *supra* note 4, at 992-93 (discussing employer liability based on "job requirements," including employer dress codes commonly implicated in third-party cases because they "draw physical and verbal sexual harassment" from third parties); Sandra L. Snaden, Note, *Baring It All at the Workplace: Who Bears the Responsibility?*, 28 CONN. L. REV. 1225, 1237-48 (1996) (discussing courts' imposition of liability based on employer dress codes, appearance policies, and requirement that workers act with an air of sexuality toward customers).

⁶ See *infra* notes 137-138, 140-142 and accompanying text.

⁷ This Note discusses the viability of a sexual harassment claim due to staff exposure to Internet pornography only in the context of the public library environment. Although private library workers would likely enjoy the same rights to a claim as workers in public libraries, the specific evidence of an Internet harassment problem is largely emerging from public library discussions of Internet access in their environments. Also, public libraries present slightly different questions of claim viability due to their stronger First Amendment responsibilities. A discussion of private library worker rights and responsibilities is therefore beyond the scope of this Note.

⁸ As late as 1995, public access to Internet in public libraries was still so sparse that the "few libraries" offering public access "received flattering, gee-whiz press coverage." Karen Hyman, *Internet Policies: Managing in the Real World*, AM. LIBR., Nov. 1997, at 60. By 1999, out of 8,921 total public libraries in the United States, "60.4% offer Internet access to the public, up from 27.8% in 1996." American Library Association, *LARC Fact Sheet—How Many Libraries Are on the*

surrounding public access provided to sexually explicit images online, especially with respect to minor access.⁹ As yet, the bulk of this controversy concerns the exposure of the *public* to such images and has resulted in legislative¹⁰ and judicial attempts by private citizens or groups¹¹ to impose access restric-

Internet? (visited Jan. 5, 1999) <<http://www.ala.org/library/fact26.html>>. Out of the 468 public libraries serving populations of 100,000 or more, 75.3% offer Internet access "directly to patrons . . ." *Id.*

⁹ See Scott E. Uhler & Philippe R. Weiss, *Liability Issues and the Internet*, ILL. LIBR., Summer 1996, at 117. The authors explain:

The Internet and the potential dangers it poses to minors, are currently at the center of intense ongoing media and judicial attention. The Internet is a vast resource . . . including materials many may consider inappropriate. Such materials include pornography, obscenity, sexually explicit literature and graphic or sexually explicit news groups.

Public and private libraries are advised to remain current on the latest state and federal statutory and case laws affecting their ability to offer patrons and employees Internet access and services.

Id.

¹⁰ In 1996, Congress passed the Communications Decency Act ("CDA") which contained a provision subjecting public libraries to liability for providing access to sexually explicit Internet content to minors. See 47 U.S.C. § 223(d) (Supp. 1997). In 1997, in response to a challenge by the ACLU, the Supreme Court invalidated that provision on the grounds that it was "facially overbroad." *Reno v. ACLU*, 117 S. Ct. 2329 (1997).

States also have attempted, and sometimes succeeded, in passing legislation similar to the CDA. See Uhler & Weiss, *supra* note 9, at 117 (reporting that "many states have successfully passed laws like the CDA," for example that of Illinois, that "criminalizes the . . . delivery of obscene writings, pictures and records," thus subjecting libraries to liability for failure to take "reasonable steps to protect [library] computer system[s] from unauthorized obscenity or child pornography"). New York passed one such statute modeled on the CDA, but it was subsequently invalidated on the grounds that it violated the Commerce Clause of the United States Constitution. See *American Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 183 (S.D.N.Y. 1997).

¹¹ For example, at least one library has been unsuccessfully sued by a parent who opposes libraries allowing unrestrained child access to Internet sexual content after her child downloaded some pornography at a local California branch. See Beverly Goldberg, *Censorship Watch: Court Dismisses Livermore Suit*, AM. LIBR., Dec. 1, 1998, at 17. The plaintiff in that case has since filed an appeal. See *News Briefs for March 22, 1999: Livermore Plaintiffs File Appeal in Mandated Filtering Quest*, AM. LIBR. ONLINE 3 (Mar. 22, 1999) <<http://www.ala.org/alonline/news/1999/990322.html>> [hereinafter *March 22, 1999 News Briefs*]. In response, on October 18, 1999, the City of Livermore and the ACLU filed amicus curiae briefs. See *News Briefs for October 25, 1999: City, ACLU File Appeal Briefs in Livermore Filtering Case*, AM. LIBR. ONLINE 3-4 (Oct. 25, 1999) <<http://www.ala.org/alonline/news/1999/991025.html>>. The Livermore brief argues in support of the trial court's finding that section 230 of the CDA preempts the state law on which the plaintiff bases her argument in support of filtering. See *id.* The lawyer for the plaintiff in *Kathleen R. v. City of Livermore*, No. 15266-4 (Cal. Super. Ct., filed

tions. However, public libraries now need to consider how they might protect their *staff* from exposure to sexually explicit Internet images since, although no claims have yet been filed, there is evidence of such staff harassment by clients.¹² Library staff, like workers in other customer service industries who are subjected to behaviors of a sexual nature by clients while at work,¹³ should now be protected by a cause of action against their library employers for third-party sexual harassment when clients create a hostile work environment¹⁴ by exposing workers to sexually explicit Internet images.

Although library staff should be able to maintain a cause of action for third-party sexual harassment to protect themselves from exposure to Internet pornography by clients, they may face obstacles to establishing such a claim, and library employers may raise several valid defenses. Some of these obstacles are common to all hostile work environment claims, such as the difficulty of showing that harassment based on exposure to sexually explicit images is sufficiently severe in and of itself to support a claim.¹⁵ Some obstacles are common

July 23, 1997), Michael Millen, believes, however, that federal and state bills requiring libraries to use filtering devices that are currently under consideration will remedy his plaintiff's grievance before the appeal is decided. *See March 22, 1999 News Briefs, supra*. Additionally, a Virginia public library system has been successfully challenged by the ACLU and legally enjoined from enforcing its Internet use policy that allowed for software filtering devices to screen out sexual content from public Internet access. *See Mainstream Loudoun v. Board of Trustees*, 24 F. Supp. 2d 552 (E.D. Va. 1998). The ACLU has publicly vowed to continue to challenge any library systems which include filtering as part of their public Internet use policies and plans to file a "barrage" of suits in 1999 toward that end. Jim Nichols, *ACLU to Sue Libraries Over Net Access*, THE PLAIN DEALER, Dec. 10, 1998, at 1B.

¹² *See Reports of Pornography, supra* note 3. For a complete discussion of the staff harassment problem, see *infra* Part II.

¹³ Some of the other customer service environments in which claims have been recognized for sexual harassment by clients include restaurants, retail stores, health services, manufacturer sales, and casinos. *See supra* note 4.

¹⁴ Theoretically, it would be possible for a claimant to ground a third-party claim on *quid pro quo* harassment where the harassment was accompanied by some sort of job action by the employer, but no such claim has yet been reported. *See Mathews, supra* note 4, at 990.

¹⁵ Showing the severity and pervasiveness of the harassing conduct is one of the required elements of a hostile work environment claim. *See Faragher v. City of Boca Raton*, 118 S. Ct. 2275, 2283-84 (1998). Although a few courts have recognized that a hostile work environment claim could be based on pornographic display alone, courts historically have not acknowledged this. *See Discrimination-Free Workplace, supra* note 2, at 1076 (reporting that most courts have required other

to third-party claims. For example, third-party claimants face the difficulty of showing that an employer has not taken sufficient remedial action against a harasser where the employer maintains relatively little control over a non-employee's activities.¹⁶ Also, a client service employer may attempt to assert an assumption of risk defense where an employee has knowingly and voluntarily assumed a sexual component as some part of a product or service offered to clients.¹⁷ Finally, some of these obstacles arise in the peculiar context of the public library environment, such as the possibility that a public library employer may claim that its responsibilities to take remedial action in the face of harassment is constrained by overriding First Amendment responsibilities to clients' rights of access to both Internet materials and to the public library building itself.¹⁸

types of harassing conduct in addition to image exposure to sustain claims).

¹⁶ See David S. Warner, Note, *Third-Party Sexual Harassment in the Workplace: An Examination of Client Control*, 12 HOFSTRA LAB. L.J. 361, 385 (1995) (reporting that "appropriate remedial measures in ordinary hostile environment cases may not necessarily be feasible in third-party contexts" where employers have limited control over non-employees and risk "alienat[ing]" a client by "foolhardy action").

¹⁷ Hooters restaurant, which uses a sexually charged atmosphere as its principal customer draw, raised this defense when it was sued by a Minneapolis waitress because of customer harassment, and "both sides in their initial salvos after complaints were filed . . . bandied about the assumption of risk defense." Jeannie Sclafani Rhee, *Redressing for Success: The Liability of Hooters Restaurant for Customer Harassment of Waitresses*, 20 HARV. WOMEN'S L.J. 163, 192 (1998). Although this Hooters case was settled without a court determination as to the viability of the defense, "[d]icta in certain [sexual harassment] cases suggest that some courts are also receptive to this position." *Id.* At least one commentator has advocated at least limited viability of an assumption of risk defense in third-party claims since the Hooters case. See Cahill, *supra* note 5, at 1137 (advocating that this defense should be available where "sex appeal is a substantial part of the product or service an employer provides to its customers").

¹⁸ Four recent decisions have limited actions taken to protect constituents, including library staff or clients, from exposure to Internet sexual content and its residual effects; this suggests that courts value rights of access to such material over the safety and security of staff or other clients. See *Reno v. ACLU*, 117 S. Ct. 2329 (1997) (invalidating the CDA which would have exposed libraries to liability for exposures of minors to sexual content and which would have forced most libraries to enforce some restrictions on access); *Mainstream Loudoun v. Board of Trustees*, 24 F. Supp. 2d 552 (E.D. Va. 1998) (invalidating a library filtering policy which sought to prevent sexual harassment of both staff and other clients by clients); *American Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 160 (S.D.N.Y. 1997) (invalidating state statute with similar goals to the CDA); Goldberg, *supra* note 11, at 17 (reporting California superior court dismissal of *Kathleen R. v. City of*

It is the position of this Note that, despite such proof obstacles and employer defenses, a third-party claim brought by library staff under these conditions is viable. Part I of this Note will define the claim of third-party sexual harassment as it has been defined generally in Equal Employment Opportunity Commission ("EEOC") Guidelines¹⁹ and in the case law. Part II will discuss evidence of the growing concern with library staff harassment that arises from client use of Internet pornography. Part III will discuss specific issues raised by fitting a third-party library staff claim involving Internet pornography display into the current third-party hostile environment claim model, including possible employer defenses. Part IV discusses measures library employers might take to reduce their risk of liability. This Note concludes that library staff who claim third-party sexual harassment by clients who expose them to Internet sexual content will face many obstacles, as do any other claimants of either co-worker or third-party harassment. However, these workers should have the same right to a safe, non-hostile work environment under Title VII of the Civil Rights Act of 1964 as do all other workers. None of the obstacles or employer defenses discussed in this Note, including a powerful preference for First Amendment protection of a client's right to view sexual content at the library, presents a legal death-knell to such a claim. Library clients, at least adults, have an unassailable right to view Internet sexual content in the public library.²⁰ This does not mean they have a right to couple their viewing with deliberate display of that material to staff. Library staff should not be doubly discriminated against by both clients and the courts because of the peculiarities of their working environment.

Livermore, No. 15266-4 (Cal. Super. Ct., filed July 17, 1997), which sought to impose liability on a public library for its failure to use filtering software to keep Internet pornography from the minor plaintiff).

¹⁹ See 29 C.F.R. § 1604.11(e) (1980) (recognizing the potential for viable third-party claims).

²⁰ See *Reno*, 117 S. Ct. at 2329.

I. THIRD-PARTY SEXUAL HARASSMENT: HISTORY AND ANATOMY OF THE CLAIM

Library staff claimants should encounter no problems filing claims based on client harassment because such claims have been recognized for nearly two decades. The EEOC has formally recognized employer liability for sexual harassment by non-employees as a violation of Title VII since 1980.²¹ In the Guidelines issued to assist courts in adjudicating sexual harassment cases,²² the EEOC provided that: "An employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action."²³ Third-party sexual harassment has been recognized by courts since at least 1981.²⁴ While subsequent complaints of third-party sexual harassment may be voluminous,²⁵ thus far, there have been few cases actually leading to litigation.²⁶ However, there are

²¹ See 29 C.F.R. § 1604.11(e).

²² See *Powell v. Las Vegas Hilton Corp.*, 841 F. Supp. 1024, 1028 (D. Nev. 1992) ("The U.S. Supreme Court has accepted the[se] E.E.O.C. Guidelines for guidance in examining hostile environment claims of sexual harassment.").

²³ 29 C.F.R. § 1604.11(e).

²⁴ See *EEOC v. Sage Realty Corp.*, 507 F. Supp. 599, 599 (S.D.N.Y. 1991) (holding employer liable for firing lobby attendant who refused to wear provocative outfit that resulted in sexual comments from passersby and propositions). See also Mark Hansen, *The Next Litigation Frontier? Claims Against Employers for Third-Party Harassment on the Rise*, 79-SEP A.B.A. J. 26, 26 (1993) (describing *Sage Realty* as "[o]ne of the first" third-party cases).

²⁵ See Hansen, *supra* note 24, at 26 (citing a New York City lawyer who handles discrimination cases exclusively who noted that complaints of third-party harassment "cross her desk several times a week").

²⁶ See *supra* note 4; see also Hansen, *supra* note 24, at 26 (reporting New York discrimination lawyer Judith Vladeck's assertion that "complaints of third-party harassment cross her desk several times a week" and lawyer Robert Fitzpatrick's assertion that "most" third-party claims are settled prior to litigation); Mathews, *supra* note 4, at 989 ("Few cases have been brought on the basis of third-party harassment. However, human resource experts predict that companies will see an increase in [third-party] sexual harassment complaints due to publicity of third party sexual harassment liability in the past few years.").

Additionally, in the wake of the Tenth Circuit's ruling in *Lockard v. Pizza Hut, Inc.*, 162 F.3d 1062 (10th Cir. 1998), there has been widespread publicity of recognition of claims based on customer harassment not only in the legal press, but even in the general business press. See, e.g., Jana Howard Carey, *Sexual Harassment Update*, 606 PLILIT 7, 78-80 (1999); *Court Decisions*, NAT'L L.J., Jan.

indications that claims may be on the rise,²⁷ and "courts have duly noted that employers could face such liability for third-party harassment, repeating the warning in case after case."²⁸ Consequently, public library employers, like all employers "who fail to protect their employees from being harassed by a nonemployee" can expect to "do so at their own peril."²⁹

11, 1999, at B19; Barbara Harris, *Sexual Harassment at Work: "Just a Pat on the Butt!"*, 48-OCT R.I. B.J. 5, 36, 36 n.62 (1999); D. Diane Hatch & James E. Hall, *Employer Liable for Customer Harassment of Employee*, PERSONNEL J., Mar. 1, 1999, at 108; Alan R. Kabat & Debra S. Katz, *Racial and Sexual Harassment Employment Law*, SE05 ALI-ABA 547, 601 (1999); Stephanie Levy, *Sexual Harassment by Customers Is Actionable Under Title VII*, TRIAL MAG., Apr. 1, 1999, available in 1999 WL 17784095; R. Bruce McAfee et al., *Workplace Harassment: Employees vs. Customers*, BUS. HORIZONS (Mar./Apr. 1999); Phil Milford, *Franchisee, Not Pizza Hut Inc. Held Liable for Sex Harassment*, LEGAL INTELLIGENCER, Dec. 21, 1998, at 4; Carole O'Blenes, *Harassment Grows More COMPLEX*, MGMT. REV., June 1, 1999, at 49; Kristine W. Samuels & Sandra Leung, *Harassment-Proofed Is Liability Proofed*, NAT'L L.J., Nov. 1, 1999, at B9; Diana P. Scott, *Latest Developments in Sexual Discrimination and Harassment*, SE17-ALI-ABA 77, 106 (1999); Beverly Bryan Swallows, *Reducing Legal Risk and Avoiding Employment Discrimination Claims*, 19-SUM FRANCHISE L.J. 9, at *9-*10 (Summer 1999), available in Westlaw. Consequently, since Lockard, the right to third-party claims under Title VII may have finally catapulted into the general conscience of lawyers, workers and employers, which may result in more claims.

²⁷ See Robert J. Aalberts & Lorne H. Seidman, *Sexual Harassment by Clients, Customers, and Suppliers: How Employers Should Handle an Emerging Legal Problem*, 1994 EMPLOYEE REL. L.J., June 1, 1994, at *1, available in 1994 WL 2809930 (describing third-party harassment as an emerging area of liability and quoting a 1992 Wall Street Journal article that "[e]xperts say that such third-party harassment is rampant"); Francis Achampong, *Employer Liability for Hostile Environment Sexual Harassment Based on a Single Occurrence*, 12 HOFSTRA LAB. L.J. 187, 188-91 (1995) [hereinafter Achampong, *Single Occurrence*] (describing how potential employer liability for sexual harassment based on a single occurrence is exacerbated, in part, by the "increasing number of third party harassment claims"); Hansen, *supra* note 24, at 26 ("[L]egal experts, employment lawyers and corporate consultants say such third-party complaints are on the rise.").

²⁸ Rhee, *supra* note 17, at 173 (citing three circuit court cases and ten district court cases which, between 1985 and 1992, recognized either potential or actual employer liability for third-party harassment); see also Lockard v. Pizza Hut, Inc., 162 F.3d 1062, 1073-1074 (10th Cir. 1998) (discussing the holdings of other third-party cases, *Rodriguez*, *Crist*, *Folkerson*, *Menchaca*, *Powell*, and *Sage*, and joining its "sister circuits" in recognizing third-party claims because employers should be liable for harassment "regardless of whether the environment was created by a co-employee or a non-employee, since the employer ultimately controls the conditions of the work environment").

²⁹ Hansen, *supra* note 24, at 23.

A. The Hostile Work Environment

While there are two recognized theories of sexual harassment,³⁰ quid pro quo³¹ and hostile work environment,³² third-party claims will most likely be filed under the hostile environment theory. However, the potential for a quid pro quo claim still exists,³³ especially since the Supreme Court recent-

³⁰ The EEOC Guidelines on "Discrimination Because of Sex" outline the two theories of employer liability for sexual harassment as follows:

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, or (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.

29 C.F.R. § 1604.11(a)(1)-(3) (1980); see also Achampong, *Single Occurrence*, *supra* note 27, at 189; ("The [EEOC] Guidelines recognize two forms of sexual harassment: 'quid pro quo' . . . and 'hostile environment' . . .").

³¹ Quid pro quo harassment occurs where an employee's work benefits, pay, promotions, bonuses, etc., are denied or granted based on an employee submitting to a superior's request for sexual favors. See *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986) (affirming both quid pro quo and hostile work environment harassment as violations of Title VII based on sex discrimination); see also 29 C.F.R. § 1604.11(a)(1)-(2); Achampong, *Single Occurrence*, *supra* note 27, at 188-91; Ann C. Juliano, Note, *Did She Ask for It?: The "Unwelcome" Requirement in Sexual Harassment Cases*, 77 CORNELL L. REV. 1558, 1565-66 (1994) ("Quid pro quo harassment involves a grant or denial of economic benefits following the employee's response to 'unwelcome sexual advances, requests for sexual favors, [or] other verbal or physical conduct of a sexual nature.' A clear example . . . amounts to 'sleep with me or I'll fire you.'").

³² See 29 C.F.R. § 1604.11(a)(3).

³³ Since third-party claims do not ordinarily involve conduct by supervisory employees or coworkers, they rest most logically on analysis under a hostile work environment theory. See Mathews, *supra* note 4, at 990 ("Typically, the environment . . . becomes hostile or offensive due to a customer Although there have been no quid pro quo third-party sexual harassment cases reported, this potential exists."); Francis Achampong, *Third Party Harassment and Other Significant Recent Developments in Sexual Harassment Law: A Discussion of the Latest Developments in Workplace Sexual Harassment Litigation*, 28 SUFFOLK U. L. REV. 631, 652 (1994) [hereinafter Achampong, *Recent Developments*] (reasoning that "[t]here is no plausible reason why" courts should not assess employer liability based on conduct by third-parties under the quid pro quo theory in cases where an employee is fired as a result of refusal to tolerate such conduct because "[s]uch behavior inflicts a tangible job detriment on the employee"). But see Juliano, *supra* note 31, at 1566 ("The quid pro quo claim arises only when the plaintiff shows a link between the job detriment and a refusal to submit to a supervisor's sexual

ly blurred the distinction between the two theories.³⁴ In *Burlington Industries, Inc. v. Ellerth*,³⁵ the Court indicated that the only substantive difference between quid pro quo and hostile work environment is that quid pro quo cases establish an "explicit" alteration in terms of conditions of employment, while hostile environment claims involve only "constructive" alterations of employment conditions in which the "threats to retaliate" against a victim merely remain "unfulfilled."³⁶

The Court, however, maintained the force of the distinction in terms of the showing necessary to establish a claim under each theory. Notably, the constructive alteration present in a hostile environment claim requires a further showing than that required in a quid pro quo claim. Conduct comprising hostile environment harassment must be "severe or pervasive."³⁷

The Court also established a new affirmative defense available only in the context of hostile work environment claims. The defense is based on whether an employer makes a reasonable effort to protect employees from harassment and whether a victim reasonably participates in her own protection.³⁸ Because quid pro quo and hostile work environment

advances A hostile working environment claim arises in situations in which an employee must endure verbal or physical abuse as part of her employment but does not suffer a tangible job detriment.").

Additionally, since third-party claims are non-supervisory and thus more analogous to co-worker claims, courts will evaluate them under the same negligence standard as co-worker claims. See *Lockard v. Pizza Hut, Inc.*, 162 F.3d 1062, 1074 (10th Cir. 1998).

³⁴ See *Burlington Indus., Inc. v. Ellerth*, 118 S. Ct. 2257, 2264 (1998).

³⁵ *Id.* at 2257.

³⁶ *Id.* at 2264.

³⁷ *Id.*

³⁸ See *id.* at 2270 ("[W]e adopt the following holding in this case and in *Faragher v. Boca Raton*"); see also *Faragher v. City of Boca Raton*, 118 S. Ct. 2275, 2292 (1998). The Court established that an employer is now entitled to show, by a preponderance of the evidence: "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Burlington*, 118 S. Ct. at 2270. The Court further held that the promulgation of an anti-harassment policy by the employer and complaint procedure would not be necessary in every case to fulfill the defense, but its existence or nonexistence could be considered as a relevant factor in the determination of the first element. See *id.* Likewise, the Court explained that failure by an employee to use an employer complaint procedure would not be dispositive in every case, "demon-

claims maintain separate showings and defenses, and because any library third-party claims would most likely be filed under the hostile environment theory, only the viability of a hostile work environment claim filed by library staff will be analyzed in this Note.

In addition to the required showing that harassing conduct was so pervasive or severe to constructively alter the conditions of employment, Title VII hostile work environment claims generally require a showing by the employee plaintiff that she was subjected to sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature; that the conduct was directed at the employee based on her sex; that such conduct was unwelcome and that the employer knows or should have known about the conduct and failed to take immediate remedial action.³⁹ Additionally, although intentional conduct is not ordinarily identified as a formal element of the claim, courts may require such a showing because, as the Supreme Court has stated, "[s]exual harassment under Title VII presupposes intentional conduct."⁴⁰

Courts have developed tests for some of these elements. To determine severity or pervasiveness, courts look at the totality of circumstances in each case.⁴¹ There is, therefore, no "mathematical" formula as to what type of conduct is sufficiently severe or pervasive to satisfy the claim.⁴² Factors examined

stration of such failure will normally suffice to satisfy the employer's burden" *Id.* The Court restricted the availability of the defense to only those cases where the employee had suffered no "tangible employment action, such as discharge, demotion, or undesirable reassignment" as a culmination to the harassment, thus restricting its application effectively to just hostile work environment claims. *Id.*

³⁹ See *Faragher*, 118 S. Ct. at 2281-84; *Rennie v. Dalton*, 3 F.3d 1100, 1107 (7th Cir. 1993); see also 29 C.F.R. § 1604.11(a)-(g) (1980).

⁴⁰ *Burlington*, 118 S. Ct. at 2266.

⁴¹ See *Faragher*, 118 S. Ct. at 2283; see also 29 C.F.R. § 1604.11(b).

⁴² *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993); see also *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 430 (3d Cir. 1995) ("Drawing the line is not always easy. On one side lie sexual assaults; other physical contact, whether amorous or hostile . . . uninvited sexual solicitations; intimidating words or acts; obscene language or gestures; pornographic pictures On the other side lies the occasional vulgar banter, tinged with sexual innuendo").

Courts often rely on and quote this passage from *Baskerville* to represent the difficult, non-bright line nature of determining severity. See, e.g., *Fall v. Indiana Univ. Bd. of Trustees*, 12 F. Supp. 2d 870, 877 (N.D. Ind. 1998); *General Accident Ins. Co. v. Gastineau*, 990 F. Supp. 631, 634 (S.D. Ind. 1998); *Johnson v. Wal-*

may include, but are not limited to, 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."⁴³ Courts apply an objective-subjective standard to the severity test, requiring that the conduct be perceived as severe by both the reasonable observer and the plaintiff herself.⁴⁴ However, courts and commentators disagree as to whether the objective component should be applied under a reasonable woman or reasonable person standard in cases where the plaintiff is female.⁴⁵ The failure to use a reasonable

Mart Stores, Inc., 987 F. Supp. 1376, 1387 (M.D. Ala. 1997).

⁴³ *Faragher*, 118 S. Ct. at 2283. A "merely unpleasant work environment," even one that includes occasional vulgarity and seemingly abusive behavior is generally not enough to support a hostile work environment claim. *Mart v. Dr Pepper Co.*, 923 F. Supp. 1380, 1388 (D. Kan. 1996) (finding an employee's crude language "highly inappropriate" but insufficient alone to support claim of hostile work environment); see also *Jordan v. Clark*, 847 F.2d 368 (9th Cir. 1988) (finding touching of the plaintiff and sexist comments insignificant and thus insufficient to support claim); *Scott v. Sears, Roebuck & Co.*, 798 F.2d 210 (7th Cir. 1986) (finding isolated propositions, slaps on buttocks, and sexual comments insufficient to support claim of hostile work environment). But see *Achampong, Single Occurrence*, *supra* note 27, at 193 n.43 (noting that one year after the Ninth Circuit's decision in *Jordan*, the Ninth Circuit found sufficiently severe and pervasive conduct to support a hostile work environment claim on facts similar to those in *Jordan*, including "sexual remarks, vulgarity, and requests for sexual favors"). The Supreme Court has stressed that Title VII should not become a "civility code" and that conduct such as "sporadic" use of abusive language or gender related jokes, or occasional teasing would prove insufficiently severe to support a claim. *Faragher*, 118 S. Ct. at 2284 (citing BARBARA LINDEMAN & DAVID D. KADUE, *SEXUAL HARASSMENT IN EMPLOYMENT* LAW 175 (1992)).

⁴⁴ See *Faragher*, 118 S. Ct. at 2284; see also *Rhee*, *supra* note 17, at 173 n.50 (reporting that in *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 67 (1986), the Supreme Court adopted an "objective-subjective standard" to determine whether harassment is "severe and pervasive" including a need to show not only likelihood that harassment would disrupt a worker's ability to work, but that it actually had).

⁴⁵ The First, Fourth, Sixth, Seventh, Eighth, and Eleventh Circuits have all employed the reasonable person standard. See *Snaden*, *supra* note 5, at 1234 n.55. The Sixth and Ninth Circuits have both recognized the reasonable woman standard. See *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991) (stating that reasonable woman could have found a letter of a sexual nature sent by co-worker to plaintiff sufficiently severe); *Yates v. Avco Corp.*, 819 F.2d 630, 637 (6th Cir. 1987) (stating that "person standing in the shoes of employee should be the 'reasonable woman'"); see also Elizabeth M. Schneider, *Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse*, 67 N.Y.U. L. REV. 520, 563 n.188 (1992); *Rhee*, *supra* note 17, at 173 n.50 ("[Q]uestions still remain as to whether this [objective] standard is from the perspective of a reasonable male or

woman standard has been criticized because it is widely believed that use of the reasonable person standard deprives female plaintiffs of what would otherwise be viable claims.⁴⁶ Whichever standard is chosen, the objectivity of this test theoretically insulates employers from legal responsibility toward "hypersensitive" employees known as "egg-shell" plaintiffs.⁴⁷ Concerning the other tests, whether conduct is of a sexual nature or is unwelcome are both questions for the jury.⁴⁸

from the perspective of a reasonable female Critics condemned [a Sixth Circuit decision finding against a female plaintiff] . . . as adopting the perspective of a 'reasonable man' when the victim was a woman . . . , where the plaintiff had claimed that a male supervisor's vulgar name calling and sexually explicit posters created a hostile environment but the court felt that such incidents were not offensive enough in the context of society at large).

The Supreme Court has not definitively resolved whether a "reasonable woman" standard should be adopted. See *Harris v. Forklift Sys.*, 510 U.S. 17, 17 (1993). In *Harris*, the trial court had evaluated harassment under a reasonable woman standard yet found the incident not severe enough to create hostile environment because of a failure by the female plaintiff to demonstrate any psychological harm. See *id.* at 21-22. The Supreme Court granted certiorari to resolve the issue of whether a plaintiff must show psychological harm to succeed in a hostile environment claim. See *id.* While the Court ruled a plaintiff no longer need show psychological harm, Justice O'Connor advocated application of the more stringent reasonable person, not the reasonable woman, to such cases in the dicta of her opinion. See *id.* Some commentators have interpreted her statement in the dicta as inconclusive. See Snaden, *supra* note 5, at 1234 ("There is a conflict among the circuits on the issue of which standard should be used to evaluate hostile environment sexual harassment claims (reasonable person or reasonable woman). [The] issue [since *Harris*] has not yet been definitively resolved by the Supreme Court."); Aalberts & Seidman, *supra* note 27, at *4 ("It should be noted that, despite the perception of some commentators stemming from Justice O'Connor's [sic] rather brief opinion in . . . [*Harris*], the 'average reasonable woman' standard, enunciated in *Ellison*, is still very much intact. It has not been replaced by the more forgiving 'average reasonable person' standard Justice O'Connor does use the latter term. Yet it must be noted that the Court did not grant certiorari to address this matter."). However, in *Faragher*, the most recent Supreme Court decision on sexual harassment, which also happened to be filed by a female plaintiff, Justice Souter used the "reasonable person" language when reiterating the severity test. See *Faragher*, 117 S. Ct. at 2283. In *Burlington*, *Faragher's* companion opinion, Justice Kennedy avoided stating the reasonableness standard although he reiterated the required severity element at least three times therein. See *Burlington*, 118 S. Ct. at 2263-65.

⁴⁶ See ERNEST C. HADLEY & GEORGE M. CHUZI, SEXUAL HARASSMENT: FEDERAL LAW *3 (1997), available in Westlaw ("[B]ehavior a reasonable woman would find objectionable may be actionable 'even if many people may deem it to be harmless or insignificant.'").

⁴⁷ *Hallberg v. Eat'n Park*, No. 94-1888, 1996 WL 182212, at *9-*10 (W.D. Pa. 1996) (quoting *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1483 (3d Cir. 1990)).

⁴⁸ See *Powell v. Las Vegas Hilton Corp.*, 841 F. Supp. 1024, 1027-28 (D. Nev.

Whether the employer knows or should have known of the harassing conduct is satisfied when it is established that the employer had either actual knowledge of harassment through employee complaints or constructive knowledge of offensive conduct due to its pervasiveness.⁴⁹

Last, whether the employer has taken sufficient steps to remedy the situation is the subject of much current litigation⁵⁰ and is generally dependent upon the nature of the harassment itself.⁵¹ Employers have been required by courts to show that not only some action was taken, but also the *effectiveness* of that action—or at least its reasonable calculation to remedy the harassment.⁵² While the Supreme Court did incor-

1992); Aalberts & Seidman, *supra* note 27, at 33. Courts differ "as to whether an objective or subjective standard applies" in determining unwelcomeness and as to what type of evidence should be admitted for an objective test. Rhee, *supra* note 17, at 170 n.30.

Neither the sexual or unwelcomeness elements required to establish the third-party hostile work environment claim in the context of library Internet content give rise to issues of a significantly different nature than as they appear in any other type of hostile work environment claim. Thus, they are not discussed in depth in this Note. For a brief discussion of the application of the sexual element to the third-party library claim, see *infra* Part III.B.

⁴⁹ See, e.g., *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1531 (M.D. Fla. 1991) (determining that the sexually harassing behavior was "too pervasive to have escaped the notice of a reasonably alert management"); see also Rhee, *supra* note 17, at 173 n.51 (citing *Robinson* and advising that "[g]enerally, if harassment is pervasive, courts find that the employer has the requisite knowledge").

⁵⁰ See Rhee, *supra* note 17, at 173 n.52 ("Litigants have begun to contest vigorously the standards for 'immediate and appropriate corrective action' to allegations of sexual harassment.").

⁵¹ The sufficiency of remedial action is open to debate and "depend[ent] upon the gravity of the alleged harassment." *Mart v. Dr Pepper Co.*, 923 F. Supp. 1380, 1388 (D. Kan. 1996); see also Kaplowitz & Harris, *supra* note 4, at *36.

⁵² Conduct, even if prompt, must be reasonably calculated to actually remedy the harassment. See Kaplowitz & Harris, *supra* note 4, at *36 ("Prompt action that is not reasonably likely to prevent the misconduct is ineffective. In this respect, ineffective action is equal to no action.") (describing *Intlekofer v. Turnage*, 973 F.2d 773 (9th Cir. 1992), in which the court of appeals held that an employer failed to meet his obligation to act when, after notice of sixteen complaints of harassment by an employee, the employer issued a warning that additional complaints would result in "a more severe disciplinary measure," but that this warning was followed by further harassing incidents).

The remedial action need not be instantaneous, however, and may include an appropriate time lag that allows the employer to respond to complaints properly. See *id.* at *36-*37 (citing *Dornhecher v. Malibu Grand Prix*, 828 F.2d 307 (5th Cir. 1987), in which an employer's action was judged sufficiently prompt where it promised the employee that she would not have to work with a contractor who had "touched her breasts and playfully choked her" after a completion of a compa-

porate the showing of remedial action by an employer into an affirmative defense, the Court did so only in the context of supervisory harassment in both *Burlington* and *Faragher*.⁵³ Consequently, it remains to be seen whether this defense will be applied in the third-party context.

B. *Special Characteristics of the Third-Party Hostile Work Environment Claim*

In at least sixteen cases since 1981, federal courts have recognized liability of employers for creation of a sexually hostile work environment by third parties.⁵⁴ It is likely that many more of these cases have been settled.⁵⁵ The elements needed to establish a third-party claim are the same as those for establishing other hostile environment claims.⁵⁶ However, courts may evaluate the sufficiency of a plaintiff's showing of at least two of the claim elements quite differently in the third-party context than they do for cases of traditional co-worker or supervisor harassment.⁵⁷ These two elements include whether an employer has actual or constructive knowledge of the harassment and whether an employer has taken appropriate, effective remedial action.⁵⁸ The EEOC Guidelines advocate that when a court is assessing employer liability for

ny presentation, one and one-half days after his notification). *But see* Llewellyn v. Celanese Corp., 693 F. Supp. 369 (W.D.N.C. 1988) (employer's two-week delay in investigating third-party harassment claim not sufficiently prompt); Achampong, *Recent Developments*, *supra* note 33, at 648 (citing *Llewellyn v. Celanese* and stating: "It would appear advisable . . . for an employer to waste no time in taking remedial action, once acquiring notice of the harassment.").

⁵³ See *Faragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998) (lifeguard harassed by "immediate supervisors"); *Burlington Indus., Inc. v. Ellerth*, 118 S. Ct. 2262 (1998) (salesperson subjected to harassment by mid-level management supervisor).

⁵⁴ See *supra* note 4.

⁵⁵ See *Rhee*, *supra* note 17, at 164 (reporting that although highly publicized third-party claims were filed by waitresses against the Hooters restaurant chain for customer harassment in at least six cities during 1993-94, all those suits settled in 1994); Achampong, *Recent Developments*, *supra* note 33, at 645-46 (reporting settled case where lobbyist employee was removed from a client account by employer after she refused a date with the client).

⁵⁶ See Achampong, *Recent Developments*, *supra* note 33, at 642-43.

⁵⁷ See Achampong, *Recent Developments*, *supra* note 33, at 642-43.

⁵⁸ See Mathews, *supra* note 4, at 991 ("The issues of employer knowledge and control surround the reported cases of third party sexual harassment in the workplace."); Achampong, *Recent Developments*, *supra* note 33, at 642-43.

third-party conduct, it should consider the "extent of the employer's control . . . with respect to the conduct of such non-employees."⁵⁹ This control factor has been included in courts' assessments of employer knowledge⁶⁰ and remedial action.⁶¹

The requirements for employer's knowledge are paid special attention by courts in third-party claims because, while actual knowledge is generally satisfied by proving that an employee complained to management, showing that the employer had constructive knowledge of a pervasive problem can be more difficult in a third-party customer service environment.⁶² This is true because employers may not yet be aware of any legal responsibility for harassment of employees by non-employees.⁶³ More significantly, in customer service organiza-

⁵⁹ 29 C.F.R. § 1604.11(e) (1980); see also Maureen E. McClain et al., *Recent Developments in Sex Discrimination*, 308 PLI/LIT 191, 209 (1986) (noting that a special factor in third-party cases is that the EEOC Guidelines advocate that courts "take into consideration the degree of control the employer has over the conduct of the non-employee").

⁶⁰ See Warner, *supra* note 16, at 374-78 (suggesting that *Magnuson v. Peak Technical Services*, 808 F. Supp. 500 (E.D. Va. 1992), establishes a "variable knowledge standard" whereby a court may require that when an employer is on the same site as where the harassment took place, constructive knowledge may suffice, but when an employer is on a different site than the harassment, an employer must have actual notice of harassment by third-parties to establish sufficient knowledge).

⁶¹ See *Otis v. Wyse*, No. 93-2439, 1994 WL 566943, at *6-7 (D. Kan. 1994) (holding that employer's relative lack of control of non-employee indicates that a single letter to the non-employee's outside supervisors notifying them of non-employee's inappropriate conduct constitutes a sufficient remedial attempt, but if the harasser were an employee, more remedial action might be required of the employer).

⁶² See Warner, *supra* note 16, at 373-74 (citing *Henson v. City of Dundee*, 682 F.2d 897, 905 (11th Cir. 1982)).

⁶³ See Achampong, *Recent Developments*, *supra* note 33, at 642. However, because of widespread publicity of employer liability for customer harassment in the wake of the Tenth Circuit's decision in *Lockard v. Pizza Hut, Inc.*, 163 F.3d 1062 (10th Cir. 1998), and some earlier third-party decisions from the 1990s, see *supra* note 26, courts may be less and less sympathetic to the difficulties employers may claim in gaining knowledge of customer harassment in the future and will likely expect the same level of responsiveness to this type of harassment as all others. In *Lockard*, the Tenth Circuit held a franchisor liable where a waitress had asked not to serve two customers prior to the harassing incident, although the waitress had not apprised the manager of the reason she did not want to serve these customers nor that they had made sexually aggressive comments to her in the past. See *id.* at 1062. Such specific warnings might have more effectively signaled the manager that a possible sexual harassment problem existed, as opposed to any other type of customer service problem, but the court of appeals found it unnecessary. See *id.*

tions, it is often true that the site of the hostile environment created by a non-employee is not located within the primary employer's own workplace, thus complicating the communication of harassment.⁶⁴ However, even in third-party cases, an employer cannot shield itself from knowledge with deliberate ignorance of the law, of the harassing conduct, or of actual notice due to employee complaints.⁶⁵ Moreover, actual notice to the employer is no more difficult for a plaintiff to establish in a third-party claim than in a co-worker or supervisor claim. Similarly, a court's assessment of whether an employer has taken immediate and appropriate remedial action that is reasonably calculated to end harassment can be problematic in third-party claims primarily because of the relative lack of the employer's control,⁶⁶ and because of judicial sensitivity to the strong effect that fear of economic reprisal from clients may have on an employer's response to harassment.⁶⁷ However, even EEOC-sanctioned sensitivity to these special concerns in

⁶⁴ See Mathews, *supra* note 4, at 991-92 (detailing a myriad of client employment environments where the employee can be subject to harassment outside of the employer's own work environment); Warner, *supra* note 16, at 374-78 (asserting that primary employer's work environment can be isolated from the actual site of harassment by customers especially in situations where an employee is dispatched to a client's office, thus making it difficult for employers to assess the hostile environment).

⁶⁵ See Kaplowitz & Harris, *supra* note 4, at *35 ("The employer [faced with a third-party claim] cannot avoid liability by burying its head in the sand—the so called 'ostrich defense' or deliberate ignorance.").

⁶⁶ See Wyse, 1994 WL 566943, at *6.

⁶⁷ The EEOC ultimately imposed liability on one restaurant owner after finding his failure to take remedial action sufficiently lacking only because his ability to confront a non-employee harasser was within his control where that particular customer was a "regular" and a good friend of the owner. See Warner, *supra* note 16, at 383, 385, 387 (citing EEOC Dec. 84-3, 34 Fair Empl. Prac. Cas. (BNA) 1887, 1891 (1984), and noting that "all businesses naturally have strong concerns toward maintaining favorable and amicable relationships with their customers and clients in order to preserve their own fiscal health Unfortunately even a mere inquiry about the propriety of the client's behavior . . . could very likely jeopardize the stability of these relationships."); see also Kaplowitz & Harris, *supra* note 4, at *34 ("Employers may be put in the position of either condoning sexual harassment of their employees or losing valuable business."); Mathews, *supra* note 4, at 177 (advocating that when harassment occurs, employers should remedy the situation by either removing the employee from serving that client, terminating the business relationship, or talking to the client, but that most employers take none of these actions because they "don't want to risk the client account" or business).

third-party cases does not mean courts are reluctant to impose liability for sexual harassment.⁶⁸

II. CREATION OF THE HOSTILE WORK ENVIRONMENT BY THIRD-PARTIES IN THE PUBLIC LIBRARY—EVIDENCE OF A GROWING PROBLEM

As client service environments, public libraries are vulnerable to the same third-party harassment as are other customer service businesses.⁶⁹ The professional library literature has recognized that public libraries are now far from being the safe havens from society that they once were considered.⁷⁰ Public libraries are increasingly subjected to the same ills of human behavior as are other public places, including crime⁷¹ and oth-

⁶⁸ See *Hernandez v. Miranda Velez*, No. 92-2701, 1994 WL 394855, at *8 (D.P.R. July 20, 1994) (denying summary judgment where employer had taken no action in the face of complaint of customer harassment except to remind complainant that the alleged harasser "was an important client"); see also *supra* note 4.

⁶⁹ See Mathews, *supra* note 4, at 996 ("Any employer with clients that visit its office is susceptible to Title VII liability for sexual harassment those clients impose upon the employer's employees.").

⁷⁰ See Bruce A. Shuman, *Designing Personal Safety into Library Buildings*, AM. LIBR., Aug. 1996, at 37 (reporting that the murder of a rural librarian shatters the "naive notion" that small towns and libraries are "safe havens").

⁷¹ See, e.g., Tom R. Arterburg, *Librarians: Caretakers or Crimefighters?*, AM. LIBR., Aug. 1996, at 33 (reporting that public libraries are now often clients of the type of violence management training provided in the past to more "traditionally violence prone establishments such as health-care facilities and corrections centers" by the National Crisis Prevention Institute, ("NCPI"), where five years previously NCPI experienced no library inquiries for its services); Patricia Bangs, *When Bad Things Happen in Good Libraries*, PUB. LIBR., May/June 1998, at 196 (reporting that by 1995 "[s]taff in Fairfax's branches had noticed an increase in crime and lesser disturbances that reflected a trend reported by library officials nationwide"); Ann Curry, *Managing the Problem Patron*, PUB. LIBR., May/June 1996, at 18-83 (reporting that library employees experience an "ever-increasing" incidence of "challenging personal encounters" with "problem patrons" due largely to societal changes, including reduced government funding for care facilities, which thrust an increasing number of "troubled individuals," "unsupervised," into aspects of mainstream "urban life" such as going to the public library, and advocating that in response, library workers should assert their rights "to work in a safe environment" and "not to be unduly or continually harassed"); Nancy Milnor Smith, *Staff Harassment by Patrons: Why Administrators Flinch*, AM. LIBR., Apr. 1994, at 316 (detailing Smith's own experience of increased general harassment as a library employee whereas when she began work as a public reference librarian in 1976, she experienced an "occasional 'odd person' hanging around," or "peeper," yet "did not feel threatened" while manning the reference desk, but that the situation had changed because of the increase of "problem patron[s]" who presented a "mere

er harassing and abusive behaviors perpetrated by clients,⁷² especially those directed toward staff.⁷³ One of these ills is sexual harassment.⁷⁴

Although as yet there have been no filed cases of sexual harassment of library employees by clients, there is recognition within the library professional literature that sexual harassment can occur not only between library employees and each

annoyance" in the mid-70s but had escalated in both increased numbers and volume of menace to today's "real threat"); Evan St. Lifer, *How Safe Are Our Libraries?*, LIBR. J., Aug. 1994, at 35-36 (reporting that increasing library crime now includes not only theft and mutilation of library materials, but also violent crime, including, arson, assault, sexual assault, murder, and hostage incidents involving the use of bombs, and that such crime "continues to fester" due to the apathy of law enforcement, lack of adequate security measures, and library dilemmas over how to implement security measures without restraining access to materials).

⁷² See, e.g., St. Lifer, *supra* note 71, at 36 ("[V]iolent or abusive behavior remains a library security risk to be reckoned with—particularly among public libraries . . .").

⁷³ See, e.g., Shuman, *supra* note 70, at 37 (reporting that both library patrons and staff are "increasingly at risk" from violent acts by clients at public libraries and detailing several such incidents, including, a 1992 murder of a rural Arizona librarian, a 1993 murder of a Georgia librarian, and a shooting spree directed toward several library staff at a Sacramento, California public library in 1993); St. Lifer, *supra* note 71, at 35-36 (reporting the risk of "violent or abusive behavior directed toward staff" by unstable clients, incidents of assault on a library staff member, and sexual assault of a librarian by library clients).

⁷⁴ Public libraries have begun to experience a number of the type of client behaviors typically identified as sexually harassing conduct, including "body touching, obscene or nude photographs, or other sexual words or conduct that has the 'purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment.'" Alan M. Koral, *Critical Decisions in the Investigation of a Sex Harassment Claim: Practice Pointers and Case Law Update*, 587 PLI/LIT 129, 136 (1998) (citing 29 C.F.R. § 1604.11(a) (1980)). For examples of occurrences of such behaviors, see, for example, Bangs, *supra* note 71, at 196 (citing a study by a criminologist which indicated that by the early 1980s, of over 1700 public libraries studied during a 12-month period, 15% to 20% had experienced incidents of "indecent exposure" and that since then, Fairfax County library staff had "sensed that both the frequency and types" of all such "problem behavior" had increased); and Curry, *supra* note 71, at 181, 183, 186-87, 188 n.2 ("Public libraries must deal with incidents caused by problem patrons with increasing frequency. Most staff are badly shaken by . . . sexual innuendo . . ."). Curry also details the rise in all kinds of "problem patron" behaviors which harass public library staff, including "flashers," and presents a "case study" exercise directed to library managers. Curry, *supra* note 71, at 183. The case study includes a scenario in which a library staff member is repeatedly followed by a patron who sometimes "touches the crotch of his jeans," a scenario described as having "sexual overtones" and reports that the Vancouver Public Library staff report a "growing number of disruptive incidents, including indecent exposures." *Id.*

other, but also as a result of library clients harassing staff.⁷⁵ The professional literature also recognizes that not only are all harassing behaviors of a sexual nature increasing in libraries,⁷⁶ but specifically third-party behaviors of a sexual nature tantamount to sexual harassment directed at staff by clients are increasing.⁷⁷ Despite this recognized increase, library management remains largely unresponsive to the growing third-party sexual harassment problem.⁷⁸

⁷⁵ One academic library developed a policy designed to combat all harassment, especially that of a sexual nature. See Mary Lou Goodyear & William K. Black, *Combating Sexual Harassment: A Public Service Perspective*, AM. LIBR., Feb. 1991, at 134. In so doing, the library followed guidelines on sexual harassment developed by the American Library Association ("ALA"), an association dedicated to public libraries. See *id.* This policy on harassment stated: "Harassment can occur between library employees, between library patrons, or between library staff and library patrons." *Id.*

⁷⁶ See *supra* note 74.

⁷⁷ See, e.g., Smith, *supra* note 71, at 316 (advocating that library administrators will not be able to hide from increased sexual harassment of staff by patrons by "refusing to acknowledge the problem"). In a 1992 study of "Librarians and Sex" that was initially intended only to be humorous, one librarian author said he "went looking for laughs and ended up with tears" when he shockingly discovered that out of 2,797 librarian respondents, 78% of female librarians, or 1,816, and 7% of male librarians, had been "sexually harassed by a library patron" in the previous 12-month period. Will Manley, *The Manley Report*, AM. LIBR., Mar. 1993, at 258; Will Manley, *No Laughing Matter This Month*, AM. LIBR., Jan. 1993, at 68 [hereinafter Manley, *No Laughing Matter*]. Manley further reported that "almost 35% of that [harassed] group felt so strongly about their experience that they made unsolicited comments on the subject," including descriptions of harassing incidents and comments such as, "Some days the harassment is so bad that I want to quit my job." Manley, *No Laughing Matter*, *supra*, at 68.

Unsettled by these results, Manley subsequently conducted a more in-depth survey in 1993 as the basis for a four-part series of articles on sexual harassment of library staff by patrons. See Will Manley, *Sexual Harassment By Patrons: Part Two*, AM. LIBR., July/Aug. 1993 [hereinafter Manley, *Part Two*]; Will Manley, *Sexual Harassment by Patrons: Part Three*, AM. LIBR., Sept. 1993 [hereinafter Manley, *Part Three*]; Will Manley, *Sexual Harassment by Patrons: Part Four*, AM. LIBR., Oct. 1993 [hereinafter Manley, *Part Four*]. This series was published in AMERICAN LIBRARIES, a professional periodical which focuses on public library issues. See *id.* Manley discovered that out of 3,758 librarian respondents reporting on frequency of sexual harassment by patrons during a 12-month period, 7% had been sexually harassed "daily," 22% "weekly," 40% "monthly," and 4% "less than monthly." Manley, *Part Two*, *supra*, at 652; see also Manley, *No Laughing Matter*, *supra*, at 68; Manley, *Part Three*, *supra*, at 756; Manley, *Part Four*, *supra*, at 828.

⁷⁸ Authors of articles recognizing sexual harassment of library staff by patrons also detail how those staff "cannot rely on their administrators to protect them from harassment," and how library staff reporting the existence of this problem also report that "supervisors gave strong signals that they do not even want such harassment reported to them." Smith, *supra* note 71, at 316; see also Goodyear &

Specifically, there are indications that behaviors involving staff exposure to sexually graphic Internet images⁷⁹ are resulting from client use of Internet sexual content and are being considered harassment of staff.⁸⁰ Such indications of a harassment problem due to exposure to Internet sexual content appear not only anecdotally in the library professional literature,⁸¹ but also in discussions by professional organizations and libraries themselves regarding potential liability due to allowing access to the Internet,⁸² and in library Internet use policies written by libraries themselves.⁸³ It has already been

Black, *supra* note 75, at 134 ("While many library managers have taken action against sexual harassment between supervisors and subordinates, they have been strangely silent concerning such harassment between library employees and patrons, or between one patron and another.").

⁷⁹ The professional literature recognizes harassing behaviors involving public library staff exposure by clients to images of a sexual nature by patrons predates the availability of Internet images and does not always involve so-called pornography. See Goodyear & Black, *supra* note 75, at 134 (detailing incident where "a library employee is working at the main circulation desk," leaves the desk momentarily, and returns to find that a patron had left "a biology textbook . . . open on her desk to the chapter on female human reproductive systems," and "[w]ritten across the top of the page are the words "Sure like to see yours.""). However, the literature also recognizes that the Internet provides a newly evocative forum for "pornographic," or "sexually explicit," or "sexually suggestive" sites." Hyman, *supra* note 8, at 60-62; see also Dorothy Field, *One Library's Approach*, AM. LIBR., Nov. 1997, at 63 (reporting that since the introduction of the Internet, public libraries have faced increased challenges to their traditional "dissemination" policies because of the attractiveness of the Internet to "marketers of hard-core pornography" and that "pornography has always been with us, from the earliest days of civilization, but never has there been a more effective tool for marketing this material and attracting new consumers than the Internet").

⁸⁰ See, e.g., David Burt, *Policies for the Use of Public Internet Workstations in Public Libraries*, PUB. LIBR., May/June 1997, at 157 (reporting that many public library policies forbid client use of Internet pornography to harass staff or other clients); Karen A.K. Keller, *Printing & Porn* (visited Jan. 15, 1999) <<http://www.mlc.lib.mi.us/hyperm/archives/michlib-l/1998/1482.html>> [hereinafter Keller, *Printing & Porn*] ("Circulation Staff are now bothered by the fact that some (a very few) patrons will print pornography and then the Staff member has to handle this material Could this be consider [sic] sexual harassment (one patron-male-visits and prints out bondage sites . . . our Circulation Staff is all female?)"); *Reports of Pornography*, *supra* note 3 (website detailing public library reports of library client behaviors relating to client use of Internet sexual content to which staff or other clients have objected, including staff exposure to sexual images).

⁸¹ See, e.g., Burt, *supra* note 80, at 157.

⁸² See *infra* notes 103, 105-107 and accompanying text.

⁸³ See, e.g., Bell County Public Library System, *Internet Access Policy* (visited Jan. 18, 1999) <<http://www.tcnet/pinevillelib/net.html>> ("[D]isplaying sexually explic-

recognized that staff exposure to sexually graphic images online, if perpetrated by a library co-worker, could constitute sexual harassment for which a claim for civil damages could be made.⁸⁴

Further, there are indications within the literature that there is a general trend in underreporting all incidents of sexual harassment of library staff.⁸⁵ Thus, underreported incidents could include those arising out of client use of Internet pornography. Failure by library staff to report such incidents would mirror a general trend in all workplaces where it is estimated that 95% of harassing incidents go unreported.⁸⁶

it material in public constitutes sexual harassment"); Loudoun County Public Library Board of Trustees, *Loudoun County Public Library Internet Use Policy* (visited Nov. 25, 1998) <<http://www.lcpl.lib.va.us/wwwpol.htm>> [hereinafter Loudoun County, *Internet Use Policy*]; Saint Paul Public Library, Saint Paul Public Library Policy on the Internet (visited Jan. 5, 1999) <<http://www.stpaul.lib.mn.us/pages/policy.htm>> ("[M]aterials on the Internet are not screened in any way, sexually explicit graphics have been displayed causing detrimental consequences including . . . sexual harassment of staff"); see also Burt, *supra* note 80, at 156-57 (analyzing 75 public library Internet access policies to answer the question, among others, of how libraries are managing Internet "pornography" and finding that 20% of the policies bar clients from using "Internet workstations" to "harass others" and 12% bar "viewing pornography on Internet workstations").

⁸⁴ See A.J. Anderson, *How Do You Manage? Analysis I: Try a Little Respect*, LIBR. J., Feb. 1, 1997, at 55 (presenting a case-study exercise directed to public library managers in which a female staff member is exposed to "a [computer] screen saver consisting of naked women floating all over the place" by another staff member who leaves it on his computer screen where the female had to frequent his office for work-related discussions, and how, if the female employee was offended by this behavior, "a sexual harassment charge *could* be levied."). Another analyst writing on the same scenario posed a solution which included that the employee displaying the offensive sexual screen saver should be "reminded of the legal definition of sexual harassment." Kenneth G. Hodossy, *How Do You Manage? Analysis II: Porno Isn't the Problem*, LIBR. J., Feb. 1, 1997, at 56.

An article advising on new library liability issues surrounding Internet use advocated that managers take note of employee use of sexually explicit Internet images at work as a potential source of sexual harassment claims: "If an employee accesses and downloads pornography or other obscene material into a library's computer, such material may be relevant in a sexual harassment suit at a later time." Uhler & Weiss, *supra* note 9, at 118.

⁸⁵ See Goodyear & Black, *supra* note 75, at 134-36 (advocating ending the "silence" of both library staff and administrators on sexual harassment of staff by clients).

⁸⁶ See Mary F. Radford, *By Invitation Only: The Proof of Welcomeness in Sexual Harassment Cases*, 72 N.C. L. REV. 499, 523 (1994) (citing UNITED STATES MERIT SYSTEMS PROTECTION BOARD, SEXUAL HARASSMENT IN THE FEDERAL GOVERNMENT: AN UPDATE 27 (1988)). One survey of psychological and sociological studies showed that such studies "generally agree" that "targets are reluctant to lodge

Underreporting of sexual harassment in the library environment is due to a variety of factors. Factors can include fear of administrative apathy and reprisal,⁸⁷ fear that claims will not be taken seriously,⁸⁸ victim guilt or shame,⁸⁹ general lack of empowerment in library staff assertion of workplace rights,⁹⁰ and difficulty in identifying the boundaries of sexually harassing behaviors.⁹¹ Perhaps the most significant factor identified as contributing to underreporting of harassment is library staff "hav[ing] a difficult time taking some action that they may see as conflicting with their service philosophy toward the [client]."⁹² This factor may prove very significant to possible underreporting of harassment involving client Internet use. It is already recognized that library staff are having a difficult time acknowledging all manner of problems resulting from providing Internet access in libraries because of their fear of appearing less than dedicated to the "professional party-line" First Amendment goal of providing entirely unrestricted client access.⁹³ Consequently, there is reason to believe that this re-

formal complaints against their harassers," and one study indicated that only "five percent" of targets file formal complaints. *Id.* (citations omitted). Reasons for why targets fail to file complaints include "fear of reprisal and blame, concerns about a loss of privacy, or the belief that nothing would be done in response to the complaint." *Id.* (citations omitted).

⁸⁷ See Smith, *supra* note 71, at 316 (Library "supervisors gave strong signals that they do not even want such harassment reported to them.").

⁸⁸ See Goodyear & Black, *supra* note 75, at 136 (describing how one academic library's attempts to improve awareness of staff harassment by clients, including sexual harassment, and procedures designed to facilitate report and pursuit of harassers, but how these attempts were hampered because "[d]espite all our efforts, we still live in an environment where harassment is viewed by some as a minor irritation, not the serious problem that it is").

⁸⁹ See *id.* at 136 (describing a series of "development sessions" that were initiated to train library "public service staff" to deal with all harassment, especially sexual harassment, by clients more effectively by learning "how to set aside the guilt that accompanies being harassed or reporting an incident").

⁹⁰ Cf. JANETTE S. CAPUTO, *THE ASSERTIVE LIBRARIAN* 15-16 (1984) (discussing the library stereotype of nonassertive behavior as a self-fulfilling prophecy which prevents librarians from asserting all types of workplace rights).

⁹¹ See Goodyear & Black, *supra* note 75, at 134-35 (describing how often interactions between library staff and clients can be termed "harassment," frequently including sexual harassment, and that these interactions could include "physical or verbal abuse or coercion" which could be "subtle or overt," but that "it is often difficult for staff members to determine if what they are experiencing is harassment or just annoyance" and that "this particularly fine line makes it hard to identify the scope and ownership of the problem").

⁹² *Id.* at 135.

⁹³ Will Manley, *Are We Free to Talk Honestly About Intellectual Freedom?*, AM.

luctance would extend to acknowledgement of sexual harassment resulting from client Internet use.

While libraries have not yet made a systematic study of such incidents of staff exposure to Internet sexual content which could lead to claims of third-party harassment,⁹⁴ the anecdotal evidence is compelling.⁹⁵ A Kansas public library reported repeated and seemingly deliberate staff exposure to online sexual content by a client dubbed the "Coat Man":

LIBR., Oct. 1992, at 112 [hereinafter Manley, *Are We Free*] (reporting that fear of being branded a censor keeps library professionals from dissenting from the "professional party line of giving children and young adults free and unfettered access to every X-rated Web site," and that this fear is a powerful deterrent to honest confrontation of library issues because "in library circles you're better off being accused of being a mass murderer than a censor"); Will Manley, *It's Time to Stop the Hypocrisy*, AM. LIBR., Nov. 1997, at 112 (describing how, in the context of the debate over how unrestricted Internet access is allowing behaviors and access to materials in the library that may be detrimental to children, anti-censorship advocates among library professionals who often defend "giving 10-year olds access to the hardest of the hard-core porn," the "First Amendment extremists," are beginning to behave like censors themselves by dismissing honest discussion of valid, child-protective concerns).

⁹⁴ Library commentator Will Manley, whose 1992 and 1993 surveys produced, likely, the only available statistics of sexual harassment of library staff by patrons so far, has predicted that libraries will begin to study their sexual harassment problems more carefully. See Manley, *No Laughing Matter*, *supra* note 77, at 68. Manley notes that despite anecdotal evidence of a widespread sexual harassment problem in libraries, "[t]here is precious little information to be found anywhere," but "[t]hat will change soon" as a result of heightened awareness of potential sex crimes against library staff due to the murder of an Arizona public librarian who was "brutally raped, before being stabbed more than 30 times with a paring knife." Manley, *No Laughing Matter*, *supra* note 77, at 68. Manley admitted that while his 1993 survey "can by no means be considered scientific it does dramatically illustrate that sexual harassment by patrons is a serious problem for many working librarians." Manley, *Part Two*, *supra* note 77, at 652.

⁹⁵ One website tracked "incident" logs kept by various public libraries that record incidents involving client use of Internet sexual content that are disturbing to either staff or other library clients. See *Reports of Pornography*, *supra* note 3. While not devoted exclusively to staff complaints, and only anecdotally representative of all public libraries, approximately 3% of the incidents logged there involve direct staff exposure to graphic sexual Internet images while at work (not counting ambient exposure from walking by terminals). See *Reports of Pornography*, *supra* note 3. The active monitoring performed by this website has recently been abandoned, and the site remains only as an archive. See *Reports of Pornography*, *supra* note 3; see also Filtering Facts, *Dangerous Access: The Epidemic of Pornography in America's Public Libraries and the Threat to Children*, at app. 2: *Adults Harassing Library Staff with Pornography* (visited Nov. 13, 1999) <<http://www.filteringfacts.org/da-main.htm>> [hereinafter *Adults Harassing Library Staff*].

Yesterday the Coat Man appeared at Cedar Rose [library] and [staff member] Laurie had a confrontation with him. He pulled the usual stunt of calling staff (Laurie) over for equipment assistance and leaving some naked bodies up on the screen. Laurie . . . asked him to remove the material off the screen when asking for assistance [from staff]. He then went into the access argument and eventually left. It appears he . . . basically spends all his time going around to metro libraries looking at porn and exposing our female staff, and other females, to the porn he leaves up on the screen for them to see.⁹⁶

Also, in an internal staff memo, a San Francisco public library reported that it had been having "some problems" with "Internet users" viewing "hard-core pornography" on terminals "close to and visible to the reference desk[s]" where staff are stationed and that in such cases, security should be prompted to ask these patrons to move out of view of the staff to more "private" terminals.⁹⁷ A librarian in a Maryland public library reported that a client repeatedly attempted to engage her in conversation, turned around to look at her while he used the Internet, and was "bothering" staff "discussing the 'only soft-core' pornographic pictures he is printing out."⁹⁸ Because of this client's behavior, at least one female staff member at that library attempted to schedule her hours so as to avoid coming into contact with him.⁹⁹ Other reports detail incidents of librarians exposed to online sexual content by patrons printing such materials at reference desk locations where library staff administer central printers¹⁰⁰ or librarians exposed to such content while assisting patrons in online search strategies using machines offering no filtering of sexual content.¹⁰¹

⁹⁶ *Reports of Pornography*, *supra* note 3 (quoting *Internal Staff Memo from Administration*, Johnson County Public Library of Kansas, dated April 30, 1998).

⁹⁷ *Reports of Pornography*, *supra* note 3 (documentation of internal staff memo circulated at the San Francisco library, dated Aug. 12, 1997).

⁹⁸ *Adults Harassing Library Staff*, *supra* note 95.

⁹⁹ *See Adults Harassing Library Staff*, *supra* note 95.

¹⁰⁰ *See Adults Harassing Library Staff*, *supra* note 95 (report of young patron printing "sexually explicit pictures" on a library printer located at a reference desk at a Los Angeles public library); Keller, *Printing & Porn*, *supra* note 80 (staff feeling that clients printing pornography visible to staff when staff must retrieve images from a central printer is sexual harassment).

¹⁰¹ *See Reports of Pornography*, *supra* note 3 (detailing report by Library Director of the Farmington, Michigan public library that a librarian was exposed to online pornography while working with a mother and child on an Internet search

While details of such incidents are not yet numerous in the literature, especially as compared to client complaints of being subjected to offensive exposure to online sexual content by other clients,¹⁰² such complaints are evidence of the circumstances in which staff, as well as clients, are routinely subjected to exposure to online sexual content by clients. Moreover, such incidents are characterized as objectionable enough to give rise to complaining reports¹⁰³ and, thus, may give rise to library staff claims of sexual harassment by clients. Claims will likely be limited, however, to those in which the staff can show that the harassment was deliberate. As previously noted, the Supreme Court has instructed that harassment under Title VII "presupposes" intentional conduct.¹⁰⁴

Although actual reports of staff harassment at public libraries from client Internet display are still sparse in the literature, the most significant evidence of a growing problem comes from assertions made by the libraries themselves, or by the professional organizations which represent library interests. Statements indicating public library recognition of a prob-

for "wholesome" *American Girls* magazine where the librarian "typed in 'American Girls'" during the search and, "[n]eedless to say, she got a little more than she bargained for"). Although this particular incident is an example of a likely unintentional exposure, under certain circumstances, such search requests could illicit a similar interaction in which it would be more difficult to ascertain whether conduct was intentional or not.

¹⁰² Reports being logged by libraries of offensive client behavior using Internet sexual content still overwhelmingly document client to client behavior, especially that directed toward children. See, e.g., *Complaint Log of the Multnomah County (OR) Public Library* (visited Nov. 25, 1998) <<http://www.filteringfacts.org/mult.htm>>; Filtering Facts, *Dangerous Access: The Epidemic of Pornography in America's Public Libraries and the Threat to Children* (visited Nov. 13, 1999) <<http://www.filteringfacts.org/da-ha.htm>>; *Reports of Pornography*, *supra* note 3; *Complaint Log of the Ft. Vancouver (WA) Public Library* (visited Nov. 25, 1998) <<http://www.filteringfacts.org/ftvan.htm>>. However, much of the collection of such data so far has been actively pursued by libraries and organizations only in the context of obtaining evidence that access to online sexual content presents some form of menace in the library, especially to children, to assist in legal battles involving filtering and access rights to such content. The *Reports of Pornography* website is maintained by an organization, Filtering Facts, which supports legal challenges to libraries and statutes that allow unfiltered access to the Internet and thus minor access to sexual content. See *Reports of Pornography*, *supra* note 3.

¹⁰³ For example, one librarian sent a memo "to her manager stating that she considers it a form of harassment that she has to deal with sexually explicit pictures as part of her every day job." *Adults Harassing Library Staff*, *supra* note 95.

¹⁰⁴ *Burlington Indus., Inc. v. Ellerth*, 118 S. Ct. 2257, 2266 (1998).

lem with staff harassment creating a sexually hostile environment have appeared in discussions led by the American Library Association's ("ALA") Freedom to Read Foundation¹⁰⁵ and the ACLU¹⁰⁶ regarding all forms of potential public library liability resulting from providing access to Internet sexual content. Moreover, the ALA was concerned enough about potential library employer liability resulting from third-party harassment to commission two legal memoranda on this issue from a private law firm.¹⁰⁷ Statements recognizing patron harassment have also appeared in pre-emptive Internet use policies that are distributed to clients and designed to warn clients not to engage in such behavior and to attempt to insulate the library from any liability.¹⁰⁸ These policies are further evidence that libraries themselves believe there is a sexual harassment problem.

The Loudoun County, Virginia, public library is one library system that has formally recognized in its Internet use policy that client display of Internet sexual content poses a threat to staff which could constitute sexual harassment.¹⁰⁹ The Board of the Loudoun County Public Library explicitly acknowledged in its Internet use policy that a potential for harassment of staff by clients using online sexual content existed and could rise to the level of creating a hostile work environment for their employees in violation of Title VII.¹¹⁰ The Loudoun County policy as originally adopted states:

Title VII of the Civil Rights Act prohibits sex discrimination. Library pornography can create a sexually-hostile environment for patrons or staff. Pornographic Internet displays may intimidate patrons or

¹⁰⁵ See Jenner & Block, *Civil Liability for an Alleged Hostile Work Environment Related to Patron or Employee Internet Use: Memorandum* (last modified Aug. 18, 1998) <http://www.ala.org/alaorg/oif/work_jb.html> [hereinafter Jenner & Block, *Civil Liability*].

¹⁰⁶ See *Censorship in a Box*, *supra* note 1 (arguing that although staff exposures exist, libraries would not be liable for a claim of sexual harassment).

¹⁰⁷ See Jenner & Block, *Civil Liability*, *supra* note 105; Jenner & Block, *Civil and Criminal Liabilities for Libraries Related to Using or Failing to Use Internet Filtering Software or Other Content Screening Mechanisms: Memorandum* (last modified Aug. 18, 1998) <http://www.ala.org/alaorg/oif/civil_jb.html>.

¹⁰⁸ See *supra* note 83.

¹⁰⁹ See Loudoun County Public Library Board of Trustees, *Loudoun County Public Library Internet Use Policy* (visited Nov. 25, 1998) <<http://www.lcpl.lib.va.us/wwwpol.htm>>.

¹¹⁰ See *id.*

staff.... Such displays would transform the library environment . . . to one which invites unwelcome sexual advances and sexual harassment. Permitting pornographic displays may constitute unlawful sex discrimination in violation of Title VII of the Civil Rights Act.¹¹¹

While this library policy was directed at protecting both "staff" and other "patrons" from "sexually hostile" behavior by patrons displaying "library pornography" in the form of online sexual content, the policy was written in language explicitly mirroring the elements that are required to sustain a sexual harassment cause of action under Title VII.¹¹² Additionally, the policy was explicitly titled "Policy on Internet Sexual Harassment."¹¹³ The policy also explicitly acknowledged that such behaviors could fulfill at least two of the elements necessary to establish a hostile work environment in a sexual harassment cause of action including, behavior of a sexual nature toward staff, and that the behavior is "unwelcome."¹¹⁴ By writing its policy in language directly evoking a hostile work environment claim, the Loudoun County library has also acknowledged that, just by permitting online sexual content displays by patrons, the library employer could be implicated in a sexual harassment cause of action brought by staff that rises to the level of "Internet sexual discrimination" under Title VII.¹¹⁵

In fact, the Loudoun County public library originally sought to avoid subjecting its staff and patrons to creation of a "sexually hostile environment" by other patrons, and thus to prevent such "Internet sexual discrimination."¹¹⁶ Loudoun's original policy advocated implementing preventive measures, including installing "site blocking software" on all machines and entirely prohibiting access to Internet "pornography" by all patrons.¹¹⁷ Additionally, in defending its Internet use policy

¹¹¹ *Id.* (emphasis added).

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ Loudoun County, *Internet Use Policy*, *supra* note 83; see also *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982) (detailing the elements of a hostile work environment claim, including unwelcomeness).

¹¹⁵ Loudoun County, *Internet Use Policy*, *supra* note 83.

¹¹⁶ Loudoun County, *Internet Use Policy*, *supra* note 83.

¹¹⁷ Loudoun County, *Internet Use Policy*, *supra* note 83. The ACLU successfully challenged the Loudoun library's use of "site blocking software" as a preventive measure against creation of a "sexually hostile environment" by clients and gar-

in court against challengers who were opposed to mandatory use of filtering software on all machines at Loudoun libraries, the County expressly argued that one of its principal compelling interests in formulating the policy was to prevent harassment of both *staff* and clients by those clients viewing and displaying Internet sexual content.¹¹⁸ Despite a lack of widespread reports of staff harassment, anecdotal evidence, library professional literature, and library policy statements reflect a

nered an injunction against enforcement of the policy on the grounds that filtering violated the First Amendment. See *Mainstream Loudoun v. Board of Trustees*, 24 F. Supp. 2d 552 (E.D. Va. 1998).

In response to the ruling, the Loudoun library adopted a revised policy on December 1, 1998, which reflected a dedication to freedom of access, allowed for freedom for adults to choose filtering for themselves and their children, and removed all reference to possible "sexually hostile" environments or "internet sexual harassment." See Loudoun County Public Library Board of Trustees, *Loudoun County Public Library Internet Use Policy* (visited Dec. 1, 1998) <<http://www.techlawjournal.com/censor/19981201pol.htm>>.

¹¹⁸ This argument was ultimately rejected by the district court as justification for the use of filtering software but, nonetheless, establishes the Loudoun library's significant concern about the harassment of staff. The library's policy was invalidated by the court only because filtering software was seen as an insufficiently narrow measure to serve this compelling interest without infringing free speech. See *Mainstream Loudoun*, 24 F. Supp. 2d at 567.

The library acknowledged one librarian's failure to receive an overwhelming response to an email request for incidents of staff harassment via client use of Internet pornography. See *id.* at 566. However, it is generally acknowledged that sexual harassment presents a complex human circumstance in which failure to report incidents is not uncommon and is not necessarily an indication that harassment is not occurring. See Radford, *supra* note 86, at 523-24 (reporting that only five percent of targets file formal complaints against harassers and "both male and female targets" do not tend to react to harassment by filing a formal complaint). Also, the Virginia district court's pronouncement fails to take into account that the Loudoun County library is not the only library entity that has expressed concern about harassment in libraries, see *supra* notes 105-107 and accompanying text, or that library staff may be feeling pressure to support First Amendment concerns over their own well-being and thus underreporting. See Manley, *Are We Free*, *supra* note 93, at 63. Further, as the anecdotal reports indicate, the lack of response to this one email survey taken early on in the Internet presence in libraries does not preclude the occurrence of harassing incidents. See *supra* notes 84, 95-103, 105-109 and accompanying text.

In early 1999, the librarian mentioned by the court, David Burt, filed freedom-of-information requests with libraries in an attempt to gain access to internal logs of both client and staff complaints resulting from client use of Internet. See *Censorship Watch: David Burt Closes Down Filtering Facts*, AM. LIBR., Jan. 2000, at 25. Since then, Burt has threatened legal action against libraries that failed to comply with the requests claiming either client confidentiality or that the library did not have any "pertinent public records." *Just the Filtering Facts*, AM. LIBR., May 1999, at 20.

recognition that client display of Internet sexual content to staff is a cause for concern in public libraries which may result in claims of third-party sexual harassment.¹¹⁹

III. APPLYING THE THIRD-PARTY HOSTILE WORK ENVIRONMENT CLAIM TO CLIENT DISPLAY OF INTERNET PORNOGRAPHY IN THE PUBLIC LIBRARY

As in other third-party hostile environment claims, to prevail under Title VII, library staff will be required to show that they were subjected to conduct of a sexual nature, that the conduct was unwelcome, and that it was severe and pervasive enough to alter the condition of employment.¹²⁰ If successful, the library employee will need to show further that the employer knew or should have known of the harassing conduct and failed to take appropriate and immediate remedial action.¹²¹ Additionally, claims may be limited to those where staff can prove deliberate harassment by clients.¹²² However, library staff will also face a unique combination of challenges in pursuing their claims, including for example, establishing that pornographic Internet display alone is intentional conduct based on the sex of the staff member, that it is sufficiently severe alone to constitute harassment, that a public library employer should not be able to shield itself with its First Amendment responsibilities, and that an assumption of risk defense should not apply where it is known that public library work now contains a sexual component due to Internet presence. The following sections discuss these special, yet not insurmountable, challenges that library staff exposed to Internet pornography by clients will face in fulfilling established parameters of liability under the hostile work environment and third-party sexual harassment theories.

¹¹⁹ See *supra* notes 95-109 and accompanying text.

¹²⁰ See 29 C.F.R. §§ 1604.11(a)-(d) (1980).

¹²¹ See *id.* § 1604.11(e).

¹²² See *Burlington Indus., Inc. v. Ellerth*, 118 S. Ct. 2257, 2266 (1998).

A. *Intent to Discriminate*

While intent is not an element formally required to prove a hostile work environment claim,¹²³ courts may nevertheless require such proof because, as the Supreme Court has stated, "Title VII discrimination presupposes intentional conduct."¹²⁴ However, the Supreme Court recently may have made proving intent easier in the context of pornographic Internet display because the Court affirmed a finding of fact by a lower court that it is unlikely that such content could be accessed unintentionally.¹²⁵ In *Reno*, the Supreme Court reiterated undisputed findings of fact made by a Pennsylvania district court regarding sexually explicit content available on the Internet:

"[U]sers seldom encounter such content accidentally . . . 'Almost all sexually explicit images are preceded by warnings as to the content.' For that reason, the 'odds are slim' that a user would enter a sexually explicit site by accident. Unlike communications received by radio or television, 'the receipt of information on the Internet requires a series of affirmative steps more deliberate and directed than merely turning a dial . . .'"¹²⁶

Thus, it follows that if such images could not have likely been accessed unintentionally, then a client working with a staff member who affirmatively exposes that staff member to Internet pornography likely did so intentionally. Additionally, other courts have "presume[d] discriminatory intent . . . from the [simple] presence of sexually derogatory words and expression" in the hostile environment because the "economic displacement and sexual degradation of its victims is so strong."¹²⁷ These court findings, taken together, suggest that a court would be predisposed to finding that display of Internet pornography to library staff, which requires an intentional act by a client to access it,¹²⁸ inherently includes an intent to discriminate in the workplace for the purposes of a hostile work environment claim.

¹²³ See 29 C.F.R. § 1604.11(b).

¹²⁴ *Burlington*, 118 S. Ct. at 2266.

¹²⁵ See *Reno v. ACLU*, 117 S. Ct. 2329, 2329, 2336 (1998).

¹²⁶ *Id.* at 2334, 2336.

¹²⁷ Suzanne G. Lieberman, *Current Issues in Sexual Harassment*, 50 WASH. U. J. URB. & CONTEMP. L. 423, 437 n.99 (1996) (citation omitted).

¹²⁸ See *Reno*, 117 S. Ct. at 2334, 2336.

B. *Discrimination Based on Sex*

For sexual harassment to be actionable under Title VII, which protects against sexual discrimination, the offensive conduct must comprise discrimination based on the victim's gender.¹²⁹ Conduct involving sexual behavior can be mistaken as automatically fulfilling this gender requirement.¹³⁰ Thus, in library cases where the offensive conduct is made up only of displaying sexually explicit Internet images to staff, but is not accompanied by any further evidence that the conduct was directed toward staff based on gender, this element could prove difficult to establish, especially where both male and female staff complain of exposure. As one district court explained, "harassment which involves sexual behavior or has sexual behavior overtones (i.e., remarks, touching, display of pornographic pictures) *but is not based on gender bias does not* state a claim under Title VII."¹³¹ However, at least one circuit has eliminated the need to establish gender bias as a separate showing in cases involving behavior or materials of a sexual nature.¹³² The Court of Appeals for the Third Circuit stated:

¹²⁹ See *Vandeventer v. Wabash Nat'l Corp.*, 887 F. Supp. 1178, 1180 (N.D. Ind. 1995).

¹³⁰ See *Plakio v. Congregational Home, Inc.*, 902 F. Supp. 1383, 1392 (D. Kan. 1995) ("The words 'sex' and 'sexual' create definitional problems because they can mean either 'relating to gender' or relating to sexual/reproductive behavior. The two are not the same, but are . . . related and easily confused. Title VII only recognizes harassment based on the first meaning." (citation omitted)).

The sexual nature of harassing behavior is not the basis of Title VII liability, but whether the behavior is directed at a target because of *gender*. Cf. *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1478 (3d Cir. 1990) (finding sexual harassment where only female police officers were subjected to *nonsexual* harassing conduct, including stolen work product, vandalized property, and physical assaults); see also Shira A. Scheindlin & John Eloffson, *Judges, Juries, and Sexual Harassment*, 17 YALE L. & POL'Y REV. 813, 818-19 (1999) ("[H]arassment [need not] have included overtly sexual connotation; nonsexual conduct may be actionable if it would not have occurred but for the victim's sex."). However, sexual behavior is considered by at least the Third Circuit as implicitly connoting harassment based on gender. See *Andrews*, 895 F.2d at 1471-75.

¹³¹ *Vandeventer*, 902 F. Supp. at 1181 (affirming summary judgment for employer where court found "no evidence" that the abuse was based on harasser's "disdain for the victim's gender" and only meant the harasser did not "like" the victim, where the harasser taunted the plaintiff by calling him a "homosexual" and that when the harassing co-worker called the plaintiff a "dick sucker" he was using a "common epithet" and not making a "sexual advance").

¹³² See *Andrews*, 895 F.2d at 1482 & n.3.

The intent to discriminate on the basis of sex in cases involving sexual propositions, innuendo, pornographic materials, or sexual derogatory language is implicit, and thus should be recognized as a matter of course. A more fact intensive analysis will be necessary [only] where the actions are not sexual by their very nature.¹³³

Thus, in the library context where harassment involves the display of pornographic or sexually explicit materials, it is likely that the sexual nature of the materials would suffice to establish the "sexual" and thus the gender-based nature of the discrimination under the *Andrews* standard.¹³⁴

C. *Severity and Pervasiveness: The Dirty Picture Cases*

Library staff plaintiffs may find the required degree of severity suffered difficult to establish because in these circumstances it would likely be comprised of only pornographic image display.¹³⁵ Courts have historically been reluctant to find that exposure to pornographic imagery alone is sufficiently severe and they ordinarily require some sort of additional offensive conduct to sustain a claim.¹³⁶ However, more recent court decisions indicate that the tide may be turning and not only will courts allow claims based solely on "dirty pictures" in proper circumstances,¹³⁷ but they will allow evaluation of such claims under the more sympathetic "reasonable woman standard" in cases involving female plaintiffs,¹³⁸ consequently

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ Library harassment, however, like other workplace harassment, may include a group of harassing behaviors which would likely make it easier to sustain a claim. See, e.g., *Adults Harassing Library Staff*, *supra* note 95. One report made by a Maryland librarian included both a person's display of pornographic images to staff required to assist such person log on to "Netscape" and print, as well as attempts by that person to engage staff in discussions of "soft-core pornographic" images being printed. *Adults Harassing Library Staff*, *supra* note 95. These incidents bothered two female staff enough that they attempted to schedule their hours so as not to encounter this client while working. See *Adults Harassing Library Staff*, *supra* note 95.

¹³⁶ See *Discrimination-Free Workplace*, *supra* note 2, at 1087 ("[M]ost courts have cited pornography in the workplace as mere evidence of hostile environment . . . and have focused primarily on other aspects of harassing behavior, such as offensive comments and sexist pranks.").

¹³⁷ See *infra* notes 139-142 and accompanying text.

¹³⁸ Although not all circuit courts agree, see *supra* note 45, many courts have adopted the reasonable woman standard in evaluating sexual harassment severity.

increasing the likelihood of female staff claim success. Historically, courts have generally been unreceptive to the idea that a hostile work environment claim could be founded on employee exposure to "dirty pictures" alone.¹³⁹ However, such reluctance is not universal. Some courts have recognized at least the possibility that a hostile environment claim could succeed based solely on employee exposure to sexually explicit images.¹⁴⁰ Additionally, some courts have denied summary judgment to employers specifically on the grounds that such a claim could survive as a matter of law and that the severity of the individual exposure presents an issue of fact for the jury.¹⁴¹ Moreover, at least two courts have found for a plaintiff

See *Ellison v. Brady*, 924 F.2d 872, 880 (9th Cir. 1991) (reasonable woman standard applied where coworker sent letter of a sexual nature to plaintiff); *Yates v. Avco Corp.*, 819 F.2d 630, 637 (6th Cir. 1987) ("person standing in the shoes of employee should be the 'reasonable woman'"); *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1524 (M.D. Fla. 1991) (reasonable woman standard applied to environment where jokes, remarks of a sexual nature, and pornographic photographs were exchanged); see also *Schneider*, *supra* note 45, at 563 n.188 (explaining that the reasoning behind courts' adoption of reasonable woman standard has been that male-biased reasonable person standard would perpetuate discrimination against women in the workplace); Ellen M. Martin et al., *Recent Developments in Sexual Discrimination*, 441 PLI/LIT 647, 661 (1992) ("Although courts have generally examined hostile workplace claims from the perspective of the 'reasonable person' . . . , several courts have held recently that . . . the trier of fact must adopt the perspective of the 'reasonable woman' where the plaintiff is female.).

¹³⁹ See *Discrimination-Free Workplace*, *supra* note 2, at 1076.

¹⁴⁰ See *Urofsky v. Allen*, 995 F. Supp. 634, 640-41 (E.D. Va. 1998) (holding that state statute restricting employee access to sexually explicit materials on state owned computers violated the First Amendment where statute failed to cover non-computerized ways of producing the hostile environment such as posting of "pin-up" pictures); *Iannone v. Frederic R. Harris, Inc.*, 941 F. Supp. 403, 403 (S.D.N.Y. 1996) (supporting retaliatory discharge claim where plaintiff "reasonably believed that employer's requiring her to work with allegedly sexually explicit photograph constituted sexual harassment in violation of Title VII"); see also Karen Lebacqz, *Essay, Justice and Sexual Harassment*, 22 CAP. U. L. REV. 605, 610 (1993) ("[T]he law began to recognize that pornography in the workplace could constitute sexual harassment."); Salime Samii, *Litigating Federal Sexual Harassment Cases: The Link Between "Sexual Harassment" and the Standard of Reasonableness*, 13 REV. LITIG. 331, 351 (1994) ("[T]he posting of pornographic pictures or even cartoons has been deemed to create a sexually hostile environment").

¹⁴¹ See *Flom v. Waste Management, Inc.*, No. 95-1924, 1997 WL 137174, at *7 (N.D. Ill. Mar. 24, 1997) (relying on the reasoning of *Baskerville v. Culligan International Co.*, 50 F.3d 428, 431 (7th Cir. 1995), which held that offensive conduct was insufficiently severe because it could appear on "primetime television," and thus denying summary judgment to employer because "[p]rime-time television does not show cartoons depicting sexual acts between human beings and animals and

under this circumstance.¹⁴²

One court established liability based on the standard that any sexually explicit material to which the employee was exposed could not be found on "prime-time" television and thus was sufficiently severe to establish the employer's liability for creating a hostile work environment.¹⁴³ Under this "prime-time" standard, it would likely be easy to establish that a li-

explicit drawings of sexual organs or sexually offensive conduct" or "dirty pictures" to which plaintiff was subjected); *Barbetta v. Chemlawn Servs. Corp.*, 669 F. Supp. 569, 573 (W.D.N.Y. 1987) (disagreeing with *Robidue v. Osceola Refining Co.*, 805 F.2d 611, 622 (6th Cir. 1986), which held that pornography in the workplace does not provide basis for hostile environment claim and that whether employer's displaying of sexually explicit slide show and calendar featuring pictures of nude and partially naked women was sufficiently pervasive to establish harassment was "a question of fact which must be determined at trial"). *But see* *Vigil v. City of Las Cruces*, 113 F.3d 1247, No. 96-2059, 1997 WL 265095, at *2 (10th Cir. May 20, 1997) (granting summary judgment to employer where employee's "single encounter with pornographic material left inside a folder by a previous worker and her supervisor's single attempt to give her pornographic software [were] not reasonably regarded as giving rise to an abusive environment").

¹⁴² See *Stair v. Lehigh Valley Carpenters Local Union No. 600*, No. 91-1507, 1993 WL 551450 (E.D. Pa. Dec. 30, 1993) (granting application for attorney's fees to plaintiff who prevailed in obtaining order enjoining union from creating a hostile work environment by promotion and display of calendars that included pictures of nude women and by failure to take action when female plaintiff complained about the calendars). Although the harassing conduct in question in *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1493-536 (M.D. Fla. 1991), included additional behavior such as verbal harassment, *Robinson* is considered by commentators to be the first decision to find a hostile environment "primarily because pictures of nude and partially nude women appeared throughout the workplace." Evelyn Oldenkamp, *Pornography, The Internet, and Student to Student Sexual Harassment: A Dilemma Resolved with Title VII and Title IX*, 4 DUKE J. GENDER L. & POL'Y 159, 165 n.46 (1997); see also Thomas D. Brown, *When Counseling Is Not Enough: The Ninth Circuit Requires Employers to Discipline Sexual Harassers*, 71 WASH. U. L.Q. 901, 916 n.107 (1993) ("The *Robinson* court heard and accepted expert testimony explaining the detrimental effects of sexual stereotyping on the workplace and linking the sexually explicit pin-ups to the abusive and demeaning attitudes of the other workers [and] . . . expand[ed] hostile environment sexual harassment to include pornography in the workplace."); Michael E. Collins, Comment, *Pin-Ups in the Workplace—Balancing Title VII Mandates with the Right of Free Speech*, 23 CUMB. L. REV. 629, 638 (1993) ("In *Robinson* . . . the . . . District Court . . . indicated that nude pictures in the workplace would be sufficient to support an action under Title VII and that injunctive relief would be proper."); *Discrimination-Free Workplace*, *supra* note 2, at 1076.

¹⁴³ *Flom*, 1997 WL 137174, at *7. The court based its "prime-time" standard on the reasoning of an earlier case, *Baskerville v. Culligan International Co.*, 50 F.3d 428, 431 (7th Cir. 1995), which had denied liability predicated in part on exposure to pornographic materials because all of the offensive materials, "dirty pictures," and conduct could not be seen on "prime-time" television. *Id.*

brary employee's exposure to the kind of images readily available on the Internet constituted sufficiently severe conduct.¹⁴⁴ Thus, there is evidence that the traditional notion that exposure to "dirty pictures" alone is not severe enough to reasonably support a hostile environment claim is changing, and library staff plaintiffs will benefit from this change. Such plaintiffs will likely no longer need to establish that the *type* of conduct to which they were subjected—image exposure—is sufficient to support a claim as a matter of law. Rather, such plaintiffs can concentrate on establishing whether the circumstances of exposure were reasonably severe enough to sustain the claim as indicated by factors such as frequency of exposure and the offensiveness of the image displayed.¹⁴⁵

Both a court's decision whether to allow the legal sufficiency of a claim predicated on "dirty pictures" alone and a court's subsequent evaluation of whether the individual circumstance of exposure was reasonably severe enough to sustain a claim may be dependent upon whether the court chooses to apply a reasonable person or a reasonable woman standard in cases involving female plaintiffs. In fact, the case most often cited as establishing that a claim predicated solely on exposure to sexually explicit images is not sufficiently severe, *Rabidue v. Osceola Refining Co.*,¹⁴⁶ has been criticized for its holding specifically because of its failure to apply the reasonable woman standard to a female plaintiff.¹⁴⁷ It is generally considered

¹⁴⁴ For example, a recent survey of several pornographic website links emailed unsolicited to the author as advertisements revealed the following sexually graphic, arguably non-"prime-time," images shown on promotional screens: full frontal male and female nudity, sexual intercourse, oral copulation, and multiple partner intercourse. See *Best Sex on the Internet* (visited Nov. 28, 1999) <<http://216.33.20.4/80s/7984651984316871/main/html>>; Secret Adult Playground, *Watch the Pamela Anderson Home Sex Video Free!* (visited Dec. 22, 1998) <<http://209.218.218.2/~crystals/entr.html>>; *Forbidden Sex Site* (visited Dec. 28, 1998) <<http://208.166.75.251/88m/index1.html>>; Premium Pics, *Mega XXX Playground* (visited Dec. 30, 1998) <<http://www.premiumpics.com>>. These images are freely accessible without age authorization requirements (despite warnings of prohibited minor access) on promotional screens designed to induce a viewer to pay for additional access, and thus should be available on any public terminal with access to the worldwideweb, such as those at public libraries. See *id.*

¹⁴⁵ See *supra* note 43 and accompanying text.

¹⁴⁶ 805 F.2d 611 (6th Cir. 1986).

¹⁴⁷ See *Ellison v. Brady*, 924 F.2d 872, 878 (9th Cir. 1991) ("[I]n evaluating the severity and pervasiveness of sexual harassment, we should focus on the perspective of the victim A complete understanding of the victim's view re-

that the reasonable woman standard is more sympathetic to female plaintiffs in sexual harassment claims and the reasonable person standard more forgiving to employer defendants.¹⁴⁸ This is considered especially true with respect to hostile environment claims involving sexually explicit imagery because it can be shown that men generally are less predisposed to consider exposure to such materials as constituting sexual harassment.¹⁴⁹

The choice of reasonable woman versus reasonable person standard could have a significant impact on the success of library staff claims because it is likely that most library claimants would be female. According to one survey, female staff are overwhelmingly the target of all sexual harassment by clients in libraries.¹⁵⁰ Thus, in the likely majority of cases where the

quires . . . an analysis of the different perspectives of men and women. Conduct that many men consider unobjectionable may offend many women."); *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1485-86 (3d Cir. 1990) (rejecting *Rabidue's* use of reasonable person standard and finding that while men may find use of derogatory and insulting terms or posting of pornographic pictures "harmless and innocent, it is highly possible that women may feel otherwise"); *Atwood v. Biondi Mitsubishi*, No. 92-1851, 1993 WL 244063, at *3 (W.D. Pa. May 12, 1993) ("This Court joins the Third Circuit and a chorus of courts and legal scholars in rejecting the 'boys will be boys' defense to sexual harassment claims.").

¹⁴⁸ See Achampong, *Recent Developments*, *supra* note 33, at 652 ("The evaluation of a hostile work environment from the perspective of a reasonable woman made it more likely for a female plaintiff to win a third party hostile environment harassment claim, because women view sexual harassment differently from men.").

¹⁴⁹ In *Robinson*, the court accepted the testimony of an expert who established that "[m]en and women perceive the existence of sexual harassment differently" and that one study found that 87% of women consider conduct such as "materials depicting sexually provocative poses, nude, and partially nude pictures" sexual harassment, whereas only 76% of men consider this same material as constituting sexual harassment. *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1507 (M.D. Fla. 1991); see also Deborah S. Brenneman, Comment, *From a Woman's Point of View: The Use of the Reasonable Woman Standard in Sexual Harassment Cases*, 60 U. CIN. L. REV. 1281, 1295 (1992) ("[W]hile the male co-workers in *Rabidue*, and in countless other workplaces around the country may have characterized the plethora of pornography as amusing, the reasonable woman would likely describe it . . . as a barrier to gaining an equal footing in the workplace.").

¹⁵⁰ See Manley, *No Laughing Matter*, *supra* note 77, at 68 (78% of female respondents and only 7% of male respondents to library survey had been sexually harassed by a client in a given 12-month period). It should be noted that this study only surveyed professional librarians, so the numbers for general library staff may prove somewhat dissimilar. However, even taking into account that possible discrepancy, and accounting for an additional possible differential between non-professional male and female staff perceiving the same activities as harass-

library claimant would be female, the plaintiff's likelihood of success in establishing severity could benefit from the courts' increasing acceptance of a reasonable woman standard.¹⁵¹ Consequently, because of the courts' increasing acceptance of pornographic display alone as sufficiently severe to establish harassment, and because of the courts' increasing employment of a reasonable woman standard, library staff should be able to establish the severity of a claim subject to no more than the same reasonableness inquiry into the circumstances of each claim than are all other sexual harassment claims.

D. *Library Employer Must Have Constructive or Actual Knowledge*

As in other third-party sexual harassment claims, courts may pay particular attention to the amount of knowledge that a public library employer has of clients exposing library staff to Internet pornography.¹⁵² Actual knowledge, as in all hostile environment claims, is satisfied by proof of direct complaints from employees.¹⁵³ However, public libraries typically operate in a system of central management with branches comprised of multiple layers of management.¹⁵⁴ Therefore, as in other organizational environments dependent upon a web of central management and subordinate supervisors, public library harassment cases involving actual complaints will raise questions of how high that complaint must travel in management in

ment, see *supra* note 149 and accompanying text, the huge gap between female and male harassment presented in this study, 71%, suggests the fact that women experience more harassment than men in the library from clients.

¹⁵¹ See *supra* note 46; Achampong, *Recent Developments*, *supra* note 33, at 652.

¹⁵² See *supra* Part I.B.

¹⁵³ See Warner, *supra* note 16, at 373-74.

¹⁵⁴ Public libraries in the United States and internationally are generally organized into a system consisting of a single central or main branch with a central administrative authority that is removed from the day to day operation of subordinate branch library units. Often there is a mid-level regional authority as well. The lowest organizational unit, the branch, generally has its own branch manager who acts as the primary supervisor of workers and maintains authority over the day to day library business. See, e.g., Thomas Ballard, *Library Systems: A Concept That Has Failed Us*, WILSON LIBR. BULL., Dec. 1985, at 19-22 (studying examples of system models of public librarianship in the United States, including the main/regional/branch system model, the main and supporting branch system model, and municipal stand-alone branch model).

order to impute liability to the central employer.¹⁵⁵ Some courts have held that complaints made only to a "lower level" of management are insufficient to attribute actual knowledge to the central employer.¹⁵⁶ Determination of knowledge may also turn on whether the employee to whom the complaint is made is reasonably vested with some authority to either remedy the harassment or to relay the information to proper central authority.¹⁵⁷

However, in *Faragher*, the Supreme Court recently overturned a similar ruling that denied employer liability where a subordinate supervisor had failed to report complaints of harassment to a higher authority.¹⁵⁸ This suggests that the Court no longer considers analysis of whether a complaint has reached the proper management heights appropriate in determining liability.¹⁵⁹ Thus, after *Faragher*, public library employers should no longer be able to shield themselves by argu-

¹⁵⁵ See Stanford Edward Purser, *Young v. Bayer Corp.: When Is Notice of Sexual Harassment to an Employee Notice to the Employer?*, 1998 B.Y.U. L. REV. 909, 910-11 (discussing the relative lack of scholarly attention focused on the significant factor of how high in management notice must travel for sexual harassment liability to attach and noting that "determination of which employee's notice of sexual harassment can be deemed notice to the employer is often the key determining employer liability"); Warner, *supra* note 16, at 373-74 (noting that actual knowledge may be established by proof of an employee complaint to "higher management") (emphasis added).

¹⁵⁶ *Van Zant v. KLM Royal Dutch Airlines*, 80 F.3d 708, 710-11 (2d Cir. 1996) (holding that reports to immediate supervisor of co-worker's lewd sexual remarks where supervisor did not inform superiors were too "low level" to impute knowledge to employer); see also *Nichols v. Frank*, 42 F.3d 503, 506-07 (9th Cir. 1994) (holding that reports of co-worker harassment made to highest ranking supervisor on a postal shift by deaf mute incapable of communicating to any other postal employees or managers were insufficient to impute knowledge to the necessary "management level," and thus, Postal Service not liable).

¹⁵⁷ See Purser, *supra* note 155, at 910-11 (noting one court's reasoning for attaching the liability to an employer in absence of complaint to a high management authority was based on employee's reasonable expectation that the person to whom she complained would either terminate the harassment or report it to someone who could).

¹⁵⁸ See *Faragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998). The Eleventh Circuit had denied the City of Boca Raton's liability for a supervisor's harassment of a lifeguard where the lifeguard had informed another supervisor of being touched in a "sexually offensive manner," and the informed supervisor never reported the complaints to any higher authority. See *Faragher v. City of Boca Raton*, 111 F.3d 1530, 1538 (11th Cir. 1997), *rev'd*, 118 S. Ct. 2275, 2294 (1998). The court of appeals held that the city could not be held liable because the informed supervisor "did not rank as higher-management in the City." *Id.*

¹⁵⁹ See *Faragher*, 111 F.3d at 1538.

ing that complaints failed to reach a high enough level of supervisory authority, and staff complaints to any supervisor or branch manager will likely now suffice to impute knowledge to the library.

It has also been recognized that the amount of constructive knowledge a customer service employer has of harassment can be difficult for a complainant to show because the site of harassment and the site of management activities are not the same.¹⁶⁰ However, this is largely a concern in situations where an employee has been dispatched to a client's location and is no longer within the property of the employer.¹⁶¹ Although library staff often work with clients in areas that are remote from supervisory work areas, even the most remote public location of the library is still within the real estate system of the employer with on-site employer management.¹⁶² Thus, this concern should provide no obstacle to library staff claims of sexual harassment.

E. *Employer Remedial Action: The "Access Argument" Provides No First Amendment Defense to Employer Remedial Responsibility*

Once a staff claimant has shown that a public library employer had sufficient knowledge of harassment by clients displaying Internet pornography, the claimant will need to further show that the library failed to take immediate corrective action reasonably calculated to end the harassment.¹⁶³ In professional discussions of problems resulting from client Internet use in libraries, much has been made of the fear that

¹⁶⁰ See Warner, *supra* note 16, at 374.

¹⁶¹ See *id.* But see Mathews, *supra* note 4, at 996 ("Third party sexual harassment inside the work environment can be just as hard to detect as discovering it outside of the work environment.").

¹⁶² Cf. Ballard, *supra* note 154, at 19-22.

¹⁶³ See 29 C.F.R. § 1604.11(e) (1980) (describing the knowledge and remedial action elements of the hostile work environment claim). Courts have required that the remedial action taken by the employer needs to be instantaneous enough and effective enough to offer some real protection to the worker; it cannot be a token effort made too late. See *supra* notes 50-52 and accompanying text. The level of action required and the speed with which it must be taken are determined relative to the character of the harassment itself; as seriousness increases, so increases the level of action and speed required. See *supra* notes 50-52 and accompanying text.

instituting any protective measure that would inhibit clients' First Amendment rights of access to the protected Internet content. Potentially, library employers could take advantage of this tension and attempt to use it as a shield against charges that the library failed to take appropriate remedial action. This defense is known among libraries as "the access argument," and even library clients seem to grasp its power to call into question any prophylactic measures taken by a library, no matter how justified, that might restrict access to library materials, including Internet pornography, which are perceived as protected absolutely by the First Amendment.¹⁶⁴ However, the Supreme Court has never held that First Amendment protections are absolute in the face of sufficient countervailing community interests.¹⁶⁵ Rather, under the "secondary effects" doctrine, the Court has allowed restrictive measures that are not intended to restrict access to protected content itself, but only to curtail an attendant circumstance or behavior, known as a secondary effect, that happens to be linked with a particular type of content incidentally.¹⁶⁶ The court allows such restrictive measures even where they have the effect of restricting access to the protected content itself.¹⁶⁷

The desire to control the intentionally harassing client display behavior directed at library staff is a desire to control behavior which is only incidentally linked with the protected Internet pornography speech. It is a desire to control the secondary effect of access to Internet pornography and not a desire to restrict the pornography itself.¹⁶⁸ Therefore, library

¹⁶⁴ The "Coat Man" when confronted by library staff for repeatedly harassing them made just such an argument when he was told to desist from requesting staff assistance with pornographic materials. See *Reports of Pornography*, *supra* note 3. Notations of clients attempting this argument to rebuff staff suggestion that the client refrain from display behavior are not infrequent in the logs of client complaints. See *Reports of Pornography*, *supra* note 3.

¹⁶⁵ See Drew Patrick Gannon, Note, *First Amendment Public Forum Analysis: Restrictions on the Right to Receive Information Upheld in Kreimer v. Bureau of Police*, 97 DICK. L. REV. 411, 414 (1993) (citing R. Allan Horning, *The First Amendment Right to a Public Forum*, 1969 DUKE L.J. 931, 947).

¹⁶⁶ *Reno v. ACLU*, 117 S. Ct. 2329, 2342 (1997) (reiterating the *Renton* holding).

¹⁶⁷ See *id.*

¹⁶⁸ The Loudoun County library expressed this in its original Internet use policy and argued the point in the case that challenged the validity of its policy. See *Mainstream Loudoun v. Board of Trustees*, 24 F. Supp. 2d 552, 564-65 (E.D. Va. 1998).

employers should be able to take whatever measures are necessary to remedy harassing behavior without disturbing any protected First Amendment access in the library.¹⁶⁹ Consequently, the First Amendment "access argument" should provide no shield for library employers against their need to take effective and immediate remedial action in the face of staff harassment.

F. *The Secondary Effects Doctrine*

The secondary effects doctrine developed when the Supreme Court acknowledged that speech activity may be comprised simultaneously of protected speech and non-speech conduct, and that the accompanying non-speech conduct comprises a "regulable evil."¹⁷⁰ This regulable evil later came to be known as a "secondary effect" of the speech.¹⁷¹ Four Supreme Court decisions are known to have shaped the modern doctrine,¹⁷² including *United States v. O'Brien*,¹⁷³ *Young v. American Mini Theatres, Inc.*,¹⁷⁴ *Renton v. Playtime Theatres*,

¹⁶⁹ Not every reaction accompanying speech can properly be characterized as a secondary effect. In *Boos v. Barry*, 485 U.S. 312 (1988), the Supreme Court clarified what it had meant by a secondary effect in *Renton*, or more specifically, what it had *not* meant to characterize as a secondary effect: psychological impact of the speech itself on a listener. See *id.* at 320-22. Libraries seeking to control the affirmative harassing conduct of clients associated with clients receiving pornographic to the speech is not the same as controlling an emotive impact on a listener or a mere listener's reaction. The *Mainstream Loudoun* court failed to delineate this separation adequately when it dismissed the secondary effects argument. See *Mainstream Loudoun*, 24 F. Supp. 2d at 552.

¹⁷⁰ *United States v. O'Brien*, 391 U.S. 367, 375-77 (1968).

¹⁷¹ The term "secondary effect" was first used in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71 n.34 (1976). While *O'Brien* never used the term "secondary effect," its rationale is seen as the precursor to the Court's subsequent rulings in *Young* and *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986) (plurality opinion), two cases known as establishing the "secondary effects" analysis beyond the realm of "symbolic speech." Philip J. Prygoski, *The Supreme Court's "Secondary Effects" Analysis in Free Speech Cases*, 6 COOLEY L. REV. 1, 3-4, 7-8 (1989); see also William L. Mitchell, II, Comment, "Secondary Effects" Analysis: A Balanced Approach to the Problem of Prohibitions on Aggressive Panhandling, 24 U. BALT. L. REV. 291, 322-23 (1995).

¹⁷² See generally Mitchell, *supra* note 171; Prygoski, *supra* note 171.

¹⁷³ 391 U.S. 367 (1968).

¹⁷⁴ 427 U.S. 50 (1976).

Inc.,¹⁷⁵ and more recently, *Boos v. Barry*.¹⁷⁶ An analysis of the development of the doctrine in these four cases reveals two important reasons why it will properly apply to library attempts to curtail sexual harassment incidentally tied to protected Internet pornography. First, the Supreme Court is especially likely to extend the doctrine's permissive restrictions in the case of sexual speech as opposed to cases of political speech.¹⁷⁷ Second, as long as the effect to be controlled is not the mere "emotive" reaction of the listener of speech, the doctrine applies.¹⁷⁸ As the desire to control sexual harassment in libraries fits both of these characteristics because it involves sexual and not political speech, and because controlling sexual harassment of staff is not designed to remedy a mere emotive objection by staff to the presence of the Internet pornography, the doctrine is likely to apply and to permit libraries to institute restrictive measures directed toward client harassers who happen to use Internet pornography as only a tool of harassment.

In *O'Brien*, the Supreme Court originated what later came to be known as the secondary effects doctrine in the political context of a draft card burning case.¹⁷⁹ Therein, the Court first recognized that an act of burning the draft card, which the plaintiff argued was "symbolic speech," could be made up of both a protected speech activity, the message of protest made by burning the card, and a non-speech activity, the destruction of the card.¹⁸⁰ The latter non-speech activity comprises a "regulable evil."¹⁸¹ The Court then ruled that a federal regulation which prohibited the burning of a draft card was constitutional as to the man who burned his card in protest.¹⁸²

The Supreme Court's next application of the secondary effects doctrine to allow regulation of protected speech occurred in *Young*, where a city had zoned "adult theaters" out of cer-

¹⁷⁵ 475 U.S. 41 (1986).

¹⁷⁶ 485 U.S. 312 (1988).

¹⁷⁷ See *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 49 n.2 (1986) (plurality opinion) (quoting *Young*, 427 U.S. at 70).

¹⁷⁸ *Boos*, 485 U.S. at 321.

¹⁷⁹ See *United States v. O'Brien*, 391 U.S. 367, 372 (1968).

¹⁸⁰ *Id.* at 376.

¹⁸¹ *Prygoski*, *supra* note 171, at *4.

¹⁸² See *O'Brien*, 391 U.S. at 372.

tain locations because of its desire to control not the viewing of the films themselves, but to limit undesirable conduct and effects which resulted from the theaters' existence, such as crime.¹⁸³ The Court noted that the city had based its desire to regulate the adult theaters on findings that crime and other negative secondary effects were shown to be linked incidentally to the occurrence of adult theaters in a given neighborhood, but not to neighborhoods with theaters showing other types of films.¹⁸⁴ The Court then upheld the ordinances as an example of "innovative land-use regulation implicating First Amendment concerns only incidentally and to a limited extent."¹⁸⁵

The Court first fully articulated the modern "secondary effects" doctrine in *Renton*, another case in which the Court upheld the zoning regulation of adult movie theaters to control incidental effects such as crime and lowered property values.¹⁸⁶ Notably, the Court reiterated a distinction it felt had been made earlier in *Young* between the stringency with which application of the secondary effects doctrine should be withheld in the contexts of political speech, but a more liberal application of the doctrine applies to sexual speech.¹⁸⁷ On the appropriateness of allowing the zoning of adult theaters to prevent secondary effects, the Court stated: "[I]t is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammelled political debate"¹⁸⁸ The Court reasoned that the regulation of the theaters was allowable because it was aimed "not at the content of the films shown at 'adult motion picture theatres,' but rather at the secondary effects of such theaters on the surrounding community."¹⁸⁹ The Court also

¹⁸³ *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71 (1976).

¹⁸⁴ *See id.* at 71 n.34; *see also* Prygoski, *supra* note 171, at *9.

¹⁸⁵ *Young*, 427 U.S. at 73.

¹⁸⁶ Although the Court first used the term "secondary effects" in *Young*, *Renton* represents its first full articulation of the doctrine's application. *See Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *Young*, 427 U.S. at 71 n.34; *see also* Prygoski, *supra* note 171, at *5, *8 ("Although the Court in *O'Brien* never used the 'secondary effects' parlance, its analysis is functionally indistinguishable from that used by the Court two decades later in *Renton* and *Boos*.").

¹⁸⁷ *See Renton*, 475 U.S. at 49 n.2; *see also* Prygoski, *supra* note 171, at *18 (noting that Justice Rehnquist quoted the plurality in *Young* in his majority opinion in *Renton*).

¹⁸⁸ *Renton*, 475 U.S. at 49 n.2 (citing *Young*, 427 U.S. at 70).

¹⁸⁹ *Id.* at 47.

explained that it based its reasoning on its earlier holding in *Young* that, as regulations of effects shown to occur incidentally to a particular type of speech content, secondary effects could be analyzed as "content-neutral" regulations despite their seeming targeting of a particular type of content.¹⁹⁰

In the most recent substantial secondary effects decision by the Supreme Court, *Boos v. Barry*,¹⁹¹ the Court reaffirmed the logic of allowing permissible restriction of secondary effects, although such restrictions appear to be targeted at a particular type of speech.¹⁹² The Court noted that because of the simultaneity of both protected speech activity and non-speech activity, the Court had been able in the past to uphold regulation of such speech activity under the First Amendment because it is seen as "content-neutral."¹⁹³ The Court then explained that restrictive regulation applies to a "particular category of speech [only] because the regulatory targets happen to be associated with that type of speech."¹⁹⁴ The Court declined to apply the doctrine to the *Boos* facts which involved a restriction of political picket signs in front of embassies.¹⁹⁵ However, the *Boos* decision was made on the basis of political speech, and thus presents an example of the Supreme Court's own recognition that it would be less likely to extend the secondary effects doctrine to regulations on political speech than to speech such as might be found in an adult movie theater.¹⁹⁶

In *Boos*, the Supreme Court also made clear that the reason it declined to allow the regulation of picketing was that the effect the District of Columbia sought to regulate was not a proper secondary effect, such as "congestion," "interference with ingress or egress," "visual clutter," the "need to protect security of embassies," or the crime effect indicated in *Renton*, but rather the attempt merely to protect the "dignity" of some diplomats.¹⁹⁷ The court further explained that had the regulation in *Renton* been grounded on a desire to restrict the "psy-

¹⁹⁰ *Id.* at 49 (citing *Young*, 427 U.S. at 70).

¹⁹¹ 485 U.S. 312 (1988).

¹⁹² See *Boos*, 485 U.S. at 312.

¹⁹³ *Id.* at 318-20.

¹⁹⁴ *Id.*

¹⁹⁵ See *id.* at 321.

¹⁹⁶ See *id.*

¹⁹⁷ *Boos*, 485 U.S. at 321-23.

chological damage it felt was associated with viewing adult movies, then analysis of the measure as a content-based statute would have been appropriate."¹⁹⁸ The Court reasoned that unlike *Renton*, the *Boos* ordinance presented an attempt to restrict an effect of picketing speech in the form of a mere "listener's reaction" to that speech created by its purely psychological "emotive impact" which comprised merely an affront to the "dignity" of diplomats.¹⁹⁹ The Court then concluded that the District of Columbia ordinance sought to restrict only a psychological effect of speech on the listener diplomats, not a secondary effect, and could thus properly be seen as a "content-based" restriction in violation of the First Amendment.²⁰⁰ The lesson learned from this line of secondary effects cases is that the Court is far more willing to permit restrictions affecting sexual speech, and the Court is willing to restrict such speech in the context of a crime-like effect incidental to a certain category of speech, so long as that effect does not represent a mere psychological impact on a listener of speech with which she objects.²⁰¹

G. *Secondary Effects in the Library*

Four recent court decisions seem to indicate that library staff could have reason to fear that the library employer will argue the First Amendment defensively in opposition to a charge that the library failed to remedy sexual harassment.²⁰² These four decisions seem to communicate that courts value library access over attempts to mitigate harassing behaviors within the library. In *Reno v. American Civil Liberties Union*,²⁰³ the Supreme Court invalidated a provision of the Communications Decency Act ("CDA") which would have held libraries criminally liable for failing to prevent a minor

¹⁹⁸ *Id.* at 321.

¹⁹⁹ *Id.* at 320-21.

²⁰⁰ *Id.*

²⁰¹ See *supra* Part IV.F.

²⁰² See *Reno v. ACLU*, 117 S. Ct. 2329 (1997); *Mainstream Loudoun v. Board of Trustees*, 24 F. Supp. 2d 552 (E.D. Va. 1998); *American Libraries Ass'n v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997); *Kathleen R. v. City of Livermore*, No. 15266-4 (Cal. Super. Ct., filed July 23, 1997).

²⁰³ 117 S. Ct. 2329 (1997).

from accessing sexual Internet content.²⁰⁴ In *American Libraries Ass'n v. Pataki*,²⁰⁵ a New York state court invalidated a state statute similar to the CDA which would have imposed similar liability on New York public libraries for failure to restrict minors from accessing Internet pornography.²⁰⁶ In *Kathleen R. v. City of Livermore*,²⁰⁷ a court twice dismissed civil claims made by a parent against a public library system for its failure to prevent her child from accessing Internet pornography.²⁰⁸ In *Mainstream Loudoun v. Board of Trustees of the Loudoun County Library*,²⁰⁹ a Virginia district court enjoined a county public library system from enforcing an Internet use policy specifically designed to guard against sexual harassment of staff and patrons because the policy included use of filtering software to block access to Internet sexual content on all public terminals.²¹⁰ While only two of these cases, *Reno* and *Mainstream Loudoun*, were actually decided on First Amendment grounds,²¹¹ all four decisions taken together could indicate that, as a policy concern, courts may value clients' access rights to public library materials and buildings significantly over efforts to safeguard the safety and security of either staff or other clients.²¹²

²⁰⁴ Although public libraries were not the only information providers exposed to liability under the CDA, they were one of the principal sponsors of litigation and one of the principal sites at which the sponsors of the suit were concerned about restricted access to the Internet as a result of the CDA. *See id.*; *see also supra* note 10 (explaining the purpose of the CDA).

²⁰⁵ 969 F. Supp. 160 (S.D.N.Y. 1997).

²⁰⁶ *See id.* at 160.

²⁰⁷ No. 15266-4 (Cal. Super. Ct., filed July 23, 1997).

²⁰⁸ *See Goldberg, supra* note 11, at 17. The plaintiff in *Kathleen R.* subsequently filed an appeal in March of 1999. *See supra* note 11.

²⁰⁹ 24 F. Supp. 2d 552 (E.D. Va. 1998).

²¹⁰ *See id.* at 552.

²¹¹ In *Pataki*, the court declined to reach the merits of the First Amendment challenge to the New York statute which would result in reduced or no Internet access at libraries, instead invalidating the statute because it violated the Commerce Clause. *See Pataki*, 969 F. Supp. at 160. But in so doing, the court indicated that it would likely defer to the Supreme Court's decision in *Reno* on the First Amendment question since the New York statute and the CDA were so similar despite legislative attempts by New York to avoid the CDA's fate. *See id.* at 183 (finding that the New York statute was "clearly modelled" on the CDA). The Livermore case was dismissed without reference to any First Amendment defensive arguments and so lacks any discussion of that issue. *See Goldberg, supra* note 11, at 17.

²¹² *See supra* note 202.

However, another recent decision, *Kreimer v. Bureau of Police for the Town of Morristown*²¹³—which involved a circumstance more directly analogous to sexual harassment of staff by clients than the desire to protect children from accessing pornography—the Third Circuit held that public libraries could take measures which effectively restricted a client's access to a public library building. The court did so despite a previous holding that access to a public library building, like access to library materials, is a right protected by the First Amendment.²¹⁴ In *Kreimer*, the court upheld the constitutionality of a New Jersey public library's patron behavior policy.²¹⁵ The policy was challenged by a patron after he was ejected from the library under the policy for his disruptive behavior and extraordinarily offensive odor that interfered with staff performance of certain duties.²¹⁶ The court of appeals found that the public library is a "limited-purpose" public forum and, as such, is allowed to exercise the government's right to exert "time, place and manner" restrictions on First Amendment rights to balance community interests.²¹⁷ Thus, the *Kreimer* decision indicates that, despite four cases resolved in favor of protecting rights to Internet access at public libraries, courts may require libraries to limit such access in the face of staff harassment and may hold libraries liable when they fail to do so.²¹⁸

Both the *Reno* and *Mainstream Loudoun* courts recognized that the secondary effects doctrine could allow restriction on protected speech under proper circumstances.²¹⁹ While both courts ultimately rejected the secondary effects argument as justification for restriction of access to Internet content,²²⁰

²¹³ 958 F.2d 1242 (3d Cir. 1992).

²¹⁴ See *id.* at 1242.

²¹⁵ *Id.*

²¹⁶ See *id.* at 1246-49.

²¹⁷ *Id.* at 1262.

²¹⁸ See *Kreimer*, 958 F.2d at 1242. *Mainstream Loudoun* centered on which measures might properly be taken by a library to protect children from accessing pornography on the Internet in libraries. See *Mainstream Loudoun v. Board of Trustees*, 24 F. Supp. 2d 552 (E.D. Va. 1998). Consequently, it is likely that the district court gave very little effort to analysis of the library's minor argument that it also desired to protect staff from harassment by using filtering devices.

²¹⁹ See *Reno v. ACLU*, 117 S. Ct. 2329, 2342 (1997) (reiterating the secondary effects holding of *Renton*); *Mainstream Loudoun*, 24 F. Supp. 2d at 564 (discussing *Renton's* secondary effects analysis).

²²⁰ See *Reno*, 117 S. Ct. at 2342-43; *Mainstream Loudoun*, 24 F. Supp. 2d at

and the district court in *Mainstream Loudoun* did so even in the face of the library's explicit argument that the library only desired to prevent a sexually hostile environment for both clients and staff,²²¹ only the Supreme Court's rejection in *Reno* conforms with proper application of the secondary effects doctrine. An examination of the district court's reasoning in *Mainstream Loudoun* as compared to the history of the Supreme Court's prior application of the secondary effects doctrine shows that the district court failed to accurately apply the doctrine and should not have universally dismissed its application under the circumstances of that case.²²²

In *Reno*, the Supreme Court found that the CDA sought to control the primary effect of access to a protected form of speech on minors.²²³ Thus, the Court found that the "secondary effects" limitation would not apply at all.²²⁴ Thus, the Court failed to discuss the proper application of a secondary effect restriction in the library context in any depth.²²⁵ However, the Court's distinction of the aim of the CDA, to prohibit minor access to protected sexual Internet content altogether, provides a useful illustration of how the Court sees the difference between primary effects and secondary effects.²²⁶ The statute in *Reno* sought to provide a restriction based on the perceived detrimental impact directly on child listeners, a primary effect of speech.²²⁷ Thus, the doctrine was properly dismissed. Such was not the case in *Mainstream Loudoun*.

The district court in *Mainstream Loudoun* erred by relying on *Boos* to justify its decision. Relying on *Boos*, the court decided not to apply the secondary effects doctrine to allow library restriction of client access to Internet pornography.²²⁸ This

564-65.

²²¹ See *Mainstream Loudoun*, 24 F. Supp. 2d at 564-65.

²²² See *supra* Part IV.F.

²²³ See *Reno*, 117 S. Ct. at 2342-43.

²²⁴ *Id.*

²²⁵ See *id.*

²²⁶ See *id.*

²²⁷ See *id.*

²²⁸ See *Mainstream Loudoun v. Board of Trustees*, 24 F. Supp. 2d 552, 564 (E.D. Va. 1998) ("The defendant's concern that without installing filtering software, Internet viewing might lead to a sexually hostile environment is solely focused on the reaction of the audience to a certain category of speech. As the Supreme Court noted in *Boos*, this is not a secondary effect.").

reliance represented a poor choice of precedent by the *Mainstream Loudoun* court, which rather should have relied on either of the two more analogous secondary effects Supreme Court decisions in *Young* or *Renton*. There are two reasons why the *Mainstream Loudoun* court improperly relied on *Boos* rather than *Young* or *Renton*. First, *Boos* was a political speech case with a higher threshold of doctrine applicability than should have been applied in the context of Internet pornography. As sexual speech cases, both *Young* and *Renton* are more analogous to the Internet pornography circumstance at hand. Second, the effects sought to be controlled in *Young* and *Renton*, crime and declining property values, are far more analogous to the sexual harassment effect that would be controlled by public libraries than the emotive dignity of visiting diplomats effect sought to be controlled in *Boos*. By mischaracterizing staff objection to being subjected to affirmative harassing behavior as mere "listeners' reactions to speech," the *Mainstream Loudoun* court improperly dismissed the application of the secondary effects doctrine to library restrictions on client Internet use.²²⁹

A public library's desire to control acts of sexual harassment by clients who happen to be using Internet sexual content as a tool of harassment that extends beyond the protected right of reception is a desire to control more than the mere emotive impact of the speech on staff. While the severe psychological impact of sexual harassment on its targets is well documented,²³⁰ it is widely recognized that sexual harassment carries far more serious impact than a mere affront to dignity.²³¹ Sexual harassment is not just an act of unpleasant communication; rather, it is recognized as an act of violence and power²³² that can inflict severe physical as well as economic

²²⁹ *Id.*

²³⁰ See, e.g., L. Camille Hébert, *The Economic Implications of Sexual Harassment for Women*, 3 KAN. J.L. & PUB. POL'Y 41, 44 (1994) (documenting both the psychological and economic effects of sexual harassment); Lynn Litow et al., *Social and Psychological Factors in Sexual Harassment: A Preventative Model for Companies*, 426 PLILIT 47, 49 (1992) (documenting some of the severe psychological consequences of harassment on targets, including, "self blame, depression, anger, disgust, sadness, and generalized anxiety").

²³¹ See *infra* notes 232-234 and accompanying text.

²³² See, e.g., Cynthia Grant Bowman & Elizabeth M. Schneider, *Feminist Legal Theory, Feminist Lawmaking, and the Legal Profession*, 67 FORDHAM L. REV. 249,

consequences on the victim.²³³ Sexual harassment also carries with it severe economic consequences for the businesses that fail to control such behavior because of "loss of productivity

252 (1998) ("[D]ominance theory present[s] an important theoretical framework within which to understand the harms of violence against women in areas such as . . . sexual harassment and pornography."); L.F. Fitzgerald, *Sexual Harassment—Violence Against Women in the Workplace*, 48 AM. PSYCHOLOGIST 1070 (1993) (documenting how sexual harassment constitutes violence in the workplace that has profound job-related, psychological and health-related consequences); J. Larkin & K. Popaleni, *Heterosexual Courtship Violence and Sexual Harassment—The Private and Public Control of Young Women*, 4 FEMINISM & PSYCHOL. 213 (1994) (studying the effect of sexual harassment and courtship on adolescent girls as two forms of male violence and control); Michelle-Lewis Liebeskind, *Preventing Gender-Based Violence: From Marginalization to Mainstream in International Human Rights*, 63 REV. JUR. U.P.R. 645, 646-47 (1994), available in Westlaw (describing that one provision of a women's convention, the Convention on the Elimination of Discrimination of all Forms Against Women, which makes recommendations to countries on human rights advises "that States include information in their reports about sexual harassment as a form of violence and discrimination against women"); Litow, *supra* note 230, at 50 (describing how the psychological literature of sexual harassment has borrowed from the literature of rape and that "some believe that sexual harassment is an expression of power"); C.S.K. Tang, *Effects of Gender and Profession and Type on Definitions of Violence Against Women in Hong Kong*, 36 SEX ROLES 837 (studying how over 90% of public service professionals surveyed classified sexual harassment as a form of violence against women, but among that group, men had a narrower definition of violence against women than women).

It should be noted that most of these studies have been conducted within the theoretical framework of sexual harassment perpetrated by men as a form of violence against women. See generally Bowman & Schneider, *supra*; Fitzgerald, *supra*; Larkin & Popaleni, *supra*; Liebeskind, *supra*; Litow, *supra* note 230; Tang, *supra*. However, just as courts have now recognized that sexual harassment can occur between same sexes or as perpetrated by women against men, it is likely that at least some of these study findings are as applicable to sexual harassment involving same sex or female perpetrators. See, e.g., Nancy L. Abell, *Current Issues in Sexual Harassment Law*, CA35 ALI-ABA 153, 190 (1996), available in Westlaw (reporting courts' recognition of same sex harassment).

²³³ See, e.g., Hébert, *supra* note 230, at 44 ("[A] [person] who is subjected to a sexually charged working environment is likely to suffer economically as well as psychologically . . . [T]he EEOC, in its March 1990 Policy Guidance on Current Issues of Sexual Harassment, recognized the potential economic effects of hostile environment harassment."); Richard C. Sorenson et al., *Solving the Chronic Problem of Sexual Harassment in the Workplace: An Empirical Study of Factors Affecting Employee Perceptions and Consequences of Sexual Harassment*, 34 CAL. W. L. REV. 457, 459 (1998) ("[S]exual harassment constitutes ' . . . a chronic occupational health problem to which the public health and preventative medicine notions of prevention may be applied.'"); Kent D. Streseman, Note, *Headshrinkers, Manmunchers, Moneygrubbers, Nuts & Sluts: Reexamining Compelled Mental Examinations in Sexual Harassment Actions Under the Civil Rights Act of 1991*, 80 CORNELL L. REV. 1268, 1278 (1995) ("[S]exual harassment victims . . . frequently suffer loss of job status as well as psychic and physical harm.").

due to morale and turnover problems."²³⁴ Thus, a public library's intent to control a sexually hostile work environment is far more analogous to the intent to control crime and declining property values designated as proper justification for secondary effect restrictions by the Supreme Court in both *Young*²³⁵ and *Renton*²³⁶ than it is to the regulation of "emotive impact" disallowed in *Boos*.²³⁷ As in *O'Brien*, *Young* and *Renton*, the act of sexual harassment by a client can be seen as a course of conduct which only happens to accompany the category of protected speech activity—in this case the receipt of Internet sexual content by a library client.²³⁸ Thus, on these facts, the court in *Mainstream Loudoun* should have followed the reasoning of *Young* and *Renton* rather than *Boos* and acknowledged a possible need for the library to control the sexually hostile work environment as a secondary effect of the protected Internet pornography.²³⁹ When properly applied,

²³⁴ Litow, *supra* note 230, at 49 (describing further that sexual harassment "ha[s] significant consequences for both individuals and organizations," that "victims of harassment often quit, attempt to quit or transfer in order to escape the situation," and that the "fiscal implications" of harassment for an organization can be "staggering with total costs for replacing an employee (including hiring and training) often exceeding the individual's annual salary"); see also Sorenson, *supra* note 233, at 491 ("[T]he cost of sexual harassment to organizations can be sizable. If not addressed, the problems may lead to a loss of productivity, decreased worker satisfaction, increased turnover and legal penalties."); Claudia Withers, *Preventing Sexual Harassment in the Workplace*, 587 PLI/LIT 109, 112 (1998) ("A Working Woman study found that sexual harassment costs the typical Fortune 500 company \$6.7 million a year in increased absenteeism, employee turnover, low morale, and low productivity."); Sally A. Piefer, Comment, *Sexual Harassment from the Victim's Perspective: The Need for the Seventh Circuit to Adopt the Reasonable Woman Standard*, 77 MARQ. L. REV. 85, 85 n.7 (1993) ("Examples of the consequences of sexual harassment include work disruptions, financial burdens for both the employee as well as the employer . . .").

²³⁵ 427 U.S. 50 (1976); see also Prygoski, *supra* note 171, at *6-*10, *17-*19.

²³⁶ 475 U.S. 41 (1986); see also Prygoski, *supra* note 171, at *16-*19.

²³⁷ 485 U.S. 312, 318-20 (1988); see also Prygoski, *supra* note 171, at *17-*19.

²³⁸ See *supra* notes 226-229 and accompanying text.

²³⁹ The author does not suggest that recognizing sexual harassment as a secondary effect should have led to the court affirming the Mainstream Loudoun County library's policy of using "blocking software" as an acceptable method of regulating the hostile work environment. The ineffectiveness of such filtering software in successfully blocking access to sexual Internet content, and doing so without blocking desirable, inoffensive content, is well documented and has been at the center of the controversy surrounding use of such software. See *Mainstream Loudoun v. Board of Trustees*, 24 F. Supp. 2d 552, 559-60 (E.D. Va. 1998) (discussing that library's use of one such filtering product, "X-Stop," known for blocking sites that do not contain sexual content). Rather, the *Mainstream Loudoun*

therefore, the secondary effects doctrine should authorize a public library employer to take measures to control the harassing behaviors even where those measures might have the effect of diminishing rights of access to protected Internet pornography. The *Kreimer* court's allowance of restrictive measures instituted by public library to prevent disruptive client conduct, even when those measures somewhat limit the client's access rights, adds further support that the library is capable of taking such restrictive measures based on harassing client conduct.²⁴⁰ Consequently, public library employers will not be able to shield themselves from full responsibility for taking appropriate remedial action by pleading that their hands are tied by the First Amendment, and *Mainstream Loudoun* should offer no support for that position.

H. *Assumption of Risk Defense*

The specter of an assumption of risk defense to employer sexual harassment liability has been raised before in at least one class of third-party cases where the work itself involved some component of a sexual nature,²⁴¹ those cases involving sexually charged restaurant and club environments.²⁴² As did

court should not have so easily dismissed the library's contention that it was entitled to take measures that ordinarily would violate First Amendment right of access to protected Internet content in the interest of controlling the sexually hostile work environment as a secondary effect. The consequences of sexual harassment are more analogous to other secondary effects, such as crime and declining property values, which have been recognized by the Supreme Court in *Young and Renton*, than they are to the "emotive impact" unconstitutionally restricted in *Boos*, on which the district court seems to have erroneously relied. See *supra* notes 235-239 and accompanying text.

²⁴⁰ See *Kreimer v. Bureau of Police*, 958 F.2d 1242 (3d Cir. 1992).

²⁴¹ This is in contrast to other work environments where the work itself is entirely devoid of any sexual component, i.e., banks, insurance companies, manufacturing of non sex-related products, etc., where any conduct of a sexual nature would be entirely interjected by the harassers. See Cahill, *supra* note 5, at 1136 (distinguishing a case in which it would arguably conflict with the public policy of Title VII to allow the assumption of risk defense where the workplace involved solely non-sexual "oil refining").

²⁴² See Cahill, *supra* note 5, at 1133-39 (reporting that the defense was raised by Hooters restaurant in one suit against them and arguing that the defense should be available wherever workers commodify their sexuality); Rhee, *supra* note 17, at 190-94 (noting that the "dicta of certain cases" suggests that courts are open to the possibility of an assumption of risk defense in sexual harassment law and that proponents of the defense argue that it should be available where work-

one restaurant chain, the public library employer, might argue that any staff claimants knowingly and voluntarily assumed the risk of sexual harassment by agreeing to serve clients in an environment where providing access to Internet materials of a sexual nature is part of the job. However, this defense to sexual harassment has yet to be sustained by a court.²⁴³ Its viability is seen as "optimistic" at best by even those who advocate its limited use in work environments that substantially include purveying products or services of a sexual nature.²⁴⁴ Consequently, because the work of public libraries does not substantially involve working with Internet sexual materials, and because stereotyping of libraries as non-sexual workplaces will also prejudice the amount of sexual risk that might reasonably be assigned to them by courts assessing applicability of a risk defense,²⁴⁵ public library staff claimants will likely prevail over this defense. The discussion of potential for an

ers choose to "consent to commodify their sexuality at work," and arguing that the defense should be available in environments where sex makes up a "substantial" part of the goods and services offered).

²⁴³ The Hooters case in which the defense was raised ultimately settled without a court determination as to the viability of the defense, *see* Rhee, *supra* note 17, at 165, and "currently there is no assumption of risk defense in sexual harassment law." Rhee, *supra* note 17, at 194.

²⁴⁴ Rhee, *supra* note 17, at 194.

²⁴⁵ One commentator made her point that women in the Hooters environment voluntarily choose an extremely sexually risky environment by explicitly juxtaposing the perceived high risk level of the Hooters environment with the relatively low expectation one would presumably have of sexual risk in library environment: "Essentially, the argument [for allowing the defense] contends that cocktail waitresses must expect and assume a certain sexual attention not expected nor tolerated, for instance, by librarians." Rhee, *supra* note 17, at 193 (emphasis added). Not only did she make the point using librarians, but she evidenced the extreme prejudice that exists against thinking of libraries as sexually risky environments in her explanation of how she derived the concept that certain work environments carry less risk than others. *See* Rhee, *supra* note 17, at 193 n.151. She derived the concept from two other scholars' development of a relative sexual risk rating scale for different employment environments. *See* Rhee, *supra* note 17, at 193 n.151 (citing Robert J. Aalberts & Lorne H. Seidman, *Sexual Harassment by Employees of Employees by Non-Employees: When Does the Employer Become Liable?*, 21 PEPP. L. REV. 447 (1994)). Aalberts and Seidman's scale had placed "bookstore employees" on the "low risk" end of the scale rating their sexual risk as a work environment. Rhee, *supra* note 17, at 193 n.151. However, the commentator felt that the bookstore imagery did not illustrate what constitutes a low sexual risk environment evocatively enough, so she "chose to take their example *one step further* to make my point *most explicitly*" and thus to use the library as an extreme example of low risk. Rhee, *supra* note 17, at 193 n.151 (emphasis added).

assumption of risk defense is not new to sexual harassment law,²⁴⁶ but such a defense got its most practical legal consideration when it was raised by a Hooters restaurant several years ago.²⁴⁷ Hooters, a chain restaurant, famously serves a highly sexualized environment along with its chicken wings and beer.²⁴⁸ Hooters was sued by several waitresses in separate suits in various cities after waitresses were subjected to lewd behavior and sexual advances that the waitresses claimed constituted a hostile work environment.²⁴⁹ The waitresses claimed the hostile environment was created by the Hooters management "explicitly selling the sexuality of its Hooters Girls."²⁵⁰ In response to a suit filed in Minneapolis, Hooters raised an assumption of risk defense.²⁵¹ While that Hooters case settled before the court could rule on the validity of the defense.²⁵² Commentators have since advocated the limited viability of such a defense in sexual harassment cases involving sexualized work environments.²⁵³

Assumption of risk is borrowed from tort law and allows that where a plaintiff "knowingly and voluntarily assumes a risk of harm arising from the negligent or reckless conduct of a defendant," that plaintiff is "barred from recovery" from the risk-assumed harm.²⁵⁴ In the context of the Hooters claims, the defense is argued to be justified because the sexually charged atmosphere of Hooters is so well known and makes up so much of the atmosphere of the Hooters business—in effect, that atmosphere comprises the very substance of what attracts

²⁴⁶ See Rhee, *supra* note 17, at 192.

²⁴⁷ See *supra* note 242.

²⁴⁸ See Cahill, *supra* note 5, at 1131-33 ("[S]ex appeal was a substantial part of the product Hooters offered to its customers . . ."). Hooters eventually adopted a sexual harassment policy in which it admitted that "female sex appeal is an essential ingredient of the Hooters concept." Cahill, *supra* note 5, at 1131 n.136 (citing *Former Hooters Employees Fired for Not Signing Form*, MIAMI HERALD, Aug. 14, 1993, at B5). Hooters now requires waitresses to sign an affirmation of their knowledge of and consent to this fact. See Cahill, *supra* note 5, at 1131 n.136.

²⁴⁹ See Rhee, *supra* note 17, at 164-65; Cahill, *supra* note 5, at 1108-09.

²⁵⁰ Rhee, *supra* note 17, at 179.

²⁵¹ See Rhee, *supra* note 17, at 191-92.

²⁵² See Rhee, *supra* note 17, at 164.

²⁵³ See Rhee, *supra* note 17, at 164. See generally Cahill, *supra* note 5.

²⁵⁴ Cahill, *supra* note 5, at 1117 (citing RESTATEMENT (SECOND) OF TORTS § 496A (1965)).

clients to Hooters as opposed to any other restaurants that also serves chicken wings.²⁵⁵ Consequently, it is argued that any waitress who chooses to work at Hooters is well apprised of the risk that she will be subjected to lewd comments and sexually charged behavior by clients.²⁵⁶ Thus, in the Hooters-like circumstance, a potential worker has a great opportunity to foresee, and to have true knowledge of, the risk of exposure to conduct of a sexual nature, thus satisfying the first element of the defense.²⁵⁷

By contrast, library workers are robbed of any similar opportunity to gain true knowledge of the risk of exposure to any sexual content or conduct in their work environment for two reasons.²⁵⁸ First, Internet sexual content is so new to libraries that its risks are not as evident as the risks associated with Hooters.²⁵⁹ Evidence of staff exposure is not widely publicized, and the library environment is not generally "known" for either sexual conduct within its walls or its vast collections of sexual content, as is Hooters.²⁶⁰ In fact, the library is so stereotypically devoid of sexual risk that it has been used as an example of the least risky end of the risk scale inapposite to work environments such as Hooters and topless dance businesses.²⁶¹ Thus, the risk of behavior of a sexual nature is not so readily assessed upon initial inspection of the library work

²⁵⁵ See Cahill, *supra* note 5, at 1131-32 (arguing that the defense elements of knowing and voluntary assumption fit where it is "undebatable" that Hooters waitresses knew "sex appeal was a substantial part of the product Hooters offered to its customers" when they decided to work there).

²⁵⁶ See Cahill, *supra* note 5, at 1131-32.

²⁵⁷ See Cahill, *supra* note 5, at 1131-32.

²⁵⁸ See *supra* note 245 and accompanying text.

²⁵⁹ Access to the Internet in public libraries only became widespread in the last three years. See *supra* note 8.

²⁶⁰ Society carries a general prejudice that librarians and libraries are not sexual entities. See Will Manley, *Facing the Public*, WILSON LIBR. BULL., June 1992, at 65 (describing a survey Manley developed entitled "Librarians and Sex" in order to dispel the stereotype of librarians who "are not widely regarded as the sexiest people," the response to which sparked off Manley's original inquiry into sexual harassment at the public library). For a working example of this prejudice and its potential effect on a library-sex risk assessment in the context of applying this defense, see *supra* note 245 and accompanying text.

²⁶¹ See Rhee, *supra* note 17, at 193 & n.151 (Rhee's modified sexual risk rating of work environments list reads: "topless dancer, high risk; cocktail waitress, mid-level risk"; "libraries" in contrast are rated as "low risk"); see also *supra* note 245 (discussing Rhee's modification).

environment. Second, sexual content is not substantially the business of the library relative to that of Hooters.²⁶² Also, library workers are not making a choice to market their own sexuality by agreeing to work in an environment where sexual content is available. So, even if a worker knows of some risk at the library, the greatness of the risk nowhere near compares to the percentage of risk perceived in an environment such as Hooters where sex is a primary commodity sold along side the food and drinks.²⁶³ Thus, knowledge of the risk of exposure to sexualized behavior is neither so easily gleaned by a worker assessing the library environment as at Hooters, nor would such risk be accorded as much likelihood of occurrence at a library by those assessing the risk for the purpose of applying the defense as is the risk in the context of Hooters.²⁶⁴

For the assumption of risk defense to apply, courts require that the plaintiff have knowledge that includes a full appreciation of the nature, character and extent of the risk.²⁶⁵ Thus, library staff are much less likely to satisfy the first element of the defense which requires a truly knowing assessment of risk. This is one area in which stereotypical prejudice against libraries seen as environments entirely devoid of sex will work in the favor of library staff when courts assess the degree of knowledge of risk workers could have had about sex in the library.²⁶⁶

The newness of the Internet to libraries will also likely destroy the perceived voluntariness of a worker's choice to assume its risks. In the Hooters context, where a sexually charged atmosphere has always been part of the employment mix,²⁶⁷ the risk is not only voluntarily assumed by workers but is actually responsible for attracting workers to that particular employment choice.²⁶⁸ In contrast, the presence of

²⁶² See Rhee, *supra* note 17, at 193 & n.151.

²⁶³ See *supra* note 248 and accompanying text.

²⁶⁴ See *supra* note 245 and accompanying text.

²⁶⁵ See RESTATEMENT (SECOND) OF TORTS § 496D (1965).

²⁶⁶ See *supra* notes 8, 245, and 259.

²⁶⁷ See Rhee, *supra* note 17, at 180 ("From the moment Hooters opened, feminist groups across the country targeted local chains in protest, voicing their opinion that its display of waitresses in tight white tops and bright orange shorts exploited women. Protestors meted out their condemnation to . . . the patrons for purchasing the commodity of women's sex appeal . . .").

²⁶⁸ One waitress who filed a harassment suit described her choice to work at

Internet sexual content is so new to libraries that most workers who have been employed for three to four years or more could never have had an opportunity to consider its risks as part of their employment choice.²⁶⁹ Thus, without adequate opportunity for library staff to make a choice regarding risks posed by the presence of Internet pornography in their job environment, any exposure would likely be seen as an entirely involuntary condition of employment.

Nevertheless, a court may still assign voluntariness to an assumption of risk even if the risk was not actually factored into an original choice by the risk bearer where she elects to continue the risky behavior once fully apprised of its danger.²⁷⁰ However, even those library staff who exhibit sufficient knowledge of risk and have voluntarily chosen to remain employed may be judged as involuntary risk assumers. As a policy matter, courts are reluctant to allow the assumption of risk defense in any environment where the risk assumer possesses vastly unequal bargaining power to that of the defendant who puts them at risk, such as an employment situation.²⁷¹ The unequal bargaining power raises serious concerns about the true voluntariness of the choice.²⁷² Consequently, it is unlikely that a court would determine librarians to have voluntarily assumed risk in electing to remain at their jobs.

Hooters waitresses and other employees in the club/restaurant environment enjoy a significant benefit from their employment which is seen as restoring waitress bargaining power²⁷³ to a degree not shared by library employees. Hooters waitresses and their ilk choose to directly "commodify"

Hooters in terms of how their sexual sales "concept" enhanced her earning potential: "I loved the [Hooters] concept. If I can use my looks to make good money, why shouldn't I?" Cahill, *supra* note 5, at 1132. Another described how she earned "as much as \$250 in tips . . . at Hooters, compared to only \$75 to \$100 . . . at another national chain restaurant," but more importantly, she "enjoyed herself at Hooters" because the sexual attention made her feel "attractive." Rhee, *supra* note 17, at 186 (citing Kirsten Downey Grimsley, *Hooters Plays Hardball with the EEOC: Restaurant Chain's Orchestrated Anger in Bias Case Puts Pressure on Overburdened Agency*, WASH. POST, Dec. 10, 1995, at H1).

²⁶⁹ See *supra* note 8.

²⁷⁰ See generally RESTATEMENT (SECOND) OF TORTS § 496 (1965).

²⁷¹ See *id.* § 496B.

²⁷² See *id.*

²⁷³ See generally Cahill, *supra* note 5; Rhee, *supra* note 17.

their sexuality.²⁷⁴ Such self-commodifying risk bearers gain an extra financial advantage from their employment choice that could tend to override courts' public policy concerns about disparate bargaining power.²⁷⁵ The extraordinary financial benefit that these commodified workers enjoy is seen as offsetting the inequality of their bargaining power and thus justifying imposition of the defense against them and those like them.²⁷⁶ Even those who have argued in favor of the risk defense only argue for its limited use in such sexually commodified environments.²⁷⁷ As library workers enjoy no extra benefit from their employment choice,²⁷⁸ courts have no such reason to disregard natural reluctance to impose the risk defense on employees forced to choose between risky behavior and their jobs.

Consequently, although sexual harassment claimants in the public library environment have agreed to work in an environment that provides a service with a sexual component, they do not share the same degree of characteristics possibly seen as justifying the defense in other environments such as Hooters. The risk of sexually harassing conduct is not so readily

²⁷⁴ See Cahill, *supra* note 5, at 1137-38; Rhee, *supra* note 17, at 180-94.

²⁷⁵ See Cahill, *supra* note 5, at 1119-20, 1138-39 (explaining that the same public policy concerns that underlay the controversy over the allowance of the assumption of risk defense also underlay Title VII's desire to eliminate discrimination and that to disallow the defense where a woman has chosen to market her sexuality in exchange for a "premium wage" and acceptance of risk would violate Title VII's public policy and destroy all women's "freedom" to make their own choices); Rhee, *supra* note 17, at 190-93 (explaining how proponents of risk acceptance in exchange for sexual commodification's financial rewards view workers who make this choice as "wholly autonomous rational actors with freely exercisable market rights" where such workers are simply exercising "choice and agency").

²⁷⁶ See Cahill, *supra* note 5, at 1119-20, 1138-39.

²⁷⁷ See Cahill, *supra* note 5, at 1139 (arguing that the assumption of risk defense should be used only where "sex appeal" is a "substantial part of the employer's business" and of the workers' "particular jobs").

²⁷⁸ Workers at all levels of public librarianship are generally underpaid. See, e.g., Mary Jo Lynch, *Librarians' Salaries: Barely Any Increase This Year*, AM. LIBR., Oct. 1, 1996, at 59 (discussing professional librarian salaries around the country which generally hover in the low \$30,000 range, even for professionals with a number of years of experience and at least one masters degree); Beverly Goldberg, *Wisconsin Director Resigns, Citing Small Town Politics*, AM. LIBR., Apr. 1, 1998, at 28 (describing an "exodus" of support staff from Wisconsin libraries in part because of underpayment); Will Manley, *Who Has the Best Page in Libraryland?*, AM. LIBR., Sept. 1, 1997, at 128 ("Pages are not just underpaid and misunderstood . . .").

assessed in the library environment as in environments where sex is one of the principal commodities or services.²⁷⁹ Most library staff will not have an adequate opportunity to make a truly voluntary decision about working with the risk of exposure by clients because of inability to factor the risk into their employment decision and unequal bargaining power.²⁸⁰ Finally, unlike the Hooters cases, courts have no reason to disregard reluctance to impose the defense in an employment context because library staff enjoy no extra financial benefit from sexual commodification.²⁸¹ Thus, an assumption of risk defense should fail against library staff who charge sexual harassment when clients expose them to Internet pornography.

IV. WHAT'S A LIBRARY TO DO?: ADEQUATE PREEMPTIVE AND REMEDIAL ACTION

Even in the face of a viable hostile work environment claim based on client display of Internet pornography to staff, there are measures that public library employers, like all other employers, can take to significantly reduce the likelihood of liability.²⁸² This is especially true in light of the Supreme Court's recent decisions in *Faragher* and *Burlington*. In both cases the Court outlined a new affirmative defense for employers who can prove by a preponderance of the evidence that they instituted anti-harassment policies and procedures and that the employee failed to take adequate advantage of these protections.²⁸³ Whether this affirmative defense will be available in third-party claims remains to be seen since it was only put forth by the Court in the context of supervisory harassment. However, it is likely that a public library employer's showing of appropriate remedial action will avoid liability.²⁸⁴

²⁷⁹ See *supra* notes 260-269 and accompanying text.

²⁸⁰ See *supra* notes 260-278 and accompanying text.

²⁸¹ See *supra* notes 273-278 and accompanying text.

²⁸² See 29 C.F.R. § 1604.11(e) (1980) (requiring plaintiff bringing hostile work environment claim to show a failure to take remedial action).

²⁸³ See *Faragher v. City of Boca Raton*, 118 S. Ct. 2275, 2292 (1998); *Burlington Indus., Inc. v. Ellerth*, 118 S. Ct. 2257, 2270 (1998).

²⁸⁴ See 29 C.F.R. § 1604.11(e); cf. Carey, *supra* note 26, at 70 (explaining that although the new affirmative defense was established by the Supreme Court in only the supervisory harassment contexts of *Faragher* and *Burlington*, it is "likely" the defense "would be available to the employer in a case of co-worker harassment

The key features that courts look for in appropriate remedial action include swiftness²⁸⁵ and reasonable calculation to effectively combat the type of harassment indicated.²⁸⁶ Relative levels of swiftness and effectiveness are determined as a function of the nature and severity of the harassment itself.²⁸⁷ It is well recognized that a preemptive company policy against sexual harassment which outlines that harassment is not condoned and that remedial action will be imposed on violators can go a long way toward convincing a court of a company's dedication to reasonably calculated remedies.²⁸⁸ However, a preemptive policy in and of itself will not insulate any employer entirely.²⁸⁹ For example, courts have said that

at [sic] well").

²⁸⁵ See Aalberts & Seidman, *supra* note 27, at *33 ("[C]orrective action must be 'prompt.' The meaning of 'prompt,' however, will vary with the conditions of employment as well as the severity of the offense."). "Clownish, boorish" conduct will generally require less prompt action than "aggressive coercive harassment" judged by a reasonableness standard. Aalberts & Seidman, *supra* note 27, at *33-*34 (citing Dornhecker v. Malibu Grand Prix Corp., 828 F.2d 307 (5th Cir. 1987)).

²⁸⁶ See, e.g., Smith v. Sheahan, 189 F.3d 529, 535 (7th Cir. 1999) (holding that "a jury could reasonably conclude" that a Sheriff's Department employer's "tepid response" to harassment "did not effectively remedy the harassment problem" and thus reversing summary judgment for Sheriff's Department where supervisor suggested that the harasser and target "kiss and make up," separated the target and harasser, and reassigned the target to "less desirable duty"); see also Kaplowitz & Harris, *supra* note 51, at *36 ("[C]ases stress that an employer should take action. However, the employer must show the effectiveness of the action, not merely that action is taken. Prompt action that is not reasonably likely to prevent the misconduct is ineffective . . . ineffective action is equal to no action.").

²⁸⁷ See Aalberts & Seidman, *supra* note 27, at *33-*34.

²⁸⁸ See Scott F. Uhler & Rinda Y. Allison, *A 10-Step Program: Reducing the Likelihood of Sexual Harassment and the Possibility of Successful Sexual Harassment Lawsuits*, ILL. LIBR., Spring 1997, at 65.

²⁸⁹ See, e.g., Ligenza v. Genesis Health Ventures, 995 F. Supp. 226, 231 (D. Mass. 1998) (finding that although employer had a sexual harassment policy, the policy provided inadequate protection to employees where it consisted of "a single line" in an "Employment Policy Statement and indicate[d] that an individual, believing him or herself to have been harassed, may file a complaint which will be investigated by the Regional Director"). The Ligenza court further noted that "[t]he Supreme Court has refused to guarantee safe harbor to every employer that provides a grievance procedure and policy against discrimination where the complaining employee failed to invoke that procedure." *Id.* (citing Meritor Savings Bank v. Vinson, 477 U.S. 57, 72 (1986)); see also Praprotnik v. St. Louis, 485 U.S. 112 (1988) (protection from liability will not apply if anti-harassment policy is ignored); Lockard v. Pizza Hut, Inc., 162 F.3d 1062, 1074 (10th Cir. 1998) (attaching liability to employer where manager forced a waitress to serve customers who then sexually assaulted her and of whom she had complained had previously subjected her to rude behavior instead of following Pizza Hut's sexual harassment policy by

such a policy, even if well executed, will not insulate an employer from liability if it is disseminated in such a fashion that it is not widely read.²⁹⁰

More important than merely instituting general policies, the public library employer must swiftly and effectively respond to actual harassment problems as they arise in the library. Responding to actual incidents of harassment means responding to both individual complaints and to evidence of a problem even if it has yet to be the subject of complaint.²⁹¹ Library employers will be responsible for pervasive harassment of which they should have been aware.²⁹² This means that library employers who have been reluctant to recognize both that public libraries currently suffer an increasing problem with all kinds of third-party sexual harassment²⁹³ and that public libraries are suffering increasing incidents of third-party harassment involving the use of Internet sexual content,²⁹⁴ must now acknowledge these problems. Acknowledgment and intolerance of third-party harassment problems should be integrated into any current anti-harassment policies and measures. Where anti-harassment policies or measures do not yet exist, library employers must create them. Further, libraries must begin to actively investigate both reported and unreported problems or risk facing increased liability. Once a li-

asking the customers to desist such behavior or to leave the restaurant); Uhler & Allison, *supra* note 277, at 65 (citing *Praprotnik*).

²⁹⁰ See *Praprotnik*, 485 U.S. at 112.

²⁹¹ See 29 C.F.R. § 1604.11(e) (1980) (stating that employer may be liable for harassment if it should have been aware of harassment even where not actually apprised by a complaint). The *Lockard* case presents a strong warning to employers. In that case, the Third Circuit attached liability to the employer who had received complaints of rude behavior and a hair pulling incident by two customers from a waitress and three requests that she not serve those customers. See *Lockard*, 162 F.3d at 1074-75. Although the waitress did not specify that the customers had also subjected her to crude, sexual comments, the court found that the employer should have had the requisite knowledge and been put on notice to enact measures specified in the restaurant's sexual harassment policy instead of forcing her to serve the customers resulting in a sexual assault. See *id.* The *Lockard* decision suggests that courts will require employers to be more proactive in enacting anti-harassment measures even where the employer may not be fully apprised of the extent or nature of the harassment.

²⁹² See *Lockard*, 162 F.3d at 1074-75.

²⁹³ See *supra* notes 75-78 and accompanying text (discussing library reluctance to admit all forms of sexual harassment of staff by clients).

²⁹⁴ See *supra* notes 84, 95-103, 105-109 and accompanying text.

brary has knowledge of any sort of harassment involving Internet sexual content, it must take swift, effective remedial action.²⁹⁵

There are at least three measures which, used in combination, should prove effective in combatting third-party harassment in libraries due to Internet sexual content display, including privacy screens, individual printers, and ejection of client violators. Privacy screens, while not 100% effective in preventing a client's ability to flash Internet sexual content to staff, have been shown in libraries to significantly reduce the ease with which clients may accomplish harassment.²⁹⁶ They will not, for example, solve the problem of clients such as the "Coat Man" who, under the guise of requesting assistance with an Internet problem, lure staff into a situation where staff are forced to focus attention on a computer screen even if the screen is equipped with a privacy screen.²⁹⁷ Installation of printers attached to each computer terminal may also reduce the instance of client pornography being sent to central printers typically operated by staff.²⁹⁸ However, neither of these measures will fully eradicate a problem in the face of particularly dedicated harassers, such as the "Coat Man."²⁹⁹ Further, in light of well publicized budget problems in recent years, many public library systems are ill-equipped financially to afford such expensive measures.³⁰⁰ Where these measures prove ineffective or unaffordable, public libraries should rely on swift client ejections from the library, perhaps permanently, to reduce the likelihood of liability for the harassment. Under *Kreimer* and the secondary effects doctrine, libraries should no longer feel reluctant to eject clients from libraries in the face of

²⁹⁵ See 29 C.F.R. § 1604.11(e).

²⁹⁶ See, e.g., Hyman, *supra* note 8, at 60-62 (discussing measures such as privacy screens and noting that all measures are "flawed"). See generally *Reports of Pornography*, *supra* note 3 (noting in some complaint instances that once privacy screens were installed in the branch, the client pornography display problems seemed to dissipate considerably).

²⁹⁷ See *supra* note 96 and accompanying text (detailing the "Coat Man" incident for which a privacy screen would offer no protection to staff lured into gazing at the harasser's screen).

²⁹⁸ See *supra* notes 98-99 and accompanying text.

²⁹⁹ *Reports of Pornography*, *supra* note 3.

³⁰⁰ See, e.g., *Conference Draws Record Crowd*, AM. LIBR., July 1, 1995, at 654 ("A [library] crisis communications plan is also de rigueur to cope with such 'all-too-familiar' plights as budget cuts . . .").

unpleasant or violent client behavior such as sexual harassment.³⁰¹ After *Kreimer*, it is unlikely that a client will be allowed to assert a First Amendment right to remain in a library once that client is notified of possible Title VII violations based on inappropriate use of the Internet and of the library's intent to eject clients to enforce its anti-harassment policy if that client persists in deliberate harassment of staff in violation of federal anti-discrimination laws.³⁰²

CONCLUSION

The great benefit of progressive sexual harassment law is perhaps not its ability to redress wrongs suffered by individual victims financially, although that is an important remedy, but rather its ability to force employers to adopt policies and attitudes that slowly transform workplaces into equal environments for all.³⁰³ Some of the courts' sexual harassment standards discussed here are in flux and remain unfavorable to the acceptance of a claim based on the types of circumstances resulting from client Internet use that a library staff claimant would likely present. However, none of the issues raised within this Note prove a death knell to such a claim. Individual courts may disagree about whether pornography alone is sufficiently severe to sustain a harassment claim, or whether a more plaintiff reasonable woman standard should apply. However, it remains that courts have found for plaintiffs on each of the individual factual circumstances outlined here that, when combined, would make up a prototypical library staff hostile environment claim based on client display of Internet pornography. Thus, because there is evidence of a problem with staff harassment due to client Internet pornography displays, and because courts are increasingly accepting the sufficiency of the

³⁰¹ See *Kreimer v. Bureau of Police*, 958 F.2d 1242 (1993). See generally Philip J. Morin, Comment, *Why Kreimer Can't Read: Striking the Proper Balance Between Library Access and Problem Patrons in Kreimer v. Bureau of Police*, 46 RUTGERS L. REV. 1845 (1994).

³⁰² See *supra* note 301 and accompanying text.

³⁰³ See *Burlington Indus., Inc. v. Ellerth*, 118 S. Ct. 2257, 2270 (1998) ("Title VII is designed to encourage the creation of antiharassment policies and effective grievance mechanisms. Were employer liability to depend in part on an employer's effort to create such procedures, it would effect Congress' intention to promote conciliation rather than litigation . . .").

factual circumstances that make up this problem in order to sustain a sexual harassment claim, public library employers should heed this warning as an opportunity to acknowledge the problem of Internet exposure to pornography and all sexual harassment in their workplaces. Further, public libraries should begin now, without fear that the First Amendment could be used as a weapon to condemn their actions, to integrate preventive measures and remedial policies geared toward combatting Internet harassment into their ordinary anti-sexual harassment campaigns.

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