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“NOT OUR PROBLEM:” CONSTRUCTION TRADE UNIONS AND HOSTILE ENVIRONMENT DISCRIMINATION

*Emily White**

And I explained why I didn't think there should be a drinking party with a stripper on a union job site. "Just because we have to take you in," the steward said, "doesn't mean anything has to change because you're here."¹

Labor unions have been instrumental in improving wages and working conditions for millions of construction workers. In an industry where the job market is inherently temporary and unstable, union construction workers receive high wages, enjoy generous pensions and benefits, and are protected in the workplace by collective bargaining agreements that are vigorously enforced by union officials. However, to this day, most construction trade unions are composed mainly of white men, and their success in improving working conditions has not been shared by women and minority workers.²

Unions in the construction trades have historically employed a variety of tactics to exclude women and minorities. These have included administering invalid admission tests to limit union membership;³ providing inadequate training to women and minority

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¹ Susan Eisenberg, *Marking Gender Boundaries: Porn, Piss, Power Tools*, in *WE'LL CALL IF WE NEED YOU: EXPERIENCES OF WOMEN WORKING CONSTRUCTION* 69 (Cornell Univ. Press 1998) [hereinafter *WE'LL CALL IF WE NEED YOU*].

² Although female workers constituted 46.4% of the total workforce in the United States in 2005, only 1.9% of carpenters, 1.2% of plumbers, and 2.6% of electricians were women. Similarly, while African Americans constituted 10.8% of the total workforce in 2005, only 4.8% of carpenters, 8.1% of electricians, and 8.9% of plumbers nationwide were African-American. BUREAU OF LABOR STATISTICS, *HOUSEHOLD DATA ANNUAL AVERAGES* (2005).

³ See *Griggs v. Duke Power Co.*, 401 U.S. 424, 436 (1971) (holding that use of an employment test with a disproportionate racial impact violates Title VII unless the test has a manifest relationship to the skills particularly required for the position).

apprentices;⁴ failing to include nondiscrimination language in the union constitution and collective bargaining agreement;⁵ refusing to refer women and minorities to jobs;⁶ failing to pursue grievances for members experiencing discrimination;⁷ and perhaps most effective, contributing to hostile work environment harassment of women and minorities.⁸

Despite the historical exclusion of women and minorities from unions in the construction trades, labor union membership still presents a tremendous opportunity for higher wages and improved working conditions for these workers. For instance, a woman employed as a union journeyman plumber earns on average more than twice the salary of a health aide,⁹ enjoys greater flexibility in employment hours and location, and often receives pension and healthcare benefits. In order for this opportunity to be fully realized, however, courts must extend greater protection under Title VII to women and minorities in the construction industry by holding unions responsible when they perpetuate hostile environment discrimination in the workplace.

A unique feature of unions in the construction industry is their unusual degree of control over the terms and conditions of employment. Due to the temporary nature of the employment relationship—construction workers often have dozens of employers over the course of a career but remain members of the same union—employers rely on unions to perform many tasks that are traditionally performed only by employers. These may include job

⁴ See Susan Eisenberg, *Ain't Got to Show You Shit*, in *WE'LL CALL IF WE NEED YOU*, *supra* note 1, at 49–50.

⁵ See, e.g., *Farmer v. ARA Serv., Inc.*, 660 F.2d 1096, 1104 (6th Cir. 1981) (holding that the provisions of the collective bargaining agreement were discriminatory in operation and effect); *Copeland v. IBEW Local No. 8*, No. 302CV7240, 2005 WL 1353905, at *8 (N.D. Ohio June 7, 2005) (holding that the union's failure to include a nondiscrimination provision in the collective bargaining agreement did not amount to a violation of Title VII).

⁶ Susan Eisenberg, *Doors, Windows, Locks*, in *WE'LL CALL IF WE NEED YOU*, *supra* note 1, at 21.

⁷ See *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665–66 (1987) (holding that the union violated Title VII where it failed to process grievances of African-American union members claiming racial discrimination).

⁸ See *Stair v. Lehigh Valley Carpenters Local 600*, No. 91-1507, 1993 WL 235491 (E.D. Pa. July 24, 1993), *aff'd*, 43 F.3d 1463 (3d Cir. 1994) (holding that the labor union created a hostile work environment in violation of Title VII by purchasing and displaying pornographic calendars stamped with the union logo).

⁹ According to the Bureau of Labor Statistics, the national mean wage for a plumber or pipefitter in 2004 was \$47,389. On the other hand, the mean annual wage for health care aides in the same year was \$24,374. BUREAU OF LABOR STATISTICS, NATIONAL COMPENSATION SURVEY (2004).

training, hiring, firing, workplace supervision, and discipline for workplace infractions. Similarly, the relatively short duration of most construction projects makes it difficult for individual union members to get relief from any one employer for workplace problems. Union members rely on their unions to address issues that arise at multiple work sites, including safety and discrimination. Thus, unions in the construction industry occupy a unique position with respect to hostile work environment race and sex discrimination. Through the exercise of the union's authority in the workplace and its role as a workplace advocate for members, unions have the power either to prevent discrimination or to perpetuate it. Sadly, many have chosen the latter.

Given the authority exercised by many unions in the construction industry and the difficulty workers face in seeking relief from employers, it makes sense to hold unions responsible under federal anti-discrimination law when they perpetuate workplace discrimination. Nevertheless in *EEOC v. Pipefitter's Association Local Union 597*, an influential recent case involving a hostile work environment race discrimination claim against a plumber's union, the Seventh Circuit Court of Appeals held that the union was not responsible for racially hostile graffiti in portable toilets reserved for plumbers, despite a district court finding that the union had assumed responsibility for the toilets' condition.¹⁰

Instead, the court held that hostile work environment discrimination is primarily the responsibility of employers, and that labor unions have no affirmative duty under Title VII to prevent or remedy workplace discrimination.¹¹ Other scholars and commentators examining the issue of hostile work environment discrimination have focused on the elements of a hostile environment claim.¹² Yet in many cases arising in the construction industry, the issue is not whether discrimination has occurred but who is responsible for

¹⁰ *EEOC v. Pipefitters Ass'n Local Union 597*, 334 F.3d 656, 661 (7th Cir. 2003) (holding that unions have no affirmative duty to investigate and remedy hostile work environment discrimination).

¹¹ *Id.*

¹² See, e.g., Judith J. Johnson, *License to Harass Women: Requiring Hostile Environment Sexual Harassment to Be "Severe or Pervasive" Discriminates Among "Terms and Conditions" of Employment*, 62 MD. L. REV. 85 (2003); Henry L. Chambers Jr., *(Un)welcome Conduct and the Sexually Hostile Environment*, 53 ALA. L. REV. 733 (2002); Ann C. Juliano, *Did She Ask for It?: The "Unwelcome" Requirement in Sexual Harassment Cases*, 77 CORNELL L. REV. 1558 (1992); Robert S. Adler & Ellen R. Peirce, *The Legal, Ethical, and Social Implications of the "Reasonable Woman" Standard in Sexual Harassment Cases*, 61 FORDHAM L. REV. 773 (1993); Rebecca K. Lee, *Pink, White, and Blue: Class Assumptions in the Judicial Interpretations of Title VII Hostile Environment Sex Harassment*, 70 BROOK. L. REV. 677 (2005).

preventing and remedying it. The Seventh Circuit's decision in *Local 597* relieves unions of responsibility for hostile work environment and harassment even where their inaction has made it harder for their members to seek relief from the employer. This is true despite the fact that unions are often in a far better position than employers to remedy workplace harassment in the construction industry.

This Article will argue that a union aware of, but unreasonably failing to address, hostile work environment discrimination against its members should be liable under Title VII where it exercises a sufficient degree of control over the workplace to remedy the discriminatory conduct. Part I of this Article will examine hostile work environment jurisprudence in the Supreme Court and the courts of appeals prior to *Local 597*. Part II will discuss the Seventh Circuit's decision in *Local 597* and its impact on subsequent cases. Part III will critique *Local 597*, arguing that it is unresponsive to hostile work environment discrimination in the construction industry; is out of harmony with the remedial purpose of Title VII; and fails to address the unique authority of construction unions over workplace conditions. Finally, Part IV will argue that unions should be liable under Title VII for hostile work environment discrimination in the construction industry provided that certain factors are met, and it will discuss and respond to possible criticism of this standard.

I. UNION LIABILITY FOR HOSTILE WORK ENVIRONMENT UNDER
TITLE VII PRIOR TO *EEOC v. PIPEFITTERS ASSOCIATION*
LOCAL 597

Title VII of the Civil Rights Act of 1964 prohibits discrimination based on race, color, sex, religion, and national origin by both employers and labor unions.¹³ Where an employer permits the ex-

¹³ Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (a),(c) (2000).

Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

istence of a racially or sexually hostile work environment, courts have found discrimination actionable under Title VII. It is not so clear, however, whether and under what circumstances a union may also be found liable for the existence of a racially or sexually hostile work environment.

A. *Elements of Hostile Work Environment Discrimination*

In *Meritor Savings Bank, FSB v. Vinson*, the Supreme Court recognized hostile work environment sex discrimination and set forth the standard for determining when a hostile work environment is actionable under Title VII.¹⁴ In that case, a bank employee was sexually harassed by her supervisor over a period of four years.¹⁵ Analogizing to prior circuit court cases recognizing racially hostile work environment discrimination under Title VII,¹⁶ the Court held that sexual harassment is actionable as employment discrimination where it is "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"¹⁷ Where a hostile work environment exists, an employer is not automatically liable; instead, courts are to apply common-law agency principles to determine the employer's responsibility.¹⁸ Additionally, the *Meritor* Court noted that, even though the employee failed to invoke the company nondiscrimination policy, the employer was not shielded from responsibility. Because the policy did not specifically mention sexual harassment

(c) Labor organization practices

It shall be an unlawful employment practice for a labor organization—

- (1) to exclude or to expel from its membership, or otherwise discriminate against, any individual because of his race, color, religion, sex, or national origin;
- (2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or
- (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

¹⁴ *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986).

¹⁵ *Id.* at 60.

¹⁶ See *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971), *superseded by statute*, Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103, *as recognized in*, *EEOC v. Shell Oil Co.*, 466 U.S. 54 (1984); *Henson v. Dundee*, 682 F.2d 897, 902 (11th Cir. 1982).

¹⁷ *Meritor*, 477 U.S. at 67 (quoting *Rogers*, 454 F.2d at 238).

¹⁸ *Id.* at 72.

and required employees to report harassment to their immediate supervisor—which in this case was the employee's harasser—it was not "calculated to encourage victims of harassment to come forward."¹⁹

The Supreme Court further clarified the standard for a plaintiff to demonstrate hostile work environment harassment in *Harris v. Forklift Systems*.²⁰ Though the harassment must be extreme and pervasive so as to alter the conditions of employment, it need not result in actual psychological harm or injury.²¹ Additionally, the Court adopted a standard that is both objective and subjective: Conditions must be such that a reasonable person would find them hostile or abusive, and the victim must also perceive them as such.²²

B. Liability for Hostile Environment Discrimination

Most recently, in *Faragher v. City of Boca Raton*²³ and *Burlington Industries, Inc. v. Ellerth*,²⁴ both decided the same day, the Supreme Court applied agency principles in holding employers vicariously liable for hostile work environment harassment by supervisors. Citing Section 219(2)(d) of the Restatement (Second) of Agency,²⁵ the Court held that although sexual harassment is usually outside of the scope of employment, the employer may still be liable where the harassing supervisor is aided in accomplishing the tort by the agency relationship.²⁶ Where discrimination by a supervisor results in a tangible adverse employment action, such as a change in em-

¹⁹ *Id.* at 72–73.

²⁰ 510 U.S. 17, 22–23 (1993) (recognizing hostile work environment as a form of employment discrimination actionable under Title VII).

²¹ *Id.* at 21.

²² *Id.* at 21–22.

²³ 524 U.S. 775, 778 (1998) (holding that an employer is vicariously liable for the sexual harassment of a supervisor under Title VII, but the employer may raise two affirmative defenses: It used reasonable efforts to correct the conduct, and the employee did not reasonably avoid harassment).

²⁴ 524 U.S. 742, 764–65 (1998) (applying agency principles in holding that an employer may be vicariously liable for the hostile work environment of a supervisor where the employer made no reasonable efforts to correct the conduct, and the employee's conduct in avoiding harassment was reasonable).

²⁵ RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (1957).

(2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:

(d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

Id.

²⁶ *Ellerth*, 524 U.S. at 759–62.

ployment status or assignment, it is clear that the agency relationship aided the discrimination.²⁷

On the other hand, where there has been no adverse employment action, an employer has an affirmative defense, which looks to the reasonableness of the employer's conduct as well as that of the plaintiff. The purpose of the affirmative defense is to encourage employers to take positive steps to prevent unlawful discrimination by their supervisory employees, such as implementing nondiscrimination policies with effective complaint procedures.²⁸

C. *Union Liability for Hostile Environment Discrimination*

In *Goodman v. Lukens Steel Co.*, the only Supreme Court case to address the issue of union liability for hostile environment discrimination, the Court found that a union had violated Title VII where it adopted the practice of refusing to pursue grievances for racial discrimination by an employer.²⁹ The union argued that it had a nondiscriminatory reason for refusing to pursue the grievances, and therefore it should not be found in violation of Title VII.³⁰ The Court rejected this argument, noting, "The Unions, in effect, categorized racial grievances as unworthy of pursuit and, while pursuing thousands of other legitimate grievances, ignored racial discrimination claims on behalf of blacks, knowing that the employer was discriminating in violation of the contract."³¹ The union policy thus violated 42 U.S.C. § 2000e-2(c)(1) of Title VII, which makes it unlawful for a union "to exclude or to expel from its membership, or otherwise discriminate against, any individual because of his race, color, religion, sex or national origin."³²

Although the *Goodman* Court noted that both lower federal courts in this case held that a union is liable under Title VII for mere passivity in the face of employer discrimination, its affirmation was based on the evidence "prov[ing] far more than mere passivity."³³ Justice Powell, joined by Justices Scalia and O'Connor, dissented from both the majority's finding of union liability and the lower courts' holding that union acquiescence in an employer's hostile work environment violates Title VII.³⁴ Justice Pow-

²⁷ *Id.* at 760-62.

²⁸ *Id.* at 764.

²⁹ *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 669 (1987).

³⁰ *Id.* at 667-68.

³¹ *Id.* at 669.

³² *Id.* at 667 (emphasis added) (quoting 42 U.S.C. § 2000e-2(c)(1)).

³³ *Id.* at 666-67.

³⁴ *Id.* at 680-81. (Powell, J., dissenting).

ell made several arguments in support of the view that Title VII imposes no affirmative duty on labor unions to oppose hostile work environment discrimination against its members.³⁵ He argued that the language of Title VII, which sets forth different responsibilities for labor unions and employers, indicates that Congress intended to prohibit only intentional, active workplace discrimination by unions.³⁶ Justice Powell noted that the National Labor Relations Act employs similar language, but this finding has not been interpreted to hold unions responsible for acquiescence in employer wrongdoing.³⁷ He also claimed that union members facing discrimination have a meaningful remedy available because they can bring a Title VII suit directly against an employer.³⁸ Finally, he argued that an affirmative obligation would disrupt labor law by forcing unions to give greater priority to employment discrimination than to other labor issues: "Like other representative entities, unions must balance the competing claims of their constituents. A union must make difficult choices among goals such as eliminating racial discrimination in the workplace, removing health and safety hazards, providing better insurance and pension benefits, and increasing wages."³⁹

On the issue of union liability, the circuits are split in the interpretation of Supreme Court jurisprudence on Title VII hostile work environment discrimination. While courts in the First,⁴⁰ Ninth,⁴¹ and Eleventh⁴² Circuits have held unions liable for intentional acquiescence in hostile work environment harassment, courts in the Third,⁴³ Fourth,⁴⁴ Eighth,⁴⁵ and Tenth⁴⁶ Circuits have

³⁵ *Id.* at 670.

³⁶ *Goodman* at 687-88 (noting that section 2000e-(c)(3) of Title VII prohibits unions from trying "to cause or attempt to cause" employer discrimination, while section 2000e-(c)(1) bars direct union discrimination).

³⁷ *Id.* at 688.

³⁸ *Id.* at 689.

³⁹ *Id.* at 688-89.

⁴⁰ *Egger v. Local 276, Plumbers and Pipefitters Union*, 644 F. Supp. 795, 802 (D. Mass. 1986), *aff'd*, 843 F.2d 18 (1st Cir. 1988) (holding that a union has an affirmative duty under Title VII to combat discrimination in the workplace, and a union that acquiesces in employer discrimination is liable under Title VII).

⁴¹ *Woods v. Graphic Commc'ns.*, 925 F.2d 1195, 1200 (9th Cir. 1991) (holding a union liable for acquiescing in a racially discriminatory work environment where it failed to pursue grievances for racial discrimination by an employer).

⁴² *Howard v. Int'l Molders & Allied Workers Union*, 779 F.2d 1546, 1552 (11th Cir. 1986) (adopting acquiescence theory of union liability for hostile work environment discrimination in the workplace).

⁴³ *Anjelino v. N.Y. Times Co.*, 200 F.3d 73, 95-96 (3d Cir. 1999) (holding that the union itself must instigate or actively support discriminatory acts to be held liable under Title VII).

found that unions have no affirmative duty to remedy workplace discrimination. It is notable that most of the cases in which the courts recognized an affirmative union duty to remedy hostile work environment discrimination involved union members in the construction trades, while those rejecting union liability arose for the most part in industries where unions had a less active role in the workplace.

II. *EEOC v. PIPEFITTERS ASSOCIATION LOCAL 597*

The Seventh Circuit's decision in *EEOC v. Pipefitters Association Local 597* is the leading court of appeals decision against union liability and has been a major setback for women and minority union members facing discrimination in the construction industry.⁴⁷ The district court found that Local 597 intentionally acquiesced in the employer's discriminatory policy because the union failed to act in opposition to a racially hostile work environment despite its policy of addressing workplace conditions even absent a grievance.⁴⁸ The Seventh Circuit reversed, holding that unions have no affirmative duty to remedy workplace discrimination and that union acquiescence in employer discrimination does not violate Title VII.⁴⁹ Although this holding has been followed in dozens of subsequent cases involving tradeswomen and minorities experiencing harassment on the job, two recent decisions have distinguished the case on both its facts and the law.

A. *Background and Lower Court Decision*

The case began on a large industrial construction project in the predominantly African-American town of Robbins, Illinois. The prime contractor on the project, Foster Wheeler, had a history

⁴⁴ *McCollum v. Int'l Bhd. of Boilermakers*, No. 1:03 CV00355, 2004 WL 595184, at *7 (M.D.N.C. Mar. 10, 2004) (holding that union acquiescence is not sufficient to establish union liability for workplace discrimination but that unions must instead instigate or actively support discriminatory acts of the employer).

⁴⁵ *Thorn v. Amalgamated Transit Union*, 305 F.3d 826, 832–33 (8th Cir. 2002) (rejecting acquiescence theory of union liability for employer discrimination and holding that unions have no affirmative duty to take remedial action against discrimination).

⁴⁶ *York v. AT&T*, 95 F.3d 948, 956–57 (10th Cir. 1996) (holding that union did not breach its duty of fair representation or acquiesce in employer discrimination where it failed to pursue female engineer's grievance concerning employer's seniority requirement in hiring).

⁴⁷ *EEOC v. Pipefitters Ass'n Local Union 597*, 334 F.3d 656 (7th Cir. 2003).

⁴⁸ *EEOC v. Pipefitters Ass'n Local 597*, 92 Fair Empl. Prac. Cas. (BNA) 349, 358–59 (N.D. Ill. Mar. 28, 2002), *rev'd*, 334 F.3d 656 (7th Cir. 2003).

⁴⁹ *Local Union 597*, 334 F.3d at 661–63.

of racially discriminatory practices. Foster Wheeler reached an agreement with the city that local residents would be hired on the project, including a number of African-American pipefitters from Local 597.⁵⁰ This victory was short-lived because, from the day they arrived on the job and throughout their employment at the Foster Wheeler project, the African-American pipefitters were confronted with a racially hostile work environment. Some of the incidents involved portable toilets reserved for the pipefitters covered with racially offensive graffiti;⁵¹ a swastika placed in an African-American's pipefitter's toolbox;⁵² a Ku Klux Klan poster displayed in the trailer used by pipefitters for breaks; and a hangman's noose strung up over the door by a fellow union member and Foster Wheeler foreman.⁵³

Although racial discrimination was barred by the collective bargaining agreement with the employer, Local 597 had no written procedure for dealing with racial discrimination complaints, and it provided no racial harassment training for any of its members or lead pipefitters.⁵⁴ James Ferguson, an African-American pipefitter

⁵⁰ *Local 597*, 92 Fair Empl. Prac. Cas. (BNA) at 352. Local 597 has a long and ugly history of discrimination against its African-American members, particularly in job referrals. In 1974, the union entered into a consent decree in which it agreed to no longer discriminate on the basis of race in the operation of its hiring hall. *Daniels v. Pipefitters Ass'n Local Union 597*, 113 F.3d 685, 686 (7th Cir. 1997). In 1988, Frank Daniels, an African-American pipefitter who was expelled from the union after resisting discriminatory job referrals, successfully brought suit pursuant to Title VII and 42 U.S.C. § 1981, a civil rights statute that prohibits discrimination in the making and enforcement of contracts. *Daniels v. Pipefitters Ass'n Local Union 597*, 945 F.2d 906, 922–26 (7th Cir. 1991). Nevertheless, the union stubbornly refused to comply with the court order, and it ultimately took an additional seven years before Frank Daniels was able to win reinstatement into his union. *Local Union 597*, 113 F.3d at 688. In all, Frank Daniels was unable to work in his trade for thirteen years due to his expulsion from the union. *Id.* at 686–87.

⁵¹ Portable toilets are one of the few common spaces shared by workers in the construction industry, and their condition is a strong indicator of company and union attitudes towards women and minorities. Inadequate toilet facilities and racially or sexually explicit graffiti convey the message that women and minority workers are not welcome and that discrimination will be tolerated on the jobsite. See generally Brief for Legal Momentum as Amicus Curiae supporting Petitioner-Appellant in *Hernandez v. HCH Miller Park Joint Venture*, 418 F.3d 732 (7th Cir. 2005) (No. 04-3615), available at <http://www.legalmomentum.org/issues/nontrad/HernandezAmicus.pdf> (arguing trial court erred in excluding evidence of sexually explicit graffiti and pornography on work-site as irrelevant to sex discrimination claim against employer); Susan Eisenberg, *Bucket or Bathroom?*, in *WE'LL CALL IF WE NEED YOU*, *supra* note 1, at 123 (commenting on the construction industry's failure to accommodate the needs of female workers).

⁵² *Local 597*, 92 Fair Empl. Prac. Cas. (BNA) at 353.

⁵³ *Id.*

⁵⁴ *Id.* at 355.

who had endured the harassment for several months, finally complained to Steve Toth, a union business agent, and Dennis Hahney, piping superintendent for Foster Wheeler and union shop steward, when he found racially harassing graffiti directed toward both him and his wife.⁵⁵ Hahney had been aware of the graffiti, the noose, and the swastika for months, but took no action to correct it until Ferguson spoke up.⁵⁶ In response to Ferguson's request, Hahney asked another foreman to paint over the graffiti in the port-a-johns, but he did nothing to prevent or remove additional racially hostile graffiti that appeared in the following months.

On the Foster Wheeler worksite, Hahney was in charge of hiring, firing, and supervision of pipefitters in his capacity as superintendent for the contractor, but as a union shop steward, he was also responsible for ensuring that the union collective bargaining agreement was enforced; the job site was safe for the pipefitters; and "no one was 'hassled'" at work.⁵⁷ The union business agent Steve Toth visited the site regularly to ensure the collective bargaining agreement was enforced, and he once reported sexually offensive graffiti in the port-a-johns, which was later removed by the employer.⁵⁸

After an investigation, the Equal Employment Opportunity Commission (EEOC) brought suit against both Foster Wheeler and Local 597 on behalf of the African-American pipefitters.⁵⁹ Though the EEOC settled with Foster Wheeler, it maintained its suit against Local 597.⁶⁰ In denying the union's motion for summary judgment, the court held that a union incurred Title VII liability if it intentionally acquiesced in an employer's hostile work environment discrimination.⁶¹ The court adopted the intentional acquiescence standard, rejecting the higher standard requiring instigation, support, ratification, or encouragement, which is used to determine union liability under the Labor Management Relations Act.⁶² Citing *Goodman v. Lukens Steel Co.*, the court held that a union is liable under Title VII where its officials are aware of but

⁵⁵ *Id.* at 354.

⁵⁶ *Id.* at 354-55.

⁵⁷ *Id.* at 354.

⁵⁸ *Id.*

⁵⁹ EEOC v. Pipefitters Ass'n Local Union 597, 334 F.3d 656, 658 (7th Cir. 2003).

⁶⁰ *Id.*

⁶¹ EEOC v. Foster Wheeler Constructors, Inc., Nos. 98 C 1601, 98 C 3217, 1999 WL 507191, at *9 (N.D. Ill. July 6, 1999).

⁶² *Id.* at *7; see, e.g., *Cole v. Appalachian Power Co.*, 67 Fair Empl. Prac. Cas. (BNA) 1730-31 (S.D.W. Va. May 19, 1995) (rejecting employer's claim against union for breach of nondiscrimination clause where "there is no allegation that the union di-

ignore racial discrimination in the workplace.⁶³

Following a bench trial, the district court found Hahney had both actual and apparent authority as an agent of Local 597 in his role as shop steward at the Foster Wheeler job site.⁶⁴ Additionally, as shop steward, Hahney acted to enforce the union collective bargaining agreement and ensure workplace safety even where there had been no complaints by union members.⁶⁵ The court also disposed of the union's argument that racial graffiti was so commonplace on construction sites that Hahney and other union officials did not realize it was offensive:

Only a visitor from another planet would fail to understand the ugliness of what was written and drawn on those walls. To credit the testimony that Hahney, Toth, Jordan and others failed to understand that the graffiti was offensive to any African American pipe fitters would require an extraordinary level of naivete or cynicism.⁶⁶

Based on these findings, the court concluded that Local 597 violated Title VII by intentionally acquiescing in the racially hostile work environment at the Foster Wheeler job site.⁶⁷ The district court awarded both compensatory and punitive damages to the plaintiffs, and it ordered injunctive relief to prevent future racial discrimination by the union.⁶⁸ The court permanently enjoined the union from permitting a racially hostile work environment at any job site and required notice posting at the union hall along with individual mailings to all union members.⁶⁹ Additionally, the union was ordered to create a written policy against racial harassment, including a complaint procedure, and to develop a racial harassment training program required for all union members.⁷⁰

B. *Court of Appeals Decision*

The Seventh Circuit Court of Appeals reversed.⁷¹ Judge Posner, writing for the majority, held that the union had no affirma-

rected, induced, authorized or ratified any acts of sexual harassment or that any of the alleged harassers acted under express or apparent authority as a union agent").

⁶³ *Foster Wheeler*, 1999 WL 507191 at *9.

⁶⁴ *EEOC v. Pipefitters Ass'n Local 597*, 92 Fair Empl. Prac. Cas. (BNA) 349, 358–59 (N.D. Ill. Mar. 28, 2002), *rev'd*, 334 F.3d 656 (7th Cir. 2003).

⁶⁵ *Id.* at 354.

⁶⁶ *Id.* at 356.

⁶⁷ *Id.* at 358–59.

⁶⁸ *Id.* at 359–60.

⁶⁹ *Id.* at 359.

⁷⁰ *Id.* at 360.

⁷¹ *Local Union 597*, 334 F.3d at 663.

tive duty to remedy hostile work environment discrimination,⁷² nor was it liable for "selective inaction" in the face of workplace discrimination.⁷³ Judge Posner, citing both practical and statutory differences between unions and employers, made a sharp distinction between the respective roles and responsibilities of unions and employers regarding workplace discrimination.⁷⁴ He also identified and discussed four categories of selective union inaction in an attempt to distinguish *Local 597* from *Goodman v. Lukens Steel Co.*⁷⁵

Judge Posner argued that, as a practical matter, unions should not be liable for workplace discrimination because they are in a far worse position than employers to remedy such discrimination.⁷⁶ Generally, union officials have no power to compel an employer to remedy or prevent discrimination against its members;⁷⁷ additionally, the union cannot discipline workers who discriminate, particularly when those workers are not union members.⁷⁸ Judge Posner asserted that union members experiencing workplace discrimination can still recover full relief from the employer.⁷⁹

Judge Posner also argued that unions and employers have different nondiscrimination responsibilities in the workplace under Title VII. The provision prohibiting a union from otherwise discriminating against its members⁸⁰ applies only to the union's function as the workers' agent in dealing with the employer.⁸¹ While employers have the affirmative duty to ensure that hostile work environment discrimination is not permitted,⁸² unions have no similar obligation.⁸³ Judge Posner concluded that, since unions have neither the duty nor the power to remedy workplace discrimination, the pipefitters' complaint about the racially hostile graffiti at the job site was addressed to Hahney as company foreman, not union shop steward.⁸⁴

⁷² *Id.* at 661.

⁷³ *Id.* at 663.

⁷⁴ *Id.* at 659–61.

⁷⁵ *Id.* at 661–62.

⁷⁶ *Id.* at 659.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ 42 U.S.C. § 2000e-2(c)(1) (2000) ("It shall be an unlawful employment practice for a labor organization (1) . . . to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin . . .") (emphasis added).

⁸¹ *Local Union 597*, 334 F.3d at 659.

⁸² *Id.* at 658.

⁸³ *Id.* at 660.

⁸⁴ *Id.*

Finally, Judge Posner dismissed the theory that Local 597 violated Title VII through selective inaction amounting to intentional acquiescence in workplace discrimination.⁸⁵ After identifying four possible types of selective inaction—two of which clearly violate Title VII and two of which do not—Judge Posner held that this case fell within the latter category.⁸⁶ Specifically, a union is liable where it makes a policy of grieving the complaints of white workers but not those of African-American workers, and where a union refuses to pursue racial grievances due to employer hostility to such complaints.⁸⁷ However, there is no union liability where a union refuses to grieve *all* discrimination complaints because it would complicate dealings with an employer, and where a union responds passively to racial discrimination but proactively to other workplace problems.⁸⁸ Echoing Justice Powell's dissent in *Goodman*,⁸⁹ Judge Posner argued that a union may have legitimate, non-discriminatory reasons for choosing to address some forms of workplace discrimination but not others. For example, "uneven remediation of different forms of discrimination may reflect nothing more than a need to determine priorities so that limited resources can be concentrated on the most urgent problems of discrimination facing a particular employer (or union) at a particular site at a particular time"⁹⁰ Judge Posner concluded that even if selective inaction could be the basis of a Title VII claim against a union, the facts in this case were insufficient to establish that Hahney should have acted in the absence of a grievance by the African-American workers.⁹¹ Because the union had no affirmative duty to remedy workplace discrimination and the plaintiffs failed to demonstrate selective inaction, Local 597 did not violate Title VII.⁹²

Writing in dissent, Judge Ilana Diamond Rovner argued that the majority opinion failed to recognize the degree of control unions may exercise in the workplace.⁹³ She instead advocated for a standard wherein a union is liable for hostile work environment discrimination when "the facts reveal that, in practice, the union

⁸⁵ *Id.* at 661–63.

⁸⁶ *Id.*

⁸⁷ *Id.* at 661.

⁸⁸ *Id.* at 661–62.

⁸⁹ *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 688–89 (1987) (Powell, J., dissenting).

⁹⁰ *Local Union 597*, 334 F.3d at 662.

⁹¹ *Id.* at 662–63.

⁹² *Id.* at 661–62.

⁹³ *Id.* at 665 (Rovner, J., dissenting).

enjoys significant control over working conditions and has the power to correct workplace inequities," yet fails to do so.⁹⁴ To determine a union's degree of authority it is important to consider not only the terms of the collective bargaining agreement, but also the actual or apparent authority union officials routinely exercise on the job site.⁹⁵

Judge Rovner agreed with the district court that Hahney and other union officials at the job site established their authority over the conditions of the port-a-johns by addressing other workplace issues; thus, their failure to address the racial graffiti in the toilets constituted intentional acquiescence in the hostile work environment.⁹⁶ In addition, the union allowed Hahney to serve as union shop steward despite the fact that he simultaneously served as a company foreman, indicating that the union "voluntarily crossed the boundary separating the company's domain from the union's."⁹⁷ Judge Rovner also dismissed the majority's argument that it would be awkward for unions to address workplace discrimination caused by fellow union members. She noted that disputes among fellow union members are common, and unions have for years had the duty to represent both harassers and victims in employer disciplinary proceedings.⁹⁸

C. *Impact on Subsequent Cases*

Local 597 has been cited by dozens of state and federal courts for the proposition that unions have no affirmative duty to remedy workplace discrimination and do not incur Title VII liability for inaction in the face of workplace discrimination.⁹⁹ In most of these cases, courts have dismissed discrimination claims against unions by women and minority construction workers, leaving them essentially without a remedy and diminishing the role of unions as workplace advocates for their members.

⁹⁴ *Id.* at 663.

⁹⁵ *Id.*

⁹⁶ *Id.* at 664.

⁹⁷ *Id.* at 665.

⁹⁸ *Id.* at 665 (citing *Thorn v. Amalgamated Transit Union*, 305 F.3d 826, 833 (8th Cir. 2002)).

⁹⁹ See, e.g., *Woods v. Ryerson & Son, Inc.*, No. Civ. 00-2619JNERLE, 2004 WL 1559379, at *1 (D. Minn. July 9, 2004); *Copeland v. IBEW Local No. 8*, No. 302CV7240, 2005 WL 1353905, at *8 (N.D. Ohio June 7, 2005); *Ellison v. Plumbers & Steam Fitters Union Local 375*, 118 P.3d 1070, 1072 (Alaska 2005); *Maalik v. Int'l Union of Elevator Constructors, Local 2*, 437 F.3d 650, 653 (7th Cir. 2006); *Jimerson v. Int'l Longshoremen's Ass'n, Local 1423*, No. Civ.A. CV205-101, 2005 WL 3533044, at *4 (S.D. Ga. Dec. 22, 2005).

For example in *Woods v. Ryerson & Son, Inc.*, an African-American steelworker brought suit against his union for acquiescing in racial harassment by other union members.¹⁰⁰ Union members made racially derogatory comments to Woods and disseminated a union pamphlet that contained racially and sexually offensive cartoons.¹⁰¹ In rejecting Woods' claim, the trial court cited *Local 597*, holding that unions have no affirmative duty to remedy hostile work environment discrimination.¹⁰² In *Copeland v. IBEW Local No. 8*, the court held that a union's failure to process a grievance for an African-American electrician experiencing hostile work environment racial discrimination did not violate Title VII in part because the union had no affirmative duty to remedy workplace discrimination.¹⁰³

Local 597 has also had an effect on cases involving hostile work environment sex discrimination. In *Ellison v. Plumbers & Steam Fitters Union Local 375*, the Alaska Supreme Court rejected a claim by a female pipefitter that her union discriminated against her by failing to address a sexually hostile work environment.¹⁰⁴ Fellow union members covered Ellison's work area and the port-a-johns with threatening sexual graffiti, posted altered pictures of her at the job site, and displayed tampons and "cramp pills."¹⁰⁵ Though Ellison complained repeatedly to her shop stewards and to a company foreman who was also a union member, they encouraged her to keep the problem within the union and not file a complaint with the company.¹⁰⁶ Relying on *Local 597* for the proposition that union acquiescence in an employer's discrimination is not sufficient to establish Title VII liability, the Supreme Court of Alaska upheld the dismissal of Ellison's claim and the award of substantial attorney's fees to the union.¹⁰⁷

As these cases demonstrate, many unions in the construction trades, relying on *Local 597*, have relinquished their traditional role as advocates for members against racial or sexual discrimination in the workplace. At best, the union response can be viewed as passive indifference to a problem that is essentially between the worker and the employer. However, if—as is typical in the con-

¹⁰⁰ *Woods*, 2004 WL 1559379, at *1.

¹⁰¹ *Id.*

¹⁰² *Id.* at *3.

¹⁰³ *Copeland*, 2005 WL 1353905, at *8.

¹⁰⁴ *Ellison*, 118 P.3d at 1072.

¹⁰⁵ *Id.* at 1072.

¹⁰⁶ *Id.* at 1077.

¹⁰⁷ *Id.* at 1075, 1078.

struction industry—union members first look to their union for assistance and leadership in dealing with workplace discrimination, *Local 597* makes it particularly difficult for those union members to get relief.

Recognizing these problems, courts in two recent cases involving female plaintiffs working in non-traditional trades have distinguished *Local 597* and limited the impact of the case for union members. In *Maalik v. International Union of Elevator Constructors, Local 2*, the Seventh Circuit limited the applicability of *Local 597* by holding a union responsible for workplace discrimination under a separate provision of Title VII.¹⁰⁸ Judge Easterbrook, writing for a unanimous Seventh Circuit panel, overturned a district court holding that only employers were liable for workplace discrimination.¹⁰⁹ In that case, Safiyyah Maalik, an African-American elevator worker, was denied certification as a mechanic after senior mechanics refused to provide her with on-the-job training because of her race and gender.¹¹⁰ Though the union could have either disciplined its members through fines and suspensions or certified Maalik on the basis of her classroom training, it refused to do so.¹¹¹ Citing *Local 597*, the union claimed that workplace discrimination was the sole responsibility of the employer, and the district court agreed.¹¹² While not directly challenging its holding in *Local 597*, the Seventh Circuit held that Maalik's union violated a separate provision of Title VII prohibiting discrimination by unions or employers in the administration of apprenticeship programs.¹¹³

Taking another approach in *Jimerson v. International Longshoremen's Association, Local 1423*, the Southern District of Georgia distinguished *Local 597* on its facts.¹¹⁴ In denying the union's motion to dismiss, the court held that a union may be held liable under Title VII if it has a "sufficient connection with a discriminatory practice."¹¹⁵ In that case, Rhonda Jimerson, a female African-

¹⁰⁸ *Maalik v. Int'l Union of Elevator Constructors, Local 2*, 437 F.3d 650, 653 (7th Cir. 2006) (basing union liability on 42 U.S.C. § 2000e-2(d), which governs joint training and apprenticeship programs, rather than 42 U.S.C. § 2000e-2(c), which addresses a union's liability in carrying out its agency function).

¹⁰⁹ *Id.* at 654.

¹¹⁰ *Id.* at 651.

¹¹¹ *Id.* at 653.

¹¹² *Id.* at 652.

¹¹³ *Id.* at 653.

¹¹⁴ *Jimerson v. Int'l Longshoremen's Ass'n, Local 1423*, No. Civ.A. CV205-101, 2005 WL 3533044, at *4 (S.D. Ga. Dec. 22, 2005).

¹¹⁵ *Id.* at *5.

American longshoreman¹¹⁶ in Georgia, alleged that she was regularly sexually harassed by her supervisors and fellow union members and that the harassment continued despite repeated complaints to her union.¹¹⁷ Jimerson's union was responsible for the discipline and supervision of union members at the work site.¹¹⁸ Additionally, the union president repeatedly told its members that the union controlled hiring.¹¹⁹ The court held that these facts, if proven, could demonstrate a sufficient connection with Jimerson's experience of discrimination to hold the union liable.¹²⁰ The *Jimerson* court thus limited the impact of *Local 597* by focusing its analysis on the relationship between union authority in the workplace and the subject of the hostile environment discrimination complaint.

III. ANALYSIS AND CRITIQUE OF *LOCAL 597*

This Section will argue that the standard for union liability for hostile work environment discrimination under Title VII as articulated in *Local 597* is inadequate to prevent and remedy discrimination in the construction industry. The decision fails to recognize the historical pervasiveness of hostile work environment racial and sexual harassment in the construction industry and the authority that many unions exercise in the workplace today. *Local 597* is also out of harmony with the remedial purpose of Title VII because it leaves many workers in the construction trades without a remedy.

A. *Hostile Work Environment Discrimination in the Construction Trades*

The Posner decision fails to appreciate the pervasiveness of racial discrimination on construction sites, as well as the role of unions in fostering and perpetuating workplace harassment of women and minorities. *Local 597* gives unions, many of which already view women and minority members as trespassers, further incentive to discount their particular interests at the work site. This only

¹¹⁶ Longshoremen, also known as stevedores, load and unload cargo from ships. There are significant similarities between the work of longshoremen and construction workers with respect to the nature of the work, the composition of the workforce, the structure of the maritime industry, and the role of unions. For an examination of employment discrimination in the maritime industry, see Yesenia Gallegos, *Sexual Harassment of Female Crewmembers: Title VII's Weaknesses in Protecting Women Employed in the Maritime Industry*, 15 U.S.F. MAR. L.J. 455 (2002-2003).

¹¹⁷ *Jimerson*, 2005 WL 3533044, at *1.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at *5.

¹²⁰ *Id.*

compounds the difficulty many union members in the construction industry already face in addressing workplace sex and race discrimination.

Sexual harassment is almost universal in the construction industry. According to a study by the Chicago Women in the Trades, 88% of women working in the construction trades reported pictures of naked or partially dressed women on the job; 83% experienced unwelcome sexual remarks at work; and 80% complained that their job site had either no toilets or dirty toilets.¹²¹ Elaine Ward, a female journeyman plumber in New York, described her union's attitude towards workplace discrimination as follows:

I would go to jobs and the Business Agents were, to put it quite bluntly, very hostile. And the more persistent I was, the more they made it clear that they were not going to do too much to help me and that it didn't matter what the laws were. It didn't matter if the jobs were supposed to have women on them. The contractors are not responsible to the union hall. And the officers in the union are not responsible directly to the members. This is what happens in practice.¹²²

The testimony of union officials in *Local 597* indicates that racial harassment is just as widespread. The union presented evidence at trial that racially hostile graffiti was common on all construction sites in order to support its argument that conditions on the Foster Wheeler site were typical and did not violate Title VII.¹²³ Foster Wheeler agents also testified that, in their years of construction experience, they knew of no effective method to eliminate racially hostile graffiti from construction sites.¹²⁴ The district court judge in *Local 597* dismissed both of these arguments, noting that the law is effective in deterring racist conduct, even among bigoted employees.¹²⁵ Yet the reversal by the Seventh Circuit means that unions no longer have any responsibility or incentive to address discrimination against or by their members at work.

Additionally, the source of harassment is often fellow union members who resent the intrusion of women and minority workers

¹²¹ CHICAGO WOMEN IN THE TRADES, BUILDING EQUAL OPPORTUNITY: SIX AFFIRMATIVE ACTION PROGRAMS FOR WOMEN CONSTRUCTION WORKERS 6 (1995).

¹²² Jane Latour, *Live! From New York: Women Construction Workers in Their Own Words*, 42 LABOR HISTORY 179, 185 (2001).

¹²³ EEOC v. Pipefitters Ass'n Local 597, 92 Fair Empl. Prac. Cas. (BNA) 349, 356 (N.D. Ill. Mar. 28, 2002), *rev'd*, 334 F.3d 656 (7th Cir. 2003) ("In defense of its inaction, Local 597 argued that racial graffiti was common on all construction sites and that there was really nothing that could be done about it.").

¹²⁴ *Id.*

¹²⁵ *Id.*

into unions historically composed solely of white males. Union culture in the construction trades is often based on a legacy of racism and sexism.¹²⁶ Large numbers of union leaders, business agents, and shop stewards today are sons, nephews, and grandsons of prior union members who proudly celebrate the glory days of past union events, many of which occurred when women and minorities were barred from union membership.¹²⁷ Consequently minority workers and women are viewed as less-qualified trespassers, whose relatively recent entry into the trade unions was the result of government coercion.¹²⁸ The response a female carpenter received when she was seeking work early in her career sums up the attitude of many unions towards affirmative action programs: "We had the coloreds forced down our throats in the '60s and we'll be damned if we have the chicks forced down our throats in the '70s."¹²⁹

Finally, unions themselves often make it harder for members to speak up about harassment, and many women and minorities are forced to resort to informal means to remedy workplace discrimination. Courts have been reluctant to hold unions responsible for selective inaction in the absence of a formal grievance by union members experiencing discrimination.¹³⁰ However, many union members in the construction trades have no access to formal grievance procedures;¹³¹ are strongly discouraged from using them by union officials;¹³² or know that the grievance procedure will be ineffective because union officials or senior union members are

¹²⁶ See Marion Crain, *Women, Labor Unions, and Hostile Work Environment Sexual Harassment: The Untold Story*, 4 TEX. J. WOMEN & L. 9, 30 n.95 (1995).

¹²⁷ See generally Marion Crain & Ken Matheny, "Labor's Divided Ranks: Privilege and the United Front Ideology," 84 CORNELL L. REV. 1542 (1999) (arguing that union denial of the increasingly diverse working class is counterproductive to the solidarity ideal among workers).

¹²⁸ See Sylvia A. Law, "Girls Can't be Plumbers"—Affirmative Action Programs for Women in Construction: Beyond Goals and Quotas, 24 HARV. C.R.-C.L. L. REV. 45, 48-55 (1989).

¹²⁹ Eisenberg, *supra* note 6, at 33.

¹³⁰ See, e.g., EEOC v. Int'l Ass'n of Firefighters Local 109, 88 Fair Empl. Prac. Cas. (BNA) 894 (S.D. Ohio Aug. 18, 2000) (granting summary judgment for union in sex discrimination claim where plaintiff never filed a formal grievance with the union).

¹³¹ See, e.g., Copeland v. IBEW Local No. 8, No. 302CV7240, 2005 WL 1353905, at *7 (N.D. Ohio June 7, 2005) (holding that a union had no duty to address workplace discrimination against a black union member because the union's collective bargaining agreement with the employer contained no nondiscrimination provision).

¹³² See, e.g., Jimerson v. Int'l Longshoremen's Ass'n, Local 1423, No. Civ.A. CV205-101, 2005 WL 3533044, at *10 (S.D. Ga. Dec. 22, 2005) (finding that union officials encouraged Jimerson not to pursue her sexual harassment complaint, promised the union would deal with the matter internally, and assured her the harassment would end).

the source of the harassment.¹³³

Instead, union members often use informal means, such as complaints to union officials, to address workplace discrimination because of the nonexistence or unavailability of grievance procedures. For instance, Local 597 had no formal grievance procedure for union members to report discrimination on the job site, even though there was a nondiscrimination clause in the collective bargaining agreement.¹³⁴ Additionally, many union members find it difficult to get a copy of either the collective bargaining agreement governing the relationship between the union and the employer or their local union constitution and by-laws, which set out the structure of the union and often contain the formal grievance procedure.¹³⁵

Even where workers have access to and understand their union's grievance procedure, shop stewards, business agents, and other union officials often discourage filing of formal grievances about workplace discrimination. By warning the members that a complaint would antagonize the employers, or that a complainant will not be believed or taken seriously, unions succeed more often than not in persuading members experiencing discrimination not to file formal grievances.¹³⁶

There are many reasons why a union may discourage members from filing discrimination claims. For instance, similar to *Goodman v. Lukens Steel Co.*, a union may argue that such claims will only antagonize employers.¹³⁷ Union officials may also believe that dealing with the problem informally is more effective. Additionally, where fellow union members are the source of the harassment, the unions may seek to protect the harassers from workplace

¹³³ See *id.* at *3.

¹³⁴ *EEOC v. Pipefitters Ass'n Local 597*, 92 Fair Empl. Prac. Cas. (BNA) 349, 355 (N.D. Ill. Mar. 28, 2002), *rev'd*, 334 F.3d 656 (7th Cir. 2003).

¹³⁵ Labor-Management Reporting and Disclosure Act of 1959 § 104, 29 U.S.C. § 414 (2000) (guaranteeing union members access to their collective bargaining agreement and constitution and by-laws). Nevertheless, in the Author's experience at Legal Momentum's Women Rebuild Project, tradeswomen often reported hostility from unions when requesting either document. Union officials demanded to know why they were requesting the documents and whether they were planning to file a lawsuit—they were warned that they could be blacklisted if they did so. See generally <http://www.legalmomentum.org/legalmomentum/programs/equalityworks/tradeswomen/>.

¹³⁶ Crain & Matheny, *supra* note 127, at 34.

¹³⁷ 482 U.S. 656, 669 (1987) (holding that union violated Title VII where it acquiesced in employer discrimination and failed to process grievances of African-American union members claiming racial discrimination because of employer hostility to such claims).

disciplinary proceedings. For example, in *Ellison v. Plumbers and Steamfitters Union Local 375*, a female plumber who was sexually harassed at work by fellow union members was urged by a shop steward and company foreman, who was also a union member, to keep the issue within the union by accepting an apology from the harasser and agreeing not to complain to company management.¹³⁸

When the shop steward or other senior union members are the source of the harassment, union members are often reluctant to use formal grievance procedures, anticipating the procedure will be ineffective. This situation is similar to *Meritor*, where the company harassment complaint procedure required the victim to report to the harasser.¹³⁹ In such cases, it is unreasonable to require union members to file formal grievances because of the decreased likelihood that the complaint will be taken seriously and the real risk of retaliation faced by the victim of discrimination. Evan Ruderman, a female electrician in New York City, described her fear of speaking up and confronting her union about workplace discrimination:

It's always perplexed me how, in the face of such blatant sexual harassment on such a daily basis, we never went to court. We followed legal channels to get women in, to fight for bathroom and changing facilities, for all these things, but we never did a class action sexual harassment suit. And why? We were scared of being blacklisted. We were scared of the fact that we had really put ourselves out there. I think that most of us who had been in the trades, and really hung our necks out, we were really beginning to also suffer from the effects of that.¹⁴⁰

Overall, *Local 597* fails to recognize the pervasiveness of racially and sexually hostile work environments in the construction industry and the role of labor unions in perpetuating workplace discrimination against women and minorities. By insulating unions from liability for workplace discrimination, the decision gives unions no incentive to represent the interests of minority and women workers experiencing hostile environment discrimination, even where the union serves as an active workplace advocate on other issues.

¹³⁸ *Ellison v. Plumbers and Steamfitters Union Local 375*, 118 P.3d 1070, 1072 (Alaska 2005).

¹³⁹ *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 71 (1986) (noting that bank's grievance policy required employees to first report harassment to a supervisor who, in this case, was the alleged harasser).

¹⁴⁰ Latour, *supra* note 122, at 184.

B. *Remedial Purpose of Title VII*

When Judge Posner noted in *Local 597* that women and minority workers facing workplace discrimination were not left without a remedy, he was referring primarily to the availability of money damages from an employer.¹⁴¹ Equitable relief is some of the most powerful relief a victim of discrimination can receive under Title VII, but due to the temporary nature of employment in the construction industry, such relief is often unavailable or ineffective from discriminatory employers. Even compensatory damages are often not a sufficient remedy because those damages are reduced where employment is short-term. On the other hand, equitable remedies like those awarded by the trial court against Local 597 can be very successful in preventing and addressing workplace discrimination in the construction industry. The lack of meaningful remedies under *Local 597* thus undermines the effectiveness of Title VII in the construction industry because the statute is enforced primarily through suits by individual plaintiffs.

The primary purpose of Title VII is to prevent workplace discrimination, not to compensate victims of discrimination.¹⁴² For this reason, courts have broad equitable authority to order remedies, such as harassment training and notice posting, and to monitor compliance.¹⁴³ The preventative goal of Title VII was also an important consideration for the Supreme Court in the creation of the affirmative defense for employers who develop a reasonable

¹⁴¹ *EEOC v. Pipefitters Ass'n Local Union 597*, 334 F.3d 656, 659 (7th Cir. 2003) ("Since the employer is both fully liable for failing to take effective measures against coworker harassment and far better positioned to apply such measures, what is to be gained, except litigation clutter, by imposing the same liability on the union?").

¹⁴² *Faragher v. City of Boca Raton*, 524 U.S. 775, 805 (1998). Title VII seeks "to make persons whole for injuries suffered on account of unlawful employment discrimination, its 'primary objective', like that of any statute meant to influence primary conduct, is not to provide redress but to avoid harm." *Id.* (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1975)).

¹⁴³ 42 U.S.C. § 2000e-5(g)(1) (2006).

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate

Id.

nondiscrimination policy.¹⁴⁴ Nondiscrimination policies have been successful in changing discriminatory conduct in white-collar work environments;¹⁴⁵ they can also go a long way in changing workplace conduct and eliminating discrimination in the blue-collar construction industry.

In the construction trades, the vast majority of jobs are temporary, though the average length of employment varies by trade, region, employer, season, and even by worker. For instance, plumbers working temporary heat jobs¹⁴⁶ in the winter may be dispatched to a different employer every week, though they work with the same union members and face similar job conditions at every site. On the other hand, it is not uncommon for a journeyman carpenter to find a job with a single employer and travel with him or her from project to project for years.

The journeyman carpenter with steady work will have a strong incentive to speak up about discrimination on the job because she has a strong stake in the employment, and there are meaningful remedies available. If she seeks compensatory damages, they will be substantial, based on the length of her employment and her future job prospects with the employer. Additionally, equitable relief from the employer—such as notice posting, a nondiscrimination grievance procedure, and harassment training—would improve her working conditions with the employer. There is still the risk that this worker could face retaliation from her employer for speaking up, but an employer's claim that she was fired for nondiscriminatory reasons, such as a work slowdown, would be less credible given her long employment with the company.

In contrast, for the plumber working temporary heat jobs, a successful discrimination claim against any one employer would result in very low compensatory damages and ineffective equitable

¹⁴⁴ See *Faragher*, 524 U.S. at 780; *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 766 (1998).

¹⁴⁵ See Thomas H. Barnard & Adrienne L. Rapp, *Are We There Yet? Forty Years After the Passage of the Civil Rights Act: Revolution in the Workforce and the Unfulfilled Promises that Remain*, 22 HOFSTRA LAB. & EMP. L.J. 627, 664–67 (2005) (arguing that the development of the affirmative defense has improved the effectiveness of Title VII in preventing discrimination by encouraging employers to develop reasonable nondiscrimination policies on their own initiative). But see Martha S. West, *Preventing Sexual Harassment: The Federal Courts' Wake-Up Call for Women*, 68 BROOK. L. REV. 457, 460 (2002) (arguing that courts should require employers, not employees, to bear the burden of demonstrating the effectiveness of workplace nondiscrimination policies).

¹⁴⁶ In the winter, construction contractors often hire plumbers to set up rudimentary heating systems to warm the job site while a project is being completed. Because they last only a short duration, temporary heat jobs are among the least desired assignments for plumbers and pipefitters.

relief. The compensatory damages would be low because a job lasts only one or two weeks at most. Equitable relief such as notice posting, harassment training, and the creation of a nondiscrimination policy would be meaningless, particularly if the source of the harassment is a fellow union member. By the time any claim is successfully asserted, the project may be complete, the job site may no longer exist, and the victim of discrimination will have moved on to dozens of other employers, as will the harasser. Neither the victim nor the harasser will see the employer's notice posting or benefit from the harassment training or nondiscrimination policy. Even if this worker decided to speak up, there is an increased risk of retaliation from the employer. Unlike the carpenter with steady employment, an employer under these circumstances could more credibly defend a layoff by arguing that the project was coming to an end and the layoff was inevitable.

On the other hand, if a plumber could bring a suit against her union for selective inaction in failing to address the workplace discrimination, it is more likely that she could receive meaningful relief in the long term. Requiring discriminatory unions to formulate nondiscrimination grievance procedures, post notices in the union hall, and provide harassment training for union members, agents, and foremen¹⁴⁷ would improve working conditions for women and minorities in the construction industry by making it easier and more worthwhile to speak out about discrimination.¹⁴⁸

The lack of meaningful remedies for many workers facing discrimination in the construction industry under *Local 597* means that most of those workers will decide not to pursue their workplace rights, and the pattern of workplace discrimination will be perpetuated. In weighing the risk of bringing a suit to assert their workplace rights, many will decide that it is not worth the trouble,

¹⁴⁷ See, e.g., *EEOC v. Foster Wheeler Constructors*, 92 Fair Empl. Prac. Cas. (BNA) 349, 359–60 (N.D. Ill. Mar. 28, 2002) (awarding injunctive relief against the union including notice posting, requiring union to develop written racial harassment nondiscrimination policy and grievance procedure, and ordering regular compliance reports), *rev'd*, 334 F.3d 656 (7th Cir. 2003).

¹⁴⁸ In her essay *Marking Gender Boundaries: Porn, Piss, Power Tools*, master electrician Susan Eisenberg describes her experience of the impact of acquiescence in the face of workplace discrimination:

The effect of a harasser's action was compounded when others on the job knew about it but did not intervene—as though he were acting on their behalf. Contractors and unions tended to underestimate the gravity of harassment and in some instances even condoned the behavior, tacitly or explicitly. Institutional procedures for prevention or punishment were rare.

Eisenberg, *supra* note 1, at 77.

expense, and risk of retaliation from both the union and the employer to bring a suit that will provide limited compensation and have no impact on future discrimination. Not only are workers reluctant to bring such claims, but private attorneys are also less likely to represent such workers because the payout from successful suits is so low.

Local 597 thus undermines the effectiveness of Title VII by precluding the pursuit of equitable remedies from unions that perpetuate hostile work environment discrimination. Though equitable remedies are often meaningless when applied to an employer, they can have a powerful impact in the union hall. Nevertheless, *Local 597* forecloses the availability of injunctive relief even from unions that close their eyes to workplace race and sex discrimination of their members. As a result, workplace discrimination in the construction trades is perpetuated, rather than deterred.

IV. HOLDING UNIONS ACCOUNTABLE FOR HOSTILE WORK ENVIRONMENT DISCRIMINATION UNDER TITLE VII

This Section advocates for the standard of union liability proposed by Judge Rovner in *Local 597*¹⁴⁹ and applied in *Jimerson*,¹⁵⁰ which looks to the degree of workplace control exercised by a union in determining Title VII liability. This Section will first discuss the legal standard courts should consider in holding a union responsible for workplace discrimination as well as the benefits of this standard for unionized workers in the construction industry. Addressing possible criticism, this Section argues that unions in the construction industry should embrace their role as workplace advocates for members experiencing discrimination.

A. *Union Liability for Hostile Work Environment Discrimination*

A union which is aware of hostile work environment discrimination against its members, but fails to attempt to remedy that discrimination, should be liable under Title VII where that failure is unreasonable and the union exercises a sufficient degree of control over the workplace. Under this standard, not every union has an affirmative duty to combat workplace discrimination; instead courts look to the degree of control the union assumed over terms

¹⁴⁹ *EEOC v. Pipefitters Ass'n Local Union 597*, 334 F.3d 656, 663 (7th Cir. 2003) (Rovner, J., dissenting).

¹⁵⁰ *Jimerson v. Int'l Longshoremen's Ass'n, Local 1423*, 2005 WL 3533044, at *1-3 (S.D. Ga. Dec. 22, 2005).

and conditions of employment in the workplace—particularly its ability to remedy the discriminatory conduct at issue.

1. Workplace Authority: Did the Union Have the Authority to Prevent the Discriminatory Conduct?

In deciding whether a union is liable for workplace discrimination, courts should first examine the degree of control the union exercises over the workplace, focusing in particular on the relationship between union control and the subject of the discrimination complaint. Some important factors indicating union control include responsibility for hiring, firing, supervision, workplace training, and discipline. Courts should also consider whether other remedies exist, including an effective employer nondiscrimination policy.

In determining whether these factors are present in any given case, an important starting point is the union's collective bargaining agreement, which sets out the respective responsibilities of each party. Other key documents are the union's own constitution and by-laws, which outline the structure of the union, the responsibilities of union officers, and the grievance procedure for its members. However, a court's inquiry should not be confined to these documents because, as Judge Rover noted, "Authority is not always conveyed formally . . . and we should not close our eyes to the realities of the workplace, particularly in the view of the broad remedial purposes of Title VII" ¹⁵¹

Factors indicating control were important considerations for the *Jimerson* court, which denied a union's motion for summary judgment because the union had the power to prevent and remedy the discriminatory conduct. ¹⁵² Rhonda Jimerson had been sexually harassed for more than a year by her fellow union members and supervisors despite repeated complaints to the union. ¹⁵³ In holding that the union could be liable for its failure to act, the court noted that the union had the power under its constitution, by-laws, and collective bargaining agreement to discipline its members for sexual harassment. ¹⁵⁴ Also important was the fact that Jimerson's union—and not her employers—were responsible for hiring, firing, supervision, and discipline on the job. ¹⁵⁵ Because

¹⁵¹ *Local Union 597*, 334 F.3d at 663 (Rovner, J., dissenting).

¹⁵² *Jimerson*, 2005 WL 3533044, at *10.

¹⁵³ *Id.* at *1–3.

¹⁵⁴ *Id.* at *4.

¹⁵⁵ *Id.* at *5 ("Jimerson asserts that the union acts as the functional equivalent of an employer, given that Local 1423 members work for various shipping companies, but

the union had the authority to remedy the conduct that was the subject of Jimerson's complaint but failed to do so, the court held that the union could be liable.

2. Notice: Should the Union Have Been Aware of the Discriminatory Conduct?

Even where a union exercises a significant degree of control over the workplace, the union must have notice of the discriminatory conduct in order to incur Title VII liability. When the source of the discrimination is an agent of the union, such as a union officer, and the discrimination results in tangible adverse action, the notice requirement has been satisfied.¹⁵⁶ Additionally, the union has actual notice of the source of discrimination where the victim files a formal grievance complaining of discrimination. However, as discussed previously, formal complaints are rare for two reasons: First, few construction unions have written procedures to deal with race or sex harassment; second, many union members are reluctant to speak up both because they fear it will be futile and because they do not wish to be labeled a troublemaker.¹⁵⁷

Given the rarity of formal union grievances for race and sex harassment in the construction industry, notice to the union is usually composed of either an informal complaint or constructive notice. Constructive notice is satisfied where the victim of discrimination can demonstrate that the union either knew or should have known of the discriminatory conduct.¹⁵⁸ Notice seems to present a unique hurdle for union members facing workplace discrimination in the construction industry. The *Jimerson* court noted that a "union may have constructive notice of harassment when it occurs daily, in the presence of others, including management or other responsible officials in the organization."¹⁵⁹ However, unlike an employer, union officers and management are not always present at the workplace. Union officials such as business agents, who are responsible for enforcing the terms of the collective bargaining agreement with the employer, may only visit the workplace on a weekly or monthly basis. Nevertheless, in order to maintain a strong connection between the union leadership and the work site, most construction unions appoint shop stewards to

only for one union, and that the union president Hill informs members on a regular basis that the union controls hiring, not the employers.").

¹⁵⁶ *Id.* at *8.

¹⁵⁷ See *supra* Section III, Part A.

¹⁵⁸ *Jimerson*, 2005 WL 3533044, at *9.

¹⁵⁹ *Id.*

each work site and instruct members to address their workplace complaints to that individual. In determining whether notice has been satisfied in any particular case, courts should carefully examine the leadership structure of the union to determine whether union agents knew or should have known of the discriminatory conduct at issue.

3. Affirmative Defense: Did the Union Develop a Reasonable Procedure to Address Workplace Discrimination?

The affirmative defense gives unions a strong incentive to take a proactive approach to discrimination by carefully crafting a reasonable nondiscrimination policy and complaint procedure for its members. Under this defense developed by the Supreme Court in *Faragher* and *Ellerth*, where there has been no adverse employment action taken against the victim of harassment, the union may prevail if it can demonstrate that it "exercised reasonable care to prevent and correct promptly" the harassing conduct,¹⁶⁰ and the union member "acted unreasonably in failing to avail herself of the union's preventive and corrective opportunities."¹⁶¹ If a union member experiencing discrimination unreasonably fails to invoke the complaint procedure, the union is shielded from liability provided that the policy is "reasonably calculated to encourage victims of harassment to come forward."¹⁶² In *Meritor*, the Supreme Court found that a policy was not reasonable where the victim was required to report the harassment to her immediate supervisor, and the policy failed to mention sex discrimination.¹⁶³ Similarly, the *Jimerson* court held that the victim's failure to file a formal grievance was not unreasonable because she had complained repeatedly to union officials who laughed at her and urged her to drop her

¹⁶⁰ *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998) (holding that an employer is vicariously liable for the sexual harassment of a supervisor under Title VII, but employer may raise the affirmative defense that it used reasonable efforts to correct the conduct or that the employee's conduct in avoiding harassment was not reasonable) (quoting *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998) (applying agency principles in holding an employer may be vicariously liable for the hostile work environment of a supervisor where the employer made no reasonable efforts to correct the conduct, and the employee's conduct in avoiding harassment was reasonable)).

¹⁶¹ *Id.*

¹⁶² *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 73 (1986).

¹⁶³ *Id.* at 72. See also *Frederick v. Sprint/United Mgmt. Co.*, 246 F.3d 1305, 1313 (11th Cir. 2001) (holding that non-compliance with an internal grievance procedure is reasonable under certain circumstances).

complaint, stating that they would take care of the problem.¹⁶⁴

The widespread creation and adoption of effective nondiscrimination policies and procedures by unions in the construction industry would be a welcome development. Currently, many unions in the construction industry have altogether failed to develop any policies to address race or sexual harassment, choosing instead to leave victims of workplace discrimination to fend for themselves. Judge Posner suggests a benign explanation for this attitude—perhaps “[t]he union believes that these workers have other remedies and that union intervention would unduly complicate the union’s role in dealing with the employer on behalf of all the workers composing the bargaining unit.”¹⁶⁵ Nevertheless, in practice it is often not possible for workers to seek relief from their employers, and many workers in the construction industry rely on their unions to advocate on their behalf to secure a workplace free from discrimination.

Altogether, this proposed standard is better because it brings union liability in line with that of employers in situations where unions have assumed similar responsibility for the terms and conditions of the workplace. It also honors the remedial purpose of Title VII by making available meaningful remedies for workers experiencing discrimination in the construction industry. Furthermore, the affirmative defense encourages the union to take preventative measures, such as nondiscrimination training and the development of a nondiscrimination policy and complaint procedure, practices which are now standard for employers in other industries.

B. Possible Criticism to Union Liability and a Response

Critics may argue that this standard will jeopardize other union goals by requiring unions to allocate a disproportionate share of union resources to the problem of workplace discrimination; that it creates an irreconcilable conflict of interest for unions where fellow union members are responsible; and that it will cause unions to close their eyes to hostile work environment harassment in the workplace in order to shield themselves from liability. This Section will address each of these arguments in turn.

First, Justice Powell and Judge Posner have argued that unions should be free to determine how to allocate resources to meet the

¹⁶⁴ *Jimerson v. Int’l Longshoremen’s Ass’n*, Local 1423, 2005 WL 3533044, at *10 (S.D. Ga. Dec. 22, 2005).

¹⁶⁵ *EEOC v. Pipefitters Ass’n Local Union 597*, 334 F.3d 656, 661 (7th Cir. 2003).

needs of their members, and that courts should not penalize unions that, for one reason or another, choose not to make workplace discrimination a priority.¹⁶⁶ According to Justice Powell, the elimination of race and sex discrimination is only one of many worthy goals among which unions must choose—others include higher wages, workplace safety,¹⁶⁷ and adequate pensions.¹⁶⁸

Given both the history of race and sex discrimination among construction unions and the current composition of workers in the industry, it is clear that, absent outside pressure, hostile work environment discrimination will never be a priority for unions.¹⁶⁹ In *Griggs v. Duke Power*, an early Title VII case, the Supreme Court emphasized that the purpose of Title VII is to break down barriers to equal workforce participation.¹⁷⁰ So long as unions are permitted to respond only to the workplace issues of the majority of their current members and ignore those of its minority and female members, the construction industry will remain largely white and male.¹⁷¹

A second argument is that holding unions accountable for hostile work environment discrimination will create an irresolvable conflict of interest for unions when their own members create the harassment.¹⁷² Nevertheless, as Judge Rovner noted in her dissent-

¹⁶⁶ *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 688–89 (1987) (Powell, J., dissenting); *Local Union 597*, 334 F.3d at 661.

¹⁶⁷ In addition to the usual dangers of construction work, women working in the industry often face their own unique workplace safety issues. These include lack of adequate sanitation facilities, the unavailability of properly fitting protective equipment, poor safety training, and even the deliberate sabotage of safety equipment. See generally OCCUPATIONAL SAFETY AND HEALTH COMM'N, WOMEN IN THE CONSTRUCTION WORKPLACE: PROVIDING EQUITABLE SAFETY AND HEALTH PROTECTION (1999), available at <http://www.osha.gov/doc/accsh/haswicformal.html>.

¹⁶⁸ *Goodman*, 482 U.S. at 688–89 (Powell, J., dissenting) ("A union must make difficult choices among goals such as eliminating racial discrimination in the workplace, removing health and safety hazards, providing better insurance and pension benefits, and increasing wages.").

¹⁶⁹ Indeed, judging from *Local 597*'s legacy of racism in job referrals—see *supra* note 50—there is no reason to believe that the union would confront the issue of workplace racism on its own initiative.

¹⁷⁰ *Griggs v. Duke Power Co.*, 401 U.S. 424, 429–30 (1971) ("The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees.").

¹⁷¹ *Crain & Matheny*, *supra* note 127, at 1542 (arguing that the labor union movement is weakened by its failure to recognize race and gender divisions among its members).

¹⁷² *EEOC v. Pipefitters Ass'n Local Union 597*, 334 F.3d 656, 661 (7th Cir. 2003) ("There is also the awkwardness of asking the union to take sides in a dispute between

ing opinion in *Local 597*, unions already deal with this sort of conflict when an employer disciplines a union member for discriminatory conduct against a fellow union member.¹⁷³ In such a case, the union owes a duty of fair representation to both the victim of harassment and the accused.¹⁷⁴ Furthermore, unions in the construction industry are better situated to deal with the harassment than an employer because the relationship is longer and the union is in a better position to prevent future discriminatory conduct. Unlike many employers in the construction industry, unions can provide nondiscrimination and anti-harassment training and develop procedures to separate harassers from victims of discrimination in job referrals.

Finally, it may be argued that unions will close their eyes to hostile work environment discrimination in order to limit their Title VII liability. It is unlikely that unions would relinquish their authority over terms and conditions in the workplace simply to avoid Title VII liability. After all, it is in the best interest of unions to embrace their role as an advocate for all of its members in the workplace. Additionally, the availability of the affirmative defense will provide unions with an incentive to affirmatively address workplace discrimination.

V. CONCLUSION

This Article has argued that unions which are aware of but fail to address hostile environment discrimination against their members should be liable under Title VII where they exercise a sufficient degree of control over the workplace to address the discriminatory conduct and their failure to act is unreasonable. The Seventh Circuit's decision in *EEOC v. Pipefitters Association Local Union 597*, which relieves unions of liability for selective inaction in the face of workplace discrimination, has been a setback for women and minorities in the construction industry. It fails to appreciate the role unions have played in the perpetuation of hostile work environment discrimination, leaving many workers without a remedy.

two employees both of whom it has the statutory duty to represent fairly in any disciplinary proceeding by the employer.").

¹⁷³ *Id.* at 665 (Rovner, J., dissenting).

¹⁷⁴ *Thorn v. Amalgamated Transit Union*, 305 F.3d 826, 833 (8th Cir. 2002) ("When the employer investigates a sexual harassment claim by one union member against another, the union has a statutory duty to fairly represent both in their disciplinary dealings with the employer.").