Employers as Vigilant Chaperones Armed With Dating Waivers: The Intersection of Unwelcomeness and Employer Liability in Hostile Work Environment Sexual Harassment Law

Nilofar Nejat-Bina*

Sexual harassment is common in American workplaces. Employees bear the costs of sexual harassment associated with their mental and physical well-being, their job security, and their dignity. In contrast, employers bear the burdens of preventing and remedying sexual harassment. In the event they fail to do so, employers risk substantial liability under Title VII of the Civil Rights Act of 1964.

One source of liability for an employer is a hostile work environment created by a supervisor who was formerly romantically involved with a subordinate. Employers seeking to avoid such liability are increasingly using dating waivers to establish that sexual conduct was welcome and to document their attempts to prevent hostile work environments.

This Comment argues that while the Supreme Court's newly articulated standards for the evaluation of employer liability under Title VII are appropriate, the unwelcomeness element is not. Unwelcomeness not only presents many practical and conceptual problems, it also leads to the perverse proliferation of dating waivers. Even if one believes that current law is not flawed, dating waivers are an inappropriate and ineffectual response to potential liability. Employers have better means by which they may prevent and remedy hostile work environments. They do not have to resort to chaperoning their employees with dating waivers.

* J.D. 1999, Boalt Hall School of Law, University of California, Berkeley; B.A. 1996, University of California, Los Angeles. I would like to thank Professor Linda Hamilton Krieger, Matt Kline, and Catherine Groves for giving new life to earlier drafts of this Comment. I give my eternal gratitude to my parents and siblings, who are models of perseverance.

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I. INTRODUCTION

Bill Gates, CEO of Microsoft, met his wife, Melinda French, when she worked for him as a product manager. 1 John F. Smith, Jr., General Motors' Chairman, met his wife when she worked for him as a secretary. 2 These are just two examples of successful relationships that formed at the workplace. As women enter the workforce in larger numbers, as people spend more hours at work and less in community activities, and as workplaces supplant bars and parties as places to meet people of similar interests, consensual sexual relationships among co-workers are increasingly common. 3

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2. See id.
3. See, e.g., Michele Conklin, Love on the Job: Liaisons Can be Tricky, But Good For a Company, ROCKY MTN. NEWS (Denver), Feb. 22, 1998, at 2G ("Eighty percent of workers say they've either been involved in or witnessed a workplace romance.... Nearly half of all workers are now women. Workers also are spending more time on the job than anywhere else. And finally, relationships have changed to become partnerships of equals, based on shared intellect and interests—traits that can easily be identified in the workplace."); Shannon Buggs, Internal Affairs, NEWS AND OBSERVER (Raleigh), Feb. 15, 1998, at E1; Carol Hymowitz & Ellen Joan Pollock, Managing Romance: Companies are
But not all office relationships are successful. Many eventually end on poor terms, leaving co-workers nervous, office environments tense, and employers concerned. A once-consensual dating relationship between a supervisory employee and a subordinate employee can expose an employer to sexual harassment liability if the supervisor continues to pursue the uninterested subordinate. With the increase in office relationships, despite their initially consensual nature, employers are increasingly exposed to sexual harassment liability for the conduct of supervisory employees. Consequently, employers seeking to prevent harassment and liability are not only requiring supervisors and subordinates who are dating to disclose their relationships; many are also forcing couples to sign “dating waivers” in which they guarantee that the relationship is voluntary and that they will notify the employer when it ends. Afterwards, the employer usually monitors the relationship, reassigns either the supervisor or the subordinate to another department, or removes the supervisor’s evaluative power over the subordinate.

This Comment addresses the difficulties employers face in limiting sexual harassment liability that may result from consensual relationships in the workplace. Its scope is limited to supervisor-subordinate relationships and to hostile work environment claims of sexual harassment under Title VII. Part II outlines the current state of sexual harassment law, elucidating the intersection of two elements integral to a hostile work environment claim: unwelcomeness and employer liability. Part III explores unwelcomeness and employer liability in greater detail and demonstrates how their interaction can put employers in the difficult position of chaperoning employees’ relationships. This Comment concludes that the current requirements for hostile work environment claims under Title VII are leading employers to take a preventive and affirmative—yet undesirable and unrealistic—role in consensual office relationships by utilizing dating waivers.

Part IV argues that while the recently elucidated employer liability standards for hostile work environment claims are proper, the current un-

Becoming More Flexible When it Comes to Office Relationships, Times Union (Albany), Feb. 16, 1998, at Cl.

4. See Conklin, supra note 3 (“One in two workplace romances will not work out, studies show.”).

5. See id.

6. For the sake of simplicity, this Comment will refer to the prototypical hostile work environment plaintiff as female, and the prototypical supervisor as male. This usage is not meant to disregard other variations of sexual harassment, such as a female supervisor harassing a male subordinate or same-sex harassment.


8. Dating waivers may be called by various terms suggesting they are contractual agreements. However, they are not really contractual in so far as they do not appear to have consideration. See Deanna Hodgin, Lawyers Try to Define Terms of Endearment, Recorder, Sept. 28, 1998, at 1.
welcomeness requirement is unnecessary and imports sexism into the analysis. Even where employer liability is fairly based on an evaluation of the employer’s response to complaints of a hostile work environment, requiring a showing of unwelcomeness can still unfairly burden sexual harassment victims. Finally, this Part contends that, despite the current state of the law, employers should not force employees to sign dating waivers. They are an improper waiver of victims’ rights, they may expose employers to other forms of liability, and they may not even solve the problem of coercion or prevent liability. In lieu of dating waivers, this Comment proposes more reasonable alternatives for employers seeking to prevent sexual harassment in the workplace.

II.

HOSTILE WORK ENVIRONMENT SEXUAL HARASSMENT LAW
UNDER TITLE VII

To comprehend the difficulties employers face in dealing with sexual harassment liability, it is necessary to first understand the development and parameters of hostile work environment claims under federal law. Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of sex, among other factors. The Equal Employment Opportunity Commission (EEOC), the federal agency charged with enforcement of Title VII, promulgates guidelines characterizing sexual harassment as discrimination on the basis of sex, and, therefore, prohibited by Title VII. The EEOC defines sexual harassment as:

[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature . . . 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.

Courts generally give great deference to the EEOC’s guidelines. The Supreme Court finally recognized sexual harassment liability under Title VII and specifically validated the hostile work environment cause of action

9. See 42 U.S.C. § 2000e-2(a) (1994) (“It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin . . . .”).
11. 29 C.F.R. § 1604.11(a).
in *Meritor Savings Bank v. Vinson* in 1986. Thus, there are two recognized forms of actionable sexual harassment under Title VII: quid pro quo sexual harassment and hostile work environment sexual harassment.

Although this Comment focuses on two elements of hostile work environment claims, it is nevertheless useful to provide some context by briefly exploring several differences between prima facie quid pro quo and hostile work environment claims. "'[Q]uid pro quo' and 'hostile environment' harassment are theoretically distinct claims, [but] the line between the two is not always clear and the two forms of harassment often occur together." Quid pro quo harassment involves the use of an employer's or supervisor's power to coerce a subordinate employee into sexual relations by threatening a tangible job detriment. "The quid pro quo claim arises only when the plaintiff shows a [causal] link between the job detriment and a refusal to submit to a supervisor's sexual advances." In such a case, the plaintiff must prove that (1) her supervisor made sexual advances toward her because of her sex; (2) she rejected the sexual advances; (3) she suffered a tangible job detriment because she rejected the supervisor's sexual advances; and (4) the employer is liable for the supervisor's conduct. Hence, in a quid pro quo case, a supervisor's sexual request is implicitly unwelcome and unwelcomeness is not a key element. Moreover, in such an instance, the employer is held strictly liable for a supervisor's conduct because courts recognize that a supervisor can demand sex with a threat of economic sanction because he is empowered by the employer.

By contrast, hostile work environment claims arise out of an employee's exposure to severe and pervasive sex-based harassment which leads to an abusive or threatening work environment. In these cases, the supervisor's conduct is presumed welcome until proven otherwise, and

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18. *See Faragher*, 118 S. Ct. at 2285 (explaining that "when a supervisor makes [discriminatory employment decisions with tangible results], he 'merges' with the employer, and his act becomes that of the employer").
the employer is not held strictly liable.\(^2\) A plaintiff who brings suit for a
hostile work environment must show that (1) she was subjected to sexual
advances, requests, or other verbal or physical sexual conduct by her super-
visor; (2) the harassment was based on her sex; (3) the supervisor's conduct
was unwelcome; (4) the harassment was sufficiently severe and pervasive to
create an abusive working environment;\(^2\) and (5) there is some basis for
holding the employer liable.\(^2\) The two elements which combine to present
a practical problem for employers seeking to limit their liability for sexual
harassment of subordinates by supervisors, and which this Comment ad-
dresses, are the unwelcomeness and employer liability elements.

A. Unwelcomeness

"The gravamen of any sexual harassment claim is that the alleged sexual
advances were 'unwelcome.'"\(^2\) Any plaintiff asserting that a supervi-
sor subjected her to sexual harassment must demonstrate that she did not
invite, solicit, or provoke the conduct, and that she did not enjoy or tolerate it.\(^2\) Seen from another perspective, this means that there is a presumption
that a supervisor's sexual conduct toward a subordinate is welcome until the
plaintiff demonstrates otherwise.\(^2\) "Thus, the sexual harassment plaintiff's
burden is more difficult than that of any other plaintiff alleging discrimina-
tion under Title VII. She must show initially not only that she suffered
discrimination (traditionally the complete Title VII burden), but also that
she did not desire this discrimination."\(^2\)

The unwelcomeness of sexual conduct at work was a salient issue in
Meritor Savings Bank v. Vinson,\(^2\) the first sexual harassment case to reach
the Supreme Court. There, the plaintiff bank employee was purportedly
fired for taking excessive sick leave; she brought suit against her employer
for sexual harassment perpetrated by her bank manager, who was also the
vice-president of the bank.\(^2\) Soon after she was hired by the vice-presi-

\(^{20}\) See Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986); Burlington Indus., Inc. v. Ellerth, 524
U.S. 772, 118 S. Ct. 2257 (1998); Faragher, 118 S. Ct. 2275.

\(^{21}\) In determining the severity and pervasiveness of the unwelcome sexual conduct, courts em-
ploy both objective and subjective standards. The plaintiff must establish that a reasonable person
would have been offended by the conduct. She must also show that she was actually offended by it. See

\(^{22}\) See Meritor, 477 U.S. 57; Burlington Indus., 118 S. Ct. 2257; Faragher, 118 S. Ct. 2275.

\(^{23}\) 477 U.S. at 68.

\(^{24}\) See, e.g., Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982). For a discussion of how
the unwelcomeness element functions as the consent inquiry in rape cases and "has served as a vehicle
to import some of the most pernicious doctrines of rape law into Title VII cases," see Estrich, supra note
16, at 826.

\(^{25}\) See generally Radford, supra note 19.

\(^{26}\) Weiner, supra note 19, at 625.

\(^{27}\) 477 U.S. 57 (1986).

\(^{28}\) See id. at 60.
dent, he “suggested that they go to a motel to have sexual relations.”29 She feared losing her job and agreed.30 During her four years of employment, they had intercourse an estimated forty or fifty times, the manager “fondled her in front of other employees . . . exposed himself to her, and even forcibly raped her on several occasions.”31 She claimed that she never formally complained about the manager for fear of losing her job.32

The district court concluded that Vinson had not suffered any sexual harassment because it did not recognize her hostile work environment claim as actionable under Title VII.33 Moreover, the court found that any sexual relationship between the plaintiff and her manager was “voluntary,” and that it did not have any bearing on her promotions at the bank.34 The Court of Appeals for the District of Columbia “surmised that the District Court’s finding of voluntariness might have been based on the voluminous testimony regarding [the plaintiff’s] dress and personal fantasies”35 and specifically noted that the plaintiff’s voluntariness, dress, or personal fantasies were not relevant.36 It reversed and remanded after finding that a hostile work environment claim was possible.37

The Supreme Court in Meritor validated hostile work environment claims as actionable claims of sexual harassment.38 With regard to welcoming, the Court acknowledged that “the question whether particular conduct was indeed unwelcome presents difficult problems of proof and turns largely on credibility determinations committed to the trier of fact.”39 The Court also corrected the district court by focusing on “whether [the plaintiff] by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary.”40 Nevertheless, the Court stated, “[w]hile ‘voluntariness’ in the sense of consent is not a defense to such a claim, it does not follow that a complainant’s sexually provocative speech or dress is irrelevant as a matter

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29. Id.
30. See id.
31. Id.
32. See id. at 60-61. Fear of termination after making a formal, public complaint is common among victims of sexual harassment and, arguably, well-founded. See Radford, supra note 19, at 523 (suggesting that victims are reluctant to file formal complaints for a variety of reasons, such as a fear of reprisal and blame, concerns about privacy, or the belief that nothing will be done in response); Hymowitz & Pollock, supra note 3 (discussing a 1983 Harvard Business Review article that urged companies to persuade the least essential employee in an office relationship—the subordinate, who is usually a woman—to leave the company).
33. See Meritor, 477 U.S. at 62.
34. Id. at 61.
35. Id. at 63.
36. See id. at 63.
37. See id. at 62.
38. See id. at 63-67.
39. Id. at 68.
40. Id.
of law in determining whether he or she found particular sexual advances unwelcome. To the contrary, such evidence is obviously relevant.”

As *Meritor* foreshadowed, the unwelcomeness inquiry can be problematic where there was once a consensual relationship between a supervisor and subordinate. Indeed, the EEOC has recognized that “[a] more difficult situation occurs when an employee first willingly participates in conduct of a sexual nature but then ceases to participate and claims that any continued sexual conduct has created a hostile work environment.” “Behavior that may have been acceptable during the context of a consensual relationship may become harassing when the conduct becomes unwelcome by one of the parties.” The plaintiff may have welcomed sexual advances in the beginning, but the sexual conduct may have become unwelcome at the termination of the consensual relationship. The EEOC suggests that the subordinate employee “has the burden of showing that any further sexual conduct is unwelcome, work-related harassment. The employee must clearly notify the alleged harasser that his conduct is no longer welcome.”

It is difficult, however, for an economically dependent and vulnerable victim to resist forcefully her supervisor’s unwanted attention, and the preexistence of a consensual relationship may not make it any easier for a plaintiff to communicate her distaste for her supervisor’s continued sexual advances.

There is scant sexual harassment case law involving consensual dating relationships. One can only guess why this is so. Nevertheless, there are several cases that help illuminate the contours of the unwelcomeness requirement. In looking for proof of unwelcomeness, courts primarily question whether the plaintiff invited the complained-of sexual conduct. For instance, in *Henson v. City of Dundee*, the city’s police chief subjected the plaintiff, a dispatcher for the police department, to “demeaning sexual inquiries and vulgarities.” The Eleventh Circuit recognized the plaintiff’s hostile work environment cause of action and demanded proof of unwelcomeness as a requirement of her prima facie claim. The court explained that sexual behavior at work was unwelcome when the plaintiff did not solicit or incite it, and when the plaintiff found it undesirable or offen-

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41. *Id.* at 69. The Court referred to the EEOC’s guidelines that direct triers of fact to consider “the record as a whole” and “the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred.” *Id.* (citing 29 C.F.R. § 1604.11(b) (1985)).


45. Perhaps victims who were involved in consensual relationships with their harassers are not believed by their peers, and, consequently, are doubtful that they could persuade a jury, or perhaps they feel some responsibility for the harassment, as if their prior consent encouraged the harasser.

46. 682 F.2d 897, 899 (11th Cir. 1982).

47. *See id.* at 902, 903.
It further determined that Henson had sufficiently alleged unwelcomeness.\textsuperscript{49} It is important to recognize that “[a]lthough the term ‘harassment’ implies unwelcomeness, the plaintiff must nevertheless affirmatively prove that the conduct was ‘unwelcome.’”\textsuperscript{50}

Even when plaintiffs may have willingly engaged in sexual conduct at work, courts have not automatically denied them protection from unwanted sexual harassment. In \textit{Swentek v. USAIR, Inc.},\textsuperscript{51} the plaintiff, a flight attendant, “was a foul-mouthed individual who often talked about sex.”\textsuperscript{52} She had “placed a ‘dildo’ in her supervisor’s mailbox ... urinated in a cup and passed it as a drink to another employee, and once grabbed the genitals of [a pilot other than the defendant] with a frank invitation to a sexual encounter.”\textsuperscript{53} The district court found that, despite having told the defendant to stop his harassing behavior, “Swentek’s own conduct indicated that [the defendant’s] behavior was ‘not unwelcome.’”\textsuperscript{54} The district court judge also determined not that the plaintiff explicitly welcomed the defendant’s sexual conduct, “but that she was the kind of person who could not be offended by such comments and therefore welcomed them generally.”\textsuperscript{55}

The Court of Appeals disagreed. It stated that the district court judge had erred in his evaluation of unwelcomeness.\textsuperscript{56} There was no evidence that the defendant knew of the plaintiff’s consensual sexual conduct with other employees or had any reason to believe his conduct would be welcomed by her.\textsuperscript{57} The Court of Appeals stated, “Plaintiff’s use of foul language or sexual innuendo in a consensual setting does not waive ‘her legal protections against unwelcome harassment.’”\textsuperscript{58} \textit{Swentek} suggests that a plaintiff’s consent to certain sexual conduct in the workplace does not necessarily render her agreeable to any and all sexual conduct.

The \textit{Swentek} court, in discussing the EEOC Compliance Manual, noted that some sexual conduct may be welcome while some may be unwelcome. “Although a charging party’s use of sexual terms or off-color jokes may suggest that sexual comments by others in that situation were not unwelcome, more extreme and abusive or persistent comments or a physical assault will not be excused ... .”\textsuperscript{59} An employee who engages in sexual behavior at work cannot “cry foul” when her co-workers reciprocate, but

\begin{itemize}
  \item \textsuperscript{48} See \textit{id.} at 903. The court relied heavily on the EEOC’s definitions of sexual harassment, 29 C.F.R. § 1604.11(a) (1998).
  \item \textsuperscript{49} See 682 F.2d at 897, 905.
  \item \textsuperscript{50} Juliano, \textit{supra} note 12, at 1570.
  \item \textsuperscript{51} 830 F.2d 552 (4th Cir. 1987).
  \item \textsuperscript{52} \textit{id.} at 556.
  \item \textsuperscript{53} \textit{id.}
  \item \textsuperscript{54} \textit{id.}
  \item \textsuperscript{55} \textit{id.} at 557.
  \item \textsuperscript{56} See \textit{id.}
  \item \textsuperscript{57} See \textit{id.}
  \item \textsuperscript{58} \textit{id.} (citing \textit{Katz v. Dole}, 709 F.2d 251, 254 n.3 (4th Cir. 1983)).
  \item \textsuperscript{59} \textit{Eq. Empl. Compl. Man.} (BNA), \textit{supra} note 14, at 4040.
\end{itemize}
the reciprocation should match the instigator’s conduct in degree and kind. Otherwise, it may be considered unwelcome sexual harassment.

For example, in *Steiner v. Showboat Operating Co.*, the plaintiff was a casino employee who sued her employer for her supervisor's sexually harassing conduct.\(^60\) The supervisor had been calling her offensive names based on her gender: “dumb fucking broad,” “cunt,” and “fucking cunt.”\(^61\) The employer argued that the plaintiff “could handle—and in fact ‘welcomed’—[the defendant’s] abuse, since she herself was ‘legendary for talking like a drunken sailor.’”\(^62\) The Ninth Circuit rejected this argument and found the defendant’s conduct was unwelcome, reasoning that it surpassed the plaintiff’s.\(^63\)

Courts do not, however, readily find unwelcomeness where the victim actively participated in the sexual conduct and then later tried to characterize it as harassment.\(^64\) For instance, in *Reed v. Shepard*, the plaintiff was a “civilian jailer.”\(^65\) She endured “suggestive remarks,” and was the “subject of lewd jokes” and egregious physical abuse.\(^66\) The evidence at trial showed that she had an “enthusiastic receptiveness” to sexual conduct at work.\(^67\) The plaintiff argued that she participated in the sexualized environment in order to gain acceptance from her co-workers.\(^68\)

Nevertheless, the Seventh Circuit found she welcomed her co-workers’ behavior because she participated in it. The court noted that “Reed not only experienced this depravity with amazing resilience, but she also relished reciprocating in kind.”\(^69\) This reasoning could be problematic in the case of a consensual relationship because the defendant could characterize the plaintiff’s earlier consent as “participation.”

Even where the victim does not participate and unequivocally tells her harasser to stop, courts may still find that she welcomed sexual behavior. In *Dockter v. Rudolf Wolff Futures*,\(^70\) the defendant employer hired the plaintiff in order to further a personal relationship with her, despite the fact

\(^{60}\) 25 F.3d 1459 (9th Cir. 1994).
\(^{61}\) *Id.* at 1461. The supervisor had also publicly reprimanded her for giving a free breakfast to two male customers. The defendant yelled at her, “Why don’t you go in the restaurant and suck their dicks while you are at it if you want to comp them so bad?” *Id.*

\(^{62}\) *Id.* at 1463 (referring to characterizations of plaintiff in defendant’s appellate brief).

\(^{63}\) *Id.* at 1464 n.5.

\(^{64}\) See Radford, supra note 19, at 516.

\(^{65}\) 939 F.2d 484 (7th Cir. 1991).

\(^{66}\) *Id.* at 486 (“Plaintiff contends that she was handcuffed to the drunk tank . . . that she was physically hit and punched in the kidneys, that her head was grabbed and forcefully placed in members’ laps . . . that she had chairs pulled out from under her, a cattle prod with an electrical shock was placed between her legs . . . She was . . . handcuffed to the toilet and her face pushed into the water, and maced.”).

\(^{67}\) *Id.* at 491.

\(^{68}\) *See id.* at 492.

\(^{69}\) *Id.* at 486.

\(^{70}\) 913 F.2d 456 (7th Cir. 1990).
that she was not sufficiently qualified for the job. The employer made several sexual advances toward the plaintiff and she flatly rejected all of them.71 He eventually fired her because of her inability to do the job for which she was hired.72 The Seventh Circuit determined that the plaintiff welcomed her employer's advances, even though she had clearly communicated her disapproval to him. It opined, "[a]lthough Plaintiff rejected [the defendant's] efforts, her initial rejections were neither unpleasant nor unambiguous, and gave [him] no reason to believe that his moves were unwelcome."73 The court forgave the employer because "[a]fter one misguided act, in which he briefly fondled Plaintiff's breast and was reprimanded by her for doing so, he accepted his defeat and terminated all such conduct."74

Query: would courts really prefer victims of sexual harassment to respond with a firm slap rather than a firm verbal rejection?

In sum, in determining whether sexual conduct was unwelcome, courts look to a variety of factors. As discussed above, a plaintiff's own conduct is examined closely and courts easily find unwelcomeness where she has not consented to or reciprocated sexual behavior. Courts seem to prefer "ideal" victims who objectively and vocally communicate their disapproval of a sexualized work environment. The EEOC has articulated this tendency, stating in its Compliance Manual that "[w]hen there is some indication of welcomeness or when the credibility of the parties is at issue, the charging party's claim will be considerably strengthened if she made a contemporaneous complaint or protest."75 Moreover, "[p]articularly when the alleged harasser may have some reason (e.g., a prior consensual relationship) to believe that the advances will be welcomed, it is important for the victim to communicate that the conduct is unwelcome."76 The EEOC emphasizes that victims of sexual harassment should objectively and outwardly communicate their disapproval of the sexual conduct.77

It follows that where the victim and harasser share a past relationship, it is especially important for the victim to firmly and clearly end the relationship, discontinue all sexualized behavior at work, and document the termination of the relationship as well as the continued sexual advances. Although many may deem these steps to be bad dating etiquette, courts may see them as good harassment prevention and proof of unwelcomeness.

71. See id. at 458.
72. See id.
73. Id. at 459 (quoting the opinion of the district court).
74. Id.
75. Eq. Empl. Compl. Man. (BNA), supra note 14, at 4037 (defining a contemporaneous complaint as one that is "made while the harassment is ongoing or shortly after it has ceased").
76. Id. (emphasis added).
77. See id. at 4037-38.
B. Employer Liability for Supervisor Conduct

In addition to proving unwelcomeness, a plaintiff must demonstrate in her prima facie case some basis for holding her employer liable for the hostile work environment. In 1998, the Supreme Court addressed employer liability for sexual harassment under Title VII in \textit{Faragher v. City of Boca Raton}\textsuperscript{79} and \textit{Burlington Industries v. Ellerth}\textsuperscript{80} In both cases, the Court held that:

\textit{[a]n employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence. The defense comprises two necessary elements: (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. . . . No affirmative defense is available, however, when the supervisor’s harassment culminates in a tangible employment action. . . .} \textsuperscript{81}

Thus, in a hostile work environment case, an employer will be vicariously liable for sexual harassment perpetrated by a supervisor, subject to an affirmative defense establishing the reasonableness of the employer’s conduct and the unreasonableness of the plaintiff’s conduct. This Section explores the reasoning of \textit{Faragher} and \textit{Burlington Industries}, and their implications for the imposition of employer liability for supervisory harassment.

Before \textit{Faragher} and \textit{Burlington Industries}, the Supreme Court had not offered a precise standard for finding employer liability in \textit{Meritor Savings Bank v. Vinson}; subsequently, circuit court decisions on the issue were inconsistent and muddled. As discussed earlier, \textit{Meritor} involved a bank manager who repeatedly and scandalously sexually harassed a subordinate under his supervision. The manager and bank denied the plaintiff’s allegations, and the bank argued that any sexual harassment that may have occurred did so without the bank’s knowledge or approval—a direct liability defense. The trial court denied that the plaintiff had suffered any sexual

\textsuperscript{78} For discussion of the sexual harassment prima facie case, see supra notes 14-22 and accompanying text.

\textsuperscript{79} 524 U.S. 775, 118 S. Ct. 2275 (1998).

\textsuperscript{80} 524 U.S. 742, 118 S. Ct. 2257 (1998).

\textsuperscript{81} \textit{Faragher}, 118 S. Ct. at 2292-93 (citations omitted); \textit{Burlington Indust.}, 118 S. Ct. at 2270 (citations omitted).

\textsuperscript{82} See \textit{Faragher}, 118 S. Ct. at 2293.


\textsuperscript{84} See \textit{id. at 61}. For more details of case facts, see supra notes 27-32 and accompanying text.
harassment, but nevertheless evaluated the employer’s liability.\textsuperscript{85} It held that the bank was not liable for the manager’s conduct because the bank had an express policy against discrimination which the plaintiff did not utilize, and because the bank had no notice.\textsuperscript{86} The trial court reasoned that the bank did not have notice of the supervisor’s conduct because “notice to [the harassing supervisor] was not the equivalent of notice to the bank.”\textsuperscript{87} The Court of Appeals for the District of Columbia reversed and held that employers were strictly liable for supervisors’ conduct, regardless of whether they knew or should have known of it.\textsuperscript{88} The appellate court even went so far as to hold that an employer was liable whether or not the supervisor had the authority, as an agent of the employer, to hire or fire employees.\textsuperscript{89}

On appeal before the Supreme Court, the plaintiff in \textit{Meritor} argued for strict liability; in opposition, the bank asserted that she had failed to utilize its formal grievance procedure and should be precluded from imposing liability on the employer.\textsuperscript{90} In its analysis, the Court first referred to the EEOC’s amicus curiae brief in which the EEOC maintained that an employer with a policy against sexual harassment and a procedure for addressing sexual harassment claims should be shielded from liability “absent actual knowledge . . . .”\textsuperscript{91} The EEOC reasoned that if the employer had actual knowledge of or did not provide a forum for victims’ complaints, the employer should be liable.\textsuperscript{92} The Court did not determine the standard for liability, but agreed with the EEOC that courts should “look to agency principles for guidance in this area.”\textsuperscript{93} The Court explained that while employer liability is not strict, employers are not immune when they have policies prohibiting sexual harassment.\textsuperscript{94} Rather, employers are liable according to agency principles and according to the adequacy, timing, and effectiveness of their remedial action.\textsuperscript{95}

Unfortunately, the Supreme Court did not provide adequate guidance in \textit{Meritor} by simply directing circuit courts to apply agency principles to determinations of employer liability. Agency principles are flexible and are subject to varied interpretations, as demonstrated by post-\textit{Meritor} cases.\textsuperscript{96}

\textsuperscript{85} See id. at 62.
\textsuperscript{86} See id.
\textsuperscript{87} Id. at 69.
\textsuperscript{88} See id. at 63.
\textsuperscript{89} See id. (reasoning that a supervisor may simply appear to possess the authority to hire or fire, which may allow him to “impose himself” on subordinates).
\textsuperscript{90} See id. at 70.
\textsuperscript{91} Id. at 71.
\textsuperscript{92} See id.
\textsuperscript{93} Id. at 72.
\textsuperscript{94} See id.
\textsuperscript{95} See id.
\textsuperscript{96} See, e.g., Harrison v. Eddy Potash, 112 F.3d 1437 (10th Cir. 1997); Karibian v. Columbia Univ., 14 F.3d 773, 780 (2d Cir.) cert. denied, 512 U.S. 1213 (1994); Kauffman v. Allied Signal, 970 F.2d 178, 180 (6th Cir. 1992); Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991).
Fortunately, *Faragher* and *Burlington Industries* promise to clear up much of the confusion, thereby giving employers and lower courts a better understanding of the parameters of sexual harassment law.

In *Burlington Industries v. Ellerth*, the Court considered itself bound by the agency principles to which it alluded in *Meritor*. In *Burlington Industries*, the plaintiff was subjected to sexual comments and gestures by her supervisor’s superior, the defendant. The defendant also made veiled threats suggesting that he would deny her tangible job benefits, for instance, if she did not “loosen up.” The plaintiff did not inform any of Burlington’s authorities about the harassment until after she quit. In its analysis, the Court emphasized that the manner in which liability is judicially imposed on employers is crucial to effectuating Congressional intent to prevent harassment. It explained that “Title VII is designed to encourage the creation of anti-harassment policies and effective grievance mechanisms . . . To the extent limiting employer liability could encourage employees to report harassing conduct before it becomes severe or pervasive, it would also serve Title VII’s deterrent purpose.” Thus, the Court held that an employer’s vicarious liability can be limited if the employer establishes that it acted reasonably in preventing or correcting sexual harassment, or that the employee acted unreasonably in failing to utilize the employer’s preventive or corrective opportunities.

Similarly, in *Faragher v. City of Boca Raton*, the Court expressed its desire to implement Title VII sensibly by offering employers an incentive to prevent and eliminate harassment, and by requiring employees to take advantage of the preventive or remedial procedures provided by their employers. The plaintiff in *Faragher*, a lifeguard, was physically and verbally harassed by her supervisors. Faragher herself never complained to City management about the harassment; however, upon another lifeguard’s complaints, the City investigated, reprimanded, and disciplined the harassers. The City, the Court noted, had completely failed to disseminate its sexual harassment policy among the lifeguards.

The Court adopted the vicarious liability standard it chose in order to accommodate the principle of vicarious liability for harm caused by misuse of supervisory authority, as well as Title VII’s equally basic policies of encouraging forethought by employers and saving action by objecting

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98. Id. at 2262.
99. See id. at 2262-63.
100. Id. at 2270.
101. See id.
103. See id. at 2281.
104. See id. at 2280-81.
105. For the standard of liability the Court adopted, see supra note 81 and accompanying text.
employees . . . ”\textsuperscript{106} It acknowledged that supervisors enjoy implicit power, and need not outwardly threaten sanctions in order to impact a workplace environment.\textsuperscript{107} Furthermore, the Court explained that employers should bear the costs created by abusive supervisors because they have ample opportunity to guard against them in screening, training, and monitoring.\textsuperscript{108}

After \textit{Faragher} and \textit{Burlington Industries}, lower courts must look more closely at the speed, manner, and efficacy with which employees complain of harassment, and with which employers respond to and remedy the alleged harassment. For instance, in \textit{Indest v. Freeman Decorating, Inc.}, the Fifth Circuit explained that “[b]y promptly invoking a company’s grievance procedure, a plaintiff has received the benefit Title VII was meant to confer.”\textsuperscript{109} It also recognized that the employer’s “swift response to the plaintiff’s complaint should have consequences for its vicarious liability exposure precisely because the company forestalled the creation of a hostile environment.”\textsuperscript{110} The court contrasted cases in which a plaintiff’s failure or delay in invoking harassment policies may indicate the company’s failure to enforce such policies and its disregard for preventing harassment.\textsuperscript{111}

It should be noted that beyond Title VII, state law can also affect an employer’s liability. Thus, for instance, in contrast to the \textit{Faragher} and \textit{Burlington Industries} standard, employers in California are held strictly liable for supervisory sexual harassment.\textsuperscript{112} The Fair Employment and Housing Act even imposes an affirmative duty on employers to prevent sexual harassment.\textsuperscript{113} Such stringent state laws offer employers tremendous reason, independent of the standards set forth in \textit{Faragher} and \textit{Burlington Industries}, to devise preventive measures in order to guard against sexual harassment.

Given these varying standards of liability, employers trying to limit their exposure to sexual harassment liability face difficult decisions when addressing sexual relationships between supervisors and subordinates. After a consensual office relationship ends, an employer may face a sexual harassment charge if the subordinate is fired or suffers negative employment action. Even if a consensual office relationship remains stable, the situation may incite other employees to allege supervisory favoritism and bias if the subordinate is promoted.\textsuperscript{114} Despite the clearer standards set

\textsuperscript{106.} See \textit{Faragher}, 118 S. Ct. at 2292.
\textsuperscript{107.} See \textit{id.} at 2291-92.
\textsuperscript{108.} See \textit{id.} at 2291.
\textsuperscript{109.} 164 F.3d 258, 265 (5th Cir. 1999).
\textsuperscript{110.} \textit{id.} at 266.
\textsuperscript{111.} See \textit{id.}
\textsuperscript{112.} See \textit{CAL. GOV’T CODE} § 12940 (Deering 1997).
\textsuperscript{113.} See \textit{id.}
forth in *Faragher* and *Burlington Industries*, determinations of employer liability may remain unpredictable.

C. The Intersection of Unwelcomeness and Employer Liability

To summarize, unwelcomeness and grounds for employer liability are two elements necessary to a prima facie claim of hostile work environment sexual harassment. Once a plaintiff alleges these elements, along with the other requisites to a hostile work environment claim, the employer can raise a two-pronged affirmative defense. If an employer has a policy geared toward preventing and discovering sexual harassment, it may reduce its risk of liability by showing that it exercised reasonable care. Additionally, if an employee did not utilize an employer’s anti-harassment policy, the employer may argue that the failure to do so was unreasonable. Proof of a consensual relationship between the supervisor and employee may mitigate or eliminate an employer’s liability by serving to rebut a plaintiff’s charges. Evidence that an employer took action to prevent or end the harassment may also preclude or mitigate liability. Either way, the liability rules provide incentives for an employer to learn about and closely monitor consensual office relationships.

III. Dating Waivers: Employers’ Response to the Intersection of Unwelcomeness and Employer Liability

Employers are extremely sensitive about their vulnerability to sexual harassment liability for supervisory conduct, particularly in the wake of the Civil Rights Act of 1991, which has exposed employers to more liability with the availability of jury trials, compensatory and punitive damages, and emotional distress awards. Before *Faragher* and *Burlington Industries*, employers needed to be vigilant about preventing sexual harassment in order to mitigate liability. “Due to the Court’s failure to specifically define the circumstances in which an employer [was] liable for sexual harassment perpetuated by the employer’s supervisory personnel, [Meritor had] provided employers with additional incentive to implement procedures to discover and prevent the occurrence of sexual harassment in the workplace.”

*Faragher* and *Burlington Industries*, by offering complete absolution from liability, offer an even greater incentive for preventive poli-

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116. *See* Faragher, 118 S. Ct. at 2293.
cies. Consensual relationships between supervisors and subordinates threaten a potential for harassment which begs for prevention.

Even though relationships between supervisors and subordinates may seem to begin consensually, there is some question as to whether they are ever meaningfully consensual. Many argue that a subordinate can never give true consent where her supervisor wields economic power over her.\textsuperscript{119} The element of supervisory power makes supervisor-subordinate relationships unique. If a subordinate ends the relationship, her supervisor may abuse his power to create a hostile environment for her. Even if it is the supervisor who ends the relationship, the subordinate may still feel targeted. It is easy to imagine, as many employers may fear, that an individual would bring a sexual harassment suit to seek revenge against a former lover.

Thus, even consensual workplace relationships may expose employers to sexual harassment liability.\textsuperscript{120} Ellen Bravo, co-director of 9 to 5, National Association of Working Women, claims that her organization receives around 15,000 phone calls each year “from non-executive women, many complaining about a relationship with a superior.”\textsuperscript{121} Subsequently, “[r]ather than broad prohibition of workplace relationships, the proscription of relationships between supervisors and subordinates . . . often makes the most sense, because such relationships present the greatest risks for the employer.”\textsuperscript{122}

Employers have experimented with a variety of methods to handle the problems presented by supervisor-subordinate dating relationships. Some employers have tried banning workplace relationships all together.\textsuperscript{123} Most have found, however, that this does not prevent relationships from forming, but instead forces them underground.\textsuperscript{124}

In other cases, employers do not develop formal policies regarding supervisor-subordinate relationships, but opt to separate or transfer employees once they learn about a specific relationship.\textsuperscript{125} Still others require employees to notify them of dating situations so that the employer can reassign one

\textsuperscript{119} See, e.g., Estrich, supra note 16, at 831 (“[T]here is no such thing as truly ‘welcome’ sex between a male boss and a female employee who needs her job.”); Lisa Black, \textit{Power Imbalance is the Key to Most Policies on Sex}, \textit{Chi. Trib.} Jan. 29, 1998, at N1 (“Because of [the] power differential, there is no possibility of real informed consent in that relationship.”).

\textsuperscript{120} See Melinda Socol Herbst, \textit{Employers May Police Some Workplace Romances}, \textit{Nat’l L. J.}, Feb. 26, 1996, at C19 (“Such a relationship can evolve into sexual harassment when one participant wishes to continue and the other does not. The continued relationship and attendant sexual advances, remarks or other conduct then could become unwelcome to the unwilling party.”).


\textsuperscript{123} See, e.g., Hallinan, supra note 115, at 454.
participant, or, in the alternative, force them to break up.\textsuperscript{126} Other employers think it inevitable that employees will enter into sexual relationships with colleagues, and conclude that efforts to prevent relationships from forming are futile.\textsuperscript{127} Other employers simply do nothing at all because they believe that employees work more efficiently and are more loyal to the company when they have a love interest at work.\textsuperscript{128}

Most companies with prohibitive policies do not prohibit dating among employees altogether.\textsuperscript{129} Many, like Motorola, ban only supervisor-subordinate relationships because they present the greatest risk of liability for employers.\textsuperscript{130} Intel Corporation "explicitly and severely" limits office dating between supervisors and their underlings; Intel's policy specifically "forbids managers from dating any employee they supervise and warns violators that they may face termination."\textsuperscript{131}

Employers who fear that absolute prohibitions do not prevent relationships from forming, but instead drive relationships underground,\textsuperscript{132} may choose a more flexible approach. There is a noticeable trend away from absolute bans on office romance and toward disclosure requirements that permit the employer to transfer one employee away from the direct supervision of the other.\textsuperscript{133} At General Motors, for example, "managers are encouraged to report romantic involvements [sic] with subordinates," to which GM responds by changing the couple's reporting relationship to remove the supervisor's power over the subordinate.\textsuperscript{134} When a supervisor and subordinate at Wal-Mart are dating, the subordinate is usually transferred away from the supervisor.\textsuperscript{135} In contrast, IBM usually moves managers who are involved in office relationships with subordinates, because managers have more flexibility.\textsuperscript{136}

ABC advertises its "open-door policy" to employees and "strongly encourages" individuals involved in supervisor-subordinate relationships to report their relationship to management officials.\textsuperscript{137} ABC will first work

\begin{footnotes}
\footnote{126.} See id.
\footnote{127.} See Meyer, supra note 123.
\footnote{128.} See Conklin, supra note 3 ("Office romances can increase company loyalty and raise energy and creativity levels of not only those involved but those around them.").
\footnote{129.} See Hazlewood, supra note 114.
\footnote{130.} See Black, supra note 119.
\footnote{131.} See Symonds et al., supra note 1. See also Hazlewood, supra note 114.
\footnote{132.} See Symonds et al., supra note 1; Hamilton, supra note 124.
\footnote{133.} See Steve Berg, Employers Struggling With Office Romances: From Friendship to Intimacy to Retaliation in the Courts, STAR TRIB. (Minneapolis), Feb. 24, 1998, at 1D.
\footnote{134.} Symonds et al., supra note 1.
\footnote{135.} See Buggs, supra note 3. Employers should be aware that they may be vulnerable to claims of disparate impact even if they do not intend to disproportionately burden women, given the fact that women are more likely to occupy subordinate rather than supervisory positions. For a brief acknowledgment of the potential for disparate impact, see James Lardner et al., Cupid's Cubicles, U.S. News \& WORLD REP., Dec. 14, 1998, at 44.
\footnote{136.} See Buggs, supra note 3.
\footnote{137.} See Vogel et al., supra note 43.
\end{footnotes}
with the couple in deciding which of them to transfer. If transfer is not a viable option, the employees have the option to end their relationship or ABC will expect one of them to resign. 138 Whatever the resolution, the supervisory employee no longer exercises power over the subordinate’s evaluations, promotions, or salary. 139

Surprisingly, despite the increase in the cost and incidence of sexual harassment lawsuits, statistics show that the majority of American employers do not operate under any explicit policy about how to deal with supervisor-subordinate dating relationships. 140 Yet “[m]any courts have said that an employer without a specific sexual harassment policy is tacitly sanctioning a hostile work environment.” 141 Given the state of the law, “[e]mployers need to monitor consensual workplace relationships to ensure that neither party is an unwilling participant,” 142 to prevent harassment, and to correct it once it begins.

Consequently, employers are increasingly turning to dating waivers to prevent or diminish the liability risk resulting from the uncertain intersection of unwelcomeness and employer liability. 143 The employment law firm of Littler, Mendelson, Fastiff, Tichy & Mathiason, which represents employers, has designed a four page document entitled “An Acknowledgment and Agreement.” 144 Employees wishing to date one another sign the agreement, thereby demonstrating their “desire to undertake and pursue a mutually consensual social and/or amorous relationship,” according to clause ‘D’ of the love contract.” 145 Littler, Mendelson attorneys have characterized the agreement as a “prenuptial agreement,” “an amorous release,” and “a safety valve to protect companies and also the individuals involved in relationships.” 146 The “Acknowledgment and Agreement” reads as follows:

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138. See id.
139. See id.
142. Herbst, supra note 120.
143. See Silverstein, supra note 140 (stating that dating waivers are “intended to crimp [employees’] ability to sue the company if [their] relationship ever turns ugly”); Jennifer J. Hamilton, Labor of Love—Part I, CONN. EMPLOYMENT L. LETTER, Dec. 1998 (“[E]ven if a love contract does not absolve [employers] of all liability, it may dissuade a disgruntled lover from suing.”).
145. Id.
146. Id.
1. [First employee] and [second employee] each, independently and collectively, desire to undertake and pursue a mutually consensual social and/or amorous relationship ("Social Relationship") with the other.

2. [First employee's] desire to undertake, pursue, and participate in said Social Relationship is completely and entirely welcome, voluntary and consensual and is unrelated to the Company, [first employee's] professional or work-related responsibilities or duties, or [first employee's] and [second employee's] respective positions in the Company or business relationship to each other . . . .

3. [Second employee's] desire to undertake, pursue, and participate in said Social Relationship is completely and entirely welcome, voluntary and consensual and is unrelated to the Company, [second employee's] professional or work-related responsibilities or duties, or [second employee's] and [first employee's] respective positions in the company or business relationship to each other . . . .

4. [First employee] has entered into said Social Relationship after having discussed in depth with [second employee] the ramifications of entering into a Social Relationship with a co-worker of [second employee's] professional position and after having had the opportunity to discuss such matters with counsel of choice or any other person of his or her choosing . . . .

The Orange County, California office of the law firm of Paul, Hastings, Janofsky & Walker, L.L.P. recommends a similar solution to employers it represents. Their suggested draft sexual harassment policy contains an optional clause:

[M]anagers and employees with supervisory responsibility may not have a dating or sexual relationship with any employee with whom they assign work, evaluate, or influence employment or compensation decisions [option: without both parties promptly advising the _____ of such a relationship, so that appropriate assurances/arrangements can be made to assure mutual consent and no adverse impact in the workplace.]

Employers may or may not choose to include the optional clause in the final draft of their sexual harassment policy. Paul, Hastings recommends the optional clause as a middle ground between unrealistically banning all office relationships and not promulgating any rules at all. If the relationship is disclosed, and the office couple ends their relationship, Paul, Hastings suggests that the employer separate the supervisor and subordinate by rescheduling them, relocating their offices, and reducing their contact

150. See id. This approach is especially preferred, according to Mr. Hay, in states like California, which impose an affirmative duty on employers to prevent sexual harassment, and which hold employers strictly liable for supervisor's improper conduct. See also CAL. GOV'T CODE § 12940(h).
with one another. The firm perceives the disclosure obligation to be the best way to prevent harassment and retaliation, as well as employers’ liability for each. Interestingly, only a small percentage of Paul, Hastings’ clients adopt the optional clause—generally, those employers who have already been sued for sexual harassment—and it is with reluctance that they do so. 

Unfortunately, dating waivers are not as simple in practice as they may appear in theory. While some employment lawyers may assert that contractual agreements and disclosure requirements reveal problems by encouraging victims of sexual harassment to turn to their employer for help, other lawyers have accused employers of trying to extinguish female employees’ right to sue. “The contract is for avoiding liability, not avoiding problems,” suggests Mary Anne Seday, the president of the National Employment Lawyers Association. Indeed, some women’s advocates would rather see the burden fall on employers; they argue that “[i]t’s part of a boss’ duty to avoid romantic entanglements with subordinates . . . .”

It is unclear whether sexual harassment law ought to regulate all forms of workplace sexual conduct, including consensual sexual relationships. As noted earlier, some feminists posit that a relationship between a supervisor and subordinate may never be truly consensual given the power dynamic integral to their work relationship. “[T]here is a vulnerability on the part of the less powerful person . . . . Because of that power differential, there is no possibility of real informed consent in that relationship.”

Lest we forget, a supervisor’s economic power over a subordinate may also involve social power.

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151. See Hay, supra note 149.
152. See id.
153. See id.
154. See Hay, supra note 149.
155. See Cohen, supra note 144.
156. Id. (comparing such contracts to the waiver of rights after an employee signs a mandatory arbitration form).
157. Berg, supra note 133. See also Faragher v. City of Boca Raton, 118 S. Ct. 2275, 2288 (1998) (“An employer can, in a general sense, reasonably anticipate the possibility of [sexual harassment] occurring in its workplace, and one might justify the assignment of the burden of the untoward behavior to the employer as one of the costs of doing business, to be charged to the enterprise rather than the victim.”).
158. See Faragher, 118 S. Ct. at 2283 (“Title VII does not prohibit . . . ‘simply teasing,’ [citation] offhand comments, and isolated incidents . . . .”).
159. For a discussion of whether subordinates can give meaningful consent to engaging in a relationship with a superior, see supra notes 119-21 and accompanying text.
160. See, e.g., Estrich, supra note 16, at 831. See also Silverstein, supra note 140 (discussing “subtle coercion”).
161. Black, supra note 119.
Employers may not exactly jump at the opportunity to act as chaperones for their employees' romantic activities. "Companies don’t want to be inside their workers’ bedrooms and resent when they’re put in that position."\textsuperscript{163} Yet many employers believe they have good reason to monitor supervisors and subordinates who are involved in relationships.\textsuperscript{164} "Such personal relationships can wreak havoc for management and workers alike when employees' performance is affected, co-worker morale declines, an appearance of favoritism is created, or sexual harassment claims result."\textsuperscript{165}

For instance, an article in the \textit{National Law Journal} advises employers to consult with the dating employees, separately and privately, in order to determine whether the relationship is truly consensual.\textsuperscript{166} "The employer should recommend that the employees notify the employer if the relationship terminates or no longer is consensual in order to allow the company opportunity to take measures to avoid potential sexual harassment claims."\textsuperscript{167} In sum, it appears that in practice employers often have no choice but to monitor their employees when costly liability is at stake.\textsuperscript{168}

\section*{IV. CRITIQUE OF DATING WAIVERS AND CURRENT SEXUAL HARRASSMENT LAW UNDER TITLE VII}

Notwithstanding the need for employers to limit liability, there are two reasons to resist the trend of dating waivers. First, a law leading employers to take drastic self-protective measures is flawed. Specifically, the unwelcomeness element is problematic in that requiring proof of it is redundant and perpetuates sexist notions. The presumption of welcomeness unfairly burdens victims; instead, the presumption should be that sexual conduct at work is unwelcome. Putting welcomeness at issue encourages employers to protect themselves by taking drastic affirmative measures which may create more problems, such as invasion of employee privacy, than they solve.

Second, even if one does not dispute the soundness of the law, one can question the efficacy, adequacy, and propriety of employers’ response to the intersection of unwelcomeness and employer liability. Dating waivers are simply not acceptable. They invade employees’ privacy, may improperly defeat meritorious claims of sexual harassment following consensual relationships, and do not even guarantee that sexual harassment will be pre-

\textsuperscript{163} Buggs, \textit{infra} note 3.
\textsuperscript{164} See \textit{Herbst, supra} note 120 ("Courts have upheld such policies \ldots finding that employers have legitimate business interests in preserving workplace harmony.").
\textsuperscript{165} \textit{Id.}
\textsuperscript{166} See \textit{id.}
\textsuperscript{167} \textit{Id.}
\textsuperscript{168} See, e.g., \textit{Hawkins, supra} note 7 (discussing how employers monitor employees' smoking habits, e-mail, voice mail, and dating relationships).
vent ed. They may not even be effective waivers. Less invasive and equally effective alternatives are available to employers seeking to prevent harassment and liability.

A. Weaknesses and Strengths in Sexual Harassment Law Under Title VII

1. Unwelcomeness as a Prima Facie Element

Unwelcomeness presents practical difficulties for both plaintiffs and employers, and should not be a prima facie element for several reasons. The presumption of welcomeness is unrealistic because it is not justified by empirical evidence about the realities of sexual harassment. It is also legally redundant insofar as its function is already served by the subjective prong of the "severe and pervasive" analysis in hostile work environment cases. Moreover, it presents problems of evidentiary proof.

First, the presumption that sexual behavior at work is welcome is unrealistic. It fails to reflect the reality of women's lives. Women and men have drastically different perceptions of what constitutes sexual harassment. For example, Barbara Gutek conducted a survey in which sixty-seven percent of the male respondents said they would be "'flattered' if they were propositioned by a woman at work, while only seventeen percent of the women responded that they would consider a proposition by a male flattering." By this measure, if the law is to recognize a woman's perspective, the legal presumption should reflect the odds that sexual conduct at work is unwelcome.

Second, the requirement that a plaintiff prove unwelcomeness is redundant. Other elements to a hostile work environment claim exist to prove that sexual conduct constituted harassment; as such, they render the unwelcomeness inquiry superfluous. In hostile work environment cases, the subjective prong of the "severe and pervasive" inquiry requires a court to question the degree to which a plaintiff found the sexual conduct offensive and the degree to which it altered her work environment. This is a subjective test and explores the victim's reality. A finding that the plaintiff welcomed, provoked, or condoned the sexual behavior necessarily affects the court's willingness to find her work environment as subjectively hostile. Like the welcomeness inquiry, the subjective prong of the "severe and pervasive" element resolves doubts about whether a particular victim actually wanted sexual conduct at work. Hence, it effectively eliminates the need for the unwelcomeness inquiry.

169. Radford, supra note 19, at 522 (citing BARBARA GUTEK, SEX AND THE WORKPLACE: THE IMPACT OF SEXUAL HARASSMENT ON MEN, WOMEN AND ORGANIZATIONS 44 (1985)).

170. See, e.g., Ellison v. Brady, 924 F.2d 872, 878-79 (9th Cir. 1991).
The unwelcomeness inquiry is unnecessary for other reasons. As Susan Estrich has argued, where the work environment is not proven objectively hostile, an individual woman’s thoughts about the welcomeness inquiry are immaterial.\textsuperscript{171} Courts will not impose liability in the absence of an objectively non-hostile environment. And where the environment is proven objectively hostile, the unwelcomeness requirement can be punitive. An employer can escape liability by portraying the woman as so unworthy of respect—as demonstrated by her dress or speech—that she welcomed an environment a reasonable woman would not have condoned.\textsuperscript{172}

As some proponents of the unwelcomeness standard argue, “[t]he unwelcomeness standard has the benefit of allowing claimants to determine subjectively what constitutes offensive behavior. By requiring claimants to indicate that the behavior is unwelcome . . . violators are put on notice that their behavior constitutes harassment.”\textsuperscript{173} Likewise, some women’s rights advocates advise victims of sexual harassment to communicate with their harassers and inform them that they find the sexual behavior offensive.\textsuperscript{174} The view that it is fair to expect victims to express their dissatisfaction was reinforced by the Supreme Court in \textit{Faragher} and \textit{Burlington Industries}.\textsuperscript{175}

Indeed, this may be a reasonable request, as long as employers provide adequate training so that potential victims know they have the right to be verbal and their employer will support them if they do stand up to a supervisor. It may also be a reasonable request if employers provide sufficient outlets for victims to speak out against their harassers. Given that the majority of employers do not have sexual harassment policies, however, victims’ propensity to remain silent seems perfectly reasonable, if not likely.

Third, in light of the fact that it is superfluous and unsubstantiated by empirical evidence, the requirement that plaintiffs prove unwelcomeness is an unreasonable imposition. “The current paradigm for proving unwelcomeness unfairly burdens the targets of sexual harassment in ways that may confirm the soundness of the decision of many targets never to file a complaint at all.”\textsuperscript{176} To the extent that sexual harassment cases become “he-said, she-said” contests, which the Supreme Court has acknowledged may hinge on credibility findings,\textsuperscript{177} victims may reasonably fear that they will not be believed. Those victims who are most intimidated and remain silent will have the most difficulty offering proof that they outwardly and objectively communicated their disapproval. Clearly, “[t]he legal require-

\begin{itemize}
\item \textsuperscript{171} See Estrich, supra note 16, at 833.
\item \textsuperscript{172} See id.
\item \textsuperscript{173} Hallinan, supra note 115, at 452.
\item \textsuperscript{174} See Weiner, supra note 19, at 644 (citing 9 to 5 National Association of Working Women, pamphlet, “Sexual Harassment—What Every Worker Needs to Know”).
\item \textsuperscript{175} See generally Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 118 S. Ct. 2257 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 118 S. Ct. 2275 (1998).
\item \textsuperscript{176} Radford, supra note 19, at 525.
\end{itemize}
b. Conceptual Problems with Unwelcomeness

The impractical aspects of unwelcomeness are closely interrelated with its many conceptual flaws. Fundamentally, the unwelcomeness requirement is sexist. Courts should judge an employer’s liability by the preventive measures an employer has taken, and the effectiveness of its remedial measures, as recently held in Faragher and Burlington Industries.\footnote{179} Courts may even reasonably scrutinize a plaintiff’s invocation of anti-harassment policies. But they should not presume that sexual harassment is welcome and impose the burden upon plaintiffs to prove otherwise. This is especially compelling in light of the fact that the presumption of welcome-ness is not sufficiently empirically substantiated.\footnote{180}

Advocates of the unwelcomeness requirement offer several arguments. The EEOC has taken the position that a showing of unwelcomeness is necessary in order to protect consensual sex in the workplace.\footnote{181} Its amicus curiae brief to the Meritor Court stated that, unlike racial discrimination, “[s]exual advances and innuendo are ambiguous: depending on their context, they may be intended by the initiator, and perceived by the recipient, as denigrating or complimentary, as threatening or welcome, as malevolent or innocuous.”\footnote{182} Many fear that eliminating the unwelcomeness element may allow “a potential federal lawsuit every time any employee made amorous or sexually oriented advances toward another.”\footnote{183}

It is worth noting that asking a subordinate out on a date is unlikely to constitute actionable sexual harassment (unless, of course, a term or condition of her job is threatened).\footnote{184} A single invitation for a date would probably not satisfy the requirement that sexual harassment be severe and pervasive enough to alter a subordinate’s work conditions.\footnote{185} Nevertheless, supervisors should be aware that a seemingly harmless invitation by a su-

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\footnote{179. See Faragher, 118 S. Ct. 2275; Burlington Indus., 118 S. Ct. at 2257.}
\footnote{180. See supra note 170 and accompanying text.}
\footnote{181. See Weiner, supra note 19, at 624.}
\footnote{182. Id. (quoting Brief for the United States and the EEOC as Amici Curiae, Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1985) (No. 84-1979), available in LEXIS, Genfed library, Briefs file).}
\footnote{183. See, e.g., Faragher, 118 S. Ct. at 2283 (emphasizing that a “sexually objectionable environment must be both objectively and subjectively offensive” as indicated by 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”).}
\footnote{185. See L.M. Sixel, Do Pacts Amount to Legal Condoms?, HOUS. CHRON., May 1, 1998, at 1 available in 1998 WL 3574895 (explaining that a single request for a date does not amount to actionable harassment).}
Supervisor carries with it several connotations. It may communicate to a woman who is trying to be taken seriously that she is merely a sex object.\textsuperscript{186} Similarly, a subordinate may question whether her job is at risk if she turns down the invitation.\textsuperscript{187}

But proof of unwelcomeness is not necessary or effective in protecting consensual sex in the workplace.\textsuperscript{188} The requirement arguably functions as a vehicle for importing the sexist doctrines of rape law into Title VII cases\textsuperscript{189} and possibly stems from an historic and misogynistic distrust of women.\textsuperscript{190} It serves as a tool to focus the court's attention on the victim rather than the harasser,\textsuperscript{191} and furthermore, it sets victims up for failure.\textsuperscript{192} Under this paradigm, actually saying "no" may not suffice if the victim communicated "yes" in other ways. This ignores the reality that victims tend not to "objectively" communicate their discomfort with harassment, but rather tolerate it in silent discomfort.\textsuperscript{193}

There are many reasons women may not outwardly communicate the unwelcomeness of their supervisors' sexual conduct. The power dynamic between a male supervisor and a female subordinate includes the sexual imbalance between men and women in the workplace,\textsuperscript{194} as well as the power imbalance between a supervisor and subordinate.\textsuperscript{195} The majority of women do not occupy managerial jobs or positions of power in corporate America;\textsuperscript{196} instead, they tend to be dispensable workers. They face tremendous pressure to keep their jobs and often fear being terminated or otherwise retaliated against for resisting a supervisor's sexual conduct.\textsuperscript{197}

\textsuperscript{186} See Barbara R. Bergmann, The Economic Emergence of Women 104-05 (1986) ("Sometimes the sexual harassment of a woman in a typically female job is done to show her and her co-workers that she is always a sex object and so cannot be a serious competitor of men.").

\textsuperscript{187} See Silverstein, supra note 141 (quoting Lewis Maltby, director of the American Civil Liberties Union's national task force on workplace issues, as stating that subtle coercion "is inevitable when one person has the power to fire the other").

\textsuperscript{188} See Estrich, supra note 16, at 826-27.

\textsuperscript{189} See Juliano, supra note 13, at 1576-77 (examining the analogy between unwelcomeness and rape shield laws).

\textsuperscript{190} See Jane E. Larson, Women Understand So Little, They Call My Good Nature 'Deceit': A Feminist Rethinking of Seduction, 93 COLUM. L. REV. 374 (1993).

\textsuperscript{191} See, e.g., Ellison v. Brady, 924 F.2d 872, 884-85 (9th Cir. 1991) (Stephens, J., dissenting).

\textsuperscript{192} See, e.g., Estrich, supra note 16, at 816 ("[O]ne applies a standard that the victim cannot and does not meet.").

\textsuperscript{193} See Radford, supra note 19, at 523-24.

\textsuperscript{194} See Juliano, supra note 12, at 1560-61.

\textsuperscript{195} See Black, supra note 119.

\textsuperscript{196} See Juliano, supra note 12, at 1560-61.

\textsuperscript{197} See Radford, supra note 19, at 523 ("[A]s typically occurs when a superior harasses a subordinate, the livelihood of the target depends upon the harasser, thus causing the target not only to refrain from filing a formal complaint, but also seek to maintain a friendly rapport with the harasser.").
Moreover, the debilitating effects of sexual harassment may render a subordinate incapable of communicating her victimization.\textsuperscript{198}

Indeed, the law has long advantaged male perspectives over female perspectives by protecting traditional male prerogatives through the imposition of doctrines of consent, corroboration, fresh complaint, and provocation where women charge sexual misconduct.\textsuperscript{199} The unwelcomeness requirement may be understood as one more indication of the legal supremacy of male perspective.\textsuperscript{200} In fact, Susan Estrich has argued that the unwelcomeness element stems from rape law.\textsuperscript{201} Historically, for charges of “real rape” (i.e., rape by a stranger), women did not need to prove resistance.\textsuperscript{202} In contrast, for charges of “acquaintance rape,”\textsuperscript{203} women had to prove that they did not want sexual intercourse and that they made their objection absolutely clear. Sexual harassment is akin to acquaintance rape insofar as the law requires victims to prove that they did not deserve to be victimized.\textsuperscript{204} The unwelcomeness element functions as the requirement of rejection functioned in rape law: it serves to blame the woman for any action or inaction which may have provoked her harasser, and suggests that she endorsed or accepted the rape/sexual harassment.\textsuperscript{205}

Once the court’s focus is on the plaintiff and her conduct—as it is in a sexual harassment case by virtue of the unwelcomeness requirement—indications that she may have been sexually provocative become relevant to determining whether she found the alleged conduct unwelcome. Consider \textit{Meritor Savings Bank v. Vinson}, where the Supreme Court deemed the victim’s speech and dress relevant to the welcomeness inquiry and material to finding sexual harassment.\textsuperscript{206} What the \textit{Meritor} Court left unanswered is from whose perspective the Court would judge Vinson’s dress and speech. Many argue that courts favor male interpretation.\textsuperscript{207}

Advocates of the unwelcomeness element can be especially adamant when discussions involve once-consensual dating relationships between supervisors and subordinates. The EEOC’s amicus brief in \textit{Meritor} argued that welcomeness must be presumed in order to “ensure that sexual harassment charges do not become a tool by which one party to a consensual

\begin{itemize}
\item \textsuperscript{198} See id. at 524 (“The most common reactions take the form of avoidance behavior or passive toleration . . . . [T]argets are reluctant to report the harassment because they fear retaliation, further denigration, blame, and loss of privacy.”).
\item \textsuperscript{199} See Estrich, supra note 16, at 815.
\item \textsuperscript{200} See id. at 815-16.
\item \textsuperscript{201} See generally id.
\item \textsuperscript{202} See id. at 813.
\item \textsuperscript{203} See id. at 813-14 (defining “acquaintance rape” as rape committed, for example, by a friend, neighbor, or co-worker).
\item \textsuperscript{204} See id. at 814 (discussing that in cases of acquaintance rape, the inquiry is too often focused on the woman’s role in provoking the rape).
\item \textsuperscript{205} See id. at 826-27.
\item \textsuperscript{207} See, e.g., Estrich, supra note 16, at 828.
\end{itemize}
A sexual relationship may punish the other.” 208 The fear is that eliminating the unwelcomeness element may empower employees who seek revenge against supervisors in the aftermath of consensual relationships. 209

Others have argued that we must limit the potential power and proliferation of sexual harassment claims and that unchecked sexual regulation may interfere with consensual sexual relations, threatening the “dance of courtship.” 210 A case involving a supervisor and subordinate who engaged in a consensual sexual relationship that evolved into an unwelcome harassment scenario represents what cynics and sexists fear about sexual harassment law: that vengeful, scorned, and conniving women will lie and misuse the law. 211 They fear the law will punish men who are confused or misled by untrustworthy women, who outwardly say “yes” but secretly mean “no.” 212 Unfortunately, such an exaggerated, distrustful conception of women as lying plaintiffs who abuse the legal system is a recurrent theme not exclusive to sexual harassment law. 213

A misogynistic fear of women and a panicked, protective concern for “men’s ‘peace of mind’ is a shockingly abstract and intangible interest for which to sacrifice the far more basic interest of women in bodily integrity and sexual autonomy.” 214 Critics of the unwelcomeness element argue that it “allows judges and juries to consider outmoded stereotypes and beliefs in their analysis of hostile environment claims.” 215 Some argue that judges take the “discretionary opportunity to apply their own sometimes antiquated ideas about what a woman’s behavior signals to men and what kind of treat-

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208. Juliano, supra note 12, at 1575.
210. See Larson, supra note 190, at 443. Professor Larson refers to arguments made by Professor Lloyd Cohen with respect to the law’s ability to distinguish consent from coercion. “Professor Cohen fears that the very prospect of governmental regulation will discourage men from initiating legitimate sexual activity. . . . Given that both men and women crave human connection, Cohen suggests, a broad tolerance of aggressive sexual communication serves the desirable utilitarian goal of encouraging sexual activity—even though such latitude might also permit more coercion.” Id. (citing Lloyd R. Cohen, Sexual Harassment and the Law, Society, May-June 1991, at 8-13).
211. See Estrich, supra note 16, at 815.
212. See Ceniceros, supra note 209 (quoting an employment lawyer as stating, “Unfortunately, what I see is in the ‘consensual relationship,’ somebody later claims it is not consensual.”); Sixel, supra note 185 (quoting a human resources consultant as saying that “men feel as if they have no protection from sexual harassment claims.”).
213. For a discussion of historical distrust of women, see, e.g., Susan Estrich, Real Rape (1987) (“[A rape charge is] easily to be made and hard to be proved, and harder to be defeated by the party accused, tho’ never so innocent.” (quoting Lord Chief Justice Matthew Hale in The History of the Pleas of the Crown, I (1971))); Larson, supra note 212, at 392-93 (1993) (“Beneath the ideal of female sexual modesty lay the fear that women were perhaps not so innocent after all. For many, the suspicion remained that women might use their power to say ‘no’ for manipulative ends . . . . Victorian sexual ideology . . . aroused the persistent suspicion that women would strategically abuse [their sexual power] to sexually dominate men.”).
214. Larson, supra note 212, at 444.
215. Juliano, supra note 12, at 1573-74. Consider, for example, the court’s view of the plaintiff in Swentek v. USAIR, Inc., supra notes 51-59 and accompanying text.
ment she should reasonably expect in return." They also claim that, "along with considerations of the plaintiff's speech and dress, [it] will continue to exclude women from the workplace and will hinder efforts to achieve equality."

Additionally, some feminist theorists have argued that the courts' failure to "make sexual consent mean something substantive to the individual from whom it is procured is one of the key mechanisms by which women's subjective experience and empirical reality is devalued in law." Others argue that the courts' expectation that plaintiffs expressly communicate to their supervisors that their conduct is unwelcome is unrealistic since "sociological evidence shows that the most common coping mechanism in the face of harassment is passivity. Yet if the woman does not tell her superior . . . to stop, possibly risking her livelihood, she may very well be found to have welcomed his behavior." The unwelcomeness element is a formidable hurdle for victims who silently accept harassment for fear of retaliation, because courts may improperly infer consent from silence.

2. Focusing on the Efficacy of Employers' Preventive and Remedial Measures

In contrast to the weaknesses of the unwelcomeness inquiry, the Supreme Court's approach to employer liability promises to strengthen the efficacy of sexual harassment law. As set forth in Faragher and Burlington Industries, the best way for courts to determine an employer's liability for a hostile work environment created by a supervisor is by evaluating the employer's preventive and remedial actions. Such a model effectively aligns employers' interests in limiting liability with employees' interests in being protected from sexual harassment. A judicial inquiry should evaluate three aspects of sexual harassment prevention: education and training, policy formulation and distribution, and effective remedial measures.

First, courts ought to examine an employer's provision of education and training to its workforce with respect to sexual harassment. Employers must educate their employees about the impropriety of sexual conduct at work, even where one is involved in a consensual office relationship. They should also sensitize employees to the possibility that men and women perceive sexual behavior differently and alert employees that people of different cultures and religions may have different expectations of appropriate workplace behavior. Educating workers about sexual harassment is a

216. Weiner, supra note 19, at 628.
218. Larson, supra note 210, at n.185 (referring to Carol Smart, Feminism and the Power of Law 32-34 (1989); Carole Pateman, Women and Consent, 8 Pol. Theory 149, 150 (1980)).
219. Weiner, supra note 19, at 630.
220. See Estrich, supra note 16, at 830.
highly effective prophylactic measure which protects employees and employers from sexual harassment—not merely the liability associated with it.

Second, courts should evaluate an employer’s formulation and distribution of a policy against sexual harassment and any provisions for victim-friendly grievance procedures. The presence or absence of a simple policy on sexual harassment is indicative of an employer’s sensitivity, or lack thereof, to the working conditions of its employees. An employer’s distribution of the policy and its efforts to inform employees of its existence also demonstrate a commitment to eradicating and preventing sexual harassment. Moreover, anti-harassment policies must be seen as part of an employer’s duty to educate its workforce; employees ought to know that sexual harassment in the workplace will not be tolerated. Of course, the creation of a policy against sexual harassment is meaningless without an effective grievance procedure by which employees can assert their right to be free from a hostile work environment. An employee ought to have several ways in which she can communicate her discomfort with a supervisor’s sexual conduct, including some that will allow her to bypass a harassing superior.

Finally, courts should question the sufficiency, promptness, and efficacy of an employer’s remedial measures, particularly those geared toward ending current harassment and preventing future harassment. Requiring courts to examine the depth of an employer’s commitment to eradicating sexual harassment seems fair; for even where an employer may not have been able to prevent an underhanded supervisor from abusing his power, an employer can easily remedy the abuse of power. A mandate for remedial action will compel employers to take victims’ needs seriously. Prevention-centered remedial measures are appealing because they address the needs of an entire workforce, instead of targeting one couple at a time with dating waivers.

B. Alternatives to Dating Waivers in Preventing Hostile Work Environment Harassment and Liability

This comment has argued, thus far, that the current construction of a plaintiff’s prima facie case in hostile work environment cases is flawed. The impropriety of requiring proof of unwelcomeness may very well lead employers to require dating waivers. Yet, even under existing law, there are less invasive, less problematic solutions for employers who seek to prevent sexual harassment and limit their liability. Employers do not have to force employees to sign “love contracts.”
1. Problems Plaguing Dating Waivers

Admittedly, employers may have good reasons for requiring dating waivers.\textsuperscript{221} A waiver may limit or eliminate the “he-said, she-said” aspect of a hostile work environment claim, as it could clarify the beginning and end of a consensual relationship. Registration requirements also typify the affirmative, preventive measures that courts can appreciate and reward.\textsuperscript{222} They demonstrate an employer’s willingness and desire to take active steps to protect employees from harassing supervisors. As an intermediate option between prohibiting all office relationships and not implementing any policy restricting employee relationships, requiring documentation seems reasonable. Where an employer is willing to work with couples in finding suitable transfers and restructuring supervisory power, dating waivers do not force employees to choose between losing their jobs and their relationship.

Regardless of their appeal, dating waivers raise many difficult questions. Would an employer who ratifies a relationship through registration be liable to other employees who might claim they are not being treated fairly because of the supervisor’s relationship with his lover? Do dating waivers prevent sex from becoming currency at the workplace? Do they really inhibit the abuse of power at the heart of sex harassment? Do waivers effectively inform subordinates that it is acceptable to say “no” to supervisors? Eager employers and attorneys who laud dating waivers in protecting employees and employers while placating all the parties involved may overlook some of their drawbacks.

First, requiring such an extreme form of disclosure could be extremely invasive. Consider the example of Joe and Tiffany Peters, who met while working at a Wal-Mart in Dodge City, Kansas, when Joe was an assistant manager.\textsuperscript{223} Joe went to his boss and “got an OK” to date Tiffany, his subordinate.\textsuperscript{224} Tiffany provided Wal-Mart with notice that she planned to resign since company policy required one of them to transfer or quit.\textsuperscript{225} On her last day at work, two district managers grilled Tiffany for two hours by asking her sexually explicit questions and reducing her to tears.\textsuperscript{226} Wal-Mart denies Tiffany’s version of the events and asserts that the managers only asked questions “necessary to determine whether Wal-Mart’s policy

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  \item \textsuperscript{221} For a discussion of why employers should take active steps to monitor office dating, see Jennifer L. Dean, Note, Employer Regulation of Employee Personal Relationships, 76 B.U. L. Rev. 1051 (1996).
  \item \textsuperscript{222} See Hamilton, supra note 143 (“If nothing else, [a dating waiver] ensures that everyone involved in the affair is aware of [an employer’s] harassment policy and understands what to do if the relationship becomes a problem.”).
  \item \textsuperscript{223} See Hawkins, supra note 7.
  \item \textsuperscript{224} Id.
  \item \textsuperscript{225} See id.
  \item \textsuperscript{226} See id.
\end{itemize}
was violated."\textsuperscript{227} Whether Tiffany's or Wal-Mart's characterization is more accurate is irrelevant. The story is illustrative of how disclosure requirements may go awry despite good intentions.

Second, requiring employees to disclose relationships and sign dating waivers may also impinge upon state constitutional or common law privacy rights.\textsuperscript{228} Employees who have sued employers for invasions of privacy resulting from prohibitions on office relationships have generally been unsuccessful.\textsuperscript{229} But a dating waiver has not yet been tested on privacy grounds.\textsuperscript{230} In particular, dating waiver policies may cause privacy problems if they result in the disclosure of extramarital affairs or homosexual relationships that employees would understandably prefer to keep hidden.

Third, strict disclosure requirements are not realistic. Requesting, suggesting, and expecting disclosure by dating employees is one thing; actually receiving disclosure is an entirely different matter. Commentators have noted that "getting employees to disclose their private affairs is often difficult, especially early on when it isn't clear whether the relationship will last."\textsuperscript{231} Knowledge that disclosure will necessitate a choice between ending their relationship, transferring, or risking termination actually may compel a couple to be dishonest with their employer about their relationship.

Fourth, chaperoning employees' sexual relationships may not even prevent sexual harassment. It is possible that a supervisor might coerce a subordinate into signing an agreement and claiming consent.\textsuperscript{232} Howard Hay, an employment lawyer and partner at Paul, Hastings, suggests that employers' human resource personnel should investigate consensual relationships fully, rely on their instincts, and search for signs of coercion or deceit.\textsuperscript{233} Unfortunately, unless subordinates are completely assured that they have the ability to disavow a relationship's consensual nature without

\textsuperscript{227} Id.

\textsuperscript{228} See, e.g., CAL. CONST. art. I, § 1 (West 1998). See also Hodgin, supra note 8; Hamilton, supra note 143; Sixel, supra note 185.

\textsuperscript{229} See, e.g., Vogel et al., supra note 43 ("An employee may establish a claim for wrongful invasion of privacy when intentional intrusion upon private affairs occurs and the intrusion would be considered highly offensive to a reasonable person. The employee must also be entitled to protection of the area of privacy intruded upon. An employer may create an exception to the employee's privacy and avoid this claim by making that exception a condition of employment.").

\textsuperscript{230} See Hamilton, supra note 143 (stating that dating waivers have not been tested in any court). For a discussion of the extent to which an employer can regulate its employees' off-duty romantic activities without violating their rights to privacy, see Rulon-Miller v. Int'l Bus. Machines Corp., 162 Cal. App. 3d 241 (App. 1 Dist. 1984).

\textsuperscript{231} Hymowitz & Pollock, supra note 3.

\textsuperscript{232} See Hodgin, supra note 8 ("Even if both sign [a dating waiver], [one] will never know that [sic] was a knowing and voluntary signature."); Hamilton, supra note 143 (arguing that "a party who is pressured into having an affair may also be pressured into signing a contract").

\textsuperscript{233} See Hay, supra note 143.
suffering retaliation, human resource personnel may not be able to discern
the truth.

Fifth, behind disclosure requirements and dating waivers lies a biological
assumption that sex in the workplace is a pervasive, natural consequence of men and women working together. Although some view the attraction between men and women as an inevitable phenomenon,234 some scholars see the biological assumption as false.235

Sixth, employers who condone office sex and oversee dating contracts
between their employees may be exposing themselves to new liability by
condoning sexual currency at the workplace.236 Indeed, is sexual behavior really so uncontrollable that it warrants invasions of employees’ privacy and the risk of greater liability? Those who advocate prohibiting all office relationships claim that employment rules that protect “the right of a few to have ‘consensual’ sex in the workplace [exist] at the cost of exposing the overwhelming majority to oppression and indignity at work.”237 It is naive to allow a sexualized work environment, because employers will not be able to trust that supervisors’ evaluations are not premised on their sexual relations with subordinates.

Finally, dating waivers may be legally questionable. As yet, they have not been tested in court.238 Critics have even suggested that, insofar as employers try to use waivers to prevent Fair Employment and Housing Act or Title VII claims, dating waivers may violate public policy.239 Indeed, as one skeptic noted:

even if a love contract does not absolve [employers] of all liability, it may dissuade a disgruntled lover from suing. The mere knowledge that he or she signed a contract attesting to the consensual nature of the affair may take some of the wind out of an angry employee’s sails. It is unlikely, however, that a love contract will protect [employers] any better than a well-enforced sexual harassment policy.240

While this observation may appeal to employers hoping to limit liability by discouraging suits through any tactic, dating waivers may just be an ineffec-

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236. See, e.g., Dean, supra note 221 (discussing how employers may risk third-party suits for favoritism).


238. See Ceniceros, supra note 209; Hamilton, supra note 143.

239. See Hodgin, supra note 8.

240. Hamilton, supra note 143.
tive and sensationalized product marketed to fearful consumers of anti-harassment advice.\textsuperscript{241}

In sum, imposing stringent liability standards on employers is problematic in that it forces them to take drastic measures, such as requiring dating waivers,\textsuperscript{242} simply to mitigate liability. But employers must not only be worried about how to protect themselves from liability once a harassing situation has developed; they should aim to prevent sexual harassment altogether. There are many ways for employers to prevent sexual harassment and discover problems early enough to prevent their own liability short of forcing employees to sign dating waivers.

2. Better Alternatives to Dating Waivers

First, employers can develop and distribute clear policies against sexual harassment. Policies should ideally include many options for filing complaints. "An effective complaint procedure gives the complainant the opportunity to speak with any person within a group of individuals designated to receive complaints, rather than designating only one person . . . ."\textsuperscript{243} Also, employees must not be forced to complain to their supervisors, as the supervisor may be the harasser.\textsuperscript{244}

Second, employers can educate their workers about the impropriety of sexual conduct at work and about their policies against sexual harassment. Careful training of all employees, especially supervisory personnel, may be an effective alternative to dating waivers. Supervisors must be especially equipped to recognize and avoid inappropriate sexual behavior at work, and employers can emphasize that engaging in a sexual relationship with a subordinate is particularly hazardous.\textsuperscript{245} Employers should teach supervisors how to deal with complaints about sexual harassment, even if he or she is not included in the chain of complaint outlined in the grievance procedure.\textsuperscript{246} Supervisors can also take action to prevent a hostile work environment: where they see employees engaging in inappropriate sexual conduct, they ought to intervene.\textsuperscript{247}

Third, employers can implement effective grievance procedures and further educate employees about how to utilize them. Employers may also actively inform employees that they bear the burden of promptly communi-

\textsuperscript{241} See Lardner et al., supra note 135.
\textsuperscript{242} See Hay, supra note 149 (explaining how California's strict liability standard is Paul, Hastings' main motivation for suggesting dating waivers).
\textsuperscript{243} Segal, supra note 141.
\textsuperscript{244} See id. (offering detailed suggestions about how employers can formulate effective grievance procedures).
\textsuperscript{245} See id.
\textsuperscript{246} See id. See also Brief for Petitioner, No. 97-282 at J.A. 143, in Faragher v. City of Boca Raton, 111 F.3d 1530 (11th Cir. 1997), reversed 524 U.S. 775 (1998) (discussing how supervisor did not know how to deal with plaintiffs' complaints of sexual harassment).
\textsuperscript{247} See Segal, supra note 141.
cating any discomfort with a supervisor’s unwelcome advances, while also reassuring employees that they will not suffer retaliation.\textsuperscript{248} Such employer action would alert both potential victims and potential harassers. Victims would be taught how to protect themselves, while harassers would be cautioned against creating a hostile work environment and would be on guard.\textsuperscript{249} As a result, employers would likely enjoy a more secure workforce and a reduction in the incidence of sexual harassment.

Finally, once an employer is informed of a hostile work environment, the employer must remedy the situation. The employer must immediately stop any ongoing harassment. This might involve investigating, transferring the alleged harasser, taking serious disciplinary action, imposing permanent probation, or terminating the alleged harasser. In addition, the employer ought to make an effort to prevent future harassment. This might involve assessing what factors allowed for a hostile work environment (e.g., whether the supervisor wielded unchecked authority and whether employees had a channel to complain about a supervisor) and changing certain workplace characteristics.

V. Conclusion

A consensual relationship between a supervisor and subordinate can have important consequences for everyone involved. The subordinate may suffer harassment and retaliation after the relationship ends. The supervisor may be charged with harassing the subordinate and having coerced her into the relationship. Other employees’ work performance may be affected by the relationship. And the employer may be exposed to liability for hostile work environment sexual harassment. Current sexual harassment law, which requires plaintiffs to prove that the sexual conduct in question was unwelcome, is problematic and ought to be improved. Furthermore, the current trend toward requiring supervisors and subordinates in consensual relationships to sign waivers guaranteeing consent is an inappropriate response on the employers’ part; it presents numerous difficulties, and employers have better solutions available.

\textsuperscript{248} See Hallinan, \textit{supra} note 115, at 462-63.

\textsuperscript{249} See Segal, \textit{supra} note 141 (“Education can help men understand how they may unintentionally but nonetheless inappropriately make women feel uncomfortable.”).