Challenges and Solutions for Public Employers: Maintaining Work Environments Free of Harassment and Discrimination by Non-Employees

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INTRODUCTION

The myriad issues regarding employer liability for harassment and discrimination of employees by supervisors and co-employees have been well explored.¹ A more recent and less-developed issue involves employer liability for discrimination by non-employees, including customers or clients of an employer. Increasingly, courts and legislatures are promulgating standards of care that make employers liable for non-employee discrimination if they knew or should have known of the conduct yet failed to take appropriate preventative and remedial action.² These standards are rooted in the legal theory of hostile work environment discrimination, which makes employers responsible for maintaining work environments free of discrimination.³

However, there is not uniform agreement that employers should be liable for discrimination by non-employees. In particular, some public employers⁴ argue that imposing liability on them for such third-party

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4. A "public employer" as used in this Comment refers to an entity that is (1) financed and directed by a nation, state or local arm(s) of government, and (2) hires and supervises employees.
discrimination would be unduly burdensome. These employers contend that public work environments are less confined and regulated than the private sector. Such work environments often welcome the public, with whom public employees must interact as a part of their job duties. Government employers fear that the public at large could be considered non-employees for the purposes of employers' discrimination liability. This enormous potential liability could jeopardize public employers' financial resources as well as harm the general public if the employers are impeded in performing their functions. For these reasons, some public employers argue against such liability for non-employee discrimination.

This Comment explores the merit of the public employer argument, which denies employer liability for discrimination committed by non-employees. Here, my focus is Title VII, the federal statute governing employment discrimination. I propose a solution that facilitates the policy goals of employer liability proponents, but neither impedes public employers from performing their public service functions nor depletes the public fisc.

I maintain that, though the public employer argument has some merit, public employers should be held to the same standards as private employers under Title VII. Once public employers have notice of discrimination by non-employees, they should be required to take appropriate steps to remedy those acts and prevent similar future harm. However, corrective and preventative measures that might be appropriate for private employers may differ from appropriate measures for public employers. The

5. See, e.g., Brief of Amicus Curiae League of Cal. Cities, Salazar v. Diversified Paratransit, Inc., 63 P.3d 215 (2003) (No. S111876). In Salazar, the plaintiff bus driver was sexually harassed and assaulted by a developmentally disabled passenger. Plaintiff complained to upper management, which did nothing to remedy the situation or prevent similar acts in the future.
6. Id. at 8.
7. Id.
8. See id. at 14-15.
10. It should be noted that numerous state courts have also examined this issue in light of state laws. See e.g., Costilla v. State, 571 N.W.2d 587, 591 (Minn. Ct. App. 1997); Anania v. Daubenspeck Chiropractic, 718 N.E.2d 480, 482-83 (Ohio Ct. App. 1998).
11. See, e.g., Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993); Lockard v. Pizza Hut, Inc., 162 F.3d 1062, 1074 (10th Cir. 1998) ("[E]mployers may be held liable... if they fail to remedy or prevent a hostile or offensive work environment on which management-level employees knew, or in the exercise of reasonable care should have known.") (quotations omitted); Folkerson v. Circus Circus Enters., Inc., 107 F.3d 754, 756 (9th Cir. 1997) ("[E]mployers may be liable for failing to prevent or remedy sexual harassment... of which management-level employers knew or in the exercise of reasonable care should have known."); Henson v. City of Dundee, 682 F.2d 897, 910 (11th Cir. 1982) (affirming that a plaintiff "must show that the employer knew or should have known of the harassment in question and failed to take prompt remedial action"); Menchaca v. Rose Records, Inc., No. 94-C1376, 1995 U.S. Dist. LEXIS 4149, at *8-9 (N.D. Ill. Apr. 3, 1995) (holding that defendant employers "knew or should have known of ... [the] sexually harassing conduct toward [plaintiff]").
appropriateness standard should take into account the unique public work environment and the special burdens that concern public employers.

To minimize potential liability for non-employee discrimination, public employers should implement appropriate policies that state, in the greatest detail possible, what steps to take to respond to non-employee discrimination. Thus, the Equal Employment Opportunity Commission (EEOC), the agency charged with implementing and enforcing Title VII, should draft detailed guidelines for public employers to follow to adequately respond to non-employee discrimination. A policy tailored to prevent liability stemming from non-employee acts should mirror policies many public employers have already implemented to reduce liability.12 If public employers simply adhere to these policies, they could avoid liability that may impede their functions and harm the public treasury. In this manner, the public employer argument is less forceful than it appears at first blush.

Beyond internal policies, if public employers wish to further lessen the fiscal risks of non-employee acts, they should seek to enter into insurance contracts to indemnify themselves against Title VII violations based on non-employee conduct. Before indemnifying a public employer, insurance carriers would ensure that the public employer has implemented and follows its stated response policies. However, insurance should serve only as a safety net in case the public employer makes a mistake in either implementing its procedures or in responding to an unforeseeable situation involving non-employee acts.

Part I introduces the legal background for assessing public employer liability for discrimination under Title VII. Part II considers why public employers should be distinguished from private employers in assessing liability for non-employee discrimination. Part III argues that while public employers should be held liable for non-employee discrimination, their responses to such discrimination should be judged differently than private employers. This Part suggests specific public employer responses that might constitute appropriate response measures such as obtaining insurance and pursuing aggressive policies against non-employee discrimination.

FEDERAL HARASSMENT AND DISCRIMINATION CLAIMS UNDER TITLE VII

A. Harassment and Discrimination Creates Legally Cognizable Hostile Work Environments

1. Extent and Frequency of Workplace Harassment and Discrimination

In a comprehensive 1981 survey, four in ten female respondents reported being sexually harassed at work at least once in the preceding two years. Subsequent studies reported even higher levels of sexual harassment in the work environment. Administrative complaints of harassment filed with the EEOC have also increased. Other studies measured the harmful economic effects of sexual harassment, finding that Fortune 500 companies each lose approximately $6.7 million annually from costs related to sexual harassment.

Discrimination in the work environment and its resultant harms is unacceptable. Harassment denies individuals the civil rights to fair employment opportunities, foment domestic strife, and handicap potential for development and advancement. Unfortunately, discrimination continues to pervade many work environments, affecting many employees.

2. Harassment is Actionable Discrimination Under Title VII

Title VII of the Civil Rights Act of 1964 provides that it is an "unlawful employment practice...to discharge any individual, or otherwise to discriminate against any individual with respect to...terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." Once an employer has actual or constructive knowledge that discrimination pervades the work environment, courts recognize the employer's duty under Title VII to take appropriate measures to prevent further discrimination. The Fourth Circuit advised that to satisfy the appropriateness standard, employer remedies...
must be “reasonably calculated to end the harassment.”\textsuperscript{21} Several circuits have held that an employer may meet this standard by conducting investigations into the alleged conduct, issuing written warnings to discourage such future conduct, or by placing harassers on probation.\textsuperscript{22}

In the landmark case of \textit{Meritor Savings Bank v. Vinson},\textsuperscript{23} the Supreme Court found that a hostile work environment created by sexual harassment is a form of sex discrimination actionable under Title VII. A hostile work environment may exist when supervisors or co-employees harass or discriminate against employees and the employer does not take reasonable steps to remedy the situation.\textsuperscript{24} To be actionable under Title VII, the harassment must be “sufficiently severe or pervasive ‘to alter the conditions of . . . employment and create an abusive working environment.’”\textsuperscript{25}

A long line of cases involving similar sexual harassment has approvingly followed \textit{Meritor} and further clarified when employers may be held liable for harassment by employees.\textsuperscript{26} In \textit{Harris v. Forklift Systems}, the Supreme Court set forth factors for determining what constitutes a hostile work environment under Title VII. In \textit{Harris}, the plaintiff was insulted and subjected to unwelcome sexual comments and advances by a supervisor because of her sex.\textsuperscript{27} First, the Court affirmed that to be actionable under Title VII, the work environment must meet the \textit{Meritor} standard of being so “permeated with ‘discriminatory intimidation, ridicule, and insult’” that it is sufficiently pervasive or severe to alter the conditions of employment.\textsuperscript{28} Second, the Court elaborated that the \textit{Meritor} standard requires a reasonably held, objectively defensible belief that the work environment is hostile and abusive, as well as a subjective belief actually held by the harassed individual.\textsuperscript{29} Lastly, the Court held that Title VII requires a court to take the totality of circumstances into account when determining whether the work environment is “hostile” or “abusive.”\textsuperscript{30} These circumstances may include the severity and frequency of the harassing conduct and the actual effect on an employee’s well-being and work performance.\textsuperscript{31}

\begin{enumerate}
\item\textsuperscript{21} \textit{Katz v. Dole}, 709 F.2d 251, 256 (4th Cir. 1983).
\item\textsuperscript{22} See, e.g., Swentek v. USAIR, Inc., 830 F.2d 552 (4th Cir. 1987); Barrett v. Omaha Nat’l Bank, 726 F.2d 424, 427 (8th Cir. 1984) (elaborating on steps an employer may take in response to a complaint of sexual harassment).
\item\textsuperscript{23} 477 U.S. 57, 64-65 (1986).
\item\textsuperscript{24} \textit{Id.} at 67-73.
\item\textsuperscript{25} \textit{Id.} at 67 (quoting Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).
\item\textsuperscript{26} See, e.g., Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 743 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 780 (1998); Harris v. Forklift Sys., Inc., 510 U.S. 17, 21-23 (1993).
\item\textsuperscript{27} \textit{Harris}, 510 U.S. at 19.
\item\textsuperscript{28} \textit{Id.} at 21 (quoting \textit{Meritor Sav. Bank, F.S.B. v. Vinson}, 477 U.S. 57, 65 (1986)).
\item\textsuperscript{29} \textit{Id.} at 21-23.
\item\textsuperscript{30} \textit{Id.} at 23.
\item\textsuperscript{31} \textit{Id.}
B. Title VII Makes Hostile Work Environments Engendered by Supervisors and Co-Employees Actionable

1. Hostile Work Environments Engendered by Supervisors

*Meritor* and subsequent case law informs the analysis of hostile work environments created by supervisors’ acts. In *Meritor*, a female bank employee sued her former employer and supervisor under a hostile work environment theory. The plaintiff testified that the supervisor made repeated demands for sexual favors and even forcibly raped her on several occasions. The plaintiff acquiesced to her supervisor’s actions for fear of job detriment.

While *Meritor* held that employers are not strictly liable for sexual harassment by supervisors, it also held that employers may be held liable for sexual harassment of employees even without actual notice of the conduct. *Meritor* stressed that courts must look to agency principles to determine employer liability. In *Meritor*, though the bank had an anti-discrimination policy and associated grievance procedures, the policy did not specifically address sexual harassment, and the grievance procedures required the plaintiff to report to her supervisor, who was her harasser.

2. Hostile Work Environments Engendered by Actions of Co-Employees

Circuit courts expanded on *Meritor* by holding employers liable when employers knew or should have known that sexual harassment was creating a hostile work environment. The Supreme Court seemed to corroborate this trend in *Faragher v. City of Boca Raton*. Logically, this is not limited to supervisorial harassment, but would include co-employee harassment as well. In co-employee harassment situations, an employer is liable for its own action or inaction in response to the alleged discrimination, but not for the harassing conduct itself. As a general matter, employers are responsible for ending the alleged harassment as well as disciplining the harasser.

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32. 477 U.S. at 59.
33. *Id.* at 60.
34. *Id.*
35. *Id.* at 72.
36. *Id.*
37. *Id.*
38. *Id.* at 73.
39. See, e.g., EEOC v. Hacienda Hotel, 881 F.2d 1504, 1515-16 (9th Cir. 1989) ("[E]mployers are liable for failing to remedy or prevent a hostile or offensive work environment of which management-level employees knew, or in the exercise of reasonable care should have known."); Hall v. Gus Constr. Co., 842 F.2d 1010, 1016 (8th Cir. 1988) ("[A]n employer who has reason to know that one of his employees is being harassed in the workplace by others on grounds of... sex... and does nothing about it, is blameworthy.") (citations omitted).
C. Title VII Holds Employers Liable for Acts of Harassment and Discrimination by Non-Employees in Certain Contexts

I. Dress Requirements and Employers' Liability for Non-Employee Harassment

The first cases to deal with the issue of employer liability for non-employee harassment involved employers who required employees to wear sexually revealing attire that encouraged sexual harassment by customers or clients. Courts held that provocative dress restrictions violate Title VII because they illegitimately impose a term or condition of employment based on sex. Under this reasoning, employers who impose sexually provocative dress codes upon their employees may be liable for sexual harassment committed by non-employees.

For example, in EEOC v. Sage Realty Corp., an employer who required a female employee to wear a sexually revealing uniform violated Title VII. The employer required the employee to wear a uniform that was ill-fitting and exposed the employee’s body in a sexually suggestive manner. After several unsuccessful attempts to modify the outfit to make it less revealing, the employer refused to further modify the uniform. The employee wore the outfit and was subjected to unwelcome sexual comments and advances as a result. For this reason, the employee refused to continue wearing the outfit and was discharged. The court found that the employer had violated Title VII by forcing the employee to wear the outfit, which subjected her to harassment, in order to keep her job. This illegitimately imposed a sex-based condition of employment upon her. The court reasoned that when an employer has contributed to the likelihood of sexual harassment by non-employees, the employer is liable for hostility in the work environment, even if that hostility is carried out by non-employees.

Likewise, in Priest v. Rotary, an employer required a cocktail waitress to wear sexually suggestive attire as a condition of her employment. In Priest, the employee was transferred from her cocktail waitress position to a position in the employer’s coffee shop because she did not comply with

42. See, e.g., Priest v. Rotary, 634 F. Supp. 571, 581 (N.D. Cal. 1986).
43. See Henson v. City of Dundee, 682 F.2d 897, 901-02 (11th Cir. 1982) (holding that an employer may violate Title VII by subjecting employees to sexual harassment which creates a hostile, offensive, or intimidating work environment).
45. Id.
46. Id. at 605.
47. Id.
48. Id. at 606-07.
49. Id. at 607-08.
50. Id. at 609-10.
the sexually suggestive dress requirement. Because the employer could not demonstrate a legitimate non-discriminatory reason for the dress requirement, the court, following similar case law, found a violation of Title VII.

2. Courts Adopt EEOC Guidelines Holding Employers Liable for Harassment by Non-Employees

The EEOC’s guidelines on sexual harassment in the work environment have long asserted that, as with co-employee harassment, employers should be liable for discrimination of its employees by non-employees if the employer has actual or constructive knowledge of the conduct and fails to respond appropriately. Although the EEOC guidelines specifically refer to sexual harassment, this language can be analogized to other forms of harassment as well.

The guidelines state that employers should be “responsible for the acts of non-employees with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action.” In reviewing cases brought to its attention, the EEOC considers the extent of the employer’s control and any other legal responsibilities the employer may have with respect to non-employees’ conduct toward employees. The guidelines function to prevent employers who condone hostile work environments from escaping liability by pleading that third parties are responsible.

Many federal courts approvingly cite to the EEOC’s guidelines. In particular, in Henson v. City of Dundee, the Eleventh Circuit ruled that the potential for any person to create a hostile or offensive work environment is not automatically enhanced or diminished by that person’s work status as an employee or non-employee. Similarly, in Menchaca v. Rose Records, Inc., the court held that a “harasser’s status [as a non-employee] does not as a matter of law shield the employer from liability under Title VII, if the employer knew or should have known of the harassment.” Rather, without regard to a harasser’s work status, the Supreme Court and other courts have advised that the focus of the inquiry lies in whether the work

52. Id. at 574-75.
53. Id. at 581.
54. See 29 C.F.R. § 1604.11(e) (2004).
55. Id.
56. See id.
58. 682 F.2d 897, 910 (11th Cir. 1982) (citing 29 C.F.R. § 1604.11(c)).
environment is permeated with pervasive and severe "discriminatory intimidation, ridicule and insult." 60

Other federal courts have also consistently held that employers who permit a hostile work environment to exist can be liable regardless of whether the environment was created by a co-employee or non-employee, because those forms of discrimination are sufficiently analogous. 61 In the medical setting, federal courts have ruled that harassment of employees by patients may subject employers to liability if the employer's response was not reasonable. 62 In fact, even single incidents of harassment that are sufficiently severe may suffice to create a hostile work environment. 63

D. The Problem of Non-Employee Harassment

1. Non-Employee Harassment is Prevalent in the Workplace

In recent years, the American job market has shifted away from manufacturing jobs and moved toward service and professional industries. Employees in these industries—ranging from restaurant workers, customer service representatives, and lawyers—necessarily have closer and more personal interaction with clients or customers than the manufacturing workers of the past. As interactions with non-employees increase, the potential for discrimination arising from those interactions also increases.

Although comprehensive statistics regarding non-employee harassment do not exist, experts and consultants believe claims are rising. 64 Professor Merrick Rossein, a consultant on employment discrimination matters, reported receiving more calls about non-employee acts in 1993 than in the previous ten years. 65 Still, he contends that the recent claims based on non-employee discrimination constitute just "the tip of the iceberg." 66 Non-employee acts are implicated in a wide range of workplace situations. For example, a female lobbyist in Washington D.C. was taken off a prestigious account after refusing a client's request for a date. 67 Additionally, in Minneapolis, six former waitresses of the Hooters

61. See, e.g., Lockard v. Pizza Hut, Inc., 162 F.3d 1062, 1073-74 (agreeing with its "sister circuits that an employer may be found liable for the harassing conduct of its customers.").
62. See, e.g., Crist v. Focus Homes, Inc., 122 F.3d 1107, 1108 (8th Cir. 1997) (holding that a residential care program for the developmentally disabled may be liable for failure to appropriately respond to harassment of employees by a mentally disabled resident).
63. See King v. Bd. of Regents, 898 F.2d 533, 537 (7th Cir. 1990).
66. Id.
67. Id.
restaurant chain alleged that the company's management cultivated an atmosphere where customers were encouraged to sexually harass female employees.\textsuperscript{68}

2. Public Policy Arguments in Favor of Employer Responsibilities for Non-Employee Harassment

Employers should exercise control over non-employees by excluding those persons the employer knows or should know are sexually harassing employees and adversely affecting the work environment. The normative public policy arguments supporting employer liability for non-employee harassment are rooted in agency law,\textsuperscript{69} which posits that employers and employees often occupy unequal bargaining positions whereby employers possess greater authority and ability to control the conditions of employment. This supports the argument that employers are best suited to implement restrictions upon non-employees that will effectively prevent and respond to harassment in the work environment.\textsuperscript{70} Indeed, courts asserted that employers often possess ultimate control of the work environment, including at least some control over non-employees.\textsuperscript{71}

Thus, employers should exclude those persons whom the employer knows or should know are harassing employees.\textsuperscript{72} A corollary to this position would hold that employers, rather than employees, are also in better positions to assume the financial burdens of maintaining a work environment free from discrimination by non-employees. For example, while employees may be hesitant to reprimand non-employee harassers for fear of suffering job detriment, employers are often better-positioned to absorb the possible consequences of reprimanding a harassing customer or client. Indeed, protecting employees from third-party discrimination should be considered a financial cost of doing business.

Ultimately, failing to impose employer liability for non-employee acts would facilitate harassment in the work environment, in violation of employees' civil right to hold employment free from such harms and in violation of public policy.\textsuperscript{73} Further, Title VII does not hold employers strictly liable for all harassment by non-employees, but only requires employers to appropriately act once they have notice of harassment. This normative

\textsuperscript{68} See \textit{id.}.
\textsuperscript{70} See Lockard v. Pizza Hut, Inc., 162 F.3d 1062, 1073-74 (10th Cir. 1998).
\textsuperscript{71} See \textit{id.}
\textsuperscript{72} See Rhee, supra note 20, at 201-04 (asserting that an employer such as Hooters should impose restrictions on particular customers who are clearly prone to harassing employees).
\textsuperscript{73} See \textit{CAL. GOV'T CODE} §12921(a) (West Supp. 2005).
understanding merely imposes a reasonable burden on employers to respond to and prevent discrimination by non-employees.

Consonant with, but not necessarily because of such arguments, many courts have held that harassment by non-employees can create hostile work environments in violation of Title VII. In light of the persuasive policy arguments and normative considerations underlying these legal holdings, there is little justification for the creation of a non-employee exception to employers' duties to maintain work environments free from discrimination. Indeed, creating a low threshold on employers to prevent and respond to non-employee harassment might actually condone and encourage such acts.

II

PREVENTING NON-EMPLOYEE HARASSMENT: THE UNIQUE POSITION OF PUBLIC EMPLOYERS

A. Public Sector Employees Also Suffer Substantial Discrimination in the Work Environment

A comprehensive study conducted in 1981 by the U.S. Merit Systems Protection Board yielded several interesting findings regarding the extent of sexual harassment in the federal workplace. Such harassment is widespread; forty-two percent of women and fifteen percent of men reported being sexually harassed in the two years preceding the study. Additionally, many victims reported being harassed over an extended time period. The study concluded that sexual harassment is a "legitimate problem" that needs to be addressed in the federal work environment.

The study also found that sexual harassment in the federal work environment is costly. A conservative estimate of the cost of harassment in the federal work environment during the two years examined by the study placed the fiscal harm at $189 million. This sum was equivalent to the total salaries of all 465 agency heads and 7,000 senior federal executives for six months. This figure accounted for such costs associated with job offers, background checks, employee training, emotional stress, individual

74. See Henson v. City of Dundee, 682 F.2d 897, 910 (11th Cir. 1982) (holding that a harasser's status does not necessarily increase that person's ability to create a hostile work environment).
75. Unfortunately, no comparable comprehensive study on the issue has since been conducted.
77. Id.
78. Id. at 15.
79. Id. at 76.
81. Id.
productivity, absenteeism, and work group productivity. The greatest costs stemmed from loss of individual and work group productivity.

The overwhelming majority of federal workers who previously worked in the private sector felt that sexual harassment in the federal work environment occurred as often as, if not more often, than in the private work environment. Indeed, sixty-eight percent of female respondents and sixty-one percent of the male respondents believed that sexual harassment is no better in the federal work environment than in the private sector. Only twenty percent of women and twenty-nine percent of men believed there was more harassment in private work environments.

Although no comprehensive studies have considered the specific extent and impact of non-employee harassment in the public work environment, there is little reason to believe that much difference exists between non-employee harm in the public and private work environments. Indeed, because employees of public employers so often must interact with the general public as a part of their job duties, non-employee discrimination may be even more prevalent in public sector employment than private sector employment.

B. Arguments Against Subjecting Public Employers to Liability for Harassment by Non-Employees

Public employers argue that the normative arguments in favor of imposing a duty on employers to respond to and prevent third-party discrimination presuppose that: (1) the work environment is private, static, enclosed, and controllable; and (2) the category of “non-employees” is easily defined. However, public employers argue that public sector work environments differ from private workplaces in substantial ways, justifying their exemption form liability for non-employee acts.

First, public sector employees are highly likely to work in non-enclosed and minimally regulated environments that welcome the public onto their premises. For this reason, public employers arguably lack meaningful control over non-employees in the public work environment. Indeed, public sector employees may often be required to work with rude and abusive non-employees entering their work environments to, for

82. See id.
83. Id.
84. Id. at 39.
85. Id.
86. Id.
88. See, e.g., id. at 5-8.
89. Id. at 9.
90. Id.
example, apply for a driver's license or participate in a parent-teacher conference.\textsuperscript{91} Unlike private employers, requiring public employers to take steps to address third-party discrimination constitutes a large financial burden on already financially strapped public entities, potentially impeding performance of vital public functions.\textsuperscript{92}

Second, the term "non-employee" is ambiguous when applied to the public sector.\textsuperscript{93} Many groups of people are involved in the various interactions occurring in the public work environment, including delivery persons, contractors, or members of the general public. While delivery persons or contractors do not set public employers apart from private employers, the extent to which the general public is welcome in public work environments is unique. The issue of non-employee presence in public work environments should be carefully examined in the context of arguments imposing employer liability for non-employee acts. Whether or not the general public is a non-employee of the public employer, as in a provider-client type framework in the private sphere,\textsuperscript{94} is currently unresolved. If, however, the general public is considered a class of non-employees for third-party harassment purposes, the potential liability for public employers is huge.\textsuperscript{95}

Consider the following example advocating against employer liability for non-employee discrimination. An African-American man works for a local municipality cleaning up a city park.\textsuperscript{96} His work environment consists of public land that the public is welcome to enter and enjoy. His daily responsibilities include mowing lawns, trimming bushes, and opening and closing park gates. A local white supremacist group has applied for a permit to demonstrate in the city park on a day that the employee is scheduled to work. The city grants the request in accordance with free-speech laws forbidding public employers from denying such permits based on the content of the speech.

However, the employee finds the anticipated message of the demonstration offensive and communicates this to his supervisor. The supervisor finds that other employees are similarly unwilling to assume their duties on that particular day because they too find the message offensive. Under the rule imposing employer liability for non-employee acts, the municipality is in a bind because it presumably needs at least one employee on duty at the

\textsuperscript{91} See id.

\textsuperscript{92} This argument might also apply to private employers who have similar fiscal concerns and find additional potential liabilities burdensome. However, public employers are different from cash-strapped private employers because they perform vital functions for their target populations. Thus, often it may be more important to protect public employers from burdensome financial responsibilities than private employers.

\textsuperscript{93} Brief of Amicus Curiae League of Cal. Cities at 9, Salazar (No. S111876).

\textsuperscript{94} In this type of framework, the public employer would be the "provider" of a good or service, and the general public or the public entity's target population the "client."

\textsuperscript{95} See Brief of Amicus Curiae League of Cal. Cities at 14-15, Salazar (No. S111876).

\textsuperscript{96} This example comes from id. at 10-11.
park on the day of the demonstration, but any employee who undertakes the responsibilities has a potential cause of action against the public employer because the white supremacist demonstration has created a hostile work environment.

A non-satisfying option the public employer could exercise is to find a temporary employee willing to work during the demonstration. However, a temporary employee might have to be compensated at a higher rate than a permanent employee, so this option carries negative financial repercussions for the public employer. Thus, hiring temporary employees agreeable to working in a hostile work environment seems extreme and unfeasible.

Additionally, temporary employees who agree initially to work in potentially harassing environments may later become uncomfortable, leading to even more hostile work environment liability for public employers. In such cases, by trying to prevent a hostile work environment for a permanent employee, a public employer would submit a temporary employee to a hostile work environment instead. To do so is problematic for the same reasons as subjecting a permanent employee to such an environment.

Public employers face greater financial restraints in shouldering financial burdens associated with increased legal liability because they generally have less access to additional capital than do private, for-profit companies; public entities’ budgets are the result of governmental appropriations. Also, unlike private, for-profit employers, the country presumably should not leave public employers at risk of financial insolvency due to legal liabilities. Public employers perform governmental duties, not market-demand services, and potential effects on the general public due to decreased funding for public services may manifest in harmful ways. For example, decreased funding due to legal liability could slow down mail service, shorten business hours at the Department of Motor Vehicles, or decrease provisions of social services.

Next consider the example of a Latina census taker who has been assigned to knock on doors and take census counts in a very exclusive and conservative white neighborhood. After knocking on one particular door in her assigned neighborhood, a young man opens the door. After she introduces herself and the purpose of her visit, the young man asks her if she would like to come in and have a drink. When she refuses, he proceeds to make sexually explicit remarks about her body and continues to ask her if she would like to come in to “have a good time.” She decides to leave the house altogether and, although very rattled, proceeds to the next home.

At the next home, an older Caucasian woman answers the door. When she sees the Latina census taker, she automatically mistakes her for a maid and informs her that she does not require maid services that day. When the employee explains that she is not a maid but rather a census taker, the woman expresses her shock that the government still allows “you people”
to hold government jobs. In these days of terrorism, she reasons, "you
never know who's who!" Finally, she slams the door in the employee's
face. At this point, the employee is so disturbed she can no longer continue
her assigned route.

The next day, the worker complains to her supervisor about the offen-
sive behavior. Because no one else is available to take over on such short
notice and with the census deadline fast approaching, the supervisor does
not have many options. If the supervisor tells the employee she must con-
tinue with her assigned area, the public employer may be liable for failing
to take reasonable steps to prevent future third-party harassment. If the su-
ervisor allows the employee to take time off or switches employees be-
tween routes, he risks not meeting the federally imposed census deadline.
If he hires an additional census taker, the bureau's finances may suffer.
Again, though private employers may face similarly difficult situations, the
consequences are arguably more directly harmful to the public when gov-
ernmental needs and duties are unfulfilled.

The examples above help bring to life the public policy concerns and
practical considerations unique to public employers. Since public employ-
ers are highly regulated by statutes governing domains like public access
and free speech, a rule imposing employer liability for non-employee acts
would affect them differently than it would affect a private enterprise.
Essentially, public employers argue that they should not be forced to regu-
late the actions of such a large group of persons (potentially the entire pub-
lic), especially because they are simultaneously forced to comply with
many regulations that apply only to the public sector.97

III
ARGUMENTS AND SOLUTIONS FOR PUBLIC EMPLOYER LIABILITY

A. Arguments for Public Employer Liability

1. Public Employers Should Prevent Non-Employees from Harassing or
   Discriminating Against its Employees

Although arguments presented by public employers' have merit, ulti-
mately, public employers should not be afforded a lower standard for re-
sponding to non-employee harassment. The risk that non-employees may
create hostile work environments is simply too large, and public employers
are in a good position to prevent such environments. Public sector employ-
ees, like their private sector counterparts, deserve work environments free
from harassment and discrimination. Even beyond merely deserving such a
work environment, equal protection laws indeed mandate it. The interest in
providing a work environment free from discrimination does not, however,

97. Id. at 9-13.
attend to the concerns of public fisc depletion, and these concerns are addressed next.

2. Few Cases Will Likely Be Litigated Against Public Employers Based on Non-Employee Acts

A potential flood of litigation against public employers based on third-party discrimination is not very high. Few claims will be pursued under this rule because many public employers are required to adopt extensive grievance procedures that employees must utilize before pursuing litigation. These procedures are usually established and promulgated by federal agencies under guidelines issued by the EEOC that govern Title VII claims, among others.

For example, the federal government requires any federal employee seeking relief from discrimination to follow a specific complaint-processing procedure. The procedure mandates that the federal employee confer with an EEOC counselor within forty-five days of the alleged discrimination to attempt to resolve the issue extra-judicially. Thereafter, the employee may file a complaint and initiate a lawsuit. Alternative dispute resolution and agency investigations are also available in place of litigation. Furthermore, in light of cases like Faragher v. City of Boca Raton and Burlington Indus., Inc. v. Ellerth, which hold that employees who do not use established grievance procedures may be limited in their recovery, public employees, like their private sector counterparts, would be motivated to utilize available grievance procedures initially instead of proceeding straight to litigation.

Although the fiscal health of public employers is an important concern in analyzing whether they should be liable for non-employee acts, it need not be determinative. Public employers that may be liable under Title VII for non-employee acts should, taking into account the uniqueness of the public work environment, devise methods to lessen the possible impact of liability. The following section introduces several methods for decreasing liability risks for non-employee harassment under Title VII.

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100. Id. at 94-95.
101. Id. at 95.
102. Id. at 96.
103. Id.
B. Integrating the Goals of Employer Liability and the Unique Concerns of Public Employers

1. The “Appropriateness” of Employer Remedies Is Determined by the Circumstances of the Work Environment

While I argue that public employers should be held to the same Title VII standards as private employers, this does not mean that public employers’ responses to non-employee harassment should also be the same as those of private employers. Once either type of employer knows or should know that discrimination by non-employees is occurring, that employer must take appropriate steps to remedy those acts and prevent future acts from occurring.106 This appropriateness standard is what allows differential effects between public and private employers despite application of the same standard of liability.107 Essentially, what may constitute an appropriate remedial response or preventative measure by a public employer is likely different from those by a private employer. Indeed, federal courts explain that the reasonableness of an employer’s remedy depends on the employer’s ability to stop the harassment from occurring.108

2. Meeting the Appropriateness Standard: Commonalities for Public and Private Employers

a. Private Employers

The private work environment comports well with agency principles and other normative arguments in favor of imposing employer liability for third-party discrimination. For this reason, private employers can take steps to reduce potential liability.

For example, at the Hooters restaurant chain, which is infamous in workplace sexual harassment discussions, an employer’s duty to appropriately respond to and prevent harassment by non-employees could be fulfilled without too much difficulty. Hooters could simply forewarn customers who are prone to harassing its employees.109 Forewarning could be accomplished verbally or by posting signs throughout the restaurant.110 Such signs would impose a reasonable restriction on customers, perhaps similar to commonplace signs that read, “No shirt, No shoes, No service.”111 By giving tactful warnings to customers against harassing

106. See, e.g., Lockard v. Pizza Hut, Inc., 162 F.3d 1062, 1074 (10th Cir. 1998); Folkerson v. Circus Circus Enters., Inc., 107 F.3d 754, 756 (9th Cir. 1997) (illustrating that in the private employer context, courts have imposed a duty on employers to take appropriate steps to remedy and prevent harassment and discrimination by non-employees).

107. See Ellison v. Brady, 924 F.2d 872, 882 (9th Cir. 1991) (seeking “reasonably calculated” remedies by employers responding to harassment).

108. See, e.g., id.


110. Id.

111. Id.
employees, Hooters could minimize its potential liability while preserving the chain's defining element of sex appeal. Hooters could also easily take affirmative steps to learn of non-employee harassment that nonetheless occurs. By requiring managers to patrol the premises periodically, management would likely witness and be in a good position to end a fair amount of harassment by non-employees.\footnote{112} Company policy should also provide means for employees to report non-employee harassment, allowing management to intercede. If warnings fail to deter customers from harassing employees, managers must take more severe steps to end harassment, such as excluding harassing patrons.\footnote{113} This would end harassment that evaded prevention and would signal other would-be harassers that Hooters is serious about maintaining a healthy work environment for its employees, thereby preventing subsequent harassment.

\textbf{b. Public Employers}

As discussed earlier, the public work environment does not always comport with agency principles and other normative arguments in favor of imposing employer liability for third-party discrimination. It should nonetheless be feasible for public employers to meet the standards set forth in EEOC guidelines and federal case law for preventing and responding to discrimination by non-employees. Indeed, the federal government, the largest and most diffuse public employer, already requires its agencies to enact risk management policies to reduce employment liability.\footnote{114}

Precisely because the public work environment is more susceptible to harm from non-employees who are welcome within its often less enclosed and less regulated environment, public employers should be particularly diligent in taking appropriate steps to minimize their potential liability for non-employee acts. In most instances, nothing more than a reasonable approach, given the particular circumstances, would be necessary.

For example, if non-employees continually harass workers in a post office, a common-sense approach would only require that the Postal Service take action, for example, by posting signs reminding the public of harassment law. Further, while the post office manager might be prohibited from excluding the harassing patron due to public access principles, the manager nonetheless has the power to step up patrols of the premises and alert the harasser to the severity of her acts. Thus in the most common instances of discrimination, a public employer can greatly assist in maintaining a healthy work environment without significant burden.

\footnote{112}{\textit{Id.} at 203.}
\footnote{113}{\textit{Id.}}
\footnote{114}{Achampong, \textit{supra} note 12, at 94-109.}
Recall the examples proffered earlier to illustrate the uniqueness of the public work environment. Several common-sense approaches exist that public employers, like private employers, might utilize in response to the potential hostile work environments. However, these approaches could still impose unduly significant burdens on public employers.

In the example of the African-American park employee offended by the demonstrations of a white supremacist group, the city has several options to reduce or eliminate its liability. First, the city might allow the employee to work a "split shift" in which he tends to his normal duties before the white supremacist group is scheduled to hold its rally. He could then leave his shift and the work environment. Later, after the rally is over, he could continue with his duties. The city might even be able to limit the amount of time that the group is permitted to congregate in the park so that the employee's split shift would be more manageable. This could involve difficult logistics for the employer and employee, though, and in other contexts, might deprive the public of the performance of more critical governmental duties.

In the example of the Latina census taker who was offended by sexual advances and discriminatory comments of two separate individuals, the public employer similarly has several options in addressing the situation. The employer could simply place another employee on the harassed employee's route, even if that would mean that the employee would take longer to do the census count because she is unfamiliar with the route. The employer could also place two employees on the route to make sure that the counting would get done, as well as to provide safety in numbers. Again, these steps impose a substantial burden on the employer. However, as far as feasible, public employers should try to implement anti-discrimination policies, maintain remedial procedures, and protect employees from non-employee harassment. What is proposed next, however, could afford public employers complementary protection against Title VII liability for non-employee harassment.

3. Public Employers Should Insure Against Non-Employee Harassment

The above-proposed steps lessen potential liability from non-employee harassment and should greatly reduce potential claims against those employers that implement and follow appropriate policies. However, to further offset potential liability, public employers should be allowed to obtain insurance contracts indemnifying them from potential losses arising from Title VII claims based on non-employee harassment.
a. Insuring Title VII Violations Based on Non-employee Acts Does Not Violate Public Policy

Some courts have held that insuring Title VII violations is against public policy because Title VII violations are often intentional acts. Ranger Insurance Co. v. Bal Harbour Club, Inc. is a leading case that concludes that insuring against intentional discrimination improperly confounds public policies against discrimination.115 In Ranger, the Florida Supreme Court held, under a state provision analogous to Title VII, that insuring intentional employment violations is against public policy because it allows insured companies to escape the financial consequences of their intentional wrongdoings.116 The court in Ranger further reasoned that harassment and discrimination might be encouraged if perpetrators know that no individual or employer harm will result from their behavior.117 Thus, Ranger is used for the proposition that insuring intentional Title VII violations would defy the statute’s goal of eliminating employment discrimination.118

Ranger, however, did not apply to non-employee harassment. In Ranger, the court relied on a Seventh Circuit case, Western Casualty & Surety v. Western World Insurance,119 which asserted that if an insurance policy were to indemnify a city for intentional racial discrimination, that city’s policy makers would be more likely to indulge their preference for discrimination by promulgating discriminatory policies.120 This example, however, is not applicable in the context of insuring Title VII violations based on third-party discrimination.

In the case of Title VII violations, a city should not be able to insure against its own intentional acts of discrimination, but it should be able to insure against third-party discrimination. Arguably, the city may still indulge in its own preference for discrimination by standing idly by while a third party discriminates against an employee, knowing that the city is insured against any Title VII action brought by the employee. However, this is an unlikely scenario. An insurance company operating in the private market would not allow its insured to stand idly by and rack up compensable damages merely based on an unwillingness to act.

More likely, a powerful individual (i.e., a manager) would indulge in her own preference for discrimination by failing to follow an established policy dictating what steps should be taken in response to reports of

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117. Id.
118. Id.; see also Bales & McGehearty, supra note 115, at 95-97 (offering a lengthy discussion regarding the assertion that insuring Title VII violations would defy the goals of the statute).
119. 769 F.2d 381 (7th Cir. 1985).
120. Ranger, 549 So. 2d at 1008-09.
third-party harassment. In such a case, the employer should be held vicari-
ously liable for the action or inaction of its managers because as high-
ranking agents of the employer, managers are entrusted with the duty of
appropriately responding to non-employee discrimination. If they fail in
these duties, the employer should be liable for a Title VII violation.

Even courts that believe insuring intentional employment practices are
against public policy have generally held that employers should be able to
insure against liabilities that have been vicariously imputed to it, namely,
when a manager engages in unlawful discrimination.121 These courts rea-
soned that it is unjust to prohibit insurance for employers that did not en-
gage in intentional harassment themselves, but are held vicariously liable
for the actions of their managers.122 For example, a federal district court
held that “public policy considerations that preclude insurance coverage for
self-inflicted injury lose a great deal of their force in the context of insur-
ance for tortious liability to innocent third parties.”123

Whether or not employees fit into the category of “innocent third
parties” set forth in that lower court’s declaration,124 and contrary to what
such courts have held, this Comment argues that an insured employer
should not automatically recover from insurance policies simply because it
was vicariously liable. Rather, as some authors have maintained, insured
employers should be held to a “standard of demonstrating intolerance of
managers who make employment decisions based on discriminatory rea-
sons.”125 This standard requires employers to ensure that managers do not
indulge their own discriminatory preferences and allow harassment or dis-
crimination by non-employees under their supervision. Further, under the
higher standard of affirmatively “demonstrating intolerance” of discrimina-
tory acts by managers, the concern that employers will be encouraged to
intentionally harass without fear of liability is alleviated.

Specifically in the public sphere, if the employer can show that it has
in fact established appropriate policies to respond to and prevent third-
party discrimination by non-employees, the employer should be able to
insure itself against individual managers disregard of such policies. For
example, an employer might meet this standard by showing it took reason-
able steps to develop, disseminate, educate, and enforce its policies regard-
ning non-employee discrimination. Insurance should not automatically
extend to an employer’s vicarious liabilities as some courts have

122. See id.
other grounds, 833 F.2d 564 (7th Cir. 1989).
124. It is unclear whether employees would be considered “innocent third parties” for insurance
recovery purposes. However, employees are clearly an integral part of the work environment, so it may
be difficult to argue that they are only “innocent third parties.”
125. Bales & McGhghy, supra note 115, at 100.
asserted,\textsuperscript{126} but rather the employer should be required to demonstrate that it carried out non-discriminatory policies and actions in good faith, warranting recovery from its insurance policies.

What if many managers of a public employer did stand idly by and indulge in their own discriminatory preferences? In such a case, the public employer as a whole condoned the inaction of its managers. Here, perhaps a variation of the duty to mitigate rule from traditional contract law should reduce the amount that the insured employer may collect from its insurance company.\textsuperscript{127} The duty to mitigate applied in this context should only allow public employers to recover for their losses under Title VII to the extent that they followed the response procedures approved by the company itself and its insurance company. If it is determined that the public employer as a whole stood idly by and tolerated discrimination from non-employees, that employer's insurance recovery should be reduced by the extent to which their inaction increased overall damages. Under this rule, a public employer would rightly bear the financial consequences of its inaction.

To the extent that this Comment suggests that a public employer may only recover for damages after it follows its response procedures and demonstrates intolerance for discriminatory preferences, the benefits a public employer may receive in exchange for its payment of insurance premiums may be limited. However, it is worth stressing that an insurance policy indemnifying public employers is invoked only when all other procedures for avoiding liability have failed. A public employer should rely on insurance only in those circumstances where no response procedure is readily executable or in the unfortunate case that it failed in a legitimate attempt to take reasonable steps to prevent and correct a discriminatory situation. With this in mind, insurance companies would rarely be forced to pay out on policies with public employers, and premiums would likely be fairly low given the low risk and low anticipated recoveries. Ultimately, low premiums would not be a difficult burden to bear in exchange for a public employer's (and the general public's) peace of mind.

The multitude of reasons proffered by public employers illustrating that the public work environment is dynamic, non-enclosed, and welcoming to the public supports the idea of having an insurance safety net. Similar to the way courts rule on issues of first impression, public employers will likely be faced with many new types of claims regarding non-employee discrimination. Indeed, because public work environments are highly dynamic, future claims will likely involve varied facts and circumstances that would make it difficult for a public employer, even one that has appropriate response procedures in place, to take steps that would be eventually be deemed "reasonable" by a court's liability analysis. In this

\textsuperscript{126} See id.; see, e.g., U.S. Fire Ins. Co., 695 F. Supp. at 948.
\textsuperscript{127} See generally Parker v. Twentieth Century Fox Film Corp., 474 P.2d 689 (Cal. 1970).
context, insurance policies that offset risks regarding claims of first impression based on non-employee acts could indeed be essential.

b. Insuring Title VII Violations Based on Non-Employee Acts Will Ensure that Harassed Individuals Will Be Compensated and that Public Employers Will Comply with the Law

Other courts have found Florida's Ranger reasoning unpersuasive and have approved insurance policies indemnifying employers against Title VII violations.128 These courts emphasized that the public policy motivation of compensating victims of discrimination is paramount.129 However, even courts that believe insuring against Title VII violations is against public policy should still allow insured public employers to recover from insurance policies when victims would otherwise go uncompensated because the employer is insolvent.130 For public employers, this insolvency component is critical.

Admittedly, insurance recovery for insolvent employers would alleviate the fear of large, adverse judgments, thus leading the public employer to be less vigilant in preventing harassment by non-employees. However, this argument is unpersuasive. As a practical matter, if a public employer is just one adverse judgment away from bankruptcy, that employer will surely be careful to comply with the law, even if it carries insurance. First, it is difficult for an employer to decide at which point it is one judgment away from insolvency (in other words, the point at which it could recover from insurance) such that it could believe (and be so bold as to act upon that belief!) that it may "safely" disregard reports of harassment by non-employees. Further, if a public employer were so brazen as to actually take such a course of action—or inaction, for that matter—either its insurance premiums would rise sky-high or no reasonable insurer operating in the private market would continue to insure it. Thus, this concern has little merit, and insurance may still prove invaluable for public employers.

Under the standard of allowing insurance recovery only when the employer is insolvent, employers are encouraged to comply with Title VII's requirement of taking appropriate steps to prevent and correct third-party discrimination because they may be held financially accountable for resulting damages. Thus, the public interest in holding employers responsible for their own action or inaction in response to notice of discrimination is served while also compensating innocent victims.131 Insuring Title VII violations stemming from non-employee acts meets the public policy goal of

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129. Id.
130. See id. at 95.
131. Id. at 97-98.
punning employers who have the opportunity to end harassment by non-
employees but refuse to do so.

CONCLUSION

Ultimately, the unique condition of the public work environment is
not as problematic as public employers may suggest. By establishing poli-
cies that draw upon both common-sense and effective approaches for deal-
ing with discrimination by non-employees, public employers can do much
to shield themselves from the few cases that could actually be litigated.
Public employers could additionally shield against large, adverse judg-
ments as well as address their duties to discourage harassment by obtaining
insurance policies against harassment by non-employees.

Through these methods, public employers are unlikely to face much
economic burden as a result of Title VII liability for non-employee acts.
The public employer argument fails to provide compelling grounds to im-
pose a different standard of liability for non-employee acts on public em-
ployers. Though public employers have different constraints and
considerations, these differences should be accommodated by differentiat-
ing appropriate responses to non-employee harassment for public employ-
ers from those for private employers.