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Civil Rights - Federal Remedies: The United States Supreme Court, as Federal Flagship for Employment Equality, Balances Responsibility between Employer and Victim by Imposing Vicarious Liability Subject to an Affirmative Defense for Supervisor Sexual Harassment Creating a Hostile Work Environment

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CIVIL RIGHTS—FEDERAL REMEDIES: THE UNITED STATES SUPREME COURT, AS FEDERAL FLAGSHIP FOR EMPLOYMENT EQUALITY, BALANCES RESPONSIBILITY BETWEEN EMPLOYER AND VICTIM BY IMPOSING VICARIOUS LIABILITY SUBJECT TO AN AFFIRMATIVE DEFENSE FOR SUPERVISOR SEXUAL HARASSMENT CREATING A HOSTILE WORK ENVIRONMENT

Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257 (1998)

I. FACTS

Kimberly Ellerth was employed in March 1993 by Burlington Industries, Inc., initially as a merchandising assistant and later promoted to sales representative.[1] Fifteen months later, Ellerth resigned after being repeatedly subjected to sexually inappropriate remarks and touches by a supervisor, Theodore Slowik.[2] Besides degrading and offensive comments,[3] Slowik's statements on three occasions could be construed as threats to deny Ellerth tangible employment benefits.[4]

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1. Ellerth v. Burlington Indus., Inc., 912 F. Supp. 1101, 1106 (N.D. Ill. 1996) (Ellerth I). Burlington is a textiles and home furnishings manufacturer with over 50 plants and more than 22,000 employees in eight divisions throughout the United States. *Id.*

2. Burlington Indus., Inc. v. Ellerth, 118 S. Ct. 2257, 2262 (1998) (Ellerth IV). Ellerth's immediate supervisor reported to Theodore Slowik who was employed at the New York office of Burlington. *Ellerth I*, 912 F. Supp. at 1106. Although Ellerth worked in Chicago, Ellerth spoke to Slowik by phone each week and interacted with him when he visited the Chicago office every month or two. *Id.* Slowik was a mid-level manager whose decision making or policy making required approval from the upper-level management hierarchy. *Ellerth IV*, 118 S. Ct. at 2262.

3. On one occasion Slowik and another employee walked by Ellerth, who was on the floor folding fabric samples, and Slowik said, "On your knees again, Kim?" *Ellerth I*, 912 F. Supp. at 1108. Ellerth considered his comment an offensive reference to fellatio. *Id.*

4. *Ellerth IV*, 118 S. Ct. at 2262. The first incident occurred when Ellerth was at a training session with Slowik who invited her to the hotel lounge. *Ellerth I*, 912 F. Supp. at 1107. Ellerth felt compelled to accept the invitation because Slowik was her boss. *Ellerth IV*, 118 S. Ct. at 2262. After Slowik commented that Ellerth's breasts were "a little lacking" and that she "ought to loosen up," Slowik then warned, "You know, Kim, I could make your life very hard or very easy at Burlington." *Ellerth I*, 912 F. Supp. at 1107.

The second incident occurred at Ellerth's promotion interview when Slowik voiced his hesitation about promoting her because she was not "loose enough" and rubbed her knee during the interview. *Id.* at 1108. Ellerth was promoted, but when Slowik informed her of the promotion, he added, "You're gonna be out there with men who work in factories, and they certainly like women with pretty butts [and] legs." *Ellerth IV*, 118 S. Ct. at 2262.

The third incident occurred over the phone when Slowik parried Ellerth's request for permission to place a customer's logo on a fabric sample: "I don't have time for you right now, Kim, . . . unless you want to tell me what you're wearing." *Id.* When Ellerth repeated her request in a second phone call, Slowik refused permission and stated something along these lines: "Are you wearing shorter skirts yet, Kim, because it would make your job a whole heck of a lot easier." *Id.*

Although Ellerth was given a copy of Burlington's employee handbook that contained a policy against sexual harassment,[5] she chose not to inform anyone in authority for fear of jeopardizing her job.[6] In May 1994, Ellerth resigned after being cautioned by her immediate supervisor for not promptly returning customer phone calls.[7] Subsequently, Ellerth sought and received a right-to-sue letter from the Equal Employment Opportunity Commission (EEOC).[8] In October 1994, Ellerth commenced a Title VII action,[9] claiming that Burlington was responsible for supervisor Slowik's sexual harassment.[10]

At trial, Burlington first argued that Slowik's harassing conduct was not sufficiently severe or pervasive to be actionable.[11] However, recognizing the threats to withhold tangible employment benefits imbedded in Slowik's harassment, the district court was unpersuaded by Burlington's first argument.[12] The court determined that a reasonable jury could easily find Slowik's conduct sufficiently severe and pervasive to create a hostile work environment claim.[13] Additionally, the court noted an overlap between quid pro quo and hostile work environment claims when supervisors brandish work-related threats to employees, predicated on submission to sexual conduct.[14]

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5. *Ellerth I*, 912 F. Supp. at 1109. Burlington's policy manual stated: "The company will not tolerate any form of sexual harassment. . . . If you have any questions or problems, or if you feel you have been discriminated against, you are encouraged to talk to your supervisor or human resources representative or use the grievance procedure promptly." Ellerth v. Burlington Indus., Inc., 102 F.3d 848, 853 (7th Cir. 1996) (Ellerth II).

6. *Ellerth I*, 912 F. Supp. at 1109. On one occasion Ellerth told Slowik that his sexual innuendos were inappropriate. *Id.* However, Ellerth stated that she chose not to inform her immediate supervisor because "it would be his duty as my supervisor to report any incidents of sexual harassment," which she feared would endanger her job. *Id.*

7. *Ellerth IV*, 118 S. Ct. at 2262. Initially, Ellerth did not mention sexual harassment as the reason for her resignation, in either her faxed letter to her supervisor or in the message she left him on his answering machine. *Ellerth I*, 912 F. Supp. at 1109. Later, Ellerth wrote a follow-up letter essentially stating she quit her job because of Slowik's harassment. *Id.*

8. *Ellerth IV*, 118 S. Ct. at 2263; *see also* Nichols v. American Nat'l Ins. Co., 154 F.3d 875, 886 (8th Cir. 1998) (instructing that before bringing a civil suit, a Title VII plaintiff must file a discrimination charge with the Equal Employment Opportunity Commission (EEOC)).

9. *See* Title VII of the Civil Rights Act of 1964 *infra* Section IIA.

10. *Ellerth IV*, 118 S. Ct. at 2263.

11. *Ellerth I*, 912 F. Supp. at 1111.

12. *Id.* at 1115. Notwithstanding Ellerth's inability to recall the specifics of almost all Slowik's offensive comments, the court found a triable issue of fact regarding sufficient severity of the threats. *Id.* Further, the court rejected Burlington's minimizing of Slowik's conduct and had little problem finding sufficient pervasiveness in weekly long distance phone calls with harassing remarks in every single phone call. *Id.* Ellerth was required to see and speak to Slowik on a regular basis, due to Burlington's management structure. *Ellerth II*, 102 F.3d 848, 851 (7th Cir. 1996).

13. *Ellerth I*, 912 F. Supp. at 1114.

14. *Id.* at n.10. Courts commonly distinguish between two types of sexual harassment: quid pro quo and hostile work environment. *Id.* at 1110; *see also* discussion *infra* Section IIA. *But cf. Ellerth II*, 102 F.3d at 855 (reasoning that the distinction between quid pro quo and hostile work environment is analytic, and it would be a mistake to think that there is a bright line between the two); BARBARA LINDEMANN & PAUL GROSSMAN, 1 EMPLOYMENT DISCRIMINATION LAW 770 (3d ed. 1996) (observing that

Burlington further argued that as an employer, it was not liable because Burlington did not know, or have reason to know, of Slowik's conduct.[15] The district court agreed and granted summary judgment to Burlington because Ellerth never informed anyone in authority about Slowik's sexual harassment.[16] The court rejected Ellerth's contention that even without awareness of Slowik's conduct, Burlington should be held strictly liable because of Slowik's threats to deny Ellerth tangible job benefits if she did not comply with his demands.[17]

The United States Court of Appeals for the Seventh Circuit reversed the district court's summary judgment,[18] but then vacated and reheard the case en banc.[19] Again reversing the summary judgment, the Seventh Circuit produced eight separate opinions, some 200 pages, and no consensus for a controlling rationale.[20] The fracture in the court epicentered on the appropriate standard of liability for employers whose supervisors sexually harass employees.[21] The crux of the controversy was whether agency principles called for a negligence or vicarious liability standard when the supervisor's sexual harassment involved unfulfilled threats of adverse employment actions.[22]

Subsequently, the United States Supreme Court granted certiorari to sort out the governing agency principles to be applied in determining employer liability for supervisor sexual harassment under Title VII.[23] In

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the line between quid pro quo and hostile work environment may be fuzzy).

15. *Ellerth I*, 912 F. Supp. at 1111.

16. *Id.* at 1117. Based on agency principles, the district court imposed a negligence standard holding employers directly liable if they knew, or should have known, and failed to act on supervisors' harassment outside the scope of their employment. *See* RESTATEMENT (SECOND) OF AGENCY § 219 (1958) [hereinafter RESTATEMENT] *infra* Section IIB.

17. *Ellerth I*, 912 F. Supp. at 1123. The court concluded that although the quid pro quo element (i.e., Slowik's threats to deny tangible job benefits) was substantial, the gravamen of Ellerth's complaint was based on Slowik creating a hostile work environment. *Id.* at 1123. Thus, the court reasoned that applying a quid pro quo standard of strict liability, rather than a hostile work environment standard of negligence, would amount to "the tail wagging the dog." *Id.*

18. *Ellerth II*, 102 F.3d at 863.

19. Jansen v. Packaging Corp. of Am., 123 F.3d 490, 495 (7th Cir. 1997) (per curiam) (consolidating the *Jansen* and *Ellerth* appeals) (Ellerth III).

20. Ellerth IV, 118 S. Ct. 2257, 2263 (1998). Circuit Judge Manion recognized the remote possibility of any reader, other than his colleagues, "finding this opinion buried amid 200 pages," but nevertheless forged ahead. *Ellerth III*, 123 F.3d at 557 (Manion, J., concurring and dissenting, joined by Chief Judge Posner).

21. *Ellerth IV*, 118 S. Ct. at 2263.

22. *Id.*

23. *Id.* at 2264. The Court also granted certiorari to another case to determine the circumstances under which an employer may be liable for a supervisor's sexual harassment. Faragher v. City of Boca Raton, 118 S. Ct. 2275, 2280 (1998) (Faragher III). Subsequently, the Court issued a joint holding for both *Faragher III* and *Ellerth IV*. *See* Ellerth IV, 118 S. Ct. at 2270. The issue of determining the appropriate standard of employer liability for supervisor sexual harassment was similar in both cases, involving threatened changes in employment status of the victims who had not protested through formal channels. *See id.* at 2262-63; *Faragher III*, 118 S. Ct. at 2280-81. However, the facts in *Faragher III* presented a counterpoint to the facts in *Ellerth IV*. The sexual harassment in *Ellerth IV* took place in the formal corporate setting, while the *Faragher III* scene involved a boisterous beach atmosphere. *See Ellerth IV*, 118 S. Ct. at 2262; *Faragher III*, 118 S. Ct. at 2280. Beth Ann Faragher

a seven-to-two decision, the Court affirmed the judgment of the United States Court of Appeals for the Seventh Circuit and remanded the case back to the United States Court of Appeals.[24] The Court *held* that employers are vicariously liable not only for tangible employment actions taken against employees who refuse supervisors' unwelcome sexual advances, but also for a hostile work environment created by supervisors' threats and sexual harassment.[25] However, if a supervisor did not take a tangible employment action, the employer may raise an affirmative defense showing that it exercised reasonable care to prevent and promptly correct sexual harassment and that the victimized employee unreasonably failed to take advantage of these opportunities.[26]

II. LEGAL BACKGROUND

Sexual harassment in the employment setting gives rise to a sex discrimination claim under Title VII of the Civil Rights Act of 1964,[27] as amended by the Civil Rights Act of 1991.[28] The courts and the EEOC have interpreted Title VII by common-law agency principles, recognizing that these principles may not be transferable in all their particulars to the statute.[29] Moreover, courts have not consistently applied uniform standards of agency liability for employers whose supervisors sexually harass their subordinates.[30]

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and other female lifeguards were subjected to their supervisors' propensity for uninvited touching of various parts of the women's anatomies, including breasts and buttocks. Faragher v. City of Boca Raton, 864 F. Supp. 1552, 1556-57 (S.D. Fla. 1994) (Faragher I). Disparaging comments were repeatedly directed at the female lifeguards, such as, "If you had tits, I would do you in a minute." *Id.* at 1557-58. Faragher was also threatened by her supervisor: "Date me or clean the toilets for a year." *Faragher III*, 118 S. Ct. at 2280.

The factfinder noted that the beach setting and disproportionate ratio of male to female lifeguards was conducive to a rambunctious camaraderie. *Faragher I*, 864 F. Supp. at 1556. Nonetheless, the trial court found the supervisors' conduct unwelcome, offensive, humiliating, as well as fairly frequent and severe. *Id.* at 1561-62. Given the clear chain of supervisory command, the district court concluded this supervisory conduct was sufficiently pervasive to infer that the city had constructive knowledge of the harassment. *Id.* at 1563-64. Under agency principles, the court determined that the supervisors were acting as agents of the city, so the court held the city directly liable for negligence in failing to prevent the harassment. *Id.* at 1564. A deeply fragmented United States Court of Appeals for the Eleventh Circuit reversed, sitting en banc. Faragher v. City of Boca Raton, 111 F.3d 1530, 1534, 1534 n.3, 1538 (1997) (Faragher II). Thereafter, the United States Supreme Court granted certiorari to derive a manageable standard of employer liability for supervisors who perpetrate hostile work environment sexual harassment. *Faragher III*, 118 S. Ct. at 2282.

24. *Ellerth IV*, 118 S. Ct. at 2271. The majority opinion, written by Justice Kennedy, was joined by Justices Rehnquist, Stevens, O'Connor, Souter, and Breyer. *Id.* at 2261. Justice Ginsberg concurred, and Justices Thomas and Scalia dissented. *Id.*

25. *Id.* at 2270. The Court defined a supervisor as having immediate or successively higher authority over the employee. *Id.*

26. *Id.*

27. 42 U.S.C. § 2000e to 2000e-17 (1994 & West Supp. 1998).

28. 42 U.S.C. § 1981 (1994). *See generally*, Penny Nathan Kahan, *Sex Harassment Update*, SD06 A.L.I.-A.B.A. 757 (1998) (analyzing recent case law and issues in sexual harassment claims).

29. Meritor Sav. Bank, F.S.B. v. Vinson, 477 U.S. 57, 72 (1986).

30. David Benjamin Oppenheimer, *Exacerbating the Exasperating: Title VII Liability of Employers for Sexual Harassment Committed by Their Supervisors*, 81 CORNELL L. REV. 66, 71 (1995).

A. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

Title VII, Section 703(a), prohibits an employer from discriminating "against any individual with respect to his [or her] compensation, terms, conditions, or privileges of employment because of such individual's . . . sex."[31] This prohibition against sex discrimination was the product of an eleventh-hour political strategy, thus leaving a paucity of legislative history to provide judicial guidance for interpreting sex discrimination under Title VII.[32] However, congressional intent to vigorously combat sex discrimination became evident when the 1964 Act was amended by the Equal Employment Opportunity Act of 1972.[33] Subsequently, the United States Supreme Court unequivocally included a supervisor's sexual harassment, leading to either tangible or intangible injury, within the ambit of Title VII's proscription of discrimination on the basis of sex.[34] Finally, the passage of the Civil Rights Act of 1991 supported sexual harassment law by allowing a right to jury trials and

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31. 42 U.S.C. § 2000e-2(a)(1) (1994). Employment terms, conditions, or privileges include hiring, firing, demoting, or promoting. Rebecca Hanner White, *Vicarious and Personal Liability for Employment Discrimination*, 30 GA. L. REV. 509, 524 (1996). However, the Supreme Court has interpreted Title VII to cover not only "terms" and "conditions" in the narrow sense of an employment contract, but all disparate treatment of female and male employees. Oncale v. Sundowner Offshore Servs., Inc., 118 S. Ct. 998, 1001 (1998). Furthermore, the statutory language of Title VII conveys the intent of Congress to define employment discrimination in the broadest possible terms. Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971). Congress deliberately chose not to enumerate specific discriminatory practices, or elucidate all the parameters of these actions. *Id.* Because constant change is the order of the day, Congress pursued the path of wisdom by being unconstrictive in terminology. *Id.*

32. *Meritor Sav. Bank*, 477 U.S. at 63-64 (1986). In an attempt to block Title VII, opponents added discrimination based on sex at the last minute on the floor of the House of Representatives. Barnes v. Costle, 561 F.2d 983, 987 (D.C. Cir. 1977); 110 CONG. REC. 2577-84 (1964). Thus, no legislative history was available for an eight-year period following the original enactment of Title VII. *Barnes*, 561 F.2d at 987.

33. 42 U.S.C. §§ 2000e to 2000e-17 (1994 & West Supp. 1998) (extending the same guarantees against sex discrimination to government employees as those afforded to private employees). The 1972 Act provided in relevant part that "[a]ll personnel actions affecting employees or applicants for employment . . . in executive agencies . . . shall be made free from any discrimination based on race, color, religion, sex or national origin." § 2000e-16. In ringing tones, the House Committee on Education and Labor reported that eight years after enactment, Title VII still left much to accomplish to elevate the status of women in the workplace. *Barnes*, 561 F.2d at 987; H.R. REP. NO. 92-238, at 4-5 (1971), *reprinted in* 1972 U.S.C.C.A.N. 2137, 2137.

34. *Meritor Sav. Bank*, 477 U.S. at 64. The EEOC has defined sexual harassment in violation of Title VII as follows:

> [u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when 1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment; 2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or 3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

29 C.F.R. § 1604.11(a) (1997).

big-money damages.[35] Two types of sexual harassment trigger Title VII: quid pro quo and hostile working environment.[36]

1. *Quid Pro Quo*

Quid pro quo sexual harassment[37] is defined as conditioning tangible employment benefits or detriments on sexual favors.[38] To state a quid pro quo claim, an employee must establish a prima facie case.[39] Generally, the elements of a prima facie case of quid pro quo sexual harassment require showing: 1) membership in a protected class; 2) subjection to unwelcome sexual harassment, such as sexual advances or requests for sexual favors; 3) harassment on the basis of sex; and 4) either submission to unwelcome advances as an express or implied condition for receiving tangible employment benefits or refusal to submit which resulted in a tangible employment detriment.[40]

The first element to be proved in a quid pro quo sexual harassment claim is membership in a protected class.[41] Congressional intent underlying Title VII targeted the entire spectrum of disparate treatment based

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35. 42 U.S.C. § 1981a(a)(1) (1994) (expanding the remedies available in Title VII cases by providing for compensatory and punitive damages, as well as damages for emotional distress). However, punitive damages have a cap, depending on the number of the defendant's employees, ranging from $50,000 for 100 or fewer employees to $300,000 for 500 or more employees. § 1981a(b)(3)(a)-(b); *but cf. Ellerth I*, 912 F. Supp. 1101, 1123 (N.D. Ill. 1996) (remarking that despite the civil rights legislation and the public consciousness-raising of events such the Hill-Thomas hearings, our nation's workplaces are still filled with sexual harassment). Anita Hill testified that Clarence Thomas used work situations to discuss sexual matters with her, including pornographic films and materials depicting his own sexual prowess. *Hearings Before the Senate Committee on the Judiciary*, 102d Cong. 36-37 (1993).

36. *Meritor Sav. Bank*, 477 U.S. at 65.

37. Professor Catharine MacKinnon introduced the term quid pro quo to sexual harassment analysis in 1979. CATHARINE MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION 32 (1979). Subsequently, MacKinnon's work was cited by the courts, which defined quid pro quo discrimination as deprivation of a job benefit, which the employee was otherwise qualified to receive, after the employee refused sexual advances. Henson v. City of Dundee, 682 F.2d 897, 909 (11th Cir. 1982). *Henson* continues to be cited as the seminal case in quid pro quo sexual harassment and as black letter law. Eugene Scalia, *The Strange Career of Quid Pro Quo Sexual Harassment*, 21 HARV. J.L. & PUB. POL'Y 307, 310 (1998).

38. *Meritor Sav. Bank*, 477 U.S. at 62.

39. In *Henson*, the court fashioned elements of a prima facie case for a quid pro quo sexual harassment claim from the *McDonnell Douglas* test. *Henson*, 682 F.2d at 911 n.22; *see also* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04, 804 n.13 (1973) (ordering and allocating the burdens of proof in employment discrimination cases by a factual showing of prima facie case elements).

40. Kauffman v. Allied Signal, Inc., 970 F.2d 178, 186 (6th Cir. 1992). These prima facie case elements may vary somewhat in different circuits. *See, e.g.*, Karibian v. Columbia Univ., 14 F.3d 773, 777 (2d Cir. 1994) (establishing a prima facie case of quid pro quo harassment when an employee presents evidence of being subjected to unwelcome sexual conduct, and the employee's reaction formed the basis for decisions affecting employment compensation, terms, conditions, or privileges). However, the United States Court of Appeals for the Ninth Circuit found these prima facie elements particularly formalistic, overlapping, and unnecessary because, for example, all individuals—male or female—belong to a protected class, and ordinarily sexual harassment is based on sex. Nichols v. Frank, 42 F.3d 503, 511 (9th Cir. 1994).

41. *Kauffman*, 970 F.2d at 186.

on sex in the workplace.[42] Thus, both genders are protected from sex discrimination by Title VII's umbrella.[43] Consequently, this element of a prima facie case only requires a simple stipulation that the employee is either a man or a woman.[44]

To fulfill the second element of a quid pro quo claim, employees must show they have been subjected to unwelcome sexual harassment.[45] The harassment must be unwelcome in the sense that the employee regarded it as undesirable or offensive; that is, the employee did not incite or solicit the behavior.[46] Should an employee submit to sex with a supervisor, however, the question for the court remains whether the employee considered the sexual advances unwelcome, not whether the sex was consensual.[47] If an employee once welcomed sexual behavior in the workplace, but later decides the conduct is offensive, further advances become unwelcome if the employee makes that clear.[48] Moreover, employees' behavior during their non-work related private life is immaterial to whether they find workplace sexual advances unwelcome.[49]

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42. *Meritor Sav. Bank*, 477 U.S. at 64 (citing Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978) (quoting Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (7th Cir. 1971))); 110 CONG. REC. 2728, 13,825 (1964).

43. Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 682 (1983).

44. Henson v. City of Dundee, 682 F.2d 897, 903 (11th Cir. 1982). Approximately nine of every ten sexual harassment actions are brought by women. John Cloud, *Harassed or Hazed?* TIME, Mar. 16, 1998, at 55. Nonetheless, Title VII sexual harassment claims are available to men as well as women. *Newport News*, 462 U.S. at 682. For example, a male restaurant manager was awarded $237,257 when he was fired after declining his female supervisor's sexual advances. EEOC v. Domino's Pizza, 909 F. Supp. 1529, 1538 (M.D. Fla. 1995); *see also* Steiner v. Showboat Operating Co., 25 F.3d 1459, 1464 (9th Cir. 1994) (allowing viable sexual harassment claims by employees of both genders against the same supervisor). However, conflicting results may ensue when the sexual harasser offends both female and male employees. *Compare* Chiapuzio v. BLT Operating Corp., 826 F. Supp. 1334, 1337-38 (D. Wyo. 1993) (finding that a supervisor's continuous desire to boast of his sexual prowess was harassing to male employees, while graphic descriptions of sex acts he wanted to perform with female employees were offensive to the females) *with* Johnson v. Tower Air, Inc., 149 F.R.D. 461, 469 (E.D.N.Y. 1993) (dismissing a sexual harassment claim brought by a female flight attendant, because the male manager's insulting and obscene remarks and gestures were unpleasant to both male and female crew members).

45. *Kauffman*, 970 F.2d at 186.

46. *Henson*, 682 F.2d at 903; *see also* Sims v. Montgomery County Comm'n, 766 F. Supp. 1052, 1077 (M.D. Ala. 1990) (indicating the police department apparently did not understand that the issue is whether females reasonably considered physical touching by male officers as unwelcome, not whether male officers viewed the touching as friendly).

47. Meritor Sav. Bank, F.S.B. v. Vinson, 477 U.S. 57, 68 (1986). The fact that the employee was not forced to participate is, therefore, not a defense. *Id.* Rather, the trier of fact determines whether a particular conduct was indeed unwelcome, and the question turns largely on credibility. *Id.*

48. Swentek v. USAIR, Inc., 830 F.2d 552, 557 (4th Cir. 1987) (characterizing as unwelcome harassment the sexual remarks and continued touching at work of an ex-lover after their affair ended). In so-called "soured romance" cases, unwelcomeness is particularly difficult to determine because "the adverse job action may stem from a personal reaction to the individual involved in the former romance and not involve harassment based on gender." *EEOC Policy Guide on Sexual Harassment*, *reprinted in* 421 FEP MANUAL 459 (1998). Therefore, the EEOC recommends clearly notifying a harasser, as well as the employer or the EEOC, that conduct is no longer welcomed. *Id.*

49. Burns v. McGregor Electronic Indus., 989 F.2d 959, 962 (8th Cir. 1993). In *Burns*, female employee had posed nude for a magazine. *Id.* at 961. Reprimanding the trial court for its decision that

Participating in offensive conduct, such as foul language, also does not indicate the comments were generally welcomed.[50]

Proving the third element of a quid pro quo case requires a showing of harassment on the basis of sex.[51] Employees must be intentionally singled out for adverse treatment because of their sex.[52] Thus, to prove a claim for sexual harassment, employees must show they would not be objects of harassment "but for" the fact of their gender.[53] Harassing conduct may be motivated by sexual desire,[54] consisting of sexual advances or behavior with clear sexual overtones.[55] But conduct of a nonsexual nature may constitute prohibited sexual harassment as well, for example, humiliating[56] or ridiculing employees based on their sex, or treating employees of one sex as inferior to the other.[57] Similarly, same-sex harassment on the basis of homosexual desire is not the only factor in determining whether a victim has been targeted because of gender.[58] Rather, harassment by sex-specific and derogatory terms may

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the employee found sexual advances at work unwelcome but not offensive because of her magazine photographs, the United States Court of Appeals for the Eighth Circuit reversed. *Id.* at 966. The court emphasized that no matter how reprehensible an employee's private life may be, her past did not mean she acquiesced to unwanted sexual advances at work. *Id.* at 963; *see also* Stacks v. Southwestern Bell Yellow Pages, Inc., 27 F.3d 1316, 1327 (8th Cir. 1994) (finding sexual advances at work unwelcome, although the female employee was having a private consensual affair with another married employee).

50. *Swentek*, 830 F.2d at 557 (warning that consensual foul language or sexual innuendo does not waive employees' legal protections against unwelcome sexual harassment). *Compare* Carr v. Allison Gas Turbine, 32 F.3d 1007, 1011 (7th Cir. 1994) (ruling that an employee's bawdy behavior and foul language neither justified nor indicated that she welcomed four years of extensive derogatory and sexual comments, pranks, graffiti, and pictures) *and* Kimzey v. Wal-Mart Stores, Inc., 107 F.3d 568, 571 (8th Cir. 1997) (determining that a victim's crude language and "tomfoolery" did not show that harassing conduct was welcome) *with* Balletti v. Sun-Sentinel Co., 890 F. Supp. 1539, 1541 (S.D. Fla. 1995) (viewing exchanged vulgarities between employees, including attempts by a female employee to pull down a male's pants that resulted in exposing his buttocks, as indicative that she welcomed such behavior) *and* Reed v. Shepard, 939 F.2d 484, 486-87 (7th Cir. 1991) (finding the plaintiff failed to prove unwelcomeness because she was put on probation for offensive language, received instructions to stop wearing a T-shirt with no bra, gave sexually suggestive gifts to male employees, and showed male supervisors her hysterectomy scars which revealed her pubic area).

51. Kauffman v. Allied Signal, Inc., 970 F.2d 178, 186 (6th Cir. 1992).

52. Henson v. City of Dundee, 682 F.2d 897, 903 (11th Cir. 1982).

53. Phillips v. Martin Marietta Corp., 400 U.S. 542, 548 (1971). The question in "but-for" causation is whether the employee would have suffered the harassment if he or she had been of a different gender. Barnes v. Costle, 561 F.2d 983, 990 n.55 (D.C. Cir. 1977); *see also* Bundy v. Jackson, 641 F.2d 934, 942 n.7 (D.C. Cir. 1981) (describing "but for" causation in sexual harassment claims). Title VII requires showing discrimination "because of" gender; so the employee must be disadvantaged, compared to others, by behavior that alters conditions of employment because it is so objectively offensive. David G. Savage, *Signs of Disagreement*, A.B.A. J., May 1998, at 50.

54. Oncale v. Sundowner Offshore Servs., Inc., 118 S. Ct. 998, 1002 (1998).

55. Bell v. Crakin Good Bakers, Inc., 777 F.2d 1497, 1503 (11th Cir. 1985).

56. *See, e.g.*, Faragher I, 864 F. Supp. 1552, 1557 (S.D. Fla. 1994) (calling women employees "b------" and asking a woman lifeguard if she was going to "f---" all the male lifeguards, just like the other female lifeguards).

57. *See, e.g.*, Sims v. Montgomery County Comm'n, 766 F. Supp. 1052, 1073 (M.D. Ala. 1990) (blaming a female police officer for an attempted escape and referring to her as the "weak link," even though the blame lay squarely on the shoulders of a male officer who failed to follow proper procedures).

58. *Oncale*, 118 S. Ct. at 1002. Victims of same-sex harassment are also included in Title VII

indicate that the harasser is motivated by general hostility, not sexual desire.[59] The critical issue is whether members of one gender are exposed to employment terms or conditions which are disadvantageous, while members of the other sex are not so exposed.[60]

The fourth element of a quid pro quo claim is the employee's submission or refusal to submit to a supervisor's unwelcome advances, resulting in a tangible employment consequence.[61] The gravamen of a quid pro quo claim is the conditioning of tangible job benefits or privileges on an employee's submission to sexual blackmail.[62] Two types of quid pro quo cases may be distinguished: refusal and submission.[63]

In a typical refusal case, an employee who rebuffs a supervisor's sexual advances can expect to suffer some reprisal at work.[64] Thus, an employee can prove quid pro quo harassment by evidence of some job-related penalty.[65] However, in a submission case, evidence of economic harm may be unavailable if the employee submits to a supervisor's sexual advances.[66] Thus, the employee's continued employment, raises, work assignments, or promotions may all depend on continued responsiveness to a supervisor's sexual demands.[67] Therefore, evidence of an adverse employment action will not always be available; but it is enough to show that the supervisor used the employee's submission to make decisions affecting terms, conditions, or privileges of the job.[68]

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prohibitions against sex discrimination. *Id.* at 1001-02. In *Oncale*, a male roustabout on an eight-man oil rig crew was forcibly subjected to sex-related, humiliating actions. *Id.* at 1001. The supervisors and co-workers constantly picked on Oncale, suggesting that he was a homosexual. *Id.* Among other harassing incidents, a male co-worker held Oncale down in a shower and shoved a bar of soap into his anus, threatening rape. Oncale v. Sundowner Offshore Servs., Inc., 83 F.3d 118, 118-19 (5th Cir. 1996).

59. *Oncale*, 118 S. Ct. at 1002.

60. *Id.* (quoting Harris v. Forklift Sys. Inc., 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)). *But see* Marley S. Weiss, *The Supreme Court 1997-1998 Labor and Employment Law Term (Part I): The Sexual Harassment Decisions*, 14(2) THE LABOR LAWYER 261, 270 (1998) (suggesting that the *Oncale* reasoning will provide a new impetus for defense strategies which contend that indiscriminate sexual harassment directed at all employees is equivalently objectionable, hence nondiscriminatory); *cf.* Savage, *supra* note 53, at 51 (quoting employment law experts as stating that the *Oncale* decision expanded the coverage to both genders, but restricted the liability by insisting on proof of actual job discrimination because of sex). "[T]his may be the opening salvo of a campaign to rein in the law." *Id.*

61. Kauffman v. Allied Signal, Inc., 970 F.2d 178,186 (6th Cir. 1992); *see also* 29 C.F.R. § 1604.11(a)(1)(2) (1997) (defining quid pro quo sexual harassment as "submission to or rejection of [unwelcome sexual] conduct by an individual . . . used as the basis for employment decisions affecting such individual").

62. Carrero v. New York City Hous. Auth., 890 F.2d 569, 579 (2d Cir. 1989).

63. Karibian v. Columbia Univ., 14 F.3d 773, 778 (2d Cir. 1993).

64. *Id.*

65. *Id.*

66. *Id.* The court did not read Title VII as punishing victims of sexual harassment who surrendered to unwelcome sexual encounters because then harassers would be encouraged to increase their persistence. *Id.* Moreover, requiring an actual economic loss for employees who submit to a supervisor's unwelcome sexual overtures unduly emphasizes the victim's reaction, when the focus should be on the prohibited behavior. *Id.* at 779.

67. *Id.* at 778.

68. *Id. But see infra* note 190 (questioning whether submission cases will be actionable as quid

Ultimately, once an employee has established a prima facie case for quid pro quo harassment, liability hinges on whether there is a causal connection between the alleged harassment and the tangible employment act.[69] Tangible employment actions include materially adverse changes in the terms and conditions of employment, such as termination of employment or demotion accompanied by a decrease in compensation.[70] Other job detriments, such as reassignments, must cause a materially significant disadvantage involving diminution in title, responsibilities, or benefits.[71] Thus, employment changes with less potential for advancement, as well as less attractive and fewer duties, are not tangible job detriments unless there is an actual pecuniary loss or change in job classification.[72] Furthermore, employee claims of being discouraged from applying for more attractive jobs must be supported by identifying specific jobs for which the employee has applied.[73]

Negative changes in public perception of the employee's job transfer are insufficient to constitute a material employment disadvantage.[74]

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pro quo sexual harassment after the *Ellerth IV* decision); Ellerth IV, 118 S. Ct. 2257, 2270 (1998) (requiring a tangible employment detriment to impose automatic vicarious liability on employers).

69. Cram v. Lamson & Sessions Co., 49 F.3d 466, 473 (8th Cir. 1995). *Compare* Nichols v. Frank, 42 F.3d 503, 509 (9th Cir. 1994) (finding a close connection between a supervisor's approval of an employee's request for a leave of absence and the supervisor's demand for oral sex, because the supervisor immediately approved the employee's request following her submission to his demand) *with* Jones v. Clinton, 990 F. Supp. 657 (E.D. Ark. 1998) (concluding then Governor Clinton's alleged reference to being a good friend of Paula Jones' supervisor, accompanied by sexual touching and a request for oral sex, was not a sufficient causal link); *see also Cram*, 49 F.3d at 474 (determining that a harasser's statement, "I'll get you for this," established an insufficient causal nexus to show enforcement of a quid pro quo demand because there was no reference to the employee's job); Hartleip v. McNeilab, Inc., 83 F.3d 767, 775-76 (6th Cir. 1996) (ruling that a harasser's statement that he was "close friends" with an individual who had impact on a claimed adverse employment decision as too attenuated to establish causation).

70. Crady v. Liberty Nat'l Bank & Trust Co., 993 F.2d 132, 136 (7th Cir. 1993).

71. Harlston v. McDonnell Douglas Corp., 37 F.3d 379, 382 (8th Cir. 1994); *cf. Crady*, 993 F.2d at 136 (stating that mere inconvenience or an alteration of job duties is not sufficiently disruptive to qualify as a materially adverse employment action); *Jones*, 990 F. Supp. at 673-74 (indicating that, without more, de minimis personnel matters are insufficient to constitute a tangible job detriment; *Harlston*, 37 F.3d at 382 (finding no significant material disadvantage when an employee's reassignment involved fewer duties and more stress, such as the need to watch the door, listen for the fax, and monitor people coming and going).

72. *Jones*, 990 F. Supp. at 672. For example, job transfers are not adverse employment actions unless they involve a demotion in form or substance or major changes in working conditions and reduction in pay or benefits. Williams v. Bristol-Myers Squibb Co., 85 F.3d 270, 274 (7th Cir. 1996). Even requiring an employee to move to another town, which the employee found unpalatable, did not rise to the level of an adverse employment action because the position, title, and salary remained unchanged. Montandon v. Farmland Indus., Inc., 116 F.3d 355, 359 (8th Cir. 1997). Courts also have required employees transferred to new positions to "give it a try" and not speculate that their employer was acting in bad faith, for purposes of comparing claimed adverse employment changes. Darnell v. Campbell County Fiscal Ct., 924 F.2d 1057, 1065 (6th Cir. 1991); *accord* Kocsis v. Multi-Care Management, Inc., 97 F.3d 876, 887 (6th Cir. 1996) (noting the failure of an employee to make a real attempt at comparing the two employment positions before filing a claim).

73. *Jones*, 990 F. Supp. at 671. Tangible employment detriments must be sufficient to create a genuine issue of fact, not mere inferences based on generalized speculation or conjecture. Splunge v. Shoney's, Inc., 874 F. Supp. 1258, 1271 (M.D. Ala. 1994).

74. Spring v. Sheboygan Area Sch. Dist., 865 F.2d 883, 886 (7th Cir. 1989). In *Spring*, a school principal argued that her transfer and reassignment to a dual principalship was a public humiliation,

A bruised ego and a semantic change in title are also insufficient tangible job detriments when pay and benefits remain the same after a lateral transfer.[75] Nor are general allegations of hostility and personal animus sufficient to constitute a materially adverse employment action, without evidence of a tangible change in duties or working conditions.[76] Patterns of negative or adverse employment actions, such as supervisor criticism and low proficiency ratings, also are insufficient to prove a tangible job detriment without financial harm, suspension, or termination of the employee.[77]

To summarize, a quid pro quo claim requires a showing that an employee was subjected to harassment on the basis of sex, as a condition of tangible employment actions.[78] The harassing conduct may be either sexual in nature or degrading and humiliating, but the behavior must be unwelcome.[79] Finally, a causal connection must sufficiently link the harassment and the tangible employment decision detrimentally affecting the employee's compensation, terms, conditions, or privileges of employment.[80]

2. *Hostile Work Environment*

Creating a hostile work environment, without causing tangible or economic loss, is also actionable under Title VII.[81] In *Meritor Savings Bank, F.S.B. v. Vinson*, the United States Supreme Court for the first time recognized an actionable Title VII claim based on sexual harassment that was sufficiently severe or pervasive so as to create an abusive work environment.[82] A hostile work environment claim is

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perceived as a "nudge toward retirement." *Id.* at 885-86. However, the court termed her argument as "not strong stuff" because the only material disadvantage to the new position was further distance from home to school, for which she was reimbursed. *Id.* at 886.

75. Flaherty v. Gas Research Inst., 31 F.3d 451, 456 (7th Cir. 1994).

76. *Jones*, 990 F. Supp. at 673.

77. Hicks v. Brown, 929 F. Supp. 1184, 1190 (E.D. Ark. 1996).

78. Kauffman v. Allied Signal, Inc., 970 F.2d 178, 186 (6th Cir. 1992).

79. Oncale v. Sundowner Offshore Servs., Inc., 118 S. Ct. 998, 1003 (1998).

80. *Jones*, 990 F. Supp. at 670.

81. Meritor Sav. Bank, F.S.B. v. Vinson, 477 U.S. 57, 65-66 (1986). Recognizing the significant relationship between employees and their working environment and that discrimination may be evinced more subtly than by isolated events such as hiring, firing, and promoting, the court interpreted Title VII to include protection from psychological abuse in the workplace. Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971). In *Rogers*, the court protected employees from a work environment so heavily charged or "polluted" with race discrimination as to alter the emotional or psychological terms and conditions of employment. *Id.* Subsequently, the court extended the availability of hostile work environment claims to sexual harassment as well, finding such conduct "poisoned" the employment atmosphere. Bundy v. Jackson, 641 F.2d 934, 945 (D.C. Cir. 1981). "Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets." Henson v. City of Dundee, 682 F.2d, 897, 902 (11th Cir. 1982).

82. *Meritor Sav. Bank*, 477 U.S. at 67. A prima facie case for hostile work environment sexual harassment is made out by elements similar to the quid pro quo prima facie case: 1) that the victim belonged to a protected group; 2) that the victim was subjected to unwelcome sexual harassment; 3)

assessed by considering the totality of the circumstances, such as the frequency, severity, and nature of the conduct, as well as the conduct's unreasonable interference with work performance.[83] While none of these circumstances is required,[84] all evidence of abusiveness of the employee's working conditions is relevant to the inquiry.[85] Thus, psychological harm is relevant, but not required, and will be considered along with any other relevant factor.[86] The whole context of workplace interrelationships between the key players, the harasser and the victim, must be assessed.[87]

The sexually harassing behavior must be subjectively and objectively severe or pervasive such that both the employee and a reasonable person would find it sufficient to create a hostile work environment.[88] Subjectively, the employee must in fact perceive the workplace as offensively abusive.[89] Objectively, the court must consider whether a reasonable person would perceive the sexual harassment as sufficiently severe or pervasive to create a hostile or abusive work environment.[90] Several courts have modified the reasonable person standard to focus on the perspective of the victim.[91]

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that the victim was harassed on the basis of sex; 4) that the harassment affected a term, condition, or privilege of employment by a supervisor's harassment which is sufficiently severe and pervasive to create a hostile work environment; and 5) the employer knew or should have known of the harassment and failed to take prompt remedial action. *Henson*, 682 F.2d at 903-04.

83. Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993). The nature of the conduct is assessed by evaluating whether the behavior is physically threatening, humiliating, or merely an offensive utterance. *Id.* Furthermore, the employee need not prove a tangible decline in productivity, only that the job became more difficult to perform because the harassment altered working conditions. *Id.* at 25 (Ginsburg, J., concurring).

84. *Id.* at 23. "This is not, and by its nature cannot be, a mathematically precise test." *Id.* at 22.

85. Nichols v. American Nat'l Ins. Co., 154 F.3d 875, 887 (8th Cir. 1998).

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

87. *Nichols*, 154 F.3d at 887; *see also* Faragher III, 118 S. Ct. 2275, 2283 (1998) (determining whether an environment is hostile or abusive by looking at all the circumstances).

88. *Harris*, 510 U.S. at 21; *see also* Daniels v. Essex Group, Inc., 937 F.2d 1264, 1272 (7th Cir. 1991) (stating that subjective and objective standards allow the trier of fact to "keep an eye on the ball" more easily than the multi-factor prima facie test for hostile work environment).

89. *Faragher III*, 118 S. Ct. at 2283. The United States Court of Appeals for the Tenth Circuit found an employee subjectively did not view the atmosphere at the office as abusive when she exchanged off-color stories with the staff members and never complained about the work environment. Sauers v. Salt Lake County, 1 F.3d 1122, 1126 (10th Cir. 1993). This office atmosphere included unusually rough, raw, and sexually explicit remarks that the entire staff tolerated. *Id.*

90. McKenzie v. Illinois Dep't of Transp., 92 F.3d 473, 480 (7th Cir. 1996). The objective standard places a check on claims filed by supersensitive "eggshell" employees. *Daniels*, 937 F.2d at 1271. The real social impact of workplace conduct depends on a constellation of surrounding circumstances, expectations, and relationships not fully captured by simply reciting the acts performed or words spoken. *Id.* Thus, the inquiry requires common sense, careful consideration, and sensitivity to the social context where the harassing occurs and is experienced by the target victim, in order that ordinary socializing is not mistaken for discrimination. Oncale v. Sundowner Offshore Servs., Inc., 118 S. Ct. 998, 1003 (1998).

91. The United States Court of Appeals for the Ninth Circuit instituted a reasonable victim standard, focusing on the perspective of either a female or male victim. Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991). The rationale is that the same behavior which women may find objectionable, men may not find offensive at all. *Id.* at 879-80. Because women are disproportionately victims of rape, they may understandably worry that the sexual harassment will lead to violent sexual assault.

Harassing conduct must be sufficiently severe to establish an actionable sexually objectionable environment.[92] However, the United States Supreme Court has taken a middle path between making actionable any conduct that is merely offensive and requiring the sexual harassment to cause a tangible psychological injury.[93] The abusive work environment does not have to seriously affect the employee's psychological well-being to alter employment conditions, because less serious effects can detract from job performance, discourage the employee from remaining on the job, or prevent career advancement.[94] That is, Title VII comes into play before the sexual harassment produces a nervous breakdown.[95]

However, mere discriminatory utterances or epithets that offend feelings are not actionable.[96] Rather, the workplace must be riddled with discriminatory intimidation, ridicule, and insult so as to alter employment terms and conditions.[97] Thus, workplace harassment is not automatically discriminatory when words are merely tinged with sexual content or connotations.[98] Appropriate sensitivity to the social context must

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Id. at 878. Believing a sex-blind standard tends to be male-biased and ignores women's experiences, the court adopted a reasonable woman standard for women victims. *Id.* at 879. Conversely, for male victims of sexual harassment the court preferred a reasonable man standard. *Id.* at n.11; *see also* Lehmann v. Toys 'R' Us, Inc., 626 A.2d 445, 603 (N.J. Super. Ct. 1993) (assessing sexual harassment hostile work environment claims by a reasonable woman standard); Andrews v. City of Philadelphia, 895 F.2d 1469, 1486 (3d Cir. 1990) (requiring the trial court to examine whether conduct was hostile and offensive to a woman of reasonable sensibilities); Burns v. McGregor Elec. Indus., Inc., 989 F.2d 959, 965 (8th Cir. 1993) (applying the reasonable woman standard to determine whether conduct was unwelcome); Spain v. Gallegos, 26 F.3d 439, 447 (3d Cir. 1994) (utilizing the reasonable person of the same sex test).

However, the Michigan Supreme Court rejected the reasonable woman standard, preferring the perspective of the reasonable person because it was carefully crafted with sufficient flexibility to incorporate gender differences. Radtke v. Everett, 501 N.W.2d 155, 166 (Mich. 1993). Fearing fragmentation of legal standards, as well as a retrenchment of sexist attitudes, the court indicated the law can have no favorites. *Id.* at 166-67. Stereotypes that women are sensitive, fragile, and need a more protective standard perpetuate paternalism. *Id.* Furthermore, in both *Oncale* and *Faragher III*, the United States Supreme Court confirmed the reasonable person standard previously laid out in *Harris*. *See Oncale*, 118 S. Ct. at 1003; *Faragher III*, 118 S. Ct. at 2283; *Harris*, 510 U.S. at 21.

92. *Faragher III*, 118 S. Ct. at 2283.

93. *Harris*, 510 U.S. at 21.

94. *Id.* at 371.

95. *Id.* Even without tangible effects, Title VII's broad rule of workplace equality is offended by creating a hostile work environment abusive to employees because of their gender. *Id.*

96. Meritor Sav. Bank, F.S.B. v. Vinson, 477 U.S. 57, 67 (1986).

97. *Id.* Title VII is not designed to purge the work environment of vulgarity, but rather to protect employees from harassment making the workplace "hellish." Baskerville v. Culligan Int'l Co., 50 F.3d 428, 430 (7th Cir. 1995). Chief Judge Posner discussed the continuum: assaults, physical contact or solicitations, and intimidating or obscene gestures, words, or pictures juxtaposed to occasional vulgar banter by boorish workers. *Id.* Upsetting a jury verdict of $25,000 for the plaintiff, Chief Judge Posner stated that the supervisor never said anything to Baskerville that could not be repeated on prime-time television. *Id.* at 431.

98. Oncale v. Sundowner Offshore Servs., Inc., 118 S. Ct. 998, 1002 (1998). In *Oncale*, Justice Scalia downplayed the arguable risk of transforming Title VII into a "general civility code for the American workplace." *Id.* Title VII does not reach genuine but innocuous differences in male-female interactions. *Id.* at 1002-03; see also Ellerth III, 123 F.3d 490, 540 (7th Cir. 1997) (Coffey, J., concurring and dissenting) (citing Vincent J. Schodolski, *Harassment Suits Curb Workplace Free*

be given careful consideration, so discriminatory conduct is not mistaken for ordinary socializing, such as intersexual flirtation or male-on-male horseplay.[99]

Harassing conduct must also be sufficiently pervasive to establish an actionable sexually objectionable environment.[100] Isolated and innocuous incidents are insufficient to demonstrate a hostile work environment claim,[101] because Title VII is directed at discrimination in employment conditions and not mere unpleasantness.[102] However, a hostile work environment is not demonstrated by alleging a "magic" threshold number of incidents.[103] The conduct must be sufficiently extreme to amount to a change in employment terms and conditions.[104] Thus, the criteria of severe and pervasive will filter out complaints of occasional teasing or sporadic use of abusive language or gender-related jokes as ordinary tribulations of the workplace.[105]

In this conflicting and often overlapping tangle of what constitutes severe and pervasive,[106] one clear theme emerges: criminal conduct of the most serious nature is plainly sufficient to state a hostile environment claim.[107] Thus, a single incident of a supervisor's sexual assault sufficiently alters the victim's employment conditions and allows a claim to be actionable.[108] However, a single incident of exposing genitals to a

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Speech, CHI. TRIB., June 23, 1997, at 1) (lamenting the transformation of the workplace into a "nervous nest," where employees are afraid to express honest emotions or say what they think because of constantly shifting legal rulings).

99. *Oncale*, 118 S. Ct. at 1003. Justice Scalia's example became instantly famous. Savage, *supra* note 53, at 50. The example compared a coach smacking his professional football player's buttocks, as he headed for the field, with the same behavior toward his secretary at the office. *Oncale*, 118 S. Ct. at 1003. On the one hand, the behavior is innocuous; but on the other, it could reasonably be perceived as abusive. *Id.* The Court urged the use of common sense in distinguishing between severely abusive conduct and same-sex roughhousing or simple teasing. *Id.*

100. Faragher III, 118 S. Ct. 2275, 2284 (1998).

101. Dey v. Colt Constr. & Dev. Co., 28 F.3d 1446, 1456 (7th Cir. 1994) (reasoning that a handful of comments spread out over months will have less emotional impact than an incessant barrage of comments).

102. Carr v. Allison Gas Turbine Div., Gen. Motors Corp., 32 F.3d 1007, 1009 (7th Cir. 1994).

103. Daniels v. Essex Group, Inc., 937 F.2d 1264, 1274 (7th Cir. 1991); *see also* Saxton v. American Tel. & Tel. Co., 10 F.3d 526, 534 (7th Cir. 1993) (recounting "relatively limited" instances of supervisor harassment which included placement of a hand on the employee's leg above the knee, rubbing her upper thigh, kissing her several seconds, and lurching at her from behind bushes). *Compare* Weiss v. Coca-Cola Bottling Co. of Chicago, 990 F.2d 333, 337 (7th Cir. 1993) (finding no sustained or serious grounds to create an issue of material fact when a supervisor repeatedly asked an employee for dates, called her a "dumb blonde," put his hand on her shoulder, tried to kiss her, and left love notes in her work area) *with* Kopp v. Samaritan Health Sys., Inc., 13 F.3d 264, 269 (8th Cir. 1993) (raising an issue of material fact when a doctor repeatedly swore at female nurses, called them abusive names, threatened and occasionally physically harmed them).

104. *Faragher III*, 118 S. Ct. at 2284.

105. *Id.* (citing BARBARA LINDEMANN & DAVID D. KADUE, SEXUAL HARASSMENT IN EMPLOYMENT LAW 175 (1992)).

106. *Id.*; *see also* John Cloud, *Sex and the Law*, TIME, Mar. 23, 1998, at 49 (stating that sexual harassment litigation hinges on terms like unwelcome and pervasive, "words that a thousand lawyers can define in a thousand ways").

107. Meritor Sav. Bank, F.S.B. v. Vinson, 477 U.S. 57, 67 (1986).

108. Tomka v. Seiler Corp., 66 F.3d 1295, 1305 (2d Cir. 1995); *accord* King v. Board of Regents,

subordinate and requesting oral sex were not deemed sufficient to state a claim of hostile work environment sexual harassment.[109]

To summarize, a hostile work environment claim requires sufficiently severe or pervasive sexual harassment so as to create an abusive workplace by altering employment terms or conditions.[110] Under the totality of the circumstances test, the frequency, severity, and nature of the sexual harassment are assessed, as well as interference with work performance.[111] Subjective and objective perceptions of the supervisor's conduct are relevant to determining whether the harassing behavior is sufficiently severe and pervasive.[112]

B. EMPLOYER LIABILITY UNDER AGENCY PRINCIPLES

Title VII expressly provides for employer liability for sexual harassment of employees[113] and defines "employer" to include "agent."[114] Moreover, because employment discrimination is a complex and pervasive problem, Congress reasoned that it could be extirpated only with thoroughgoing, unrelenting, broad-scale remedies.[115] To that end, the United States Supreme Court commanded the lower courts to "look to agency principles" for guidance in determining the standard of employer liability in sexual harassment cases.[116] The *Restatement*

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898 F.2d 533, 537 (7th Cir. 1990) (acknowledging that a single act of sexual harassment may be sufficient to state a Title VII hostile work environment claim); Crisonino v. New York City Hous. Auth., 985 F. Supp. 385, 388 (S.D.N.Y. 1997) (indicating a single incident of assault sufficient for hostile work environment sexual harassment, when a supervisor called an employee a "dumb b----," gave her a hard shove so she fell backward, and caused injury as she hit the floor); Johns v. Harborage I, Ltd., 585 N.W.2d 853, 861 (Minn. Ct. App. 1998) (finding a single incident sufficiently severe to state a claim, when a male lured the victim into a storage closet, exposed himself, and then forcibly pulled down the victim's pants).

109. Jones v. Clinton, 990 F. Supp. 657, 675 (E.D. Ark. 1998). Paula Jones alleged that then-Governor Clinton dropped his pants to expose his erect penis and told her to "kiss it." *Id.* at 664. The district court determined that this conduct, although boorish and offensive, did not constitute sexual assault. *Id.* at 675. Subsequently, Ms. Jones appealed the district court's decision. Jones v. Clinton, 138 F.3d 758 (1998). However, the parties reached a $850,000 settlement, ending the sexual harassment suit filed against President Clinton in 1993. John King, *Jones to Get Her Money from Clinton* (visited Jan. 12, 1999) <http://www.CNN.com>.

110. *Meritor Sav. Bank*, 477 U.S. at 67.

111. Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993).

112. Faragher III, 118 S. Ct. 2275, 2283 (1998).

113. 42 U.S.C. § 2000e-2(a) (1994).

114. *Id.* § 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 agent of such a person." *Id.* Unfortunately, Title VII does not specifically define "agent". Sauers v. Salt Lake County, 1 F.3d 1122, 1125 (10th Cir. 1993). *But cf.*, White, *supra* note 31, at n.6. (stating that for purposes of Title VII, courts have deemed employees to be agents if they participated in the decision-making process).

115. EEOC v. Shell Oil Co., 466 U.S. 54, 69 (1984); *see also* H.R. REP. No. 92-238, at 8, 14 (1971); S. REP. No. 92-415, at 5 (1971), *reprinted in* 1971 U.S.C.C.A.N. 2137, 2149.

116. Meritor Sav. Bank, F.S.B. v. Vinson, 477 U.S. 57, 72 (1986). Agency is the fiduciary relationship resulting from consent by a person to act on behalf of and under the control of another person. RESTATEMENT, *supra* note 16, at § 1.

(Second) of Agency, governing the master-servant relationship,[117] embodies the general rules defining when an employer is liable for supervisor actions.[118]

1. *Scope of Employment*

The master-servant relationship may result in an employer's vicarious liability[119] for wrongful acts of its employees, under the doctrine of *respondeat superior*.[120] But agency law also governs the liability of the employer for failing to fulfill its special duty to protect employees.[121] The rationale provided by the *Restatement* is that the law should hold employers liable for delegating authority to their employees to act on behalf of the employer.[122] Reasonably, an employer can anticipate or

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117. A master-servant relationship is a form of agency where the master employs the servant as an agent to perform the master's affairs, and the master controls the conduct of the servant or agent while performing those services. RESTATEMENT, *supra* note 16, at § 2. *But see* HAROLD GILL REUSCHLEIN & WILLIAM A. GREGORY, THE LAW OF AGENCY AND PARTNERSHIP § 48-50, at 99-104 (1979) (distinguishing principal-agent relationships from master-servant relationships). A principal-agent relationship is a contractual relationship; whereas, a master-servant relationship is an employment relationship. *Id.* However, in analyzing respondeat superior liability, courts may confuse the two and use contract principles of agency. Oppenheimer, *supra* note 30, at n.34.

118. *See* Faragher III, 118 S. Ct. 2275, 2290 (1998) (indicating that "it makes sense" to hold employers vicariously liable for a supervisor's tortious actions, made possible by abuse of authority, and Restatement section 219 is an appropriate starting point). The Restatement provides that a master is liable for the torts of his servants under the following circumstances:

> (1) A master is subject to liability for the torts of his servants committed while acting in the scope of their employment.
> (2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:
> (a) the master intended the conduct or the consequences, or
> (b) the master was negligent or reckless, or
> (c) the conduct violated a non-delegable duty of the master, or
> (d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

RESTATEMENT, *supra* note 16, § 219.

119. Vicarious liability is also sometimes termed per se liability or strict liability as well. Oppenheimer, *supra* note 30, at 74. Such liability is imposed without considering the fault of the employer, who may be blameless but is nonetheless liable. *Id.* at 88. That is, liability is vicariously imposed on one party for a wrong committed by another party, most commonly liability on the employer for the wrong of an employee or agent. Alan O. Sykes, *The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines*, 101 HARV. L. REV. 563, 563 (1988).

120. Respondeat superior literally translates from Latin as, "[l]et the superior respond," but the origins of this doctrine are obscure and disputed. Rochelle Rubin Weber, Note, *"Scope of Employment" Redefined: Holding Employers Vicariously Liable for Sexual Assaults Committed by Their Employees*, 76 MINN. L. REV. 1513, 1516 (1992).

121. Oppenheimer, *supra* note 30, at 77 (describing theories of agency law principles concerning liability arising from the employer-employee relationship).

122. *See* RESTATEMENT, *supra* note 16, § 219 cmt. a (explaining that the conception of the master's liability appears to be an outgrowth of the idea that the master can control the servant's physical activities). "From this, the idea of responsibility for the harm done by the servant's activities followed naturally." *Id.*

foresee the possibility of sexual harassment in the workplace, which justifies assigning the burden of such conduct to the enterprise as a cost of doing business.[123]

Thus, an employer may be liable for an agent's misconduct in the agent's course of employment even though the employer did not authorize, participate in, or know of the acts.[124] In fact, the employer may also be liable for the agent's acts even if the employer expressly forbade them.[125] Because the employer holds the agent out as trustworthy and competent, in effect the employer guarantees the agent's good conduct regarding matters within the scope of the agency.[126]

However, the employer is also liable for an agent's actions outside the agency scope if the employer adopted those actions for the employer's own use or benefit.[127] In addition, if the employer expressly authorized the agent's actions, the employer is liable for the agent's actions outside the scope of the agent's employment.[128] Thus, the agency principle of respondeat superior rests on a deeply rooted sentiment that responsibility for injuries cannot be disclaimed by employers who characteristically perform those activities.[129] The

123. Faragher III, 118 S. Ct. 2275, 2288 (1998).

124. JOSEPH STORY, COMMENTARIES ON THE LAW OF AGENCY § 452, at 536-37 (5th ed. 1957).

125. *Id.* Although sexual harassment would seem to fall outside a supervisor's scope of employment, respondeat superior focuses on the authority to supervise, not the authority to harass. Oppenheimer, *supra* note 30, at 82.

126. STORY, *supra* note 124, § 452; *see also* RESTATEMENT, *supra* note 16, § 228 (providing that generally an employee's conduct is within the scope of employment if it is the type of conduct the employee is employed to perform and if the conduct substantially conforms to the authorized time and space limits of the work assignment). *But cf.* Doe v. Samaritan Counseling Ctr., 791 P.2d 344, 348 (Alaska 1990) (concluding that a pastoral counselor's sexual relationship with a patient was within the scope of employment because this unauthorized harassment arose from and was reasonably incidental to legitimate work activities); Marston v. Minneapolis Clinic of Psychiatry & Neurology, Ltd., 329 N.W.2d 306, 308, 310 (Minn. 1983) (considering an employee psychologist's intentional sexual overtures as within the scope of employment, regardless of whether the acts were performed with a motivation to serve the employer); Nelson v. Gillette, 571 N.W.2d 332, 337 (N.D. 1997) (declining to constrict the definition of scope of employment, when a social worker sexually abused a client during business hours and at business-related locations, so that the victim would have a remedy at the very moment it is most needed).

127. STORY, *supra* note 124, § 456; *see also* FLOYD R. MECHEM, OUTLINES OF THE LAW OF AGENCY § 732, at 562 (4th ed. 1952) (attributing responsibility to the employer for an agent's acts which result in injuries to third persons).

128. STORY, *supra* note 124, § 456.

129. Ira S. Bushey & Sons, Inc. v. United States, 398 F.2d 167, 171 (2d Cir. 1968). Employers are almost always properly subject to vicarious liability under respondeat superior, which recognizes the supervisor's effect on the workplace. Oppenheimer, *supra* note 30, at 76. Because of the close connection between the power that supervisors exercise and the work environment itself, the supervisor's acts of sexual harassment can almost never be independent of the supervisor's authority as an agent of the employer. *Id.* From a policy perspective, holding employers responsible for their employees' wrongful acts allocates risks efficiently, because employers can consider their liability as a necessary cost of business and ensure that injured employees are compensated. *Id.* at 78. Moreover, the employer is the party best able to control the work environment, thus placing the burden for corrective action on the employer will deter improper employee actions. *Id.* at 77-78. *Accord* White, *supra* note 31, at 561-62 (concluding that employers are in the best position to foot the bill for

employer has a greater opportunity to guard against supervisors' conduct and thus has an incentive to screen, train, and monitor their performance.[130]

2. *Role of the Supervisor*

Corporate or government entities necessarily must act through their agents.[131] For purposes of Title VII, a supervisor who is given plenary authority by an employer acts as the employer's agent.[132] Therefore, when an employer invests a supervisor with the power to alter the workplace, that supervisor effectively is the employer.[133] Supervisors act as the eyes, ears, and voice of the employer.[134] In other words, the deliberate act of someone at the decision-making level in the corporate hierarchy essentially is the corporation's deliberate act.[135] From an employee's perspective, the employer and supervisor merge into a single entity.[136] Furthermore, the level of trust and authority delegated to supervisors allows them access to other employees precisely because of the agency relationship.[137] Thus, the supervisor is aided by the agency relationship in performing wrongful acts on the employee.[138]

In determining whether a person acts in an agency or supervisory capacity, a court must examine the job functions performed by the individual and the circumstances of the particular employment relationship.[139] Relevant circumstances include the supervisor's direct authority over the employee, the overall structure of the workplace, and the relative

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supervisor sexual harassment, so imposing personal liability on those supervisors would not be an effective deterrent).

130. Faragher III, 118 S. Ct. 2275, 2291 (1998). The agency relationship gives a supervisor the chance to be in contact and sexually harass an employee who may be reluctant to accept the risks of blowing the whistle. *Id.* Moreover, a victim cannot simply walk away or tell the supervisor "where to go." *Id.*

131. Davis v. City of Sioux City, 115 F.3d 1365, 1371 (8th Cir. 1997) (Arnold, J., concurring and dissenting). Because corporate or government personifications are a legal fiction, these entities cannot act by themselves and can only effectuate their purposes through their agents. *Id.*

132. *Id.*

133. *Id.* at 1370-71. Likewise, the corporate entity does not itself have a mental capacity to learn of its employees' wrongdoings. The employer must rely on its agents to ensure compliance with the laws in order to avoid liability. *Id.* at 1371.

134. Oppenheimer, *supra* note 30, at 80. Supervisors give instructions and interpret regulations for employees, evaluate and report on employee performance, and generally influence or determine the employee's work environment. *Id.*

135. Hunter v. Allis-Chalmers Corp., 797 F.2d 1417, 1422 (7th Cir. 1986); *see also* Shager v. Upjohn Co., 913 F.2d 398, 405 (7th Cir. 1990) (characterizing as a "cat's paw" the corporate committee that serves as a conduit of a supervisor's prejudice to terminate an employee, thus exposing the company to liability despite the innocence of committee members).

136. Kotcher v. Rosa & Sullivan Appliance Ctr., 957 F.2d 59, 62 (2d Cir. 1992); *see also* Faragher III, 118 S. Ct. 2275, 2285 (1998) (describing supervisors' decisions as those of the employer).

137. Oppenheimer, *supra* note 30, at 89.

138. *Id.* The agency relationship enables a harassing supervisor to call and retain an employee into the supervisor's presence even over objections, to place the employee in a compromising position, and to encroach on the employee's personal privacy to a large extent. *Id.*

139. 29 C.F.R. § 1606.8(c) (1998).

positions of the supervisor and employee.[140] If a supervisor exercises significant control over an employee's terms and conditions of employment, the supervisor acts as the alter ego of the employer.[141] In such instances, the employer is strictly liable for the supervisor's unlawful employment practices whether or not the employer knew of the supervisor's conduct.[142]

However, a supervisor need not have plenary authority to hire, fire, or promote to be considered an agent whose conduct is binding on an employer.[143] Nor does the supervisor need to have a position of high authority in the business structure in order to hold the employer liable under agency principles.[144] In fact, a supervisor who has limited authority and is merely in the business's intermediate structure can serve as an agent for Title VII purposes.[145] Requiring supervisors to have significant control over the employee, taken to an extreme, would have the illogical result of shielding employers from liability for the sexual harassment of low-level supervisors.[146]

In quid pro quo sexual harassment cases, the supervisor's liability is vicariously imputed to the employer where sexual favors are directly linked to the denial or grant of a tangible employment benefit.[147] By definition, the supervisor acts as the company when conditioning sexual favors as quid pro quo for job benefits.[148] Thus, because the quid pro quo harasser wields the employer's authority to alter the employee's terms and conditions of employment, the law imposes strict liability on the employer.[149]

In *Meritor Savings Bank*, however, the United States Supreme Court rejected the possibility that employers are automatically liable for a

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140. Vance v. Southwestern Bell Tel. & Tel. Co., 863 F.2d 1503, 1515 (11th Cir. 1989). Thus, whether a person is in a position to be considered an agent for Title VII purposes is an issue for the factfinder. Sims v. Montgomery County Comm'n, 766 F. Supp. 1052, 1069 (M.D. Ala. 1990).

141. Sauers v. Salt Lake County, 1 F.3d 1122, 1125 (10th Cir. 1993). An agent or supervisor's high rank in the organization makes that individual an employer's alter ego. Ellerth IV, 118 S. Ct. 2257, 2267 (1998). That is, if a harasser is at a sufficiently high level, or if the employer ratifies the supervisor's acts, the harassment becomes that of the employer. *Id.*

142. *Sauers*, 1 F.3d at 1125; *see also* 29 C.F.R. § 1604.1(c) (1998).

143. *Sims*, 766 F. Supp. at 1069.

144. *Id.*

145. *Vance*, 863 F.2d at 1515.

146. Harrison v. Eddy Potash, Inc., 112 F.3d 1437, 1447-48 (10th Cir. 1997). "This was not the result intended by Title VII [or] *Meritor*." *Id. But see* Karibian v. Columbia Univ., 14 F.3d 773, 780 (2d Cir. 1994) (rendering situations where low-level supervisors do not rely on their supervisory authority indistinguishable from co-worker harassment).

147. Davis v. City of Sioux City, 115 F.3d 1365, 1367 (8th Cir. 1997).

148. Steele v. Offshore Shipbuilding, Inc., 867 F.2d 1311, 1316 (11th Cir. 1989).

149. *Karibian*, 14 F.3d at 777. In fact, every court of appeals has automatically imputed to the employer supervisory sexual harassment resulting in tangible detriment to the subordinate employee. Meritor Sav. Bank, F.S.B. v. Vinson, 477 U.S. 57, 76 (1986) (Marshall, J., concurring, joined by Justices Brennan, Blackmun, and Stevens).

supervisor's hostile work environment sexual harassment.[150] Nevertheless, the Court cautioned that an employer is not necessarily insulated by lack of notice of a supervisor's actions and the existence of complaint procedures.[151] Thus, the lower courts faced the challenge of determining what middle ground remained in agency law to impose employer liability for a supervisor's discriminatory practices.[152] Hostile work environment sexual harassment was held to a negligence standard.[153] That is, employers were directly liable[154] if they knew or should have known about supervisor harassment and failed to take prompt remedial action against the supervisor.[155]

To summarize, courts generally have applied vicarious liability for quid pro quo sexual harassment and a negligence standard, or direct liability, for hostile work environment claims.[156] However, some courts also treated threats of tangible employment actions, as well as actual consequences, as sufficient to justify a quid pro quo claim.[157] And so the United States Supreme Court granted certiorari to resolve this nag-

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150. *Meritor Sav. Bank*, 477 U.S. at 72.

151. *Id.* at 72-73. *But see* Oppenheimer, *supra* note 30, at 74 (noting the confusion caused by the *Meritor* Court when it simultaneously rejected basic agency law theory of imposing vicarious liability for hostile work environment harassment while requesting the courts to look to agency principles for guidance). The *Meritor* Court adopted this position based on the Solicitor General's brief. *Id.* at 75. This amicus curiae brief was filed on behalf of the EEOC at the urging of Clarence Thomas who was its chairman at the time. *Id.* Thus, the EEOC added to the confusion by disavowing its previous stance that endorsed strict liability for all supervisory sexual harassment, both quid pro quo and hostile work environment. *Id.*

152. Bouton v. BMW of N. Am., Inc., 29 F.3d 103, 106 (3d Cir, 1994); *see also Karibian*, 14 F.3d at 779 (indicating that the Supreme Court declined to offer further enlightenment on employer liability beyond these alpha and omega rules).

153. Henson v. City of Dundee, 682 F.2d 897, 905 (11th Cir. 1982).

154. Direct liability under agency principles arises when the master is negligent or reckless in a) giving improper or ambiguous orders or failing to make proper regulations; b) employing improper persons or instrumentalities thereby involving risk of harm to others; c) supervising activities; d) permitting negligent conduct on premises or within instrumentalities under the master's control. RESTATEMENT, *supra* note 16, § 213. In addition, if an employer ratifies an act of harassment by not disapproving of it, the employer adopts the act as its own. *Id.* § 82. Thus, employers are directly liable for harm caused by breach of their duty. *Id.* Specific to sexual harassment, agency law imposes direct liability when an employer acts unreasonably by a) failing to instruct employees to refrain from sexual harassment; b) failing to adopt policies to prevent the harassment; c) employing people known to have harassed other employees; d) failing to properly supervise employees to prevent harassment; e) standing by and doing nothing when harassment occurs; and f) failing to prevent the harassment. Oppenheimer, *supra* note 30, at 98.

155. Baskerville v. Culligan Int'l Co., 50 F.3d 428, 431-32 (7th Cir. 1995).

156. *Id.; see also* Oppenheimer, *supra* note 30, at 71 (criticizing the courts for failing to impose a uniform standard of vicarious liability on employers for supervisor sexual harassment). Professor Oppenheimer blamed the federal courts for incorrectly applying agency rules, thus creating a quagmire and leaving an important area of law unclear and unpredictable. *Id.* at 76.

157. Karibian v. Columbia Univ., 14 F.3d 773, 778 (2d Cir. 1994). *But see* Scalia, *supra* note 37, at 325 (advocating that "quid pro quo should be excised, with Occam's razor. And the manner in which it gained a life of its own stands warning against mechanical reliance on complex tests").

ging question which had slowly percolated,[158] regarding the proper employer liability standards for supervisor sexual harassment.[159]

III. CASE ANALYSIS

Delivering the majority opinion in *Ellerth IV*, Justice Kennedy set out the issue as whether an employer may be held liable, without being negligent or otherwise at fault, for a supervisor's unwelcome and threatening sexual advances toward an employee who suffers no adverse tangible employment consequences.[160] The Court premised its analysis and conclusions on an important proposition, a factual conclusion as yet unestablished.[161] Specifically, the Court assumed that a trier of fact could find, in the supervisor's remarks, numerous unfulfilled threats to take adverse tangible employment action against the employee if she denied sexual favors to the supervisor.[162]

A. QUID PRO QUO AND HOSTILE WORK ENVIRONMENT: THRESHOLD QUESTIONS

The Court began its analysis by defining the two categories of sexual harassment claims, quid pro quo and hostile work environment.[163] The Court then noted the limited utility of these terms for determining which standard of employer liability applies.[164]

The Court indicated that the terms are now relevant only as a threshold question regarding an employee's ability to prove discrimination.[165] An employee proves a quid pro quo claim by showing that a tangible employment action resulted from refusing to submit to a supervisor's sexual demands.[166] In this situation, the employee has an actionable claim because the employment decision itself represents an alteration of the terms or conditions of employment based on sex, which is prohibited discrimination under Title VII.[167]

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158. Ellerth III, 123 F.3d 490, 494 (7th Cir. 1997) (suggesting the United States Supreme Court should bring order to the chaotic case law in the important field of supervisor sexual harassment).

159. Ellerth IV, 118 S. Ct. 2257, 2264 (1998).

160. *Id.* at 2262. Chief Justice Rehnquist and Justices Stevens, O'Connor, Souter, and Breyer joined Justice Kennedy's majority opinion. *Id.* at 2261. Justice Ginsburg concurred in judgment. *Id.* at 2271. Justice Thomas dissented, joined by Justice Scalia. *Id.*

161. *Id.* at 2264.

162. *Id.*

163. *Id.*

164. *Id.*; *see also* Sims v. Montgomery County Comm'n, 766 F. Supp. 1052, 1074 (M.D. Ala. 1990) (refusing to pigeonhole claims of quid pro quo or hostile work environment sexual harassment by different liability standards).

165. *Ellerth IV*, 118 S. Ct. at 2265.

166. *Id.*

167. *Id.*

Further, an employee proves a hostile work environment claim by showing severe or pervasive behavior based on sex.[168] The Court clarified that such behavior includes a supervisor's unfulfilled threats to change an employee's terms or conditions of employment.[169] However, after the threshold question of proof is resolved, then the standard of employer liability is derived from agency principles.[170]

B. AGENCY PRINCIPLES: FORMULATING EMPLOYER LIABILITY STANDARDS

Noting that Congress explicitly directed the judiciary to interpret Title VII claims according to agency principles, the Court looked to the *Restatement (Second) of Agency*.[171] In light of this congressional mandate, the Court cited the need for a uniform and predictable federal, rather than state, standard of employer liability.[172] Indeed, state court decisions regarding state employment discrimination law rely on federal court decisions interpreting Title VII.[173]

Then the Court proceeded to dissect the *Restatement*, starting with the central principle of agency law: "A master is subject to liability for the torts of his servants committed while acting in the scope of their employment."[174] Thus, an employer may be liable for employees' intentional and negligent torts if committed within the scope of the employees' employment.[175] To be considered within the scope of employment, generally actions must be performed by an employee who has a purpose of serving the employer.[176] However, supervisor sexual

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168. *Id.*

169. *Id.; see also* Ellerth III, 123 F.3d 490, 514 (7th Cir. 1997) (Posner, J., concurring and dissenting, joined by Manion, J.) (drawing a distinction between a supervisor's deliberate act, which can reasonably be termed a company act, while the mere threat of such act is not a company act); Gary v. Long, 59 F.3d 1391, 1393, 1396 (D.C. Cir. 1995) (cautioning that more than saber rattling alone is required to impose quid pro quo liability for supervisors who alternately promise and then threaten employment consequences as carrot-and-stick tactics without follow-through).

170. *Ellerth IV*, 118 S. Ct. at 2265.

171. *Id.* at 2266; *see also* RESTATEMENT, *supra* note 16 and discussion *supra* Section IIB; Meritor Sav. Bank, F.S.B. v. Vinson, 477 U.S. 57, 72 (1986) (agreeing with the EEOC that Congress wanted agency principles to guide courts in the area of sexual harassment); Brief for the United States and the EEOC as Amici Curiae at 22, Meritor Sav. Bank, F.S.B. v. Vinson, 477 U.S. 57 (1986) (No. 84-1979) (contending that Congress forewarned courts that formulated employer liability standards should draw from traditional agency principles).

172. *Ellerth IV*, 118 S. Ct. at 2265. The Court characterized this federal standard not as a judicial creation, but rather, as a judicial interpretation of the general common law of agency in accord with legislative intent. *Id.* The dissent by Justices Thomas and Scalia begged to differ, labeling the majority's federal standard a "whole-cloth creation." *Id.* at 2273.

173. *Id.* at 2265-66.

174. RESTATEMENT, *supra* note 16, § 219(1).

175. *Ellerth IV*, 118 S. Ct. at 2266.

176. *Id.*; *see also* RESTATEMENT, *supra* note 16, §§ 228(1)(c), 230 (classifying conduct as within the scope of employment, even if forbidden by the employer, when at least partly actuated by a purpose of serving the employer); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF

harassment rarely serves an employer's purpose[177] and, thus, usually is not within the scope of employment.[178]

Nevertheless, agency principles impose employer liability for employee torts committed outside the scope of employment as well.[179] Employers may be held liable if they intended the conduct or consequences, were negligent or reckless, or had a nondelegable duty.[180] Further, employers may be held liable if a supervisor purported to act on behalf of the employer, and this apparent authority was relied upon, or if the supervisor was aided in committing the tort by the agency relationship.[181]

But the Court did not find employer liability based on the employer's own intentional, negligent, or reckless conduct.[182] Burlington was neither directly liable, because the company had no intention of sexually harassing Ellerth, nor indirectly liable because supervisor Slowik was not high enough in rank to be considered Burlington's alter ego.[183] Furthermore, Ellerth had requested the Court to impose strict

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TORTS § 70, at 505-06 (5th ed. 1984) (terming tortious conduct, such as a salesperson lying to a customer to make a sale, as within scope of employment because the employer is benefited by the additional sale, despite violating the employer's policies).

177. *Ellerth IV*, 118 S. Ct. at 2266 (reasoning that an employer's purpose is seldom served by a supervisor who acts for personal motives of sexual desire or gender-based animus). *But see supra* note 125 (discussing cases of unauthorized sexual harassment determined to be within the scope of employment).

178. *Ellerth IV*, 118 S. Ct. at 2266. The *Faragher III* Court came to this same conclusion, that generally supervisor sexual harassment is not within the scope of employment, but on different grounds. 118 S. Ct. 2275, 2288 (1998). The Court recognized not only that sexual harassment is a reasonably foreseeable workplace problem, but also that a supervisor's scope of authority and responsibility includes maintaining a safe and productive work environment. *Id.* Thus, an employer may be fairly charged for a supervisor's unlawful sexual harassment as a cost of doing business. *Id.* However, the Court concluded that supervisor harassment is more appropriately evaluated as outside the scope of employment, in order to distinguish peer from supervisor harassment. *Id.* at 2289-90.

179. RESTATEMENT, *supra* note 16, § 219(2) cmt. e (enumerating situations of employer liability for employees who act from personal motives and thus fall outside the scope of employment); *see also* 2 L. JAYSON & R. LONGSTRETH, HANDLING FEDERAL TORT CLAIMS § 9.07[4], at 9-211 (1998) (limiting employer liability under the Federal Tort Claims Act, 28 U.S.C. § 1346(b) (1994 & West Supp. 1999), when supervisors act from personal motives, which are deemed outside the scope of employment).

180. RESTATEMENT, *supra* note 16, § 219(2)(a)-(c). A nondelegable duty arises from a special relationship requiring a heightened duty of care that remains the absolute responsibility of the principal party. *Id.* § 214 cmt. a. Thus, a nondelegable duty is an affirmative and nontransferable obligation to ensure the protection of the party to whom the duty runs. General Bldg. Contractors Ass'n, Inc. v. Pennsylvania, 458 U.S. 375, 396 (1982).

181. RESTATEMENT, *supra* note 16, § 219(2)(d).

182. *Ellerth IV*, 118 S. Ct. at 2267.

183. *Id. But see* Faragher III, 118 S. Ct. 2275, 2284 (1998) (illustrating a high echelon harasser who acts as the alter ego of the employer from the Court's previous decision in *Harris*); *cf.* Harris v. Forklift Sys., Inc., 510 U.S. 17, 19 (1993) (describing sexual harassment of an employee by the company president). However, none of the harassing supervisors in either *Ellerth IV* or *Faragher III* was at a high enough level to be treated as the organization's proxy. *Ellerth IV*, 118 S. Ct. at 2267; *Faragher III*, 118 S. Ct. at 2284. The Court indicated that such positions as proprietors, partners, and corporate officers are of sufficient rank in the hierarchy to impose automatic liability. *Faragher III*, 118 S. Ct. at 2284; *see also* Weiss, *supra* note 60, at 300 (voicing the open question: "[H]ow high is high echelon?"). Professor Weiss stated that it is unclear exactly how far down the corporate ladder executives can be to still be considered as proxies or alter egos of the organization. *Id.* at 293-94.

liability, not a negligence standard.[184] The Court also dismissed the possibility of holding Burlington liable for sexual harassment because of a nondelegable duty.[185]

Finally, the Court examined the apparent authority standard and aided in the agency relation standard of employer liability for employee conduct outside the scope of employment.[186] Apparent authority is relevant when the supervisor purports to use a power not actually held, rather than misusing or threatening to misuse actual power.[187] Thus, the Court also found this standard inappropriate because Slowik had actual supervisory authority, not apparent authority.[188] However, the Court found that under the agency relationship standard, it was appropriate to impose vicarious liability on an employer for supervisor sexual harassment, with a caveat: the requirement of "something more."[189]

The existence of "something more" is beyond dispute when a supervisor inflicts an adverse tangible employment action on an employee.[190] Without the aid of the agency relationship, the supervisor would be unable to make significant changes in a subordinate's employment status such as termination, nonpromotion, undesirable reassignment, or reduction in benefits.[191] However, "something more" is less obvious when supervisor sexual harassment does not culminate in a tangible job consequence.[192] For example, a supervisor's sexual harassment always conveys a threatening character because of delegated power over subordinates, and so the supervisor is always aided by the agency relationship.[193] On the other hand, some acts of supervisor harassment could also be committed by a co-worker, so the supervisor's status makes little difference.[194] Therefore, tension is created between the two

184. *Ellerth IV*, 118 S. Ct. at 2267.

185. *Id.*

186. *Id.* at 2267.

187. *Id.* at 2267-68.

188. *Id.* at 2268.

189. *Id.* The Court reasoned that most tortfeasors in the work environment are aided by their agency relationship with the employer due to proximity and regular contact with a captive pool of potential victims. *Id.* Without "something more," the employer would be vicariously liable for co-worker harassment as well, an extension the Court was unwilling to pursue. *Id.*

190. *Id.* However, the Court did not address situations in which supervisors coerce employees into submitting to unwelcome sexual relationships. Kahan, *supra* note 28, at 763. Because the employee submits, in order to receive an employment benefit, the employee will be unable to demonstrate any tangible job detriment. *Id.* Therefore, the question remains whether submission claims will still be cognizable as quid pro quo sexual harassment, the threshold determining whether an employer may raise the affirmative defense. *Id.*

191. *Ellerth IV*, 118 S. Ct. at 2268-69.

192. *Id.*

193. *Id.*

194. *Id.; see also* Ellerth III, 123 F.3d 490, 512 (7th Cir. 1997) (Posner, J., concurring and dissenting, joined by Manion, J.) (asserting that without a tangible employment act, a supervisor's modes of harassment are equally available to co-workers; yet confirming that a victimized employee

possibilities presented by the malleable terminology of the aided in the agency relation standard.[195] The standard may be read either to expand or to limit employer liability.[196]

Moreover, the Court gave weight to the fact that Congress had not changed *Meritor's* ruling in any subsequent amendments to Title VII.[197] The *Meritor* Court interpreted agency principles as refraining from applying vicarious liability to employers for supervisor[198] sexual harassment creating a hostile work environment.[199] Nevertheless, now the *Ellerth IV* Court held that an employer is vicariously liable when a supervisor either takes a tangible employment action or creates a hostile work environment.[200]

C. AFFIRMATIVE DEFENSE: REACHING A COMPROMISE

Despite holding employers liable without being negligent or otherwise at fault, the Court extended an olive branch: if the supervisor has not taken any tangible employment action against the subordinate, the employer may raise an affirmative defense.[201] The employer must prove two necessary elements for this defense: 1) the employer has exercised reasonable care to prevent and promptly correct the supervisor sexual harassment; and 2) the employee has unreasonably failed to take advantage of the employer's preventive or corrective opportunities.[202] The

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is bound to be constantly aware of a supervisor's authority).

195. *Ellerth IV*, 118 S. Ct. at 2269.

196. *Id.*

197. *Id.* at 2270; *see also* Meritor Sav. Bank, F.S.B. v. Vinson, 477 U.S. 57, 72 (1986).

198. *Ellerth IV*, 118 S. Ct. at 2270. The Court defined a supervisor as an individual who has immediate or higher-level authority over the harassed employee. *Id. But see* Weiss, *supra* note 60, at 299 (stating that the Court failed to raise the issue of management or supervisory harassers outside of the hierarchical chain of direct authority over a victim). Professor Weiss described the sharp boundary line between supervisors and others as really more of a continuum, and she predicted that "these chickens will come home to roost" in later problems regarding the omitted classifications. *Id.* at 307-08. For example, collateral supervisors outside the direct line of authority may trade favors with each other to punish harassment targets. *Id.* at 308.

199. *Meritor Sav. Bank*, 477 U.S. at 72.

200. *Id.* The Court's holding also applies to Faragher III, 118 S. Ct. 2275 (1998). Justices Marshall and Brennan must be smiling from the grave because they argued for vicarious liability for hostile work environment supervisory harassment 12 years earlier in their concurrence to the *Meritor* decision. *Id.* at 74 (Marshall, J., concurring, joined by Justices Brennan, Blackmun, and Stevens). Justice Marshall supported this stricter standard of liability because a supervisor is charged not only with the power to hire, fire, or discipline employees but also with ensuring a safe, productive workplace. *Id.* at 76. Reasoning that both abuses of power should have the same consequence, Justice Marshall indicated that it is precisely because a supervisor is clothed with the employer's authority that the supervisor is able to impose unwelcome sexual advances on subordinates. *Id.* at 76-77.

201. *Ellerth IV*, 118 S. Ct. at 2270. The lack of a detrimental job consequence gives employer defendants an opportunity to prove by a preponderance the affirmative defense. *Id.* Or, as Justice O'Connor so aptly stated, "the employer may convince the fact finder that despite the smoke, there is no fire." Price Waterhouse v. Hopkins, 490 U.S. 228, 266 (1989) (O'Connor, J., concurring).

202. *Ellerth IV*, 118 S. Ct. at 2270. However, the Court cautioned that employer proof of promulgating an anti-harassment policy is not necessary in every instance, nor is proof the employee failed to avoid harm limited only to unreasonable failure to take advantage of the grievance procedure. *Id.* Justice Thomas's dissent criticized this hedging by the Court, as "issu[ing] only Delphic pronounce

affirmative defense limits employer liability by encouraging employers to develop and implement policies and grievance procedures to combat sexual harassment.[203] Additionally, employers must reasonably respond to a course of harassing conduct by taking measures to stop the harassment and to prevent recurrence.[204] Based on the avoidable consequences doctrine of tort law, the employee is also encouraged to report supervisor sexual harassment before it becomes severe or pervasive.[205]

D. THE DISSENT

Justice Thomas, writing for the dissent,[206] charged the majority with willfully "manufacturing" the rule holding employers vicariously liable for supervisors who create a hostile work environment based on sex.[207] The dissent voiced particular concern that employers will now be held to different standards of liability for hostile work environment claims, depending on whether the basis is sex or race.[208] Challenging the majority's affirmative defense as a poorly defined "divination of Title VII's gestalt," Justice Thomas warned of a "continuing reign of confusion" in sexual harassment litigation.[209] Amidst predictions of an avalanche of litigation to clarify the "myster[ious]" and "vague" affirmative defense, Justice Thomas spoke of the mind-boggling paradox that the majority claimed to follow legislative intent behind Title VII, promoting conciliation rather than litigation.[210]

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ments and leav[ing] the dirty work to the lower courts." *Id.* at 2274.

203. *Id.* at 2270. The Court indicated that the goal of both Congress and the EEOC is deterrence. *Id.*

204. Weiss, *supra* note 60, at 309. Professor Weiss places an employer at high risk by knowingly leaving a harassing supervisor in place. *Id.* Strong oversight and preferably retraining or discipline may ensure against repeat harassment, but in some cases the only reasonable option may be to fire the supervisor. *Id. But see, e.g.*, Ellison v. Brady, 924 F. 2d 872, 882 (9th Cir. 1991) (ruling that an effective remedy is one reasonably calculated to end the harassment and is assessed proportionately to the seriousness of the conduct); Saxton v. American Tel. & Tel. Co., 10 F.3d 526, 536 (7th Cir. 1993) (determining that the employer effectively responded to a complaint of sexual harassment by conducting a prompt, although inconclusive, investigation and by allowing the victim to work at home until the harasser was transferred); Waymire v. Harris County Tex., 86 F.3d 424, 429 (5th Cir. 1996) (reprimanding the harasser was appropriate and sufficient to avoid employer liability because the harassment stopped following this remedial action).

205. Ellerth IV, 118 S. Ct. at 2270; *see also* C. MCCORMICK, LAW OF DAMAGES 127 (1935) (summarizing the general rule of avoidable consequences as follows: "Where one person has committed a tort . . . against another, it is incumbent upon the latter to use such means as are reasonable under the circumstances to avoid or minimize the damages. The person wronged cannot recover for any item of damage which could thus have been avoided."); Hunter v. Allis-Chalmers Corp., 797 F.2d 1417, 1427-28 (7th Cir. 1986) (penalizing a discharged victim of harassment for failing to mitigate the harm, under the doctrine of avoidable consequences: "You cannot just leave the labor force after being wrongfully discharged, in the hope of someday being made whole by a judgment at law").

206. Justice Scalia joined Justice Thomas' dissenting opinion. *Ellerth IV*, 118 S. Ct. at 2271.

207. *Id.*

208. *Id.*

209. *Id.* at 2273.

210. *Id.* at 2273-74.

IV. IMPACT

Sexual harassment has proven to be a hot topic,[211] with the United States Supreme Court granting certiorari to three Title VII cases on the issue during the 1998 term alone.[212] The Court's holdings have had an immediate impact on racial discrimination in the workplace. However, it remains to be seen whether the Court's attempt to provide clear guidelines will stem the surging tide of sexual harassment litigation.

A. VICARIOUS LIABILITY FOR RACIALLY HOSTILE ENVIRONMENT

The spillover to race-based harassment from the Court's decision in *Ellerth IV* did not take long.[213] Relying on *Ellerth IV*, the United States Court of Appeals for the Tenth Circuit reinstated a black transit worker's claim that her supervisor created a racially hostile work environment.[214] The Tenth Circuit reasoned that sexual harassment principles apply with equal force to racial harassment for three reasons: 1) a preference for harmonizing these employer liability standards;[215] 2) similar situations presented by both racial and sexual harassment; and 3) the *Ellerth IV* Court interpreted the same Title VII language which is relevant to employer liability in race discrimination.[216] According to the court, a reasonable jury could find vicarious liability if it decides that the supervisor had sufficient control over the employee to be considered her supervisor and if the employee could not have avoided the harm.[217]

Therefore, concerns regarding some dangers of analogizing race and sex may be allayed by the decision in *Ellerth IV*.[218] Borrowing

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211. Monica E. McFadden, *But is it Harassment?* TRIAL , Dec. 1998, at 48.

212. *Ellerth IV*, 118 S. Ct. at 2260; Faragher III, 118 S. Ct. 2275, 2282 (1998) (concerning the extent of employer liability for supervisor sexual harassment); Oncale v. Sundowner Offshore Servs., Inc., 118 S. Ct. 998 (1998) (concerning same-sex harassment); *see also* Weiss, *supra* note 60, at 261 (commenting that the Court's concentration in a single term on such a narrow, albeit highly important, issue is unusual). Professor Weiss noted that Title VII is already a mature statute, under which sexual harassment claims have been recognized since the mid-1970s. *Id.* at 263. Moreover, despite the persistence of the sexual harassment problem in the workplace, "it would be unfair to characterize employers as resisting compliance." *Id.* Rather, Professor Weiss suggested that employers may be having difficulty refining their anti-harassment policies so as to effectuate compliance with Title VI. *Id.*

213. *See Ellerth IV*, 118 S. Ct. at 2272-73 (Thomas, J., dissenting, joined by Justice Scalia) (ruing the Court's differential employer liability for hostile work environment discrimination based on sex and race, Justice Thomas suggested restoring parallel treatment under a uniform negligence standard). However, the standard is swinging in the opposite direction, imposing vicarious liability for both sexual and racial hostile work environment claims. *See* Wright-Simmons v. City of Oklahoma City, 155 F.3d 1264 (10th Cir. 1998).

214. *Wright-Simmons*, 155 F.3d at 1270.

215. *See* Faragher III, 118 S. Ct. 2275, 2283 n.1 (1998).

216. *Wright-Simmons*, 155 F.3d at 1270.

217. *Id.* at 1271.

218. *See Ellerth IV*, 118 S. Ct. at 2270; *see also* L. Camille Hebert, *Analogizing Race and Sex in Workplace Harassment Claims*, 58 OHIO ST. L.J. 819, 878 (1977).

from the standards of proof in sexual harassment claims, courts had made the burden of establishing racial harassment more difficult.[219] Thus, the danger arose that importing gender-neutral perspectives to all discrimination claims would dilute the relevance of racial minorities' experiences with racially threatening and offensive behavior.[220] However, the *Ellerth IV* Court's imposition of vicarious liability on employers, regardless of fault, now has enabled the courts to get equally tough with racial harassment.[221]

B. DETERRENCE OR OPENED LITIGATION FLOODGATES

The dissent by Justice Thomas forecast that, in practice, employer liability may very well become the rule.[222] The dissent suggested that litigation will not be curbed but, rather, will simply shift to proving the two-pronged affirmative defense.[223] Justice Thomas criticized the majority for providing "shockingly little guidance" to employers who wish to avoid liability and for leaving the "dirty work" to the lower courts.[224]

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219. Hebert, *supra* note 218, at 878. For example, the sexual harassment requirement of unwelcomeness makes relevant an inquiry into whether the target of racial harassment somehow invited that behavior. *Id.*

220. *Id.* Specifically, due to the requirement that sexual harassment conduct must be severe or pervasive, even serious racially motivated statements regarding lynching or assault were determined insufficient for an actionable racial harassment claim. *Id.*

221. *See Ellerth IV*, 118 S. Ct. at 2270; *see also Wright-Simmons*, 155 F.3d at 1270; Deffenbaugh-Williams v. Wal-Mart Stores, Inc., 156 F.3d 581 (5th Cir. 1998) (applying vicarious liability to employers for racially discriminating against an employee terminated because of her relationship with a black man); Owens v. Commercial Testing & Eng'r Co., 1998 U.S. Dist. LEXIS 18147, at **28-29 (S.D. Ala. 1998) (following the reasoning in *Ellerth IV* as to the substantive merits of a racially hostile work environment claim). Moreover, race-based harassment claims brought under § 1981 have no statutory ceiling on punitive damage awards. 42 U.S.C. § 1981 (1994).

222. *Ellerth IV*, 118 S. Ct. at 2274 (Thomas, J., dissenting, joined by Justice Scalia). *See, e.g., Landmark Eveleth 16 Suit is Heading Back to Court* (visited Nov. 30, 1998) <http://www.pioneerplanet.com> (reporting that the United States Court of Appeals for the Eighth Circuit reopened "the seminal sexual harassment case in the U.S," *Jenson v. Eveleth Taconite Co.*, 824 F. Supp. 847 (D. Minn. 1993)). The EEOC stated this class action lawsuit opened the door for others, including the $34 million settlement between Mitsubishi Corp. and 350 women employees in Illinois. *Id.* Nevertheless, in the *Eveleth* mine case, the federal magistrate responsible for determining how much 15 years of pain and suffering was worth, labeled the women histrionic, paranoid, or puritanical. *Id.* The magistrate then awarded a mere $11,000 per victim. *Id.* Subsequently, the appellate court issued an unusually harsh rebuttal castigating the magistrate's decision and ordering a trial. *Id.* Experts predict a historic settlement or judgment. *Id.* A local employment attorney said, "I hear the cash registers ringing very loudly." *Id.* Just before the jury was to consider damages, Eveleth settled for an undisclosed amount. Amy Radil, Minnesota Public Radio (visited Jan. 1, 1999) <http://www.npr.org>.

223. *Ellerth IV*, 118 S. Ct. at 2273-74 (Thomas, J., dissenting, joined by Justice Scalia); *see also* Weiss, *supra* note 60, at 315 (surmising that Justice Thomas is surely correct in his predictions that the litigation will now focus to elaborating on the affirmative defense).

224. *Ellerth IV*, 118 S. Ct. at 2274 (Thomas, J., dissenting, joined by Justice Scalia); *see, e.g.*, Stephens v. Rheem Mfg. Co., 162 F.3d 1013, 1014 (8th Cir. 1998) (reversing summary judgment and remanding to allow the plaintiff to prove a hostile work environment claim, thus entitling her employer to present an affirmative defense); Newton v. Cadwell Lab., 156 F.3d 880, 884 (8th Cir. 1998) (reversing summary judgment on a sexual harassment claim because the lack of a detrimental employment

However, employers can be masters of their own fate by taking action to minimize their liability through policy statements and effective grievance procedures.[225] In order to avoid liability, employers face an increased burden of educating and sensitizing their employees.[226] Employers should also take prevention a step further by developing organized, formal, and comprehensive programs.[227] In fact, some employers are instituting zero-tolerance policies.[228] Care must be taken to allow a safe avenue of complaint for victims of sexual harassment, as well as effective dissemination of the policy.[229] Employers must not consider sexual harassment policy or procedures as a game to be played but not taken seriously.[230]

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action no longer controls the issue of vicarious liability after *Ellerth IV*).

225. Daniel L. Hovland, *Sexual Harassment: What Employers Need to Know*, GAVEL, Dec. 1996-Jan. 1997, at 8; *see also* Ellerth III, 123 F.3d 490, 513 (7th Cir. 1997) (Posner, J., concurring and dissenting, joined by Judge Manion) (stating courts are "at sea" in designing optimum systems to rein in supervisors' discretion in exercising their delegated authority, so this responsibility should be entirely shifted to the employer).

226. Hovland, *supra* note 225, at 7.

227. *Id.* at 8. Attorney Hovland recommends advising employer clients to take the initiative by a) conducting an informal survey of employees to determine if there is a sexual harassment problem in the workplace, perhaps including an audit of the premises to remove insensitive materials; b) establishing the support of top management by briefing and educating supervisors on the costs and consequences of sexual harassment; c) adopting and publishing an express written policy against sexual harassment, revised periodically and clearly demonstrating the employer's understanding and commitment to zero-tolerance (the policy should contain a purpose, definitions of sexual harassment, outline steps for victims and management to follow if sexual harassment is perceived, and list possible disciplinary actions); d) establishing a flexible complaint procedure which offers more than one channel of action, such as designating individuals to contact who are "credible, objective, impartial, and sensitive to the problem"; e) investigating complaints properly by carefully documenting all efforts taken to discipline harassers; f) being sensitive and serious about the sexual harassment so that victims or harassers cannot construe the policy as a sham; and g) training all levels of employees to gain a better understanding and early recognition of signals of sexual harassment. *Id.* at 8-9.

228. Cloud, *supra*, note 106, at 49 (reporting on zero-tolerance policies of large employers, such as General Motors and Wal-Mart, which even forbid "sending e-mail with a naughty Web address to a co-worker"). *Compare Ellerth III*, 123 F.3d at 511, 513 (Posner, J., concurring and dissenting, joined by Judge Manion) (suggesting the unfeasibility of large employers' ability to stamp out harassment by monitoring thousands of supervisors, without extreme expense and great curtailment of employee privacy by such means as continuous surveillance, periodic lie-detector tests, or company spies trailing employees on business trips) *with id.* at 569 (Wood, J., concurring and dissenting, joined by Judges Easterbrook and Rovner) (assuring that employers are quite capable of monitoring supervisors "without engaging in Orwellian surveillance").

229. Faragher III, 118 S. Ct. 2275, 2293 (1998) (denying remand for consideration of a possible affirmative defense of the employer which failed to disseminate its harassment policy and failed to bypass harassing supervisors when victims registered complaints).

230. Bundy v. Jackson, 641 F.2d 934, 943 (D.C. Cir. 1981). In *Bundy*, when the employee brought complaints of her supervisor's harassment to the attention of a high-level manager, he responded, "[A]ny man in his right mind would want to rape you." *Id.* at 940; *see also* Hunter v. Allis-Chalmers Corp., 797 F.2d 1417, 1420 (7th Cir. 1986) (chastising supervisors for failing "to take more than half-hearted measures to stop the harassment"); Sims v. Montgomery County Comm'n, 766 F. Supp. 1052, 1072 (M.D. Ala. 1990) (criticizing higher-ups for setting the stage by creating an environment in which all male police officers felt free to sexually harass at their pleasure); Weiss, *supra* note 60, at 310 (informing that a real and meaningful investigation is essential, to avoid employees' perceptions that the employer is just "going through the motions" or that the procedure would be futile or, worse, counterproductive).

Conversely, victimized employees are also required by the presence of the employer's affirmative defense not to sit back and aggregate incidents of harassment.[231] Unfortunately, victims may be reluctant to come forward with a complaint because of the effects of systematic oppression.[232] However, in *Ellerth IV,* the Court provided an incentive for employees to be forthcoming in order to recover.[233]

V. CONCLUSION

In *Ellerth IV*, the holding of the United States Supreme Court sent a clarion call to employers that sexual harassment must be eradicated from the workplace.[234] Imposing vicarious liability, without negligence or fault, challenges employers to set a tone of respect in the working environment.[235] Yet, the affirmative defense fairly balances responsibility between employer and employee to take immediate steps to confront, prevent, and remove barriers to sexual equality in employment.[236]

Noel Evans

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231. *Ellerth III*, 123 F.3d at 523 (Coffey, J., concurring in part and dissenting in part); *see also* Steele v. Offshore Shipbuilding, Inc., 867 F.2d 1311, 1313 (11th Cir. 1989) (describing an employee keeping detailed notes of her supervisor's offensive comments for months before reporting the harassment to the employer).

232. Ellerth I, 912 F. Supp. 1101, 1123 (N.D. Ill. 1996).

233. Ellerth IV, 118 S. Ct. 2257, 2270 (1998); *see also* Pamela J. White, *Sexual Harassment: Risky Business in the Law Office*, 31 MD. BAR J. 20, 25 (1998) (recommending that employees should be made aware of their own obligations to tell their employers about problems of workplace sexual harassment).

234. *See Ellerth IV*, 118 S. Ct. at 2270.

235. *See id.*

236. *See* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (indicating that Title VII invalidates all artificial, arbitrary, and unnecessary barriers that operate as "built-in headwinds" to employment opportunity).