Employment Law—Employer Liability for Third-party Sexual Harassment: Does Costilla Take the Hoot out of Hooters?

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EMPLOYMENT LAW—EMPLOYER LIABILITY FOR THIRD-PARTY SEXUAL HARASSMENT: DOES COSTILLA TAKE THE HOOT OUT OF HOOTERS?

Costilla v. State,
571 N.W.2d 587 (Minn. Ct. App. 1997),
review denied, (Minn. Jan. 28, 1998)

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I. INTRODUCTION

While elimination of sexual harassment in the workplace has been long anticipated, the law has been slow to develop a meaningful remedy. Recently, the Minnesota Court of Appeals in Costilla v. State, addressed a sexual harassment claim by an employee against her employer where sexual harassment was perpetrated by a non-employee. Finding there was a question of fact as to the appropriateness of the employer's reaction to the harassment, the court held in favor of the employee. Significantly, this holding marked the first time that Minnesota courts have recognized an employee's cause of action against an employer for sexual harassment by a non-employee under the Minnesota Human Rights Act.

The decision, while representing progress in the area of sexual harassment claims, raises several questions. Although finding employers have a broad duty to protect their employees from sexual harassment, the decision leaves unresolved the standard to be applied in evaluating an employer's response to a report of third-party sexual harassment.

First, this case note will examine the historical legal development in preventing and remedying sexual harassment in the workplace. Next, this case note will set out and explain the Costilla decision, which includes an examination of the extent and nature of employer liability for third-
party sexual harassment under the "broad duty" employers have to protect employees from sexual harassment. Finally, this case note explores the difficulty of applying Costilla to an establishment in which the employer relies upon the sexuality of its employees as a form of business promotion. The reasoning that the court applied in Costilla will be hypothetically tested on the facts of a settled sexual harassment case. The nature of the business—a bar—arguably invited harassment.

In order to properly analyze the questions inherent in Costilla, it is first necessary to examine the history of both Title VII of the Civil Rights Act of 1964 and the Minnesota Human Rights Act (MHRA), the legislative devices courts use to remedy sexual discrimination in the workplace.

II. HISTORY

A. Title VII

The past thirty years has seen a gradual evolution in employer liability for sexual harassment. Title VII of the Civil Rights Act of 1964 was enacted to protect employees against discrimination in "compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin ...." Today, Title VII is commonly recognized as the source of legal prohibition against sexual harassment; interestingly, this was not the original intent of congress. Opponents to the Civil Rights Act offered an amendment that included "sex" as a protected category in an effort to defeat the bill. Much to

8. See infra Part III. and accompanying notes.
9. See infra Part IV. and accompanying notes.
10. See infra note 93 and accompanying text.
11. See infra note 93 and accompanying text.
17. See 110 CONG. REC. 2577-84 (1964); see also BARBARA LINDEMANN & DAVID D. KADUE, SEXUAL HARASSMENT IN EMPLOYMENT LAW 3 (1992).
their surprise, the bill passed as amended and has now come to be the basis of federal sexual harassment claims.

What is now referred to as sexual harassment was first recognized by the courts in 1975 as sex discrimination. The lower courts increasingly began to recognize sexual harassment as a Title VII violation in the late 1970s. Initially, the courts only recognized sexual harassment in the form of quid pro quo propositioning by employers. In a quid pro quo claim, an employer would be held vicariously liable for the conduct of its supervisors. These early cases also required a plaintiff to show a loss of

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House floor debate after civil rights opponent Congressman Howard Smith offered an amendment adding sex to the 1964 Civil Rights Bill).

19. See id.

20. Sexual harassment is now more broadly defined as "the imposition of any unwanted condition on any person's employment because of that person's sex." LINDEMANN & KADUE, supra note 17, at 4. A traditional narrow definition of sexual harassment in the workplace is "a demand that a subordinate, usually a woman, grant sexual favors in order to obtain or retain a job benefit." Id. at 3-4.


23. See Rhee, supra note 14, at 167 and n.27. Professor Catherine A. MacKinnon first used the term "quid pro quo" to describe when "an employer solicits sexual favors from an employee explicitly in exchange for either job security or opportunity." CATHERINE A. MACKNINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE STUDY OF SEX DISCRIMINATION 35 (1979); see, e.g., Barnes, 561 F.2d at 987.

24. See Barnes, 561 F.2d at 995; see also Miller, 600 F.2d at 213-15 (recognizing a cause of action under Title VII when an employee is fired for refusing a supervisor's demand for sexual favors); Tomkins, 568 F.2d at 1044 (concluding that "Title VII is violated when a supervisor, with the actual or constructive knowledge of the employer, makes sexual advances or demands toward a subordinate employee and conditions that employee's job status evaluation, continued employment, promotion, or other aspects of career development on a favorable response to those advances or demands, and the employer does not take prompt and appropriate remedial action after acquiring such knowledge"); Williams, 413 F. Supp. at 658 (recognizing a cause of action under Title VII for employer's advances toward employee).

25. See Miller, 600 F.2d at 213; 29 C.F.R. § 1604.11(c) (1981); RESTATEMENT (SECOND) OF AGENCY § 213(d) (1958). Some courts have applied a strict liability standard to quid pro quo claims. See, e.g., Henson v. City of Dundee, 682 F.2d 897, 910 (11th Cir. 1982) (stating that in a classic quid pro quo case an employer is strictly liable for the conduct of its supervisors). But see Tomkins, 568 F.2d at 1048-49 (requiring a showing that the employer had actual or constructive knowledge of a supervisor's sexually harassing conduct and failed to take remedial action). Cf. Barnes, 561 F.2d at 995 (MacKinnon, J., concurring) (recognizing that a supervisor is not acting within her apparent scope of employment when she extorts sexual consideration from a subordinate in exchange for favorable job ac-
tangible job benefits as a result of the discrimination.  

The courts later came to recognize the existence of a hostile work environment as a form of sexual harassment. In Meritor Savings Bank v. Vinson, the Supreme Court finally recognized an employee’s cause of action against an employer for sexual harassment due to a hostile work environment under Title VII.

The United States Supreme Court recently clarified the scope of an employer’s liability for harassment by a supervisor in Burlington Ind. Inc. v. Ellerth, 118 S. Ct. 2257, 2268 (1998) and Faragher v. City of Boca Raton, 118 S. Ct. 2275, 2290 (1998). The Court stated that where tangible employment action is taken by a supervisor to the detriment of the employee, the employer is held strictly liable for the supervisor’s act in a claim brought under Title VII. See Ellerth, 118 S. Ct. at 2268-69; Faragher, 118 S. Ct. at 2290-93.

See generally Sara Beth Meier, Case Comment, Expanding Title VII to Prohibit a Sexually Harassing Work Environment, 70 GEO. L.J. 345, 348 (1981) (stating that case law prior to Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981), required the plaintiff to show that the employer took retaliatory action after sexual advances were declined); Terence J. Bouressa, Note, Bundy v. Jackson: Eliminating the Need to Prove Tangible Economic Job Loss in Sexual Harassment Claims Brought Under Title VII, 9 PEPP. L. REV. 907, 908 (1982) (summarizing sexual harassment cases prior to Bundy v. Jackson).

The court found that a hostile work environment may be created where a supervisor makes repeated derogatory or suggestive comments about an employee’s sex or sexuality. See id. The court held that such harassment, even without demanding quid pro quo from the employee, was a form of sexual harassment in violation of Title VII. See id. at 944. The court relied upon race based claims brought under Title VII in holding that the plaintiff did not have to prove that her employer deprived her of any tangible job benefits to bring a claim under Title VII. See id. (citing Rogers v. Equal Employment Opportunity Comm’n, 454 F.2d 234, 238 (5th Cir. 1971).

In recognizing the Act’s prohibition against sex discrimination, the Court noted that there was little legislative history to assist the Court in interpreting the statute. See id. at 64. In two recent decisions, the United States Supreme Court clarified employer liability for a sexually hostile work environment created by an employer’s immediate supervisor. See Ellerth, 118 S. Ct. at 2269; Faragher, 118 S. Ct. at 2293. The Court defined an affirmative defense available to an employer where no tangible employment action was taken against an employee:

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.

Ellerth, 118 S. Ct. at 2269.
Eventually, courts began to hold employers liable when employees harassed other employees. The standard for holding an employer liable for sexual harassment by a co-worker under Title VII is one of negligence. Sexual harassment by a co-employee is a violation of Title VII where "the employer knew or should have known of the harassment and failed to take immediate and appropriate action." 32

Today it can be argued that the duty Title VII imposes on employers, providing and maintaining a workplace free of sexual harassment, also includes confronting harassment by non-employees. The Minnesota approach to sexual harassment, although derived from a different source, is very similar to the Title VII analysis.

B. Minnesota Historical Development

Minnesota courts have relied upon the Minnesota Human Rights Act ("MHRA") when addressing sex discrimination and sexual harassment claims. The MHRA includes sexual harassment as a form of sexual

32. Barrett v. Omaha Nat'l Bank, 726 F.2d 424, 427 (8th Cir. 1984) (citing 29 C.F.R. § 1604.11(d) (1981)).
33. See 29 C.F.R. § 1604.11(e)-(f) (1996) (stating that employers may be responsible for the acts of non-employees and that "[p]revention is the best tool for the elimination of sexual harassment" and employers should develop "methods to sensitize all concerned" about the issue of sexual harassment); see also infra note 72. In declining to recognize employer liability for sexual harassment by a supervisor a federal district court made the following pessimistic statement: "[A]n outgrowth of holding [repeated verbal and physical sexual advances towards an employee by a supervisor] to be actionable under Title VII would be a potential federal lawsuit every time any employee made amorous or sexually oriented advances towards another. One court observed that the only sure way an employer could avoid such charges would be to have employees who were asexual. See Corne v. Bausch & Lomb, Inc., 390 F. Supp. 161, 163-64 (D. Ariz. 1975) (vacated and remanded in Corne v. Bausch & Lomb, Inc., 562 F.2d 55 (9th Cir. 1977)). The legal standard for addressing sexual harassment in the workplace appears to have evolved to the point where employers are required to protect employees from sexual harassment. See supra note 29. However, this standard arguably allows for a "sexually charged" work environment like a bar. See Kelly Ann Cahill, Hooters: Should There Be an Assumption of Risk Defense to Some Work Environment Sexual Harassment Claims?, 48 VAND. L. REV. 1107, 1115 (1995) (arguing that an employer which uses the sex appeal of its serving staff as business promotion should be allowed the assumption of risk defense in cases where an employee brings a sexual harassment claim against an employer for sexual harassment by customers).
discrimination and defines the circumstances where a hostile work environment is created. Minnesota courts have applied principles developed under Title VII for purposes of construing the MHRA. To make a prima facie case of sexual harassment, a plaintiff must show five factors: (1) the employee belongs to a protected group; (2) the employee was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of affected a term, condition, or privilege of employment; and (5) the employer had knowledge or constructive knowledge of the harassment and failed to take timely and appropriate action. This same test is applied to sexual harassment claims brought under Title VII.

In this historical context, the legal ramifications of the Costilla decision can be fully understood.

III. THE COSTILLA DECISION

A. Facts

Maria Costilla ("Costilla") was employed by the State of Minnesota in the Department of Economic Security ("DES") as a state monitor advocate. The position required her to work closely with Herman Acosta (Minn. Ct. App. 1996) (recognizing an employer's common law duty of care to include liability for sexual harassment where there is physical injury or threat of physical injury).

37. See Minn. Stat. § 363.01, subd. 41 (1996).
38. See, e.g., Danz v. Jones, 263 N.W.2d 395, 398-99 (Minn. 1978). The MHRA's prohibition against employment discrimination appears to be broader than that of Title VII. See Continental Can, 297 N.W.2d at 248-50. Compare Minn. Stat. § 363.03, subd.1 (1996) (prohibiting discrimination on the basis of "race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance, membership or activity in a local commission, disability, sexual orientation, or age") with 42 U.S.C. § 2000e-2 (1994) (forbidding discrimination with regard to an individual's "compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin").
40. See Bersie, 399 N.W.2d at 146 (applying the harassment test from Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982)). The federal courts have stated that a plaintiff must show: "(1) She belongs to a protected class; (2) the conduct in question was unwelcome; (3) the harassment was based on sex; (4) the harassment was sufficiently severe or pervasive to create an abusive work environment; and (5) there is some basis for imputing liability to the employer." Magnuson v. Peak Technical Servs., Inc., 208 F. Supp. 500, 512 (E.D. Va. 1992) (citing Swentek v. U.S. Air, Inc., 830 F.2d 552, 556 (4th Cir. 1987)).
41. See State v. Costilla, 571 N.W.2d 587, 589 (Minn. Ct. App. 1997), review denied, (Minn. Jan. 28, 1998). In this capacity, Costilla worked with urban Hispan-
Costilla and Acosta together performed on-site reviews of Minnesota advocate offices, which involved visiting various rural locations requiring overnight stays. Costilla also attended out of town professional training sessions with Acosta.

Costilla claimed that beginning in 1992 Acosta committed numerous acts of sexual harassment in the course of their professional relationship. She further maintained that the State was made aware of the harassment on several occasions. A co-worker of Costilla told the DES affirmative action officer about specific harassing behavior by Acosta during a training session in Chicago. The officer told Costilla that she would no longer have to work alone with Acosta and helped her arrange to see a counselor to discuss the harassment. The officer spoke with Acosta's supervisor about his behavior and was told that the supervisor would talk to Acosta about sexual harassment. Nonetheless, the harassing behavior continued until June 1995 when a high-ranking DES commissioner contacted the federal regional administrator in Chicago and insisted that Acosta have no further contact with Costilla. Costilla subsequently filed suit, claiming she was the victim of sexual harassment.

B. The Court's Analysis

1. Overview

The Costilla court, affirming the trial court, recognized Costilla's cause of action under the MHRA. The court drew on three sources of law in determining that the MHRA allows an employee to bring an action against her employer for sexual harassment when the harassing party is a

ics and seasonal migrant farm workers. See id.

42. See id. at 589. Costilla brought a separate cause of action against Herman Acosta and the United States Department of Labor. See id. at 590.

43. See id. at 589.

44. See id. Costilla claimed specific acts of sexual harassment occurred during these overnight trips. See id.

45. See id.

46. See id. The specific behavior complained of included inappropriate comments, touching, grabbing, attempted kissing, and solicitations. See id.

47. See id. at 589-90.

48. See id.

49. See id. at 589. Linda Sloan was the DES affirmative action officer during the period relevant to this action. See id.

50. See id.

51. See id.

52. See id. at 590. Costilla filed suit in January 1996. See id.

53. See id. at 589.

54. See id. at 597.
First, the court relied upon the Equal Employment Opportunity Commission ("EEOC") guidelines. Second, the court looked to comparable decisions from other jurisdictions. Third, the court re-

55. See id. at 591.

56. See id. The court was guided by EEOC guidelines, which state in relevant part:

An employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing these cases, the Commission will consider the extent of the employer's control and any other legal responsibility, which the employer may have with respect to the conduct of such non-employees.


It should be noted that EEOC guidelines are not binding on the court. See General Elec. Co. v. Gilbert, 429 U.S. 125, 141-42 (1976). They are, however, entitled judicial deference. See Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971). EEOC guidelines have been recognized or adopted in whole or in part in several sexual harassment cases. See Horn v. Duke Homes, Inc., 755 F.2d 599, 603 (7th Cir. 1985) (adopting EEOC guidelines for strict liability); Henson v. City of Dundee, 682 F.2d 879, 910 (11th Cir. 1982) (citing 29 C.F.R. § 1604.11(e), which notes that an employer may also be responsible for the acts of non-employees); Bundy v. Jackson, 641 F.2d 934, 947 (D.C. Cir. 1981) (recognizing EEOC guidelines as a useful basis for injunctive relief in sexual harassment cases); Jarman v. City of Northlake, 950 F. Supp. 1375, 1378 (N.D. Ill. 1997) (citing 29 C.F.R. § 1604.11(e) in stating that a non-employee is capable of creating a sexually hostile work environment); Powell v. Las Vegas Hilton Corp., 841 F. Supp. 1024, 1027 (D. Nev. 1992) (noting the lack of case law on the issue, the court referred to the EEOC guidelines for guidance in determining whether an employer could be liable for the sexual harassment of an employee by a non-employee). See also Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986) (recognizing that EEOC guidelines support the view that sexual harassment leading to non-economic injury can violate Title VII).

57. See Costilla, 571 N.W.2d at 591. The Costilla court noted that in recent years numerous federal courts of appeal and federal district courts have held that employers may be held liable for sexual harassment by third parties. See id. (citing Folkerson v. Circus Circus Enters., Inc., 107 F.3d 754, 756 (9th Cir. 1997) (holding that an employer may be liable when a patron sexually harasses an employee if the employer either ratifies or acquiesces in the harassment by not taking immediate and/or corrective actions when it knows or should have known of the conduct); Trent v. Valley Elec. Ass'n, 41 F.3d 524, 527 (9th Cir. 1994) (finding that the employee had a reasonable expectation that Title VII protected her from being subjected to sexually offensive remarks at a seminar that her employer required her to attend); Henson, 682 F.2d at 910 (noting that any person, even a non-employee, can create a hostile work environment); Jarman v. City of Northlake, 950 F. Supp. 1375, 1379 (N.D. Ill. 1997) (finding that the defendant city could be found liable for failing to take appropriate immediate corrective action with respect to sexual harassment of an employee by a non-employee alderman); Magnuson v. Peak
viewed the application of the MHRA to other workplace sexual harassment cases and the Minnesota Supreme Court’s liberal and remedial interpretation of the MHRA with respect to removing sex discrimination from the workplace.  

2. MHRA Analysis and Continuing Violation Doctrine

After determining that Costilla could proceed with her cause of action under the MHRA, the court considered discrimination claims involving continuing violations brought under the MHRA and recognized that a reasonable fact finder could find that the State’s actions were an inappropriate response. In addition, the court determined that the State’s acquiescence to Costilla’s sexual harassment occurred within the MHRA limitations period under the continuing violation doctrine. The court resolved the limitations issue, explaining that the continuing violation doctrine provides an exception to the MHRA statute of limitations where a series of related unlawful employment practices, such as sexual harass-

58. See Costilla, 571 N.W.2d at 592.
59. See id. at 593.
60. See id.
61. See id. at 594. Although the trial court did not decide the MHRA statute of limitations issue, the court of appeals elected to review the matter. See id. at 592 (citing Harms v. Independent Sch. Dist. No. 300, 450 N.W.2d 571, 577 (Minn. 1990)).
ment, occur over a period of time.\[62\]

Next, the Costilla court reasoned that to determine whether the State acted inappropriately, it must consider whether the employer's actions were reasonable.\[63\] The court considered the "employer's ability to control the non-employee" together with the broad MHRA requirement that an employer "take timely and appropriate action to protect employees from sexual harassment."\[64\] The court acknowledged that in the case at bar there was significant interaction between the plaintiff's employer and the third-party's employer.\[65\] However, the court seemed to give more weight to the MHRA requirement that an employer take timely and appropriate action to protect its employees.\[66\] The court noted that "the State's acquiescence in the harassment is established either by [the DES affirmative action officer's] failure to communicate the seriousness of the harassment to Costilla's supervisors, or by the supervisors' disregard for Costilla's safety."\[67\]

Concluding that there was a question of material fact as to the appropriateness of the State's action,\[68\] the court reversed the trial court's grant of summary judgment in favor of the State.\[69\] The court speculated that the State's response to the continuing violation was inappropriate because, as later demonstrated, the State was able to quickly stop the harassment with one letter from a high-ranking state official to a high-ranking federal official.\[70\]

\[62\] See Costilla 571 N.W.2d at 593; see also Lane v. Ground Round, Inc., 775 F. Supp. 1219, 1224 (E.D. Mo. 1991). The court in Costilla relied upon MHRA cases, holding that "the continuing violation doctrine acts as an exception to the MHRA statute of limitations and allows a complainant to hold an employer liable for a series of related acts of sexual harassment if the 'unlawful employment practice manifests itself over time.'" Costilla, 571 N.W.2d at 593 (quoting Lane, 775 F. Supp. at 1224).

\[63\] See Costilla, 571 N.W.2d at 593.

\[64\] Id. (citing MINN. STAT. § 363.01, subd. 41(3) (1996)); see also Cummings v. Koehnen, 568 N.W.2d 418, 422 (Minn. 1997) (recognizing that the plaintiff must show that the employer failed to take appropriate and timely action); 29 C.F.R. § 1604.11(e) (1996).

\[65\] See Costilla, 571 N.W.2d at 594.

\[66\] See id. at 593-94.

\[67\] Id. at 594 n.2.

\[68\] See Costilla, 571 N.W.2d at 594.

\[69\] See id. at 597.

\[70\] See id. at 594.
IV. ANALYSIS OF THE COSTILLA DECISION

A. Introduction

The Minnesota Court of Appeals' decision in Costilla constitutes a logical and necessary expansion of sexual harassment law. By extending employee liability to third party harassment, the court demonstrated sound judicial reasoning that is consistent with both legal authority and society's demand for the elimination of sexual harassment in the workplace. In analyzing the scope of the Costilla decision, it is helpful to first determine the liability theme chosen by the Minnesota Court of Appeals. Next, two questions left unanswered by the Costilla court must be explored in order to guide practitioners and courts in their application of sexual harassment principles. These questions relate to the reasonableness of the employer's reaction to sexual harassment and the amount of control the employer has over the non-employee. Finally, the Costilla principles must be applied to a de facto harassing situation in order to determine which defenses are available to the employer and in which situations the Costilla court's reasoning is relevant.

71. Moreover, the court's holding is consistent with the federal regulatory scheme for sexual harassment. See 29 C.F.R. § 1604.11(a)-(e) (1996). Recognizing that employer liability for the sexual harassment of an employee by a non-employee is an important development in judicial remedies for workplace sexual harassment. See Collen M. Davenport, Case Note, Sexual Harassment Under Title VII: Equality in the Workplace or Second-Class Status?: Meritor Savings Bank, FSB v. Vinson, 106 S. Ct. 2399, 10 HAMLINE L. REV. 193, 208 (1987); Tina Kirstein Ezzell, Note, Eradicating Title VII Sexual Harassment by Recognizing an Employer’s Duty to Prohibit Sexual Harassment, 33 ARIZ. L. REV. 383, 383 (1991); see also supra note 1 and accompanying text; cf Cynthia Grant Bowman, Street Harassment and the Informal Ghettoization of Women, 106 HARV. L. REV. 517, 521 (1993) (suggesting prosecution of street harassment such as catcalls, leers, winks, and grabs).

72. See MINN. STAT. § 363.01, subd. 41(3) (1996). Sexual harassment occurs when “the employer knows or should know of the existence of the harassment and fails to take timely and appropriate action.” Id. Other states offer similar statutory protections against sexual harassment. See MASS. GEN. LAWS ANN. ch. 155B, § 4, subd. 1 (West 1997); OR. REV. STAT. § 659.080 (1996).

B. The Costilla Reasoning

1. The Court of Appeals' Chosen Theme

Three themes emerge in the decisions of cases in which employers were held liable for third-party sexual harassment: (1) the third party's control over the employee; (2) employer enforced dress code; and (3) an employer's broad duty to protect employees from sexual harassment. The third party control situation arises where the employee is placed in a position under the "control" of the third party. The second theme involves an employer enforced dress code that invites sexual harassment by the public. Where the employer requires an employee to wear a uniform that is sexually revealing, the employer arguably forces the employee to concede to sexual harassment by the public. Where the Costilla court seems to have adopted this last approach, it provides little guidance relative to application or effect.

2. Unanswered Questions

An employer has a duty to take whatever action is reasonably calculated to end the sexual harassment of an employee whether the harassing

76. See EEOC v. Newtown Inn Assoc., 647 F. Supp. 957, 958 (E.D. Va. 1986) (involving employees required to wear provocative outfits pursuant to a marketing scheme); EEOC v. Sage Realty Corp., 507 F. Supp. 599, 608-11 (S.D.N.Y. 1981) (involving an employee required to wear a provocative uniform as a condition of her employment); State by Beaulieu v. RSJ, Inc., 552 N.W.2d 695, 702 (Minn. 1996) (involving a situation where complainants' sexual discrimination claims regarding revealing uniforms were dismissed due to failure of the Minnesota Department of Human Rights to issue a timely probable cause determination).
78. See, e.g., Henson v. City of Dundee, 682 F.2d 897, 910 (11th Cir. 1982) (holding that an employer is strictly liable for actions of its supervisors which result in sexual harassment); Powell v. Las Vegas Hilton Corp., 841 F. Supp. 1024, 1028 (D. Nev. 1992) (holding that an employer can be liable under Title VII for sexual harassment of an employee by a non-employee, including its customers). But see Whitaker v. Carney, 778 F.2d 216, 220-21 (5th Cir. 1985) (declining to hold that Title VII places a duty on the employer to solicit complaints from victims or provide a formal grievance procedure).
79. See Costilla, 571 N.W.2d at 592.
party is the employee's supervisor or co-worker. Under Costilla, the same rules seem to apply to harassment by third parties. The questions that Costilla leaves unanswered are: (1) when is the employer's response going to be "timely," and (2) what is the "appropriate action" to be taken by an employer when responding to third-party harassment? These questions were remanded to the trial court. Both are questions of fact, and their answers depend on variable fact-specific circumstances. Furthermore, the court acknowledged that the employer's ability to control the non-employee is a consideration in determining the reasonableness of the employer's response, but the court did not provide any guidance as to what extent of control is required. The answers to these questions are crucial if the bench and bar of Minnesota are to meaningfully consider claims of third-party sexual harassment in the workplace.

a. Reasonableness Undefined?

The court stated that it applied a "reasonableness standard" in evaluating the employer's reaction to Costilla's claim of sexual harassment. This reasonableness standard considers the employer's control over the non-employer and "the MHRA's broad purpose of requiring employers to take timely and appropriate action to protect employees from sexual harassment." When determining whether an employer took timely or appropriate remedial action regarding a complaint of sexual harassment by a co-worker, Minnesota courts take into consideration whether the employer disseminated an anti-harassment policy to the offending employees, transferred the offending employee to another shift, or took or threatened to take disciplinary action against the offending employees. In other words, an employer has an affirmative duty to investigate com-

plaints of sexual harassment and deal appropriately with the offending personnel.  

Although Minnesota courts have not required an employer to promulgate written policies to deal with allegations of sexual harassment, the Minnesota Court of Appeals has stated that a company that fails to institute such a policy is likely to have knowledge of the harassment imputed to them.  

The Minnesota Court of Appeals has previously stated that the MHRA is not preventative, but rather is remedial in nature, but it appears that the court’s interpretation of timely and appropriate remedial measures under the employer’s broad duty to protect employees from harassment could actually be interpreted as a duty to prevent both known and anticipated harassment.

While the reasonableness standard is an important part of the Costilla decision, the issue of third-party sexual harassment also gives rise to a new consideration in holding an employer liable for sexual harassment—the extent of the employer’s control over the harasser.

b. The Paradox of Control

Historically, the issue of control has not been considered by the courts because they have traditionally found employer liability based upon theories sounding in agency. However, non-employee sexual harassment raises questions of control outside of the employment relationship recognized under theories of agency law. The Costilla court noted that determining whether an employer’s actions were timely and appropriate involves consideration of both the employer’s ability to control the non-employee and the broad duty the MHRA imposes upon employers to protect employees from sexual harassment. However, a paradox is created where the employer has a duty to protect an employee from someone over whom it may not have any control. There may be many real world illus-

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87. See Gillson v. State, 492 N.W.2d 835, 841 (citing Continental Can Co. v. State, 297 N.W.2d 241, 251 (Minn. 1980)).
88. See Guiliani v. Stuart Corp., 512 N.W.2d 589, 591 (Minn. Ct. App. 1994). Minnesota does not employ a standard of strict liability for sexual harassment by supervisors or managers, however the court will impute supervisor knowledge of harassment to the employer. See McNabb, 352 N.W.2d at 383.
89. See Tore, 509 N.W.2d at 561.
90. See supra note 25.
91. See Costilla, 571 N.W.2d at 593.
92. It is also reasonably foreseeable that there are some situations in which the employer would be reluctant to fulfill its duty to the employee (i.e. taking action to stop sexual harassment of that employee) where the harasser is a valued client or customer. Moreover, it is common for third-party sexual harassment to go unreported by the affected employee either due to the client or supplier’s economic importance to the employer or for fear of being perceived as not being able to handle the work environment. See Robert S. Aalberts & Lorne H. Seidman, Sex-
trations of this paradox, but the actual facts of a single settled sexual harassment action involving Hooters, Inc. will be used as an illustration.

3. Illustration

The "Hooters concept" is a restaurant theme that originated with Hooters of America, Inc. Hooters of America describes Hooters as "[a] casual, beach-theme restaurant known for the Hooters Girls – the surfer girl next door" and admits that "[t]he element of female sex appeal is prevalent in the restaurants." Arguably, this business concept, and particularly the restaurant's provocative dress code, invites, induces, and incites sexual harassment. The question becomes—how does the Costilla reasoning apply to sexual harassment by third parties when the very nature of the employer's business invites sexual harassment? Specifically, how do the timely and appropriate standards of reasonableness apply where the employer itself creates a "sexually charged" atmosphere?

Similar issues have been raised in litigation (ultimately resulting in negotiated settlements) against Hooters, Inc., but never addressed by Minnesota appellate courts. The plaintiffs in the district court cases


94. Id.

95. Id.

96. Hooters, Inc., has been accused of creating a harassing environment. See infra note 99 and accompanying text, which outlines the allegations. The required uniform of Hooters bar consists of the following: "Hooters T-shirt, ½ shirt, or tank top (Hooters Girls only), orange 'Dolfin's' shorts, white bra, suntan pantyhose (non-design), clean white tennis shoes and socks, name-badge, pouch/belt, prom-like appearance (hair, make-up and nails done neatly), positive attitude showing through, prettiest smile in the whole world!" Rajan Chaudhry, Holding Hooters Close to Heart, RESTAURANT & INSTITUTIONS, Aug. 15, 1995, at 30 (quoting Hooters Employee Handbook, at 24). See also Hooters, www.hootersofamerica.com (visited Jan. 23, 1999) <http://www.hootersofamerica.com/newpages/info.html> ("[T]he Hooters Girl uniform consists of orange shorts and white tank top, short sleeves or long sleeves T-shirt. Pantyhose and bras are required."). The national restaurant chain acknowledges that its "business is on the female sex appeal side." Paul A. Driscoll, Hooters Settles Gender Bias Suit, Deal Will Allow Chain to Continue with Female Staff, WIS. ST. J., Oct. 1, 1997, at 8B (quoting a spokesman for the restaurant, Mike McNeil).

claimed that the company intended to create a hostile work environment and was liable for sexual harassment by its customers. The plaintiffs’ complaints made specific allegations, including: (1) customer requests for sexual intercourse and touching; (2) a request by a customer for waitresses to “sit on his face;” (3) a customer asking the plaintiff to sit on his lap; (4) a customer refusing to pay his bill until the waitress would take off her shirt; (5) customers asking waitresses if they knew another waitress’ bra size; and (6) customers commenting about women’s breasts and buttocks and asking if they were wearing underwear. These examples implicate basic tenets sexual harassment jurisprudence: the unwelcomeness of the harassment and assumption of risk doctrine.

a. Unwelcomeness

Minnesota state and federal courts, as well as the United States Supreme Court, recognize that “[t]he gravamen of any sexual harassment claim is that the alleged sexual advances were ‘unwelcome.’” Courts have applied both objective and subjective standards in determining if sexual advances or conduct were undesirable and offensive. A claimant does not have to show that the employer intended to create an abusive or hostile work environment, but rather sexual harassment claimants must demonstrate specific consequences or effects of an employment practice. The United States Supreme Court has held that the conduct must be sufficiently severe or pervasive such that a reasonable person would
find the environment hostile or abusive, thus altering the condition of the claimant’s employment. Additionally, the claimant must subjectively perceive the environment to be abusive.

The determination of whether a work environment is hostile is a fact-intensive question that requires “consideration of the circumstances, including the frequency of the conduct and its severity,” and in some situations, the claimant’s “expectations given their choice of employment.” This latter concept echoes the assumption of risk doctrine.

b. Assumption of Risk

Scholars have offered two alternative theories in analyzing sexual harassment claims in the unique situation where a woman knowingly agrees to work in an environment that exemplifies her sexuality. One school of thought opposes the marketing of women’s sexuality viewing it as the exploitation and disempowerment of women. The other school maintains that a woman in an establishment with a sexually charged environment consciously consents to commodify her sexuality, thereby assuming the risk of sexual harassment by customers, and the employer should not be held liable for harassment that follows. The argument can be

104. See id. The Court also clarified that injuring a plaintiff’s psychological well-being was actionable under Title VII. See id. Some jurisdictions, including the Eighth Circuit, have adopted a “reasonable woman” standard to determine if the conduct was “sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment.” (citing Ellison 924 F.2d at 879, 879 n.3, and noting that a reasonable woman under similar circumstances is the appropriate standard to apply in determining the existence of a hostile work environment).
105. Crist, 122 F.3d at 1111 (citing Harris, 510 U.S. at 22-23). The courts apply a totality of the circumstances approach when evaluating a claim of a hostile work environment. See Harris, 510 U.S. at 23.
106. Crist, 122 F.3d at 1111.
107. See Rhee, supra note 14, at 167.
109. See Kelly Ann Cahill, Hooters: Should There Be an Assumption of Risk Defense to Some Work Environment Sexual Harassment Claims?, 48 VAND. L. REV. 1107, 1130-33 (1995). Cahill proposes that the assumption of risk defense should be applied in hostile work environment sexual harassment law and where sex appeal is a substantial part of the employer’s business. See id. In those instances, the employer should be allowed to argue that the employee assumed the risk of sexual harass-
made, with respect to an allegedly sexually charged atmosphere at places such as Hooters, Inc., that an employee assumes all risks by choosing to work in that environment.

In contrast, the facts of Costilla do not implicate assumption of risk. Clearly, assumption of risk would have no application where Costilla had the expectation of a benign work environment free from unwanted sexual attention. However, future application of the Costilla court's reasoning could have effects of which extend to a "de facto" harassing environment.

c. Applying the Costilla Analysis to a De Facto "Harassing Environment"

The Costilla court clearly states that employers have a duty to take timely and appropriate actions to protect their employees from sexual harassment by nonemployees. The logical extension of this duty would be to find employers such as Hooters liable for the conduct of their customers when such employers fail to take timely and appropriate action to protect their employees. As applied to an environment that allegedly exists at Hooters, a court may likely determine that an employer's response to sexual harassment by customers can be neither timely nor appropriate where: (1) the employer solicits the potential harassers to the work environment; (2) the employer creates and promotes an atmosphere that emphasizes the sexuality of women; (3) the employer enforces a dress code requiring female employees to wear a sexually revealing uniform; and

10. In Crist v. Focus Homes, Inc., the Eighth Circuit stated that employees who chose to work in a group home for developmentally disabled did not assume the risk of being subjected to sexually inappropriate conduct of one of the mentally incapacitated residents. See Crist, 122 F.3d at 1110. The court reversed the trial court's grant of summary judgment and held that the employees who were subject to the allegedly inappropriate conduct had a cognizable claim under Title VII and the Minnesota Human Rights Act against their former employer. See id. at 1108.

11. See Costilla, 571 N.W.2d at 590-92.


13. See supra note 96 for a description of the required uniforms. This factor alone is, arguably, a basis for a claim of sexual harassment. See, e.g., EEOC v. Sage Realty Corp., 507 F. Supp. 599, 604 (S.D.N.Y. 1981); see also Aalberts & Seidman, supra note 92, at 459 (considering a bona fide occupation defense for establishments that required employees wear provocative attire).
the employer's employee handbook suggests that its employees should not complain if they find their "duties, uniform requirements, or work environment" "offensive, intimidating, hostile or unwelcomed." It is therefore conceivable that establishments such as Hooters would be immediately liable for even a single instance of harassment by virtue of their broad duty to protect their employees from harassment. However, such an employer may assert the affirmative defense that their employees assumed the risk by choosing to work in such an environment.

V. CONCLUSION

Costilla does set important precedent because it recognizes the full protections of the Minnesota Human Rights Act, the instructive value of EEOC guidelines, and conforms Minnesota case law with progressive case law on the issue in other jurisdictions. Costilla provides notice and warns of potential claims against employers for non-employee sexual harassment. Most importantly, Costilla encourages employers to devise a policy regarding harassment by non-employees and inform employees of complaint procedures.

114. Chaudhry, supra note 96, at 30 (quoting Hooters' Employee Handbook, at 30). The Hooters' Employee Handbook provides the following acknowledgment to be signed by their employees:

I hereby acknowledge and affirm . . . (3) that the Hooters concept is based on female sex appeal and that the work environment is one in which joking and innuendo based on female sex appeal is commonplace.

I also acknowledge and affirm that I do not find my job duties, uniform requirements, or work environment to be offensive, intimidating, hostile or unwelcomed.

(Employee signature and date; Witness (Manager) signature and date.)

Id. (quoting Hooters' Employee Handbook, at 30). The Hooters' Employee Handbook also contains the following statement: "I hereby acknowledge and affirm . . . that I should immediately notify company officials of any sexual harassment complaints that I might have." Id. (quoting Hooters' Employee Handbook, at 30). However, in light of the acknowledgment that the employee does not find her job "offensive, intimidating, hostile or unwelcomed," this acknowledgment loses significance and potency.

115. See Costilla, 571 N.W.2d at 593.

116. For example, Hooters may point to the signed acknowledgment discussed above (in supra note 114), but the legality of such a "waiver" is probably questionable. Additionally, as discussed above, the facts of Costilla do not raise an assumption of risk defense, but Crist v. Focus Homes, Inc., 122 F.3d 1107, 1111 (8th Cir. 1997), suggests that employees do not assume the risk of working in an environment where employees may be subject to sexually harassing conduct by third parties. See supra Part. IV.B.3.b.
The court, however, failed to clarify the extent of employers’ broad duty to protect employees from sexual harassment. The Minnesota Court of Appeals did not define a clear standard. The Minnesota Supreme Court declined review. Just as employees waited for the courts to develop the existing judicial protections regarding sexual harassment in the workplace, employers must now wait for further clarification regarding their duty to protect employees from all sexual harassment and the scope of their liability if they do not.

Meanwhile, the potential reach of Costilla is unpredictable. Specifically, the boundaries of timeliness, reasonableness, and indeed of any of the theories applied in Costilla are questionable when one contemplates a work environment based upon sex appeal. Absent clear parameters, employers and owners of such establishments have few guideposts; consequently, their ability to craft policies and take measures to protect their employees and themselves is severely impaired. Given the opportunity to shape the rough edges of the Costilla decision, the Minnesota courts should take it.

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