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Volume 20 | Number 4

Article 7

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12-1-1998

### Employer Liability for Racist Hate Speech by Third-Parties: Comparison of Approaches in Great Britain and the United States

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#### Recommended Citation

Audrey C. Tan, *Employer Liability for Racist Hate Speech by Third-Parties: Comparison of Approaches in Great Britain and the United States*, 20 Loy. L.A. Int'l & Comp. L. Rev. 873 (1998).

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EMPLOYER LIABILITY FOR RACIST HATE SPEECH BY THIRD-PARTIES:  
COMPARISON OF APPROACHES IN GREAT BRITAIN AND THE UNITED  
STATES.

I. INTRODUCTION

Two young African-American women answer an advertisement that seeks temporary waitresses for a dinner at a large hotel.<sup>1</sup> The two women are hired and told to report to the hotel's main banquet hall the next night. They do so and, except for a bit of confusion over drink orders, things proceed quite well for the next few hours. As the women begin to serve the main course, however, the speaker begins to joke about black men's sexual prowess. Soon, the women hear words such as "nigger" and "sambo."<sup>2</sup>

They are uncomfortable, but make the best of it by concentrating on their work and avoiding eye contact with any of the guests. But it is too late—the speaker has spotted them. Suddenly, the amplification sounds ten times louder than it did a moment earlier, time freezes, and the two women feel every eye in the room on them as the speaker says, "[D]arkies [are] good at giving blow jobs."<sup>3</sup>

The women then become the target of other sexually and racially explicit remarks from audience members. One of them is asked what a black woman's vagina tastes like.<sup>4</sup> The other feels a man's strong arm reach across her chest. The two women run out of the banquet room to find their manager. The manager tries to comfort them and tells them to go home. They decide not to leave immediately but nevertheless leave soon afterwards—still shaking from fear and indignation.

This incident occurred in England. In *Burton v. De Vere Hotels Ltd.*, two black women, who had worked as waitresses at a dinner put on by a local men's club, sued the hotel for violation of

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1. See *Burton v. De Vere Hotels Ltd.*, [1997] I.C.R. 1, 3 (Eng.)

2. *Id.* at 3.

3. See *id.*

4. See *id.*

employment provisions of the Race Relations Act of 1976.<sup>5</sup> These employment provisions are Great Britain's equivalent of Title VII of the Civil Rights Act of 1964.

The issue in this case was whether an employer could be held liable for racial harassment by a third-party—in this case the dinner speaker and the dinner guests. This was an issue of first impression for Great Britain. In the United States, a similar issue was the subject of *Rosenbloom v. Senior Resource, Inc.*, a 1996 Title VII case.<sup>6</sup>

This Comment will compare the treatment of this issue in Great Britain with that in the United States.<sup>7</sup> It will focus on the differences between the employment provisions of the Race Relations Act of 1976 and Title VII of the Civil Rights Act of 1964, and the different liability standards developed by British and U.S. courts. Because *Burton* and *Rosenbloom* are the only published opinions that have addressed this subject, this Comment will discuss those opinions in depth. It will also discuss related issues, including the issue of employer liability for sex-based hate speech by third-parties. Specifically, Part II explores British law, including the Race Relations Act of 1976 and *Burton v. De Vere Hotels Ltd.* Part III discusses U.S. law, including the history of Title VII and *Rosenbloom v. Senior Resource Inc.* Finally, Part IV proposes that a liability standard similar to that used in Title VII cases be applied to British racial harassment cases.

## II. BRITISH LAW

### A. Race Relations Act 1976

#### 1. Generally

In response to the expansion of anti-Semitic activities throughout Europe in the early 1960s, the General Assembly of the United Nations adopted the Declaration on the Elimination of All Forms of Racial Discrimination (Declaration) in 1963.<sup>8</sup> To

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5. See *id.* at 4; Race Relations Act, 1976, ch. 74 pt. II (Eng.).

6. See *Rosenbloom v. Senior Resource, Inc.*, 974 F. Supp. 738, 743 (D. Minn. 1997).

7. For a comparison of the sexual harassment statutes in Great Britain and the United States see Nicolle R. Lipper, Comment, *Sexual Harassment in the Workplace: A Comparative Study of Great Britain and the United States*, 13 COMP. LAB. L. J. 293 (1992).

8. See Nathan Courtney, Note, *British and United States Hate Speech Legislation: A*

implement this Declaration, Great Britain's Parliament adopted the Race Relations Act of 1965.<sup>9</sup> A decade later, Parliament adopted stronger legislation, the Race Relations Act of 1976 (1976 Act).<sup>10</sup>

The 1976 Act strengthened its predecessor Act by adding a section dealing with racial harassment and discrimination in the workplace.<sup>11</sup>

## 2. Section 4 (2) of the Race Relations Act of 1976

Part II of the 1976 Act deals with employment discrimination. Section 4(2) of Part II provides in pertinent part that "[i]t is unlawful for a person, in the case of a person employed by him at an establishment in Great Britain, to discriminate against that employee . . . (c) by dismissing him, or subjecting him to any other detriment."<sup>12</sup>

Although Section 4(2) does not explicitly prohibit racial harassment, British courts have long held that such acts can constitute "detriment" under Section 4(2)(c).<sup>13</sup> Whether a particular act of harassment constitutes "detriment" is a factual matter decided by the court adjudicating the case.<sup>14</sup>

Racial harassment qualifies as detriment under the Race Relations Act only if the harasser intended the victim to hear the harassment and a reasonable employee would have complained about it.<sup>15</sup> In *De Souza v. Automobile Association*,<sup>16</sup> a black woman overheard one of her managers call her a racially derogatory

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Comparison, 10 BROOK. J. INT'L L. 727, 733 (1993).

9. See *id.*; Race Relations Act, 1965 (Eng.).

10. See Courtney, *supra* note 8, at 740; Race Relations Act of 1976, ch. 74 (Eng.).

11. See W.T. Murphy, *The British Race Relations Act of 1976*, 1 COMP. LAB. L.J. 137, 137-38 (1976):

Substantial new protections against discrimination in employment have been introduced. Employees complaining of discrimination are now given direct access to industrial tribunals, and a new Commission for Racial Equality has been established to assist and advise complainants and employers, and to promote the policies of the new legislation. The pattern of the new legislation follows closely that of the Sex Discrimination Act of 1975, which prohibited discrimination not covered by the Equal Pay Act of 1970, against persons by reason of their sex or marital status in the employment field.

*Id.* at 137.

12. Race Relations Act of 1976, ch. 74, pt. II, § 4(2) (Eng.).

13. See Kirby v. Manpower Services Comm'n, [1980] 3 All E.R. 334, 341 (Eng.).

14. See BL Cars Ltd. v. Brown, [1983] I.C.R. 143, 144 (Eng.).

15. See *De Souza v. Automobile Ass'n*, [1986] I.C.R. 514, 524 (C.A.)(Eng.).

16. See *id.* at 517.

tory name. The black woman brought suit claiming that the racial insult was a "detriment" to her under the Race Relations Act.<sup>17</sup> The court disagreed and explained that the statute required that the insult cause her to be "treated" less favorably on the basis of her race.<sup>18</sup> In the court's opinion, she could only be "treated" less favorably if the speaker had intended for "her to overhear the conversation in which it was used, or knew or ought reasonably to have anticipated that the person he was talking to would pass the insult on or that the employee would become aware of it in some other way."<sup>19</sup>

*B. Liability of Employer for Racial Hate Speech by Third-Parties under the Race Relations Act 1976: Burton v. De Vere Hotels Ltd.*

1. Facts

On November 1, 1994, the Pennine Hotel, owned by De Vere Hotels Ltd., hired Freda Burton and Sonia Rhule as waitresses for a dinner put on by a local men's club.<sup>20</sup> Andrew Pemberton, the hotel manager in charge of the dinner, delegated the catering to two assistant managers, Steven Smith and Nicholas Binks.<sup>21</sup>

Mr. Pemberton knew that Mr. Bernard Manning would be the guest speaker.<sup>22</sup> He also knew, from prior experience at another hotel, that Mr. Manning was a "'blue' comedian . . . likely to make sexually explicit jokes."<sup>23</sup>

During Mr. Manning's performance, Ms. Burton and Ms. Rhule entered the banquet hall to clear tables.<sup>24</sup> They heard Mr. Manning joke about the sexual organs and sexual abilities of black men.<sup>25</sup> He used derogatory words such as "wog," "nigger," and "sambo."<sup>26</sup> According to the lower tribunal:

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17. *See id.* at 518.

18. *See id.* at 521.

19. *Id.* at 524.

20. *See Burton v. De Vere Hotels Ltd.*, [1997] I.C.R. at 2-3.

21. *See id.* at 3. The remainder of this Comment refers to the Pennine Hotel, De Vere Hotels Ltd., Mr. Pemberton, Mr. Smith, and Mr. Binks collectively as the "employers." It refers to Ms. Burton and Ms. Rhule collectively as the "employees."

22. *See id.*

23. *Id.*

24. *See id.*

25. *See id.*

26. *Id.*

Matters became significantly worse for these applicants (who were young Afro-Caribbean women) when Mr. Manning spotted them going about their business. He made a racially offensive remark to them saying: 'Very nice, that's how I like my cocoa.' He then compounded that by making a remark that was both racially and sexually offensive to the effect that 'darkies were good at giving blow jobs.' Despite these remarks, which considerably upset and offended the employees, they carried on working as best they could. Unhappily Mr. Manning created an atmosphere which probably encouraged some guests further to abuse them.<sup>27</sup>

After Mr. Manning's act was over, one of the guests asked Ms. Rhule "what a black woman's vagina tasted like."<sup>28</sup> She was appalled by the whole incident and immediately reported it to Mr. Smith.<sup>29</sup> Meanwhile, another guest "tried to put his arms around [Ms. Burton] and made racially and sexually offensive" remarks.<sup>30</sup> Mr. Smith witnessed this scene and terminated it.<sup>31</sup> Although Mr. Smith did not eject the guest, he did apologize to the women.<sup>32</sup>

The following day, Ms. Burton and Ms. Rhule filed a complaint against their employers stating:

We feel that the Pennine Hotel made a gross error in allowing the whole incident to take place. Lack of supervision of the managing staff contributed to this greatly, had they vetted Mr. Manning and his material they would not have placed three Afro-Caribbean waitresses in such a prejudiced atmosphere. Racism is an issue which we feel very strongly about; to be degraded (a) because we are women, (b) because we are black, is unforgivable.<sup>33</sup>

The next day, Mr. Pemberton met with the women and wrote an apology for the traumatic incident.<sup>34</sup> He also attempted, unsuccessfully, to obtain compensation from the guests who had humiliated them.<sup>35</sup>

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27. *Id.*

28. *Id.*

29. *See id.*

30. *See id.*

31. *See id.*

32. *See id.*

33. *Id.* at 3-4.

34. *See id.* at 4.

35. *See id.*

Ms. Burton and Ms. Rhule sued their employers under the 1976 Act, complaining of "racial discrimination—unfair treatment."<sup>36</sup> They depicted instances of racial abuse and harassment. Although they did not complain of sexual abuse or harassment, under these facts they could have easily pled such a claim.<sup>37</sup>

## 2. Reasoning

### *a. Lower tribunal's reasoning*

The lower industrial tribunal (lower tribunal), which serves as a trial court for employment matters, heard the employees' case first.<sup>38</sup> To determine whether the employers were liable for the racial harassment by Mr. Manning and the dinner guests, the lower tribunal applied Section 4(2) of the Race Relations Act of 1976.<sup>39</sup> Under that statute, discrimination occurs when the employer "subjects" an employee to "detriment."<sup>40</sup>

Read in the overall context of the Race Relations Act, the lower tribunal explained that the word "detriment" in subsection (c) of Section 4(2) can be interpreted to include racial harassment or abuse suffered by a black employee.<sup>41</sup> The lower tribunal also explained that racial discrimination under the Race Relations Act can be both an affirmative act as well as a failure to act.<sup>42</sup>

Although the lower tribunal found that the employees had suffered detriment within the meaning of subsection (c), the lower tribunal did not hold the employers liable for two reasons: The employers had not "knowingly stood by while the employees were abused and harassed nor had they foreseen that Mr. Manning would behave as he did."<sup>43</sup>

### *b. Appeal tribunal's reasoning*

The employees appealed the lower court's ruling to the industrial appeal tribunal (appeal tribunal).<sup>44</sup> The appeal tribunal fo-

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36. *Id.*

37. *See id.*

38. *See id.* at 1.

39. *See id.*

40. *See* Race Relations Act, 1976, ch. 74, pt. II, § 4(2) (Eng.).

41. *See* *Burton* [1997] I.C.R. at 5.

42. *See id.* at 4.

43. *Id.* at 6.

44. *See id.* at 2.

cused its analysis on Section 4(2)(c) of the 1976 Act.<sup>45</sup>

The appeal tribunal criticized the lower tribunal for adding an element to the Section 4(2)(c) test.<sup>46</sup> This element consisted of the question: Was the employer motivated by “racial animus” when it subjected its employee to the racial detriment?<sup>47</sup>

The appeal tribunal explained that this question was unnecessary.<sup>48</sup> The appeal tribunal further explained that Section 4(2)(c) did not require the employer’s racial animus to have motivated the racial harassment.<sup>49</sup> It was enough to show that the employer had subjected the employee to racial detriment, regardless of the motivation.<sup>50</sup>

Moreover, the appeal tribunal explained that Mr. Pemberton subjected the employees to racial harassment by failing to foresee the racial harassment.<sup>51</sup> Thus, Mr. Pemberton could be liable for the harm even though his action, or more appropriately his inaction, had not been motivated by racial animus.<sup>52</sup> It was no defense that Mr. Pemberton would have treated white women in the same way—by forgetting to protect them. The only relevant issue was whether Mr. Pemberton subjected Ms. Burton and Ms. Rhule to racial detriment.<sup>53</sup>

To determine liability for racial harassment, the appeal tribunal focused on the meaning of the word “subjecting” in Section 4(2)(c).<sup>54</sup> The liability determination proved difficult, however, because the harassment had been committed by Mr. Manning and the dinner guests—third-parties who were not agents of the employer.<sup>55</sup>

With respect to racial harassment of employees by a third-party, the employees argued that employers have a duty to take reasonable steps to protect employees from harassment which the employer either knew about or should have foreseen.<sup>56</sup> Applying

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45. *See id.* at 7.

46. *See id.*

47. *See id.*

48. *See id.*

49. *See id.*

50. *See id.*

51. *See id.*

52. *See id.* at 8.

53. *See id.* at 9.

54. *See id.*

55. *See id.*

56. *See id.* The Race Relations Act places the duty on employers to not “subject” the



this test, the employees set forth five propositions which they argued lead to the inevitable conclusion that their employers subjected them to racial harassment:

[1] That the employers employed the employees.

[2] That on 1 November 1994, the employers required the employees to work in what turned out in fact to be a racially and sexually offensive environment. As a result they suffered the detriment of racial harassment.

[3] The risk of the employees being subjected to sexual harassment was reasonably foreseeable. Mr. Pemberton actually knew that Mr. Manning's act would be 'blue.' A reasonable employer would have foreseen that the female waitresses would or might be seriously distressed by the sexually explicit jokes he was likely to tell.

[4] The employees failed to take any steps to guard against the risks of sexual harassment which they should have foreseen. The tribunal was critical of Mr. Pemberton's failure to advise his assistant managers to keep an eye open for trouble during Mr. Manning's act and to take steps to prevent the female staff from being offended. They found that Mr. Pemberton simply failed to apply his mind to what might happen to the appellants that night.

[5] It follows that, because the employers culpably failed to protect the employees from sexual harassment and the very steps which would have protected them from sexual harassment would also have protected them from racial harassment, the employers must also have culpably failed to protect the employees from racial harassment. Therefore, they 'subjected' the employees to the detriment they suffered, namely racial harassment.<sup>57</sup>

To satisfy proposition [3], the foresight component of the test, the employees introduced a novel argument. Under the facts of the case, the employer could foresee sexual harassment but not racial harassment.<sup>58</sup> To bridge that gap, the employees argued that "because they were black as well as female, it . . . [was] foreseeable

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employee to detriment, the detriment in this case being racial harassment. See Race Relations Act, 1976, ch. 74 (Eng.).

57. *Burton* [1997] I.C.R. at 7-8.

58. See *id.* at 8.

that they would be racially as well as sexually harassed.”<sup>59</sup> To support their novel proposition, they analogized their case to the tort of negligence—if there is foreseeable risk of harm of a type suffered by plaintiffs then the defendant is liable for all of the actual harm suffered by plaintiffs.<sup>60</sup>

The employers disagreed with the employees’ suggestion that foresight of sexual harassment carries with it “foresight of racial harassment.”<sup>61</sup> They argued that this reasoning mistakenly confused tort principles, where there is a single duty of care, with the “two distinct torts of sex discrimination and race discrimination.”<sup>62</sup> Because the employees failed to allege sexual harassment in their suit, the employees had to persuade the court that foresight of sexual harassment ought to be interchangeable with foresight of racial harassment.<sup>63</sup>

To satisfy the foreseeability component, the employers believed that employees should be required to show one of the following:

(1) the employer had actual knowledge that racial harassment was occurring; (2) the employer was guilty of a deliberate or reckless failure to inform himself of what was happening; (3) the employer had such a high degree of foresight that he knew what was likely to happen; or (4) the employer willfully shut his eyes to what he ought to have known was going to happen.<sup>64</sup>

Regarding duty, the employers argued that a breach of duty “must go beyond a mere negligent act or omission to act.”<sup>65</sup> In-

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59. *Id.* The employees argued that “any dividing line between racial and sexual harassment would be quite artificial.” *Id.* For guidance, the employees looked to the “European Commission Recommendation Number 92/131/EEC entitled ‘On the Protection of the Dignity of Women and Men at Work,’ (1992 O.J. (L 49) 1) where it is said that women of non-white origin are more likely to be the subject of sexual harassment than white women.” *Id.*

60. *See id.* at 8; *see also* Page v. Smith [1995] 2 All ER 736, 737. Perhaps appellants should have made the following argument regarding the foreseeability issue: Comedians who have a propensity for making jokes of a sexually explicit nature very often also have a propensity for making jokes which ridicule racial or ethnic groups. Therefore, a reasonable employer who knew they were hiring a comedian who made sexually derogatory jokes would also have been aware that the comedian might pose a danger of making racially insensitive jokes. Under this reasoning, the danger that was foreseeable (all sorts of derogatory jokes) would have been the same danger that actually occurred.

61. *Burton* [1997] I.C.R. at 9.

62. *Id.*

63. *See id.*

64. *Id.*

65. *Id.* The *Burton* court used the term “culpability” to refer to “duty.” *Id.*

stead, there must be "either a deliberate or reckless action or a deliberate or reckless omission to do what was reasonable in light of what he knew or foresaw."<sup>66</sup> The employers further suggested that the word "subjecting" implies "a sense of action or decision rather than mere negligence."<sup>67</sup> The employers also noted that the Race Relations Act places a less burdensome duty on the employer than does the common-law duty of care of an employer.<sup>68</sup>

The appeal tribunal did not wholly accept the contentions of either side.<sup>69</sup> The appeal tribunal acknowledged that if the employers met a recklessness standard, racial harassment would be present:

We do accept that, in practice, where an employer is shown to have actual knowledge that racial harassment of an employee is taking place, or deliberately or recklessly closes his eyes to the fact that it is taking place, if he does not act reasonably to prevent it, he will readily be found to have subjected his employee to the detriment of racial harassment.<sup>70</sup>

Surprisingly, the appeal tribunal rejected the liability standard advocated by the employees, which incorporated negligence principles. Instead, the court devised a new test—the control test.<sup>71</sup> The appeal tribunal explained that the word "subjecting" in Section 4(2)(c) does not connote actual decision but rather control:<sup>72</sup>

A person 'subjects' another to something that he causes or allows that thing to happen in circumstances where he can control whether it happens or not. An employer subjects an employee to the detriment of racial harassment if he causes or permits the racial harassment to occur in circumstances in which he can control whether it happens or not.<sup>73</sup>

The control test lies somewhere between traditional negligence and strict liability, but closer to the latter. The appeal tribunal was uncomfortable with a particularized foresight requirement.<sup>74</sup> It emphasized the undesirability of importing negligence

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66. *Id.*

67. *Id.*

68. *See id.*

69. *Id.*

70. *Id.*

71. *See id.* at 10.

72. *Id.*

73. *Id.*

74. *See id.*

principles into the statutory torts of racial and sexual discrimination.<sup>75</sup> The appeal tribunal did recognize, however, that there would be instances when what the employer knew or foresaw might be relevant to the degree of control the employer could exercise.<sup>76</sup> For instance, an unexpected or unforeseeable event might be determined to be outside the employer's control.

The appeal tribunal also acknowledged that the degree of control could not be ascertained by foresight alone.<sup>77</sup> For example, an employer might foresee the possibility of racial harassment yet be powerless to prevent it.<sup>78</sup> In such a case, the employer would not be held accountable. On the other hand, harassment might occur unexpectedly in circumstances over which the employer has control. In such a case, the employer might be deemed to have subjected the employee to the harassment and therefore be liable for the harm caused by it.<sup>79</sup>

Applying these principles to the facts before it, the appeal tribunal noted that Mr. Pemberton said he "would never allow young female staff to go into a function where he knew a performer might tell sexually explicit jokes."<sup>80</sup> Mr. Pemberton, however, was careless in this respect and "did not give the matter a thought."<sup>81</sup> The appeal tribunal believed that he should have done so because events within the banquet hall were clearly under the control of Mr. Pemberton's assistants.<sup>82</sup> The appeal tribunal believed that if Mr. Pemberton had properly instructed the two young women, they would not have been harassed. They might have heard a few offensive words before being withdrawn, but nothing more.<sup>83</sup> Because the employers clearly controlled whether or not racial harassment would occur under these circumstances, the appeal tribunal found that the employers subjected Ms. Burton and Ms. Rhule

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75. *See id.*

76. *See id.*

77. *See id.*

78. *See id.* "For example, the employer of a bus or train conductor might recognize that the employee will on certain occasions face a risk of racial harassment. Yet the prevention of such [harassment] will largely be beyond the control of the employer." *Id.* In these circumstances, the employer can only publicly reprove the offensive behavior and offer appropriate support to harassed employees. *See id.*

79. *See id.*

80. *Id.*

81. *Id.*

82. *See id.*

83. *See id.*

to racial harassment.<sup>84</sup>

### C. Problems With the Control Test

In enunciating the control test, the appeal tribunal in *Burton* interpreted the language of Section 4(2)(c) of the Race Relations Act as imposing a duty similar to strict liability.<sup>85</sup> The court felt the word "subjecting" connotes control and therefore the liability test should focus on that factor.

The language of Section 4(2)(c), however, does not mandate the use of a strict liability test. It would have been just as reasonable for the court to interpret the phrase "subjecting to a detriment" as a negligence standard. The employer's duty would then be a duty not to *negligently* subject its employees to racial harassment.

The major problem<sup>86</sup> with the control test is expansiveness. Conceptually, the court could use the control test to find an employer liable in virtually any situation because it can always be presumed that the employer has some control over the workplace. For example, the owner of a temporary agency might be held liable under this reasoning if one of its workers is subjected to harassment at a work site. The argument would be that the owner should have foreseen that some of its temporary workers might

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84. See *id.* at 11.

85. British commentators Karon Monaghan and Makbool Javaid applauded the decision in *Burton*:

This result is fair and understandable. It does not make an employer liable for racial harassment in circumstances which he has no control over but puts a duty on him to stop it where he can. This is highly relevant for workplace harassment, whether on the shop floor, in the restaurant/hotel, or public service office. Employers should now put up notices in areas accessible to the public that racial abuse or harassment will not be accepted whether from employees or customers. They should also take steps to deal with it if it does occur. An employer must properly supervise and monitor the workplace and staff.

Karon Monaghan & Makbook Javaid, *No Laughing Matter*, 147 NEW L.J. 350, 352 (1997).

86. It is also possible that the *Burton* court devised the control test to fit the facts before it. Among those facts was the absence of foreseeability that Mr. Manning would tell race-based jokes. The hotel manager, Mr. Pemberton, had knowledge only of Mr. Manning's propensity to tell sex-based jokes. If the court were to use a traditional negligence analysis, the court would have difficulty satisfying the foreseeability component of the negligence analysis. The court may have been reluctant to accept the appellants' argument that the foreseeability of sex-based harassment could somehow be used to show the foreseeability of race-based harassment. In light of this reluctance, the court may have instead decided to devise the control test to make it easier to find employers liable for racial harassment caused by third-parties. See generally *Burton* [1997] I.C.R. 1 (Eng.).

face racial or sexual harassment at the places where they are tempting if they had carefully screened potential clients.

The owner could be held liable under the control test because the owner *theoretically controls* the workplace through its ability to screen potential clients. The court's imposition of such a screening requirement would have drawbacks: (i) Screening would entail extra work for the temporary agency, (ii) could frustrate potential clients, and, (iii) in the end, might not even accomplish its intended purpose of preventing harassment of temporary workers.

To limit the expansiveness of the control test, a foreseeability element should be incorporated into the test to move it closer to a traditional negligence standard.<sup>87</sup> Foreseeability in this instance would entail asking the following question: Did the employer know or have reason to know that racial harassment would likely occur in the workplace? Although the *Burton* court suggested that foreseeability could be used to temper the control test in certain situations, it also admitted that in other situations foreseeability would not be considered. To ensure the use of a negligence-based liability standard, future courts should insist that a foreseeability component always be applied in the control test.

The potential cost of enforcement represents another negative aspect of the control test. Although a workplace free from all forms of racial and sexual harassment is a laudable goal, one must consider the costs of enforcement. Enormous complications and expenses will result if every employer must satisfy the high standard of behavior set by the appeal tribunal in *Burton*. Under such a standard of behavior, every employer will have to determine the boundaries of its control at any given time to prevent racial harassment. In addition, each employer will have to determine whether it has taken sufficient steps correlative to its control under the circumstances to prevent such racial harassment. Under the control test, an employer could potentially be held liable even in situations where it has little or no notice of the potential harm.

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87. Use of the control test eliminates the comfort an employer would have knowing that it will always be tested by a "reasonable person" standard. The control test raises the bar—acting as a reasonable person is no longer enough in every situation. Admittedly, there could be a situation where certain harm to an employee is foreseeable but the employer possesses insufficient control to prevent or remedy the harm. In that situation, the employer should be excused from liability because it lacks the requisite control. By doing this, the liability standard would shift to one based on foreseeability, tempered in certain situations where the employer has control.

*D. How Can Employers Minimize Potential Liability For Racial Harassment by Third-Parties?*

1. Refuse to hire racial minorities for these types of positions

In discussing ways to minimize racial harassment by third-parties, the *Burton* court mentioned the possibility of refusing to hire racial minorities for jobs where there is potential exposure to racial slurs.<sup>88</sup> Although that court decided this course of action would be unacceptable, there has been litigation in the United States in which employers have argued that women who wish to work in establishments featuring scantily-clad waitresses must be willing to "assume the risk" of sexual harassment.<sup>89</sup>

While society may still be willing to tolerate such establishments, it is uncertain whether courts should accept, or allow, similar situations that involve racial stereotypes. For example, suppose someone decided to open a bar catering to members of the Aryan Nation, a white supremacist group, and hired African-American waiters so that patrons could ridicule them. Under an assumption of the risk analysis,<sup>90</sup> the business owner would be protected from liability for racial harassment by patrons so long as the owner warned employees that they were likely to be subjected to racial slurs and those employees agreed to assume this risk.

There is no easy answer to this dilemma. On one hand, it can be argued that people should be free to do what they want as long as they hurt only themselves,<sup>91</sup> such as the employees of the hypothetical bar described above. Also, organizations such as the NAACP would be free to exercise their own rights of free speech in an effort to shut down the bar.

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88. See BURTON, [1997] I.C.R. at 10.

89. Two men have filed suit against the Hooters restaurant chain, alleging that the restaurant violated Title VII by hiring only women to work as waitresses. The "uniform" for waitresses at Hooters consists of a form-fitting tank top, orange shorts, and sneakers. See *Latuga v. Hooters, Inc.*, No. 93-C7709 and 93-C6338, 1996 U.S. Dist. LEXIS 4169, at \*21 (N.D. Ill. Mar. 29, 1996).

90. On the other hand, Title VII might make it illegal for this hypothetical employer to refuse to consider hiring African-Americans, even if the stated purpose for this refusal is to protect candidates from racial harassment they might encounter on the job. In this situation the employer would be in a catch-22, facing liability if it fails to hire minority candidates and facing yet other liability if it does hire such candidates.

91. See generally James R. Stout & Thomas S. Tanana, *Could California Reduce AIDS by Modeling Nevada Prostitution Law?*, 2 SAN DIEGO JUST. J. 491 (1994).

On the other hand, society has struggled hard to overcome the detrimental effects of slavery and other institutions which oppress people based on nothing more than the color of their skin. Perhaps, the greater good would be served by not allowing employees to put themselves in such a situation.<sup>92</sup> Although as individuals they might benefit financially, this benefit would be outweighed by the detrimental effects of such employment.

2. Refuse to allow private parties known to practice racial discrimination on hotel grounds

After a hotel becomes aware that a dinner group will have a host who expresses racially derogatory sentiments, the hotel has various choices. The hotel can take action to prevent waitresses and other employees from being harmed by those insults. Alternatively, the hotel can refuse to accommodate such dinner groups. As discussed above, an employer cannot refuse to hire racial minorities on the grounds that such refusal will protect them from hearing racial insults. Once the employer hires racial minorities, however, it may be impossible for an employer to protect them from all racial hate speech.<sup>93</sup> The best that the employer can do is to act quickly to protect the employees once the hate speech starts.

Even removing employees from the place where they are being subjected to racial hate speech is problematic. Why should the employee be removed? Perhaps the better approach would be for the employer to step in and tell the dinner guests and speakers to stop the offensive behavior. The employer could take a further step and refuse to admit such groups onto the premises.

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92. See Monaghan & Javaid, *supra* note 85.

What if the employer had issued a warning so as to leave the choice of working to the women, and then seek to argue that 'all reasonable steps had been taken?' It is unlikely that such an approach would succeed. The mere issuing of a warning for discrimination in the interests of the worker would run afoul of the provisions of the Race Relations Act of 1976. The answer is to stamp out racism or sexism in the workplace even if the source is a much valued client or customer, and particularly when it is an inexplicably popular entertainer.

*Id.*

93. Two ways that the employer might prevent racial hate speech at dinner functions would be to (1) request copies of all speeches in advance so as to review their content, or (2) impose a rule that no dinner guests hire speakers who express racially derogatory sentiments, either expressly or impliedly.



Of course, this approach will entail a financial sacrifice on the part of the employer—but this may be a small price to pay in order to maintain a proper working environment, free from racial bigotry.

### III. UNITED STATES LAW

#### A. Title VII Hostile Work Environment Doctrine

Title VII of the Civil Rights Act of 1964 is intended to protect employees of private businesses from discriminatory practices.<sup>94</sup> Title VII makes it unlawful for employers “to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”<sup>95</sup>

A substantial part of Title VII employment litigation involves discrimination based on sex. Courts have interpreted sex discrimination to include sexual harassment. The courts have identified two types of sexual harassment: (1) quid pro quo sexual harassment and (2) hostile work environment sexual harassment.<sup>96</sup> Quid pro quo sexual harassment occurs when an employer retaliates for an employee’s failure to submit to demands for sexual favors. Hostile work environment sexual harassment occurs when the employer creates or tolerates a working environment so replete with sexual intimidation that an abusive working environment results. The first type of harassment, quid pro quo harassment, occurs only in instances of sexual discrimination. A hostile work environment, however, can apply to both sexual and racial discrimination.<sup>97</sup>

Courts look at the totality of the circumstances to determine whether a work environment is hostile. Factors considered include (1) the frequency of the discriminatory conduct; (2) the severity of the discriminatory conduct; (3) whether the discriminatory con-

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94. Title VII applies only to private businesses which employ fifteen or more employees. See 42 U.S.C. § 2000e-2(a); *Goldman v. Wilsey Foods, Inc.*, 216 Cal. App. 3d 1085, 1096 (1989).

95. Cynthia L. Estland, *Freedom of Expression in the Workplace and the Problem of Discriminatory Harassment*, 75 TEX. L. REV. 687, 695 (1997); Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (1994).

96. See David S. Warner, Note, *Third-Party Sexual Harassment in the Workplace: An Examination of Client Control*, 12 HOFSTRA LAB. L.J. 361 (1995).

97. See *Snell v. Suffolk County*, 782 F.2d 1094, 1102-03 (2nd Cir. 1986) (discussing race discrimination).

duct is physically threatening or humiliating or merely an offensive utterance; and (4) whether the discriminatory conduct unreasonably interferes with an employee's work performance.<sup>98</sup>

In *Harris v. Forklift Systems*, the Supreme Court devised a two-step inquiry to analyze hostile work environment claims: (1) Was the employee offended by the work environment?; (2) Would a reasonable person be offended by the work environment?<sup>99</sup>

The court in *Daniels v. Essex Group, Inc.* further developed the application of the hostile work environment concept.<sup>100</sup> In *Daniels*, the plaintiff was the only African-American male employee in his division.<sup>101</sup> He worked for his employer for ten years, and the racial harassment climaxed during his last year of employment.<sup>102</sup> During that last year, racially threatening slogans were written on the bathroom walls, including "KKK all niggers [sic] must die."<sup>103</sup> One threat was directed at the plaintiff by including his first name: "hi Bob KKK."<sup>104</sup> When Halloween of that year arrived, a life-size dummy with a black head, white overalls, and fake blood was hung in the plaintiff's work path.<sup>105</sup> Although the plaintiff immediately reported this incident to his supervisor, the dummy remained in place for several shifts.<sup>106</sup> The plaintiff also suspected that a co-worker shot a bullet through the window of his home.<sup>107</sup> After a year of such harassment, the plaintiff resigned.<sup>108</sup>

The court performed a three-step analysis. First, it applied a subjective standard and found that the plaintiff had suffered both physical and psychological injuries from the racial harassment.<sup>109</sup> Second, the court applied an objective standard and concluded that the racial harassment would have adversely affected a reasonable person's work performance.<sup>110</sup> Third, the court asked

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98. See *Harris v. Forklift Systems*, 510 U.S. 17, 24 (1993).

99. See *id.* at 21.

100. See *Daniels v. Essex Group*, 937 F.2d 1264 (7th Cir. 1991).

101. See *id.* at 1265.

102. See *id.* at 1266.

103. *Id.*

104. *Id.*

105. See *id.*

106. See *id.*

107. See *id.* at 1267.

108. See *id.*

109. See *id.* at 1273.

110. See *id.*

whether the employer, aware of the harassment, had met its obligation to remedy the situation.<sup>111</sup> The court determined that the employer failed to take remedial action.

In addition, an employer's liability under the hostile work environment doctrine also depends on whether the employee responsible for the harassment is the victim's co-worker or supervisor. If a co-worker committed the harassment, the liability standard resembles a negligence standard. Under this standard, the employer has an obligation to remedy harm of which it has actual or constructive notice.<sup>112</sup>

On the other hand, if the harasser supervises the victim, the liability analysis differs. In this situation, courts will apply agency principles to impute the harassing conduct of the supervisor to the employer. Applying agency principles in this manner means that an employer might be held liable for harassment of which it has no notice.<sup>113</sup>

The U.S. Supreme Court in *Meritor Savings Bank v. Vinson* addressed the question of employer liability for harassment by supervisors under Title VII.<sup>114</sup> In that case, the Court explained that general agency principles should guide the courts. While the use of agency principles could potentially impose liability upon employers in situations where upper management does not know that racial harassment occurred, the Court was careful to explain that it was rejecting the general imposition of strict liability upon employers in this situation.<sup>115</sup>

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111. See *Davis v. Monsanto Chem. Co.*, 858 F.2d 345, 349 (6th Cir. 1988); *Dillon v. Chrysler Corp.*, 518 F. Supp. 170, 173 (E.D. Mo. 1981); *Winfrey v. Metropolitan Utilities Dist.*, 467 F. Supp. 56, 60 (D. Neb. 1979).

112. See *Ways v. City of Lincoln*, 871 F.2d 750, 755 (8th Cir. 1989) (regarding racially derogatory cartoons circulated among police department employees); *Rochon v. Attorney Gen. of the U.S.*, 734 F. Supp. 543, 546-47 (D.D.C. 1990) (addressing an employer's duty to adequately investigate racially harassing phone calls).

113. Arguably, an employer always has constructive notice of harassment by its supervisors since the employer hires and trains those supervisors.

114. See *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).

115. See *id.* at 72. Some states do have anti-discrimination laws that impose strict liability. For example, the California Fair Employment and Housing Act holds employers strictly liable for the harassing conduct of their agents and supervisors. See CAL. EMP. LAW § 41.80(1)(a)(ii) (Matthew Bender, 1997); CAL. GOV. CODE § 12940(h)(1); *Kelly-Zurian v. Wohl Shoe Co.*, 22 Cal. App. 4th 397, 415 (1994); *Fisher v. San Pedro Peninsula Hosp.*, 214 Cal. App. 3d 590, 608 & n.6 (1989).

*B. Liability of Employer for Sexual Harassment by Third-Parties Under Title VII*

Although to date only one published Title VII case<sup>116</sup> dealing with employer liability for racial hate speech by a third-party has been published, a number of Title VII cases have dealt with employer liability for sexual harassment by a third-party. Examination of the cases dealing with gender-based discrimination can help in understanding the issues in race-based discrimination cases because the parameters of Title VII liability are similar for gender-based and race-based discrimination.<sup>117</sup>

The following factors must be shown in a sexual harassment hostile work environment case: "(1) [the plaintiff] 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 working environment; and (5) there is some basis for imputing liability to the employer."<sup>118</sup> Factor five of this test can be determinative in cases involving potential liability for sexual harassment by third-parties. The EEOC Guidelines state that liability may be imputed to the employer for acts by third-parties when the plaintiff proves that the employer had actual or constructive knowledge of the sexual harassment and failed to immediately and appropriately respond.<sup>119</sup>

EEOC Guidelines regarding employer liability for racial harassment by third-parties have also been promulgated.<sup>120</sup> The lan-

116. See *Rosenbloom v. Senior Resource, Inc.*, 974 F. Supp. 738 (D. Minn. 1997).

117. See *Meritor Savings Bank*, 477 U.S. at 64-67 (discussing sex discrimination); *Snell v. Suffolk County*, 782 F.2d 1094, 1102-03 (2d Cir. 1986) (discussing race discrimination).

118. *Magnuson v. Peak Technical Services, Inc.*, 808 F. Supp. 500, 512 (E.D. Va. 1992).

119. See 29 C.F.R. § 1604.11(e) (1994). These guidelines state, in pertinent 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.

*Id.*

120. See *id.* § 1606.8(e). These guidelines provide:

An employer may also be responsible for the acts of non-employees with respect to harassment of employees in the workplace on the basis of national origin, where the employer, its agents or supervisory employees, knows or should have known of the conduct and fails to take immediate and appropriate corrective ac-

guage of both sets of EEOC Guidelines is essentially the same. Therefore, an interpretation of the Sexual Harassment Guidelines<sup>121</sup> would also apply to the Racial Harassment Guidelines.<sup>122</sup>

The sexual harassment EEOC Guidelines impose a negligence standard of liability.<sup>123</sup> Under a negligence framework, the employer has a duty to take "immediate and appropriate corrective action"<sup>124</sup> to sexual harassment. To determine whether the employer satisfied this duty, the courts ask whether the employer knew or should have known of the sexual harassment.<sup>125</sup>

In addition, the courts in these types of cases examine the amount of authority the alleged harasser has over the victim. In so-called "client-control cases," the harasser is a client of the employer and exercises full or limited authority over the victim.<sup>126</sup> For example, a "client-control case" exists where an employee of a temporary agency experiences harassment at the place where she is temping. In this example, a third-party (i.e., the business using the temp agency) perpetuates the harassment. The other category of sexual harassment, based on the degree of control held by the harasser, is "client-non-control cases."<sup>127</sup> In "client-non-control cases," a third-party who does not have control over that employee commits the harassment. For example, this type of case exists where an employer requires a female employee to wear a revealing uniform which leads to sexual harassment by male customers.<sup>128</sup>

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tion. 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.

*Id.*

121. See *id.* § 1604.11(e)(1994).

122. See *id.* § 1606.8.

123. See Ronald Turner, *Title VII and Hostile Work Environment Sexual Harassment: Mislabeling the Standard of Employer Liability*, 71 U. DET. MERCY L. REV. 817, 820 (1994); Frederick J. Lewis & Thomas L. Henderson, *Employer Liability for "Hostile Work Environment" Sexual Harassment Created by Supervisors: The Search for an Appropriate Standard*, 25 U. MEM. L. REV. 667, 733 (1994); Amanda D. Smith, Note, "Supervisor" Hostile Environment Sexual Harassment Claims, Liability Insurance and the Trend Towards Negligence, 31 U. MICH. J.L. REFORM 263, 268 (1997).

124. 29 C.F.R. §1606.8(e).

125. See Smith, *supra* note 123, at 270-71.

126. Magnuson v. Peak Technical Services, Inc., 808 F. Supp. 500, 507-08 (E.D. Va. 1992).

127. See Powell v. Las Vegas Hilton Corp., 841 F. Supp. 1024, 1027 (D. Nev. 1992).

128. See EEOC v. Sage Realty Corp., 507 F. Supp. 599 (S.D.N.Y. 1981).

Moreover, in *Powell v. Las Vegas Hilton Corp.*,<sup>129</sup> a female blackjack dealer alleged that she had been fired in retaliation for protesting about sexual harassment by male customers.<sup>130</sup> The Court denied the defendant's motion for summary judgment, noting that a jury could find the defendant hotel liable for maintaining a hostile environment even though the hotel had adopted a policy prohibiting sexual harassment.<sup>131</sup> The jury could find that the hotel had not adequately enforced this policy because hotel management had repeatedly ignored the plaintiff's complaints.<sup>132</sup>

The racial hate speech cases discussed in this Comment involve situations where the third-party did not supervise or control the employee and, for this reason, most closely resemble the sexual harassment "client-non-control cases."

*C. Liability of Employer for Racial Hate Speech by Third-Parties under Title VII: Rosenbloom v. Senior Resource, Inc.*

1. Facts

Although courts have analyzed employer liability under Title VII for sexual harassment by a third-party, *Rosenbloom v. Senior Resource, Inc.* was the first case to address this issue in the context of racial harassment.<sup>133</sup> In *Rosenbloom*, the employer, Senior Resource, Inc., was a social service agency which operated a senior center at Park Center, Minneapolis.<sup>134</sup>

On October 31, 1994, Senior Resource hired Mr. Marilyn Lucky Reynolds Rosenbloom, an African-American male, to coordinate programs at Park Center.<sup>135</sup> His immediate supervisor was Ms. Alice Moorman who was later replaced by Ms. Kathy Mosavat.<sup>136</sup> Moorman and Mosavat both reported to Beth Zemek.<sup>137</sup>

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129. See *Powell v. Las Vegas Hilton Corp.*, 841 F. Supp. at 1024 (D. Nev. 1992).

130. See *id.*

131. See *id.* at 1030.

132. See *id.*

133. The U.S. District Court in *Rosenbloom v. Senior Resource, Inc.*, 974 F. Supp. 738 (1997), addressed a situation where a third-party, who commonly visited a senior resource center, subjected the plaintiff to racial slurs. In addressing precedent in this area, the court stated, "the parties in the court have failed to find any case law where an employer has been held liable for the racial harassment of an employee by a third-party." *Id.* at 743.

134. See *id.* at 740.

135. See *id.*

136. See *id.*

137. See *id.*

Mr. Roger Kolb, who was not a client of Senior Resource, often loitered in Park Center.<sup>138</sup> On December 9, 1994, Kolb, unprovoked, approached Rosenbloom and threatened: "[F]ucking nigger, I'm going to kill you."<sup>139</sup> As a result of this incident, Kolb was asked to leave.<sup>140</sup> Rosenbloom later wrote a memo to Ms. Moorman explaining that he did not want Kolb to return to Park Center. He also commented that clients of Senior Resource had subjected him to racist remarks in the past.<sup>141</sup>

Despite Rosenbloom's letter, Kolb returned to Park Center on December 12, 1994.<sup>142</sup> This time, Kolb did not encounter Rosenbloom. Rather, one of the Senior Resource employees escorted Kolb off the premises.<sup>143</sup> Rosenbloom complained in writing to Moorman that her response to the December 9 incident was inadequate.<sup>144</sup> Moorman then spoke to her supervisor, Beth Zemek, about Rosenbloom's situation.<sup>145</sup> On December 13, 1994, Zemek told Moorman to write a memo instructing employees not to allow Kolb into Park Center and to call the police immediately if he returned.<sup>146</sup> In addition, Senior Resource distributed anti-racism posters and notices.<sup>147</sup>

On December 16, 1994, Kolb returned again to Park Center.<sup>148</sup> This time, Kolb intentionally bumped into Rosenbloom and called him a "lying black Christian."<sup>149</sup> Kolb entered Moorman's office and remained there for twenty minutes until Moorman escorted him out.<sup>150</sup> Meanwhile, Rosenbloom telephoned Zemek and complained that Moorman failed to immediately remove Kolb from Park Center.<sup>151</sup>

Following this incident, Zemek called the Minneapolis Housing Authority and asked for a restraining order against

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138. *See id.*

139. *Id.*

140. *See id.*

141. *See id.*

142. *See id.*

143. *See id.* at 740-41.

144. *See id.* at 741.

145. *See id.*

146. *See id.*

147. *See id.*

148. *See id.*

149. *Id.*

150. *See id.*

151. *See id.*

Kolb.<sup>152</sup> After the restraining order was issued, Kolb was never seen again at Park Center.<sup>153</sup> On March 23, 1995, however, Rosenbloom received an anonymous racist phone call, which may have been from Kolb.<sup>154</sup> Rosenbloom told Zemek about the phone call, and Zemek reassured him that she would report it to the police and extend the restraining order.<sup>155</sup>

In December 1994, Senior Resource fired Moorman from her position as the Director of Park Center because of her failure to immediately remove Kolb from Park Center on December 16.<sup>156</sup> Mosavat replaced Moorman but Mosavat's relationship with Rosenbloom was no better than Moorman's relationship with him. At a staff meeting in January of 1995, Rosenbloom complained about the harassment by Kolb. Mosavat told him, "I don't give a damn what you think."<sup>157</sup> Afterwards, Mosavat later apologized for this comment.<sup>158</sup>

Rosenbloom eventually wrote Zemek a memo regarding the racism that he had experienced at Park Center.<sup>159</sup> Some of the Senior Resource clients had taunted Rosenbloom by calling him such racial epithets as "nigger," "sambo" and "zebra."<sup>160</sup> These same terms were written on tables in Park Center.<sup>161</sup> Clients subjected Rosenbloom to such abuse throughout his employment with Senior Resource, and the situation worsened for Rosenbloom after he planned an African-American cultural celebration.<sup>162</sup> This problem was discussed at staff meetings and "at least some employees felt that little was done in the form of policies or clear direction to prevent racism from occurring at Park Center."<sup>163</sup>

Rosenbloom filed a charge of race discrimination with the Minneapolis Civil Rights Department on April 7, 1995.<sup>164</sup> He claimed that he had been subjected to a racially hostile work envi-

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152. *See id.*

153. *See id.*

154. *See id.*

155. *See id.*

156. *See id.*

157. *Id.*

158. *See id.*

159. *See id.*

160. *Id.*

161. *See id.*

162. *See id.*

163. *Id.*

164. *See id.* at 741-42.



ronment.<sup>165</sup> In addition, he alleged that Senior Resource failed to address its clients' racist remarks.<sup>166</sup> Finally, Rosenbloom charged Senior Resource with using a sexual harassment complaint to "set him up"<sup>167</sup> for termination.

When Rosenbloom returned to work on June 16, 1995, he requested to work more hours.<sup>168</sup> Senior Resource failed to accommodate Rosenbloom's request and on June 22, 1995, Rosenbloom resigned.<sup>169</sup> In his resignation letter, Rosenbloom claimed that the Senior Resource had constructively discharged him.<sup>170</sup>

Rosenbloom sued Senior Resource in state court on May 21, 1996.<sup>171</sup> The case was removed to federal court on June 7, 1996.<sup>172</sup> Rosenbloom's amended complaint contained eight claims, including a claim of race discrimination and harassment under Title VII.<sup>173</sup>

## 2. Reasoning

In his complaint, Rosenbloom alleged Senior Resource subjected him to a racially hostile work environment.<sup>174</sup> In addition, Rosenbloom alleged that Senior Resource discharged him because of: (1) the incidents with Kolb in December of 1994, and (2) the racial slurs made against him by clients of Senior Resource.<sup>175</sup> First, Rosenbloom argued that Senior Resource's liability for these actions stemmed from Kolb's position as a Senior Resource volunteer and therefore as its agent.<sup>176</sup> Second, Rosenbloom contended that "Moorman and Mosavat had a duty to respond to the racist behavior by Kolb and other clients, and by failing to respond, ratified the racism."<sup>177</sup> The court summarily dismissed the first theory because of a lack of evidence that Kolb volunteered with Senior Resource.<sup>178</sup>

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165. *See id.*

166. *Id.* at 742.

167. *Id.*

168. *See id.*

169. *See id.*

170. *See id.*

171. *See id.*

172. *See id.*

173. *See id.*

174. *See id.*

175. *See id.*

176. *See id.*

177. *Id.*

178. *See id.* at 742-43.

As to Rosenbloom's second theory, the court noted that it raised an "interesting and difficult question of first impression within the Eighth Circuit and possibly the Federal Courts."<sup>179</sup> The court further noted that:

Rosenbloom suggests that an employer may be liable for acts of third-parties that create a racial hostile work environment if the employer fails to take steps to remedy the harassment once it becomes known to the employer. Rosenbloom argues that by failing to keep Kolb from returning to Park Center, and by not instituting a policy to deal with racial slurs, Senior Resource ratified the racist behavior.<sup>180</sup>

The court began its analysis by explaining that it was unaware of any case law dealing with the question of whether an employer can be liable for a third-party's racial harassment of an employee.<sup>181</sup> The court did explain, however, that several courts had ruled that an employer may be liable for sexual hostile work environment when the employer knows of the harassing conduct and neglects to take steps to remedy the harassment.<sup>182</sup> Next, the court explained that commentators have noted that such liability in the sexual hostile work environment represents a recent expansion of conventional interpretations of Title VII and the Supreme Court has "warned against unsubstantiated judicial extensions of employer liability not contemplated within the Civil Rights Act of 1964."<sup>183</sup> The court noted that its own Eighth Circuit had never before extended an employer's liability in this manner.<sup>184</sup>

The court explained that "most of the cases involving employer liability for third-party sexual harassment involved one of two situations."<sup>185</sup> In the first situation, the third-party exercises control over the employee.<sup>186</sup> For example, such a situation occurs

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179. *Id.* at 743.

180. *Id.*

181. *See id.* The court stated that "[t]he parties and the Court have failed to find any case law where an employer has been held liable for the racial harassment of an employee by a third-party." *Id.*

182. *See id.*; *see, e.g., Powell v. Las Vegas Hilton Corp.*, 841 F. Supp. 1024, 1027 (D. Nev. 1992); *Magnuson v. Peak Technical Services Inc.*, 808 F. Supp. 500, 512 (E.D. Va. 1992); *EEOC v. Sage Realty Corp.*, 507 F. Supp. 599, 609-10 (S.D.N.Y. 1981).

183. *Rosenbloom v. Senior Resource Ctr.*, 974 F. Supp. at 743; *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 72 (1986).

184. *See Rosenbloom*, 974 F. Supp. at 743.

185. *Id.*

186. *See Magnuson v. Peak Technical Services, Inc.*, 808 F. Supp. 500, 507-11 (E.D. Va. 1992).

when an employee of a temporary agency sues the agency after being placed into a sexual hostile work environment.<sup>187</sup> In this situation, both the temporary agency and the business using the agency's services exercise control over the employee. The agency, as the ultimate employer, can be held liable.<sup>188</sup>

In the second situation, an employer establishes a policy or dress code that makes the employee's "acquiescence in sexual harassment by the public . . . a prerequisite of her employment."<sup>189</sup> In addition, the court noted that "several courts have gone beyond these two categories of cases and suggest[ed] that employers have a broad duty to protect their employees from sexual harassment, even when an employer does not directly benefit from the harassment."<sup>190</sup>

The court acknowledged that circumstances might exist where an employer could be held liable for a racially hostile work environment created by a third-party.<sup>191</sup> In the case before it, however, the court found that "there is no evidence Senior Resource benefited from Kolb's disruptive behavior or from the racist slurs by its clients."<sup>192</sup> Instead, the court found that the record showed Senior Resource was indeed concerned about each incident, and on at least on one occasion, tried to remedy the situation immediately.<sup>193</sup> Although the court was disappointed that Senior Resource failed to respond more quickly to the racist remarks by its clients, the court explained that no facts demonstrated Senior Resource ratified such comments.<sup>194</sup> Rather, the court noted that

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187. See *Rosenbloom*, 974 F. Supp. at 743.

188. See *id.*

189. *EEOC v. Sage Realty Corp.*, 507 F. Supp. 599, 609-10 (S.D.N.Y. 1981); see also *Beaulieu v. RSJ, Inc.*, 552 N.W.2d 695, 700 (Minn. 1996) (discussing a restaurant owner's statement that he was "trying to sell legs").

190. *Rosenbloom*, 974 F. Supp. at 743; see generally *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982); *Powell v. Las Vegas Hilton Corp.*, 841 F. Supp. 1024 (D. Nev. 1992).

191. *Rosenbloom*, 974 F. Supp. at 743-44. In the court's words, "[j]ust as in sexual hostile work environment cases, there may be circumstances where an employer can be held liable for the racial hostile work environment created by a third-party." *Id.*

192. *Rosenbloom*, 974 F. Supp. at 744.

193. See *id.*

194. See *id.* If the court found that Senior Resource ratified the racist comments of Kolb and others, the court could, under a Title VII analysis, impute liability for those statements to Senior Resource.

An employer acts within the scope of his or her employment usually by exercising the powers actually vested in him or her; however, if an employer becomes aware of harassment by a supervisor and does nothing to stop it, the employer,

Senior Resource had taken steps to educate its clients by distributing posters and notices discouraging racism.<sup>195</sup>

Finally, the court explained that it "did not intend to minimize Kolb's conduct or the racist remarks."<sup>196</sup> The court felt that no one should have to endure the treatment Rosenbloom endured.<sup>197</sup> The court found that "federal law, however, does not hold an employer liable in all circumstances for a third-party's discriminatory behavior."<sup>198</sup>

*D. Problems With the Title VII Hostile Work Environment Doctrine as Used in Cases Involving Racial Harassment by Third-Parties*

One problem with the Title VII hostile work environment doctrine is that it places too high of a burden of proof on the plaintiff employee. *Rosenbloom* required that the employer have knowledge of the harassment before requiring the employer to remedy the harm.<sup>199</sup> In addition, the court was also lenient in its review of the propriety of the remedy. In the court's view, the memo that Senior Resource issued, which barred Kolb from Park Center, and its attempt on one occasion to immediately stop the harassment, represented an appropriate remedy.<sup>200</sup>

U.S. courts, applying Title VII law in the same manner as in *Rosenbloom*, might not have found the defendants in *Burton* liable. In *Burton*, the defendants knew that Mr. Manning would likely make sexually explicit remarks. They did not, however, know that he might make race-based remarks. For this reason, a U.S. court, under a Title VII analysis, might have absolved the employers of responsibility because the racial harassment by Mr. Manning was not foreseeable. Even if the employers had known that Mr. Manning had a propensity to tell race-based jokes, a Title VII liability standard, which resembles a negligence standard,

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by acquiescing, has brought the supervisor's actions within the scope of employment.

2 CALIFORNIA EMPLOYMENT LAW 41-272, § 41.81(6)(a)(M. Kirby Wilcox ed., Matthew Bender 1997).

195. See *Rosenbloom*, 974 F. Supp. at 744.

196. *Id.*

197. See *id.*

198. *Id.*

199. See *id.* at 744 n.6.

200. See *id.*

would require that the employer have notice of the particular harm to the employees.

Similarly, the British court in *Burton* explained that the employer hotel could only foresee sexually derogatory remarks, but not racially derogatory remarks. That court, however, applied the control test, thereby enabling the court to find the employer liable for the racial harassment experienced by Ms. Burton and Ms. Rhule. The court found the employer hotel liable even though the court admitted that under the facts, the employer would not have foreseen that the women would be racially harassed by Mr. Manning or the guests.

In addition, a Title VII analysis would consider that the harassment of the women only occurred on that single occasion. In *Ellison v. Brady*,<sup>201</sup> the court explained that both the severity and the frequency of harassment must be considered. If the employee experiences extremely severe harassment, a single incident may give rise to a hostile work environment.<sup>202</sup> On the other hand, less severe harassment that occurs repeatedly can also give rise to a hostile work environment.<sup>203</sup>

Thus, because the harassment in *Burton* only occurred on that one night, a court applying Title VII principles would need to find that the employees experienced extremely severe harassment in order to determine that a hostile work environment existed. Although Mr. Manning directed some of his jokes at the women rather than to the general audience, that fact alone may not constitute severe harassment sufficient to create a hostile work environment. A more significant fact other than Mr. Manning's jokes is that some of the dinner guests physically harassed the women.<sup>204</sup> If the court, however, determines that the employer could not foresee this physical harassment, these actions may also be insufficient to support the finding of a hostile work environment.

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201. 924 F.2d 872 (9th Cir. 1991).

202. *See id.* at 878.

203. *See id.*

204. *See generally* Fisher v. San Pedro Peninsula Hosp., 214 Cal. App. 3d 590, 610 (1989).

#### IV. PROPOSED LIABILITY STANDARD

##### A. *Continuum of Liability Standards*

Imagine a liability continuum, on one end of which sits a strict liability standard that holds the employer liable even where no fault exists. At the opposite end is an intentional act standard that requires the employer to act with recklessness or an intent to cause the harm. On this continuum, the control test is located closer to the strict liability standard. The Title VII hostile work environment test is located closer towards the middle, where a negligence standard would be located.

The following subsection recommends that Britain abandon the control test in favor of a negligence standard similar to that used in Title VII hostile work environment cases.<sup>205</sup>

##### B. *Proposed Liability Standard for British Cases: A Modified Negligence Standard*

As described above, courts could apply a wide range of liability standards to situations where a third-party subjects an employee to racial hate speech. Using a liability standard such as strict liability affords the greatest protection to minority employees. Conversely, the use of a liability standard with a recklessness or intent requirement best protects employers against unwarranted and unfair claims.

The case law on this subject takes different courses in Britain and the United States. In *Burton*, the only British case on this subject, the court devised the control test, a test closely resembling a strict liability standard.<sup>206</sup> In the United States, the court in *Rosenbloom v. Senior Resource Center*<sup>207</sup> applied the Title VII hostile work environment doctrine, which is essentially a negligence standard.<sup>208</sup>

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205. This recommendation is made despite faults with the Title VII hostile work environment standard identified in the preceding subsection of this Comment. Although the Title VII standard may at times fail to provide a remedy for aggrieved employees, this failure is outweighed by the great strength of the Title VII standard—its inherent flexibility and commensurate use in fairly allocating fault.

206. See *Burton v. De Vere Hotels Ltd.*, [1997] I.C.R. 1, at 10.

207. See *Rosenbloom*, 974 F. Supp. 738 (1997).

208. Although the language of the Race Relations Act and Title VII differs, courts could, if they wished, construe each of these statutes so that their liability standards become essentially equivalent.

As explained earlier, the primary problem with the control test is that it is too rigid and could open the floodgates to a greater number of lawsuits against employers.<sup>209</sup> A negligence standard, which is inherently more flexible than a strict liability standard, is more appropriate<sup>210</sup> for determining employer liability. This is true especially in instances where a third-party<sup>211</sup> commits the racial harassment.

One way to formulate a negligence-based liability test under the Race Relations Act is to begin with a negligence test that utilizes an objective "reasonable person" standard, and then modify that test for use in situations of racial harassment by third-parties. This test comprises of two basic components: (1) duty and (2) foreseeability.

The first component of the test imposes a duty on the employer to protect its employees from racial harassment by third-parties.<sup>212</sup> The language of section 4(2)(c) of the Race Relations

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209. See generally *Jansen v. Packaging Corp. of America*, 123 F.3d 490 (1996).

210. In *Jansen*, the court explained that the standard of liability in Title VII sexual harassment hostile work environment cases should be a negligence standard. See *id.* at 494, 501-02. The court stated:

Because a hostile work environment is difficult to define, employers may be unable to send an unambiguous message to employees. I believe the appropriate inquiry in dealing with this conduct remains whether the company has taken due care to prevent harassment and to respond to complaints of harassment. Traditionally, courts have viewed negligence as a close approximation of what the prevention of harm should cost to the company.

*Id.* at 501-02 (citations omitted). The court also extolled the flexibility inherent in a negligence standard: "By its conception, negligence possesses the flexibility to respond by degree to amorphous or variable harms, such as this one." *Id.* (citations omitted).

211. Contrast this third-party situation where the victim's supervisor commits the harassment. In such a situation, courts will apply agency principles to impute liability to the employer in a manner which resembles strict liability. See *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 63 (1986).

212. The *Burton* court's control test resembles the duty component of the negligence standard discussed above, without a foreseeability component to limit liability. Without a foreseeability component, the control test edges towards a strict liability standard, although the test uses lack of foreseeability in certain circumstances to show that the employer had no control over the work environment. The *Burton* court described the classic situation where an employer would lack control over the workplace—a bus driver who could constantly be exposed to racial harassment by passengers and others. In such circumstances, the most obvious solution would be for the employer to warn all prospective employees that they may be subject to this type of harassment but that the employer will not consider this possibility when making the decision to hire them. Having given this warning, the employer would not be under any further duty to protect the employee from harm outside the scope of any protection which the employer could reasonably offer. See *Burton v. De Vere Hotels Ltd.* [1997] I.C.R. at 10.

Act creates a duty not to "subject" an employee to "detriment."<sup>213</sup> Detriment includes racial harassment.

With respect to harm caused by third-parties, the foreseeability of the particular harm occurring limits the scope of the employer's duty. The amount of control the employer has over the workplace also qualifies the employer's duty. The employer bears responsibility only for those aspects of the work environment over which it reasonably can exercise control.

The foreseeability component represents the second component of the negligence-based liability test. It holds employers liable for those actions foreseeable to a reasonable employer, operating with the abilities and limitations of an average employer in the same situation.<sup>214</sup> Thus, the employer has the responsibility to prevent racial harassment that it actually foresees or that it should have foreseen.

A requirement of actual knowledge does not trouble courts.<sup>215</sup> But the concept of constructive knowledge does.<sup>216</sup> Thus, courts should use constructive knowledge with restraint when acts of third persons are involved. The courts should exercise such restraint because acts by third persons may be difficult or even impossible to foresee.

To ensure that it does not become too easy for employers to evade liability under this prong of the test, the courts should prescribe factors that an employer can consider in determining whether racial harassment by third-parties is likely to occur. These factors could include the following: (1) Whether the employer was previously aware of the presence of third persons and of their propensity for this type of behavior; and (2) Assuming that the first factor is not present, whether in the given employment situation, the employer should have been aware of the likely presence of third persons who would commit acts of racial harassment.

In addition, the court should carefully examine the propriety of prophylactic measures. It would be helpful if courts refused to give free reign to employers in this area. The public policy of protecting minorities, who cannot effectively protect themselves, dictates that courts will err, if at all, in affording too many rather than

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213. Race Relations Act 1976, ch. 74, pt. II, § 4(2) (Eng.).

214. See *Burton* [1997] I.C.R. at 8.

215. See *id.* at 9-10.

216. See *id.*



too few protective measures.

The components of a negligence standard under the Race Relations Act can be summarized as follows: (1) Duty of an employer to avoid subjecting its employees to detriment; (2) Foreseeability, that is, did the employer actually foresee, or would a reasonable employer have foreseen that the harm would occur; and (3) Appropriateness of the Remedy, that is, did the employer under the circumstances take appropriate measures to prevent or stop the harm?

The propriety of the measures is a subjective factor determined by a judge or jury. Some factors that might be considered in making this determination include: (1) How soon after the employee reported the harm did the employer respond to it? (2) How effective was the employer's response in nullifying the harm? (3) How would a reasonable employer in the same situation have responded?

While the standards upon which a determination of liability will be made are important, it is equally, if not more important, that the decision-maker exercise wisdom in applying the standard. This is especially true when using a negligence standard because such a test is inherently flexible and its success depends heavily upon the court's sound judgment.

## V. CONCLUSION

Although most people do not consider themselves racist, psychologists maintain that we all have subconscious biases.<sup>217</sup> Despite slow progress in civil rights jurisprudence over the last two decades, progress nevertheless continues to be made on this front. As we all move forward, employers will continue to face situations where legal pressure to provide a workplace free from racial harassment conflicts with the practical realities of running a business. While it would be nice to shield all persons from cruelty, especially cruelty based on race, this is virtually impossible. The only reasonable option then, is for society to do its utmost to rid workplaces of race-based harassment while simultaneously acknowledging that some individuals will occasionally be hurt.

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217. See Charles R. Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322.

British courts have gone too far in their efforts to protect individuals from race-based harassment. The control test, while laudable, imposes too much potential liability on employers—it is close to a strict liability standard. Rather, because it is often difficult for employers to predict the behavior of third-parties, British courts should reinterpret the language of the 1976 Act as imposing a more flexible negligence standard.

This negligence standard should be modified for use in situations where third-parties have racially harassed an employee. This can be achieved by considering whether a reasonable employer would have foreseen the possibility of race-based harassment by third-parties and whether the employer took appropriate measures to remedy the harm.

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