

TEACHERS' SEXUAL HARASSMENT CLAIMS BASED ON STUDENT CONDUCT: DO SPECIAL EDUCATION TEACHERS WAIVE THEIR RIGHT TO A HARASSMENT-FREE WORKPLACE?

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INTRODUCTION

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on an individual's sex.¹ Title VII imposes sexual harassment liability on employers that subject their employees to a "hostile work environment."² A hostile work environment (HWE) is a workplace that is "permeated with 'discriminatory intimidation, ridicule, and insult' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'"³ Although the conduct of a supervisor or co-worker normally creates a HWE, the conduct of non-employees can also create a HWE.⁴ In HWE cases, employers are liable if they know about the harassment and fail to take remedial action in a timely manner.⁵

In June 2007, in *Mongelli v. Red Clay Consolidated School District Board of Education*,⁶ the District Court of Delaware faced the novel issue of whether a school board may be held liable for a Title VII HWE sexual harassment claim based on the harassing conduct of a special education student.⁷ In *Mongelli*, a fourteen-year-old mentally-impaired student, over the course of two weeks, abused his special education teacher, both verbally and physically.⁸ The teacher, Ms. Mongelli, alleged that she repeatedly complained of the student's conduct through written reports she filed with the principal's office and through verbal complaints she made to the assistant principal.⁹ She further alleged that the school did not take any remedial action during the two-week period over which

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1. 42 U.S.C. § 2000e-2(a)(1) (2006).

2. *See, e.g.*, *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23 (1993).

3. *Id.* at 21 (quoting *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65, 67 (1986)).

4. *See* Lori A. Tetreault, Annotation, *Liability of Employer, Under Title VII of Civil Rights Act of 1964* (42 U.S.C.A. §§ 2000e et seq.) for *Sexual Harassment of Employee by Customer, Client, or Patron*, 163 A.L.R. FED. 445 (2000).

5. *See id.*; *see also* EEOC Guidelines, 29 C.F.R. § 1604.11(e) (2008) ("An employer may also be responsible for the acts of non-employees . . . where the employer . . . knows or should have known of the conduct and fails to take immediate and appropriate corrective action.").

6. 491 F. Supp. 2d 467 (D. Del. 2007).

7. *Id.* at 476-78.

8. *Id.* at 471-73.

9. *Id.* at 471-72.

the incidents occurred.¹⁰

The court in *Mongelli* held that, although schools can be liable for a HWE sexual harassment claim created by the conduct of a special education student, *Mongelli*'s claim failed because the student's conduct was not "severe or pervasive" enough to meet the requirements for a Title VII claim.¹¹

The *Mongelli* decision has important implications for the thousands of special education teachers across the nation. Over 600,000 children between the ages of six and twenty-one classified as mentally retarded were educated by the U.S. Department of Education under the Individuals with Disabilities Education Act during the 2000-01 school year.¹² The number soars to a staggering 5,775,000 children when other disabilities are also considered.¹³ If schools are not held liable for HWEs created by the acts of special education students, the thousands of teachers responsible for educating these students essentially forfeit a portion of their right to be free from sexual harassment in the workplace.

This Note explores the parameters of school liability for HWE sexual harassment claims brought by teachers. Part I addresses the background of Title VII sexual harassment claims. Part II takes an in-depth look at the factual background of the *Mongelli* case as well as the *Mongelli* court's holdings. Part III analyzes the *Mongelli* court's holdings. It argues that the *Mongelli* court's preliminary holdings are valid and that the grant of summary judgment is defensible in light of existing case law and the imprecise nature of the test courts must apply in Title VII HWE cases. Part IV discusses the future of Title VII sexual harassment claims brought by teachers who allege sexual harassment by students. This section suggests measures that schools should take to ensure that they are not liable for the harassing conduct of students and will conclude by discussing the appropriate analysis courts should employ when analyzing similar claims.

I. TITLE VII SEXUAL HARASSMENT BACKGROUND

"Congress enacted Title VII of the Civil Rights Act of 1964 to protect employees from discrimination in the workplace."¹⁴ Title VII makes it "an unlawful employment practice for an employer . . . 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."¹⁵ Although Title VII's language clearly prohibited sex discrimination, it did not "define sexual harassment as discrimination, nor did its legislative

10. *Id.* at 473.

11. *Id.* at 480.

12. TWENTY-FOURTH ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT 20 (2002), available at <http://www.ed.gov/about/reports/annual/osep/2002/section-ii.pdf>.

13. *Id.*

14. Jeffrey S. Lyons, *Be Prepared: Unsuspecting Employers Are Vulnerable for Title VII Sexual Harassment Environment Claims*, 37 U.S.F. L. REV. 467, 467 (2003) (citations omitted).

15. 42 U.S.C. § 2000e-2(a) (2006).

history offer guidance as to whether sexual harassment was a form of discrimination."¹⁶ As a result of this ambiguity, courts did not begin to "recognize sexual harassment as a type of sex discrimination prohibited by Title VII" until the late 1970s.¹⁷

"The first type of Title VII sexual harassment claims courts recognized" was *Quid pro quo* (QPQ) sexual harassment.¹⁸ QPQ sexual harassment occurs when an employer conditions "an employee's future employment status on their response to the sexual advances" of the employer.¹⁹ The most obvious example of QPQ sexual harassment is when a supervisor promises a subordinate employee a promotion in exchange for sexual activities or threatens the employee that refusing to engage in sexual activity will result in termination.²⁰

The second type of sexual harassment claim courts recognized was HWE sexual harassment.²¹ Hostile work environment was first recognized in the form of racial discrimination.²² In *Rogers v. EEOC*,²³ the Fifth Circuit "reasoned that Title VII prohibited discriminatory working environments that could destroy the emotional and psychological stability of minority employees; thus, statutory protection extended beyond economic or tangible discrimination."²⁴ Although *Rogers* did not apply to sexual discrimination,²⁵ after the *Rogers* decision the Equal Employment Opportunity Commission (EEOC) "issued guidelines declaring hostile work environment sexual harassment a violation of Title VII."²⁶ These guidelines "essentially created a new form of Title VII action"²⁷ now known as HWE sexual harassment.²⁸ Although the EEOC guidelines were

16. Sarah Pahnke Reisert, *Let's Talk about Sex Baby: Lyle v. Warner Brothers Television Productions and the California Court of Appeal's Creative Necessity Defense to Hostile Work Environment Sexual Harassment*, 15 AM. U.J. GENDER SOC. POL'Y & L. 111, 115 (2006) (citations omitted).

17. Kelly Ann Cahill, *Hooters: Should There Be an Assumption of Risk Defense to Some Hostile Work Environment Sexual Harassment Claims?*, 48 VAND. L. REV. 1107, 1110 (1995); see also *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972).

18. Cahill, *supra* note 17, at 1110.

19. *Id.*

20. See Robert J. Aalberts & Lorne H. Seidman, *Sexual Harassment of Employees by Non-employees: When Does the Employer Become Liable?*, 21 PEPP. L. REV. 447, 455 (1994).

21. See Lyons, *supra* note 14, at 470; Tetreault, *supra* note 4, § 2[a].

22. Reisert, *supra* note 16, at 115.

23. 454 F.2d 234 (5th Cir. 1971), superseded by statute on other grounds, 42 U.S.C. § 2000e-5 (2006), as recognized in *EEOC v. Shell Oil Co.*, 466 U.S. 54, 63 (1984).

24. Reisert, *supra* note 16, at 115.

25. *Id.*

26. *Id.* (citing EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. §§ 1604.11(a)-(f) (2008)). The EEOC guidelines, which were issued in 1980, state, in pertinent part, that conduct which has "the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment," is a violation of Title VII.

27. Lyons, *supra* note 14, at 470.

28. *Id.*

adopted in 1980, it was not until 1986 that the Supreme Court recognized HWE sexual harassment.²⁹

A. *The Supreme Court Recognizes, Defines, and Refines HWE Claims*

In four landmark decisions, the United States Supreme Court established a framework for HWE sexual harassment cases.³⁰

1. *Meritor Savings Bank, F.S.B. v. Vinson*.³¹—The Supreme Court first recognized a Title VII HWE sexual harassment claim in *Meritor Savings Bank, F.S.B. v. Vinson*. In *Meritor*, a female bank teller alleged that throughout her four-year employment at the defendant bank her supervisor fondled her, repeatedly demanded sex from her (to which she consented on multiple occasions out of “fear of losing her job”),³² and raped her on several occasions.³³ The bank argued that the plaintiff did not have an actionable claim because Title VII required a tangible loss of an economic character, and did not protect “purely psychological aspects of the workplace environment.”³⁴ The Court rejected this argument.³⁵ Justice Rehnquist, writing for the Court, opined that “Title VII is not limited to ‘economic’ or ‘tangible’ discrimination. The phrase ‘terms, conditions, or privileges of employment’ evinces a congressional intent ‘to strike at the entire spectrum of disparate treatment of men and women’ in employment.”³⁶ The Court then acknowledged that the EEOC guidelines allowed HWE claims and also extended the reasoning from *Rogers* to the sexual context of *Meritor*’s case.³⁷ The Court concluded by stating that, “a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment.”³⁸

Although *Meritor* was a victory for victims of workplace sexual harassment in that the Court officially recognized HWE claims, the Court also placed a very significant limitation on these claims by requiring the harassment to be “sufficiently *severe or pervasive* ‘to alter the conditions of [the victim’s] employment and create an abusive working environment.’”³⁹ The “severe or pervasive” requirement is a difficult one to satisfy; often, it is the hurdle

29. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 73 (1986).

30. An affirmative defense to HWE sexual harassment claims is actually set forth in the sister cases of *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

31. 477 U.S. 57 (1986).

32. *Id.* at 60.

33. *Id.*

34. *Id.* at 64 (quoting Brief of Petitioner at 30-31, 34, *Meritor Sav. Bank, FSB v. Vinson*, No. 84-1979 (U.S. Dec. 11, 1985)).

35. *Id.*

36. *Id.* (citations omitted).

37. *Id.* at 65-66.

38. *Id.* at 66.

39. *Id.* at 67 (quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)) (emphasis added).

plaintiffs cannot overcome when trying to defeat a motion for summary judgment.⁴⁰ Although the *Meritor* Court required that harassment be severe or pervasive, “the opinion fell short of providing any clear guidance as to what would be considered severe or pervasive enough to create such an environment.”⁴¹ For example, the Court did not address whether the conduct must be severe enough to cause the plaintiff psychological injuries. The Court also failed to specify whether the environment must be hostile according to a reasonable person standard or simply according to the plaintiff’s subjective view of the environment. The Court, however, answered these questions in the following cases.

2. *Harris v. Forklift Systems, Inc.*⁴²—In *Harris*, a female manager for an equipment rental company alleged that the company’s male president regularly insulted her due to her gender⁴³ and made sexual innuendos about her clothing.⁴⁴ After *Harris* complained about the president’s conduct, the president promised the conduct would stop.⁴⁵ Instead, *Harris* was compelled to quit when the president accused her, in front of her coworkers, of promising to have sex with a customer.⁴⁶ The district court ruled for the defendants because the president’s comments were not severe enough to interfere with the work performance of “[a] reasonable woman manager under like circumstances”⁴⁷ and *Harris* herself was not “so offended that she suffered injury.”⁴⁸

After the Sixth Circuit affirmed,⁴⁹ the Supreme Court granted certiorari to resolve a circuit split about whether, in HWE sexual harassment claims, the harassing conduct “must ‘seriously affect an employee’s psychological well-being’ or lead the plaintiff to ‘suffer injury.’”⁵⁰ As one commentator noted, the “facts of *Harris* placed the issue squarely before the Court to determine how the

40. See e.g., *Van Horn v. Specialized Support Servs., Inc.*, 241 F. Supp. 2d 994, 1008-09 (S.D. Iowa 2003) (severe or pervasive element not met where a mentally impaired patient touched the plaintiff’s breasts on two occasions, pinched her inner thigh on another, and made sexually suggestive comments).

41. Lyons, *supra* note 14, at 471-72.

42. 510 U.S. 17 (1993).

43. *Id.* at 19. *Harris* alleged that the president made statements such as: “You’re a woman, what do you know,” “We need a man as the rental manager,” and at least once referred to her as a “dumb ass woman.” *Id.* It is interesting to note that this factual scenario would never, by today’s standards, create a HWE. However, the Court granted certiorari because it wanted to resolve a circuit split. *Id.* at 20.

44. *Id.* at 19.

45. *Id.*

46. *Id.*

47. *Id.* at 20 (quoting *Harris v. Forklift Sys., Inc.*, No. 3-89-0557, 1991 WL 487444, at *7 (M.D. Tenn. Feb. 4, 1991)).

48. *Id.*

49. *Harris v. Forklift Sys., Inc.*, 976 F.2d 733 (6th Cir. 1992).

50. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 20 (1993) (internal punctuation omitted).

‘severe and pervasive’ analysis should be applied.”⁵¹

In resolving the circuit split, the *Harris* Court held that harassing conduct in a HWE claim does *not* have to cause the plaintiff psychological injury.⁵² More importantly, the Court added the requirement that the environment created by the conduct must be perceived, both objectively and subjectively, as hostile or abusive.⁵³ The Court stated:

Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII’s purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim’s employment, and there is no Title VII violation.⁵⁴

Thus, under this requirement, the plaintiff herself⁵⁵ must actually perceive the environment as abusive and the plaintiff must show that a reasonable person would also find the environment hostile or abusive.⁵⁶

After acknowledging that the objective and subjective test was not, and could not be, “mathematically precise,”⁵⁷ the *Harris* Court stated that when determining whether an environment is hostile, courts must look *at all the circumstances*.⁵⁸ The Court went on to give examples of factors that the lower courts should consider, namely “the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.”⁵⁹

These four factors—frequency, severity, physical threats versus offensive

51. Lyons, *supra* note 14, at 472.

52. *Harris*, 510 U.S. at 22.

53. *Id.* at 21-22.

54. *Id.*

55. Although the victim of sexual harassment is typically female, the subjective and objective test applies to both males and females. See *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 78 (1998) (“Title VII’s prohibition of discrimination . . . protects men as well as women.”) (citing *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 682 (1983)).

56. See *Crist v. Focus Homes, Inc.*, 122 F.3d 1107, 1111 (8th Cir. 1997) (“[C]onduct must be sufficiently severe or pervasive to create an environment that a reasonable person would find hostile or abusive.”).

57. *Harris*, 510 U.S. at 22. Interestingly, Justice Scalia filed a concurring opinion in which he complained that the standard adopted by the majority was unclear and gave little guidance to juries; he was, however, forced to join the majority because he could not find a valid alternative “to the course the Court today has taken.” *Id.* at 24 (Scalia, J., concurring).

58. *Id.* at 23 (emphasis added). This approach is known as the “totality of the circumstances” approach. This name comes from the EEOC Guidelines, which state: “In determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred.” 29 C.F.R. § 1604.11(b) (2008).

59. *Harris*, 510 U.S. at 23.

utterances, and unreasonable interference with work performance—although not exhaustive, comprise the majority of the analysis that courts consider when determining whether the severe or pervasive threshold has been met.⁶⁰ The Court further refined the totality of the circumstances test in *Oncale v. Sundowner Offshore Services, Inc.*⁶¹

3. *Oncale v. Sundowner Offshore Services, Inc.*—In *Oncale*, the plaintiff, a homosexual male, alleged that he was harassed by his male coworkers.⁶² The lower courts ruled that *Oncale* did not have an actionable Title VII claim because his alleged harassers were also male.⁶³ Like in *Harris*, the Court granted certiorari to resolve a split among the circuit courts.⁶⁴ The *Oncale* Court held that plaintiffs could bring HWE sexual harassment claims based on harassing conduct from coworkers of the same sex.⁶⁵ Writing for a unanimous Court, Justice Scalia was careful to emphasize that this holding did not expand Title VII into a “general civility code.”⁶⁶ The Court insisted that it avoided such a result because of the crucial importance the Court has always given to the *Harris* requirement that the environment be objectively hostile.⁶⁷ The *Oncale* Court continued, further defining *Harris*'s objective severity of harassment requirement:

We have emphasized, moreover, that the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering “all the circumstances.” In same-sex (as in all) harassment cases, that inquiry requires careful consideration of the *social context* in which particular behavior occurs and is experienced by its target. . . . The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectation, and relationships which are not fully captured by a simple

60. See *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 270-71 (2001) (using only the *Harris* factors); *Lockard v. Pizza Hut, Inc.*, 162 F.3d 1062, 1072 (10th Cir. 1998) (applying the four factors but noting that they were not exhaustive); *Crist v. Focus Homes, Inc.*, 122 F.3d 1107, 1111 (8th Cir. 1997) (considering the *Harris* factors and the plaintiffs' expectations given their choice of employment); *Van Horn v. Specialized Support Servs., Inc.*, 241 F. Supp. 2d 994, 1008 (S.D. Iowa 2003) (relying on the *Harris* factors).

61. 523 U.S. 75 (1998).

62. *Id.* at 77. Besides being subjected to regular verbal abuse, *Oncale* was physically assaulted by two coworkers, one of whom threatened to rape him. *Id.*

63. *Id.*

64. See *id.* at 79 (noting that “state and federal courts have taken a bewildering variety of stances” on the issue of same sex HWE sexual harassment claims).

65. *Id.*

66. *Id.* at 81.

67. *Id.* The Court viewed the important emphasis it gives to the objectively hostile requirement as “sufficient to ensure that courts and juries do not mistake ordinary socializing in the workplace—such as male-on-male horseplay or intersexual flirtation—for discriminatory ‘conditions of employment.’” *Id.*

recitation of the words used or the physical acts performed.⁶⁸

Two very important conclusions necessarily result from the Court's statement. First, the objective hostility standard used in HWE claims looks at the reasonable person *in the plaintiff's position*.⁶⁹ Thus, if a female construction worker brings an HWE sexual harassment claim, a court must determine whether the alleged conduct would be sufficiently hostile to the reasonable female construction worker, who will almost certainly differ from the reasonable female librarian.⁷⁰ Second, courts must look at the social context surrounding alleged events.⁷¹ Courts must examine the work environment in which conduct occurs. Returning to the construction example, off-color jokes and vulgar language might be the norm for a construction site,⁷² but these activities would probably never be tolerated, let alone be considered normal, in a library.

4. *Ellerth and Faragher*.—In the companion cases of *Burlington Industries, Inc. v. Ellerth*⁷³ and *Faragher v. City of Boca Raton*,⁷⁴ the Supreme Court established an affirmative defense for employers in Title VII HWE claims. Before recognizing the defense, the Court established that in Title VII claims, agency principles apply. Employers may be held vicariously liable for the discriminatory conduct of their supervisors.⁷⁵ In order to “square” this holding with “*Meritor*’s holding that an employer is not ‘automatically’ liable”⁷⁶ for the discriminatory acts of its supervisors, the Court formulated an affirmative defense that allowed employers to avoid liability in certain situations.⁷⁷ To invoke the defense, an employer must show, by a preponderance of the evidence, that the following two elements are met: “(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

68. *Id.* at 81-82 (quoting *Harris v. Forklift Sys. Inc.*, 510 U.S. 17, 23 (1993)) (emphasis added).

69. *Id.*

70. See Ann C. McGinley, *Harassment of Sex(y) Workers: Applying Title VII to Sexualized Industries*, 18 YALE J.L. & FEMINISM 65, 101 (2006) (comparing the severe and pervasive requirement for blackjack dealers, exotic dancers, and legal prostitutes).

71. *Oncale*, 523 U.S. at 81.

72. See *Gross v. Burggraf Constr. Co.*, 53 F.3d 1531, 1537 (10th Cir. 1995). In *Gross*, a female truck driver for a construction company alleged that her supervisor's repeated use of vulgarity and profanity created a HWE. *Id.* at 1536. The *Gross* court recognized that in the “real world of construction work, profanity and vulgarity are not perceived as hostile or abusive. Indelicate forms of expression are accepted or endured as normal human behavior.” *Id.* at 1537.

73. 524 U.S. 742 (1998).

74. 524 U.S. 775 (1998).

75. See *id.* at 807; see also *Ellerth*, 524 U.S. at 765.

76. *Faragher*, 524 U.S. at 804.

77. *Id.* at 807.

otherwise.”⁷⁸

To meet the first prong of the test, the employer must show that it “took reasonable measures to educate its employees on proper conduct (prevention) and to monitor its workplace to address complaints by its employees (correction).”⁷⁹ The Court did not give employers specific direction regarding prong two, but the Court stated that an employer would normally satisfy the second element by showing that an employee failed to use “any complaint procedure provided by the employer.”⁸⁰

B. *The Proper Test Today for HWE Claims*

These landmark cases make it possible to formulate a comprehensive test for Title VII sexual harassment claims. Although there are several different analyses used by the U.S. circuit courts,⁸¹ most courts (including five circuit courts)⁸² use a test similar to the one established in *Henson v. City of Dundee*.⁸³ The *Henson* elements require the plaintiff to establish that

- (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 employee’s sex . . . ; (4) the harassment complained of affected a term, condition, or privilege of employment; and (5) existence of employer liability.⁸⁴

The fourth element incorporates the objective and subjective requirement from *Harris*. In other words, the fourth element requires that the harassment be sufficiently severe or pervasive, both objectively and subjectively, to have altered a term, condition, or privilege of employment.⁸⁵ Since *Oncale*, it is also necessary to examine the social context of the workplace when determining whether the objective aspect of the severe and pervasive element is met.⁸⁶ Additionally, the fifth element incorporates the affirmative defense set forth in *Faragher*⁸⁷ and *Ellerth*.⁸⁸

Today, the proper test requires a court to determine whether, under the totality of the circumstances (including the social context), a plaintiff has demonstrated that she suffered unwelcome harassment that was “sufficiently

78. *Id.*

79. Lyons, *supra* note 14, at 476.

80. *Ellerth*, 524 U.S. at 765.

81. See Debra S. Katz, *Harassment in the Workplace*, SM097 A.L.I.-A.B.A. 121, 134-36 (2007) (describing the different tests used by the circuit courts).

82. Specifically, the Third, Fourth, Sixth, Ninth, and Eleventh Circuits. *Id.* at 133.

83. 682 F.2d 897 (11th Cir. 1982).

84. Katz, *supra* note 81, at 133.

85. See McGinley, *supra* note 70, at 101.

86. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998); accord McGinley, *supra* note 70, at 101.

87. *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998).

88. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998).

severe or pervasive by objective and subjective measures to alter the terms or conditions of employment.”⁸⁹

C. Employer Liability for Acts of Non-employees

Each of the preceding Supreme Court cases dealt with discriminatory conduct by supervisors or co-workers. The Supreme Court has never explicitly held that employers are liable for HWEs created by non-employees.⁹⁰ However, the EEOC guidelines state that “[a]n employer may . . . be responsible for the acts of non-employees . . . where the employer . . . knows or should have known of the conduct and fails to take immediate and appropriate corrective action.”⁹¹ The non-employees responsible for creating a HWE are often customers or clients,⁹² but have also been patients⁹³ or students.⁹⁴ In the overwhelming majority of jurisdictions, courts have adhered to the EEOC guidelines⁹⁵ and have allowed HWE sexual harassment claims based on the conduct of non-employees.⁹⁶

Because the Supreme Court has not officially recognized HWE claims based on the acts of non-employees, the Court has also not addressed an affirmative defense to such claims.⁹⁷ The affirmative defense established in *Faragher* and *Ellerth* only applied to HWEs created by the conduct of the plaintiff’s

89. McGinley, *supra* note 70, at 101.

90. *See generally* Tetreault, *supra* note 4. Tetreault’s annotation, which lists all of the “federal cases which considered whether an employer may be held liable for the sexually harassing acts of nonemployees,” does not list any Supreme Court cases that address the issue. Additionally, not a single case that addresses employer liability for the acts of non-employees cites to authority from the Supreme Court.

91. 29 C.F.R. § 1604.11(e) (2008).

92. *See, e.g.*, *Lockard v. Pizza Hut, Inc.*, 162 F.3d 1062, 1067 (10th Cir. 1998); *Oliver v. Sheraton Tunica Corp.*, No. CIV. A. 398CV203-D-A, 2000 WL 303444, at *1 (N.D. Miss. Mar. 8, 2000).

93. *See, e.g.*, *Crist v. Focus Homes, Inc.*, 122 F.3d 1107, 1108 (8th Cir. 1997).

94. *See, e.g.*, *Peries v. N.Y. City Bd. of Educ.*, No. 97 CV 7109 (ARR), 2001 WL 1328921, at *1 (E.D.N.Y. Aug. 6, 2001).

95. *See Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986). The EEOC guidelines, “while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.” *Id.* at 65 (quoting *General Electric Co. v. Gilbert*, 429 U.S. 125, 141-42 (1976)).

96. *See generally* Tetreault, *supra* note 4; *see also* *Mongelli v. Red Clay Consol. Sch. Dist. Bd. of Educ.*, 491 F. Supp. 2d 467, 476-77 (D. Del. 2007) (noting that four circuit courts have followed the EEOC guidelines and citing approximately twenty decisions holding that employers face liability for the harassing conduct of non-employees). *But cf.* *Ulmer v. Bob Watson Chevrolet, Inc.*, No. 97 C 7460, 1999 WL 1101332 (N.D. Ill. Nov. 29, 1999) (denying a HWE sexual harassment claim because the alleged harasser was not employed by the defendant).

97. The Supreme Court does not need to determine whether an affirmative defense to a claim exists when it has not recognized the claim itself.

supervisor(s).⁹⁸ It would, however, “appear reasonable . . . to expect that an employer’s affirmative defense in a nonemployee situation might be similarly altered.”⁹⁹ Once again, most courts follow the EEOC Guidelines and impose liability only if the employer “knows or should have known of the conduct and fails to take immediate and appropriate corrective action.”¹⁰⁰

II. *MONGELLI*: THE DISTRICT COURT DECISION

In January 2004, Ms. Mongelli signed a six-month employment contract for a teaching position with the Red Clay Consolidated School District.¹⁰¹ Even though she had no experience teaching special education students, Mongelli was “assigned to John Dickinson High School . . . as a teacher for ninth grade special education students.”¹⁰² “Almost immediately after she began teaching . . . [she] began having problems with one of her students, JW, who was fourteen years old.”¹⁰³ JW suffered from educable mental retardation as well as psychiatric problems that were not associated with the mental retardation.¹⁰⁴ Over the next two months, JW consistently engaged in activity that Ms. Mongelli found offensive.¹⁰⁵ Mongelli alleged that she repeatedly complained of JW’s conduct both by filing written reports with the principal’s office and by making verbal complaints to the assistant principal.¹⁰⁶ The written reports (called SBRs) filed by Ms. Mongelli detailed the following conduct:

1) *April 26, 2004*: “JW continues to use very inappropriate language. . . . As [Mongelli] leaned over to help a student who was seated, JW got out of his seat and came up behind her. He grabbed [Mongelli] forcefully and proceeded to ‘hump’ her.”

2) *May 3, 2004*: “When [Mongelli] was teaching the class, JW looked directly at her breasts and stated: ‘Your [nipples] are hard.’” At the end of the period, [JW] grabbed [Mongelli’s] arm forcefully and pulled her close to his body. He stated, ‘You’re a b[it]ch, but I mean that in a good way.’”

98. *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998).

99. *Tetreault*, *supra* note 4, § 2[b].

100. 29 C.F.R. § 1604.11(e) (2008).

101. *Mongelli*, 491 F. Supp. 2d at 471.

102. *Id.*

103. *Id.*

104. Telephone Interview with Joseph Bernstein, Attorney for Ms. Mongelli (Jan. 11, 2008).

105. *Mongelli*, 491 F. Supp. 2d at 472-73.

106. *Id.* At the outset, it is important to note that, because the court was ruling on the defendant’s motion for summary judgment, it was required to “view the underlying facts and all reasonable inferences therefrom in the light most favorable to the party opposing the motion.” *Id.* at 475 (quoting *Pa. Coal Ass’n v. Babbit*, 63 F.3d 231, 236 (3d Cir. 1995)). Therefore, in this case, the court had to assume that all of Ms. Mongelli’s allegations were true.

3) *May 4, 2004*: “At the end of the period, [JW] sat on top of the desk and stared directly at [Mongelli]. [JW] opened his legs wide and pretended to be having sex. He moved the lower portion of his body up and down quite rapidly. He said: ‘Oh, oh, aah.’ He made ‘sucking’ noises with his mouth and pretended he was breathing heavily.”

4) *May 5, 2004*: “As [Mongelli] walked into the classroom . . . , [JW] grabbed her arm very forcefully and refused to let go. He said, ‘Let’s do the tango.’ He pulled [Mongelli] close to his body and moved [her] forward. When [she] told him to let go of her arm, he said: ‘[You’re] a b[it]ch. Chill.’ Then, he stated: ‘Do you have sex?’ and ‘Who do you have sex with?’”

5) *May 5, 2004*: “When [Mongelli] told [JW] to sit down, he threatened: ‘My mom is going to take care of you. She’s going to rock you.’ [Mongelli] wrote out [a referral to the time out room] and gave it to JW. He yelled, ‘I ain’t f[uc]king going anywhere. You’re a f[uc]king bitch.’ He tore the form in half. [Mongelli] called the main office for an administrator. [Principal Chad] Carmack . . . came to the classroom and removed [JW]. Mr. Carmack sent [JW] back to [Mongelli’s] classroom before the end of the period.”

6) *May 6, 2004*: “[JW] got out of his seat, came up to [Mongelli’s] desk, and stared directly at [her]. Then, [JW] sang a rap song stating, ‘How’s your p[uss]y?’ He sang the [word] ‘p[uss]y’ several times during his rap song. When [Mongelli] told him to go to [the time out room], he continued singing even louder. After [JW] sang, he made ‘sucking’ noses with his mouth.”

7) *May 7, 2004*: “[JW] got out of his seat and walked over to [Mongelli]. Then, [he] sang a rap song stating, ‘Ms. Mongelli gives h[ea]d.’ He sang this four times. As he was singing, [JW] pointed to his p[eni]s three times.”¹⁰⁷

These allegations constitute the only conduct the court considered in Mongelli’s claim.¹⁰⁸

Mongelli alleged that she placed each of the SBRs in the principal’s mailbox “on the day it was written.”¹⁰⁹ The school, however, did not take any disciplinary action in response to the reports until after Mongelli filed the last report on May

107. *Id.* at 472-73 (internal footnotes omitted).

108. The court failed to include four SBRs that concerned JW’s conduct prior to April 26, 2004. The prior incidents consisted of vulgar language similar to that contained in the complaints the court did consider and did not include any physically threatening act. First Amended Complaint ¶ 15, *Mongelli*, 491 F. Supp. 2d 467 (D. Del. 2007) (No. 05-359 SLR).

109. *Mongelli*, 491 F. Supp. 2d at 473 n.10.

7.¹¹⁰ On May 8, 2004, JW was “permanently removed from [Mongelli’s] classroom and suspended from school for five days.”¹¹¹ After a committee evaluated JW’s conduct and determined that “JW’s behavior was a manifestation of his disability,”¹¹² the assistant principal and JW’s mother “mutually agreed that JW would remain home for the remainder of the school year.”¹¹³

On May 13, 2004, Mongelli agreed to a one year teaching contract with the school.¹¹⁴ Approximately one month later, as a result of the incidents Mongelli alleged, the Delaware State Police criminally charged JW with “Unlawful Sexual Contact in the Third Degree, Sexual Harassment, and two counts of Offensive Touching (all of which are misdemeanors).”¹¹⁵ JW eventually entered into a plea bargain and pled guilty to “two counts of Offensive Touching and one count of Sexual Harassment.”¹¹⁶

Approximately one month after JW was criminally charged, Mongelli was fired, allegedly for complications with her teaching license.¹¹⁷ She then brought, inter alia, a Title VII HWE sexual harassment claim against the school district and the board of education.¹¹⁸

Ultimately, the district court denied Mongelli’s claim and granted the defendant school board’s motion for summary judgment.¹¹⁹ However, before reaching its decision, the *Mongelli* court had to make three preliminary determinations.

A. *The Mongelli Court’s Preliminary Holdings*

First, the *Mongelli* court had to determine whether employers could be held liable for a HWE created by the conduct of a non-employee.¹²⁰ The court recognized that the “emerging trend” in federal courts was to allow such claims under Title VII.¹²¹ Because the court could find “no reason to deviate” from the trend, it held that “employers may, under certain circumstances, be held liable for

110. *Id.* at 474.

111. *Id.*

112. *Id.* (internal brackets and emphasis omitted).

113. *Id.* (citation omitted).

114. *Id.*

115. *Id.*

116. Plaintiff’s Answering Brief in Opposition to Defendant’s Motion for Summary Judgment at 6, *Mongelli*, 491 F. Supp. 2d. 467 (D. Del. 2007) (No. 05-359 SLR).

117. *Mongelli*, 491 F. Supp. 2d at 474.

118. *Id.*

119. *Id.* at 483.

120. *Id.* at 475-77. The *Mongelli* court actually framed the “first issue” as whether “a teacher . . . [could] sue the school district for which she works” based on the harassing conduct “allegedly committed by one of the teacher’s students.” *Id.* at 475. Answering this question required the court to first answer the question concerning employer liability for the acts of non-employees. *Id.* at 476-77.

121. *Id.* at 476. The court pointed out that the First, Eighth, Ninth, and Tenth U.S. Circuit Courts of Appeal’s decisional law had followed the EEOC guidelines, which allow these claims.

sexual harassment suffered by their employees at the hands of non-employees.”¹²²

Second, the *Mongelli* court had to determine whether schools could be liable for a hostile work environment created by the harassing conduct of students against their teachers.¹²³ The court stated:

[S]uch a scenario involves competing public interests, namely, a school’s duty to protect teachers from abusive students versus its obligation to teach those students how to conduct themselves in a socially acceptable way. Unlike cases involving abusive co-workers or customers, a school district cannot easily “terminate” a student or permanently ban him from the premises; instead, the district must attempt to deal with the abusive student using the limited tools and resources at its disposal.¹²⁴

Despite recognizing the difference between student-on-teacher harassment and non-employee HWE sexual harassment claims involving customers, the *Mongelli* court held that, generally, schools can be liable for HWE “claims under Title VII . . . [if the schools] fail to address teachers’ claims of harassment by students.”¹²⁵

Finally, the court examined whether a teacher could bring a Title VII HWE claim “when the abuse is perpetrated by a special education student.”¹²⁶ The court first discussed its concerns with allowing such a claim, noting that special education students are unique in that “school districts are obligated under federal law to teach [them]”¹²⁷ and they “are prone to disruptive behavior by virtue of their disabilities.”¹²⁸ However, the court reasoned that prohibiting such claims would essentially “‘immunize’ schools from liability”¹²⁹ whenever a special education student harassed a teacher, regardless of the circumstances or the severity of the harassment.¹³⁰ Further, “[s]uch a blanket prohibition would do a disservice to teachers, who deserve a working environment free from abuse, and would provide schools with no incentive to remedy incidents of harassment in their special education classrooms.”¹³¹ Based on this reasoning, the *Mongelli* court determined that “while the requisite threshold of abuse will necessarily be higher than with students lacking developmental disabilities . . . harassment of teachers by special education students can constitute a hostile work environment for Title VII purposes.”¹³² In sum, the court held that *Mongelli* could bring a Title VII HWE sexual harassment claim against the school based on JW’s conduct.

122. *Id.* at 477.

123. *Id.*

124. *Id.*

125. *Id.* at 478.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

B. *The Mongelli Court Denies Mongelli's Claim*

After clearing the path for Mongelli to bring her Title VII HWE claim, the court immediately proceeded to shoot it down. According to the court, Mongelli's claim failed for two reasons.¹³³

First, the "severity of the conduct and the context in which it took place [were] not sufficient to satisfy Title VII's 'severe or pervasive' requirement."¹³⁴ In making this determination, the court should have considered "'all the relevant circumstances surrounding the discriminatory conduct."¹³⁵ However, the court only considered the "short period of time" over which the incidents occurred and that the school eventually removed JW from the plaintiff's classroom.¹³⁶

Second, the court found that "[e]ven if JW's conduct were deemed to satisfy the 'severe or pervasive' requirement . . . [Mongelli] has failed to establish that a reasonable person in her situation would have been detrimentally affected by the objectionable conduct."¹³⁷ According to the court, the record was insufficient to show where "the tolerance threshold of a reasonable special education teacher lies."¹³⁸ In other words, the record failed to show what conduct a reasonable special education teacher would find hostile enough to alter the terms or conditions of employment.¹³⁹

Based on these findings, the *Mongelli* court granted the School Board's motion for summary judgment.¹⁴⁰

III. ANALYSIS OF THE *MONGELLI* DECISION

The *Mongelli* court was correct in each of its three preliminary holdings. In addition, the court was probably correct in its decision to grant summary judgment for the defendant school board.¹⁴¹

A. *The Mongelli Court's Preliminary Holdings Are Valid*

The *Mongelli* court's preliminary holdings are valid because they are consistent with existing case law.

1. *Employers May Be Held Liable for HWE's Created by the Conduct of Non-employees.*—As discussed in Part I.C, the overwhelming majority of courts

133. *Id.* at 480-81.

134. *Id.* at 480.

135. *Id.* (quoting *Arasteh v. MBNA Am. Bank, N.A.*, 146 F. Supp. 2d 476, 494-95 (D. Del. 2001)).

136. *Id.*

137. *Id.*

138. *Id.* at 481.

139. *Id.*

140. *Id.*

141. This will, unfortunately, never be decided by an appellate court. Although Mongelli filed an appeal, the case was later settled in mediation for an undisclosed amount. Telephone Interview with Joseph Bernstein, Attorney for Ms. Mongelli (Jan. 11, 2008).

have held that, in certain situations, Title VII imposes liability upon employers for the harassing acts of non-employees.¹⁴² The court in *Mongelli* decided that there was “no reason to deviate from this trend.”¹⁴³ Even though the Supreme Court has not explicitly held that Title VII imposes liability in these situations,¹⁴⁴ in the absence of the Court’s direction to hold otherwise, the *Mongelli* court was correct in following the current weight of authority.

2. *Title VII Imposes Liability on Schools for HWEs Created by Student-on-Teacher Harassment.*—Few courts have confronted the issue of school liability under Title VII for student-on-teacher harassment.¹⁴⁵ The Supreme Court has yet to address the issue¹⁴⁶ and scholarly commentary is noticeably lacking.¹⁴⁷ However, the few courts that have addressed the issue have unanimously found that Title VII imposes liability on schools for student-on-teacher harassment.¹⁴⁸

The court in *Plaza-Torres v. Rey*¹⁴⁹ recognized that the issue had never been expressly resolved,¹⁵⁰ but held that “student-on-teacher sexual harassment may be inferred from recent Title VII [and] Equal Protection . . . case law.”¹⁵¹ The *Rey* court relied on two equal protection cases, *Schroeder v. Hamilton School District*¹⁵² and *Lovell v. Comsewogue School District*,¹⁵³ and a Title VII case, *Peries v. New York City Board of Education*.¹⁵⁴

Both *Schroeder* and *Lovell* involved students harassing a teacher based on the teacher’s sexual orientation.¹⁵⁵ However, these claims were structured as Equal Protection claims because Title VII does not “provide for a private right of action based on sexual orientation discrimination.”¹⁵⁶ The courts in both *Schroeder* and *Lovell* held that plaintiffs could bring Equal Protection claims

142. See *supra* notes 92-96 and accompanying text.

143. *Mongelli*, 491 F. Supp. 2d at 477.

144. See *supra* note 90 and accompanying text.

145. See *Plaza-Torres v. Rey*, 376 F. Supp. 2d 171, 181 (D.P.R. 2005) (noting that only a “handful of cases” dealt with student-on-teacher harassment).

146. *Id.* at 180.

147. The research for this Note produced a good deal of scholarly work focusing on teacher-on-student harassment or student-on-student harassment, but none concerning student-on-teacher harassment.

148. See *Rey*, 376 F. Supp. 2d at 180; *Peries v. New York City Bd. of Educ.*, No. 97 CV 7109 (ARR), 2001 WL 1328921 (E.D.N.Y. Aug. 6, 2001); *accord Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946, 951 (7th Cir. 2002); *Lovell v. Comsewogue Sch. Dist.*, 214 F. Supp. 2d 319, 322 (E.D.N.Y. 2002).

149. 376 F. Supp. 2d 171 (D.P.R. 2005).

150. *Id.* at 180.

151. *Id.*

152. 282 F.3d 946 (7th Cir. 2002).

153. 214 F. Supp. 2d 319 (E.D.N.Y. 2002).

154. No. 97 CV 7109 (ARR), 2001 WL 1328921 (E.D.N.Y. Aug. 6, 2001).

155. In both cases, a teacher alleged that students repeatedly referred to the teacher using homophobic slurs. See *Schroeder*, 282 F.3d at 948-49; *Lovell* 214 F. Supp. 2d at 321.

156. *Schroeder*, 282 F.3d at 951.

based on student-on-teacher harassment.¹⁵⁷ The court in *Schroeder* also stated: “Were this a Title VII case, the defendants could be liable to [the plaintiff] if he demonstrated that they knew he was being harassed and failed to take reasonable measures to try to prevent it.”¹⁵⁸

Finally, the court in *Peries*, a Title VII case based on student-on-teacher racial harassment, determined that schools should be held to the same standard that employers are held to in cases involving the harassing conduct of non-employees.¹⁵⁹ Therefore, according to the *Peries* court, schools could be held liable for HWEs created by student conduct.¹⁶⁰

Although the *Rey* court recognized that these three cases were only persuasive authority, it concluded that “absent clear directive from the U.S. Supreme Court . . . we will not limit the reach of Title VII liability by closing the door on student-on-teacher harassment. After all, Title VII seeks to eliminate all forms of sex discrimination in all work environments.”¹⁶¹

The *Mongelli* court’s opinion is consistent with *Rey* and the cases on which the *Rey* court relied. Thus, the *Mongelli* court’s holding that Title VII imposes liability on schools for HWEs created by student-on-teacher harassment seems sound.

3. *Title VII Imposes Liability on Schools for HWEs Created by the Harassing Conduct of Special Education Students.*—Courts have consistently held that Title VII imposes liability for the harassing conduct of *mentally challenged* non-employees.¹⁶²

For example, in *Crist v. Focus Homes Inc.*,¹⁶³ three female plaintiffs¹⁶⁴ were employed by Focus Homes, an organization that ran homes for individuals with developmental disabilities.¹⁶⁵ Focus Homes opened a new facility and hired the plaintiffs for the positions of manager, assistant manager, and lead program

157. *Plaza-Torres v. Rey*, 376 F. Supp. 2d 171, 182 (D.P.R. 2005).

158. *Schroeder*, 282 F.3d at 951.

159. *Peries*, 2001 WL 1328921 at *6.

160. *Id.*

161. *Rey*, 376 F. Supp. 2d at 182.

162. *See Crist v. Focus Homes, Inc.*, 122 F.3d 1107, 1108 (8th Cir. 1997) (allowing Title VII claim based on conduct of severely impaired patient); *Van Horn v. Specialized Support Services, Inc.*, 241 F. Supp. 2d 994, 1012-13 (S.D. Iowa 2003) (finding actionable a claim based on conduct of patient with Down syndrome); *Peries*, 2001 WL 1328921, at *6-7 (allowing claim where special education students harassed teacher because of his ethnicity); *McGuire v. Virginia*, 988 F. Supp. 980, 988 (W.D. Va. 1997) (allowing claim where incompetent adult son of board member repeatedly harassed a secretary); *Salazar v. Diversified Paratransit, Inc.*, 11 Cal. Rptr. 3d 630, 637 (Ct. App. 2004) (allowing claim where developmentally disabled bus passenger repeatedly assaulted the bus driver).

163. 122 F.3d 1107 (8th Cir. 1997).

164. *Id.* at 1108. The individual plaintiffs were Crist, Miskowic, and Elbers.

165. *Id.*

staff.¹⁶⁶ Throughout a four month span, a severely impaired patient (J.L.)¹⁶⁷ repeatedly abused the plaintiffs, both physically and sexually.¹⁶⁸ For example, “over thirteen reports involved J.L.’s grabbing of the [plaintiffs’] breasts, buttocks, or genital areas.”¹⁶⁹ Other incidents included J.L. openly masturbating and exposing himself to the plaintiffs.¹⁷⁰

Despite these egregious incidents, the district court granted *the defendant’s* motion for summary judgment.¹⁷¹ The district court found that because of the patient’s severe impairments, “his conduct could not constitute sexual harassment.”¹⁷² Further, the district court determined that even if J.L.’s conduct did constitute sexual harassment, “Focus Homes could not be held responsible for his behavior because it could not control the behavior.”¹⁷³

The Eighth Circuit reversed because the district court wrongly focused on the patient’s intent.¹⁷⁴ The court stated that “the actor who engages in physical conduct need not have the intent to create an abusive working environment. Rather, the focus of sexual harassment cases is primarily on the effect of the conduct.”¹⁷⁵ Similarly, in the educational setting, courts should not focus on the ability of a special education student to form intent, but rather on the effect of the student’s conduct.

*Peries v. New York City Board of Education*¹⁷⁶ is the only case beside *Mongelli* that specifically addressed whether schools may be held liable when special education students harass a teacher. In *Peries*, a special education teacher alleged that throughout a five year span, special education students repeatedly directed racist remarks at him.¹⁷⁷ The court recognized that the case was unusual because the harassment came from students,¹⁷⁸ but determined that the school could be held liable.¹⁷⁹ The *Peries* court reached its conclusion by focusing on the control the school had over the students rather than on the students’ intent.¹⁸⁰

As with the first two preliminary holdings, the *Mongelli* court’s holding that

166. *Id.*

167. J.L. was only sixteen years old, but he was over six feet tall and weighed over two hundred pounds. *Id.* Despite his size, he only “functioned at the level of a two-to-five-year-old.” *Id.*

168. *Id.*

169. *Id.* at 1109.

170. *Id.*

171. *Id.* at 1110.

172. *Id.*

173. *Id.*

174. *Id.* at 1110-11.

175. *Id.* at 1111.

176. No. 97 CV 7109 (ARR), 2001 WL 1328921 (E.D.N.Y. Aug. 6, 2001).

177. The students regularly taunted Peries, calling him names such as “fucking Hindu” and “Indian Shit.” *Id.* at *1-2.

178. *Id.* at *5.

179. *Id.* at *6.

180. *Id.*

Title VII imposes liability on schools for the harassing conduct of special education students is correct because it is consistent with existing case law.

B. The Mongelli Court's Grant of Summary Judgment Was Probably Correct

Part I.B of this Note determined that the proper Title VII test was whether, under the totality of the circumstances, a plaintiff demonstrated that she suffered unwelcome harassment that was "sufficiently severe or pervasive by objective and subjective measures to alter"¹⁸¹ the terms, conditions, or privileges of employment, keeping in mind the social context of the workplace.¹⁸²

The *Mongelli* court determined that *Mongelli* did not meet the objective requirement because she "failed to establish that a reasonable person in her situation would have been detrimentally affected."¹⁸³ To analyze whether the *Mongelli* court correctly decided that the objective element was not met, this section describes a theoretical test that determines whether the terms or conditions of employment were altered.¹⁸⁴ It then examines existing case law to determine whether the *Mongelli* decision is consistent with decisions that have addressed similar issues.

1. The Terms and Conditions Approach.—In her article, *Harassment of Sex(y) Workers: Applying Title VII to Sexualized Industries*,¹⁸⁵ Ann McGinley noted that the Title VII test requires the trier of fact to first determine the terms, conditions, or privileges of employment.¹⁸⁶ McGinley formulated a three question test "[t]o determine whether particular behavior constitutes a term or condition of employment."¹⁸⁷ The three questions are:

- 1) whether the behavior in question is necessary to the particular job performed by the employee; 2) whether it relates to the essence of the business in which the job is performed; and 3) whether the employer communicated to the employee, either implicitly or explicitly, that this behavior constituted part of the employee's job.¹⁸⁸

181. McGinley, *supra* note 70, at 101.

182. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 82 (1998).

183. *Mongelli v. Red Clay Consol. Sch. Dist. Bd. of Educ.*, 491 F. Supp. 2d 467, 480 (D. Del. 2007).

184. McGinley, *supra* note 70, at 101.

185. *Id.*

186. *Id.* at 102. McGinley's article focuses on women in sexualized professions, including exotic dancers and prostitutes (in legal brothels). Despite the difference in professions, the Title VII analysis remains the same. McGinley is concerned with the range of conduct exotic dancers must endure. Similarly, this Note examines the range of conduct special education teachers must endure.

187. *Id.*

188. *Id.* The three questions in McGinley's test basically ask the same thing: should the employee have expected the harassing conduct? If a behavior is necessary to the particular job being performed, the employee may reasonably expect that she will be required to endure that behavior. Similarly, if the employer explicitly informs the employee that the behavior is part of the

If the answer to all three questions is yes, then the behavior at issue is a term or condition of employment.¹⁸⁹ If the court answers yes to all three questions, the behavior in question cannot create a HWE because, by definition, a behavior that is a term or condition of employment cannot alter a term or condition of employment.¹⁹⁰ After the three question test determines the terms or conditions of employment, the trier of fact must then decide whether these terms or conditions were altered by the harassing conduct.¹⁹¹

To illustrate, McGinley uses the example of exotic dancers. She explains that “a term or condition of employment for exotic dancers in gentlemen’s clubs may require tolerating hooting and staring.”¹⁹² Thus, for an exotic dancer, “being asked to endure hooting and staring would not alter the terms or conditions of employment, because tolerating this behavior is [already] a term or condition of employment.”¹⁹³

Applying this test to Mongelli’s case, the pertinent questions are whether enduring JW’s conduct was necessary to teaching a ninth grade special education class, and whether the school board informed Mongelli that enduring this sort of behavior was part of her job.

2. *Relevant Case Law.*—The *Mongelli* court held that the threshold of abuse in Title VII claims was necessarily higher for special education teachers.¹⁹⁴ Therefore, the most helpful cases to determine whether *Mongelli* was decided correctly examine workplace environments where employees might be expected to tolerate some severe conduct. These cases can be separated into two categories: (1) the employee was regularly exposed to crude situations in the workplace, or (2) the employee knew that the harasser suffered from a condition that made the harasser more prone to engage in harassing conduct.

a. *Employees regularly exposed to crude behavior in the workplace.*—In *Gross v. Burggraf Construction Co.*,¹⁹⁵ the plaintiff, a female truck driver for a construction company, complained that her supervisor referred to her using derogatory terms and constantly used profanity.¹⁹⁶ The court in *Gross* stated that the proper Title VII sexual harassment test is contextual and changes “depending

job, then the employee will expect the behavior.

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. *Mongelli v. Red Clay Consol. Sch. Dist. Bd. of Educ.*, 491 F. Supp. 2d 467, 478 (D. Del. 2007).

195. 53 F.3d 1531 (10th Cir. 1995).

196. *Id.* at 1536. *Gross* alleged that, on one occasion, her supervisor referred to her as a “cunt,” and that on another, he stated to a co-worker, “Mark, sometimes don’t you just want to smash a woman in the face?” *Id.* However, the court found that the evidence concerning the use of “cunt” was inadmissible. *Id.* at 1541.

upon the work environment”¹⁹⁷ in which the conduct occurred.¹⁹⁸ The court recognized that “[i]n the real world of construction work, profanity and vulgarity are not perceived as hostile or abusive.”¹⁹⁹ The court instead viewed profanity as a normal and accepted form of expression.²⁰⁰ According to the court, because construction workers must expect crude language in the workplace, the supervisor’s vulgar comments were insufficient to create a HWE.²⁰¹

In *Coolidge v. Consolidated City of Indianapolis*,²⁰² the court was confronted with a peculiar factual scenario. The plaintiff, Coolidge, worked in a forensic crime lab.²⁰³ Coolidge’s former supervisor, who had been fired for sexually harassing Coolidge,²⁰⁴ allegedly left two videotapes that contained pornography depicting necrophilia and other “disturbing images” where he knew Coolidge would find them.²⁰⁵ Coolidge found the tapes and became nauseous after viewing their content.²⁰⁶ The court held that the videotapes did not create a HWE because the “encounter was brief and not particularly severe.”²⁰⁷ In its analysis of the tapes’ severity, the court stated, “Crime Lab employees frequently worked with corpses, so pornography depicting necrophilia might not have the same shocking overtones there as it would in another setting.”²⁰⁸ Thus, although the facts were markedly different, in both *Coolidge* and *Gross*, the courts found that offensive conduct did not alter the terms or conditions of employment where the plaintiffs were regularly exposed to similar behavior in the course of their work.

Gross and *Coolidge* illustrate a deficiency in McGinley’s three question terms and conditions test.²⁰⁹ McGinley’s test fails to account for behaviors that, although not necessary for the particular job or business involved, are common in certain workplace environments. For example, in *Gross*, the court did not find that enduring profane language was necessary to performing the job of a truck driver.²¹⁰ The *Gross* court also did not find that profanity or vulgarity related to the essence of either construction work or truck driving.²¹¹ Rather, the *Gross* court merely found that profanity was a normal behavior in the construction

197. *Id.* at 1538.

198. This is consistent with *Oncale*, which requires courts to examine the social context in which conduct takes place. See *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 82 (1998).

199. *Gross*, 53 F.3d at 1537.

200. *Id.*

201. *Id.* at 1547.

202. 505 F.3d 731 (7th Cir. 2007).

203. *Id.* at 732-33.

204. *Id.* at 733.

205. *Id.*

206. *Id.*

207. *Id.* at 734.

208. *Id.*

209. See McGinley, *supra* note 70, at 102.

210. *Gross v. Burggraf Constr. Co.*, 53 F.3d 1531, 1537 (10th Cir. 1995).

211. *Id.* at 1537-38.

industry.²¹² Similarly, the *Coolidge* court did not find that enduring pornographic materials depicting necrophilia was necessary to a forensic scientist's job.²¹³ Thus, it would be appropriate to add an inquiry to McGinley's test: is a behavior so common in a workplace that exposure to such behavior would not sufficiently alter the terms or conditions of employment? If so, then exposure to such a behavior would not create a HWE.

b. Employee is aware that individual is prone to harassing conduct.—The cases in this category involve plaintiffs who were allegedly harassed by mentally or psychiatrically impaired individuals. In each case, the court determined that a Title VII claim could theoretically be brought. The courts, however, differed on whether summary judgment was appropriate.

(i) Plaintiff's claim survived summary judgment.—In *Peries v. New York City Board of Education*,²¹⁴ discussed in Part III.A.3., the court allowed a special education teacher's Title VII HWE racial harassment claim to survive summary judgment even though the alleged conduct came from special education students.²¹⁵ The court found that five years of "ongoing name-calling, mimicking, and other abuse" could have been "sufficiently severe or pervasive to alter the conditions" or terms of employment.²¹⁶

Similarly, in *Crist v. Focus Homes Inc.*,²¹⁷ also discussed in Part III.A.3, the court allowed the plaintiffs' claims even though the alleged harasser was severely mentally impaired.²¹⁸ Recall that in *Crist* the patient repeatedly grabbed the employees' genital areas and masturbated in front of the employees.²¹⁹ The court in *Crist* recognized that whether J.L.'s conduct was hostile or abusive "require[d] particularized consideration of the circumstances, including . . . the [plaintiffs'] expectations given their choice of employment."²²⁰ However, because of "factual disputes in the record,"²²¹ the court found that whether J.L.'s conduct was abusive, under the circumstances, was an issue for a jury after a full trial.²²²

Finally, in *Salazar v. Diversified Paratransit, Inc.*,²²³ the plaintiff, a bus driver for a company that transported developmentally disabled individuals, brought a Title VII HWE sexual harassment claim after a passenger with Down syndrome harassed her on several occasions and exposed his genitals to Salazar

212. *Id.*

213. *Coolidge*, 505 F.3d at 734.

214. *Peries v. N.Y. City Bd. of Educ.*, No. 97 CV 7109 (ARR), 2001 WL 1328921 (E.D.N.Y. Aug. 6, 2001).

215. *Id.* at *6-7.

216. *Id.* at *6.

217. 122 F.3d 1107 (8th Cir. 1997).

218. *Id.* at 1111.

219. *Id.* at 1109.

220. *Id.* at 1111.

221. *Id.*

222. *Id.*

223. 11 Cal. Rptr. 3d 630 (Ct. App. 2004).

twice.²²⁴ The second exposure incident culminated when the passenger attacked Salazar, attempting to touch “her all over and . . . put his hands under her shirt and shorts.”²²⁵ The *Salazar* court held that a jury should have determined the case.²²⁶

(ii) *Plaintiff's claim did not survive summary judgment.*—The court in *Van Horn v. Specialized Support Services, Inc.*²²⁷ found that the plaintiff's HWE claim failed because she could not establish the objective part of the severe or pervasive test.²²⁸ The plaintiff worked for a company that provided care for “mentally retarded and developmentally disabled clients.”²²⁹ She specifically worked with KB, a twenty-one year old male with Down syndrome.²³⁰ During the span of one month, KB touched Ms. Van Horn inappropriately on three separate occasions.²³¹ In the first incident, KB briefly touched Ms. Van Horn's breasts.²³² In the second, he pinched her inner thigh.²³³ In the third, KB pinched Ms. Van Horn's breast near the nipple.²³⁴ KB also made a few sexually suggestive comments, the worst of which was “Betty wears pantyhose, I could take them off her, oooh.”²³⁵ Despite the three physical incidents, the *Van Horn* court found that the plaintiff's HWE claim failed because she did not sufficiently establish the objective part of the severe or pervasive test.²³⁶ The court emphasized that the alleged conduct “took place over a period of less than one month,”²³⁷ most of the conduct was mere utterances and not physically threatening or humiliating,²³⁸ and of the three physical incidents only the last (breast pinching) was objectively severe.²³⁹

224. *Id.* at 633-34.

225. *Id.* at 634.

226. *Id.* at 637-38. In *Salazar*, the case was initially tried to a jury, but at the “conclusion of Salazar's case, the trial court granted nonsuit in favor of the defendants” on the grounds that employers were not liable for the acts of a client or customer. *Id.* at 634. The California Court of Appeals upheld the nonsuit. *Id.* However, the California legislature subsequently passed a bill to abrogate the appellate court's decision. *Id.* At the direction of the California Supreme Court, the court of appeals reexamined the case in light of the new legislation. *Id.* at 635. Upon reexamination, the *Salazar* court determined that the trial court's grant of nonsuit in favor of defendants was no longer proper. *Id.* at 637-38.

227. 241 F. Supp. 2d 994 (S.D. Iowa 2003).

228. *Id.* at 1008-09.

229. *Id.* at 998.

230. *Id.* at 999.

231. *Id.* at 1000-04.

232. *Id.* at 1000.

233. *Id.* at 1002.

234. *Id.* at 1004.

235. *Id.* at 1004.

236. *Id.* at 1008-09.

237. *Id.* at 1009.

238. *Id.* at 1008.

239. *Id.*

3. *The Mongelli Court's Grant of Summary Judgment Is Defensible.*—The *Mongelli* court's grant of summary judgment is defensible because it is consistent with the case law previously discussed.

The factual scenario in *Mongelli*²⁴⁰ most closely resembles the factual scenario from *Van Horn*.²⁴¹ In both cases, the alleged harassment took place in the span of less than one month, consisted mostly of offensive utterances, and did not consist of incidents that were overly physically threatening or humiliating. The *Van Horn* court found that the objective test was not met because the incidents occurred over a short period of time and only one incident was objectively hostile or abusive.²⁴² Similarly, in *Mongelli*, the incidents occurred over a short period of time and probably only one incident (JW humping Mongelli) was objectively severe.²⁴³

Although the majority of cases discussed *allowed* Title VII claims based on the conduct of mentally impaired non-employees, the cases that survived summary judgment involved harassment that was either inherently more severe²⁴⁴ than JW's conduct or much more frequent than JW's conduct.²⁴⁵ For example, the patient in *Crist* grabbed the plaintiffs' genital areas and repeatedly masturbated in front of the plaintiffs.²⁴⁶ The harassment in *Peries*, although not physically threatening, occurred repeatedly for five years.²⁴⁷ JW's conduct was not inherently severe and only occurred over a two week span.²⁴⁸ Thus, as with the patient's conduct in *Van Horn*, JW's conduct "did not rise to the level of the conduct"²⁴⁹ present in the cases that survived summary judgment.

This conclusion is somewhat dissatisfying because Title VII "seeks to eliminate all forms of sex discrimination in all work environments."²⁵⁰ Further, it would seem that conduct severe enough to incur criminal charges would be sufficiently severe for the purposes of Title VII. However, as the *Harris* court noted, the objectively severe and pervasive test is, "by its nature," mathematically imprecise.²⁵¹ JW's conduct was probably severe enough that another court may have ruled differently. However, given the social context of

240. *Mongelli v. Red Clay Consol. Sch. Dist. Bd. of Educ.*, 491 F. Supp. 2d 467 (D. Del. 2007).

241. *Van Horn v. Specialized Support Servs., Inc.*, 241 F. Supp. 2d 994 (S.D. Iowa 2003).

242. *Id.* at 1008.

243. *See Mongelli*, 491 F. Supp. 2d at 480. Furthermore, JW humping Mongelli is probably not as severe as KB pinching the plaintiff's breast in *Van Horn*.

244. *See, e.g., Crist v. Focus Homes, Inc.*, 122 F.3d 1107, 1108-10 (8th Cir. 1997).

245. *See, e.g., Peries v. N.Y. City Bd. of Educ.*, No. 97 CV 7109 (ARR), 2001 WL 1328921, at *6 (E.D.N.Y. Aug. 6, 2001).

246. *Crist*, 122 F.3d at 1109.

247. *Peries*, 2001 WL 1328921 at *1-2.

248. *Mongelli*, 491 F. Supp. 2d at 472-73.

249. *Van Horn v. Specialized Support Servs., Inc.*, 241 F. Supp. 2d 994, 1009 (S.D. Iowa 2003).

250. *Plaza-Torres v. Rey*, 376 F. Supp. 2d 171, 182 (D.P.R. 2005).

251. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993).

the special education classroom, and in light of the *Van Horn* decision, the *Mongelli* court's grant of summary judgment is defensible.

IV. SUGGESTIONS FOR THE FUTURE

Despite the lack of explicit instruction from the Supreme Court,²⁵² the early case law indicates that teachers will be allowed to bring HWE claims based on the conduct of mentally impaired students.²⁵³ It also appears that schools will be allowed to use the *Faragher* affirmative defense against these claims.²⁵⁴ Therefore, although the conduct in *Mongelli* was not sufficient to establish a HWE, it is important for schools to be aware of the potential for liability and the need to implement procedures to avoid it.

A. Suggestions for Schools

Because liability in HWE sexual harassment claims results when harassing conduct creates a HWE and the employer fails to take remedial action,²⁵⁵ schools should put programs in place to prevent harassment and to remedy any harassment that occurs.²⁵⁶

1. *Preventive Measures.*—The “primary objective”²⁵⁷ of Title VII is to prevent harassment.²⁵⁸ The EEOC Guidelines stress that “[p]revention is the best tool for the elimination of sexual harassment.”²⁵⁹ The Supreme Court recognized that Title VII’s preventive goals warranted an affirmative defense for employers that “exercised reasonable care to prevent and correct promptly any sexually harassing behavior.”²⁶⁰ As one commentator noted, the Supreme Court’s message is clear: “To avoid going to trial and losing a Title VII sexual

252. See *Rey*, 376 F. Supp. 2d at 180 (U.S. Supreme Court has not addressed “school liability for sexual harassment suffered by a teacher on account of a student.”).

253. See discussion *supra* Part III.A.3.

254. See *Peries v. N.Y. City Bd. of Educ.*, No. 97 CV 7109 (ARR), 2001 WL 1328921, at *6 (E.D.N.Y. Aug. 6, 2001) (stating that a teacher could prevail in his claim based on student harassment only if he could show “that the school board either provided no reasonable avenue of complaint or knew of the harassment and failed to take appropriate remedial action”).

255. See, e.g., *Lockard v. Pizza Hut, Inc.*, 162 F.3d 1062, 1071-72 (10th Cir. 1998). In *Lockard*, the defendants had a sexual harassment policy in place that every employee was required to read. However, when male customers harassed a female employee, the manager did not take remedial action. As a result, the owner of the restaurant was held liable for the conduct of the non-employees. *Id.* at 1074-75.

256. Lyons, *supra* note 14, at 476.

257. *Faragher v. City of Boca Raton*, 524 U.S. 775, 806 (1998).

258. *Id.*; accord Sean Obermeyer, Note, *Resolving the Catch 22: Franchisor Vicarious Liability for Employee Sexual Harassment Claims Against Franchisees*, 40 IND. L. REV. 611, 636 (2007) (noting that Title VII’s focus on prevention is correct because of the staggering costs of sexual harassment in the workplace).

259. 29 C.F.R. § 1604.11(f) (2008).

260. *Faragher*, 524 U.S. at 807.

harassment suit, employers must take preventative measures.²⁶¹ According to the EEOC,

An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under [T]itle VII, and developing methods to sensitize all concerned.²⁶²

Therefore, schools should implement programs aimed at educating teachers about student harassment.²⁶³ These programs should, at a minimum, alert teachers to the types of behaviors the school does not consider harassment. The school should also design specific and clear procedures that teachers use to register complaints concerning student conduct.²⁶⁴

2. *Remedial Action.*—A school district's remedial action plan should be designed so that the employee responsible for receiving teachers' complaints is also the employee responsible for taking remedial action. This design minimizes the risk that a lack of communication will result in school liability. For example, suppose a school district's policy concerning teachers' complaints is structured in the following manner:

- (1) All teachers shall file complaints of harassing conduct with the assistant principal.
- (2) The assistant principal shall relay all harassment complaints to the head principal.
- (3) The head principal shall inform the school board of complaints she deems to be significant.
- (4) The school board shall take remedial action as it deems appropriate.

In this scenario, the school can be held liable in one of three ways. First, the assistant principal may fail to inform the principal of a complaint (and thus no action would be taken). Second, the principal might not inform the school board of a complaint, either out of carelessness, or because she determines that the complaint is minor in nature. Finally, the school board may fail to take action when it should have. This scenario may lead to a devastating lack of communication—either from the assistant principal to the principal, or from the principal to the school board.

On the other hand, if the employee who receives the complaints is also the individual responsible for taking remedial action, there is no chance that a lack in communication between employees will impose liability on the school. To

261. Lyons, *supra* note 14, at 489.

262. 29 C.F.R. § 1604.11(f) (2008).

263. *See* Lyons, *supra* note 14, at 476.

264. It is important for schools to establish clear complaint procedures so that the school can raise an affirmative defense in cases where a teacher fails to take advantage of the complaint procedures. *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998).

illustrate, suppose instead that the school district's policy states:

- (1) All teachers shall file complaints of harassing conduct with the principal.
- (2) The principal shall take immediate action to remedy the situation.
- (3) The principal shall notify the board of any and all complaints as well as the action taken to remedy the situation.

This scenario corrects the communication problems presented in the previous example. Because the principal is responsible for receiving the complaints and taking remedial action, the potential for error is limited to an error in the principal's discretion.

B. Suggestions for Courts

Courts should take teachers' claims of student-on-teacher sexual harassment seriously. Early court decisions extended Title VII to cover student-on-teacher harassment.²⁶⁵ Therefore, a court should deny a school board's motion for summary judgment if a teacher can demonstrate that she suffered unwelcome harassment that was "sufficiently severe or pervasive by objective and subjective measures to alter"²⁶⁶ the terms, conditions, or privileges of employment. As in any other Title VII case, this demands examination of both the subjective and objective severity of behavior²⁶⁷ and the social context in which the behavior occurred.²⁶⁸

CONCLUSION

The title of this Note questions whether special education teachers waive their right to be free from sexual harassment from students. Case law directly related to the topic is sparse, but the early decisions indicate that teachers may bring Title VII HWE sexual harassment claims against schools that know (or should have known) about students harassing teachers and did nothing to remedy the situation.²⁶⁹ Although special education teachers may be required to expect a heightened degree of abuse from their students,²⁷⁰ they should not completely forfeit their right to work in an environment free of sexual harassment.²⁷¹

265. See discussion *supra* Part III.A.2.

266. McGinley, *supra* note 70, at 101.

267. Harris v. Forklift Sys., Inc., 510 U.S. 17, 22 (1993).

268. Oncale v. Sundower Offshore Servs., Inc., 523 U.S. 75, 80-81 (1998).

269. See discussion *supra* Part III.A.2-3.

270. See *Mongelli v. Red Clay Consol. Sch. Dist. Bd. of Educ.*, 491 F. Supp. 2d 467, 478 (D. Del. 2007).

271. See *id.* (teachers deserve a working environment free from abuse).

