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ABOLISHING THE QUID PRO QUO AND WORK ENVIRONMENT DISTINCTIONS IN SEXUAL HARASSMENT CASES UNDER THE CIVIL RIGHTS ACT OF 1964: *VINSON V. TAYLOR*

Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against employees or prospective employees on the basis of sex,¹ and affords relief to an employee who has been subjected to sexual harassment in the work environment.² Actiona-

¹ Civil Rights Act of 1964, Pub. L. No. 88-352, § 703, 78 Stat. 241, 255 (1964) (codified in scattered sections of 42 U.S.C.) [hereinafter cited as Title VII]. 42 U.S.C. § 2000e-2(a) (1982), states in relevant part:

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 . . . sex . . . 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 . . . sex

. . . .
Id. See generally Chamallas, *Evolving Conceptions of Equality Under Title VII: Disparate Impact Theory and the Demise of the Bottom Line Principle*, 31 UCLA L. Rev. 305, 306 (1983) (discussing congressional intent of Title VII). Title VII has been viewed as a congressional attempt to rid the workplace of injustice. *Id.*; see also Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. AND COM. L. REV. 431, 433-57 (1966) (discussing legislative history of Title VII).

² See *Craig v. Y & Y Snacks, Inc.*, 721 F.2d 77, 80 (3d Cir. 1983); *Miller v. Bank of America*, 600 F.2d 211, 213 (9th Cir. 1979); accord *Heelan v. Johns-Manville Corp.*, 451 F. Supp. 1382, 1388 (D. Colo. 1978); *Munford v. Barnes & Co.*, 441 F. Supp. 459, 466 (E.D. Mich. 1977).

While there is little legislative history on the Title VII prohibition against sex discrimination, congressional committees have recognized that it includes a prohibition against sexual harassment. See SUBCOMM. ON INVESTIGATIONS OF THE HOUSE OF REP. COMM. ON POST OFFICE AND CIVIL SERVICE, 96th CONG., 2D SESS., REPORT ON SEXUAL HARASSMENT IN THE FEDERAL GOVERNMENT 153 (Comm. Print 1980) [hereinafter referred to as SUBCOMM. ON INVESTIGATIONS]; *Examinations on Issues Affecting Women in our Nation's Labor Force: Hearings Before the Sen. Comm. on Labor and Human Resources*, 97th Cong., 1st Sess. 333 (1981) [hereinafter referred to as *Hearings on Labor*].

Guidelines provided by the Equal Employment Opportunity Commission (EEOC) state in relevant part:

[H]arassment on the basis of sex is a violation of . . . Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's

ble sexual harassment exists when a tangible work benefit is conditioned upon the acquiescence to sexual demands³—the so-called quid pro quo situation⁴—as well as when an employee is subjected to a sexually offensive work environment.⁵ The federal courts of appeals, however, are not in agreement as to the proper standard for imputing liability to an employer for sexually harassing acts committed by supervisory personnel.⁶ In the quid pro quo situa-

employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment.

29 C.F.R. § 1604.11(a). Sexual harassment also has been defined as "unsolicited nonreciprocal male behavior that asserts a woman's sex role over her function as worker." L. FARLEY, *SEXUAL SHAKEDOWN* 14-15 (1978). See generally Oneglia & Cornelius, *Sexual Harassment in the Workplace: The Equal Employment Opportunity Commission's New Guidelines*, 26 ST. LOUIS U.L.J. 39, 40-50 (1981) (discussing EEOC definition of sexual harassment).

³ See *Horn v. Duke Homes*, 755 F.2d 599, 603-04 (7th Cir. 1985); *Katz v. Dole*, 709 F.2d 251, 255 n.6 (4th Cir. 1983); *Henson v. City of Dundee*, 682 F.2d 897, 910-12 (11th Cir. 1982).

⁴ See C. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 32 (1979). The terms "quid pro quo" and "condition of work" were originally coined by Catherine MacKinnon, who urged that strict liability is warranted in all sexual harassment cases. *Id.* at 32, 40, 211.

⁵ See *Katz v. Dole*, 709 F.2d 251, 254 (4th Cir. 1983); *Henson v. City of Dundee*, 682 F.2d 897, 902 (11th Cir. 1982); *Bundy v. Jackson*, 641 F.2d 934, 943-44 (D.C. Cir. 1981). The creation of an offensive work environment resulting from sexual harassment can be viewed as a violation of Title VII because it amounts to sex discrimination with respect to the "terms, conditions, or privileges of employment." *Bundy*, 641 F.2d at 943; see 42 U.S.C. § 2000 e-2(a) (1982); see also EEOC Guidelines, 29 C.F.R. § 1604.11(a), *supra* note 2 (includes creation of offensive work environment within definition of sexual harassment). See generally Case Comment, *Expanding Title VII to Prohibit a Sexually Harassing Work Environment*, 70 GEO. L.J. 345, 347-51 (1981) (supporting *Bundy* extension of Title VII claims to hostile work environment allegations).

⁶ See Note, *Employment Discrimination—Defining an Employer's Liability Under Title VII for On-the-Job Sexual Harassment: Adoption of a Bifurcated Standard*, 62 N.C.L. REV. 795, 795-96 (1984). Compare *Tomkins v. Public Serv. Elec. & Gas Co.*, 568 F.2d 1044, 1048-49 (3d Cir. 1977) (employer liable for supervisor's misconduct when no remedial action taken after learning of misconduct) and *Garber v. Saxon Business Prods.*, 552 F.2d 1032, 1032 (4th Cir. 1977) (employer liable if aware of supervisor's improper conduct) with *Katz v. Dole*, 709 F.2d 251, 255 n.6 (4th Cir. 1983) (bifurcated standard imposed—strict liability in quid pro quo situations and actual or constructive knowledge standard for hostile environment situations) and *Barnes v. Costle*, 561 F.2d 983, 985, 993 (D.C. Cir. 1977) (employer liable for supervisor's sexual harassment when supervisor implicitly or explicitly conditioned employment benefit on acquiescence to sexual favors).

Some commentators favor strict liability in all sexual harassment cases involving supervisors or management. See Atanasio, *Equal Justice Under Chaos: The Developing Law of Sexual Harassment*, 51 U. CIN. L. REV. 1, 30-34 (1981); Case Comment, *Sexual Harassment of Employees Creates Discriminatory Work Environment in Violation of Title VII—Bundy v. Jackson*, 15 SUFFOLK U.L. REV. 1385, 1395 (1981); see also Lipsig, *Sexual Harassment In*

tion, an employer is generally held to be vicariously liable.⁷ In contrast, the circuits have been reluctant to impose vicarious liability on an employer, absent a showing of fault, when a supervisor creates an offensive working atmosphere but does not threaten a tangible employment benefit.⁸ Recently, in *Vinson v. Taylor*,⁹ the Court of Appeals for the District of Columbia Circuit held that an employer is liable to an employee who is subjected to a sexually offensive work environment created by a supervisor notwithstanding the fact that the employer has no knowledge of such circumstances.¹⁰

In *Vinson*, the female plaintiff alleged that Taylor, her supervisor, demanded sexual relations as compensation for hiring her and that she submitted to his demands only because she feared losing her job.¹¹ It was further alleged that Taylor caressed her,

the Workplace, N.Y.L.J., Oct. 25, 1985, at 1, col. 1 (current trend imposing strict liability upon employer for supervisor's sexual harassment should be applauded). Other commentators oppose strict liability when an employer had no actual or constructive notice of a supervisor's wrongdoings. See Bryan, *Sexual Harassment as Unlawful Discrimination Under Title VII of the Civil Rights Act of 1964*, 14 Loy. L.A.L. Rev. 25, 47-54 (1980); McLain, *The EEOC Sexual Harassment Guidelines: Welcome Advances Under Title VII?*, 10 U. BALT. L. Rev. 275, 317-322, 336-37 (1981).

⁷ See, e.g., *Horn v. Duke Homes*, 755 F.2d 599, 604-05 (7th Cir. 1985) (employer liable for quid pro quo sexual harassment regardless of whether employer had notice of supervisor's improper conduct); *Katz v. Dole*, 709 F.2d 251, 255 n.6 (4th Cir. 1983) (employer strictly liable if supervisor conditioned employment benefit on sexual favors); *Henson v. City of Dundee*, 682 F.2d at 910-12 (quid pro quo condition made by supervisor warrants employer liability even though employer may not have had notice).

⁸ See, e.g., *Katz*, 709 F.2d at 255 (employer liable for offensive work environment only when employer had actual or constructive notice of supervisor's misconduct and took no remedial action); *Henson v. City of Dundee*, 682 F.2d 897, 905 (11th Cir. 1982) (when supervisor creates offensive work environment, employer not liable unless employer knew or should have known of supervisor's sexual harassment and failed to take remedial action); *Bundy v. Jackson*, 641 F.2d 934, 943 (D.C. Cir. 1981) (employer liable for offensive work environment when employer had notice of its occurrence). But see *Miller v. Bank of America*, 600 F.2d 211, 213 (9th Cir. 1979) (making no distinction between types of sexual harassment; holding employer strictly liable when employer had no notice and took steps to ensure good working environment.).

Notwithstanding the notice requirement generally asserted by the courts for the offensive work environment situation, the EEOC guidelines have imposed strict liability upon employers for an offensive work environment created by a supervisor even though an employer had no notice. See 29 C.F.R. § 1604.11(c). According to the EEOC guidelines, it is also possible to impose liability on an employer when the harassment was committed by a third-party non-employee or a co-worker if the employer had knowledge or reason to know of the sexual harassment and failed to take appropriate action. See *id.* § 1604.11(d)-(e).

⁹ 753 F.2d 141 (D.C. Cir. 1985).

¹⁰ *Id.* at 147, 152.

¹¹ *Id.* at 143-44.

followed her into the ladies room, exposed himself to her on a number of occasions, and raped her.¹² Taylor denied all the claims of sexual harassment¹³ and the employer, Capital City Federal Savings & Loan Association, asserted that it had no knowledge of any of his alleged activities.¹⁴ Plaintiff took an indefinite sick leave and was discharged two months later for excessive use of that leave.¹⁵ Plaintiff commenced an action under Title VII of the Civil Rights Act of 1964 against Taylor and her employer, asserting that she had been subjected to sexual discrimination as a result of Taylor's conduct.¹⁶ The district court concluded that plaintiff did not make out a case of sexual discrimination because she did not lose any tangible employment benefit as the result of any unlawful condition imposed upon her by her supervisor.¹⁷ However, as a result of the district court's failure to consider the liability of the defendants with respect to an alleged sexually offensive work environment created by the supervisor,¹⁸ the court of appeals reversed and remanded the matter for further proceedings.¹⁹

Chief Judge Robinson, writing for the court, noted that there are "at least two separate avenues . . . open to a Title VII plaintiff for a demonstration of unlawful sex discrimination"²⁰ —the quid

¹² *Id.* Vinson claimed that Taylor made sexual advances toward other employees. *Id.* at 144. The district court refused to allow the plaintiff to present direct evidence concerning the experience of co-workers, but indicated that she could introduce such evidence in rebuttal. See *Vinson v. Taylor*, 23 Fair Empl. Prac. Cas. (BNA) 37, 38-39 n.1 (D.D.C. 1980), *rev'd*, 753 F.2d 141 (D.C. Cir. 1985). The court of appeals held that decision to be erroneous, stating that "evidence tending to show Taylor's harassment of other women working alongside Vinson is directly relevant to the question whether he created an environment violative of Title VII." 753 F.2d at 146. As to Vinson's submittal to Taylor's alleged sexual demands out of fear of losing her job, the court of appeals held that "a victim's capitulation to on-the-job sexual advances cannot work a forfeiture of her opportunity for redress." *Id.*

¹³ 753 F.2d at 144. Taylor maintained that plaintiff made her allegations in retaliation for a business dispute. *Id.*

¹⁴ *Id.* Despite Vinson's contention that she had informed her employer through a grievance procedure, the district court found that management had no knowledge of Taylor's actions. *Id.* at 147 n.43.

¹⁵ *Id.* at 143.

¹⁶ *Id.* Plaintiff also claimed the existence of a violation of her fifth amendment rights and a violation of 42 U.S.C. § 1985(2), but she withdrew those claims after oral arguments in the district court. *Id.* at 143 n.12.

¹⁷ *Id.* at 144.

¹⁸ *Id.* at 145. The district court's analysis in *Vinson* was limited to the quid pro quo form of sexual harassment. See *Vinson v. Taylor*, 23 Fair Empl. Prac. Cas. (BNA) 37, 43 (D.D.C. 1980), *rev'd*, 753 F.2d 141 (D.C. Cir. 1985).

¹⁹ *Vinson*, 753 F.2d at 145, 152.

²⁰ *Id.* at 144.

pro quo situation²¹ and the condition of the work environment.²² Determining that Vinson's claim was clearly one for an offensive work environment,²³ Judge Robinson held that "[a]n infringement of Title VII is not . . . necessarily dependent upon the victim's loss of employment or promotion."²⁴ Furthermore, the court held that "Title VII imposes upon an employer without specific notice of sexual harassment by supervisory personnel responsibility for that species of discrimination."²⁵ Disclaiming any reliance upon the doctrine of respondeat superior,²⁶ the court based its holding on congressional intent²⁷ and the Equal Employment Opportunity Commission's guidelines.²⁸ Judge Robinson also employed an anal-

²¹ *Id.* at 144-45.

²² *Id.* at 145.

²³ *Id.* The *Vinson* court defined a sexually offensive work environment as one in which an employee is "subjected to 'sexually stereotyped insults' or 'demeaning propositions' that illegally poison the 'psychological and emotional work environment.'" *Id.* (quoting *Bundy v. Jackson*, 641 F.2d 934, 944 (D.C. Cir. 1981)).

²⁴ *Vinson*, 753 F.2d at 144.

²⁵ *Id.* at 147; see also *Jeppsen v. Wunnicke*, 37 Fair Empl. Prac. Cas. (BNA) 994, 997 (D. Alaska 1985) (relying on *Vinson* to impose strict liability on an employer for hostile work environment). The *Vinson* court stated that, because the employee perceives that a supervisor has a significant amount of influence, the employer should be held strictly liable even when the supervisor had no actual authority of any kind. 753 F.2d at 150.

²⁶ 753 F.2d at 150. The doctrine of respondeat superior imposes strict liability upon an employer for the unauthorized torts committed by an employee while engaged in the scope of his employment. See H. REUSCHLEIN & W. GREGORY, *AGENCY & PARTNERSHIP* 101 (1979). Conduct is within the scope of employment when:

- (a) it is of the kind he is employed to perform; (b) it occurs substantially within the authorized time and space limits; (c) it is actuated, at least in part, by a purpose to serve the master, and (d) if force is intentionally used by the servant against another, the use of force is not unexpected by the master.

RESTATEMENT (SECOND) OF AGENCY § 228 (1957). The *Vinson* court's explicit denial of the use of the respondeat superior doctrine is apparently in reaction to the use of this term by other courts to justify the imposition of liability on an employer in Title VII cases. See, e.g., *Miller v. Bank of America*, 600 F.2d 211, 213 (9th Cir. 1979) (respondeat superior applied when sexual harassment committed by supervisor); see also Significant Development, *New EEOC Guidelines on Discrimination Because of Sex: Employer Liability for Sexual Harassment Under Title VII*, 61 B.U.L. REV. 535, 539 (1981) (finding employer liable based on traditional respondeat superior principles would be rare).

²⁷ *Vinson*, 753 F.2d at 148, 150. While recognizing that the legislative history of Title VII is virtually silent on the matter of an employer's vicarious liability, the court noted that Senate debate over analogous matters contained expressions of concern by opponents of the bill that employers could be held responsible for discriminatory practices over which they have no control. *Id.* at 148 (quoting 110 CONG. REC. 5820, 8177 (1964) (statements of Sens. Stennis and Tower)).

²⁸ *Vinson*, 753 F.2d at 148-49. The EEOC guidelines on sexual discrimination provide in relevant part: "an employer . . . is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether . . . the em-

ogy to racial and religious discrimination cases in which employers have been found strictly liable under Title VII.²⁹

Dissenting to a later denial of the defendant's request for a rehearing en banc,³⁰ Judge Bork asserted that the court's decision improperly expanded the employer's exposure to vicarious liability beyond established precedent which required the imposition of liability only when an employer had knowledge of a supervisor's wrongdoings.³¹

The *Vinson* Court has now imposed the same standard of strict liability in all instances involving sexual harassment by a supervisor.³² It is submitted that while reaching a just result, the court failed to explore adequately the rationale behind the extension of strict liability to employers whose supervisors create offensive work environments without the employers' actual or construc-

ployer knew or should have known of their occurrence." 29 C.F.R. § 1604.11(c) (1985). The *Vinson* court concluded that the inclusion of supervisory personnel as "agents" is in accord with the spirit of Title VII. See 753 F.2d at 149.

²⁹ *Vinson*, 753 F.2d at 149 & n.67. In racial and religious discrimination cases falling under Title VII, courts have imposed liability upon the employer regardless of whether there was notice or fault. See *Young v. Southwestern Sav. & Loan Ass'n*, 509 F.2d 140, 144 n.7 (5th Cir. 1975). Cases involving racial and religious discrimination under Title VII do not discuss notice as a prerequisite to imputing liability to the employer in offensive or hostile work environment situations. See *Calcote v. Texas Educ. Found.*, 578 F.2d 95, 98 (5th Cir. 1978).

³⁰ *Vinson v. Taylor*, 760 F.2d 1330, 1330 (D.C. Cir. 1985)(per curiam).

³¹ *Id.* at 1132-33 (Bork, J., dissenting). Judge Bork noted that prior cases before the court were, unlike the *Vinson* case, actions in which the employer was allegedly aware of the supervisor's sexual harassment. *Id.* at 1332 (Bork, J., dissenting) (citing *Bundy v. Jackson*, 641 F.2d 934, 943 (D.C. Cir. 1981) and *Barnes v. Costle*, 561 F.2d 983, 1001 (D.C. Cir. 1977) (MacKinnon, J., concurring)). Judge Bork asserted that *Barnes* and *Bundy* explicitly limited the imputation of liability to instances in which an employer was aware of an supervisor's sexual harassment. *Vinson*, 760 F.2d at 1332 (Bork, J., dissenting). However, the *Bundy* court merely noted that *Barnes* "did suggest" that an employer "might be" relieved of liability if the supervisor's misconduct contravened employer policy without the employer's knowledge, and if the employer promptly rectified the offense. See *Bundy*, 641 F.2d at 943.

Judge Bork objected to the ruling that the voluntary nature of the acts was irrelevant, see *Vinson*, 760 F.2d at 1330 (Bork, J., dissenting), and also to the ruling that permitted the introduction of evidence tending to show the supervisor's sexual harassment of other employees, *id.* at 1331 (Bork, J., dissenting).

³² See *Vinson*, 753 F.2d at 151-52; *Bundy v. Jackson*, 641 F.2d 934, 943 (D.C. Cir. 1981) (employer liable when he knew supervisor was sexually harassing employee creating offensive work environment); cf. *Barnes v. Costle*, 561 F.2d 983, 993 (D.C. Cir. 1977) (employer generally responsible for discriminatory practices of supervisor, but exonerated if situation rectified upon discovery). Contrary to the assertion of Judge Bork, see *supra* note 31 and accompanying text, prior decisions of the District of Columbia Circuit did not explicitly require knowledge on the part of the employer in all instances of sexual harassment, see *Vinson*, 753 F.2d at 147.

tive knowledge. This Comment will examine the duties and responsibilities delegated to a supervisor by an employer with respect to the working environment and will submit that the court in *Vinson* should have expressly rejected the distinction between offensive work environment and quid pro quo situations.³³

THE INVALID DISTINCTION BETWEEN QUID PRO QUO AND WORK ENVIRONMENT

Courts that distinguish quid pro quo sexual harassment from the sexually offensive work environment situation often base their decisions on agency principles³⁴ or on the common law notion of respondeat superior.³⁵ These courts posit that the imposition of vicarious liability on employers is justified in instances of quid pro quo harassment because supervisors in such situations utilize the official authority delegated to them by their employers when they give employees the choice of either acceding to sexual demands or

³³ While a male employee can be the victim of sexual harassment in the workplace, and, pursuant to the definition of sexual harassment as established by the EEOC, would equally be protected under Title VII, *cf.* 29 C.F.R. § 1604.11(a) (Title VII protects individuals from sexual harassment in employment); *Wright v. Methodist Youth Services*, 25 Fair Empl. Prac. Cas. (BNA) 563, 564 (N.D. Ill. 1981) (male employee brought suit under Title VII stemming from homosexual advances which led to termination); *see also* M. MEYER, I. BERCHTOLD, J. OESTREICH & F. COLLINS, *SEXUAL HARASSMENT* 5 (1981) (survey revealed that men as well as women receive form of sexual harassment in workplace), this Comment will focus its discussion on sexual harassment committed by supervisors against female employees.

For convenience, this Comment will employ male pronouns when referring to employers and supervisors.

³⁴ *See Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982); *see also* Significant Development, *supra* note 26, at 538 (discussion of employer's vicarious liability under Title VII based on agency principles). In *Henson*, the court held an employer strictly liable for the quid pro quo demands made by a supervisor because the supervisor "relie[d] upon his apparent or actual authority to extort sexual consideration from an employee." 682 F.2d at 910.

³⁵ *See, e.g., Horn v. Duke Homes*, 755 F.2d 599, 605 (7th Cir. 1985) (employer liable under broad respondeat superior theory); *Henson v. City of Dundee*, 682 F.2d 897, 910 (11th Cir. 1982) (respondeat superior less applicable to offensive work environment); *Miller v. Bank of Am.*, 600 F.2d 211, 213 (9th Cir. 1979) (non-application of respondeat superior would create "enormous loophole" in protection afforded by Title VII); *see also Hearings on Labor, supra* note 2, at 339 (EEOC guidelines follow "common law standard of respondeat superior" imposing liability on employer for sexual harassment by supervisor). Reliance on the respondeat superior doctrine is technically inappropriate because an element of the doctrine requires the employee to be pursuing the interests of the master-employer while engaging in the offensive conduct. *See* Significant Development, *supra* note 26, at 539. This is generally not the case when a supervisor sexually harasses an employee. *Id.*

forfeiting job benefits, continued employment, or promotion.³⁶ Conversely, it has been asserted that a supervisor is not utilizing authority delegated to him by his employer when creating a sexually offensive work environment, but is merely pursuing personal objectives that are outside the scope of his employment.³⁷ In sexually offensive work environment cases, liability is usually not imposed upon an employer absent a showing of fault such as actual or constructive knowledge of the supervisor's misconduct.³⁸ It is submitted that the imposition of different standards of liability in quid pro quo and offensive work environment situations is based on the erroneous assumption that a supervisor uses official authority only when engaging in quid pro quo harassment.

Due to the hierarchical complexity of modern business organizations,³⁹ managers and supervisors act as functionaries of the business entrepreneur.⁴⁰ Among other responsibilities, the supervisor's duties include the organization of the workplace into a "cohesive and efficient whole that operates with the minimum of disruption and friction."⁴¹ It is submitted, therefore, that when a supervisor

³⁶ See *Horn v. Duke Homes*, 755 F.2d 599, 605 (7th Cir. 1985). In *Horn*, the court determined that the supervisor's sexual demands were made possible by the delegation of the employer's powers. *Id.* In a quid pro quo situation, the supervisor relies on his apparent or actual authority. See *Henson v. City of Dundee*, 682 F.2d 897, 910 (11th Cir. 1982); see also Note, *supra* note 6, at 807 (supervisor acting in official capacity when employment conditioned on return of sexual favors).

³⁷ See, e.g., *Katz v. Dole*, 709 F.2d 251, 255 (4th Cir. 1983) (following *Henson*); *Henson v. City of Dundee*, 682 F.2d 897, 910 (11th Cir. 1982) (supervisor acts outside scope of his authority when he creates sexually offensive work environment); see also *McLain, supra* note 6, at 318-21 (unlike non-harassment Title VII cases, courts have imposed differing standards of liability on employer for supervisors' sexual harassment); Note, *supra* note 6, at 808-09 (supervisor creates hostile environment without exercising supervisory powers).

³⁸ See *Henson v. City of Dundee*, 682 F.2d 897, 905 (11th Cir. 1982); *Cummings v. Walsh Const. Co.*, 561 F. Supp. 872, 877 (S.D. Ga. 1983); *Coley v. Consolidated Sail Corp.*, 561 F. Supp. 645, 650 (E.D. Mich. 1982).

³⁹ See D. BROWN, *MANAGING THE LARGE ORGANIZATION* 111 (1982) (as organizations increase in size, their structures become more complex).

⁴⁰ See *Horn v. Duke Homes*, 755 F.2d 599, 605 (7th Cir. 1985). In *Horn*, the court noted that a company is a legal form which acts through appointed agents such as supervisors who have authority to hire and fire. *Id.*; see also *Miller v. Bank of America*, 600 F.2d 211, 213 (9th Cir. 1979) (no employer, whether corporation, partnership, or sole proprietorship can function without employees); *Calcote v. Texas Educ. Found.*, 578 F.2d 95, 98 (5th Cir. 1978) (corporation can only operate through its authorized personnel).

⁴¹ B. WALLEY, *HANDBOOK OF OFFICE MANAGEMENT* 109 (2d ed. 1982). The skills of a supervisor are expected to include the ability to build cooperative efforts and a good working environment. See G. TERRY & J. STALLARD, *OFFICE MANAGEMENT & CONTROL* 419 (8th ed. 1980). Managers set the tone which affects the productivity and the financial stability of the company. See M. MEYER, I. BERCHTOLD, J. OESTREICH & F. COLLINS, *supra* note 33, at 78; D.

engages in activity that affects the working environment, he is clearly acting within the scope of his employment.⁴² The fact that an employer may not have specifically directed the supervisor to create a sexually offensive work environment is not significant; indeed such specific direction is no more likely to exist when a supervisor conditions the loss or gain of employment benefits upon the return of sexual favors.⁴³ The authority conveyed in both cases is a general one to promote the efficient use of working operations and human resources.⁴⁴ Therefore, it is submitted that the distinction drawn between the two types of sexual harassment, leading courts and commentators to apply differing standards of employer liability, is without merit. Thus, it is submitted that although the *Vinson* Court arrived at a just decision, it should have declared that, with respect to the delegation of authority, there is no real distinction between the *quid pro quo* and work environment situations.

It is suggested that an employee has the right to work in a congenial atmosphere untainted by racial or sexual slurs.⁴⁵ Psychological as well as economic benefits are protected under Title VII.⁴⁶

STERN, MANAGING HUMAN RESOURCES, THE ART OF FULL EMPLOYMENT 42-57 (1982).

⁴² The supervisor's conduct can distract the employee so that the employee cannot properly perform employment duties, thereby altering contractual conditions of employment. See *Compston v. Borden, Inc.*, 424 F. Supp. 157, 160-61 (S.D. Ohio 1976).

⁴³ See *Horn v. Duke Homes*, 755 F.2d 599, 605 (7th Cir. 1985). The *Horn* court rejected the argument that an employer should avoid liability because he did not expressly authorize the supervisor to sexually harass an employee by conditioning an employment benefit on the receipt of sexual favors. *Id.*; see *Miller v. Bank of America*, 600 F.2d 211, 213 (9th Cir. 1979). It is submitted, therefore, that distinguishing the sexually harassing environment situation from the *quid pro quo* situation on the ground that the employer does not direct the supervisor to create an offensive work environment is without justification.

⁴⁴ See *Henson v. City of Dundee*, 682 F.2d 897, 913 (11th Cir. 1982) (Clark, J., concurring in part and dissenting in part).

⁴⁵ See, e.g., *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971) (congenial work environment is "intangible fringe benefit" which deserves protection), *cert. denied*, 406 U.S. 957 (1972). Terms and conditions of employment under Title VII means more than tangible compensation. See *Carroll v. Talman Fed. Sav. & Loan Ass'n*, 604 F.2d 1028, 1032 n.13 (7th Cir.), *cert. denied*, 445 U.S. 929 (1979). A supervisor's misconduct alters the contractual conditions of the employee's employment. See *Compston v. Borden, Inc.*, 424 F. Supp. 157, 160-61 (S.D. Ohio 1976).

⁴⁶ See *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972). The *Rogers* court held that a racially discriminatory work environment was actionable notwithstanding the fact that the employer may have had no discriminatory intent. *Id.*; see also *Gray v. Greyhound Lines East*, 545 F.2d 169, 176 (D.C. Cir. 1976) (psychologically harmful work environment resulted when managers hired on basis of race in violation of Title VII); *United States v. City of Buffalo*, 457 F. Supp. 612, 632-35 (W.D.N.Y. 1978) (racially derogatory materials and buttons displayed in workplace permitted by supervisor violated Title VII). "[A] variety of employment practices which are related not to economic

It is submitted that the creation of an oppressive work environment by supervisory personnel through the use of sexual innuendoes and constant sexual advances hinders an employee's ability to perform job-related tasks, thereby amounting to a denial of an employment right. Indeed, such activity has the same effect as quid pro quo sexual harassment.⁴⁷

Some commentators have argued that an employer has more control over a supervisor's conduct in the quid pro quo situation than in the work environment situation, thereby justifying the application of a knowledge standard in the latter.⁴⁸ However, cases dealing with religious and racial discrimination demonstrate that control is not the basis for the imposition of liability under Title VII.⁴⁹ Moreover, it is safe to assume that an employer maintains

fringe benefits but to intangibles, such as psychological impact upon minority employees from a work environment heavily charged with discrimination, fall within the protection of the expansive statutory [Title VII] language." *City of Buffalo*, 457 F. Supp. at 631. Applying different standards for sexual discrimination than for racial and religious discrimination under Title VII would be contrary to Congress' findings. See *Horn v. Duke Homes*, 755 F.2d 599, 606 (7th Cir. 1985).

⁴⁷ Drawing lines of demarcation between acts that constitute quid pro quo and those that create an offensive work environment is difficult. See, e.g., *Katz v. Dole*, 709 F.2d 251, 254-55 (supervisor made quid pro quo sexual proposition and caused hostile work environment). In *Katz*, the court indicated that the case could be considered of the quid pro quo type because the supervisor made quid pro quo demands. This classification was made notwithstanding that the employee did not actually lose any "tangible" employment benefit. *Id.* at 255 n.6. However, the court based its holding on the existence of an offensive work environment and remanded the case for a determination as to the employer's knowledge or lack thereof. *Id.* at 256. The factual circumstances in *Katz* illustrate the relationship between quid pro quo and work environment sexual harassment. Cf. *id.* at 255 n.6 (under same facts, plaintiff arguably victim of quid pro quo and condition of work harassment). It is suggested that quid pro quo demands have the effect of creating a sexually offensive work environment. In light of their similarities and interrelationships, it is submitted that the quid pro quo and work environment situations should be treated alike by the courts. See generally Crull, *The Impact of Sexual Harassment on the Job—A Profile of the Experiences of 92 Women*, in *SEXUALITY IN ORGANIZATIONS: ROMANTIC & COERCIVE BEHAVIORS AT WORK* 70 (D. Neugarten & J. Shafritz eds. 1980) (discussion of effect on employee's ability to perform employment tasks); L. FARLEY, *supra* note 2, at 204.

⁴⁸ See Note, *supra* note 6, at 804, 809. See generally Note, *What Behavior Constituting Sexual Harassment?*, 34 LAB. L.J. 238, 242-43 (1983) (strict liability unwarranted).

⁴⁹ See *Flowers v. Crouch-Walker Corp.*, 552 F.2d 1277, 1282 (7th Cir. 1977). The *Flowers* court did not consider whether the employer had the opportunity or the ability to take corrective action. See *id.* Rather, the court stated, "[t]he defendant is liable as principal for any violation of Title VII or section 1981 by [the supervisor] in his authorized capacity as supervisor." *Id.* (emphasis added). Cases of racial and religious discrimination under Title VII generally do not draw a distinction between instances in which an employee lost her job or other tangible employment benefit and those in which an offensive work environment was created. Compare *Flowers*, 552 F.2d at 1282 (liability for Title VII violation imputed to employer) with *Calcote v. Texas Educ. Found.*, 578 F.2d 95, 97 (5th Cir. 1978) (supervisor's

sufficient control over the conditions of the work environment to warrant the imposition of accountability.⁵⁰ Furthermore, it is submitted that the imposition of legal responsibility would actually serve to motivate employers to exert greater control over the work environment to prevent sexual harassment by supervisors.

racial discrimination which created intolerable work environment and conditions and caused constructive discharge imposed liability upon employer); *Carridi v. Kansas City Chiefs Football Club*, 568 F.2d 87, 88 (8th Cir. 1977) (ethnic slurs alone can amount to Title VII violation and invoke vicarious liability); *Young v. Southwestern Sav. & Loan Ass'n*, 509 F.2d 140, 144 n.7 (5th Cir. 1975) (requiring atheist employee attendance at religious prayer meeting caused intolerable work environment). In *Young*, the court imposed liability on the employer notwithstanding the fact that the employee never lodged a complaint to a high-ranking company officer pursuant to company policy, thereby denying the employer an opportunity to control the situation. See *Young*, 509 F.2d at 144-45.

District court cases concerning racial and religious discrimination under Title VII also do not draw the types of distinctions that are drawn in sexual harassment cases. See *United States v. City of Buffalo*, 457 F. Supp. 612, 635 (W.D.N.Y. 1978); *Compston v. Bordon, Inc.*, 424 F. Supp. 157, 160 (S.D. Ohio 1976). In *Compston*, the court held that the employee did not lose any tangible employment benefit as a result of the supervisor's derogatory comments of the Jewish faith. 424 F. Supp. at 161-62. However, without making distinctions based upon an employer's ability to control a supervisor's acts, the *Compston* court rendered judgment against the employer for the offensive work environment created by his supervisor's verbal abuse. *Id.* at 162. In *City of Buffalo*, liability was imposed upon the city, acting as employer, for the creation of an offensive work environment as well as for the denial of tangible employment benefits even though the City's Commission had no knowledge of the wrongdoings. 457 F. Supp. at 635, 639-40; see also S. REP. NO. 238, 92d Cong., 1st Sess. 5 (1971) (discrimination against women should be treated no differently than discrimination based on race). It is submitted that requiring notice before an employer can be held liable to a sexually harassed employee for an offensive work environment is contrary to the intended effect of Title VII.

⁵⁰ See D. BROWN, *supra* note 39, at 198-205. Management has the ability to make the environment more suitable to the characteristics, values, and needs of employees. *Id.* Employers can effectively use formal grievance procedures to curb sexual harassment. See Foucher & McCulloch, *Sexual Harassment in the Workplace—What Should the Employer Do?*, in *SEXUALITY IN ORGANIZATIONS—ROMANTIC COERCIVE BEHAVIOR AT WORK* 89-91 (D. Neugarten & J. Shafritz eds. 1980). There are many other measures an employer can take to maintain a working environment free of sexual harassment. See VERMONT ADVISORY COMM. TO THE U.S. COMM'N ON CIVIL RIGHTS AND THE GOVERNOR'S COMM. ON THE STATUS OF WOMEN, *SEXUAL HARASSMENT ON THE JOB, A GUIDE FOR EMPLOYERS* 16 (1982) [hereinafter cited as VERMONT ADVISORY COMM.]; Hill & Behrens, *Love in the Office: A Guide for Dealing with Sexual Harassment Under Title VII of the Civil Rights Act of 1964*, 30 DE PAUL L. REV. 581, 614-22 (1981). Employers should direct their attention to organizational design, direction, human resources, control, and feedback to minimize sexual harassment in the workplace. See M. MEYER, I. BERCHTOLD, J. OESTREICH & F. COLLINS, *supra* note 33, at 85-107. Employers can ensure that supervisors will maintain a work environment free of sexual harassment by basing job performance evaluations on the supervisor's ability to maintain a harmonious work atmosphere and by providing employees with information on their rights and the channels they are to take to enforce those rights. See B. WALLEY, *supra* note 41, at 101.

THE KNOWLEDGE REQUIREMENT: AN UNDUE BURDEN ON THE
VICTIMIZED EMPLOYEE

Those who oppose the application of strict liability in work environment cases often argue that the imposition of liability is unfair when the employer is unaware of his supervisor's wrongdoings.⁵¹ It is submitted, however, that the knowledge requirement places an excessive burden on the victim of sexual harassment to inform an unsuspecting employer. Victims of sexual harassment are often afraid to circumvent the normal chain of command because they fear that they will be blamed, ostracized or fired.⁵² Employees are often unable to take the risk of informing their employer of a supervisor's misconduct in light of their economic vulnerability.⁵³ Furthermore, many employees perceive that management will not take their complaints seriously.⁵⁴ The possibility

⁵¹ See, e.g., Conte & Gregory, *Sexual Harassment in Employment — Some Proposals Towards More Realistic Standards of Liability*, 32 *DRAKE L. REV.* 407, 411-12 n.18 (unfair to impose liability upon employer when employer without notice of sexual harassment); Note, *supra* note 6, at 810 (fairest standard of liability must be assigned to each form of sexual harassment).

⁵² See U.S. OFFICE OF PERSONNEL MANAGEMENT, WORKSHOP ON SEXUAL HARASSMENT 10 (1980). The effects of sexual harassment include feelings of powerlessness, fear, anger, nervousness, decreased job satisfaction, and diminished ambition. *Hearings on Labor, supra* note 2, at 524. Specifically, studies reveal that, among other things, sexually harassed women are often fired, forced to resign, or barred from promotions and other benefits. *Id.* at 168-69.

The type of insensitivity sometimes encountered by victimized employees is exemplified by the facts of *Bundy v. Jackson*. See 641 F.2d 934, 939-41 (D.C. Cir. 1981). After being subjected to continual sexual insults and demeaning propositions from her supervisor, the plaintiff notified her superiors, who also failed to take her complaint seriously and made sexually harassing remarks themselves. *Id.* at 939-40. Following the plaintiff's complaint of sexual harassment to the EEOC, the plaintiff claimed that the supervisors retaliated by criticizing her work. *Id.* at 941. She pursued her complaint by way of informal and then formal meetings conducted by the EEOC. *Id.* After receiving "satisfactory" ratings for work performance, plaintiff was found eligible for promotion. *Id.* The District of Columbia Circuit imposed vicarious liability on the employer, holding that an offensive work environment violates Title VII and warrants the imposition of liability. *Id.* at 941-46.

⁵³ See SUBCOMM. ON INVESTIGATIONS, *supra* note 2, at 13. The resulting economic loss from informing an employer of a supervisor's harassment often includes the loss of seniority in employment or even dismissal. See *id.* at 12. Employees are sometimes unable to take action against unwanted sexual harassment because they cannot afford to secure legal assistance. See VERMONT ADVISORY COMM., *supra* note 50, at 9. Employees are sometimes reluctant to risk dismissal because they lack the skills and experience necessary for other employment. *Id.* at 10.

⁵⁴ See SUBCOMM. ON INVESTIGATIONS, *supra* note 2, at 12. Managers are reluctant to recognize that sexual harassment in the workplace is a problem. *Id.*; see also *Bundy v. Jackson*, 641 F.2d 934, 940 (D.C. Cir. 1981) (supervisor dismissed claims of sexual harassment without investigation); Middleton, *Sexual Harassment on the Job: New Rules Issued*, 60 *A.B.A.*

of retaliation by a supervisor while an employer investigates a claim of sexual harassment also poses a dilemma to a victimized employee.⁵⁵ It is submitted, therefore, that the knowledge necessary to impute liability to the employer will rarely exist because the very conditions that the employer creates and fosters may prevent incidents of sexual harassment from ever coming to his attention. Thus, it is suggested that sexual harassment in the workplace environment, which has come to be recognized as a serious problem today,⁵⁶ may never be mitigated without expunging the knowledge requirement and imposing an affirmative duty on the part of the employer to take preventive measures.⁵⁷ The knowledge re-

J. 703, 703 (1980) (statements of Nancy Kreiter, research director of Women Employed in Chicago). Believing that management will not give their complaints credence, many victimized women have chosen to quit their jobs rather than file complaints. See Waks & Starr, *The "Sexual Shakedown" in Perspective: Sexual Harassment in its Social & Legal Contexts*, 7 EMPLOYEE REL. L.J. 567, 569 (1982). The imposition of liability upon employers will encourage them to confront the problem of sexual harassment in the workplace. See C. MacKINNON, *supra* note 4, at 211.

⁵⁵ See VERMONT ADVISORY COMM., *supra* note 50, at 9. An investigation performed by a House subcommittee disclosed that most women subjected to sexual harassment do not file a complaint. See SUBCOMM. ON INVESTIGATIONS, *supra* note 2, at 11. Women are aware that employers can acquiesce to continued misconduct by supervisors while they superficially investigate a sexual harassment claim. See L. FARLEY, *supra* note 2, at 147.

⁵⁶ See SUBCOMM. ON INVESTIGATIONS, *supra* note 2, at 1, 21. The Subcommittee on Investigations of the House of Representatives found serious widespread sexual harassment in the federal workplace, warranting corrective action. *Id.* "The damages suffered by the victim of sexual harassment are as serious and severe as those suffered by the victims of any other tort." Lipsig, *supra* note 6, at 1, col. 1. While Title VII was designed to guard against employment discrimination, adequate enforcement may be lacking and further congressional action may be necessary. See *Hearings on Labor*, *supra* note 2, at 1. "Discrimination against women is no less serious than other forms of prohibited employment practices . . ." H.R. REP. NO. 238, 92d Cong., 1st Sess. 5 (1971); see also *Hearings on Labor*, *supra* note 2, at 2 (sexual discrimination in workplace a pervasive social and economic evil in today's economy); U.S. MERIT SYSTEMS PROTECTION BOARD OFFICE OF MERIT REVIEW AND STUDIES, SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: IS IT A PROBLEM? 5 (1981) (42% of female and 15.3% of male federal employees sexually harassed over two-year period); Collins & Blodgett, *Sexual Harassment . . . some see it . . . some won't . . .*, 59 HARV. BUS. REV. 76, 84 (Mar.-Apr. 1981).

⁵⁷ See *Horn v. Duke Homes*, 755 F.2d 599, 605 (7th Cir. 1985). Eleanor Holmes Norton, Chairman of EEOC during the House subcommittee investigation in 1980 indicated, "it would be naive to rely on complaints alone to handle sexual harassment. To do so places an unfair burden on women to come forward in a situation that is extremely difficult for the average person." See SUBCOM. ON INVESTIGATIONS, *supra* note 2, at 13. It has been asserted that before the EEOC guidelines imposing strict liability upon the employer were issued, "there were no teeth in the laws" governing sexual harassment. See Middleton, *supra* note 54, at 703. Section 1604.11(f) of the EEOC guidelines acknowledges that "[p]revention is the best tool for the elimination of sexual harassment" and recognizes that it is the duty of employers to take steps to prevent it. 29 C.F.R. § 1604.11(f); see Note, *Legal Remedies for*

quirement thwarts Congress' intent in enacting Title VII by failing to promote the elimination of sexual discrimination.⁵⁸

CONCLUSION

The extent of an employer's exposure to vicarious liability under Title VII for the acts of its supervisors is predicated upon the delegation of authority. The distinction between the *quid pro quo* and the condition of work environment situations drawn by some federal courts of appeals is unjustified because employers delegate to their supervisors the authority to maintain a good working environment—and that environment constitutes a significant employment right. Furthermore, the knowledge standard, which is generally imposed only in offensive work environment cases, places an excessive burden on the victim of sexual harassment to inform her employer. The holding of *Vinson v. Taylor* is a welcome step toward imputing liability upon the party best able to control the atmosphere in the working environment. Employers can and should take preventive measures against sexual harassment, thereby equalizing the opportunity for all employees to perform their jobs effectively and to achieve job advancement.

Barbara Verdonik

Employment-Related Sexual Harassment, 64 MINN. L. REV. 151, 159 (1979) (employers better equipped to bear costs of employee's sexual misconduct). "It was Congress' judgment that employers, not the victims of discrimination, should bear the cost The strict liability rule is admirably suited for this purpose." *Horn*, 755 F.2d at 605. While employers may not be able to control the thoughts and beliefs of their employees, they can train and sensitize employees so that they conduct themselves appropriately. See *Hearings on Labor*, *supra* note 2, at 531.

⁵⁸ See *Horn v. Duke Homes*, 755 F.2d 599, 605-06 (7th Cir. 1985) (notice requirement does not comport with purpose of Title VII). Title VII seeks to place women on equal footing with men, impose stringent demands upon employers and "strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." *United States v. City of Buffalo*, 457 F. Supp. 612, 629 (W.D.N.Y. 1978). Title VII was intended to "eliminate such irrational impediments to job opportunities and enjoyment which have plagued women in the past." *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir.) (emphasis added), *cert. denied*, 404 U.S. 991 (1971); see also *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971) (racial discrimination creating offensive work environment violates Title VII), *cert. denied*, 406 U.S. 957 (1972). The *Rogers* Court held that Title VII should be accorded liberal interpretations to effectuate congressional intent. 454 F.2d at 238.