

QUID WITHOUT A QUO: HARASSMENT LAW CHANGES ITS TERMINOLOGY WITHOUT CHANGING ITS MEANING

JOEL ISRAEL*

INTRODUCTION

The goal has not changed and neither has the concept. Today's quid pro quo sexual harassment cases are often factually similar to those from the past twenty years and still seek to protect the victimized employee. The prototypical case still involves the supervisor and the employee, the former demanding sexual favors from the latter, and threatening negative employment repercussions if the employee does not submit. If the employee proves there were actual repercussions, the employer is held strictly liable for the supervisor's actions. If there are no repercussions, the employee may seek redress under a different category of harassment case. Under either scenario, the employee can obtain a remedy.

Since sexual harassment was first addressed by courts more than twenty-five years ago, the general analysis of this form of gender discrimination has not undergone any dramatic alterations. While the concept has not changed, however, the terminology has, and scholars and courts continue to debate how best to protect the victimized employee.

Traditionally, there have been two categories of sexual harassment under Title VII: "quid pro quo" and "hostile work environment." As the First Circuit stated fifteen years ago, "[t]he gist of a quid pro quo claim is that [an employee] is threatened by [a supervisor] with demands for a sexual encounter."¹ If the employee rejects the demands, then the supervisor's threats may come to fruition and the employee may lose her job.² Conversely, the employee may accede to the supervisor's demands and be rewarded for her compliance.³ If the employee is threatened, and then rewarded or punished, she is a victim of quid pro quo harassment, regardless of whether there was a sexual encounter.⁴ In con-

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1. *Lipsett v. Univ. of P.R.*, 864 F.2d 881, 913 (1st Cir. 1988).

2. *Id.* This note will refer to the employee victim as "she" and the harassing supervisor as "he" because that is the most common situation in sexual harassment cases. This note will not discuss the debate over what constitutes a supervisor for purposes of employer liability. For more on this topic, see, e.g., *Durham Life Ins. Co. v. Evans*, 166 F.3d 139 (3d Cir. 1999) (finding that new agency managers had made threats constituting a tangible employment action, thus affirmative defenses were not available to plaintiff); *Hall v. Bodine Elec. Co.*, 276 F.3d 345 (7th Cir. 2002) (holding that the employer could not be held liable for a co-worker's sexually harassing behavior).

3. *Lipsett*, 864 F.2d at 913.

4. *Id.*

trast, the focus of a hostile work environment case is the supervisor's or co-worker's behavior, and the harm is established when unwelcome acts of a sexual nature, ranging from sexual speech to offensive behavior, are so severe and pervasive that they interfere with the employee's job performance.⁵

The factual predicates in many cases could be characterized interchangeably as either hostile work environment or quid pro quo harassment.⁶ However, the two categories have traditionally been separated in terms of their definitions, in how they have been applied by the courts, and in the standard of liability applied to the employer in each case. For example, quid pro quo has been categorized as conduct that is *malum in se*, or wrongful in and of itself, and thus subject to strict liability regardless of the circumstances or the defenses proffered by the employer and supervisor.⁷ Hostile work environment, on the other hand, is only *malum prohibitum*: prohibited not because it is wrong in itself, "but because of the negative effects that are associated with it."⁸

This Note examines the twenty-five year history of quid pro quo sexual harassment, from its inception in the late 1970s through its treatment over the past five years, during which its importance and utility in the harassment lexicon has been greatly diminished. It argues that over the last few years the term "tangible employment action" has replaced "quid pro quo" as the more functional label used to encompass the form of sexual harassment so reprehensible that an employer should be subject to strict liability. The label, "tangible employment action," however, is just that—a label—and retains the concept of "quid pro quo."⁹

Although the dividing line between quid pro quo and hostile work environment harassment, based on the existence of a tangible employment action, has been clarified by this modification, it is arguable that the only change is in semantics, and thus it is a distinction without a difference. Still, this distinction may be more significant than it first appears. By viewing the conditioning of job benefits on sexual favors as a tangible employment action, courts have created a road map that aids the victimized employee and strengthens the ability of females to achieve the goals of Title VII. With the goal of equality in mind, and in order to best protect the victimized employee, quid pro quo harassment should remain a strict liability offense, punishable regardless of an employer's defenses. As a result, it should retain its separate category as distinct from hostile work environment harassment, which permits affirmative defenses.

5. See Sandra Day O'Connor, *The Effects of Gender in the Federal Courts: The Final Report of the Ninth Circuit Gender Bias Task Force: The Quality of Justice*, 67 S. CAL. L. REV. 745, 1055 (1994).

6. *Henson v. City of Dundee*, 682 F.2d 897, 909 n.18 (11th Cir. 1982) (stating that the elements of quid pro quo harassment a plaintiff must prove are similar to those of hostile environment harassment).

7. Steven Aden, "Harm in Asking": A Reply to Eugene Scalia and an Analysis of the Paradigm Shift in the Supreme Court's Title VII Sexual Harassment Jurisprudence, 8 TEMP. POL. & CIV. RTS. L. REV. 477, 492 (1999).

8. *Id.* at 493.

9. As discussed later, a tangible employment action "constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Burlington Indus., Inc. v. Elterh*, 524 U.S. 742, 761 (1998).

While much scholarly research has focused on the hostile work environment side of sexual harassment, far fewer scholars have devoted articles to quid pro quo harassment. This Note attempts to bridge that gap by surveying quid pro quo's history and, more importantly, by examining how lower courts have followed the Supreme Court's 1998 holdings in the tangible employment action domain. It will also explain whether or not the current system of liability is appropriate.

Part I of this Note describes the history of quid pro quo harassment's origins, from Title VII's creation to early harassment cases and paradigms. Part II discusses the Supreme Court's treatment of quid pro quo harassment, beginning in 1986 with *Meritor Savings Bank v. Vinson*¹⁰ and continuing in 1998 with the landmark opinions *Faragher v. City of Boca Raton*¹¹ and *Burlington Industries, Inc. v. Ellerth*.¹² Part III evaluates the success of the Supreme Court's holdings, analyzes subsequent lower-court treatment of quid pro quo harassment, and demonstrates how the term, but not the concept, has been substantially diminished by the advent of the tangible employment action. Part IV illustrates how various courts and commentators have debated the viability of quid pro quo as a discrete category of sexual harassment and looks at a variety of arguments for which standard of liability should apply. Part V argues that tangible employment action is similar in concept to quid pro quo, and that the goals of Title VII are best served when an employer, within the context of tangible employment action claims, is subject to strict liability. Even with a strict liability standard, an employer can still take preventative or corrective measures to avoid future harassment and employee suits or to thwart a supervisor who takes advantage of his position of authority.

I. THE ORIGINS OF QUID PRO QUO SEXUAL HARASSMENT

A. Title VII and Early Recognition

Title VII of the Civil Rights Act of 1964 provides that an employer may not "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."¹³ Congress added the prohibition of sex discrimination to Title VII after the race, color, religion and national origin categories had been established.¹⁴ In fact, the gender discrimination provision was added at literally the last minute.¹⁵ As a result, there is little legislative history regarding the reasons for its inclusion.¹⁶ In addition, the terms "quid pro quo" and "hostile work

10. 477 U.S. 57 (1986).

11. 524 U.S. 775 (1998).

12. 524 U.S. 742 (1998).

13. 42 U.S.C. § 2000e-2(a)(1) (2001).

14. See *Meritor*, 477 U.S. at 63.

15. *Id.* at 63-64 (citing 110 CONG. REC. 2577-2584 (1964)).

16. See *id.* at 64.

environment” are not mentioned in Title VII but are causes of action that have been developed independent of legislative initiative.

Professor Catharine MacKinnon is credited with creating the distinction between “quid pro quo” and “hostile environment” sexual harassment.¹⁷ In her 1979 book *Sexual Harassment of Working Women*, MacKinnon defined “quid pro quo” harassment as sexual harassment “in which sexual compliance is exchanged, or proposed to be exchanged, for an employment opportunity.”¹⁸ She argued that quid pro quo and hostile environment claims emerged from the same discriminatory intent, and that both actions discriminatorily define women as “sexual objects” and thus exclude other possible descriptions, such as “capable employees.”¹⁹

In 1980, the Equal Employment Opportunity Commission (“EEOC”) followed MacKinnon’s work by defining sexual harassment in regulations promulgated under Title VII and identifying two types: “quid pro quo” and “hostile environment.”²⁰ Though the EEOC Guidelines are not controlling on courts, they may properly be used for guidance.²¹

The hostile work environment classification originated in both form and substance from already-existing Title VII racial harassment law, making the extension into gender discrimination a natural progression. One scholar states, however, that the elements of quid pro quo were created “virtually out of whole cloth,” meaning the cause of action appears to have had no predecessor similar in nature.²² The logic of this argument is that quid pro quo harassment involving sex had no parallel in the racial discrimination context, but could fit into the emerging area of gender discrimination.²³ The quid pro quo cause of action was born because it came to be regarded by many as “too reprehensible to escape liability.”²⁴

17. See CATHERINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* (1979).

18. *Id.* at 32.

19. *Id.*

20. See 29 C.F.R. § 1604.11(a) (2002). The Guidelines state:

Harassment on the basis of sex is a violation of Sec. 703 of title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute 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.

Subsections (1) and (2) define “quid pro quo” sexual harassment, and (3) defines “hostile environment.”

21. See *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 141-42 (1976) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). The Court referred to the Guidelines as “‘a body of experience and informed judgment to which courts and litigants may properly resort for guidance.’” *Id.* at 142. The weight to be accorded the Guidelines depends upon “‘the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.’” *Id.*

22. Aden, *supra* note 7, at 483.

23. *Id.* at 486.

24. *Id.*

B. Early Cases Discuss Quid Pro Quo

In 1977, the D.C. Circuit Court first recognized quid pro quo sexual harassment, though not by name, as a violation of Title VII in *Barnes v. Costle*.²⁵ In *Barnes*, a female government employee refused her male supervisor's sexual advances and was subsequently terminated in retaliation.²⁶ In holding that the employer violated Title VII by discriminating on the basis of sex, the Court described gender as "an indispensable factor in the job-retention condition of which [the plaintiff] complains."²⁷ The discrimination led to "the exaction of a condition which, but for his or her sex, the employee would not have faced," thus establishing what was essentially a quid pro quo claim.²⁸

Other federal courts followed suit by holding employers strictly liable for similar instances of sexual harassment.²⁹ *Henson v. City of Dundee*³⁰ was the first published federal decision to use the term "quid pro quo" expressly to describe a type of sex discrimination, when it stated that "[a]n employer may not require sexual consideration from an employee as a *quid pro quo* for job benefits."³¹ The plaintiff in *Henson* was a police dispatcher who claimed that her police chief "prevented her from attending the local police academy because she refused to have sexual relations with him."³² The Eleventh Circuit held that quid pro quo discrimination occurs when a woman refuses sexual advances and consequently is "deprived of a job benefit which she was otherwise qualified to receive."³³ When the supervisor uses "the means furnished to him by the employer to accomplish the prohibited purpose," he is acting within the scope of his employment and it is logical to hold the employer liable.³⁴ In its analysis, the *Henson* court reviewed prior attempts by other courts to set out a test, and ultimately modeled its own after the Supreme Court's *McDonnell Douglas Corporation v. Green* opinion.³⁵ The court delineated five factors the plaintiff must establish to state a prima facie case of quid pro quo sexual harassment:³⁶

25. *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977).

26. *See id.* at 985, 992.

27. *Id.* at 992.

28. *Id.* at 990 n.55.

29. *See, e.g., Nichols v. Frank*, 42 F.3d 503, 513-14 (9th Cir. 1994) (holding that once quid pro quo harassment is established, the employer is "ipso facto" liable); *Horn v. Duke Homes, Inc.*, 755 F.2d 599, 604-606 (7th Cir. 1985) (adopting EEOC's rule on strict liability for a supervisor's acts of sexual harassment); *Craig v. Y & Y Snacks, Inc.*, 721 F.2d 77, 80-81 (3d Cir. 1983) (stating that knowledge is imputed to employers when a supervisor attempts to retaliate after making sexual advances to an employee); *Henson v. City of Dundee*, 682 F.2d 897, 910 (11th Cir. 1982) (holding that quid pro quo harassment "is every bit as deleterious to the remedial purposes of Title VII as other unlawful employment practices").

30. *Henson v. City of Dundee*, 682 F.2d 897, 911 n.22 (11th Cir. 1982).

31. *Id.* at 908.

32. *Id.* at 900.

33. *Id.* at 909.

34. *Id.* at 910.

35. *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973). The Supreme Court laid out four factors necessary for a complainant in a Title VII case to establish a prima facie case of racial discrimination. The prima facie case may be established by showing:

(i) that [the plaintiff] belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications,

(1) The employee is a member of the protected class; (2) She was subjected to unwelcome sexual harassment to which members of the opposite sex had not been subjected; (3) She applied and was qualified for a position for which the employer was accepting applications; (4) That despite her qualifications she was rejected; (5) That after her rejection, the position remained open and the employer continued to accept applicants who possessed complainant's qualifications.³⁷

Finally, the court added that a prima facie case may vary depending on the facts. For example, in cases where submission to unwanted advances is either an express or implied condition of receiving a job benefit, the employee "need not prove . . . that she actually applied for a given position since such an application would have been futile."³⁸

Following *Henson*, a job application process case, other courts expanded the original five factors to cover other situations. One court, for example, held that a plaintiff must show that she was subjected to sexual advances and that her reaction to those advances affected "tangible aspects of . . . employment."³⁹ These tangible aspects could include "compensation, terms, conditions, or privileges" of the plaintiff's employment.⁴⁰ Courts have also held that the quid pro quo defendant had no affirmative defense, but may rebut the prima facie case by showing that the alleged behavior "either did not take place or that it did not affect a tangible aspect of the plaintiff's employment."⁴¹ These decisions extended quid pro quo beyond the scope of the application process.

In addition, courts after *Henson* have held that quid pro quo harassment comprises both refusal cases, in which the employee rejects her supervisor's advances and suffers a tangible employment action, and submission cases, in which the employee accepts her supervisor's "quid" to avoid a negative employment action.⁴² In the context of a refusal case, the substance of the claim is that a tangible job benefit or detriment was conditioned on the employee submitting to the supervisor's sexual blackmail and that adverse consequences followed from her refusal to submit.⁴³ Unfulfilled threats, however, are actionable

he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. *Id.* at 802.

36. *Henson*, 682 F.2d at 911 n.22.

37. *Id.*

38. *Id.* Following *Henson*, different courts have applied different rationales as their basis for holding the employer strictly liable, and a discussion of those justifications will follow in Section IV.

39. See, e.g., *Lipsett v. Univ. of P.R.*, 864 F.2d 881, 898 (1st Cir. 1988) (adding that the fact-finder must determine if the supervisor's advances were unwelcome).

40. See, e.g., *Karibian v. Columbia Univ.*, 14 F.3d 773, 777 (2d Cir. 1994) (holding that employee's assignments, raises and promotions were conditioned on continued acquiescence to supervisor's sexual demands).

41. See, e.g., *Lipsett*, 864 F.2d at 898.

42. See, e.g., *Karibian*, 14 F.3d at 777.

43. See *Carrero v. N.Y. City Hous. Auth.*, 890 F.2d 569, 579 (2d Cir. 1989) (harassing supervisor gave employee negative evaluation after she complained of his harassing behavior, and employee was demoted).

only as hostile work environment harassment claims, rather than quid pro quo, because there is a quid (threat) without a quo (subsequent action).⁴⁴

Although lower courts consistently accepted quid pro quo as a discrete category of sex discrimination,⁴⁵ with its distinction as “[t]he most oppressive and invidious type of workplace sexual harassment,”⁴⁶ their interpretation of the scope of quid pro quo was varied. As a result, the development of quid pro quo has not been nearly as straightforward as the discussion of its history so far suggests. One scholar argues that in following the standards set forth by the Supreme Court in *McDonnell*,⁴⁷ *Henson* might have made quid pro quo “redundant of existing law literally from the day it was recognized,” and thus a superfluous category all along.⁴⁸ Furthermore, the Second Circuit in 1994 transformed the *Henson* five-part test to another multi-part test,⁴⁹ and the newer test was fundamentally different from the first even though it was supposed to be the same.⁵⁰ As the Ninth Circuit noted, “Five-part, seven-part or even ten-part tests frequently serve only to obfuscate the real inquiry.”⁵¹ This criticism will be further discussed in Section IV, but the suggestion that the two different tests might have laid out two different concepts is illustrative of the complexities and ambiguities surrounding the history of quid pro quo.

Another debate is which standard of liability should apply. The Seventh Circuit concluded that perhaps quid pro quo would be more effective if an employer’s liability was determined on the basis of a negligence standard rather than on the basis of a strict liability standard.⁵² The Fifth Circuit, meanwhile, broke from the common approach of strict liability by excusing an employer from liability when the employer had taken prompt remedial action to address an employee’s quid pro quo grievance.⁵³ In doing so, this circuit affirmed a district court decision declaring that it could not apply agency principles because that would result in strict liability to the employer, and “the Fifth Circuit . . . has made clear that Title VII is not a strict liability statute.”⁵⁴ Thus, the implication

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

45. Eugene Scalia, *The Strange Career of Quid Pro Quo Sexual Harassment*, 21 HARV. J.L. & PUB. POL’Y 307, 309 (1998).

46. *Nichols v. Frank*, 42 F.3d 503, 510 (9th Cir. 1994).

47. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

48. Scalia, *supra* note 45, at 324.

49. See *Karibian*, 14 F.3d at 778, stating:

The relevant inquiry in a quid pro quo case is whether the supervisor has linked tangible job benefits to the acceptance or rejection of sexual advances. It is enough to show that the supervisor used the employee’s acceptance or rejection of his advances as the basis for a decision affecting the compensation, terms, conditions or privileges of the employee’s job.

50. Scalia, *supra* note 45, at 324.

51. *Nichols*, 42 F.3d at 513.

52. See, e.g., *Jansen v. Packaging Corp. of Am.*, 123 F.3d 490, 505-06 (7th Cir. 1997) (en banc) (per curiam) (Kanne, J., concurring) (arguing that employee should win if she can prove employer negligence in failing to address quid pro quo threats). A further discussion of this topic will follow in Section IV.

53. Stacey Dansky, Note, *Eliminating Strict Employer Liability in Quid Pro Quo Sexual Harassment Cases*, 76 TEX. L. REV. 435, 444-46 (1997) (citing *Sims v. Brown & Root Indus. Servs. Inc.*, 78 F.3d 581 (5th Cir. 1996) (unpublished table decision), *aff’g* 889 F. Supp. 920 (W.D. La. 1995), *cert. denied*, 519 U.S. 817 (1996)).

54. *Sims*, 889 F. Supp. at 930, *quoted in* Dansky, *supra* note 53 at 445.

was that some of the circuits were interpreting Title VII differently, and this discrepancy needed to be resolved.⁵⁵ The job of resolving that discrepancy naturally fell to the Supreme Court.

II. THE SUPREME COURT ENTERS THE DISCUSSION

A. Decisions Prior to *Ellerth* and *Faragher*

The Supreme Court ruled on its first sexual harassment case almost ten years after lower courts had first weighed in. In 1977, the Court identified that “a primary objective of Title VII is . . . to achieve equal employment opportunity and to remove the barriers that have operated to favor white male employees over other employees.”⁵⁶ Until 1986, however, sexually harassed employees likely could only look to forms of discrimination other than sex under Title VII for guidance. Finally, in *Meritor Savings Bank v. Vinson*,⁵⁷ a hostile environment claim, the Supreme Court formally recognized sexual harassment as actionable.⁵⁸ In *Meritor*, the plaintiff, a bank teller, alleged that her supervisor had consistently harassed her over a four-year span by requesting sexual favors and repeatedly fondling and touching her.⁵⁹ The defendant, a bank, contended that it should be absolved of liability because the supervisor acted without its approval or consent.⁶⁰ The Supreme Court agreed with the plaintiff that a hostile environment harassment claim violates Title VII when an employee is subjected to severe or pervasive sexual harassment that constructively alters the terms or conditions of her employment.⁶¹

However, the Court declined to rule on the proper standard of employer liability for hostile environment claims.⁶² Instead, the Supreme Court held that employers are not automatically liable for supervisor sexual harassment, and agreed with the EEOC that courts should look to agency principles for guidance.⁶³ It noted that “courts have consistently held employers liable for the discriminatory discharges of employees by supervisory personnel, whether or not the employer knew, should have known, or approved of the supervisor’s actions.”⁶⁴ Thus, in distinguishing between the hostile environment situation in *Meritor* and an incident that leads to “discriminatory discharge,” the Court recognized a difference between hostile environment claims and quid pro quo harassment, yet it later acknowledged that this difference between the terms served a limited purpose in the holding, which was focused on the hostile environment

55. Dansky, *supra* note 53, at 446.

56. *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 364 (1977) (citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971) and *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975)).

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

58. *Id.* at 64 (holding that “[w]ithout question, when a supervisor sexually harasses a subordinate because of the subordinate’s sex, that supervisor ‘discriminate[s]’ on the basis of sex”).

59. *Id.* at 60.

60. *Id.* at 61.

61. *See id.* at 65-66.

62. *Id.* at 72.

63. *Id.* A further discussion on agency principles will follow in Section IV.

64. *Id.* at 70-71.

claim.⁶⁵ Justice Rehnquist, writing for the majority, described hostile environment as “non quid pro quo” and seemed to equate quid pro quo with economic loss, however this idea was not further explored.⁶⁶

Ironically, the Court in *Meritor* was one vote away from potentially eradicating the confusion and debate over the standard of liability that has existed over the past twenty-five years. As will be discussed again in Section IV, four justices, led by Justice Marshall, supported a strict liability standard for hostile work environment harassment as well as quid pro quo.⁶⁷ Had that minority turned into a 5-4 majority, the debate today might be limited to scholars, as courts would have little reason to draw a bright line between quid pro quo and hostile environment. But Justice Marshall’s concurrence remained just that, and though the Supreme Court mirrored lower courts in holding that quid pro quo harassment conditions employment or promotion on sexual favors,⁶⁸ questions and confusion remained. In 1998, the Court took up the issue again and decided what remain today the two definitive holdings on sexual harassment.

B. *Burlington Industries, Inc. v. Ellerth* and *Faragher v. City of Boca Raton*

1. The Facts of Each Case

In *Ellerth*, the plaintiff, Kimberly Ellerth, quit her job as a salesperson after fifteen months due to consistent sexual harassment by one of her supervisors, Ted Slowik, a mid-level manager.⁶⁹ She alleged that Slowik threatened to deny her tangible job benefits or punish her for not acceding to his sexual demands, yet she never suffered retaliation and never told anyone in authority about Slowik’s conduct, despite knowing that Burlington had a policy against sexual harassment.⁷⁰

In *Faragher*, Beth Ann Faragher had worked part-time for five years as a lifeguard in Boca Raton when she brought an action alleging that two of her immediate supervisors created a “sexually hostile atmosphere.”⁷¹ She cited repeated incidents of touching, lewd remarks, and threats of harsher work assignments against her and other female lifeguards.⁷² Faragher claimed that the incidents amounted to discrimination in the “terms, conditions, and privileges” of her employment.⁷³

65. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 752 (1998).

66. *Meritor*, 477 U.S. at 65.

67. *See id.* at 74 (Marshall, J., concurring).

68. *See Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-22 (1993) (holding that Title VII is not solely limited to conduct that seriously affects an individual’s psychological well being).

69. *Ellerth*, 524 U.S. at 747-48.

70. *Id.*

71. *Faragher v. City of Boca Raton*, 524 U.S. 775, 780 (1998).

72. *Id.*

73. *Id.* at 780-81.

2. The *Ellerth* and *Faragher* Decisions

a) The Majority Opinions

These two separate opinions, one written by Justice Souter and one written by Justice Kennedy, validated hostile environment claims and led to one uniform rule. In the process, the terms “quid pro quo” and “hostile work environment” lost much of their force. In *Ellerth*, Justice Kennedy commented on the terms’ usefulness, stating that they “are helpful, perhaps, in making a rough demarcation between cases in which threats are carried out and those where they are not or are absent altogether, but beyond this are of limited utility.”⁷⁴ Thus, after *Faragher* and *Ellerth* were decided, these terms were no longer controlling for employer liability purposes.⁷⁵ Instead, liability, or the avoidance of liability, turned on whether or not a tangible employment action was taken.⁷⁶ The Court in *Ellerth* held:

An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. . . . No affirmative defense is available, however, when the supervisor’s harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment.⁷⁷

Though the Supreme Court asserted that there is no affirmative defense for quid pro quo, it does not appear to have explained why. The Court cited Title VII legislative policy to justify permitting defenses for hostile work environment claims, but did not explain why this policy would exclude defenses when a tangible employment action is taken.⁷⁸ Instead, the Court stated that a tangible employment action taken by the supervisor becomes, for Title VII purposes, the act of the employer.⁷⁹

As a result of *Ellerth* and *Faragher*, a Title VII claimant who refuses the unwelcome advances of her supervisor and suffers a tangible employment action may recover against the employer without showing any fault on the part of the employer. But when no tangible employment action is taken, the employer is permitted to present an affirmative defense to rebut the presumption of vicarious liability.⁸⁰ That is, the employer must prove that it exercised reasonable care to prevent and correct any harassing behavior and that the employee failed to

74. *Ellerth*, 524 U.S. at 751.

75. *Id.* at 765; see *Faragher*, 524 U.S. at 807.

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

77. *Id.*

78. See *Faragher*, 524 U.S. at 807-08.

79. See *id.* at 804-05.

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

take advantage of any of the employer's corrective or preventive opportunities.⁸¹ These "quid without quo" cases, exemplified by *Ellerth* and *Faragher*, are threats that result in neither reprisal nor submission, and are actionable only as hostile environment claims.⁸² Therefore, the distinction between quid pro quo and hostile environment now turns on whether there has been a tangible employment action, in essence, whether there has been an action that "constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."⁸³

In discussing employer liability, the Court noted that the distinction between quid pro quo and hostile work environment should not be used as a method of determining employer liability for discrimination against an employee.⁸⁴ Instead, "[t]he principal significance of the distinction is to instruct that Title VII is violated by either explicit or constructive alterations in the terms or conditions of employment and to explain that the latter must be severe or pervasive."⁸⁵ The "explicit" alteration encompasses quid pro quo actions, while the constructive alterations include hostile environment actions. The distinction between explicit and constructive alterations is also based on a judicial policy, namely that the former should be treated more harshly than the latter.⁸⁶

Notably, the Court did not "suggest the terms *quid pro quo* and hostile work environment are irrelevant to Title VII litigation."⁸⁷ In fact, the terms are particularly relevant when "they illustrate the distinction between cases involving a threat which is carried out and offensive conduct in general."⁸⁸ The Court also noted that prior to these two decisions, a plaintiff would have every incentive to tailor her claim into a quid pro quo case, as it was the only form of sexual har-

81. *Id.*

82. *See id.*; *Faragher*, 524 U.S. 775.

83. *Ellerth*, 524 U.S. at 761. The EEOC offers three criteria with which to determine whether a change in a job constitutes a tangible employment action: 1) A tangible employment action is the means by which the supervisor brings the official power of the employer to bear on subordinates, as demonstrated by: an official act of the enterprise, which is usually documented in official company records, that may be subject to review by higher level supervisors, and often requires the formal approval of the enterprise and use of its internal processes; 2) A tangible employment action usually inflicts direct economic harm; 3) A tangible employment action usually can only be caused by a supervisor or other person acting with the authority of the company. Examples of such an action include hiring and firing, promotion and failure to promote, demotion, undesirable reassignment, a decision causing a significant change in benefits, compensation decisions and work assignment. ENFORCEMENT GUIDANCE: VICARIOUS EMPLOYER LIABILITY FOR UNLAWFUL HARASSMENT BY SUPERVISORS, EEOC COMPLIANCE MANUAL (BNA) N:4078 (June 18, 1999).

84. *Ellerth*, 524 U.S. at 752.

85. *Id.*

86. *See Faragher*, 524 U.S. at 796 (finding that quid pro quo is used by courts "to cover the unordered and unauthorized acts of the servant for which it is found to be expedient to charge the master with liability, as well as to exclude other acts for which it is not") (quoting W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON, & DAVID G. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 502 (5th ed. 1984)).

87. *Ellerth*, 524 U.S. at 753.

88. *Id.*

assessment that led to an employer's vicarious liability.⁸⁹ This desire to find a quid pro quo "put expansive pressure on the definition."⁹⁰

b) The Dissenting Opinions

Justice Thomas, joined by Justice Scalia, wrote a dissenting opinion in *Ellerth*, and authored the dissent in *Faragher* as well. Primarily, Justice Thomas reasoned that "absent an adverse employment consequence, an employer cannot be held vicariously liable if a supervisor creates a hostile work environment."⁹¹ He would restore employer liability for racial and sexual harassment to a parallel status and "hold an employer liable for a hostile work environment only if the employer is truly at fault."⁹²

His dissent in *Ellerth* also suggested that the Court's decision is in "considerable tension" with its earlier *Meritor* holding "that employers are not strictly liable for a supervisor's sexual harassment."⁹³ Thus, Justice Thomas argued that the Court identified an affirmative defense, "based solely on its divination of Title VII's *gestalt*," and provided little instruction as to how employers can actually avoid liability.⁹⁴ As a result, the dissent issued a warning about the inevitable result of the Court's holding: "There will be more and more litigation to clarify applicable legal rules in an area in which both practitioners and the courts have long been begging for guidance."⁹⁵ Section III will consider the prescience of the dissent's view.

3. The Supreme Court since 1998

The Supreme Court has only explicitly dealt with sexual harassment once since its 1998 decisions. In *Breeden*, a per curiam opinion involving co-workers' allegedly offensive reaction to a non-employee's sexually explicit comment, the Court did not break any new ground, affirming the *Ellerth* and *Faragher* holdings as reiterations of "what was plain from our previous decisions."⁹⁶ The Court did not otherwise add to those decisions, as it found *Breeden* to involve a single incident of sexual innuendo, that "[n]o reasonable person could have believed . . . violated Title VII's standard."⁹⁷ Thus, *Ellerth* and *Faragher* remain the Court's decisive opinions on sexual harassment law.

III. HOW LOWER COURTS HAVE FOLLOWED THE SUPREME COURT SINCE 1998

Federal case law over the past few years demonstrates that most courts have followed the *Ellerth* and *Faragher* holdings, albeit with some variation and confusion. As will be discussed in Section V, lower courts, particularly the Fifth Circuit, have further clarified the standard by devising an easier-to-follow road

89. *Id.*

90. *Id.*

91. *Faragher*, 524 U.S. at 810 (Thomas, J., dissenting).

92. *Ellerth*, 524 U.S. at 774 (Thomas, J., dissenting).

93. *Id.* at 773.

94. *Id.*

95. *Id.* at 774.

96. *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 270 (2001) (per curiam).

97. *Id.* at 271.

map that sets forth the questions to be asked in a tangible employment action claim.

Many courts acknowledge that the Supreme Court has counseled against employing the traditional categories of quid pro quo and hostile work environment, yet these courts still utilize the terminology and still sometimes cite to cases prior to 1998, thus maintaining the terms' existence.⁹⁸ Further analysis of several holdings will help illustrate the subtle paradox. For example, the Second Circuit in *Gregory v. Daly*⁹⁹ stated that the traditional categories now have limited utility, following the trend of the Supreme Court.¹⁰⁰ In contrast, a district court was willing to address each claim separately when a plaintiff set forth both quid pro quo and hostile work environment as distinct causes of action.¹⁰¹ This court referred to Second Circuit opinions decided before 1998 in setting out a prima facie case of quid pro quo sexual harassment.¹⁰²

A district court in the Eighth Circuit, meanwhile, cited the 1986 *Meritor* opinion as grounds for the distinction between quid pro quo claims and hostile environment claims and observed that both are cognizable under Title VII.¹⁰³ Then the court relied upon *Ellerth* and *Faragher*, stating that in supervisor harassment cases, the two traditional terms are useful only to illustrate the evidentiary distinction between cases in which the threats are carried out and those featuring general offensive conduct.¹⁰⁴ After following Eighth Circuit precedent in laying out the factors for a quid pro quo claim,¹⁰⁵ the district court determined that the elements of hostile work environment harassment are similar to quid pro quo, and that liability inevitably turns on whether or not a tangible employment action occurred.¹⁰⁶ Thus, the district court ultimately reached the result that the Supreme Court envisioned; that is, a decision based on the existence of a tangible employment action. Still, the reliance on quid pro quo and hostile work environment terminology is greater than what was anticipated by Justice Kennedy in the *Ellerth* opinion.

By contrast, other courts have taken the Supreme Court's holding and developed new standards that effectively move beyond quid pro quo and hostile work environment. For example, the Eleventh Circuit, following the Supreme Court's proscription, no longer continues to apply a bright-line distinction be-

98. See, e.g., *EEOC v. Am. Home Prods. Corp.*, No. C 00-3079-MWB, 2001 U.S. Dist. LEXIS 21271, at *17 (N.D. Iowa 2001) (citing *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986) to reference the traditional categories but also discussing their limited relevancy); *Gigliotti v. Sprint Spectrum, L.P.*, 1:00-CV-217 (FJS/RFT), 2001 U.S. Dist. LEXIS 20221, at *12-18 (N.D.N.Y. 2001) (noting that the Second Circuit had counseled against classification of quid pro quo and hostile work environment but still applying the categories to the case at hand); *Kraft v. Yeshiva Univ.*, 00 Civ. 4899 (RCO), 2001 U.S. Dist. LEXIS 16152, at *19-20 (S.D.N.Y. 2001) (separating quid pro quo from hostile work environment by quoting *Karibian*, 14 F.3d at 777 and *Harris*, 510 U.S. at 21).

99. 243 F.3d 687 (2d Cir. 2001).

100. See *id.* at 698.

101. *Gigliotti*, 2001 LEXIS 20221 at *12 n.5.

102. See *id.* at *16-17 (citing *Carrero v. N.Y. City Hous. Auth.*, 890 F.2d 569, 579 (2d Cir. 1989); *Karibian v. Columbia Univ.*, 14 F.3d 773, 777-78 (2d Cir. 1994)).

103. *Am. Home Prods.*, 2001 LEXIS 21271, at *17 (quoting *Ellerth*, 524 U.S. at 752).

104. *Id.* at *18 (citing *Ogden v. Wax Works, Inc.*, 214 F.3d 999, 1006 (8th Cir. 2000)).

105. See *id.* (quoting *Ogden*, 214 F.3d at 1006 n.8).

106. See *id.* at *18, *21-22.

tween the two claims and instead distinguishes between the two based on whether there was a finding of a tangible employment action.¹⁰⁷ Although the Circuit formerly analyzed the two claims under “slightly varying tests,” current analysis indicates a willingness to move beyond the distinction.¹⁰⁸ This willingness materializes into a new standard, bereft of any mention of quid pro quo or hostile environment. In the Eleventh Circuit, to establish a prima facie case of sexual harassment, the plaintiff must show:

- (1) that she belongs to a protected group; (2) that she has been subject to unwelcome sexual harassment; (3) that the harassment was based on her sex; (4) that the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment; and (5) that there is a basis for holding the employer liable.¹⁰⁹

The quid pro quo and hostile work environment claims are combined under the fourth element, with any one quid pro quo situation satisfying the test. Under the fifth element, however, the basis for liability differs; under quid pro quo the standard is a finding of a tangible employment action, and under hostile work environment the standard is the severe or pervasive harassment coupled with the absence of an affirmative defense.

The Fifth Circuit, in an opinion that will form part of the argument in Section V, also laid out an easy-to-follow “*Ellerth/Faragher* road map” that follows the Supreme Court and employs the terms quid pro quo and hostile environment only to clarify the two forms of harassment.¹¹⁰ In the first step, courts determine whether the complaining employee has suffered a tangible employment action.¹¹¹ If she has, the suit is classified as a “quid pro quo” case; if not, the suit is a “hostile environment” case.¹¹² Then there is a fork in the *Ellerth/Faragher* road: In the second step of a quid pro quo case, courts determine if the tangible employment action resulted from the employee’s acceptance or rejection of her

107. *Pipkins v. City of Temple Terrace*, 267 F.3d 1197, 1200 n.3 (11th Cir. 2001).

108. *Id.* (citing *Johnson v. Booker T. Washington Broad. Serv. Inc.*, 234 F.3d 501, 508 n.7 (11th Cir. 2000)).

109. *Id.* at 1199-1200 (citing *Johnson*, 234 F.3d at 508) (applying test from *Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1245 (11th Cir. 1999) (en banc), cert. denied, 529 U.S. 1068 (2000)).

110. See *Casiano v. AT&T Corp.*, 213 F.3d 278, 283-84 (5th Cir. 2000). For more cases applying the *Ellerth/Faragher* road map, see, for example, *Gage v. VII, Inc.*, No. 4:00 CV-1672-BE, 2001 U.S. Dist. LEXIS 18213 (N.D. Tex. 2001) (denying a claim of quid pro quo harassment because the employee did not suffer a tangible employment action); *Clardy v. Silverleaf Resorts, Inc.*, N. 3:99-CV-2893-P, 2001 U.S. Dist. LEXIS 16481 (N.D. Tex. 2001) (granting summary judgment because employee failed to prove any adverse changes relating to her job condition or status); *Ratts v. Bd. of County Comm’rs*, 141 F. Supp. 2d 1289 (D. Kan. 2001) (finding employee’s fear of losing her job unrealized and arguing that mental anguish is outside the scope of quid pro quo claims).

111. *Casiano*, 213 F.3d at 283 (citing *Ellerth*, 524 U.S. at 761-62). What actually constitutes a tangible employment action can vary depending on the court. See, e.g., *Bowman v. Shawnee State Univ.*, 220 F.3d 456 (6th Cir. 2000) (finding no adverse employment action where plaintiff only lost part of his job title for ten days); *Watts v. Kroger Co.*, 170 F.3d 505 (5th Cir. 1999) (finding no tangible employment action where plaintiff, after complaining of harassment, was assigned to a different work schedule); cf. *Mallinson-Montague v. Pocrnick*, 224 F.3d 1224 (10th Cir. 2000) (denying employer judgment as a matter of law where plaintiffs claimed they suffered tangible employment actions because, after they rejected their supervisor’s sexual advances, he began taking steps to diminish their commissions and bonuses and put their jobs in jeopardy).

112. *Casiano*, 213 F.3d at 283.

supervisor's alleged harassment.¹¹³ If the employee cannot demonstrate a nexus, then the employer is not vicariously liable under Title VII; if the employee can show a nexus, then the employer is vicariously liable *per se* and not entitled to raise the affirmative defense available in hostile environment cases.¹¹⁴ Thus, when the employee establishes a causal nexus between the tangible employment action she suffered and her acceptance or rejection of her supervisor's sexual harassment, the employer is vicariously liable, *ipso facto*, and the inquiry ends.¹¹⁵ Proximity in time, by itself, does not establish sufficient causation between the tangible employment action and the employee's acceptance or rejection of her supervisor's alleged harassment.¹¹⁶ In this scheme, "quid pro quo" and "hostile work environment" are used to demarcate the first step, but "tangible employment action" is used to determine the crucial nexus between the quid and the quo.

The availability of affirmative defenses under this new structure turns on the existence, or lack thereof, of an employment action. Yet despite this clarification, sexual harassment that involves a tangible employment action is still subject to varied interpretations, and employers in at least one circuit may not be completely out of hope.¹¹⁷ In the Tenth Circuit, the employer may refute a tangible employment action claim in one of two ways: (1) by proving that it took no negative employment action, e.g., the employee resigned; or (2) "by establishing that the decision to terminate was made for legitimate business reasons and not because the employee refused to submit to sexual demands."¹¹⁸ Of course, this may just be a formal instruction in how to disprove a nexus. Thus, courts have not been uniform in following the Supreme Court's holdings, though all apply it in some form, and some, such as the Fifth Circuit, have established a modified framework that simplifies application.¹¹⁹

IV. THE DEBATE OVER QUID PRO QUO'S EXISTENCE

Despite the apparent relative ease with which many courts have dealt with sexual harassment over the last several years, many scholars and commentators still debate the viability of quid pro quo and the utility of maintaining it as a distinct cause of action. This section focuses on various criticisms of quid pro quo, and then contrasts them with critics who believe it is important to maintain quid pro quo or tangible employment action harassment as a separate category.

113. *Id.* (citing *Ellerth*, 524 U.S. at 753-54). If no tangible employment action is taken, then the road map takes a different path and the employer may raise an affirmative defense to absolve itself of liability. See, e.g., *Jackson v. Ark. Dep't of Educ.*, 272 F.3d 1020 (8th Cir. 2001) (finding the employer's harassment prevention policy to be effective, and because employee failed to take advantage of this policy, employer was not subject to vicarious liability on a hostile environment claim).

114. *Casiano*, 213 F.3d at 283-84 (citing *Faragher*, 524 U.S. at 808).

115. *Casiano*, 213 F.3d at 284.

116. *Clardy v. Silverleaf Resorts, Inc.*, N. 3:99-CV-2893-P, 2001 U.S. Dist. LEXIS 16481, *15 (N.D. Tex. 2001) (citing *Hass v. ADVO Sys., Inc.*, 168 F.3d 732, 733 (5th Cir. 1999)).

117. See *Smith v. Cashland, Inc.*, 193 F.3d 1158 (10th Cir. 1999).

118. See *id.* at 1160.

119. See discussion in Section V.

A. Unanswered Questions After *Ellerth/Faragher*

While most courts have followed the Supreme Court's lead, not all commentators agree with the Court's logic or its brevity in discussing sexual harassment. In short, critics contend that the Court's decisions have left several questions unanswered. For example, the *Ellerth* and *Faragher* opinions did not identify the "quantum of causation" necessary between the supervisor's acts of hostility and the employee's subsequent tangible job detriment.¹²⁰ Consequently, a victim could be subject to extensive outrageous sexual conduct that never leads to a tangible job action, and thus her claim would be subject to the employer's affirmative defenses, whereas a victim subject to one isolated threat, which is followed later by a negative job action, need not worry about the employer's liability.¹²¹ Additionally, the Court never explained why not allowing the hostile environment affirmative defenses to be utilized in quid pro quo cases was justified by Title VII's legislative policy; it only stated that no affirmative defense was available.¹²² The affirmative defenses were defined for claims involving no tangible employment action; however, what is necessary for employers to successfully raise the defenses is not clear from the holding, which forces lower courts to make the determination on a case-by-case basis.¹²³

Furthermore, in a question that will be taken up in Part V, the Supreme Court did not discuss what level of liability should apply to tangible employment action claims when a clear quid pro quo demand results in a tangible job detriment or submission to the sexual demands.¹²⁴ As a result, the legal effect of such a demand and the degree of retaliation by the supervisor necessary to state a quid pro quo claim are still unclear.¹²⁵ The Supreme Court avoided making this determination by subtly redefining quid pro quo claims as tangible employment actions.¹²⁶ Despite this subtle redefinition of harassment claims based on the existence of a tangible employment action, as subsequent court holdings demonstrate, a distinction between the quid pro quo and hostile environment labels persists, even though the Supreme Court pronounced that the categories are not controlling in establishing an employer's liability.¹²⁷ Even if the terms may not themselves account for liability, courts still apply the two categories freely to aid their analysis and ultimate determinations.¹²⁸

120. Aden, *supra* note 7, at 508.

121. *Id.* This problem of not having to prove a nexus in a quid pro quo claim was addressed by the Fifth Circuit in *Casiano v. AT&T Corp.*, 213 F.3d 278 (5th Cir. 2000), but not by the Supreme Court.

122. Brian C. Baldrate, Note, *Agency Law and the Supreme Court's Compromise on "Hostile Environment" Sexual Harassment in Burlington Industries, Inc. v. Ellerth and Faragher v. City of Boca Raton*, 31 CONN. L. REV. 1149, 1177 (1999); *see also Faragher*, 524 U.S. at 808.

123. Tara Kaesebier, *Employer Liability in Supervisor Sexual Harassment Cases: The Supreme Court Finally Speaks*, 31 ARIZ. ST. L.J. 203, 227 (1999).

124. Aden, *supra* note 7, at 512.

125. *Id.*

126. *Id.*

127. *See Baldrate, supra* note 122, at 1172.

128. *See* Section III.

B. Quid Pro Quo as a Superfluous and Otherwise Categorizable Form of Harassment

The argument has been made, most notably by current Department of Labor Solicitor General Eugene Scalia, that there is no utility in distinguishing between quid pro quo harassment and hostile environment harassment.¹²⁹ Just before the Supreme Court ruled in *Ellerth* and *Faragher*, Scalia argued that “[quid pro quo owes its longevity to the triumph of form over substance in the application of discrimination law.”¹³⁰ He states that quid pro quo was substantively redundant of existing law “from the day it was recognized in *Henson*,” and should be abandoned as a category.¹³¹

By dividing quid pro quo into submission cases (in which the employee submits to the demands for sex to avoid punishment) and retaliation cases (in which the employee does not submit and suffers a tangible employment action), Scalia’s argument, at least logically, makes sense. A retaliation case could be classified as an adverse job action, albeit “an especially contemptible” one where powerful direct evidence and heightened emotional impact may have a profound effect on the jury, thus bearing on damages.¹³² Despite the reprehensible nature of quid pro quo retaliation, Scalia feels placing it in a separate category is superfluous.¹³³

In submission cases, meanwhile, Scalia argues that a woman forced to engage in unwanted sex with her supervisor to keep her job has merely satisfied all of the elements of a claim for hostile work environment harassment.¹³⁴ The quid pro quo proposition is still important evidence, just as it is in an adverse job action case; indeed, the quid pro quo submission case with its express threat of retaliation will often prove stronger than many environmental harassment claims.¹³⁵ But, to Scalia, quid pro quo adds superfluous elements to other tests: he cites the addition of “sexual advances” to the test for adverse job action and the threat of job action or a promised job benefit in submission cases (an element that can be omitted and yet still allow a hostile environment claim under Title VII).¹³⁶

According to Scalia, these submission and retaliation cases do not require quid pro quo treatment in order to be actionable as either adverse job action or hostile environment sexual harassment claims, and thus quid pro quo requires “a formal conditioning of employment on sex that the law itself does not demand, as the hostile environment cases show” and “injects needless formalism

129. Scalia, *supra* note 45, at 324.

130. *Id.*

131. *Id.*

132. *Id.* at 313-14. An adverse job action claim involves a decision to terminate, demote, refuse to promote or hire, and other similar claims. *Id.* at 308.

133. *Id.* at 314, 308. See also Lucetta Pope, *Everything You Ever Wanted to Know About Sexual Harassment But Were Too Politically Correct to Ask*, 30 SW. U. L. REV. 253, 293 (2001) (contending that rather than de-commissioning sexual harassment law, courts should limit its independence by forcing all sexual harassment claims to join non-sexual harassment and adverse job action claims, and abandon “sexual attraction” as proof of discriminatory intent).

134. Scalia, *supra* note 45, at 316.

135. *Id.* at 317.

136. *Id.*

and complexity to the analysis of employment discrimination.”¹³⁷ Thus, viewing quid pro quo retaliation as an adverse job action and submission as a hostile work environment situation would eliminate the need to retain quid pro quo as a separate category of discrimination.¹³⁸ Such an elimination would not dramatically decrease an employer’s liability, since employers are held strictly liable in adverse job action cases, just as they are in quid pro quo retaliation cases.¹³⁹ Of course, as will be argued later, such an elimination would remove quid pro quo, and now tangible employment, from its own distinct and recognizable category.

Steven Aden, Chief Litigation Counsel for the Rutherford Institute, articulates a contrary view. Aden counters that Scalia really seeks a return to a single structure of liability and thus Scalia’s argument is “nothing less than a well-cloaked assault upon the citadel of sexual harassment law itself.”¹⁴⁰ Yet Aden believes that the distinction between quid pro quo and hostile work environment is a continuum, rather than a divide, since both impact women in a similar fashion: that is, both lead the victim to submit, quit, or inevitably get fired for “cause.”¹⁴¹ Furthermore, any woman who receives a harassing threat or promise may not have suffered a tangible employment action, but “thereafter labors under the condition that her prospects for advancement have been severely diminished by her non-compliance, and may yet again be elevated by a decision to provide the sexual favors demanded.”¹⁴² By arguing how damaging such a threat may be, even though it would only qualify as a hostile environment claim, Aden demonstrates that hostile environment and quid pro quo actions can be very similar. In so doing, he at least slightly merges his analysis with Scalia’s. However, unlike Aden, Scalia concludes that because both forms of sexual harassment result from a supervisor misusing his inherent power, an employer’s liability in all cases should be the same, in essence, liable only if it endorses the conduct.¹⁴³

C. A Variety of Possibilities on Liability

What form of liability should apply to employers in sexual harassment cases? Should different standards of liability be imposed based on whether or not there is a tangible employment action? These questions are paramount to this entire discussion, because there might not be a valid reason to retain quid pro quo as a separate category of harassment if the standard is the same for all

137. *Id.* at 319. Additionally, because quid pro quo refers to both retaliation and submission cases, the term is overly broad, as it does not specify whether there was a threat or promise, a submission or resistance, whether a job was gained or lost, or if the damages were economic or emotional. The term “quid pro quo” only conveys that the suit involves sex discrimination. This problem would be eliminated if quid pro quo were eliminated altogether as a separate category of harassment, or if retaliation cases were subsumed into adverse job claims and quid pro quo were to comprise submission cases only. Then, at least, the term would succinctly describe the harassment scenario at issue. *Id.* at 316.

138. *Id.* at 320.

139. Baldrate, *supra* note 122, at 1169 (citing Scalia, *supra* note 45, at 321).

140. Aden, *supra* note 7, at 491.

141. *Id.* at 495 (quoting Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 834 (1991)).

142. *Id.* at 498.

143. Scalia, *supra* note 45, at 323.

forms of harassment.¹⁴⁴ Despite the crucial importance of resolving this issue, the question of an employer's standard of liability has not been dealt with by the Supreme Court since *Meritor*, and thus remains a constant source of confusion.¹⁴⁵

1. Four-Justice Concurrence in *Meritor*

Scalia's argument that liability in quid pro quo and hostile environment cases should be the same almost became the law, though not in the way Scalia intended, when the debate and confusion over sexual harassment was still in a fledgling state over fifteen years ago. In *Meritor*, a four-Justice concurrence led by Justice Marshall advocated strict liability for all forms of sexual harassment, and fell just one Justice short of making strict liability the majority rule.¹⁴⁶ Justice Marshall stated:

A supervisor's responsibilities do not begin and end with the power to hire, fire, and discipline employees, or with the power to recommend such actions. Rather, a supervisor is charged with the day-to-day supervision of the work environment and with ensuring a safe, productive workplace. There is no reason why abuse of the latter authority should have different consequences than abuse of the former. In both cases it is the authority vested in the supervisor by the employer that enables him to commit the wrong: it is precisely because the supervisor is understood to be clothed with the employer's authority that he is able to impose unwelcome sexual conduct on subordinates.¹⁴⁷

Justice Marshall contended that a supervisor was aided by his inherent power in both forms of sexual harassment and that the law of agency, which dismisses liability for an employer when a supervisor is acting outside the scope of employment, did not justify establishing a special rule requiring notice for employers in hostile environment cases.¹⁴⁸ Justice Marshall concluded that all sexual harassment should be subject to strict liability and his opinion fell just one justice short of settling the issue.¹⁴⁹

2. Theories of Liability

In the absence of a bright-line rule, courts and commentators have used varying rationales and theories in establishing what standard of employer liability should apply in sexual harassment cases. Many courts have relied upon agency principles.¹⁵⁰ For example, the Supreme Court in *Meritor*, and later in *Ellerth* and *Faragher*, determined that Congress intended to apply agency principles to determine an employer's liability in sexual harassment cases.¹⁵¹ The

144. *See id.* at 322.

145. Aden, *supra* note 7, at 481.

146. *See Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 74 (1986) (Marshall, J., concurring).

147. *Id.* at 76-77.

148. *Id.* at 77.

149. *See id.* at 78. Marshall concluded that because employers are subject to strict liability in quid pro quo cases, the same standard should apply to hostile work environment matters.

150. Aden, *supra* note 7, at 488-89.

151. *Meritor*, 477 U.S. at 72 (arguing that Congress intended to apply agency principles to guide courts in deciding harassment cases because Title VII's definition of "employer" includes any "agent" of an employer); *see also Faragher v. City of Boca Raton*, 524 U.S. 775, 790-91 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 759-760 (1998).

Court did not base its holdings solely on agency law, but adapted agency concepts to Title VII's objectives.¹⁵² It drew on principles from the Restatement (Second) of Agency in establishing vicarious liability.¹⁵³ Therefore, the justification for holding an employer liable for a supervisor's actions flows from the agency relationship—it centers around the fact that this relationship provides the supervisor with the power to commit the harassment and to make decisions affecting the terms and conditions of the employee's employment.¹⁵⁴ At least one circuit places this agency concept under the theory of respondeat superior.¹⁵⁵

The aid of the agency relationship is especially important to the supervisor when he takes a tangible employment action against an employee. Since the employer has given the supervisor power to take such actions, the decisions are thus considered "official acts" of the employer, and the "aided by the agency relation" standard always applies when a tangible employment action takes place.¹⁵⁶ This theory has been used by the Supreme Court in subjecting employers to strict liability for supervisors' tangible employment actions. Of course, not everyone agrees that this should be the case.

3. Objections to Strict Liability

The most common arguments against the application of strict liability and agency principles to quid pro quo harassment are: (1) that the supervisor is not acting with the alleged authority; (2) that negligence liability is a better standard; and (3) that neither strict liability nor negligence liability considers the best interests of all parties involved.

The question of whether the supervisor is acting with apparent authority, as the Restatement (Second) of Agency suggests, is crucial. In a quid pro quo submission case, the supervisor is demanding sexual favors, which he has no authority to do, as should be clear from company policy and harassment laws.¹⁵⁷ Furthermore, as Scalia argues, a quid pro quo harasser acts with no more authority than a boss guilty of severe or pervasive hostile environment harassment.¹⁵⁸ Because of this lack of difference in authority, the supervisor in his capacity is using the same power supplied by the company despite company pol-

152. See *Faragher*, 524 U.S. at 802 n.3; Baldrate, *supra* note 122, at 1164.

153. See RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (1958), stating:

A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless . . . (d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

See also *Faragher*, 524 U.S. at 802.

154. Baldrate, *supra* note 122, at 1167; see also *Faragher*, 524 U.S. at 803-04; *Ellerth*, 524 U.S. at 759-60.

155. See, e.g., *Nichols v. Frank*, 42 F.3d 503, 514 (9th Cir. 1994) (holding employer automatically liable under traditional agency principles because quid pro quo harassment was established). Other courts have described the agency principles under a scope-of-employment theory of liability. See, e.g., *Bouton v. BMW of N. Am.*, 29 F.3d 103, 106-07 (3d Cir. 1994) (arguing that "[s]cope-of-employment liability is often invoked in quid pro quo cases because the supervisor has used his authority over the employee's job to extort sexual favors").

156. See *Ellerth*, 524 U.S. at 760-61.

157. Scalia, *supra* note 45, at 322-23.

158. *Id.* at 323.

icy prohibiting his actions, and thus the standard of employer liability in both cases should be identical.¹⁵⁹

Alternately, a uniform standard of liability for employers could be imposed in all sexual harassment cases if the negligence standard were adopted.¹⁶⁰ Yet the likelihood of negligence becoming a standard is certainly lower since the Supreme Court has moved toward strict liability. The debate over whether to apply a negligence standard or a strict liability standard goes to the heart of sexual harassment laws: that is, the employer's ability to protect employees from being victimized in the workplace. When an employer is subject to strict liability, the employer will be held liable without any inquiry into preventative or corrective actions it has taken. Under strict liability, the employer may have little incentive to take such measures, potentially resulting in less protection for, and more harm to, women in the workplace.¹⁶¹ If the employer is given the opportunity to avoid liability via affirmative defenses or negligence liability, it must assume the responsibility of not only establishing a grievance procedure, but also investigating all complaints and taking action if it believes it to be necessary to defend against employee claims.¹⁶² Thus, as legal scholar Allan King notes, not only must the employer disclaim in writing the lack of authority of supervisors to make good on quid pro quo threats, employees must also sense that management will act upon their quid pro quo complaints and protect them from their supervisor and possible retaliation if they report.¹⁶³

Issues in sexual harassment are seen more clearly when the situation is viewed not as a bilateral relationship, but a trilateral one, in which the employer, employee, and supervisor are all involved.¹⁶⁴ The culpable supervisor takes actions which both result in a loss of efficiency to the employer and impose additional emotional and, sometimes, financial costs on the employee.¹⁶⁵ The employer has a stake in avoiding a workplace in which sex and blackmail, as opposed to merit, determine pay and promotions.¹⁶⁶ However, the supervisor would rather keep his employer—the only party with the power to prevent the tangible employment action, or once it occurs, to mitigate its effects—in the dark.¹⁶⁷ Thus, the employer is only capable of prevention or mitigation if the employee informs and cooperates with it, which places a disproportionate amount of pressure on the employee to avoid a fear of retaliation and respond.¹⁶⁸ Thus, strict liability would fail to ally the employer (who is stuck with liability

159. *Id.*

160. *See, e.g.,* Baldrate, *supra* note 122, at 1169 (arguing that the establishment of negligence as the one standard would create a bright-line standard in all harassment cases). Others, however, feel negligence might not work. *See, e.g.,* Aden, *supra* note 7, at 501 (contending that if negligence was the standard for quid pro quo claims, the employee's right to relief might be subject to the supervisor's knowledge of how far he can legally go before his employer will be subject to liability).

161. *See* Dansky, *supra* note 53, at 438.

162. *Id.* at 468.

163. Allan G. King, *Resist and Report: A Policy to Deter Quid Pro Quo Sexual Harassment*, 50 BAYLOR L. REV. 333, 344 (1998).

164. *Id.* at 339.

165. *Id.* at 347-48.

166. *Id.*

167. *See id.* at 342.

168. *Id.*

regardless of any corrective measures it seeks to take) and employee against the harassing supervisor, and would limit the relationship to a bilateral one with the employer effectively relegated to the sidelines.¹⁶⁹ The trilateral relationship seems to fit the hostile environment claim as well, and indeed it may, which is why some scholars care much less about the above arguments than they do establishing the same standard for both forms of sexual harassment in order to eliminate confusion.¹⁷⁰

D. Quid Pro Quo as a Viable Separate Category

Despite the unanswered questions, arguments to the contrary, and disagreements over standard of liability, some feel that quid pro quo should remain a separate category of sexual harassment. It will likely remain a distinct category of Title VII discrimination so long as the Supreme Court retains different standards of liability for quid pro quo and hostile work environment claims.¹⁷¹ Yet, quid pro quo stands “no longer as a prescriptive cause of action, but now as a descriptive paradigm of a type of harassment sufficiently egregious to impose strict liability on the employer.”¹⁷² It was never meant to be a definition, but rather a label for the range of situations that involve a “conditioning of terms of employment on sexual favors sufficient to give rise to employer liability.”¹⁷³

Quid pro quo varies from hostile work environment in both function and rationale. It differs in function because hostile work environment claims only hold actionable hostility in the workplace that is sufficiently “severe and pervasive” as to alter the terms and conditions of employment. By contrast, all quid pro quo claims are actionable.¹⁷⁴ It differs in rationale because, taken alone, a singular hostile environment action does not hinder a female employee’s performance, rather multiple actions create a severe effect over time, giving rise to conduct which is prohibited because it creates “a pervasive atmosphere of hostility.”¹⁷⁵ In contrast, quid pro quo conduct is harmful in essence because any one action can immediately “brutalize and demotivate” an employee, even if never repeated again.¹⁷⁶ These differences in function and rationale underlie the argument for keeping the two categories of harassment separate.

169. See *id.* at 334.

170. See, e.g., Scalia, *supra* note 45, at 323; see also Baldrate, *supra* note 122, at 1171.

171. Aden, *supra* note 7, at 479.

172. *Id.*

173. *Id.*

174. *Id.* at 486.

175. *Id.* at 493.

176. *Id.* at 494. Aden further argues that an employee-victim likely never knows how her supervisor will react. Her decision to submit is based on a guess as to whether or not the supervisor will make good on his threat or promise, and if she resists, she is predicting that the supervisor will not follow through. After all, if she submits and the supervisor does not carry through with a promise of reward, the employee still cannot enforce a “quid pro quo contract.” Regardless, the supervisor retains power over the state of the victim’s employment. *Id.* at 499.

V. QUID PRO QUO'S EXISTENCE IN THE FUTURE

Long before quid pro quo (or even sexual harassment for that matter) was well-defined in the discrimination lexicon, the Supreme Court offered a reminder of why Title VII exists— “to achieve equal employment opportunity and to remove the barriers that have operated to favor white male employees over other employees.”¹⁷⁷ That reminder provides a valuable framework: the future viability of quid pro quo and the standard of employer liability for sexual harassment should serve the purpose of removing barriers for women in the workplace. An employee’s status as a woman, and the ability of male supervisors to take advantage of that fact, should not inhibit the workplace experience. With this underlying purpose in mind and given the Supreme Court’s 1998 decisions and subsequent lower court treatment, I argue that quid pro quo sexual harassment has been modified to the extent that, with the exception of submission cases, it is better described now by using the phrase “tangible employment action.” The concept, however, of demanding sexual favors in exchange for some form of employment action or inaction has remained much the same and the distinction in terms may not indicate a corresponding difference in usage.

A. Quid Pro Quo’s Continued Vitality

Because Title VII originally targeted race, and gender discrimination was added by motion on the House floor, sexual harassment law has been developed almost entirely by the courts.¹⁷⁸ The Supreme Court, with *Faragher* and *Ellerth*, has taken a clear path in altering the terminology of quid pro quo claims by requiring a tangible employment action, which itself establishes a distinct form of sexual harassment, and the Court has shown no signs in the last five years of changing its approach.¹⁷⁹ As it stands, a supervisor’s threats, without more, do not qualify as a tangible employment action and are now classified under the hostile environment category.

Since 1998, lower courts have set out to follow the Supreme Court’s lead, developing new methods of enforcing the Court’s decision by further de-emphasizing the term “quid pro quo” but not the concept from which it was born. This is illustrated perfectly by the Fifth Circuit, which employs an easy-to-follow “*Ellerth/Faragher*” road map, or inquiry, that travels down the former quid pro quo path by first searching for a tangible employment action.¹⁸⁰ If a tangible employment action is found, according to the Fifth Circuit, a court must determine if it resulted from the employee’s acceptance or rejection of her supervisor’s alleged sexual harassment.¹⁸¹ This step requires proof of a nexus between the employment action and the harassment.¹⁸² Of course, the Supreme Court does not allow any affirmative defenses, but the Tenth Circuit’s *Smith v.*

177. *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 364 (1977) (vacating judgment on a seniority system alleged to have violated Title VII).

178. See, e.g., *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 63-64 (1986); Aden, *supra* note 7, at 484.

179. See *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 270 (2001) (per curiam).

180. See *Casiano v. AT&T Corp.*, 213 F.3d 278, 283 (5th Cir. 2000).

181. *Id.*

182. *Id.*

Cashland decision reminds us that the defendant can still prove that either no negative employment action was actually taken or that a termination decision was based on legitimate reasons wholly unrelated to the employee's refusal to submit to sexual demands.¹⁸³

With the tangible employment action road map, no mention of "quid pro quo" is necessary, yet the victimized employee has the same legal recourse when subjected to the quid pro quo form of sexual harassment. An employee who believes that she has been victimized will know whether or not a tangible employment action such as a demotion or dismissal has occurred because such actions are self-evident. If it has, she must prove that the employment action was due either to her rejection or submission to a supervisor's sexual advances. If there has been no tangible employment action, in order to sustain a claim the employee must demonstrate that a severe and pervasive hostile work environment has altered her employment experience.

Ultimately, these are not categories, but questions about what kind of action has taken place. The victimized employee need not fit her experience into a category, but instead must evaluate her situation to see which path she must travel down the *Ellerth/Faragher* road map. This is all accomplished without employing the words "quid pro quo," words which are no longer necessary to accomplish Title VII's goals of providing females with an equal employment experience. Rather, because liability is still attenuated by the same set of circumstances, the new terminology could conceivably make the victimized employee's claim easier to delineate with a path that is simpler to follow. In addition, the employee does not have to worry about fitting her situation into the adverse job action rubric, as Scalia would advocate, instead remaining within a further clarified sexual harassment domain, one carved specifically for her situation.¹⁸⁴

B. Strict Liability for Tangible Employment Actions

It seems clear that sexual harassment involving tangible employment actions "poisons the workplace for all personnel, not just the victim."¹⁸⁵ The crucial inquiry is whether or not strict liability or allowing the employer to raise affirmative defenses will most effectively keep the "poison" from spreading.

Of the many arguments expressed, Judge Richard Posner's is perhaps most convincing. He argues in a Seventh Circuit case that the "company act" of an employee suffering a tangible employment action gives the employer requisite notice that something improper may have happened that requires prompt further inquiry.¹⁸⁶ Judge Posner adds that, "[i]n a well-regulated company, a supervisor who wants to fire a subordinate has to obtain the approval of higher-ups . . . and they will have an opportunity therefore to determine the bona fides

183. *Smith v. Cashland, Inc.*, 193 F.3d 1158, 1160 (10th Cir. 1999).

184. As noted earlier, moving tangible employment actions into the adverse job action category would make it one of a number of claims that could qualify as an adverse job action. By remaining within the sexual harassment domain, tangible employment actions retain the distinction as a separate category and ease-of-access that victims deserve.

185. *King*, *supra* note 163, at 345.

186. See *Jansen v. Packaging Corp. of Am.*, 123 F.3d 490, 514-15 (7th Cir. 1997) (Posner, J., concurring and dissenting).

of his proposal.”¹⁸⁷ This well-reasoned argument acknowledges that an employer does not have to be helpless in these situations, because long before the employee brings a claim, the employer has the opportunity to review the hiring, firing and other employment decisions of its supervisors, particularly those decisions raising red flags. Presumably, the firing of a female employee who has otherwise done satisfactory work will be greeted with skepticism in a well-run company. A prudent employer, realizing that it does not have the ability to raise affirmative defenses in tangible employment action harassment cases, would be wise to review any job action that could have even a trace of taint. This not only aids the employer but also keeps it allied with the employee in the trilateral harassment relationship proffered in Section IV.

In cases where severe and pervasive hostile environment harassment has occurred without any tangible employment action, the Supreme Court allows the employer to raise an affirmative defense. According to the Court’s analysis, allowing an affirmative defense supports Title VII’s legislative purpose “to recognize the employer’s affirmative obligation to prevent violations and give credit here to employers who make reasonable efforts to discharge their duty.”¹⁸⁸ Because a hostile environment claim avoids conditioning work on sex, thus steering clear of sexual blackmail, courts do not deem it to be as flagrant a violation of Title VII and allow affirmative defenses.¹⁸⁹

Yet, not only are tangible employment actions, which are conditioned on the acceptance or rejection of sexual favors, flagrant and reprehensible enough to earn strict liability for employers, they also have the potential to be thwarted prior to their occurrence. Affirmative defenses certainly allow an employer to demonstrate that it has developed solid harassment policies that an employee can utilize, but effective employee policies are also those that avoid sexual harassment problems in the first place. While it may be a reality of society that no workplace will completely escape the traces of harassment, anti-harassment policies and training that threatens supervisors with immediate dismissal upon the discovery of a request for sexual favors can reduce the problem before it begins and keep the workplace freer of sexual blackmail. If a supervisor takes advantage of his position and ignores company policy by demanding and receiving sexual favors from an employee by threatening her with job loss or a job detriment, then the employer should be subject to strict liability and be forced to tighten its watch over perpetrators of harassment in order to ensure that employee complaints and future employment actions taken against employees are legitimate and defensible. The potential for litigation should be incentive enough for the weary employer.

After all, respondeat superior liability involves the allocation of risk, and how it should be spread. In a tangible employment action, the supervisor bears the risk of being caught and punished while the employer bears the risk of a suit. The employee, who has been degraded and humiliated by a sexual quid pro quo, should never face the prospect that her inability or hesitation to follow

187. *Id.* at 513.

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

189. *Dansky*, *supra* note 53, at 439-440.

company policy inevitably leaves her as the loser while the other two sides of the triangular relationship escape.

CONCLUSION

Congress could certainly amend Title VII to eliminate any distinction between quid pro quo and hostile environment claims, bringing one uniform standard of liability to all sexual harassment claims.¹⁹⁰ In the meantime, the courts have acted first in maintaining a continuum, and have turned a sexual harassment claim into a road map, the direction of which turns on whether or not the employee has been subjected to a tangible employment action. The goal of Title VII is to create an equal employment experience, and this is more likely to be achieved if the employer is subject to more stringent standards that motivate employers to develop more precise and effective employee harassment policies. For this reason, imposing strict liability is a fair and just method of punishing an employer when a supervisor conditions a tangible employment action on sexual favors. The victimized employee should never bear the risk that such a reprehensible act will be, in essence, excused by the courts.

Equally important, the Supreme Court has acted to diminish use of the term “quid pro quo,” and decisions of the lower courts indicate that it has succeeded. The quid pro quo concept, however, has certainly not disappeared and has not lost its primary utility as a factual category that has a powerful impact on juries. Better yet, today’s victim of sexual harassment likely would have an easier time using the *Ellerth/Faragher* road map than she would have faced in defining the elements of quid pro quo. Instead of forcing her to fit her claim into a category, the road map allows the employee to examine the facts of her situation, to answer certain questions, and to develop her claim based on whether or not there has been a tangible employment action. This recent approach does nothing to lessen the impact and power of Title VII, and only further helps to protect a victim of sexual harassment in the modern workplace, which has been the goal since Catherine MacKinnon first delineated standards for sexual harassment claims almost twenty-five years ago.

190. Baldrate, *supra* note 122, at 1177.