



# Sexual Harassment: Developments in Federal Law

**-name redacted-**

Legislative Attorney

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## Summary

Gender-based discrimination, sexual harassment, and violence against women in the workplace, schools, and society at large are continuing topics of legislative and judicial concern. Legal doctrines condemning the extortion of sexual favors as a condition of employment or job advancement and other sexually offensive workplace behaviors resulting in a “hostile environment” have evolved from judicial decisions under Title VII of the 1964 Civil Rights Act and other federal equal employment opportunity laws. The earlier judicial focus on economic detriment or *quid pro quo* harassment—that is, making submission to sexual demands a condition of job benefits—has largely given way to Title VII claims alleging harassment that creates an “intimidating, hostile, or offensive environment.” Under Title IX of the Education Amendments of 1972, victims of sexual harassment that occurs in a public school setting may make similar *quid pro quo* or hostile environment claims.

For more information on related laws regarding sex discrimination, see CRS Report RL30253, *Sex Discrimination and the United States Supreme Court: Developments in the Law*, by (name redacted).

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## Introduction

Gender-based discrimination, sexual harassment, and violence against women in the workplace, schools, and society at large are continuing topics of legislative and judicial concern. Legal doctrines condemning the extortion of sexual favors as a condition of employment or job advancement and other sexually offensive workplace behaviors resulting in a “hostile environment” have evolved from judicial decisions under Title VII of the 1964 Civil Rights Act and other federal equal employment opportunity laws.<sup>1</sup> The earlier judicial focus on economic detriment or *quid pro quo* harassment—that is, making submission to sexual demands a condition of job benefits—has largely given way to Title VII claims alleging harassment that creates an “intimidating, hostile, or offensive environment.” Under Title IX of the Education Amendments of 1972,<sup>2</sup> victims of sexual harassment that occurs in a public school setting may make similar *quid pro quo* or hostile environment claims.

In recent years, the U.S. Supreme Court has addressed a range of sexual harassment issues, from the legality of same-sex harassment to the vicarious liability of employers and local school districts for monetary damages as the result of harassment by supervisors and teachers. These and other significant Supreme Court cases regarding sexual harassment and violence against women are discussed below.

For more information on related laws regarding sex discrimination, see CRS Report RL30253, *Sex Discrimination and the United States Supreme Court: Developments in the Law*, by (name redacted).

## Federal Equal Employment Opportunity Law

Title VII of the 1964 Civil Rights Act does not mention sexual harassment but makes it unlawful for employers with 15 or more employees to discriminate against any applicant or employee “because of ... sex.”<sup>3</sup> Federal law on the subject is, therefore, largely a judicial creation, having evolved over four decades from federal court decisions and guidelines of the Equal Employment Opportunity Commission (EEOC) interpreting Title VII’s sex discrimination prohibition.<sup>4</sup> Sexual harassment in federally assisted education programs is also prohibited by Title IX of the 1972 Education Amendments.<sup>5</sup> While Title VII and Title IX are the primary sources of federal sexual harassment law, relief from such conduct has also been sought, albeit less frequently, pursuant to §1983 of Title 42, the Federal Employees Liability Act, and the Equal Protection and Due Process Clauses of the U.S. Constitution.<sup>6</sup>

Two forms of sexual harassment have been recognized by the courts and EEOC administrative guidelines. The first, or “*quid pro quo*” harassment, occurs when submission to “unwelcome”

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<sup>1</sup> Title VII prohibits employment discrimination on the basis of race, color, religion, sex, or national origin. 42 U.S.C. §§2000e et seq.

<sup>2</sup> Title IX prohibits sex discrimination in federally funded education programs or activities. 20 U.S.C. §1681.

<sup>3</sup> 42 U.S.C. §2000e-2(a)(1).

<sup>4</sup> *Id.* at §§2000e et seq.

<sup>5</sup> 20 U.S.C. §§1681 et seq. See *Franklin v. Gwinnet County Pub. Sch.*, 503 U.S. 60 (1992).

<sup>6</sup> See, e.g., *Doe v. Taylor Indep. Sch. Dist.*, 975 F.2d 137 (5<sup>th</sup> Cir. 1992).

sexual advances, propositions, or other conduct of a sexual nature is made an express or implied condition of employment, or where it is used as the basis of employment decisions affecting job status or tangible employment benefits. As its name suggests, this form of harassment involves actual or potential economic loss—such as termination, transfer, or adverse performance ratings—as a consequence of the employee’s refusal to exchange sexual favors demanded by a supervisor or employer for employment benefits. The second form of actionable harassment consists of unwelcome sexual conduct that is of such severity as to alter a condition of employment by creating an “intimidating, hostile, or offensive working environment.” The essence of a “hostile environment” claim is a “pattern or practice” of offensive behavior by the employer, a supervisor, co-workers, or non-employees so “severe or pervasive” as to interfere with the employee’s job performance or create an abusive work environment.

In 1980, the federal agency responsible for enforcing Title VII issued guidelines prohibiting both *quid pro quo* and hostile environment sexual harassment.<sup>7</sup> The EEOC guidelines focus on sexuality rather than gender—in terms of job detriments resulting from “[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical behavior of a sexual nature”—and require that a “totality of the circumstances” be considered to determine whether particular conduct constitutes sexual harassment.<sup>8</sup> In addition, the EEOC anticipated judicial developments in hostile environment law when it eliminated tangible economic loss as a factor and provided that unwelcome sexual conduct violates Title VII whenever it “has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.” According to the EEOC guidelines, an employer is liable for both forms of sexual harassment when perpetrated by supervisors. The employer, however, is liable for harassment perpetrated by co-worker or nonemployees only if the employer knew or should have known of the harassment and failed to “take immediate and appropriate corrective action.” They also recommend that employers take preventive measures to eliminate sexual harassment and state that employers may be liable to those denied employment opportunities or benefits given to another employee because of submission to sexual advances.<sup>9</sup>

In 1990, the EEOC issued policy guidance to elaborate on certain legal principles set forth in its interpretative guidelines from a decade before.<sup>10</sup> First, the later document reasserted the basic distinction between “quid pro quo” and “hostile environment” and states that an employer “will always be held responsible for acts of ‘quid pro quo’ harassment by a supervisor while hostile environment cases require ‘careful examination’ of whether the harassing supervisor was acting in an ‘agency capacity.’”<sup>11</sup> On the “welcomeness” issue, the policy guide states that “a contemporaneous complaint or protest” by the victim is an “important” but “not a necessary element of the claim.” Instead, the Commission will look to all “objective evidence, rather than subjective, uncommunicated feelings” to “determine whether the victim’s conduct is consistent, or inconsistent, with her assertion that the sexual conduct is unwelcome.”<sup>12</sup> In determining whether a work environment is hostile, several factors are emphasized:

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<sup>7</sup> For more details on agency guidance on sexual harassment, see the EEOC’s website at <http://www.eeoc.gov>.

<sup>8</sup> 29 C.F.R. §1604.11(a).

<sup>9</sup> *Id.* at §1604.11.

<sup>10</sup> Equal Employment Opportunity Commission, Policy Guidance on Current Issues of Sexual Harassment, March 19, 1990, at <http://www.eeoc.gov/policy/docs/currentissues.html>.

<sup>11</sup> *Id.* at 405:6695.

<sup>12</sup> *Id.* at 405:6686.

- (1) whether the conduct was verbal or physical or both; (2) how frequently it was repeated;
- (3) whether the conduct was hostile or patently offensive; (4) whether the alleged harasser was a co-worker or supervisor; (5) whether others joined in perpetrating the harassment; and
- (6) whether the harassment was directed at more than one individual.

However, because the alleged misconduct must “substantially interfere” with the victim’s job performance, “sexual flirtation or innuendo, even vulgar language that is trivial or merely annoying, would probably not establish a hostile environment.” In addition, “the harasser’s conduct should be evaluated from the objective standard of a ‘reasonable person.’”<sup>13</sup>

In 1999, the EEOC rescinded the employer liability rules of these earlier documents, in line with the *Faragher* and *Ellerth* decisions discussed below. The latest guidelines apply the same liability principles to all forms of illegal harassment—whether based on race, color, sex, religion, national origin, age, or disability—prohibited by federal anti-discrimination statutes.<sup>14</sup> In terms of substantive scope, the guidance emphasizes that harassment targeted against an individual because of sex need not involve sexual comments or conduct to be actionable. For example, the EEOC states that frequent, derogatory remarks about women may constitute unlawful harassment even if they are nonsexual in nature so long as they are sufficiently pervasive and are directed only at female (or male) employees because of their sex. Both the “supervisor” and “tangible employment action” necessary for imputing vicarious employer liability are broadly defined. Thus, the former includes any individual who has, or is regarded to have, the authority to affect an employee’s work activities or status, whether directly or by recommendation to a final decision maker. The latter refers to any job detriment or benefit that results in significant change in employment status (e.g., a pay raise in exchange for sexual favors), but an unfulfilled threat by a supervisor is insufficient to be a “tangible employment action.”

In addition, the employer has a duty of “reasonable care” to prevent and remedy harassment and, unless a very small employer, must establish, disseminate, and enforce a formal anti-harassment policy and complaint procedure, among other steps. Even an employer that promptly responds to a complaint has not taken reasonable care if it ignored prior complaints by other employees, or if it fails to screen supervisory applicants for any prior record of engaging in harassment. A harassment victim, on the other hand, must take advantage of any policy and procedures provided by the employer, and may be denied full monetary relief if she unreasonably delays in complaining. An employee may reasonably be excused from complaining, or for delay in doing so, only where there appears to be a risk of retaliation or other built-in obstacles making the complaint mechanism ineffective.

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<sup>13</sup> *Id.*

<sup>14</sup> Equal Employment Opportunity Commission, Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors, June 18, 1999, <http://www.eeoc.gov/policy/docs/harassment.html>.

## Quid Pro Quo Harassment

The earliest judicial challenges involving tangible job detriment or *quid pro quo* harassment claims—filed by women who were allegedly fired for resisting sexual advances by their supervisors—were largely unsuccessful. The discriminatory conduct in such cases was deemed to arise from “personal proclivity” of the supervisor rather than “company directed policy which deprived women of employment opportunities.” Until the mid-1970s, federal district courts were reluctant either to find a Title VII cause of action or to impose liability on employers who were neither in complicity with, nor had actual knowledge of, *quid pro quo* harassment by their supervisory employees. An historic turning point came when the federal district court in *Williams v. Saxbe* held for the first time that sexual harassment was discriminatory treatment within the meaning of Title VII because “it created an artificial barrier to employment which was placed before one gender and not the other, despite the fact that both genders were similarly situated.”<sup>15</sup> Echoing earlier opinions that an employer is not liable for “interpersonal disputes between employees,” the court nonetheless refused to dismiss the complaint since “if [the alleged harassment] was a policy or practice of plaintiff’s supervisor, then it was the agency’s policy or practice, which is prohibited by Title VII.”<sup>16</sup>

Appellate tribunals in several federal circuits soon began to affirm that *quid pro quo* harassment violates Title VII where “gender is a substantial factor in the discrimination,” reversing contrary lower court holdings. For example, in *Barnes v. Costle*, the D.C. Circuit disagreed with “the notion that employment conditions summoning sexual relations are somehow exempted from the coverage of Title VII.”<sup>17</sup> Finding that it was “enough that gender is a factor contributing to the discrimination in a substantial way,” the court ruled that differential treatment based upon an employee’s rejection of her supervisor’s sexual advances violated the statute. Similarly, in *Tomkins v. Public Service Electric & Gas Co.*, the Third Circuit reversed the trial court’s denial of Title VII protection to all “sexual harassment and sexually motivated assault,” finding that where an employee’s “status as a female was a motivating factor in the supervisor’s conditioning her continued employment on compliance with his sexual demands,” actionable *quid pro quo* harassment had occurred.<sup>18</sup> “[T]o establish a *prima facie* case of *quid pro quo* harassment, a plaintiff must present evidence that she was subject to unwelcome sexual conduct, and that her reaction to that conduct was then used as the basis for decisions affecting the compensation, terms, conditions, or privileges of her employment.”<sup>19</sup>

Where the conduct of the alleged harasser is motivated by factors other than the sex of the plaintiff, however, there may be no *quid pro quo* harassment. So-called “paramour” cases are a prime example. In *Piech v. Arthur Anderson & Co.*,<sup>20</sup> the court held that the plaintiff’s inability to obtain a promotion, given instead to a female co-worker who was romantically involved with the employer, did not result from sex discrimination since all other employees, male or female, were equally affected. In contrast, the claim that females employed by the defendant had to extend sexual favors to succeed was cognizable as *quid pro quo* harassment. *Ellert v. University of Texas*

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<sup>15</sup> 413 F. Supp. 654, 657-58 (D.D.C. 1976).

<sup>16</sup> *Id.* at 660-61.

<sup>17</sup> 561 F.2d 983 (D.C.Cir. 1977).

<sup>18</sup> 568 F.2d 1044 (3d Cir. 1977).

<sup>19</sup> *Karibian v. Columbia Univ.*, 14 F.3d 773, 777 (2d Cir.), cert. denied 512 U.S. 1213 (1994).

<sup>20</sup> 841 F.Supp 825 (N.D. Ill. 1994).

similarly held that a secretary could not establish a *quid pro quo* harassment claim by alleging that her discharge resulted from her knowledge of the university dean's unwelcome advances towards an associate.<sup>21</sup> Even if the plaintiff's knowledge of the affair was the basis of action taken against her, it was not motivated by her gender and thus was not prohibited by Title VII.

While the loss of a "tangible employment benefit" has most often meant dismissal or demotion, *quid pro quo* claims may also arise from denial of career advantages—job title, duties, or assignments—of less immediate economic impact upon the employee. The Seventh Circuit, for example, has ruled that a tenured professor who was allegedly stripped of her job title and removed from academic committees because she rebuffed the sexual advances of the university provost may have a claim for *quid pro quo* sexual harassment under Title VII.<sup>22</sup> By contrast, the Fourth Circuit vacated a judgment in favor of the plaintiff in *Reingold v. Virginia*,<sup>23</sup> concluding that assigning her extra work, giving her inappropriate work assignments not included in her job description, and denying her the opportunity to attend a professional conference, did not amount to a "significant change in employment status." Generally speaking, the more remote or insubstantial the consequences of refusing a supervisor's unwelcome advances, the less likely that prerequisites for a *quid pro quo* will be found.<sup>24</sup>

The dismissal by Judge Susan Weber Wright of Paula Jones' sexual harassment lawsuit against former President Clinton squarely addressed the workplace consequences that must flow from the refusal to submit to an unwelcome sexual advance for the court to find actionable harassment.<sup>25</sup> Plaintiff Jones claimed that her career advancement had repeatedly been thwarted by her state employer as retribution for rebuffing the former Arkansas Governor. As evidence of "tangible job detriments," Jones alleged that she had been discouraged by supervisors from seeking job promotions or pay increases; that following return from maternity leave, she was transferred to a new position with fewer responsibilities; that she was effectively denied access to grievance procedures available to other sexual harassment victims; and that by physically isolating her directly outside her supervisor's office with little work to do, she was "subjected to hostile treatment having tangible effects." Judge Wright was unconvinced by the record, however, that any threat perceived by Jones during her alleged hotel meeting with the former Governor was so "clear and unambiguous" as to be a *quid pro quo* conditioning of "concrete job benefits or detriments on compliance with sexual demands." "Refusal" cases like *Jones*, calling for proof of "tangible job detriment" by plaintiffs who resist unwelcome sexual demands,<sup>26</sup> were distinguished from so-called "submission" cases, where "in the nature of things, economic harm will not be available to support the claim of the employee who submits to the supervisor's demands."<sup>27</sup>

It was widely anticipated that some further guidance on the essential character of *quid pro quo* harassment, particularly in relation to Jones' claims against President Clinton, would be

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<sup>21</sup> 52 F.3d 543 (5<sup>th</sup> Cir. 1995).

<sup>22</sup> *Bryson v. Chicago State Univ.*, 96 F.3d 912 (7<sup>th</sup> Cir. 1996). See also *Durham Life Ins. Co. v. Evans*, 166 F.3d 139, 153 (3d Cir. 1999).

<sup>23</sup> 151 F.3d 172, 175 (4<sup>th</sup> Cir. 1998).

<sup>24</sup> See *Webb v. Cardiothoracic Surgery Assoc.*, 139 F.3d 532, 539 (5<sup>th</sup> Cir. 1998).

<sup>25</sup> *Jones v. Clinton*, 16 F. Supp. 2d 1054 (E.D.Ark. 1998).

<sup>26</sup> E.g., *Cram v. Lamson & Sessions Co.*, 49 F.3d 466 (8<sup>th</sup> Cir. 1995); *Sanders v. Casa View Baptist Church*, 134 F.3d 331, 339 (5<sup>th</sup> Cir. 1998); *Gary v. Long*, 59 F.3d 1391, 1396 (D.C. Cir. 1995).

<sup>27</sup> *Karibian v. Columbia Univ.*, supra n. 19. See also *Jansen v. Packaging Corp of Am.*, 123 F.3d 490 (7<sup>th</sup> Cir. 1997).



forthcoming when the Supreme Court decided *Burlington Industries, Inc. v. Ellerth*.<sup>28</sup> That case involved a former merchandising assistant at Burlington Industries who alleged that she was the subject of repeated boorish and offensive comments and gestures by a division vice-president who implied that her response to his advances would affect her career. Ellerth detailed three incidents in which her supervisor's comments could be construed as threats to deny her tangible job benefits. A short time later, she quit her job without informing anyone in authority about the harassment, even though she was aware of Burlington's anti-harassment policy. Squarely presented by *Ellerth*, therefore, was the question of whether sexual advances by a supervisor accompanied by the threatened but not actualized loss of employment or job benefits may render an employer liable for *quid pro quo* harassment.

In fashioning an employer liability rule in *Ellerth*, the Court considered the judicial distinction between *quid pro quo* and environmental harassment to be less important than whether the claim involved a threat that had been "carried out" in fact.<sup>29</sup> Such actions, according to the Court, include instances where the subordinate employee is subjected to "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" for failing to permit sexual liberties.<sup>30</sup> Claims based on unfulfilled threats of retaliation were equated by the Court to hostile environment harassment, requiring plaintiff to prove "severe and pervasive" conduct.

Since Ellerth had not demonstrated that she was the victim of retaliation by her supervisor—in fact, she had been promoted during the period in question—there was no tangible detriment for which the employer could be held strictly liable. The case was remanded, however, for application of an alternative standard of vicarious employer liability formulated by the Court for supervisory harassment cases not involving a "tangible employment action." Under that rule, after the plaintiff proves that the supervisory misconduct is both "severe and pervasive," the employer may assert as an "affirmative defense" that its actions to prevent and remedy workplace harassment were "reasonable," while the plaintiff "unreasonably" failed to take advantage of any anti-harassment policies and procedures of the employer. Ellerth's failure to avail herself of the employer's grievance procedure likely defeated any Title VII recovery against Burlington under the second prong of this defense. The judicial task for lower courts after *Ellerth* is to construe this duty of reasonable care governing the employer's affirmative defense to liability. Other than rewarding employers for prophylactic measures aimed at workplace harassment and compelling victim participation in those efforts, *Ellerth* provides little specific guidance.

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<sup>28</sup> 524 U.S. 742 (1998).

<sup>29</sup> Under common law agency principles, the majority reasoned, an employer is generally immune from liability for the tortious conduct of its agent (the harassing supervisor in *Ellerth*), which is deemed to be "outside the scope of employment," unless the wrongdoer is "aided" in the harassment by "the existence of the agency relation." The "aided in the agency relation standard" differentiates supervisory harassment for which an employer may be automatically liable from similar acts committed by mere co-workers. And it is most clearly satisfied in those cases where the harassment culminates in a "tangible employment action."

<sup>30</sup> *Ellerth*, 524 U.S. 761.

## Hostile Environment Harassment

The earlier judicial focus on economic detriment or *quid pro quo* harassment—making submission to sexual demands a condition to job benefits—largely gave way to Title VII claims for harassment that create an “intimidating, hostile, or offensive environment.” The first federal appellate court to jettison the tangible economic loss requirement and recognize a hostile environment claim of sexual harassment was the D.C. Circuit in *Bundy v. Jackson*.<sup>31</sup> Despite the plaintiff’s failure to prove *quid pro quo* harassment—she was not fired, demoted, or denied a promotion—the court refused to permit an employer to lawfully harass an employee “by carefully stopping short of firing the employee or taking any other tangible actions against her in response to her resistance.”<sup>32</sup> Another decision important to the judicial development of sexually hostile environment law was *Henson v. Dundee*, in which the Eleventh Circuit rejected a claim of *quid pro quo* harassment but found that the employee had a right to a trial on the merits to determine whether the misconduct alleged made her job environment hostile.<sup>33</sup>

In *Meritor Savings Bank v. Vinson*,<sup>34</sup> the Supreme Court ratified the consensus then emerging among the federal circuits by recognizing a Title VII cause of action for sexual harassment. According to the Court, a “hostile environment,” predicated on “purely psychological aspects of the workplace environment,” could give rise to legal liability, and “tangible loss” of “an economic character” was not an essential element.<sup>35</sup> This holding was qualified by the Court with important reservations drawn from earlier administrative and judicial precedent. First, “not all workplace conduct that can be described as ‘harassment’ affects a term, condition, or privilege of employment within the meaning of Title VII.” For example, the “mere utterance” of an “epithet” engendering “offensive feelings in an employee” would not ordinarily be *per se* actionable, the opinion suggests. Rather, the misconduct “must be sufficiently severe or pervasive to alter the conditions of [the victim’s] employment and create an abusive working environment.”<sup>36</sup>

Second, while “voluntariness” in the sense of consent is not a defense to a sexual harassment charge,

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<sup>31</sup> 641 F.2d 934 (1981).

<sup>32</sup> *Id.* at 945.

<sup>33</sup> 682 F.2d 897 (11<sup>th</sup> Cir. 1982). In an oft-quoted passage from its opinion, the court stated:

Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. 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. A pattern of sexual harassment inflicted upon an employee because of her sex is a pattern of behavior that inflicts disparate treatment upon a member of one sex with respect to terms, conditions, or privileges of employment. There is no requirement that an employee subjected to such disparate treatment prove in addition that she suffered tangible job detriment. *Id.* at 902.

<sup>34</sup> 477 U.S. 57 (1986).

<sup>35</sup> *Id.* at 58.

<sup>36</sup> *Id.* at 62 (quoting *Henson v. Dundee*), supra n. 33 at 904. In *Meritor Savings* the complainant alleged that her supervisor demanded sexual relations over a three-year period, fondled her in front of other employees, followed her into the women’s restroom and exposed himself to her, and forcibly raped her several times. She claimed she submitted for fear of jeopardizing her employment. During the period she received several promotions which, it was undisputed, were based on merit alone so that no exchange of job advancement for sexual favors (*quid pro quo* harassment) was alleged or found.

[t]he gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome.' ... The correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary.<sup>37</sup>

Accordingly, "it does not follow that a complainant's sexually provocative speech or dress is irrelevant as a matter of law in determining whether he or she found particular sexual advances unwelcome. To the contrary, such evidence is obviously relevant."<sup>38</sup>

On the question of employer liability, the *Meritor Savings* majority held that the court below had "erred in concluding that employers are always automatically liable for sexual harassment by their supervisors."<sup>39</sup> The usual rule in Title VII cases is strict liability, and four Justices, concurring in the judgment, argued that the same rule should apply in the sexual harassment context as well. The majority disagreed, impliedly suggesting that in hostile environment cases no employer, at least none with a formal policy against harassment, should be made liable in the absence of actual or constructive knowledge.

The Supreme Court's failure to clearly define what constitutes a hostile environment in *Meritor Savings* led to frequent conflict in the lower courts, particularly as to the necessity of proving that serious psychological injury resulted from the harassing conduct.<sup>40</sup> The Court's decision in *Harris v. Forklift Systems, Inc.* revisited and offered some clarification of *Meritor Savings* in this regard.<sup>41</sup> In *Harris*, a company president had subjected a female manager to sexual innuendo, unwanted physical touching, and insults because of her gender. After two years, she left the job. In its decision, the Supreme Court decided that hostile environment sexual harassment need not "seriously affect psychological well-being" of the victim before Title VII is violated. According to the Court, *Meritor Savings* had adopted a "middle path" between condemning conduct that was "merely offensive" and requiring proof of "tangible psychological injury." Thus, a hostile environment is not created by the "mere utterance of an ... epithet which engenders offensive feelings in an employee." On the other hand, a victim of sexual harassment need not experience a "nervous breakdown" for the law to come into play. "So long as the environment would reasonably be perceived, and is perceived, as hostile or abusive, there is no need for it also to be psychologically injurious."<sup>42</sup>

*Harris* also addressed the standard of reasonableness to be applied in judging sexual harassment claims, another issue dividing the lower federal courts. The Court opted for a two-part analysis, both components of which must be met for a violation to be found. First, the conduct must create an objectively hostile work environment—"an environment that a reasonable person would find hostile and abusive." Second, the victim must subjectively perceive the environment to be abusive. The "totality of circumstances" surrounding the alleged harassment are to guide judicial inquiry, including "the frequency of the discriminatory conduct; its severity; whether it is

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<sup>37</sup> *Id.* at 68 (citing 29 C.F.R. §1604.11(a)(1985)).

<sup>38</sup> *Id.* at 69.

<sup>39</sup> *Id.* at 72.

<sup>40</sup> Compare *Rabidue v. Osceola Refining Co.*, 805 F.2d 611 (6<sup>th</sup> Cir. 1986); *Scott v. Sears Roebuck*, 798 F.2d 210 (7<sup>th</sup> Cir. 1986); and *Brooms v. Regal Tube*, 830 F.2d 1554 (11<sup>th</sup> Cir. 1987) with *Andrews v. City of Philadelphia*, 895 F.2d 1469 (3d Cir 1990); *Burns v. McGregor Electronic Indus., Inc.*, 955 F.2d 559 (8<sup>th</sup> Cir. 1992); and *Ellison v. Brady*, 924 F.2d 872 (9<sup>th</sup> Cir. 1991).

<sup>41</sup> 510 U.S. 17 (1993).

<sup>42</sup> *Id.* at 21-22.

physically threatening or humiliating or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."<sup>43</sup>

Since *Meritor Savings* and *Harris*, a broad range of hostile environment harms—frequently as concerned with lewd comments, inquiries, jokes, or displays of pornographic materials in the workplace as with overt sexual aggression—have been brought before the federal courts. *Robinson v. Jackson Shipyards, Inc.*<sup>44</sup> was among the first reported decisions to impose liability for sexual harassment based on the pervasive presence of sexually oriented materials—magazine foldouts or other pictorial depictions—and “sexually demeaning remarks and jokes” by male co-workers without allegations of physical assaults or sexual propositions directed at the plaintiff. Most courts, however, have limited recovery to cases involving repeated sexual demands or other offensive conduct.<sup>45</sup> Except for cases involving touching or extreme verbal behavior, courts are often reluctant to find that sexual derision—or claims against pornography in the workplace—is sufficient to create a hostile environment when unaccompanied by sexual demands.<sup>46</sup> The First Amendment has even been invoked to curb harassment claims founded solely on verbal insults or pictorial or literary matter, as impermissible content-based restrictions on free speech.<sup>47</sup> This tendency may be reinforced by the Court's admonition in *Oncale v. Sundowner Offshore Services* that Congress never intended Title VII to become a general “code of civility.” Conduct need not be overtly sexual, however, as other hostile conduct directed against the victim because of the victim's sex is also prohibited.<sup>48</sup> And, in line with *Meritor Savings*, evidence of a sexual harassment claimant's own provocative behavior or prior workplace conduct is generally relevant to a judicial determination of whether the defendant's conduct was unwelcome.<sup>49</sup>

Likewise, claims involving isolated or intermittent incidents have frequently been dismissed as insufficiently pervasive. A recurring point in the decisions is that “simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the ‘terms and conditions of employment.’”<sup>50</sup> In *Jones v. Clinton*, for example, the court ruled that considering the “totality of the circumstances,” an alleged hotel incident and other encounters between Paula Jones and former President (then-Governor) Clinton were not “the kind

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<sup>43</sup> *Id.* at 22-23.

<sup>44</sup> 760 F. Supp. 1486 (M.D.Fla. 1991).

<sup>45</sup> E.g. *Highlander v. K.F.C. Nat'l Mgmt. Co.*, 805 F. 2d 644 (6<sup>th</sup> Cir. 1986); *Waltman v. Int'l Paper Co.*, 875 F.2d 468, 475 (5<sup>th</sup> Cir. 1989); *King v. Bd. of Regents*, 898 F.2d 533, 537 (7<sup>th</sup> Cir. 1990). But cf. *Vance v. Southern Tel. & Tel. Co.*, 863 F.2d 1503, 1510 (11<sup>th</sup> Cir. 1989).

<sup>46</sup> E.g. *Cowan v. Prudential Ins. Co. of Am.*, 141 F.3d 751, 758 (7<sup>th</sup> Cir. 1998); *Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1017 (8<sup>th</sup> Cir. 1988); *Jones v. Flagship Int'l*, 793 F.2d 714 (5<sup>th</sup> Cir. 1986), cert. denied, 479 U.S. 1065 (1987).

<sup>47</sup> E.g. *DeAngelis v. El Paso Officers' Ass'n*, 51 F.3d 596 (5<sup>th</sup> Cir. 1995); *Johnson v. County of Los Angeles Fire Dep't*, 865 F. Supp. 1430, 1440 (C.D.Cal. 1994). But cf. *O'Rourke v. City of Providence*, 235 F.3d at 735-36; *Aguilar v. Avis Rent A Car Sys., Inc.*, 21 Cal. 4<sup>th</sup> 121 (1999), cert. denied, 529 U.S. 1138 (2000).

<sup>48</sup> See *Carter v. Chrysler Corp.*, 173 F.3d 693, 701 (8<sup>th</sup> Cir. 1999); *Andrews v. City of Philadelphia*, 898 F.2d 1469, 1485 (3d Cir. 1990); *Bell v. Crackin Good Bakers, Inc.*, 777 F.2d 1497, 1503 (11<sup>th</sup> Cir. 1985); *McKinney v. Dole*, 765 F.2d 1129, 1138 (D.C.Cir. 1985). But cf. *Brown v. Henderson*, 257 F.3d 246 (2d Cir. 2001).

<sup>49</sup> See, e.g., *Jones v. Wesco Inv. Inc.*, 846 F.2d 1154 n.5 (8<sup>th</sup> Cir. 1988); *Swentek v. USAIR, Inc.*, 830 F.2d 552, 556 (4<sup>th</sup> Cir. 1987).

<sup>50</sup> *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268 (2001). See also *Scusa v. Nestle USA Co.*, 181 F.3d 958 (8<sup>th</sup> Cir. 1999); *Lam v. Curators of the Univ. of Mo.*, 122 F.3d 654, 656-57 (8<sup>th</sup> Cir. 1997); *Sprague v. Thorn Am., Inc.*, 129 F.3d 1355, 1366 (7<sup>th</sup> Cir. 1997); *Saxton v. Am. Tel. & Tel. Co.*, 10 F.3d 526, 534 (7<sup>th</sup> Cir. 1993); *Chamberlin v. 101 Realty*, 915 F.2d 777 (1<sup>st</sup> Cir. 1990); *Drinkwater v. Union Carbide Corp.*, 904 F.2d 853 (3d Cir. 1990); *Ebert v. Lamar Truck Plaza*, 878 F.2d 338 (10<sup>th</sup> Cir. 1989).

of sustained and nontrivial conduct necessary for a claim of hostile work environment.”<sup>51</sup> In particular, the court noted that plaintiff Jones “never missed a day of work” because of the incident nor did she complain to her supervisors; never did she seek medical or psychological treatment as a consequence of alleged harassment; and that her allegations generally failed to demonstrate any adverse workplace effects. The Seventh Circuit, in another case, concluded that while an Illinois state employee “subjectively perceived her work environment to be hostile and abusive” the paucity of sexually oriented comments complained of—three suggestive comments by a co-worker over a three-month period—“were not sufficiently severe that a reasonable person would feel subjected to a hostile working environment.”<sup>52</sup> Of course, a single incident may be actionable if it is linked to a granting or denial of an employment benefit (*quid pro quo* harassment), or if the incident involves physical assault or other exceptional circumstances.<sup>53</sup> The EEOC policy statement also states that the agency “will presume that the unwelcome, intentional touching of a charging party’s intimate body areas is sufficiently offensive to alter the conditions of her working environment and constitute a violation of Title VII.”<sup>54</sup>

## Same-Sex Harassment

Title VII was interpreted early on by the courts and the EEOC to protect both men and women against workplace sexual harassment by the opposite sex. In *Meritor Savings*, the Court found that Congress intended “to strike at the entire spectrum of disparate treatment of men and women” in employment and read Title VII to prohibit discriminatory harassment by a supervisor “because of the subordinate’s sex.” Until the Supreme Court decision in *Oncale v. Sundowner Offshore Services, Inc.*, however, federal courts were sharply divided over whether the act applied when the harasser and the victim are of the same sex. Although Title VII does not prohibit direct discrimination by an employer based on an employee’s sexual orientation<sup>55</sup>—whether homosexual, bisexual, or heterosexual—several federal appellate and trial courts found that same-sex harassment was actionable in some circumstances. In effect, “because of” sex in Title VII reached all disparate treatment based on the sex or gender of the employee, without regard to whether the harasser is male or female.<sup>56</sup> The Fifth Circuit, on the other hand, concluded that same-sex harassment could never form the basis of a Title VII claim.<sup>57</sup>

In *Oncale v. Sundowner Offshore Services, Inc.*, the U.S. Supreme Court agreed with the majority view of the federal courts that “nothing in Title VII necessarily bars a claim of discrimination ‘because of ... sex’ merely because the plaintiff and the defendant (or the person charged with

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<sup>51</sup> Jones v. Clinton, 990 F. Supp. 657, 675-76 (D. Ark. 1998).

<sup>52</sup> McKensie v. Illinois Dep’t of Transp., 92 F.3d 473, 478 (7<sup>th</sup> Cir. 1996). See also Butler v. Ysleta Indep. Sch. Dist., 161 F.3d 263 (5<sup>th</sup> Cir. 1998); Penry v. Fed. Home Loan Bank of Topeka, 155 F.3d 1257 (10<sup>th</sup> Cir. 1998). But cf. Abeita v. TransAm. Mailings, 159 F.3d 246 (6<sup>th</sup> Cir. 1998).

<sup>53</sup> E.g. Howley v. Town of Stratford, 217 F.3d 148 (2d Cir. 2000); Davis v. U.S. Postal Service, 142 F.3d 1334 (10<sup>th</sup> Cir. 1998); Crisonino v. New York City Hous. Auth., 985 F. Supp. 385 (S.D.N.Y. 1997).

<sup>54</sup> Equal Employment Opportunity Commission, Policy Guidance on Current Issues of Sexual Harassment, March 19, 1990, at <http://www.eeoc.gov/policy/docs/currentissues.html>.

<sup>55</sup> Ulane v. E. Airlines, Inc., 742 F.2d 1081 (7<sup>th</sup> Cir. 1984), cert. denied, 471 U.S. 1017 (1985).

<sup>56</sup> See, e.g., Yeary v. Goodwill Indus. - Knoxville, Inc., 107 F.3d 443 (6<sup>th</sup> Cir. 1997); Baskerville v. Culligan Int’l Co., 50 F.3d 428, 430 (7<sup>th</sup> Cir. 1995); Quick v. Donaldson Co., 90 F.3d 1372 (8<sup>th</sup> Cir. 1996).

<sup>57</sup> Garcia v. Elf Atochem N. Am., 28 F.3d 449 (5<sup>th</sup> Cir. 1994).

acting on behalf of the defendant) are of the same sex.”<sup>58</sup> The case involved *quid pro quo* and hostile environment claims of a male offshore oil rig worker who alleged that he was sexually assaulted and abused by his supervisor and two male co-workers, forcing him to quit his job. Although the Court acknowledged that Congress was “assuredly” not concerned with male-on-male sexual harassment when it enacted Title VII, it found no justification in the statutory language or the Court’s precedents for excluding same-sex harassment claims from the coverage of Title VII. The opinion for the Court is notable for its emphasis on general sexual harassment principles, possibly paving the way for stricter scrutiny of sexual harassment claims in general. First, the opinion observes that federal discrimination laws do not prohibit “all verbal or physical harassment in the workplace,” only conduct that is discriminatory and based on sex. Moreover, harassing or offensive conduct “is not automatically discrimination because of sex, merely because the words used have a sexual content or connotation.” Instead, the Court emphasized, those alleging harassment must prove that the conduct was not just offensive, but “actually constituted” discrimination.<sup>59</sup> Second, reiterating *Meritor Savings* and *Harris*, only conduct so “severe or pervasive” and objectively offensive as to alter the conditions of the victim’s employment is actionable so that “courts and juries do not mistake ordinary socializing in the workplace—such as male-on-male horseplay or intersexual flirtation—for discriminatory ‘conditions of employment.’”<sup>60</sup> Another moderating aspect of the *Oncale* ruling is the Court’s obvious concern for “social context” and workplace realities when appraising all sexual harassment claims—same-sex or otherwise.<sup>61</sup>

The full implications of *Oncale* for same sex harassment and hostile environment cases remain largely unsettled. The Court clearly reinjected the element of discrimination—“because of sex”—back into harassment law, perhaps tempering a tendency on the part of some lower courts to equate offensive behavior with a hostile environment without more. Indeed, the opinion states that “Title VII does not prohibit all verbal or physical harassment” and “requires neither asexuality or androgyny in the workplace.” Because little guidance was offered, however, for determining when untoward conduct crosses the line to sex-based discrimination, lower courts have been left to grapple with the issue. The Court’s opinion suggests two possible approaches to demonstrating a nexus between sexually offensive conduct and gender discrimination.

A trier of fact might reasonably find such discrimination, for example, if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace. A same-sex harassment plaintiff may also, of course, offer direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace.

It is difficult, however, to discern how either approach would aid male same-sex plaintiffs like *Oncale* in proving discrimination “because of sex” when they are victims of harassment by other males on an oil rig or in other male-dominated workplaces.

The *Oncale* ruling also marked a general tempering of earlier decisions driving current trends in sexual harassment litigation. The numerous examples cited by the Court of “innocuous differences” in the way men and women interact might serve as the basis for future judicial

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<sup>58</sup> 523 U.S. 75, 79 (1998).

<sup>59</sup> *Id.* at 80-81.

<sup>60</sup> *Id.* at 81.

<sup>61</sup> *Id.* at 81-82.

acceptance of a wider latitude of behavior in the workplace than might otherwise have been considered permissible. The lengths to which the opinion seems to go in articulating the bounds of permissible heterosexual behavior in a same-sex harassment case reinforces this conclusion. Thus, the express approval of “intersexual flirtation” and “teasing or roughhousing” implies that a certain level of fraternization in the workplace is permissible and the consequent range of actionable conduct correspondingly reduced. In this regard, the decision’s emphasis upon “social context” may complicate the already difficult judicial task of identifying a sexually hostile work environment. Does this mean, for example, that conduct permitted in a blue-collar workplace may be actionable in a white-collar, professional environment? Thus, the decision might lead to the dismissal of cases the courts have entertained in the past. At the very least, beyond its threshold endorsement of a same-sex cause of action under Title VII, the *Oncale* decision appears to raise as many questions as it answers.

Lower courts have offered answers to some of those questions. As *Oncale* emphasizes, the object of Title VII is elimination of discrimination “because of sex.” Thus, inappropriate conduct that targets both sexes, or is inflicted regardless of sex, is not covered. The statute does not reach the “equal opportunity” or “bisexual” harasser who treats male and female employees the same, however inappropriately.<sup>62</sup> Harassment is “because of” sex only if the gender of the victim is the motivating or “but for” cause of the offensive conduct.<sup>63</sup> That offensive workplace conduct may be more offensive—or have a disparate impact—on female than male employees may not suffice if an intention to discriminate is lacking.<sup>64</sup> For example, in *Kestner v. Stanton Group, Inc.*,<sup>65</sup> a female employee complained about a male manager’s abusive demeanor and constant yelling. Although the manager had also made several sexually suggestive and crude remarks that were gender-specific, the Sixth Circuit concluded: “That [the manager] yelled at employees, male and female, and that he cursed in front of employees, male and female, does not by itself create a hostile work environment.”<sup>66</sup>

Similarly, the courts have generally reiterated the position that Title VII provides no remedy to a person claiming harassment at the hands of co-workers motivated solely by hostility to his perceived sexual orientation.<sup>67</sup> “Gender” is not to be equated with “sexual orientation” under Title VII. In *Spearman v. Ford Motor Co.*,<sup>68</sup> the plaintiff claimed that he had been subjected to vulgar and sexually explicit insults and graffiti by his co-workers who, he alleged, perceived him to be too feminine to fit the male image in a manufacturing plant. But because the employee’s problems were found to stem from an altercation over work issues and because of his apparent homosexuality, rather than sex, the Seventh Circuit dismissed the action. If the plaintiff can show that the harassment was based on his or her failure to conform to gender stereotypes, however, an action for sexual harassment may be allowed.

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<sup>62</sup> See, e.g., *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000); *Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc.*, 224 F.3d 701 (7th Cir. 2000).

<sup>63</sup> *Green v. Adm. of the Tulane Educ. Fund*, 284 F.3d 642, 659 (5th Cir. 2002); *Succar v. Dade County Sch. Bd.*, 229 F.3d 1343, 1345 (11th Cir. 2000).

<sup>64</sup> *EEOC v. Nat’l Educ. Ass’n*, 422 F.3d 840, 844 (9th Cir. 2005); *DeClue v. Cent. Illinois Light Co.*, 223 F.3d 434, 437 (7th Cir. 2001).

<sup>65</sup> 202 Fed. Appx. 56 (6th Cir. 2006).

<sup>66</sup> *Id.* at 59.

<sup>67</sup> See, e.g., *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 765 (6th Cir. 2006); *Kay v. Independence Blue Cross*, 142 Fed. Appx. 48 (3d Cir. 2005); *Higgins v. New Balance Athletic Shoe Co.*, 194 F.3d 252 (1st Cir. 1999).

<sup>68</sup> 231 F.3d 1080 (7th Cir. 2000).

The Supreme Court has denounced sexual stereotyping under Title VII in a failure to promote case,<sup>69</sup> and several federal appellate courts have applied the same rationale in the harassment setting. In *Nichols v. Azteca Restaurant Enterprises, Inc.*,<sup>70</sup> a male restaurant employee was addressed by his coworkers as a female and was taunted for his feminine manner of walk and serving customers, in addition to being subjected to derogatory comments based on his sexual orientation. The court ultimately found that the harassment at issue was closely linked to gender because the plaintiff's harassers discriminated against him for being too feminine.

In a subsequent case, however, the Ninth Circuit *en banc* largely disregarded sexual stereotypes, focusing instead on the "unwelcome physical conduct of a sexual nature" to permit a gay man to pursue a harassment claim. The plaintiff in *Rene v. MGM Grand Hotel*<sup>71</sup> was a former butler who claimed his supervisor and several fellow employees on an all male staff engaged in offensive gestures and touched his body "like they would to a woman." In this "sexual touching hostile environment" case, the appellate court ruled, the sexual orientation of the victim was "irrelevant," since "[t]he physical attacks to which Rene was subjected, which targeted body parts clearly linked to his sexuality, were 'because of ... sex.'"<sup>72</sup> Three judges concurred in the result, but wrote separately that the employee could sue for gender-stereotyping harassment as in *Nichols*. In both cases, they stated, a male employee was mocked for his mannerisms and addressed by coworkers in female terms "to remind [him] that he did not conform to their gender-based stereotypes."<sup>73</sup>

Instead of animosity or ridicule, post-*Oncale* courts have also considered issues raised by employees who are subjected to unwelcome displays of affection or sexual advances by supervisors or coworkers of the same sex. This has likewise required a judicial determination as to the motivation behind the alleged discriminatory conduct—whether based on gender or sex, which is prohibited by Title VII, or sexual orientation, which is not. In *Oncale*, the Supreme Court noted that one way by which a plaintiff can prove that an incident of same-sex harassment constitutes sex discrimination is to show that the alleged harasser made explicit or implicit proposals of sexual activity and provide "credible evidence" that the harasser was homosexual. In *Shepherd v. Slater Steels Corp.*,<sup>74</sup> the Seventh Circuit permitted the case to go to trial on evidence that the harasser's action was based on sexual attraction, such as repeated remarks that the plaintiff was a "handsome young man," coupled with other encounters of a sexual nature. The Fifth Circuit has decided that there are two types of evidence that are likely to be "especially [credible] proof" that the harasser may be a homosexual.<sup>75</sup> The first type is evidence suggesting that the harasser intended to have some kind of sexual contact with the plaintiff, rather than "merely to humiliate him for reasons unrelated to sexual interest." Second is proof that the alleged harasser made same-sex advances to others, particularly other employees. According to the court, a harasser might make sexually demeaning remarks and putdowns for sex-neutral reasons, but it is less likely that sexual advances would be made without regard to sex. Other courts have required the plaintiff to demonstrate that the harassment was motivated by sexual

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<sup>69</sup> *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

<sup>70</sup> 256 F.3d 864 (9<sup>th</sup> Cir. 2001). But cf., *Kay v. Independence Blue Cross*, 142 Fed. Appx. 48, 51 (3d Cir. 2005).

<sup>71</sup> 305 F.3d 1061 (9<sup>th</sup> Cir. 2002), cert. denied, *MGM Grand Hotel, LLC v. Rene*, 538 U.S. 922 (U.S. 2003).

<sup>72</sup> *Id.* at 1066.

<sup>73</sup> *Id.* at 1069.

<sup>74</sup> 168 F.3d 998 (7<sup>th</sup> Cir. 1999).

<sup>75</sup> *La Day v. Catalyst Tech., Inc.*, 302 F.3d 474 (5<sup>th</sup> Cir. 2002).



desire.<sup>76</sup> Suffice it to say, considerable confusion persists among the lower courts as to whether gender, sexual attraction, or conduct of a sexual nature is the key factor distinguishing discrimination based on sex from sexual orientation discrimination in the same-sex harassment context. To a large extent, the answer may depend on the facts presented by the particular case.

## Remedies

In 1991, Congress enacted amendments to the Civil Rights Act of 1964.<sup>77</sup> Of particular importance to sexual harassment claimants, the amendments established jury trials and compensatory and punitive damages as remedies for Title VII violations. Previously, Title VII plaintiffs had no right to a jury trial and were entitled only to equitable relief in the form of injunctions against future employer misconduct, reinstatement, and limited backpay for any loss of income resulting from any discharge, denial of promotion, or other adverse employment decision. Consequently, victims of alleged sexual harassment were often compelled to rely on state fair employment practices laws,<sup>78</sup> or traditional common law causes of action for assault, intentional infliction of emotional distress, unlawful interference with contract, invasion of privacy, and the like, to obtain complete monetary relief.<sup>79</sup> Section 102 of the 1991 amendments altered the focus of federal EEO enforcement from reliance on judicial injunctions, where voluntary conciliation efforts fail, to jury trials, and compensatory and punitive damages in Title VII actions involving intentional discrimination.<sup>80</sup>

Compensatory damages under the 1991 Act include “future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses.”<sup>81</sup> The compensatory and punitive damages provided by §102 are “in addition to any relief authorized by Section 706(g)” of the 1964 Civil Rights Act.<sup>82</sup> The 1991 amendments further state that “[c]ompensatory damages awarded under [§1981a] shall not include backpay, interest on backpay, or any other type of relief authorized under section 706(g).” Therefore, plaintiffs may recover damages in addition to equitable relief, including backpay. Punitive damages may also be recovered against private employers where the plaintiff can demonstrate that the employer acted “with malice or reckless indifference” to the individual’s federally protected rights. Punitive damages are not recoverable, however, against a governmental entity.<sup>83</sup> In cases where a plaintiff seeks compensatory or punitive damages, any party may demand a jury trial.<sup>84</sup>

The damages remedy under the law is limited by dollar amount, however, according to the size of the defendant employer during the 20 or more calendar weeks in the current or preceding calendar year. The sum of compensatory and punitive damages awarded may not exceed: \$50,000

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<sup>76</sup> *Dick v. Phone Directories Co.*, 397 F.3d 1256, 1264 (10<sup>th</sup> Cir. 2005).

<sup>77</sup> Civil Rights Act of 1991, P.L. 102-166, 105 Stat. 1071.

<sup>78</sup> E.g., *Wirig v. Kinney Shoe Corp.*, 448 N.W. 2d 526, 51 FEP Cases 885 (Minn. Ct.App. 1989), *aff’d in part and rev’d in part on other grounds*, 461 N.W.2d 374 (Minn. Sup.Ct. 1990).

<sup>79</sup> See, e.g., *Rojo v. Kliger*, 52 Cal.3d 65, 901 P.2d 373 (Cal. Sup.Ct. 1990); *Baker v. Weyerhaeuser Co.*, 903 F.2d 1342 (10<sup>th</sup> Cir. 1990); *Syndex Corp. v. Dean*, 820 S.W.2d 869 (Tex. App. 1991).

<sup>80</sup> 105 Stat. 1072, 42 U.S.C. §1981a.

<sup>81</sup> 42 U.S.C. §1981a(b)(3).

<sup>82</sup> *Id.* at §1981a(a)(1).

<sup>83</sup> *Id.* at §1981a(b)(1).

<sup>84</sup> *Id.* at §1981a(c).

in the case of an employer with more than 14 and fewer than 101 employees; \$100,000 in the case of an employer with more than 100 and fewer than 201 employees; \$200,000 in the case of an employer with more than 200 and fewer than 501 employees; and \$300,000 in the case of an employer with more than 500 employees.<sup>85</sup> In jury trial cases, the court may not inform the jury of the damage caps set forth in the statute.

In *Pollard v. E.I. duPont de Nemours & Co.*,<sup>86</sup> the Supreme Court significantly expanded the amount of monetary relief that may be awarded victims of sexual harassment or other forms of intentional discrimination prohibited by Title VII. Prior to that decision, there was a dispute among the circuits as to whether “front pay” in lieu of reinstatement was authorized by §706(g) of Title VII, or was included in “compensatory damages” and subject to the \$300,000 cap imposed by the 1991 Act.<sup>87</sup> Front pay is money awarded for lost compensation during the period between judgment for a Title VII plaintiff and the plaintiff’s reinstatement, or money awarded when reinstatement is impractical. When reinstatement is not immediately available, front pay is paid until the plaintiff is reinstated. In some instances, however, reinstatement may not be a viable option at all. Continuing hostility between the plaintiff and the employer or co-workers, or psychological injuries suffered as a result of discrimination, may prevent the plaintiff’s return to the workplace. Front pay in such circumstances is a substitute for reinstatement.

The plaintiff in *Pollard* had claimed that she was a victim of co-worker harassment and that her supervisors were aware of the illegal conduct. As a consequence, she was given a medical leave of absence for psychological assistance but was later fired for refusing to return to what she claimed was a hostile work environment. At trial, *Pollard* was awarded \$300,000 in compensatory damages—the maximum allowable—for emotional and psychological suffering but was denied any additional front pay because of the cap. The Sixth Circuit affirmed the result.

In a unanimous decision, the Supreme Court concluded that front pay is not an element of compensatory damages within the meaning of the 1991 Act, thus ruling that the statutory cap did not apply. Tracing the history of Title VII, the Court noted that the original statute authorized backpay awards, which had been interpreted by the courts to include front pay to a date certain in the future as an alternative to reinstatement. To limit front pay to cases where there is eventual reinstatement after judgment, reasoned the Court, would leave the most egregious offenders subject to the least sanctions. Likewise, a ruling that front pay could be considered compensation for “future pecuniary losses” subject to the damages cap would fly in the face of the congressional intent behind the 1991 Act “to expand the available remedies by permitting the recovery of compensatory and punitive damages in addition to previously available remedies, such as front pay.” The consequences of *Pollard* for employers may be considerable. The estimated monetary value of harassment or other intentional discrimination cases may be multiplied several times if juries or judges can be persuaded by plaintiffs’ attorneys to award front pay for years, or even decades, into the future.<sup>88</sup>

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<sup>85</sup> *Id.* at §1981a(b)(3).

<sup>86</sup> 532 U.S. 843 (2001).

<sup>87</sup> The Sixth Circuit in *Pollard* had held front pay subject to the cap, 213 F.2d 933, while other circuits had concluded to the contrary. E.g. *Pals v. Schepel Buick & GMC Truck, Inc.*, 220 F.3d 495 (7<sup>th</sup> Cir. 2000); *EEOC v. W&O Inc.*, 213 U.S. 600 (11<sup>th</sup> Cir. 2000).

<sup>88</sup> In a precursor to *Pollard*, for example, the Ninth Circuit affirmed a jury award of \$350,000 in compensatory damages and \$124,010.46 back pay for lost wages to a 59-year-old woman who was forced to quit her job due to posttraumatic stress syndrome caused by workplace harassment. Because she claimed that her age, stress, and background would foreclose a future job or career, the trial court also awarded the employee more than \$600,000 in (continued...)

The expansion of Title VII remedies dramatically affects the level of relief available in cases of intentional sex discrimination, where for the first time employees in the private sector have the prospect of federal compensatory and punitive damage recoveries and the right to a jury trial. The act now provides a monetary remedy for victims of sexual harassment in employment in addition to lost wages. Since harassment of the hostile environment type often occurs without economic loss to the employee, in terms of pay or otherwise, critics of the prior law charged that the sexual harassment victim was frequently without any effective federal relief. Title VII plaintiffs may now seek monetary compensation for emotional pain and suffering, and other pecuniary and nonpecuniary losses, caused by sexual harassment. Moreover, federal claims may be joined with pendent state-law claims for damages unlimited by the caps in the federal law or an election made between pursuing state and federal remedies.

## Liability of Employers and Supervisors for Monetary Damages

The addition of monetary damages to the arsenal of Title VII remedies rekindled inquiry into an employer's liability for harassment perpetrated by its supervisors and nonsupervisory employees and the personal liability of individual harassers. The *Ellerth* decision ratified the federal circuit courts, which had generally declared employers vicariously liable for *quid pro quo* sexual harassment committed by supervisors culminating in tangible job detriment.<sup>89</sup> Only those with actual authority to hire, promote, discharge, or affect the terms and conditions of employment can engage in *quid pro quo* harassment and are held to act as agents of the employer, regardless of their motivations. *Quid pro quo* harassment is viewed no differently than other forms of prohibited discrimination for which employers have routinely been held vicariously liable. Because Title VII defines employer to include "any agent" of the employer, the statute is understood to have incorporated the principle of *respondeat superior*, in effect holding "employers liable for the discriminatory [acts of] ... supervisory employees whether or not the employer knew, should have known, or approved of the supervisor's actions."<sup>90</sup> However, the suggestion in *Meritor Savings* that courts look to agency law in developing liability rules for hostile work environment led most lower federal courts to reject vicarious liability for employers lacking actual or constructive knowledge of environmental harassment perpetrated by a supervisor. Prior to *Ellerth* and *Faragher*, most courts made an employer liable for a hostile environment only if it knew or should have known about the harassment and failed to take prompt remedial action to end it.

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(...continued)

"front pay" to cover wages lost from the date of jury verdict forward for 11 years. Amtrak argued that this front pay award must be included in the \$300,000 statutory cap on damages as "future pecuniary losses" specifically covered by the statute. *Gotthardt v. Nat'l R.R.*, 191 F.3d 1148 (9<sup>th</sup> Cir. 1999).

<sup>89</sup> See *Horn v. Duke Homes*, 755 F.2d 599, 604 (7<sup>th</sup> Cir. 1985).

<sup>90</sup> *Meritor Sav.*, 477 U.S. at 70-71.

## Vicarious Employer Liability: the *Ellerth/Faragher* Affirmative Defense

A different set of liability principles was adopted by the Supreme Court for supervisory harassment in *Ellerth* (discussed above) and *Faragher v. City of Boca Raton*.<sup>91</sup> While working for the City of Boca Raton, Faragher and her female colleagues were subjected to offensive touching, comments, and gestures from two supervisors. Although Faragher did not complain to department management at the time of her employment, when she resigned from her position for reasons unrelated to the alleged harassment, Faragher sued the city under Title VII.

As in *Ellerth*, the *Faragher* Court largely abandoned the legal distinction between *quid pro quo* and hostile environment harassment, looking instead to agency principles as guides to employer liability for supervisory misconduct. The Court reiterated *Ellerth's* determination that sexual harassment by a supervisor is not within the scope of employment. But because a supervisor is “aided” in his actions by the agency relationship, a more stringent vicarious liability standard was warranted than pertains to similar misconduct by mere co-workers, where the employer is liable for negligence only if he fails to abate conditions of which he “knew or should have known.” “When a person with supervisory authority discriminates in the terms and conditions of subordinates’ employment, his actions necessarily draw upon his superior position over the people who report to him, or those under them, whereas an employee generally cannot check a supervisor’s abusive conduct the same way that she might deal with abuse from a co-worker.”<sup>92</sup>

The Court also determined, however, that public policy considerations were important in crafting employer liability rules. The congressional design behind Title VII favored both the creation of anti-harassment policies and effective grievance mechanisms by employers, and a coordinate duty on the part of employees to avoid or mitigate harm. To accommodate these Title VII policies and agency principles of employers’ vicarious liability, the Court in *Ellerth* and *Faragher* adopted a composite standard which for the first time explicitly allows employers an affirmative defense to liability for environmental harassment caused by supervisory misconduct. According to the Court:

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 preventative or corrective opportunities provided by the employer or to avoid harm otherwise. While proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the

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<sup>91</sup> 524 U.S. 775 (1998).

<sup>92</sup> *Id.* at 803.

employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense.<sup>93</sup>

The affirmative defense is unavailable, however, and employers are strictly liable for harassment of subordinate employees by their supervisors perpetrated by means of a "tangible employment action," such as discharge, demotion, or undesirable reassignment.

The affirmative defense adopted by the Court in *Ellerth* and *Faragher* imposes a duty of care on both the employer and the employees to prevent workplace harassment and to mitigate its effects. The first line of defense for the employer is to adopt and communicate to its staff and management an effective sexual harassment policy and complaint procedure. In most cases, the failure to do so—at least in the case of large employers, like the city government in *Faragher*—will result in strict liability for any harassing conduct by supervisory employees, whether or not the alleged victim suffers any adverse employment action. Questions remain, however, as to the scope of that legal obligation, particularly in relation to smaller employers, since the Court's formulation appears to leave open the possibility that corrective actions short of a formalized anti-harassment policy may be reasonable, at least in some circumstances. Thus, considerations of employer size and resources, and the structure of the workplace (e.g., whether a single location or on scattered sites) may be relevant factors.

Similarly, the latest High Court decisions place the burden on aggrieved employees to avail themselves of corrective procedures provided by the employer—thereby mitigating damages caused by the alleged harassment—or risk having their claim legally barred. However, the Court did not address whether an employee's failure to take such saving action would be deemed "unreasonable" if the complainant is able to demonstrate the inadequacy of the employer's grievance procedure, if employees had suffered retaliation for invoking the procedure in the past, or if harassing supervisors previously had not been disciplined for their action. Nor do the decisions specifically address the fate of employers denied the benefit of the affirmative defense because an employee followed the complaint procedure set forth in the employer's anti-harassment policy. Is strict employer liability the rule in such cases, or is the issue to be decided in light of the overall appropriateness of the employer's remedial response? Thus, many questions remain for lower courts to decide in regard to the employer's assertion of an affirmative defense. Consequently, while clarifying the law to some extent, it may take the courts years to flesh out the concept of "reasonable care," "correct promptly," "unreasonably failed," and "tangible employment action," all key elements in the Court's definition of the employer's affirmative defense.

Some guidance may be gleaned from later federal appeals court decisions that have grappled with issues left unresolved by *Ellerth* and *Faragher*. Much judicial attention has focused on whether conduct alleged by the plaintiff amounts to a tangible employment action, nullifying the employer's affirmative defense, and to the adequacy of any corrective action taken by the employer in response to alleged harassment. Aside from hiring, discharge, promotion or demotion, and benefits decisions having direct economic consequences, an employment action may be "tangible" if it results in a significant change in employment status.<sup>94</sup>

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<sup>93</sup> *Id.* at 807-08.

<sup>94</sup> See, e.g., *Murray v. Chicago Transit Auth.*, 252 F.3d 880 (7<sup>th</sup> Cir. 2001); *Durham Life Ins. Co v. Evans*, 166 F.3d 139, 153 (3d Cir. 1999); *Watts v. Kroger Co.*, 170 F.3d 505, 510 (5<sup>th</sup> Cir. 1999); *Sharp v. City of Houston*, 164 F.3d 923 (5<sup>th</sup> Cir. 1999); *Reinhold v. Commonwealth of Virginia*, 151 F.3d 172 (4<sup>th</sup> Cir. 1998); *Webb v. Cardiothoracic* (continued...)

In addition, most courts have read *Ellerth* to require, at a minimum, that the employer establish, disseminate, and enforce an anti-harassment policy and complaint procedure.<sup>95</sup> Beyond adopting an anti-harassment policy and procedures for its employees, the employer must undertake immediate and appropriate corrective action—including discipline proportionate to the seriousness of the offense—when it learns of a violation.<sup>96</sup> Whether the employer has responded in a prompt and reasonable manner depends on all the underlying facts and circumstances, and the harassment victim’s own conduct may be a relevant factor.<sup>97</sup> In some cases, alleged harassers who were discharged but later exonerated have sued their employers. The employer has usually prevailed, however, as long as the decision to fire or otherwise discipline the suspected perpetrator was based on a good faith belief of misconduct after an adequate investigation was performed.<sup>98</sup> Even before the High Court’s latest decisions, lower court rulings suggested that the most effective defensive strategy for employers to avoid liability for a hostile work environment was a proactive approach.<sup>99</sup> In addition, the courts have generally been reluctant to impose Title VII liability on employers who act “prophylactically” to stem harassing conditions before they begin.<sup>100</sup>

The practical lesson for employers is to formulate and communicate to employees a specific policy forbidding workplace harassment; to establish procedures for reporting incidents of harassment that bypass the immediate supervisor of the victim if he or she is the alleged harasser; to immediately investigate all alleged incidents and order prompt corrective action (including make-whole relief for the victim) when warranted; and to appropriately discipline the harasser.

Finally, the Court continued to build on its holdings in *Faragher* and *Ellerth* in *Kolstad v. American Dental Association*.<sup>101</sup> Addressing the availability of punitive damages for violations of Title VII, the Court concluded that although an employer may be vicariously liable for the misconduct of its supervisory employees, it will not be subject to punitive damages if it has made good faith efforts to comply with Title VII. The Court noted that subjecting employers that adopt antidiscrimination policies to punitive damages would undermine Title VII’s objective of encouraging employers to prevent discrimination in the workplace.

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(...continued)

Surgery Assoc., 139 F.3d 532 (5<sup>th</sup> Cir. 1998).

<sup>95</sup> See, e.g., *Durham Life Ins. Co.*, 166 F.3d at 162 (3d Cir. 1999); *Sharp*, 164 F.3d at 931-32; *Wilson v. Tulsa Junior College*, 164 F.3d 534 (10<sup>th</sup> Cir. 1998); But cf. *Hall v. Bodine Elec. Co.*, 276 F.3d 345 (7<sup>th</sup> Cir. 2002).

<sup>96</sup> See *Skidmore v. Precision Printing and Packaging, Inc.*, 188 F.3d 606 (5<sup>th</sup> Cir. 1999); *Mockler v. Multnomah County*, 140 F.3d 808 813 (9<sup>th</sup> Cir. 1998).

<sup>97</sup> See, e.g., *Gawley v. Indiana Univ.*, 276 F.3d 301 (7<sup>th</sup> Cir. 2002); *Jackson v. Arkansas Dep’t of Educ.*, 272 F.3d 1020 (8<sup>th</sup> Cir. 2001); *Indest v. Freeman Decorating, Inc.*, 164 F.3d 258 (5<sup>th</sup> Cir. 1999); *Coates v. Sundor Brands, Inc.*, 164 F.3d 1361 (11<sup>th</sup> Cir. 1999); *Van Zant v. KLM Royal Dutch Airlines*, 80 F.3d 708, 715 (2d Cir. 1996); *Steiner v. Showboat Operating Co.*, 25 F.3d 1459 (9<sup>th</sup> Cir. 1994), cert. denied, 513 U.S. 1082 (1995).

<sup>98</sup> See, e.g., *Cotran v. Rollins Hudig Hall Int’l, Inc.*, 17 Cal. 4<sup>th</sup> 93 (1998); *Morrow v. Wal-Mart Stores, Inc.*, 152 F.3d 559 (7<sup>th</sup> Cir. 1998); *Waggoner v. City of Garland Tex.*, 987 F.2d 1160, 1165 (5<sup>th</sup> Cir. 1993).

<sup>99</sup> See, e.g., *McKenzie v. Illinois Dep’t of Transp.*, 92 F.3d 473 (7<sup>th</sup> Cir. 1996).

<sup>100</sup> See, e.g., *Farley v. Am. Cast Iron Pipe Co.*, 115 F.3d 1548 (11<sup>th</sup> Cir. 1997); *Gary v. Long*, 59 F. 3d 1391 (D.C. Cir 1995).

<sup>101</sup> 527 U.S. 526 (1999).

## Constructive Discharge

In 2004, the Supreme Court resolved a conflict among the federal circuits concerning the defenses, if any, that may be available to an employer against an employee's claim that she was forced to resign because of "intolerable" sexual harassment at the hands of a supervisor. In *Pennsylvania State Police v. Suders*,<sup>102</sup> the plaintiff claimed that the tangible adverse action was supervisory harassment so severe that it drove the employee to quit, a constructive discharge in effect. The Court accepted the theory of a constructive discharge as a tangible employment action, but it also set conditions under which the employer could assert an affirmative defense and avoid strict liability under Title VII. The issue is of key importance for determining the scope of employers' vicarious liability in "supervisory" sexual harassment cases alleging a hostile work environment.

As noted, *Farager* and *Ellerth* held employers strictly liable for a sexually hostile work environment created by a supervisor, when the challenged discrimination or harassment results in a "tangible employment action." The Court defined that term categorically to mean any "significant change in employment status" that may—but not always—result in economic harm. Specifically, included were "hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."<sup>103</sup> However, a "constructive discharge," where the employee quits, claiming that conditions are so intolerable that he or she was effectively "fired," presented an unresolved issue. Could an employer, faced with a claim of constructive discharge, still assert the *Ellerth/Farager* defense?

The constructive discharge doctrine originated in federal labor law and was later transposed by judicial interpretation to employment discrimination cases. Basically, the courts have held that an employee alleging a constructive discharge must demonstrate the concurrence of two factors: (1) the employee suffered harassment or discrimination so intolerable that a reasonable person in the same position would have felt compelled to resign and (2) the employee's reaction to the workplace situation was reasonable given the totality of circumstances. Because of its direct economic harm on employees, the Third Circuit in *Suders* joined the Eighth Circuit,<sup>104</sup> concluding that constructive discharge, if proven, is the functional equivalent of an actual dismissal and amounts to a tangible employment action. Taking the opposite position, the Second and Sixth Circuits had decided that a voluntary resignation, as opposed to a dismissal, was never the kind of official action that deprived the employer of its legal defenses.<sup>105</sup> The opposing circuits refused to view constructive discharge as a tangible employment action because it is a "unilateral" act of the employee that is neither instigated nor ratified by the employer.

In *Suders*, the Court applied the framework of its 1998 rulings to stake out a middle ground between the conflicting approaches to constructive discharge taken by the courts of appeals. The only real difference between the harassment in *Ellerth/Farager* and this case was one of degree; that is, *Suders* presented a "worst case" scenario, or harassment "rached up to the breaking point." But a constructive discharge claim requires more than a pattern of severe or pervasive workplace abuse as would satisfy the legal standard for ordinary harassment. Employees

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<sup>102</sup> 542 U.S. 129 (2004).

<sup>103</sup> *Ellerth*, 524 U.S. at 761.

<sup>104</sup> *Jaros v. Lodge Net Enter. Corp.*, 294 F.3d 960 (8<sup>th</sup> Cir. 2002).

<sup>105</sup> *Turner v. Dowbrands, Inc.*, No. 99-3984, 2000 U.S. App. LEXIS 15733 (6<sup>th</sup> Cir. 2002); *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283 (2d Cir. 1999), cert. denied, 529 U.S. 1107 (2000).

advancing “compound” claims must also prove that the abusive working environment became so intolerable that a reasonable person would have felt compelled to resign. Such objectively intolerable conditions could result from co-worker conduct, unofficial supervisory act, or “official” company acts. The Court’s earlier decisions applied agency principles to define employer vicarious liability for a supervisor’s harassment of subordinates. Only when supervisory misconduct is “aided by the agency relation,” as evidenced by a tangible or “official act of the enterprise,” is the employer’s responsibility so obvious as to warrant strict liability. When no tangible employment action is taken, the basis for imputing blame on the employer is less evident, and the focus shifts to the Title VII policy of prevention. The employer may then defeat vicarious liability by showing that it had reasonable anti-harassment procedures in place that the employee unreasonably failed to utilize.

Ultimately, the Court held that Title VII encompasses employer liability for constructive discharge claims attributable to a supervisor, but ruled that an “employer does not have recourse to the *Ellerth/Faragher* affirmative defense when a supervisor’s official act precipitates the constructive discharge; absent such a ‘tangible employment action,’ however, the defense is available to the employer whose supervisors are charged with harassment.”<sup>106</sup> In recognizing hostile environment constructive discharge claims, *Suders* enhanced Title VII protection for employees who quit their jobs over intense sexual harassment by a supervisor. But the decision also makes it easier for an employer to defend against such claims by showing that it has reasonable procedures for reporting and correcting harassment of which the employee failed to avail herself. Only “if the plaintiff quits in reasonable response to an employer-sanctioned adverse action officially changing her employment status or situation, for example, a humiliating demotion, extreme cut in pay, or transfer to a position in which she would face unbearable working condition,” is the employer made strictly liable for monetary damages or other Title VII relief.<sup>107</sup>

Moreover, even where there has been a tangible employment action, coupled with a constructive discharge or resignation, the employer may have defenses available. First, the employer may argue that the harassing conduct did not occur as alleged, or was not sufficiently severe, pervasive, or unwelcome to meet standards for a Title VII violation. Second, if the tangible employment action is shown to be unrelated to the alleged harassment, or is taken for legitimate non-discriminatory reasons—particularly, if by persons other than the alleged harasser—the employer might escape liability. Finally, the employer might be able to demonstrate that, whatever form the underlying supervisory harassment may take, it did not meet the standard for constructive discharge: “so intolerable that a reasonable person would have felt compelled to resign.” But *Suders* also makes it more difficult to obtain summary judgment and avoid jury trials in sexual harassment cases involving constructive discharge claims. Under the decision, if there is any real dispute about whether the employee suffered a tangible employment action, the employer may not rely on the affirmative defense to obtain summary judgment.

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<sup>106</sup> *Suders*, 542 U.S. at 140-141.

<sup>107</sup> *Id.* at 209.



## Personal Liability of Harassing Supervisors and Co-workers

Because the term “agent” is included within the definition of “employer,” some division of judicial opinion initially existed regarding the personal liability of individual supervisors and co-workers for hostile environment harassment or other discriminatory conduct. However, all of the federal circuit courts to address the question eventually interpreted the term “agent” in the statutory definition as merely incorporating *respondeat superior* and refused to impose personal liability on agents.<sup>108</sup> These courts also note the incongruity of imposing personal liability on individuals while capping compensatory and punitive damages based on employer size, as the statute does, and exempting small businesses that employ less than 15 persons from Title VII altogether.

## Retaliation

Under Title VII, it is unlawful for employers to discriminate or retaliate against an employee “because he has opposed any practice made an unlawful employment practice [under Title VII] ... or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII].”<sup>109</sup> The scope of this retaliation provision was the subject of judicial debate for a number of years. In 2006, however, the Supreme Court issued its decision in *Burlington Northern and Santa Fe Railway Co. v. White*,<sup>110</sup> a case that involved a plaintiff who alleged that her employer had unlawfully retaliated against her by reassigning her to a less desirable position after she had made several complaints about sexual harassment on the job.

In a 9-0 decision with one justice concurring, the Court held that the statute’s retaliation provision encompasses any employer action that “would have been materially adverse to a reasonable employee or job applicant.”<sup>111</sup> This standard, which is much broader than a standard that would have confined the retaliation provision to actions that affect only the terms and conditions of employment, generally makes it easier to sue employers if they retaliate against workers who complain about discrimination. Under the Court’s interpretation, employees must establish only that the employer’s actions might dissuade a worker from making a charge of discrimination. This means that an employee may successfully sue an employer for retaliation even if the employer’s action does not actually result in an adverse employment action, such as being fired or losing wages.

In 2008, the Court issued a decision in *Crawford v. Metropolitan Government of Nashville and Davidson County*,<sup>112</sup> a case in which the plaintiff alleged that her participation in a sexual

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<sup>108</sup> *Lissau v. S. Food Serv.*, 159 F.3d 177, 181 (4<sup>th</sup> Cir. 1998); *Wathen v. GE*, 115 F.3d 400, 405 (6<sup>th</sup> Cir. 1997); *Dici v. Pennsylvania*, 91 F.3d 542, 552 (3<sup>d</sup> Cir. 1996); *Haynes v. Williams*, 88 F.3d 898 (10<sup>th</sup> Cir. 1996); *Tomka v. Seiler Corp.*, 66 F.3d 1295 (2<sup>d</sup> Cir. 1995); *EEOC v. AIC Sec. Investigations, Ltd.*, 55 F.3d 1276 (7<sup>th</sup> Cir. 1995); *Gary v. Long*, 59 F.3d 1391 (D.C. Cir. 1995), cert. denied, 516 U.S. 1011 (1995); *Grant v. Loan Star Co.*, 21 F.3d 649 (5<sup>th</sup> Cir. 1994), cert. denied, 513 U.S. 1015 (1994); *Miller v. Maxwell’s Int’l Inc.*, 991 F.2d 583 (9<sup>th</sup> Cir. 1993), cert. denied, 510 U.S. 1109 (1994); *Busby v. City of Orlando*, 931 F.2d 764 (11<sup>th</sup> Cir. 1991).

<sup>109</sup> 42 U.S.C. §2000e-3(a).

<sup>110</sup> 548 U.S. 53 (2006).

<sup>111</sup> *Id.* at 57.

<sup>112</sup> 555 U.S. 271 (2008).

harassment investigation against her supervisor resulted in her termination. Although the plaintiff cooperated in the investigation and provided testimony regarding explicit comments and actions made by her boss, the fact that she had not filed the sexual harassment complaint or other charges with the Equal Employment Opportunity Commission (EEOC) led the lower court to rule that she was not covered under Title VII's retaliation provision. In reversing the decision, the Court held that Title VII's retaliation provision encompasses retaliation against "an employee who speaks out about discrimination not on her own initiative, but in answering questions during an employer's internal investigation."<sup>113</sup> The Court emphasized that this result would prevent employers from undermining the purpose of Title VII by silencing employees who might fear being penalized if they reported discrimination during the course of an investigation.<sup>114</sup>

## Sexual Harassment in the Schools

Title IX of the 1972 Education Amendments provides that "[no] person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance,"<sup>115</sup> and the statute has been interpreted to provide a basis for challenging sexual harassment in classrooms and on campuses. The Court's recent decisions involving Title IX address various issues, including employer liability and the availability of damages and other statutory remedies.

Under Title IX, student victims of any form of sex discrimination, including sexual harassment, may file a written complaint with the Office of Civil Rights (OCR) for administrative determination and possible imposition of sanctions—including termination of federal funding—upon the offending educational institution.<sup>116</sup> In addition, school personnel who harass students may be sued individually for monetary damages and other civil remedies under 42 U.S.C. §1983, which prohibits the deprivation of federally protected rights under "color of law."

In addition to making administrative sanctions available, Title IX provides student victims with an avenue of judicial relief. In *Cannon v. University of Chicago*,<sup>117</sup> the Supreme Court ruled that an implied right of action exists under Title IX for student victims of sex discrimination who need not exhaust their administrative remedies before filing suit.<sup>118</sup> However, the availability of monetary damages under Title IX remained uncertain until *Franklin v. Gwinnett County Public Schools*.<sup>119</sup> In *Franklin*, a female high school student brought an action for damages under Title IX against her school district alleging that she had been subjected to sexual harassment and abuse by a teacher. Although the harassment became known and an investigation was conducted, teachers and administrators did not act and the petitioner was subsequently discouraged from pressing charges. The Court, which found that sexual harassment by a teacher constituted

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<sup>113</sup> *Id.* at 849.

<sup>114</sup> In a related development in a Title VII case that involved allegations of sex discrimination but not sexual harassment, the Court determined that Title VII protects third parties who have not personally engaged in protected activity from retaliation by employers. *Thompson v. N. Am. Stainless, LP*, 131 S. Ct. 863 (2011).

<sup>115</sup> 20 U.S.C. §1681(a).

<sup>116</sup> 34 C.F.R. §100.7(d)(1)(1995).

<sup>117</sup> 441 U.S. 677 (1979).

<sup>118</sup> A private right of action allows an individual to sue in court for violations under a statute rather than wait for a federal agency to pursue a complaint administratively.

<sup>119</sup> 503 U.S. 60 (1992).

discrimination on the basis of sex, held that damages were available to the sexual harassment victim if she could prove that the school district had intentionally violated Title IX.

After *Franklin*, it was clear that sexual harassment by a teacher constituted sex discrimination, but the extent to which school districts could be held liable for misconduct by its employees was less clear. The appropriate standard for measuring a school district's liability for sexual abuse of a student by a teacher remained unsettled until the Supreme Court ruling in *Gebser v. Lago Vista Independent School District*.<sup>120</sup> In *Gebser*, the Supreme Court answered the question of what standard of liability to apply to school districts under Title IX where a teacher harasses a student without the knowledge of school administrators. Jane Doe, a thirteen year old student, had been sexually abused by a teacher, but there was no evidence that any school official was aware of the situation until after it ended. Instead of strict liability or theory of constructive notice, Doe relied on the familiar common law principle later applied by the Court in *Ellerth* and *Faragher* that an employer is vicariously liable for an employee's injurious actions, even if committed outside the scope of employment, if the employee "was aided in accomplishing the tort by the existence of the agency relationship."<sup>121</sup> According to this theory, the harasser's status as a teacher made his abuse possible by placing him in an authoritative position to take advantage of his adolescent student. Because teachers are almost always "aided" by the agency relationship, however, and application of the common law rule "would generate vicarious liability in virtually every case of teacher-student harassment," the Fifth Circuit rejected the approach in favor of its actual knowledge standard.

In a 5 to 4 opinion, the Supreme Court affirmed, avoiding any comparison to the strict liability and affirmative defense framework promulgated for Title VII employment law. It held that a student who has been sexually harassed by a teacher may not recover damages against the school district "unless an official of the school district who at a minimum has authority to institute corrective measures on the district's behalf has actual knowledge of, and is deliberately indifferent to, the teacher's misconduct."<sup>122</sup> The differing legislative constructs of Title VII and Title IX, and an apparent reluctance to impose excessive financial liability on schools, appeared to drive the Court's decision.

Unlike Title VII, Title IX has been judicially determined to provide only an "implied" private right of action and rather than a statute of general application, it imposes legal obligations only as a condition to the receipt of federal financial assistance. These distinctions persuaded the Court to "shape a sensible remedial scheme that best comports with the statute" and its legislative history.<sup>123</sup> In analyzing congressional intent, the Court examined the statutory provisions for Title IX enforcement by means of federal agency termination of federal funds to noncomplying school districts following notice and opportunity to be heard. Given the express notice requirement of the statute, the majority felt it unfair to impose a vicarious or constructive notice standard on school districts in private lawsuits. Moreover, there was concern that the award of damages in any given case might unfairly exceed the amount of federal funding actually received by the school. Consequently, there was no actionable Title IX claim since responsible school administrators were without notice or "actual knowledge" of the alleged sexual relationship. The Court

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<sup>120</sup> 524 U.S. 274 (1998).

<sup>121</sup> *Doe v. Lago Vista Indep. Sch. Dist.*, 106 F.3d 1223, 1225 (5<sup>th</sup> Cir. 1997) (citing Restatement (Second) of Agency §219(2)(d)(1958)).

<sup>122</sup> *Gebser*, 524 U.S. at 277 (1998).

<sup>123</sup> *Id.* at 284.

summarily noted that Lago Vista's failure to promulgate and publicize an anti-harassment policy and grievance procedure, as mandated by U.S. Department of Education regulations, established neither actual notice, deliberate indifference, or even discrimination under Title IX.

*Davis v. Monroe County Board of Education*, decided in 1999, addressed the standard of liability that should be imposed on school districts to remedy student-on-student harassment.<sup>124</sup> The plaintiff in *Davis* alleged that her fifth-grade daughter had been harassed by another student over a prolonged period—a fact reported to teachers on several occasions—but that school officials had failed to take corrective action. A sharply divided Court determined that the plaintiff had stated a Title IX claim. Because the statute restricts the actions of federal grant recipients, however, and not the conduct of third parties, the Court again refused to impose vicarious liability on the school district. Instead, “a recipient of federal funds may be liable in damages under Title IX only for its own misconduct.”<sup>125</sup> School authorities' own “deliberate indifference” to student-on-student harassment could violate Title IX in certain cases. Thus, the Court held, where officials have “actual knowledge” of the harassment, where the “harasser is under the school's disciplinary authority,” and where the harassment is so severe “that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school,” the district may be held liable for damages under Title IX.<sup>126</sup>

In qualifying the *Davis* standard, the Court suggested that student harassment may be far more difficult to prove than sexual harassment in employment. Beyond requiring “actual knowledge,” the Court cautioned that “schools are unlike the adult workplace” and disciplinary decisions of school administrators are not to be “second guess[ed]” by lower courts unless “clearly unreasonable” under the circumstances. Additionally, the majority emphasized that “damages are not available for simple acts of teasing and name-calling among school children, even where these comments target differences in gender.”<sup>127</sup> In effect, *Davis* left to school administrators the task of drawing the line between innocent teasing and actionable sexual harassment—a difficult and legally perilous task at best.

More recently, the Court issued a decision in *Fitzgerald v. Barnstable School Committee*,<sup>128</sup> a case in which the Court considered whether Title IX provides the exclusive statutory remedy for unlawful sex discrimination in the education context. The lower court, concluding that Title IX was the exclusive statutory remedy, had rejected a claim that the original plaintiffs filed under 42 U.S.C. §1983 for violations of Title IX and the Equal Protection Clause of the Constitution.<sup>129</sup> In

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<sup>124</sup> 526 U.S. 629 (1999). Prior to *Davis*, the federal appeals courts were divided between those that refused to award Title IX damages or injunctive relief against a school district for student-on-student or “peer” sexual harassment, *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006 (5<sup>th</sup> Cir.), cert. denied 519 U.S. 861 (1996), *Davis v. Monroe*, 120 F.3d 1390 (11<sup>th</sup> Cir. 1997), and others that had applied agency principles and Title VII legal standards to hold school officials liable for failure to take reasonable steps to prevent known hostile environment harassment by students or other third parties. *Murray v. New York Univ. Coll. of Dentistry*, 57 F.3d 243, 248-50 (2d Cir. 1995); *Brown v. Hot, Sexy and Safer Prod., Inc.*, 68 F.3d 525, 540 (1<sup>st</sup> Cir. 1995), cert. denied 516 U.S. 1159 (1996); and *Clyde K. v. Puyallup Sch. Dist.*, 35 F.3d 1396, 1402 (9<sup>th</sup> Cir. 1994).

<sup>125</sup> *Davis*, 526 U.S. at 640.

<sup>126</sup> *Id.* at 650.

<sup>127</sup> *Id.* at 652.

<sup>128</sup> 555 U.S. 246 (2008).

<sup>129</sup> 42 U.S.C. §1983, which provides a remedy for deprivation of rights under color of state law, creates no new substantive rights but rather provides relief where state law is inadequate. Thus, individuals who sue under §1983 must find a source of rights elsewhere. As a result, §1983 is often used to enforce constitutional rights, such as the right to equal protection.

a unanimous decision, the Court reversed, holding that “Title IX was not meant to be an exclusive mechanism for addressing gender discrimination in schools, or a substitute for § 1983 suits as a means of enforcing constitutional rights.”<sup>130</sup> As a result, plaintiffs may file claims related to sex discrimination in education under both statutes in the future.

In 2001, OCR revised its Title IX guidance in light of Supreme Court decisions regarding school liability.<sup>131</sup> The guidance is intended to illustrate the principles that a school should use to recognize and effectively respond to sexual harassment of students in its program.

More recently, in the wake of several high-profile incidents involving student bullying, OCR released additional guidance that discusses when student bullying may violate federal education anti-discrimination laws and that clarifies a school’s obligation to combat such bullying.<sup>132</sup> OCR also released separate guidance that specifically addresses the circumstances under which the harassment of gay students may be prohibited by law. Although discrimination on the basis of sexual orientation is not expressly forbidden by statute, in some cases, sexual orientation discrimination may also be a form of sex discrimination that violates Title IX.<sup>133</sup> As noted above, in the employment context, the Supreme Court has recognized that sex discrimination may encompass same-sex sexual harassment, meaning that sex discrimination is prohibited even if the harasser and victim are members of the same sex.<sup>134</sup> The Court has also ruled that gender stereotyping is a form of discrimination on the basis of sex.<sup>135</sup> Therefore, if a student who is gay is being harassed because of a failure to conform to gender stereotypes, such harassment is prohibited by Title IX. It is important to note, however, that Title IX prohibits sexual orientation discrimination only when it constitutes a form of sex discrimination. Thus, the statute may not prohibit all forms of sexual orientation discrimination or harassment of students.<sup>136</sup>

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<sup>130</sup> *Fitzgerald*, 555 U.S. at 258.

<sup>131</sup> Department of Education, Revised Sexual Harassment Guidance: Harassment of Students By School Employees, Other Students, or Third Parties, January 19, 2001, at <http://www.ed.gov/about/offices/list/ocr/docs/shguide.html>.

<sup>132</sup> United States Department of Education, *Office for Civil Rights*, Dear Colleague Letter, October 26, 2010, <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html>.

<sup>133</sup> *See, e.g., Ray v. Antioch Unified Sch. Dist.*, 107 F. Supp. 2d 1165 (N.D. Cal. 2000); *Doe v. Perry Cmty. Sch. Dist.*, 316 F. Supp. 2d 809 (S.D. Iowa 2004).

<sup>134</sup> *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75 (1998).

<sup>135</sup> *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

<sup>136</sup> For more information on sexual harassment in schools, see OCR’s policy guidance on the issue. U.S. Department of Education, *Office for Civil Rights*, Revised Sexual Harassment Guidance: Harassment of Students By School Employees, Other Students, or Third Parties, January 2001, <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.html#Guidance>.

## **Author Contact Information**

(name redacted)  
Legislative Attorney  
[redacted]@crs.loc.gov, 7-....

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