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NOTE

DEFINING EMPLOYER LIABILITY: TOWARD A PRECISE APPLICATION OF AGENCY PRINCIPLES IN TITLE VII SEXUAL HARASSMENT CASES

“[I]n spite of whatever social enlightenment our nation might have achieved in the wake of the civil rights movement, the various anti-discrimination laws enacted by [C]ongress, and such consciousness raising events in our nation’s history as the Anita Hill/Clarence Thomas hearings, the nation’s workplaces are still filled with those who are eager to exploit their positions of authority and act motivated by discriminatory animus.”¹

I. INTRODUCTION

Kimberly Ellerth sued Burlington Industries, Inc. (hereinafter “Burlington”) for sexual harassment based on the actions of her supervisor, Ted Slowik.² Ellerth brought her claims under

1. Ellerth v. Burlington Indus., Inc., 912 F. Supp. 1101, 1123 (N.D. Ill. 1996) (Castillo, J.), *rev’d*, 102 F.3d 848 (7th Cir. 1996), *aff’d in part, rev’d in part*, 123 F.3d 490 (7th Cir. 1997) (en banc) (per curiam), *aff’d sub nom.* Burlington Indus., Inc. v. Ellerth, 118 S. Ct. 2257 (1998) [hereinafter “Ellerth I”].

2. *See id.* at 1105-1106. Slowik was not Ellerth’s immediate supervisor. Throughout her employment at Burlington, Ellerth reported to a supervisor in Burlington’s Chicago office. Her immediate supervisors, in turn, reported to Slowik. *Id.* at 1106.

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Title VII of the Civil Rights Act of 1964.³ The United States District Court for the Northern District of Illinois granted Burlington's motion for summary judgment, dismissing Ellerth's claims with prejudice.⁴

Ellerth appealed to the United States Court of Appeals for the Seventh Circuit.⁵ The panel reversed the district court's decision.⁶ Burlington moved for a rehearing en banc, which was granted.⁷ On rehearing, a majority of the court agreed that Ellerth presented enough evidence to survive summary judgment on a claim of quid pro quo sexual harassment.⁸

Burlington then petitioned the Supreme Court for certiorari.⁹ The Supreme Court granted review to resolve differing views among the federal courts and to establish a standard for employer liability in sexual harassment cases.¹⁰ The Court held that, even in cases where the employee did not suffer a tangible employment action, the employer is vicariously liable unless it can establish an affirmative defense.¹¹ The Court defined the affirmative defense as a two-element test.¹² The first element requires the employer to prove it took reasonable action to prevent and correct the harassment.¹³ If it did, the second element requires the employer to prove that the employee unreasonably failed to take advantage of corrective measures available to her.¹⁴ If the employer proves both elements of the

3. See *id.* at 1105.

4. See *id.* at 1124.

5. See *Ellerth v. Burlington Indus., Inc.*, 102 F.3d 848 (7th Cir. 1996), *vacated en banc*, 123 F.3d 490, 494 (7th Cir. 1997) (per curiam) [hereinafter "Ellerth II"].

6. See *id.* at 863.

7. See *id.*

8. See *Ellerth v. Burlington Indus., Inc.*, 123 F.3d 490, 494 (7th Cir. 1997) (en banc) (per curiam) [hereinafter "Ellerth III"]. Ellerth waived her claim of hostile environment harassment on her appeal. The grant of summary judgment dismissing Ellerth's claim for hostile environment was therefore affirmed. *Id.*

9. See *Burlington Indus., Inc. v. Ellerth*, 118 S. Ct. 2257, 2262 (1998).

10. See *id.* at 2264.

11. See *id.* at 2270.

12. See *id.*

13. See *Burlington*, 118 S. Ct. at 2270.

14. See *id.* For ease of reference and because women are overwhelmingly the victims of sexual harassment, this note will use feminine pronouns to refer to plaintiffs in general. See CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 28 (1979).

defense by a preponderance of the evidence, it will not be held vicariously liable.¹⁵

Section II of this note discusses applicable principles and law in sexual harassment cases, including Title VII, Equal Employment Opportunity Commission Guidelines, agency principles, and case law that illustrate two primary approaches taken by the courts in determining the standard for employer liability. This section also discusses relevant portions of the first Supreme Court case to address sexual harassment under Title VII. Section III discusses the facts that gave rise to Ellerth's sexual harassment claims. Section IV discusses the procedural history of Ellerth's case, including the district court's decision, the decision of the Seventh Circuit panel that heard Ellerth's appeal and the en banc decision of the Seventh Circuit. Section V discusses the Supreme Court's opinion in *Ellerth v. Burlington Industries* in the context of sexual harassment law under Title VII. Section VI offers a critique of the Supreme Court's analysis, asserting that it is inconsistent with agency principles. Finally, Section VII concludes that a bright-line standard of employer liability, based on agency principles, is necessary in Title VII sexual harassment cases.

II. BACKGROUND

A. OVERVIEW OF TITLE VII

Congress enacted Title VII as part of the Civil Rights Act of 1964 (hereinafter "Title VII" or "the Act").¹⁶ Title VII prohibits employers from discriminating against a person because of race, color, religion, sex, or national origin.¹⁷ Prohibited discrimination may include termination, refusal to hire, or any

15. *See id.*

16. *See Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 63 (1986).

17. *See* 42 U.S.C.A. § 2000e-2(a)(1):

It shall be an unlawful employment practice for an employer 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.

Id.

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other practice which alters a person's "compensation, terms, conditions or privileges of employment."¹⁸ Title VII also forbids segregation and discriminatory classification of workers when these practices adversely impact the status of the employee.¹⁹ Finally, Title VII prohibits practices that explicitly discriminate against workers as well as those that are facially neutral but have a discriminatory effect.²⁰

Courts recognized sexual harassment as discrimination under Title VII by drawing an analogy to race-based harassment.²¹ Like the use of racial epithets by co-workers, harassment based on sex is a barrier to equality in the workplace.²² This argument is rooted in the language of Title VII itself.²³ The "terms, conditions, or privileges of employment" include the right to work in an environment that is free from the psychologically harmful effects of discrimination.²⁴

B. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION GUIDELINES

Congress created the Equal Employment Opportunity Commission (EEOC) to effectuate the provisions of Title VII.²⁵ In this capacity, the EEOC receives complaints from victims of employment discrimination.²⁶ In order to assist in the investigation of victims' claims of discrimination, the EEOC developed guidelines defining the conduct that constitutes sexual har-

18. *Id.*

19. See 42 U.S.C.A. § 2000e-2(a)(2):

It shall be an unlawful employment practice for an employer 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.

Id.

20. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 230 (1971).

21. See *Henson v. City of Dundee*, 682 F.2d 897, 902 (11th Cir. 1982).

22. See *id.*

23. See 42 U.S.C.A. § 2000e-2(a)(1).

24. *Henson*, 682 F.2d at 901 (quoting 42 U.S.C.A. § 2000e-2 (a)(1)).

25. See 42 U.S.C.A. § 2000e-5(a). "The commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practices as set forth in section 2000e-2 or 2000e-3 of this title." *Id.*

26. See 42 U.S.C.A. § 2000e-5(e)(1).

assessment under Title VII, as well as the role of the employer in preventing and correcting sexual harassment in the work place.²⁷ The guidelines describe the EEOC's standards for assessing employee claims of work place harassment.²⁸ The guidelines are not binding on the courts.²⁹ However, courts and litigants properly rely upon the guidelines because they "constitute a body of experience and informed judgment" that can be useful in deciding sexual harassment cases.³⁰

In evaluating claims of work place harassment, the guidelines instruct the EEOC to examine the "totality of the circumstances" to determine whether sexual harassment has occurred.³¹ The "totality of the circumstances" includes the nature of the conduct as well as the facts surrounding the conduct.³² Accordingly, the guidelines describe conduct that amounts to sexual harassment as well as the circumstances that may give rise to a finding of sexual harassment.³³ Prohibited conduct includes "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature."³⁴

After identifying the types of prohibited conduct, the guidelines go on to describe three situations in which such conduct amounts to sexual harassment.³⁵ First, sexual harassment arises when the employee's submission to the advances is made a term or condition of employment.³⁶ Second, sexual harassment occurs when the employee's submission, or the lack of it,

27. See Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11.

28. See 29 C.F.R. § 1604.11(a)(b).

29. See *Meritor*, 477 U.S. at 65.

30. *Id.* (quoting *General Electric Co. v. Gilbert*, 429 U.S. 125, 141-142 (1976)).

31. 29 C.F.R. § 1604.11(b):

In determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The legality of a particular action will be made from the facts, on a case by case basis.

Id.

32. *Id.*

33. See 29 C.F.R. § 1604.11(a).

34. *Id.*

35. See *id.*

36. See 29 C.F.R. § 1604.11(a)(1). "[S]ubmission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment." *Id.*

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is the basis of employment decisions affecting the employee.³⁷ These are commonly known as “quid pro quo” sexual harassment.³⁸ Third, sexual harassment arises when conduct “has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.”³⁹ This form of harassment is commonly known as “hostile environment” sexual harassment.⁴⁰

Regardless of which of the three types of harassment a plaintiff claims or whether the harassment results in a tangible employment action, the guidelines state that employers are vicariously liable for sexual harassment when it is committed by a supervisor.⁴¹ Thus, even when employers forbid sexual harassment, the employer is vicariously liable for a supervisor’s harassment.⁴² Moreover, an employer will be vicariously liable even when it did not know that sexual harassment occurred.⁴³

The strict vicarious liability approach outlined above has not prevailed in most courts, in part because the EEOC, then headed by Clarence Thomas, shifted its position.⁴⁴ Thomas urged Solicitor General Charles Fried to submit an amicus brief to the Supreme Court in *Meritor Savings Bank v. Vinson*,⁴⁵ the first sexual harassment case decided by the Su-

37. See 29 C.F.R. § 1604.11(a)(2). “[S]ubmission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual.” *Id.*

38. See *Meritor*, 477 U.S. at 65.

39. 29 C.F.R. § 1604.11(a)(3).

40. See *Meritor*, 477 U.S. at 65.

41. See 29 C.F.R. § 1604.11(c). Some commentators refer to this as “strict vicarious liability” because the imposition of vicarious (as opposed to direct liability based on employer negligence) liability is strict. Vicarious liability is imposed in all cases of sexual harassment by a supervisor. Interview with David B. Oppenheimer, Professor of Law at Golden Gate University School of Law, in San Francisco, Cal. (October 27, 1998).

42. See *id.*

43. See *id.*

44. See David B. Oppenheimer, *Exacerbating the Exasperating: Title VII Liability of Employers for Sexual Harassment Committed By Their Supervisors*, 81 CORNELL L. REV. 124 (1995) (citing David G. Savage, *Thomas Fought Workplace Harassment*, L.A. TIMES, Oct. 10, 1991, at A6).

45. 477 U.S. 57 (1986).

preme Court.⁴⁶ In the brief, the Solicitor General urged that the appropriate standard for imposing liability on employers for a hostile work environment should be negligence.⁴⁷ Thus, whether an employer has a sexual harassment policy and complaint procedure, combined with the harassment victim's failure to use them, should insulate an employer from vicarious liability.⁴⁸ The *Meritor* Court relied heavily on that reasoning to conclude that agency principles limited employer liability.⁴⁹ Since then, the guidelines' strict vicarious liability standard has been imposed in some circuits, but not in others, and has not been followed by the Supreme Court.⁵⁰

C. AGENCY PRINCIPLES AND SEXUAL HARASSMENT

1. *The Rationale for Applying Agency Principles to Sexual Harassment*

Congress intended agency principles to determine the standard of employer liability under Title VII.⁵¹ Additionally, the Supreme Court relied on Title VII's definition of an "employer,"

46. See Brief for the United States and the Equal Employment Opportunity Commission as Amici Curiae at 10-13, *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986) (No. 84-1979); Oppenheimer, *supra* note 44, at 122 (stating that *Meritor* was the Supreme Court's first opportunity to address sexual harassment under Title VII).

47. See Brief for the United States and the Equal Employment Opportunity Commission as Amici Curiae at 6-7 (stating that employer liability depended on whether the employer knew or should have known of the harassment and failed to provide appropriate redress).

48. See *id.* at 26. This position directly contradicts the 1980 EEOC guidelines. See 29 C.F.R. §1604.11(c) (stating that an employer's policy against sexual harassment and/or knowledge of sexual harassment in the workplace do defeat vicarious liability).

49. See *Meritor*, 477 U.S. at 71-72 (quoting extensively from the amicus brief and stating that it was appropriate to consider the circumstances of each case rather than impose a bright-line rule). The Court stated in the next paragraph that agency principles limited employer liability. See *id.*

50. See Brief for the United States and the Equal Employment Opportunity Commission as Amici Curiae at 10-13, *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986) (No. 84-1979).

51. See 42 U.S.C.A. § 2000e-(b). "The term employer means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agents of such a person." See also *Meritor*, 477 U.S. at 72; 29 C.F.R. § 1604.11(c) ("Applying general Title VII principles, an employer... is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment....").

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including language like the “agents of such a person,” to support its use of agency principles in deciding discrimination cases.⁵² Accordingly, in *Meritor Savings Bank v. Vinson*, the Court suggested that the Restatement (Second) Agency, section 219 (hereinafter “Section 219”) was a useful starting place for determining whether an employer should be liable for sexual harassment.⁵³

2. *Applying Section 219 to Sexual Harassment*

Agency principles apply to workplace sexual harassment because they describe employers’ responsibilities arising out of the injurious conduct of their employees.⁵⁴ Therefore, a proper interpretation of common law agency principles is essential to formulating the correct rule for employer liability in sexual harassment cases.⁵⁵

Section 219 describes several situations in which an employer may be liable for the torts of his employee.⁵⁶ Generally, an employer is liable for injuries caused by an employee while he is acting within the scope of his employment.⁵⁷ The assumption underlying this rule is that an employer can control an employee’s conduct when the employee is acting within the scope of his service to the employer.⁵⁸ Because the employer exercises such control, it is responsible for harm that results from the employee’s conduct.⁵⁹

52. See *Meritor*, 477 U.S. at 72.

53. See *id.*

54. See Oppenheimer, *supra* note 44, at 77.

55. See Oppenheimer, *supra* note 44, at 141.

56. See RESTATEMENT (SECOND) OF AGENCY § 219(1) (1957).

57. See *id.* For ease of reference, and because harassers are often male supervisors, masculine pronouns will be used to refer to supervisors. See MACKINNON, *supra* note 14, at 28 (1979) (citing the Working Women United Survey. Of 155 women surveyed, forty percent were harassed by their male supervisors). The Restatement defines scope of employment as follows: “1) Conduct of a servant is within the scope of employment if, but only if: 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).

58. See RESTATEMENT (SECOND) OF AGENCY § 219(1) cmt. a (1957).

59. See *id.* The classic example is where the driver of a delivery vehicle causes an auto accident while he is making deliveries. Because the driver was doing his job

The Restatement also describes four situations in which employers may be liable for an employee's acts that occur *outside* the scope of his or her employment.⁶⁰ First, employers may be liable when they intended the employee to harm someone.⁶¹ Second, employers may be liable when they are themselves negligent or reckless.⁶² Third, employers may be liable when the employee's conduct violated a non-delegable duty of the employer.⁶³ The comments to the Restatement describe these three categories as situations in which employers are either guilty of tortious conduct or are legally responsible for the employee's tortious conduct.⁶⁴

The fourth situation described in Section 219 is different because the employers are not themselves guilty of tortious conduct.⁶⁵ Rather, the employer is vicariously liable based on his relationship with the employee.⁶⁶ This standard encompasses two distinct, but related situations.⁶⁷ In the first, employers may be liable when their employee acts or speaks on behalf of

(driving) at the time of the accident, his employer can be liable for the plaintiff's injuries. The rationale is that the employer can control the competence of drivers when their conduct (driving) is within the scope (time period, duties) of their employment. *See id.*

60. *See* RESTATEMENT (SECOND) OF AGENCY § 219(2) (1957).

61. *See* RESTATEMENT (SECOND) OF AGENCY § 219(2)(a) (1957). *See also* RESTATEMENT (SECOND) OF AGENCY § 212 cmt. a. (1957). This rule comes from tort law, which holds people liable for the acts of others when they cause and intend an act or result. For an example, *see* RESTATEMENT (SECOND) OF AGENCY § 212 illus. 1 (1957): the employer tells his employee to shoot anyone who enters his property. A customer rightfully enters the property and the employee shoots him. The employer is liable because he intended the act and/or the consequences. *See id.*

62. *See* RESTATEMENT (SECOND) OF AGENCY § 219(2)(b) (1957). *See also* RESTATEMENT (SECOND) OF AGENCY § 213 cmt. d (1957). For example, an employer may be liable for his negligence or recklessness when he hires someone that he has reason to believe will harm others. *See id.* This is direct, as opposed to vicarious liability. *See* RESTATEMENT (SECOND) OF AGENCY § 219(2) cmt. e (1957).

63. *See* RESTATEMENT (SECOND) OF AGENCY § 219(2)(c) (1957). A non-delegable duty is a kind of vicarious liability, where a statute, contract, charter or franchise, or the common law imposes a duty on an employer. The employer may not delegate his responsibilities under this duty to someone else, like an agent or contractor. A classic example is the duty of common carriers to transport their passengers safely. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 70 at 511 (5th ed. 1984).

64. *See* RESTATEMENT (SECOND) OF AGENCY § 219(2) cmt. e (1957).

65. *See id.*

66. *See id.*

67. *See* RESTATEMENT (SECOND) OF AGENCY § 219(d) (1957).

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the employer and someone else relied on this "apparent authority."⁶⁸ In the second, employers may be liable if the employee was "aided in accomplishing the tort by the existence of the agency relation."⁶⁹ Either of these situations may provide a basis for employer liability.⁷⁰ In other words, under a correct reading of agency principles, a plaintiff does not have to prove the existence of both sets of circumstances.⁷¹

The two situations are related because there is a certain degree of overlap between them.⁷² For example, a supervisor may sexually harass a subordinate, asserting that he has the authority to terminate her if she does not submit.⁷³ Believing that he has this authority, she submits to avoid being terminated.⁷⁴ In that situation, the supervisor has asserted his authority to terminate the victim, whether he has it (actual authority) or not (apparent authority).⁷⁵ The fact that he is, in fact, a supervisor and he used his status to perpetuate the harassment may also give rise to liability based on the agency relation standard because he could not have perpetuated the harassment if he was not a supervisor.⁷⁶

D. SEXUAL HARASSMENT CASE LAW

Prior to the Supreme Court's decision in *Ellerth*, the federal courts could not agree on how to determine employer liability in sexual harassment cases.⁷⁷ In some cases, the court determined that the standard of employer liability hinged on whether the victim claimed quid pro quo or hostile environment harassment.⁷⁸ In other cases, however, the court imposed

68. *Id.*

69. *Id.*

70. *See id.* The Restatement uses the disjunctive: "... or he was aided in accomplishing the tort by the existence of the agency relation." *Id.*

71. *See* RESTATEMENT (SECOND) OF AGENCY § 219(d) (1957).

72. *See Ellerth II*, 102 F.3d at 861-862.

73. *See id.*

74. *See id.*

75. *See Ellerth II*, 102 F.3d at 861-862.

76. *See id.*

77. *See* Oppenheimer, *supra* note 44, at 131.

78. *See Henson*, 682 F.2d at 910. "In the classic quid pro quo case an employer is strictly liable for the conduct of its supervisors, while in the [hostile] work environment

vicarious liability to both quid pro quo and hostile environment claims.⁷⁹ The Supreme Court's decision in *Meritor Savings Bank, FSB v. Vinson* did not articulate a bright-line standard, so the conflict summarized above continued after the *Meritor* decision.⁸⁰

Before and after *Meritor*, sexual harassment was actionable under Title VII in two general forms; quid pro quo harassment and hostile environment harassment.⁸¹ Quid pro quo harassment occurred when a supervisor relied on his authority to require sexual favors from employees.⁸² If the employee refused, the supervisor exercised his power to terminate or discipline the employee.⁸³ A tangible employment action was the defining feature of the quid pro quo type of harassment.⁸⁴ Plaintiffs could not claim quid pro quo harassment unless they could prove a tangible employment action, such as termination or a disciplinary action.⁸⁵

Hostile environment harassment, in contrast, was a situation in which the victim "[ran] a gauntlet of sexual abuse."⁸⁶ The victim typically did not suffer a tangible employment action, such as demotion or termination, but the treatment she endured substantially altered her working conditions.⁸⁷ For example, the victim may have been so distraught by the harasser's conduct that she missed work.⁸⁸ As a rule, the "mere utterance" of a sexual remark was not enough to alter the victim's working conditions.⁸⁹ Rather, the plaintiff must have suf-

case, the plaintiff must prove that higher management knew or should have known of the sexual harassment before the employer may be held liable." *Id.*

79. See *Karibian v. Columbia Univ.*, 14 F.3d 773, 780 (2d Cir. 1994).

80. See *Oppenheimer*, *supra* note 44, at 131. *Meritor* was the Supreme Court's first opportunity to address sexual harassment under Title VII.

81. See *Henson*, 682 F.2d at 910.

82. See *id.*

83. See *id.*

84. See *id.*

85. See *Henson*, 682 F.2d at 910.

86. *Id.* at 902.

87. See *id.*

88. See *Meritor*, 477 U.S. at 60.

89. *Henson*, 682 F.2d at 904 (citing *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1972)).

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ferred severe or pervasive harassment to claim hostile work environment harassment under Title VII.⁹⁰

1. *Henson v. City of Dundee: Employer Liability Depends on Type of Claim*

The United States Court of Appeals for the Eleventh Circuit was one of the first federal circuits to address the issue of whether sexual harassment constituted discrimination under Title VII.⁹¹ In *Henson v. City of Dundee*⁹², the plaintiff, Barbara Henson, was a dispatcher for the city of Dundee's police department.⁹³ After working there for two years, she quit and sued the city of Dundee for sex discrimination in violation of Title VII.⁹⁴ She claimed that her supervisor, John Sellgren, sexually harassed her by refusing to promote her unless she engaged in sexual activity with him, and that he created a hostile work environment.⁹⁵

Because Henson claimed both quid pro quo and hostile environment harassment, the court addressed employer liability as to both types of claims.⁹⁶ The court stated that the type of harassment the victim claimed determined whether an employer would be vicariously liable.⁹⁷ According to the *Henson* court, in quid pro quo cases it was appropriate to find the employer vicariously liable because the supervisor misused the authority delegated to him by the employer.⁹⁸ Thus, the employer's liability derived from the agency relationship.⁹⁹

In contrast, the employer's liability for creating a sexually hostile work environment derived from its own negligence in

90. See *Meritor*, 477 U.S. at 67.

91. See *Henson*, 682 F.2d 897.

92. 682 F.2d 897 (11th Cir. 1982).

93. See *Henson*, 682 F.2d at 899.

94. See *id.*

95. See *id.* at 899-900. Henson claimed both quid pro quo harassment based on the supervisor's refusal to promote and a hostile work environment consisting of severe or pervasive sexual harassment. See *id.*

96. See *id.* at 910.

97. See *Henson*, 682 F.2d at 910.

98. See *id.*

99. See *id.*

failing to correct the harassment.¹⁰⁰ The court held that direct liability, rather than vicarious liability, was the appropriate standard in hostile environment cases because the supervisor acted outside the scope of his authority in harassing the employee-victim.¹⁰¹ The reason for the difference in treatment was that, in a hostile work environment case, unlike a quid pro quo case, the supervisor did not misuse the authority delegated to him by the employer to take action against the employees that report to him.¹⁰² Instead, he acted according to his own intentions, not those of the employer.¹⁰³ Moreover, the court noted that any person in the workplace is capable of creating a hostile work environment for another employee.¹⁰⁴ The ability to fill a work environment with sexual innuendoes and insults does not depend on the amount of authority the employer grants to the individual.¹⁰⁵ Thus, co-employee harassment, as opposed to harassment by a supervisor, does not subject the employer to vicarious liability.¹⁰⁶ The same conduct by a supervisor, because it can happen regardless of the harasser's position, is also not subject to vicarious liability.¹⁰⁷

2. *Karibian v. Columbia University: Employer Liability Does Not Depend on the Type of Claim*

In *Karibian v. Columbia University*,¹⁰⁸ the United States Court of Appeals for the Second Circuit found the defendant employer vicariously liable for a hostile work environment created by one of its supervisors.¹⁰⁹ Sharon Karibian worked in Columbia University's fundraising office.¹¹⁰ She worked there for three years, until the office closed in 1990.¹¹¹ Mark Urban was the Development Officer for Annual Giving and supervised

100. *See id.*

101. *See Henson*, 682 F.2d at 910.

102. *See id.*

103. *See id.*

104. *See id.*

105. *See Henson*, 682 F.2d at 910.

106. *See id.*

107. *See id.*

108. 14 F.3d 773 (2d Cir. 1994).

109. *See Karibian*, 14 F.3d at 780.

110. *See id.* at 775.

111. *See id.* at 775-776.

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the office.¹¹² From the beginning of her employment, Urban pressured Karibian to engage in sexual activity with him.¹¹³ After leaving the university, Karibian sued under Title VII for sex discrimination, asserting both hostile environment and quid pro quo sexual harassment claims.¹¹⁴

In stark contrast to the *Henson* approach, the *Karibian* court's imposition of vicarious liability did not depend on whether the plaintiff claimed quid pro quo or hostile environment harassment.¹¹⁵ The court reasoned that it was inappropriate to apply different standards of employer liability to quid pro quo and hostile environment claims because the conduct of the supervisor is essentially the same in both situations.¹¹⁶ Instead, the court defined two standards for vicarious liability that followed traditional agency principles.¹¹⁷

Thus, under the *Karibian* court's approach, when a supervisor created a sexually hostile work environment, the employer was liable in either of the following two situations.¹¹⁸ First, the employer was liable if the supervisor used his actual or apparent authority to further the harassment.¹¹⁹ An example of this comes from the facts of *Karibian* itself.¹²⁰ There, Karibian's working conditions varied noticeably depending on her response to Urban; for example, whether she received raises or promotions depended on whether she had been receptive to his advances.¹²¹ Second, the employer was liable if the agency relationship helped the supervisor create the hostile work environment.¹²² Again, the facts of *Karibian* illustrate this rule.¹²³

112. See *id.* at 775.

113. See *Karibian*, 14 F.3d at 776.

114. See *id.* at 776-777.

115. See *id.* at 781.

116. See *id.* The court stated that "it would be a jarring anomaly to hold that conduct which always renders an employer liable under a quid pro quo theory does not result in liability to the employer when that *same conduct* becomes so severe and pervasive as to create a discriminatorily abusive work environment." *Id.* (emphasis added).

117. See *Karibian*, 14 F.3d at 780.

118. See *id.*

119. See *id.*

120. See *id.* at 778.

121. See *Karibian*, 14 F.3d at 778.

122. See *id.* at 780.

Karibian claimed that Urban used his authority as a supervisor to force her into an abusive sexual relationship.¹²⁴ Presumably, she would not have submitted had he not been her supervisor.¹²⁵

The *Karibian* court then applied the rule to the facts of the case. The plaintiff's continued advancement at Columbia depended on her response to her supervisor's advances, satisfying the classic quid pro quo requirements.¹²⁶ The fact that she did advance, and was not terminated, illustrated the court's point that actual economic loss was not necessary to a quid pro quo claim.¹²⁷ In addition, Urban's repeated advances, remarks, threats, and innuendoes also created a hostile working environment.¹²⁸ The Court found that, given Urban's authority to promote and terminate Karibian, the university was liable for his creation of a hostile work environment.¹²⁹

3. *The Supreme Court Declined to Establish a Bright-Line Standard for Employer Liability*

The Supreme Court discussed sexual harassment under Title VII for the first time in *Meritor Savings Bank v. Vinson*.¹³⁰ Mechelle Vinson sued her former employer, Meritor Savings Bank, for sexual harassment committed by her supervisor, Sydney Taylor.¹³¹ One of the key issues was whether hostile environment harassment was actionable under Title VII.¹³² The Court held that it was, and went on to discuss standards of employer liability for sexual harassment.¹³³

123. *See id.*

124. *See id.*

125. *See Karibian*, 14 F.3d at 780.

126. *See id.* at 778.

127. *See id.*

128. *See id.* at 780.

129. *See Karibian*, 14 F.3d at 780.

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

131. *See id.* at 60.

132. *See id.* at 64.

133. *See id.* at 66-73.

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The Court began by stating that agency principles determine the standard for employer liability.¹³⁴ According to the Court, vicarious liability for sexual harassment was most clearly appropriate when a supervisor “exercise[d] the authority actually delegated to him by his employer.”¹³⁵ Thus, when a supervisor made decisions that changed an employees status, those decisions could be imputed to the employer.¹³⁶ In the context of discrimination, a supervisor’s decision to terminate an employee based on his or her gender would be imputed to the employer.¹³⁷

However, Vinson’s supervisor did not terminate her because of her sex or refusal of his sexual demands.¹³⁸ Rather, his persistent advances created a hostile working environment.¹³⁹ In such a case, the Court stated, the usual agency rule does not apply.¹⁴⁰ Unfortunately, the Court did not state an alternative rule.¹⁴¹ Instead, it instructed the courts to rely on the common law of agency in determining a standard for employer liability.¹⁴² The Court further cautioned the lower courts that agency principles limited, rather than expanded, employer liability.¹⁴³

Since the *Meritor* court declined to articulate a bright-line standard, courts have been unclear as to the appropriate standard for employer liability.¹⁴⁴ Indeed, courts have taken varied approaches both before and after *Meritor*, underscoring the

134. See *Meritor*, 477 U.S. at 70.

135. *Id.*

136. See *id.* This is commonly known as the scope of employment rule. See RESTATEMENT (SECOND) OF AGENCY § 219(1) cmt. 1 (1957).

137. See *id.*

138. See *Meritor*, 477 U.S. at 60. Vinson was terminated for excessive use of sick leave. See *id.*

139. See *id.* at 64.

140. See *id.* at 70.

141. See *id.* at 72.

142. See *Meritor*, 477 U.S. at 72.

143. See *id.* This statement has been criticized as dictum. See Oppenheimer, *supra* note 44, at 131. Moreover, after *Meritor*, not all of the circuits read agency principles to limit employer liability. See e.g. *Karibian*, 14 F.3d 773 (imposing vicarious liability for hostile environment harassment, where the supervisor used his delegated authority to perpetuate a hostile work environment).

144. See *Burlington*, 118 S. Ct. at 2264.

need for a clear standard of employer liability.¹⁴⁵ Thus, in *Ellerth*, the Supreme Court sought to articulate the agency analysis in sexual harassment cases and the rule for imposing vicarious liability which subsequent courts could follow.¹⁴⁶

III. FACTS OF *ELLERTH*

Kimberly Ellerth met Ted Slowik in March of 1993 during her second interview for a merchandizing assistant position at Burlington.¹⁴⁷ On this occasion, Slowik made the first of many remarks that Ellerth found offensive.¹⁴⁸ Specifically, he asked her if she was married, whether she was planning to have children, and whether she and her husband were “practicing” to have children.¹⁴⁹ Slowik also stared at her in a sexual way throughout the interview, which made her feel uncomfortable.¹⁵⁰

Despite Slowik’s conduct during the interview, Ellerth later sent a letter to Mary Fitzgerald thanking her for the opportunity to meet with Slowik and stating, “[t]he insight he gave me into the position only provided me with more incentive to take the job....”¹⁵¹ About one week after Ellerth’s interview with Slowik, Fitzgerald offered her the job and she accepted.¹⁵²

Ellerth assisted Fitzgerald in Burlington’s Chicago office.¹⁵³ Fitzgerald, in turn, reported to Slowik, who worked in the New York office.¹⁵⁴ Despite working in different offices and the geo-

145. See discussion *supra* Part II.D.

146. See *Burlington*, 118 S. Ct. at 2264.

147. See *Ellerth v. Burlington Indus., Inc.*, 912 F. Supp. 1101, 1106. Ellerth’s first interview was with Mary Fitzgerald, who would be one of Ellerth’s supervisors in the Chicago office. Slowik was the vice president of sales and marketing for Burlington’s House Mattress Ticking division. See *id.*

148. See *id.*

149. *Id.*

150. See *id.*

151. *Ellerth I*, 912 F. Supp. at 1106.

152. See *id.*

153. See *id.* Ellerth assisted Fitzgerald with her day to day activities. Fitzgerald was Ellerth’s immediate supervisor; Fitzgerald reported to Slowik. See *id.*

154. See *id.*

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graphical distance between Slowik and Ellerth, Slowik's inappropriate behavior toward her continued.¹⁵⁵

Ellerth traveled frequently as part of her job, primarily for training purposes.¹⁵⁶ Her travel took her to New York, San Francisco, and North Carolina.¹⁵⁷ Ellerth encountered Slowik during some of these trips.¹⁵⁸ For example, when Ellerth was in North Carolina for training, she met with Slowik, another sales representative, and his wife for dinner.¹⁵⁹ Slowik was loud and obnoxious during dinner.¹⁶⁰ Ellerth recalled that he had been rude to the waitress, and that she was offended by his conduct.¹⁶¹ After dinner, Ellerth and Slowik went back to the hotel in which they were staying.¹⁶² He invited her to accompany him to the hotel bar, where an all-women band was playing music, and she accepted.¹⁶³ Slowik commented favorably on the band members' legs, breasts, and revealing outfits.¹⁶⁴ He then turned to Ellerth and said that she was "a little lacking in that area," referring to her breasts.¹⁶⁵ Ellerth was offended, but did not reply to his remarks.¹⁶⁶ When she did not respond, Slowik told her that she should "loosen up."¹⁶⁷ As Slowik left the bar, he told her, "You know, Kim, I could make your life very hard or very easy at Burlington."¹⁶⁸ Ellerth took this as a threat,

155. See *Ellerth I*, 912 F. Supp. at 1106-1109.

156. See *id.* at 1106.

157. See *id.* at 1106-1108. During one of the San Francisco trips, at a bedding conference, Ellerth saw Slowik often, but he largely ignored her. On the last day of the conference, however, Slowik commented on Ellerth's "ass" while staring at her rear. Ellerth was so upset that she ran to the bathroom and cried. *Id.* at 1108.

158. See *id.*

159. See *Ellerth I*, 912 F. Supp. at 1107.

160. See *id.*

161. See *id.* Although Ellerth could not recall Slowik's specific remarks to and about the waitress, Ellerth stated that she was probably offended because the remarks were of a sexual nature. See *id.*

162. See *id.*

163. See *Ellerth I*, 912 F. Supp. at 1107.

164. See *id.*

165. *Id.* Slowik had been staring at Ellerth's breasts and legs throughout this encounter. See *id.*

166. See *id.*

167. *Ellerth I*, 912 F. Supp. at 1107.

168. *Id.*

meaning she would have to have sex with Slowik to keep her job.¹⁶⁹

In the summer of 1993, Ellerth went to New York for training.¹⁷⁰ At one point during her trip, Ellerth had lunch with Slowik and Angelo Brenna, another Burlington Vice President.¹⁷¹ During lunch, Slowik told sexual jokes and rubbed Ellerth's knee under the table.¹⁷² Ellerth moved her leg away from Slowik's hand but said nothing.¹⁷³ She did not think Brenna was aware of the incident.¹⁷⁴ After lunch, in Ellerth's presence, Slowik commented on Ellerth's legs to Brenna.¹⁷⁵

Slowik also traveled regularly to Burlington's Chicago office, where Ellerth would encounter him.¹⁷⁶ In the fall of 1993, Slowik was in the Chicago office and saw Ellerth helping another employee fold fabric samples.¹⁷⁷ He said, "[o]n your knees again, Kim?"¹⁷⁸ Ellerth was offended, believing that Slowik's comment referred to oral sex.¹⁷⁹ On another of Slowik's visits to Chicago, Ellerth found Slowik sitting at her desk making a telephone call.¹⁸⁰ He said to her, "[i]t's nice to have my butt where your butt was, Kim."¹⁸¹

In December 1993, Ellerth and her husband encountered Slowik at Burlington's Christmas party.¹⁸² Slowik remarked to Ellerth's husband that he was "a lucky man to have a woman like that."¹⁸³ Ellerth observed this encounter and assumed that

169. *See id.*

170. *See id.* at 1106.

171. *See Ellerth I*, 912 F. Supp. at 1106.

172. *See id.* at 1107.

173. *See id.*

174. *See id.*

175. *See Ellerth I*, 912 F. Supp. at 1107.

176. *See id.* at 1106. "Throughout her employment at Burlington, Ellerth saw Slowik, [in Chicago] on average, for a day or two every month or two." *Id.*

177. *See id.* at 1107-1108.

178. *Id.* at 1108.

179. *See Ellerth I*, 912 F. Supp. at 1108.

180. *See id.*

181. *Id.*

182. *See Ellerth I*, 912 F. Supp. at 1108.

183. *Id.*

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Slowik was referring to her.¹⁸⁴ Ellerth also claimed that Slowik patted her rear during this party.¹⁸⁵

In addition to their face to face encounters, Slowik made inappropriate comments to Ellerth during their weekly telephone conversations.¹⁸⁶ On two occasions, Slowik asked Ellerth what she was wearing.¹⁸⁷ On the first occasion, Ellerth had contacted Slowik to get his approval on a customer's order.¹⁸⁸ He refused to give his approval, stating, "I don't have time for you right now Kim, unless you're telling me – unless you want to tell me what you are wearing."¹⁸⁹ On the second occasion, Ellerth had called Slowik again to get his approval on the same order.¹⁹⁰ He denied approval for the second time.¹⁹¹ During this conversation, Slowik asked, "[a]re you wearing shorter skirts yet, Kim, because it would make your job a whole heck of a lot easier."¹⁹²

Slowik made many other remarks during his conversations with Ellerth.¹⁹³ Once, Slowik told an offensive joke: "[w]hat is the difference between a blonde and a limo? Not everyone has been in a limo."¹⁹⁴ To Ellerth, who is blonde, this joke implied that she was promiscuous.¹⁹⁵ During several other conversations, Slowik commented on Ellerth's legs.¹⁹⁶ His remarks included: "[h]ow are those legs of yours, Kim?" and "[i]t must be

184. *See id.*

185. *See id.*

186. *See Ellerth I*, 912 F. Supp. at 1108.

187. *See id.* at 1109.

188. *See id.* at 1108-1109.

189. *Id.* at 1109.

190. *See Ellerth I*, 912 F. Supp. at 1108. Ellerth claims that this follow-up telephone call occurred 1-2 days after her initial call to obtain permission for the customer's order. *See* Plaintiff's Brief in Opposition to Summary Judgment, Appendix, Exhibit C at 257:11, *Ellerth v. Burlington Indus., Inc.*, 912 F. Supp. 1101 (N.D. Ill. 1996) (No. 95 C 0839).

191. *See id.* at 1109.

192. *Id.*

193. *See id.*

194. *Ellerth I*, 912 F. Supp. at 1108.

195. *See id.* at 1115. *See* David G. Savage, *Changing Rules on the Job*, ABA J., Aug. 1998 at 43 (a photograph of Kimberly Ellerth reveals that she is blonde).

196. *See id.* at 1108.

hard for a woman like you, Kim, to have a job like that—a woman with great legs.”¹⁹⁷

In March of 1994, Slowik interviewed Ellerth for a promotion.¹⁹⁸ During the interview, he rubbed her knee and voiced a concern about promoting her because she was “not loose enough.”¹⁹⁹ Despite Slowik’s “hesitation,” Ellerth received the promotion.²⁰⁰

Two months after she received the promotion, Patrick Lawrence, Ellerth’s new supervisor, received complaints about her from customers and other employees.²⁰¹ Lawrence sent Ellerth a memorandum regarding the complaints on May 22, 1994.²⁰² In his memorandum, Lawrence stated that two customers and three Burlington employees complained that Ellerth had failed to return their telephone calls.²⁰³

On May 31, 1994, Ellerth informed Lawrence that she was quitting.²⁰⁴ At that time, she did not state that the reason she quit was Slowik’s harassing behavior.²⁰⁵ However, on June 21, 1994, three weeks after leaving Burlington, Ellerth wrote a

197. *Id.* at 1108.

198. *See Ellerth I*, 912 F. Supp. at 1108.

199. *Id.* Slowik said that he had hesitations about promoting Ellerth because she was “arrogant” and not “loose enough” for him. Slowik also stated that he had voiced this concern to other people at Burlington. When describing the travel requirements of the new position, Slowik asked Ellerth whether her husband would miss her when she was away. *Id.*

200. *See id.* Ellerth was promoted to Sales Representative. Patrick Lawrence became her immediate supervisor. He reported to Slowik. *See id.* at 1106.

201. *See id.* at 1109. Burlington’s Customer Service Manager, Donna Thibideau, also received complaints about Ellerth. *See id.*

202. *See Ellerth I*, 912 F. Supp. at 1109.

203. *See Ellerth v. Burlington Indus., Inc.*, 102 F.3d 848, 853 (7th Cir. 1996), *vacated en banc*, 123 F.3d 490, 494 (7th Cir. 1997) (per curiam).

204. *See Ellerth I*, 912 F. Supp. at 1109. Ellerth informed Lawrence of her resignation by both telephone and fax. *See id.*

205. *See id.* Ellerth said that when she wrote the first letter to Lawrence she initially included, as one of her reasons, a statement about Slowik’s behavior. She deleted that statement, on her husband’s advice, before faxing the letter to Lawrence. *See id.*

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letter to Lawrence stating that she had quit because of Slowik's harassing behavior.²⁰⁶

Throughout Ellerth's employment, Burlington had a policy forbidding sexual harassment.²⁰⁷ Ellerth was aware of the policy and had a copy of the employee handbook, which contained a statement of the policy.²⁰⁸ Ellerth's husband advised her that complaining might jeopardize her job.²⁰⁹ Furthermore, Ellerth was not aware of how vigilantly the policy was enforced, or if it was enforced at all.²¹⁰ Ellerth knew that Lawrence, as her supervisor, had a duty to report complaints of sexual harassment and Ellerth was afraid Slowik would make her job more difficult if he knew that she had complained.²¹¹ Therefore, Ellerth felt her job would be in jeopardy if she complained to Lawrence.²¹² Ellerth alleged that she told several employees and one Burlington customer about Slowik's behavior.²¹³ However, each person denied having had a conversation with Ellerth in which she complained of sexual harassment.²¹⁴

206. *See id.*

207. *See id.* at 1118. The policy states, in pertinent part: "The Company will not tolerate any form of sexual harassment in the workplace... If you have any questions or problems, or if you feel you have been discriminated against, you are encouraged to talk with your supervisor or human resources representative or use the grievance procedure promptly." *Id.*

208. *See Ellerth I*, 912 F. Supp. at 1109.

209. *See id.*

210. *See id.* at 1108. The district court found this assertion insufficient to raise a genuine issue of material fact, which is necessary to survive summary judgment. *See id.*

211. *See id.* at 1109.

212. *See Ellerth I*, 912 F. Supp. at 1109. The facts do not indicate whether Lawrence would have had to tell Slowik that Ellerth had complained.

213. *See id.* at 1118 n.12. Ellerth alleged that she complained to Donna Thibideau, a customer service manager, between January and March 1994, Sherry Hester and Laura Peffal, both customer service representatives, Patrick Crosson, a sales representative, and Cara Jimenez, a Burlington customer. None of the other employees was a supervisor. *See id.*

214. *See id.* at 1109 n.6. Although each of the people Ellerth complained to denied having such a conversation with her, the district court assumed her allegations to be true. Because the court was determining whether to grant summary judgment to the defendant, it evaluated the facts in the light most favorable to Ellerth. *See id.*

IV. PROCEDURAL HISTORY OF *ELLERTH*

A. THE UNITED STATES DISTRICT COURT

On October 12, 1994, Ellerth filed complaints with the EEOC and the Illinois Department of Human Rights.²¹⁵ The EEOC issued a right to sue letter on November 30, 1994, and Ellerth subsequently sued Burlington in the United States District Court for the Northern District of Illinois.²¹⁶ In her suit, Ellerth claimed sex discrimination and constructive discharge under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et. seq.*²¹⁷ Ellerth's suit alleged that Slowik inappropriately touched her and that he created a hostile work environment.²¹⁸ She further alleged that Slowik's conduct resulted in her constructive discharge.²¹⁹

Burlington moved for summary judgment, which the district court granted.²²⁰ The court did not doubt that Slowik subjected Ellerth to a hostile work environment.²²¹ The court concluded, however, that Burlington could not be liable for Slowik's conduct under Title VII because Ellerth could not prove Burling-

215. *See* Ellerth v. Burlington Indus., Inc., 102 F.3d 848, 853 (7th Cir. 1996), *vacated en banc*, 123 F.3d 490, 494 (7th Cir. 1997) (per curiam).

216. *See* Ellerth II, 102 F.3d at 853. The EEOC may issue a right to sue letter to a complainant at any of several points during the complaint process. A right to sue letter simply indicates that a complainant has exhausted his or her administrative remedies. Interview with David B. Oppenheimer, Professor of Law at Golden Gate Univ. School of Law, in San Francisco, Cal. (Jan. 19, 1999).

217. *See* Ellerth v. Burlington Indus., Inc., 912 F. Supp. 1101, 1105 (N.D. Ill. 1996).

218. *See id.* A hostile work environment is one in which sexual harassment has the purpose or effect of unreasonably interfering with the victim's work environment or job performance or creates an intimidating, hostile or offensive work environment. To be actionable under Title VII, sexual harassment must be severe or pervasive such that it alters the conditions of the victim's employment. The court considered four factors: frequency, severity, whether the supervisor's conduct was physically threatening or humiliating, and whether the supervisor's conduct unreasonably interfered with the victim's work performance. *See id.* at 1110.

219. *See id.* at 1124. Constructive discharge occurs when an employer "makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation." *Id.* Constructive discharge, in this context, requires that the employer know about abusive working conditions and fail to resolve the problem. *See id.*

220. *See id.*

221. *See* Ellerth I, 912 F. Supp. at 1114.

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ton's liability under any of the three agency principles it applied.²²²

Under the first theory of liability, Burlington would be vicariously liable if Slowik's actions were within the scope of his employment.²²³ The district court found that an employer is not vicariously liable for the supervisor's acts if the supervisor's intent is "too little actuated by a purpose to serve the master."²²⁴ In this case, the court found no evidence indicating that Slowik's conduct was motivated in any way by a purpose to serve Burlington.²²⁵ Therefore, the court concluded, Burlington could not be held liable under this theory.²²⁶

Under the second theory of liability, Burlington would be liable for acts committed outside the scope of Slowik's employment if Burlington was negligent or reckless.²²⁷ Negligence and recklessness require that Burlington knew or should have known about the harassment.²²⁸ Once Burlington discovered the hostile work environment, it had a duty to take reasonable steps to correct the harassment.²²⁹ The court noted that this is the most common basis relied upon in sexual harassment cases.²³⁰ In this case, because Ellerth never informed her supervisor, or anyone else in authority, of Slowik's behavior, Burlington never actually knew of Slowik's conduct and could

222. *See id.* at 1123. In *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986), the Supreme Court held that agency principles determine when an employer is vicariously liable for sexual harassment. Accordingly, the District Court applied agency principles to determine whether Burlington was liable for Slowik's conduct. *See id.* at 1116, 1120. The three bases for liability are: 1) when the tort is committed within the scope of employment, 2) employers are liable for their own negligence or recklessness, and 3) masters are liable when the servant relies on "apparent authority" or is assisted in accomplishing the tort by the agency relationship. *See id.* As to the scope of employment rule, sexual harassment, of course, is not within anyone's job description. Forbidden conduct, however, may be considered within the scope of someone's employment if the person intends to serve the employer. *See id.* at 1116.

223. *See id.* at 1115.

224. *Ellerth I*, 912 F. Supp. at 1116.

225. *See id.* at 1117.

226. *See id.*

227. *See id.*

228. *See Ellerth I*, 912 F. Supp. at 1118.

229. *See id.* at 1118, 1124.

230. *See id.* at 1117.

not have taken steps to correct the harassment.²³¹ Therefore, the court concluded, Burlington could not be found negligent or reckless in failing to correct the hostile work environment.²³²

However, Ellerth responded by arguing that Burlington was vicariously liable because Slowik was a decision-maker in the company.²³³ If Slowik was a decision-maker in the company, she argued, his knowledge of the hostile environment could be imputed to Burlington.²³⁴ The court found this argument unpersuasive because Slowik, while a vice president, was not high enough in the corporate hierarchy to be considered a "decision-maker."²³⁵ Therefore, Burlington could not be liable for Slowik's conduct under this theory.²³⁶

Under the third agency theory of liability, Burlington would be liable if Slowik was assisted by the agency relation when he harassed Ellerth.²³⁷ The district court reasoned that an employee is assisted by the agency relation when he purports to act for the employer and someone relies on this assertion of apparent authority.²³⁸ On the surface, this basis seemed to be successful for Ellerth because Slowik told her he could make her life at Burlington very easy or very hard, depending on her reaction to him.²³⁹ Thus, it appeared that Slowik did rely on his authority as a supervisor when he harassed her.²⁴⁰ The court stated, however, that a person who knows the limits of the employee's (in this case, the supervisor's) authority could not subject the employer to liability.²⁴¹ Ellerth knew that Burlington did not authorize Slowik's conduct because she knew it had an

231. *See id.* at 1118.

232. *See Ellerth I*, 912 F. Supp. at 1118.

233. *See id.*

234. *See id.*

235. *See id.* at 1119. An affidavit from Slowik's superior, Salvatore Porio, showed that, while Slowik had some decision-making authority, he was not part of the upper management who had decision-making and policy-making authority for the whole company. *Id.* at 1119 n.14.

236. *See Ellerth I*, 912 F. Supp. at 1119.

237. *See id.* at 1120.

238. *See id.*

239. *See id.*

240. *See Ellerth I*, 912 F. Supp. at 1120.

241. *See id.*

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explicit policy against sexual harassment.²⁴² Ellerth possessed a copy of the policy and had read it.²⁴³ Based on these facts, the court concluded that she could not impose vicarious liability on Burlington under this theory.²⁴⁴

Finally, the court addressed Ellerth's constructive discharge claim.²⁴⁵ Constructive discharge occurs only when an employer "makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation."²⁴⁶ For reasons similar to those articulated in the agency discussion, the court found that Ellerth could not claim she was constructively discharged.²⁴⁷ Specifically, the court found that Burlington could not have made Ellerth's working conditions intolerable because it was not aware that she was being harassed.²⁴⁸

Because Ellerth could not demonstrate Burlington's liability for Slowik's harassment, the district court granted Burlington's motion for summary judgment.²⁴⁹ The court dismissed her action with prejudice.²⁵⁰

B. THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

1. *The Panel Decision*

Ellerth appealed to the United States Court of Appeals for the Seventh Circuit.²⁵¹ First, the panel addressed whether Ellerth's complaint was broad enough to encompass both quid pro quo and hostile work environment claims.²⁵² The panel stated

242. *See id.* at 1121.

243. *See id.*

244. *See Ellerth I*, 912 F. Supp. at 1121.

245. *See id.* at 1124.

246. *Id.* (citing *Weihaupt v. American Med. Ass'n*, 874 F.2d 419, 426 (7th Cir. 1989)).

247. *See id.*

248. *See Ellerth I*, 912 F. Supp. at 1124.

249. *See id.*

250. *See id.*

251. *See Ellerth II*, 102 F.3d at 848.

252. *See id.* at 854-855. *See also* discussion *infra* part II.D. for a discussion of the terms "quid pro quo" and "hostile environment."

that the same actions that create a hostile work environment can encompass a quid pro quo demand.²⁵³ For example, Slowik's persistent harassment of Ellerth, in the form of unwanted touching and sexual remarks, created a hostile working environment.²⁵⁴ Because some of this harassment consisted of threats to make Ellerth's work more difficult if she rebuffed Slowik, her claims also encompassed a quid pro quo demand.²⁵⁵ Moreover, neither Title VII nor the EEOC demand that a plaintiff plead the particular theory of sexual harassment.²⁵⁶ Applying this reasoning to Ellerth's circumstances, the panel found that Slowik repeatedly linked his sexual demands to Ellerth's working conditions.²⁵⁷ Therefore, the court found that Ellerth's complaint encompassed allegations of quid pro quo and hostile environment harassment.²⁵⁸

Second, the panel discussed whether the district court properly applied agency principles.²⁵⁹ The panel applied the "scope of employment" rule that conduct arising out of an employee's responsibilities is within the scope of employment, even if the particular conduct was forbidden by the employer.²⁶⁰ Applying this rule to Ellerth's case, the panel focused on several important facts.²⁶¹ First, Slowik's harassing conduct occurred during working hours and in the work environment.²⁶² Even when Ellerth and Slowik were not in the office, they were conducting company business.²⁶³ Second, Slowik had substantial authority to alter Ellerth's working conditions.²⁶⁴ Burlington gave Slowik the authority to hire, to promote, and to assign work to El-

253. *See id.* at 855. Conversely, the court stated, the victim of a quid pro quo demand is, by definition, the victim of a hostile working environment. *See id.*

254. *See id.*

255. *See Ellerth II*, 102 F.3d at 855.

256. *See id.*

257. *See id.* (describing the threats Slowik made and the instances in which he refused his approval of customer orders unless Ellerth cooperated with his demands or answered personal questions).

258. *See id.* at 863.

259. *See Ellerth II*, 102 F.3d at 856.

260. *See id.* at 858.

261. *See id.* at 859.

262. *See id.*

263. *See Ellerth II*, 102 F.3d at 859.

264. *See id.*

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lerth.²⁶⁵ His sexual demands were linked to these responsibilities, making her tolerance of them a condition of her employment.²⁶⁶ Contrary to the district court's conclusion, the panel found that Slowik acted within the scope of his employment when he harassed Ellerth.²⁶⁷ As a result, the court found that Burlington could be vicariously liable for Slowik's conduct, and reversed the grant of summary judgment.²⁶⁸

2. *The En Banc Decision*

Burlington petitioned for rehearing en banc and the Seventh Circuit granted the petition on January 28, 1997.²⁶⁹ The case was reargued en banc on February 25, 1997, resulting in eight different opinions because the court could not agree on the proper standard for employer liability in sexual harassment cases.²⁷⁰ A majority of the court affirmed the district court's grant of summary judgment against Ellerth's claim of hostile environment harassment and reversed the district court in favor of her claim of quid pro quo harassment.²⁷¹ Thus, the majority found that Ellerth did not state sufficient facts to proceed on her claim of hostile environment harassment, but could proceed on a claim of quid pro quo harassment.²⁷²

265. *See id.*

266. *See id.*

267. *See Ellerth II*, 102 F.3d at 859.

268. *See id.* at 859-860.

269. *See id.* at 863. Upon rehearing, Ellerth's case was consolidated with that of Alice Jansen, a similarly situated plaintiff. The case does not indicate why the petition for rehearing was granted.

270. *See Ellerth v. Burlington Indus., Inc.*, 123 F.3d 490 (7th Cir. 1997) (per curiam). The opinion does not indicate which judge authored the per curiam opinion. Judges Cudahy and Kanne's opinion addressed only Jansen's claims of sexual harassment. *See supra* note 266. The other judges held as follows: Chief Judge Posner and Judges Manion and Coffey did not find that Ellerth's evidence of quid pro quo harassment could survive summary judgment. Chief Judge Posner and Judge Manion advocated a "company acts" standard for quid pro quo claims, which essentially required more than unfulfilled threats. Judge Coffey advocated a negligence standard for all sexual harassment claims and could not find sufficient proof of Burlington's negligence. The remaining judges (Flaum, Easterbrook, and Wood) concurred in the judgment of the court, although they came to that conclusion in different ways. *See id.* at 494.

271. *See id.*

272. *See id.*

Burlington then petitioned the Supreme Court of the United States for certiorari.²⁷³ The Court granted certiorari “to assist in defining the relevant standards of employer liability.”²⁷⁴

V. THE SUPREME COURT’S ANALYSIS

Burlington Industries v. Ellerth was an attempt to reconcile the past, represented by *Meritor*, with the then current cases existing in the federal circuits. Prior to *Ellerth*, the federal circuits were split regarding how employers were to be held liable for sexual harassment under Title VII.²⁷⁵ As the *Ellerth* Court observed, the problem was not simply “what standard should be applied” but also the application of agency principles that lay beneath the standard.²⁷⁶ The agency analysis was a significant problem because the various federal courts interpreted agency principles differently.²⁷⁷ The Supreme Court had never before articulated the appropriate agency analysis and, in *Ellerth*, had the opportunity to break new ground in Title VII sexual harassment cases.

A. THE COURT’S APPLICATION OF AGENCY PRINCIPLES TO SEXUAL HARASSMENT

The central issue before the Court was whether an employer should be vicariously liable for a hostile work environment created by one of its supervisors.²⁷⁸ The Court applied three rules from section 219 of the Restatement of Agency, focusing on the

273. See *Burlington Indus., Inc. v. Ellerth*, 118 S. Ct. 2257, 2262 (1998).

274. *Id.* at 2264.

275. See e.g., *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982) (imposing vicarious liability only for quid pro quo harassment claims); *Karibian v. Columbia Univ.*, 14 F.3d 773 (2d Cir. 1994) (applying vicarious liability to both hostile environment and quid pro quo claims); *Miller v. Bank of America*, 600 F.2d 211 (9th Cir. 1979) (applying traditional agency principles to find vicarious liability when the harasser is a supervisor).

276. *Burlington Indus., Inc. v. Ellerth*, 118 S. Ct. 2257, 2264 (1998).

277. See generally *Henson*, 682 F.2d 897 (imposing vicarious liability only for quid pro quo harassment claims); *Karibian*, 14 F.3d 773 (applying vicarious liability to both hostile environment and quid pro quo claims); *Miller*, 600 F.2d 211 (applying traditional agency principles to find vicarious liability when the harasser is a supervisor).

278. See *Burlington*, 118 S. Ct. at 2265.

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scope of employment rule, negligence, and the agency relation standard.²⁷⁹

The Court first applied the scope of employment rule, which states that employers are vicariously liable for torts committed by their employees when the employees are acting within the scope of their employment.²⁸⁰ Under the scope of employment rule, employers may be liable for both the negligent and intentional torts of their employees.²⁸¹ The Court stated that sexual harassment is intentional conduct, and applied the scope of employment rule for intentional conduct.²⁸²

Employer liability for intentional conduct arises when the employee's intent, "however misguided, is wholly or in part to further the employer's business."²⁸³ Therefore, even when conduct, such as sexual harassment, is forbidden, an employer will be liable where its employee intended to serve the employer.²⁸⁴ The general rule, according to Title VII case law, is that sexual harassment is not within the scope of a supervisor's employment because harassers act according to their own motives, with no intent to serve the employer.²⁸⁵ Therefore, because Slowik was not acting to serve Burlington, Ellerth could not assert that Slowik acted within the scope of his employment when he harassed her.²⁸⁶

The Court then discussed the second basis for employer liability, negligence.²⁸⁷ Under the negligence standard of section 219(2)(b), Ellerth would have to prove that Burlington knew or should have known that a hostile environment existed as a re-

279. See *id.* at 2266-2268. Note that negligence is not a basis for vicarious liability. Rather, in the sexual harassment context, an employer would be liable for its own negligence in failing to prevent or correct sexual harassment. See RESTATEMENT (SECOND) OF AGENCY § 219 (2) cmt. e (1957) (stating that, unlike the other standards, negligence is the standard when the employer is guilty of tortious conduct).

280. See *id.* at 2266.

281. See *id.*

282. See *Burlington*, 118 S. Ct. at 2266.

283. *Id.*

284. See *id.*

285. See *id.* at 2267.

286. See *Burlington*, 118 S. Ct. at 2267.

287. See *id.*

sult of Slowik's conduct, and that it failed to take reasonable steps to stop the harassment.²⁸⁸ Thus, even if a supervisor's motives were entirely personal (i.e., he was acting outside the scope of his employment), his employer would be liable if it knew or should have known about the harassment and failed to prevent or correct it.²⁸⁹ The Court noted that negligence is the minimum standard of liability imposed by Title VII.²⁹⁰ However, because Ellerth did not assert a claim under the negligence standard, the Court did not consider the issue.²⁹¹

The Court then discussed whether the third basis for liability, the agency relation standard, would allow Ellerth to impose vicarious liability.²⁹² The agency relation standard, stated in section 219(2)(d), applies when the supervisor misuses the authority delegated to him by the employer.²⁹³ This rule, the Court noted, is potentially very broad and could cover most of the torts that occur in a workplace.²⁹⁴ Since *Meritor* limits employer liability, however, the agency relation standard cannot be read so broadly as to cover all harassment in the workplace.²⁹⁵ The Court then had to identify the point at which vicarious liability would apply.²⁹⁶

1. *Agency Principles Demand Vicarious Liability Where a Tangible Employment Action was Taken Against the Employee*

Following the agency relation standard, vicarious liability is most clearly appropriate when the supervisor takes action against the employee, usually in the form of termination or denial of a raise or promotion.²⁹⁷ The Court stated that all of the

288. *See id.* (discussing RESTATEMENT (SECOND) OF AGENCY § 219 (2)(b) (1957)). *See also* discussion *supra* Part III.B.2.

289. *See id.*

290. *See Burlington*, 118 S. Ct. at 2267.

291. *See id.*

292. *See id.* at 2268.

293. *See id.* *See also* discussion *supra* Part II.B.2.

294. *See Burlington*, 118 S. Ct. at 2268.

295. *See id.*

296. *See id.*

297. *See id.* "A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with

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Courts of Appeals that had addressed this issue found vicarious liability in cases where the employee suffered economic injury in the form of a tangible employment action.²⁹⁸ Indeed, the Court stated that an employer becomes strictly liable when an employee suffers such an economic injury.²⁹⁹

The rationale for imposing vicarious liability where the employee suffered economic injury centers on the employer's relationship with its supervisors.³⁰⁰ Generally, only supervisors can cause economic injuries because the employer vests authority in the supervisor to make decisions (such as hiring, termination, promotion, and giving raises) that economically impact the employees below him.³⁰¹ In making decisions that are within his authority, the supervisor invokes the official power of the employer.³⁰² Thus, the decision to terminate an employee, for example, is a "company act."³⁰³ The potential clearly exists for the supervisor to misuse his power when making these kinds of decisions.³⁰⁴ Accordingly, when a decision to terminate is based on sexual harassment, the company is vicariously liable under Title VII.³⁰⁵ Since *Ellerth* did not suffer a tangible employment action, however, the Court went on to discuss the rationale for imposing vicarious liability when no such action was taken against the employee.³⁰⁶

significantly different responsibilities, or a decision causing a significant change in benefits." *Id.*

298. *See Burlington*, 118 S. Ct. at 2268. For the purposes of this discussion, the reader should assume that "tangible employment action" refers to "hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change of benefits." *Id.*

299. *See id.*

300. *See id.* at 2269.

301. *See id.*

302. *See Burlington*, 118 S. Ct. at 2269.

303. *See id.*

304. *See id.*

305. *See id.*

306. *See Burlington*, 118 S. Ct. at 2265, 2269. *Ellerth* did not suffer a tangible employment action because the threats *Slowik* made to her were not carried out. *See id.* *See also* discussion *supra* Part III for a more detailed description of the threats *Slowik* made regarding *Ellerth's* employment at *Burlington*.

2. *The Rationale for Imposing Vicarious Liability When No Tangible Employment Action Was Taken Against the Employee*

Whether vicarious liability exists in the absence of a tangible employment action is a more complicated issue because the supervisor's conduct in harassing an employee is not as clearly connected to the employer.³⁰⁷ The Court warned that the language of the agency relation standard can be read to limit or expand the potential for vicarious liability because, in a sense, a supervisor is always aided by the agency relation when he commits a tort against a subordinate.³⁰⁸ On the one hand, the fact that a supervisor's power has a threatening character that enables him to commit harassment could be a reason to expand employer liability.³⁰⁹ Employees sense that the supervisor is "clothed with the employer's authority" and, further, that he abuses his authority when he sexually harasses a subordinate.³¹⁰

On the other hand, sexual harassment that does not result in a tangible employment action often consists of behavior that co-workers can engage in, and the supervisor's status, therefore, makes little difference to the employee.³¹¹ In these circumstances, it may not be appropriate to apply vicarious liability automatically, because it could lead to strict vicarious liability for sexual harassment regardless of the harasser's position in the company.³¹² Because of this tension, as well as *Meritor's* demand that agency principles be read to limit the imposition of vicarious liability, the *Ellerth* court declined to automatically impose vicarious liability in the absence of a tangible employment consequence.³¹³

307. See *id.* at 2269.

308. See *id.*

309. See *id.*

310. *Id.* (citing *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 77 (1986) (Marshall, J., concurring)).

311. See *Burlington*, 118 S. Ct. at 2269.

312. See *id.* at 2270.

313. See *id.*

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B. THE COURT'S HOLDING

The Court ultimately held that, in cases where the employee did not suffer tangible employment consequences, the employer is subject to vicarious liability unless it can prove an affirmative defense.³¹⁴ The Court further defined the affirmative defense as consisting of two elements.³¹⁵ The first element requires the employer to prove it took reasonable action to prevent and correct the harassment.³¹⁶ If it did, the second element requires the employer to prove that the employee-victim unreasonably failed to take advantage of corrective measures available to her.³¹⁷ If the employer proves both elements by a preponderance of the evidence, it is not vicariously liable for a hostile work environment created by one of its supervisors.³¹⁸

Thus, Burlington was subject to vicarious liability for Slowik's creation of a hostile environment.³¹⁹ However, because Ellerth did not allege that she suffered a tangible employment action, on remand, Burlington may assert the affirmative defense the Court established.³²⁰

314. *See id.*

315. *See Burlington*, 118 S. Ct. at 2270.

316. *See id.*

317. *See id.*

318. *See id.* In proving the first element of the defense, the existence of a sexual harassment policy is not necessary as a matter of law, but whether a policy exists is relevant. The existence of a policy, as a practical matter, notifies employees of their opportunity to come forward with complaints of harassment. Interview with David B. Oppenheimer, Professor of Law at Golden Gate Univ. School of Law, in San Francisco, Cal. (Oct. 27, 1998). Accordingly, an employee's failure to use her employer's complaint procedure "will normally suffice to satisfy the employer's burden under the second element of the defense." *Id.*

319. *See Burlington*, 118 S. Ct. at 2271.

320. *See id.*

C. THE COURT REJECTED A CATEGORICAL APPROACH TO DETERMINING EMPLOYER LIABILITY

Much of the reasoning behind the Court's holding involved the use of the terms "quid pro quo" and "hostile environment" in sexual harassment cases.³²¹ Specifically, the Court addressed whether the terms "quid pro quo" and "hostile environment" should determine the imposition of vicarious liability.³²² This issue was before the Court because the district court upheld the distinction between quid pro quo and hostile environment harassment which determined whether vicarious liability would apply.³²³ In contrast, the Seventh Circuit panel applied traditional agency principles and found Burlington liable based on the scope of employment rule.³²⁴ The Seventh Circuit, en banc, was split on whether Burlington was vicariously liable.³²⁵ Thus, the Supreme Court had the opportunity to reject the use of "quid pro quo" and "hostile environment" as categories of harassment that determined the standard for employer liability.³²⁶ The Court took this opportunity, and held that the terms were not useful for formulating a standard of employer liability.³²⁷

To illustrate its point, the Court noted that a trier of fact could find threats of retaliation in Slowik's remarks to Ellerth.³²⁸ However, Slowik's failure to carry out his threats would remove Ellerth's claim from the quid pro quo category of sexual harassment.³²⁹ If Slowik had carried out his threats, Ellerth would have had a claim of quid pro quo harassment, which automatically subjects the employer to vicarious liability.

321. *See id.* at 2265.

322. *See id.*

323. *See Ellerth v. Burlington Indus., Inc.*, 912 F. Supp. 1101, 1123 (N.D. Ill. 1996) (pointing out that there is a doctrinal inconsistency in imposing vicarious liability for quid pro quo harassment but not for hostile environment harassment). In keeping with that inconsistency, the district court applied a negligence standard to Ellerth's hostile environment claim. *See id.* at 1117.

324. *See Ellerth v. Burlington Indus., Inc.*, 102 F.3d 848, 863 (7th Cir. 1996).

325. *See Ellerth III*, 123 F.3d 490.

326. *See Burlington*, 118 S. Ct. at 2264.

327. *See id.*

328. *See id.*

329. *See id.* at 2265. Rather, Ellerth's claim would be one of hostile environment harassment. *See id.*

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ity.³³⁰ Because prior cases held out the promise of vicarious liability only in quid pro quo cases, Ellerth only pressed her quid pro quo claim when she sought to impose vicarious liability on Burlington.³³¹

However, Ellerth's quid pro quo claim was not very strong because she did not suffer a tangible employment action such as termination or denial of a raise or promotion.³³² Thus, one of the issues facing the district court was whether Ellerth's claim was really one of hostile environment sexual harassment with a quid pro quo component.³³³ The Supreme Court resolved this issue by stating that the type of claim was not dispositive in determining whether employers could be vicariously liable for sexual harassment.³³⁴ Rather, a determination of vicarious liability would depend on whether the employer could satisfy the affirmative defense the Court established.³³⁵

The Court noted several justifications for its rejection of the categorical approach.³³⁶ First, the terms do not appear in the text of Title VII, indicating that Congress did not intend for liability to depend on the type of claim.³³⁷ Rather, the terms first appeared in academic literature and were used to describe conduct that amounted to sexual harassment.³³⁸ Second, the terms served only a limited purpose in *Meritor*, where the Supreme Court was deciding whether sexual harassment constituted employment discrimination.³³⁹ Essentially, for the *Meritor* Court, determining the type of the claim was a threshold question of whether sexual harassment had occurred.³⁴⁰ In

330. See *Burlington*, 118 S. Ct. at 2264.

331. See *id.* at 2271. Prior cases did not impose vicarious liability for hostile environment cases. See discussion *infra* Part II.D.1.

332. See *id.* at 2264, 2265.

333. See *Ellerth I*, 912 F. Supp. at 1121. The problem with a "hybrid" claim was, of course, that the court would not know which standard to apply if the type of claim determined whether vicarious liability would apply. See *id.*

334. See *Burlington*, 118 S. Ct. at 2265.

335. See *id.* at 2270.

336. See *id.* at 2264-2265.

337. See *id.* at 2264-2265 (quoting 42 U.S.C. § 2000e-2(a)(1)).

338. See *Burlington*, 118 S. Ct. at 2264 (citing CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* (1979)).

339. See *id.*

340. See *id.* at 2265.

Meritor, the terms were not used to determine the standard for employer liability; that question was resolved by the application of agency principles.³⁴¹ Therefore, the *Ellerth* Court was not bound by precedent that imposed different standards depending on the type of claim.³⁴²

Accordingly, the *Ellerth* Court outlined principles for imposing vicarious liability that did not depend on the labels “hostile environment” and “quid pro quo.”³⁴³ The Court’s holding requires vicarious liability when a tangible employment action was taken and allows for vicarious liability in a hostile environment-type situation.³⁴⁴ However, unlike a tangible employment action case, in a hostile work environment case, employers will be able to assert the affirmative defense the Court established.³⁴⁵ Because employers could be vicariously liable in a hostile environment case, the Court held that *Ellerth* should have had the opportunity to prove she had a claim for which Burlington may be held liable.³⁴⁶ It therefore remanded *Ellerth*’s case to the district court, where Burlington could assert the affirmative defense.³⁴⁷

VI. CRITIQUE: AGENCY PRINCIPLES DEMAND VICARIOUS LIABILITY IN ALL CASES OF SEXUAL HARASSMENT BY A SUPERVISOR

A. THE *ELLERTH* RULE IS CONTRARY TO THE AGENCY PRINCIPLES STATED IN SECTION 219 OF THE RESTATEMENT (SECOND) OF AGENCY

Burlington Industries, Inc. v. Ellerth provided the ideal vehicle for articulating the proper application of agency principles in determining employer liability for sexual harassment because *Ellerth*’s claims did not comfortably fit into the prior

341. *See id.* at 2264.

342. *See Burlington*, 118 S. Ct. at 2264.

343. *See id.* at 2265-2270. *See also* discussion *supra* Part II.D.

344. *See id.* at 2270.

345. *See id.*

346. *See Burlington*, 118 S. Ct. at 2271.

347. *See id.*

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rules.³⁴⁸ Specifically, Ellerth's claims were a blend of hostile environment and quid pro quo harassment, illustrating the artificial nature of the distinction between the two types of claims as it applied to employer liability.³⁴⁹

The Court wisely used Ellerth's case to reject the use of "quid pro quo" and "hostile environment" as dispositive categories in sexual harassment cases.³⁵⁰ In so doing, the Court opened the door to plaintiffs like Kimberly Ellerth, whose claims do not fall comfortably into either category.³⁵¹ At the heart of the Court's rejection of the categories is the recognition that vicarious employer liability should not depend entirely on what kind of harassment the plaintiff suffered when she was harassed by her supervisor.³⁵²

If labeling claims as "quid pro quo" or "hostile environment" no longer determines the standard of employer liability, the Court should establish a bright line rule, imposing vicarious liability in all cases of sexual harassment by a supervisor.³⁵³ Instead of relying on *Meritor* to limit employer liability, the Court should have followed the agency analysis as articulated in the 1980 EEOC guidelines, which imposed vicarious liability in all cases of sexual harassment by a supervisor.³⁵⁴

One shortcoming of the *Ellerth* rule is that the type of harassment a plaintiff suffered will still, in large part, determine whether the employer will be vicariously liable.³⁵⁵ It is true that categorizing a plaintiff's claim as quid pro quo or hostile environment no longer determines the imposition of vicarious

348. Interview with David B. Oppenheimer, Professor of Law at Golden Gate Univ. School of Law, in San Francisco, Cal. (Oct. 27, 1998).

349. See *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257, 2265 (1998).

350. See *id.*

351. See *Ellerth v. Burlington Indus., Inc.*, 912 F. Supp. 1101, 1121 (N.D. Ill. 1996) (stating that Ellerth's is essentially a hostile environment claim with a quid pro quo component).

352. See *Burlington*, 118 S. Ct. at 2265.

353. See Oppenheimer, *supra* note 44, at 153.

354. See *id.* See also discussion *supra* section II.B.

355. Interview with David B. Oppenheimer, Professor of Law at Golden Gate Univ. School of Law, in San Francisco, Cal. (Oct. 27, 1998).

liability.³⁵⁶ The practical result of the Court's holding, however, is that whether a plaintiff suffered some form of economic injury determines whether she can hold her employer vicariously liable.³⁵⁷ Without a tangible employment action, the employer will have the opportunity to defeat the imposition of vicarious liability.³⁵⁸ Thus, despite the Court's rejection of the categorical approach, in reality, its decision perpetuated the distinction between quid pro quo and hostile environment claims.

Under the *Ellerth* rule, vicarious liability is automatic when the employee suffers a tangible employment action.³⁵⁹ Because quid pro quo sexual harassment, by definition, results in a tangible employment action against the victim, vicarious liability will automatically apply.³⁶⁰ If, instead, the employee did not suffer a tangible employment action, vicarious liability is not automatic because the employer may assert the affirmative defense.³⁶¹ In the latter case, the employee, by definition, was the victim of hostile work environment harassment.³⁶² As a result, the Court's holding is little more than a change in vocabulary.

Another problem with the *Ellerth* rule is its inconsistency with agency principles.³⁶³ Had the Court adhered more closely to section 219 in its agency application, the Court would not have established the affirmative defense.³⁶⁴ Indeed, the Court noted that the agency relation standard appeared to cover most of the misconduct that occurs in the workplace.³⁶⁵ Unfortu-

356. See *Burlington*, 118 S. Ct. at 2265.

357. See *id.* at 2270.

358. See *id.* ("When no *tangible employment action* is taken, a defending employer may raise an affirmative defense") (emphasis added).

359. See *id.*

360. See *Henson v. City of Dundee* 682 F.2d 897, 909 (11th Cir. 1982) (citing 29 C.F.R. 1604.11(a)(1)(2)).

361. See *Burlington*, 118 S. Ct. at 2270.

362. See Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a)(3).

363. Interview with David B. Oppenheimer, Professor of Law at Golden Gate Univ. School of Law, in San Francisco, Cal. (Oct. 27, 1998).

364. See *id.*

365. See *Burlington*, 118 S. Ct. at 2268.

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nately, the court declined to follow this line of reasoning to its logical result.³⁶⁶

B. APPLYING THE SCOPE OF EMPLOYMENT AND AGENCY
RELATION STANDARDS LEAD TO STRICT VICARIOUS LIABILITY
FOR SEXUAL HARASSMENT COMMITTED BY A SUPERVISOR

There are at least two bases, found in Section 219, for imposing vicarious liability in sexual harassment cases.³⁶⁷ First, sexual harassment is within a supervisor's scope of employment because he is responsible for the work environment he oversees.³⁶⁸ For example, Slowik's duties included supervising Ellerth's work.³⁶⁹ Ellerth's work served Burlington's interests.³⁷⁰ Consequently, Slowik's supervision of those tasks were also for Burlington's benefit and therefore were within the scope of his employment.³⁷¹

Moreover, a supervisor's responsibility is not limited to personnel decisions; he is also charged with maintaining a safe and productive work environment.³⁷² Sexual harassment

366. See *id.* at 2270 (stating that *Meritor* required the Court to use agency principles to limit employer liability for sexual harassment committed by supervisors).

367. See Oppenheimer, *supra* note 44 at 98-99 (describing three bases for imposing vicarious liability for sexual harassment by supervisors).

368. See *id.* at 80. There are at least three definitions of scope of employment. See RESTATEMENT (SECOND) OF AGENCY § 228 (1957), which defines scope of employment as: "1) Conduct of a servant is within the scope of employment if, but only if: 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." Alternatively, Seavey states that conduct is within the scope of employment "if it can be said rationally that the employment is the primary cause of the tort." WARREN A. SEAVEY, HANDBOOK ON THE LAW OF AGENCY § 87 cmt. a (1964). Prosser and Keeton state that scope of employment encompasses "acts which are so closely connected with what the servant is employed to do, and so fairly and reasonably incidental to it, that they may be regarded as methods, even though quite improper ones, of carrying out the objectives of the employment." W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 70 at 502 (5th ed. 1984).

369. See *Ellerth v. Burlington Indus., Inc.*, 102 F.3d 848, 859-860 (7th Cir. 1996), *vacated en banc*, 123 F.3d 490, 494 (7th Cir. 1997) (*per curiam*).

370. See *id.*

371. See *id.*

372. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 76 (1986) (Marshall, J., concurring).

clearly impacts both the safety and productivity of the work environment.³⁷³

Sexual harassment is readily analogous to other conduct which has been found to be within the scope of employment.³⁷⁴ Horseplay is one example.³⁷⁵ In *Leonbruno v. Champlain Silk Mills*,³⁷⁶ the New York Court of Appeals found that horseplay between employees was within the scope of employment because it should be expected.³⁷⁷ The employer should have expected the workmen in its factory to engage in pranks and jokes because such conduct from the men was "inseparable from factory life."³⁷⁸ Thus, foreseeability, in part, determines whether conduct is within the scope of employment.³⁷⁹

Similarly, sexual harassment is a known problem in the workplace.³⁸⁰ Sexual innuendoes, advances, and harassment characterize the modern workplace just as pranks between factory workers were a characteristic of workplaces in the 1920s. That so many employers today have policies prohibiting sexual harassment indicates that employers expect harassment to oc-

373. See 3 *EMPLOYMENT DISCRIMINATION* 2d § 46.01(2) (Matthew Bender, 1998) (citing Sandroff, *Sexual Harassment in the Fortune 500*, *WORKING WOMAN*, Dec. 1988 at 69.) "A typical Fortune 500 company spends as much as \$6.7 million a year in sexual harassment costs due to absenteeism, turnover and lost productivity." *Id.* See also Louise F. Fitzgerald, *Sexual Harassment: Violence Against Women in the Workplace*, *AMERICAN PSYCHOLOGIST*, Oct. 1993 at 1072 (describing the consequences of sexual harassment to employers and victims).

374. See *Faragher v. City of Boca Raton*, 118 S. Ct. 2275, 2286-2287 (1998).

375. See *e.g.*, *Leonbruno v. Champlain Silk Mills*, 128 N.E. 711 (N.Y. 1920) (employer was found vicariously liable for an eye injury sustained by an employee when another employee threw an apple at him). Judge Cardozo described horseplay in that case as "...a moment of diversion from work to joke with or play a prank upon a fellow workman." *Id.* See also *Blunk v. Atchison, T & S. F. Ry. Co.*, 217 P.2d 494, 495 (Cal. 1950) (describing horseplay as "sportive acts"). These definitions are not meant to suggest that sexual harassment involves the same kind of prankish behavior that occurred in these cases. Rather, the use of horseplay cases is merely to illustrate the fact that such conduct, like sexual harassment, is foreseeable by the employer.

376. 128 N.E. 711 (N.Y. 1920).

377. See *Leonbruno*, 128 N.E. at 711.

378. *Id.*

379. See *Faragher*, 118 S. Ct. 2275, 2287 (describing cases that used a broad definition of "scope of employment").

380. See *id.* at 2288.

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cur.³⁸¹ The fact that employers can foresee and prevent sexual harassment in the workplace is therefore a basis for imposing vicarious liability.

Second, the agency relation standard, as *Ellerth* makes clear, appears to cover a broad range of workplace misconduct.³⁸² The agency relation standard imposes vicarious liability when an employee is able to commit the tort because of his employment.³⁸³ The supervisor's ability to harass his subordinate is "facilitated by [his] position of authority."³⁸⁴ Without his supervisory position, he would not have leverage over the employees he supervises.³⁸⁵ He is able to call employees into his office for meetings, reprimands, or other work-related discussions.³⁸⁶ In the course of these interactions, the supervisor has the opportunity to sexually harass his subordinate.³⁸⁷ The fact that someone in authority is subjecting a worker to harassment reinforces an employee's reluctance to resist advances or complain.³⁸⁸ Thus, contrary to the Court's opinion, a broad reading of the agency relation standard is appropriate in sexual harassment cases.

Ellerth provides several examples of how a supervisor's relationship with the employer helps the supervisor commit harassment.³⁸⁹ First, Slowik told Ellerth that he could "make [her] life very hard or very easy at Burlington."³⁹⁰ In making this threat, Slowik undeniably relied on the power delegated to him by Burlington. The fact that Slowik did not actually terminate, demote, or deny raises to Ellerth is immaterial because he had

381. See 3 EMPLOYMENT DISCRIMINATION 2d § 46.01(2) (Matthew Bender, 1998) (citing Sandroff, *Sexual Harassment in the Fortune 500*, WORKING WOMAN, Dec. 1988 at 69, 71). Of 160 Fortune 500 companies, 76% had written policies prohibiting sexual harassment. See *id.*

382. See *Burlington*, 118 S. Ct. at 2268.

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

384. Alan Q. Sykes, *The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines*, 101 HARV. L. REV. 563, 606 (1988).

385. See *id.* at 606-607.

386. See Oppenheimer, *supra* note 44, at 88.

387. See *id.*

388. See *id.* at 88-89. See also Sykes, *supra* note 384, at 606.

389. See *Ellerth I*, 912 F. Supp. at 1107.

390. *Id.*

already linked the conditions of her employment to her tolerance of his advances.³⁹¹ Then, Slowik made Ellerth's life at Burlington "very hard" by continuing to harass her.³⁹² Second, Slowik's reluctance to promote Ellerth because she was "not loose enough" demonstrates his willingness to use his supervisory power against her if she did not accept advances.³⁹³ Third, the fact that Slowik could pursue Ellerth for so long illustrates the coercive power of a supervisor's authority; she was too afraid of what would happen to her if she complained to anyone at Burlington.³⁹⁴

VII. CONCLUSION

As Ellerth's case demonstrates, the Supreme Court took the necessary step of rejecting "quid pro quo" and "hostile environment" harassment as categories for determining the standard of employer liability.³⁹⁵ Thus, under *Ellerth*, plaintiffs whose claims do not comfortably fit into one of these two categories may still be able to impose vicarious liability on their employers. Unfortunately, the Court failed to precisely apply the proper scope of employment and agency relation standards. A precise application of these standards demands vicarious liability in all cases of sexual harassment by a supervisor. The Supreme Court in *Ellerth* adopted *Meritor's* dictum that agency principles limited employer liability, and therefore declined to properly apply agency principles to Kimberly Ellerth's

391. See *Karibian v. Columbia Univ.*, 14 F.3d 773, 778 (2d Cir. 1994) (stating that Urban's threats to terminate Karibian if she did not comply with his sexual demands amounted to sexual harassment because he "linked tangible job benefits to the acceptance or rejection of sexual advances." The fact that Karibian was promoted, and not terminated, did not change the analysis). Similarly, in Ellerth's case, Slowik linked tangible job benefits (continued employment, making her life at Burlington easy or difficult) to Ellerth's acceptance or rejection of his advances. See *Ellerth*, 912 F. Supp. at 1107, 1108 (describing Slowik's threat to make Ellerth's life easy or difficult, his hesitations about promoting Ellerth because she was not "loose enough" and his denial of her request for a special customer order because she would not describe what she was wearing).

392. See *Ellerth I*, 912 F. Supp. at 1106-1109 (describing Slowik's harassment of Ellerth).

393. *Id.* at 1108.

394. See *id.* at 1117.

395. See *Burlington Indus., Inc. v. Ellerth*, 118 S. Ct. 2257, 2265 (1998).

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claims.³⁹⁶ As a result, a bright-line standard of employer liability in Title VII sexual harassment cases continues to elude courts and commentators in this important area of law.

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396. *See id.* at 2270.

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