EMPLOYER VICARIOUS LIABILITY FOR SEXUAL HARASSMENT UNDER TITLE VII — A CASE FOR STRICT LIABILITY

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In June of 1986, the Supreme Court of the United States decided the landmark case of *Meritor Savings Bank v. Vinson*, 477 US 57 (1986) holding, *inter alia*, that "a claim of 'hostile environment' sex discrimination is actionable under Title VII...."[(1)]

The Supreme Court, however, refused "to impose absolute liability on employers for the acts of their supervisors, regardless of the circumstances of a particular case."[(2)] This holding resulted in considerable confusion in the lower federal courts as to when an employer might be vicariously liable for the acts of its supervisory employees.

Two Supreme Court decisions handed down in June of 1998, *Burlington Industries v. Ellerth*, 66 LW 4634 (6-30-98), and *Faragher v. City of Boca Raton*, 66 LW 4643 (6-30-98),[(3)] revisit the *Meritor* decision and attempt to resolve the question of when an employer can be

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(1) Meritor, 477 US, at 63. Although discussed later in this article, a hostile environment results when the victim is subjected to sexually oriented behavior that is severe and constant enough to create an objectively abusive work environment. The invidious evil of a hostile environment has been explained as follows:

"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."

Id., at 66, quoting from *Henson v. Dundee*, 682 F.2d 897, 902 (CA 11, 1982).

(2) *Id.*

(3) The *Burlington Industries* and *Faragher* cases involved claims brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*, while *Gebser* dealt with a claim brought pursuant to Title IX of the Education Amendments of 1972, 20 U.S.C. §1681 *et seq.*

held vicariously liable for sexual harassment committed by its supervisory personnel. This article will review the liability analysis set forth in *Burlington Industries* and *Faragher* decisions and then argue in favor of a "bright line" strict liability standard.

1. The EEOC Guidelines and the *Meritor* Decision

Title VII of the Civil Rights Act of 1964 prohibits discrimination "against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of ...sex."[4] The Equal Employment Opportunity Commission, the federal agency charged by Congress with monitoring and implementing equality in the workplace, promulgated Guidelines on Discrimination Because of Sex in 1985.[5] Section 1604.11 details the EEOC's position with respect to sexual harassment in the workplace and provides, in relevant part, as follows:

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

The Guidelines clearly prohibit not only the so-called "*quid pro quo*" form of sexual harassment (i.e., sex is demanded in return for some employment benefit or favor, or under threat of retaliation), but also outlaw behavior creating a hostile working environment. The Guidelines

[4] 42 USC §2000e-2(a)(1). Discrimination on the basis of race, color, religion and national origin are also prohibited under Title VII.

[5] The EEOC issued Guidelines in 1980 declaring sexual harassment to be a form of sex discrimination under Title VII. As the Supreme Court explained in *Meritor*, the EEOC Guidelines represent an administrative interpretation of Title VII and, as such, are not binding on the federal courts. 477 US, at 65.

also set forth various standards of employer liability for sexual harassment.[6]

With respect to liability for sexual harassment by supervisory employees, the Guidelines provide, in relevant part, that:

> "(c) Applying general Title VII principles, an employer ...is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence."

Thus, the EEOC has taken the unambiguous position that an employer should be held strictly liable for the acts of supervisors who engage in practices constituting sexual harassment. Under the Guidelines, neither the existence of an anti-harassment policy nor the absence of knowledge (actual or constructive) insulates the employer from vicarious liability. As will be seen later, the position of the EEOC as expressed in the Guidelines has definitely not been accepted by the Supreme Court in the *Burlington Industries* and *Faragher* cases.

Even before these two recent Supreme Court decisions, the EEOC's position with respect to vicarious liability of employers for the acts of their supervisors was called into question in the *Meritor* case. The alleged facts in *Meritor* were straightforward and representative of a particularly egregious pattern of sexual harassment. Mechelle Vinson was hired by Meritor Savings Bank as a teller-trainee. Her supervisor, Sidney Taylor, was a vice president and manager of the branch where

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[6] Under the EEOC Guidelines an employer will be liable for sexual harassment between fellow employees where the employer "knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action." 29 CFR §1604.11(d). An employer can also be liable for sexual harassment committed by non-employees under the same standard as set forth immediately above. However, in such cases, the EEOC will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees. 29 CFR §1604.11(e). This article will not address the issue of vicarious liability for sexual harassment committed by fellow employees or by persons outside the employ of the company.

Vinson was employed. Vinson worked for the bank for a period of four years and was promoted, on the basis of merit, from her original entry-level position to assistant branch manager. However, when she notified the bank that she would be taking sick leave for an indefinite period of time, the bank reacted by firing her. Vinson filed suit alleging that she had been harassed repeatedly by Taylor during her four years at the bank.

The sexual harassment began when Taylor invited Vinson to dinner shortly after her probationary period at the bank had ended. Vinson accepted Taylor's invitation and during dinner Taylor suggested they go to a motel afterwards for sex. Vinson testified that she eventually accepted Taylor's request because she was afraid of losing her job. This first sexual encounter was not the last, and testimony indicated that over the ensuing years Vinson and Taylor had sexual relations 40 to 50 times both during and after working hours.[7] Vinson admitted that she never reported any of these events to anyone at the bank, even though the bank had a complaint procedure in place, out of fear of retaliation by Taylor.

The District Court found in favor of the bank on two grounds. First, the District Court concluded that the sexual relationship between Vinson and Taylor was voluntary and did not impact on her continued employment at the bank. Second, because the bank had an established complaint procedure that admittedly went used by Vinson, the bank did not have notice of the sexual harassment. In other words, without actual knowledge (or sufficient information to constitute constructive knowledge) of the sexual harassment, an employer should not be held liable for the actions of one of its supervisors.

On appeal the Court of Appeals for the District of Columbia reversed the decision of the District Court. The Court of Appeals concluded that the facts alleged by Vinson were of a nature and magnitude to give rise to a claim of hostile environment sexual harassment. Since the District Court did not consider Vinson's claim of sex discrimination in terms of the existence of a hostile environment, the case should be remanded to the District Court for further proceedings. Moreover,

[7] 477 US, at 60.

the fact that the relationship might have been voluntary did not dispose of the issue of actionable sexual harassment in the opinion of the Court of Appeals. In the Court's view, when tolerating sexual harassment is made a condition of employment, it is irrelevant to consider whether or not the victim voluntarily tolerated the offensive sexual harassment. Finally, the Court of Appeals held that the bank should be liable for the actions of its supervisory personnel whether or not the bank had knowledge of the sexual harassment. In the words of the Court of Appeals, "the mere existence—or even the appearance—of a significant degree of influence in vital job decisions gives any supervisor the opportunity to impose on employees."[8]

The Supreme Court granted *certiorari* and affirmed the decision of the Court of Appeals, but on different grounds. The Court did not seriously question the view that a sexually hostile work environment can give rise to a cause of action under Title VII. This was the position espoused by the EEOC and the lower federal courts that had dealt with the issue, including the Court of Appeals in the *Meritor* case. Indeed, the Supreme Court went a step further and conclusively held that a victim of sexual harassment need not show any specific detrimental economic effect so long as the hostile environment is "sufficiently severe and pervasive" so as "'to alter the conditions of [the victim's] employment....'"[9] Where the Court differed with the Court of Appeals was over the issue of the proper standard of employer liability, to the extent that the Court of Appeals had agreed with the EEOC Guidelines holding employers strictly liable for the actions of their supervisory employees.

The Supreme Court in *Meritor* nevertheless declined "to issue a

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[8] *Id.*, at 63, quoting from 753 F2d 141, 150 (CADC, 1985).

[9] *Id.*, at 67, quoting from *Henson v. Dundee*, 682 F2d 897, 904 (CA 11, 1982). The severe and pervasive requirement in hostile environment cases is intended to screen out complaints based on isolated behavior, such as lewd and suggestive comments that are not repeated. The hostile environment must be such that it alters the conditions of employment. The Supreme Court in *Harris v. Forklift Systems, Inc.*, 510 US 17, 21-22 (1993) made clear that economic and tangible harm are not required to sustain a Title VII hostile environment claim so long as the situation is "objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so."

definitive rule on employer liability"[10] stating only "that the Court of Appeals erred in concluding that employers are automatically liable for sexual harassment by their supervisors."[11] At the same time, the Court rejected the argument that the absence of notice should insulate the bank as Vinson's employer from liability for the actions of Taylor. The bank should not be relieved of liability because it had a complaint procedure and a general policy against sex discrimination. Nor should the bank escape liability because of the failure of Vinson to file a complaint under the procedure. The Court reasoned that the complaint procedure would have required Vinson to file her complaint with Taylor as her immediate supervisor. This is obviously unreasonable. Moreover, the policy against discrimination did not specifically mention sexual harassment so employees, including Vinson, would not necessarily know that the bank would correct that form of discrimination as well as the more conventional forms of discrimination. The Court acknowledged that the bank's argument, based on Vinson's failure to file a complaint, "might be substantially stronger if its procedures were better calculated to encourage victims of harassment to come forward."[12]

In place of the strict liability standard, the Court suggested that lower courts in the future should look to traditional principles of agency, as set forth in the Restatement (Second) of Agency §§219-237 (1958), to determine when an employer is liable for the actions of its supervisory employees in their capacity as agents of the employer. By declining to set out a clear standard of employer liability, the Supreme Court left the door open to a great deal of uncertainty, and litigation.

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[10] *Id.*, at 72.

[11] *Ibid.*

[12] *Id.*, at 73. The Court's opinion presents a strong argument in favor of preventive law, i.e., every company should have a formal, written policy proclaiming "zero tolerance" for sex discrimination and sexual harassment, as well as an established and well-publicized complaint procedure that allows an employee to by-pass his or her supervisor (direct and indirect) when it is the supervisor who is accused of the improper behavior.

2. The *Burlington Industries* and *Faragher* Decisions

a) The Facts[13] and Lower Court Decisions

These two cases came to the Supreme Court and were decided together. In the *Burlington Industries* case, a female employee by the name of Kimberly Ellerth quit her job as a salesperson at Burlington Industries approximately 15 months after being hired. She alleged in her complaint that she was repeatedly harassed by her indirect supervisor to whom her immediate supervisor reported. The alleged harasser, Ted Slowik, was a mid-level manager and a vice president at Burlington Industries with authority to make hiring and promotion decisions subject to approval by his supervisor. Ellerth worked in a two-person office in Chicago and reported directly to the supervisor in the Chicago office who, in turn, reported to Slowik in New York.

Slowik's alleged behavior consisted of inappropriate comments and gestures, including touching Ellerth's knee during a face-to-face meeting. The gist of Ellerth's complaint was that Slowik's comments contained an implicit suggestion that her future with the company might somehow depend on her wearing more revealing clothes and on her general willingness to exploit her sexuality.[14] Notwithstanding Slowik's implicit threats, Ellerth received a promotion during her brief tenure with the company and there was no evidence that she was penalized in any way.

Ellerth never informed anyone at the company about the behavior of Slowik. She quit abruptly after being cautioned by her immediate supervisor to return customer calls more promptly. In her first letter to the company after quitting, she did not mention sexual harassment as a reason for quitting. However, Ellerth did cite Slowik's behavior as a cause in a second letter sent to the company a few weeks later. Her

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[13] The *Burlington Industries* case arose on an appeal from a summary judgment. Therefore, the Supreme Court, under established principles of jurisprudence, assumed that the allegations in the plaintiff's complaint were true.

[14] For example, the Court cites a few illustrative comments of Slowik to the effect that "you're gonna be out there with men who work in factories, and they certainly like women with pretty butts/legs" and "I don't have time for you right now, Kim—unless you want to tell me what you're wearing." 66 LW, at 4635.

rationale for not reporting Slowik's behavior to her immediate supervisor was that he would be required to report it to his supervisor, i.e., Slowik.[15]

The District Court granted a motion for summary judgment in favor of Burlington Industries concluding that Ellerth's complaint had elements of both a *quid pro quo* and a hostile environment cause of action. The trial judge believed that a *quid pro quo* claim would create vicarious employer liability, whereas a hostile environment claim would require a showing of negligence on the part of Burlington Industries. The behavior alleged by Ellerth was, in the opinion of the trial judge, sufficiently severe and pervasive to meet the *Meritor* standard for a hostile environment. However, since Burlington Industries neither knew, nor had reason to know, of Slowik's sexual harassment of Ellerth the company could not be held liable vicariously for the actions of Slowik under the hostile environment theory. In other words, the company was not negligent because Ellerth failed to file an internal complaint against Slowik. With respect to the *quid pro quo* claim, the judge held that it did nothing more than contribute to the hostile environment faced by Ellerth.

The Court of Appeals reversed the decision of the District Court without reaching consensus on the appropriate standard of liability to be applied to the company in a mixed *quid pro quo* and hostile environment case.[16]

The *Faragher* case arose when a female lifeguard, Beth Ann Faragher, brought suit against the City of Boca Raton for discrimination as a result of a sexually hostile environment created and/or tolerated by her immediate supervisors, Bill Terry, David Silverman and Robert Gordon. All three men were employed in supervisory capacities by the Marine Safety Section of the Parks and Recreation Department of the City.

Faragher worked part-time and summers from 1985 until 1990 as a lifeguard while attending college. She was subjected to a hostile working environment as a result of sexually suggestive comments and uninvited touching from Terry and Silverman. On one occasion she was

[15] *Ibid.*
[16] *Ibid.*

told that a woman would never be promoted to the rank of lieutenant. She was boldly told on another occasion by one of the men: "Date me or clean toilets for a year."[17] Although the City had a formal policy against sexual harassment, for some unexplained reason, the policy was not circulated to the supervisors or employees of the Marine Safety Division. Not surprisingly, Faragher never filed a formal complaint against any of her supervisors.[18]

The District Court in a non-jury trial found that the conduct of Terry and Silverman had created a hostile environment "sufficiently serious to alter the conditions of Faragher's employment."[19] In the opinion of the trial judge, the City should be liable for the sexual harassment by its supervisory employees for three reasons. First, the pervasiveness of the sexual harassment was at a level such that the City should have had knowledge of it. Second, Terry and Silverman were agents of the City and, therefore, the City is liable for their actions under traditional theories of agency law. Third, Gordon had actual knowledge of the behavior in his supervisory capacity and did not take steps to stop it.[20]

A panel of the Court of Appeals for the Eleventh Circuit reversed the decision of the District Court with respect to the findings that the City (1) had constructive knowledge of the sexual harassment and (2) was vicariously liable for the actions of its supervisors under principles of agency. Instead, the Court of Appeals concluded that Terry and Silverman were acting outside of the scope of their employment when they harassed Faragher.

On rehearing before the Court of Appeals sitting *en banc*, the initial appellate decision was affirmed. The basis for the affirmance was the opinion that, "'an employer may be indirectly liable for hostile en-

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[17] 66 LW, at 4644.

[18] According to the District Court record, other female lifeguards were sexually harassed by Terry and Silverman. Two months prior to Faragher's resignation, another female lifeguard filed a complaint against Terry and Silverman with the City's Director of Personnel. This complaint was duly investigated by the City and found to be meritorious. Terry and Silverman were reprimanded and punished. *Id.*, at 4645.

[19] *Ibid.*

[20] *Ibid.*

vironment sexual harassment by a superior: (1) if the harassment occurs within the scope of the superior's employment; (2) if the employer assigns performance of a nondelegable duty to a supervisor and an employee is injured because of the supervisor's failure to carry out that duty; or (3) if there is an agency relationship which aids the supervisor's ability or opportunity to harass his subordinate."'[21]

During the 12-year period following the Supreme Court's opinion in *Meritor*, the lower federal courts proved unable to agree on a consistent standard or rationale regarding employer vicarious liability. The Supreme Court granted *certiorari* in *Burlington Industries* and *Faragher* to resolve this divergence in opinions.

b) Agency Law and Vicarious Liability under Title VII

The Supreme Court in *Meritor*, as well as in *Burlington Industries* and *Faragher*, looked to the Restatement (Second) of Agency §§219-237 (1958)[22] for guidance as to when an employer is liable in common law for the actions of its employees. Section 219(1) of the Restatement provides that: "A master is subject to liability for the torts of his servants committed while acting in the scope of employment." Vicarious liability is imposed whether the tort is intentional (as is usually the case with sexual harassment) or negligent. On the other hand, if the tort is committed outside of the scope of employment, the employee is said to be on a "frolic and detour" and the employer is relieved of liability for the employee's tortious actions. The liability issue in agency law ultimately turns on whether the behavior in question is within, or outside of, the scope of employment.

The difficult problem in the case of intentional torts such as sexual harassment, however, is that they are rarely deemed to be within the scope of employment of the individual who commits them. No employer has supervisory personnel with job descriptions that include

[21] *Ibid.*, quoting from the Court of Appeals opinion at 111 F.3d 1530, 1534-1535 (CA 11, 1997).

[22] The Restatements represents a systematic effort to derive core principles of law from the myriad of common law decisions throughout the United States. While courts frequently look to the Restatements for guidance, the Supreme Court has cautioned against the wholesale importation of common law principles into Title VII jurisprudence. *Meritor*, 477 US, at 72.

sexually harassing lower level employees. The Restatement endeavors to avert this problem by defining intentional conduct "to be within the scope of employment when 'actuated, at least in part, by a purpose to serve the [employer],' even if it is forbidden by the employer."[23] The Supreme Court in *Burlington Industries* reviewed a series of federal cases addressing this issue before concluding that "[t]he general rule is that sexual harassment by a supervisor is not conduct within the scope of employment."[24]

The Court in *Faragher* offered a comprehensive review of the various theories of employer liability relied on by the federal courts in addition to the scope of employment doctrine of agency law. Specifically, Justice Souter writing for the Court identified four additional theories for vicarious liability as follows: (1) proxy, (2) merger, (3) strict liability, and (4) abuse of power.[25]

The proxy theory has been applied in cases where the person perpetrating the sexual harassment holds a top management position and, thus, directly represents the employer as its proxy. The example cited by the *Faragher* Court was the earlier Supreme Court case of *Harris v. Forklift Systems, Inc.*, 510 US 17 (1993). In *Harris*, the person ac-

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[23] *Burlington Industries*, 66LW, at 4637-4638, quoting from the Restatement §§228(1)(c) and 230. The Court of Appeals in *Meritor* came at this issue in a different way when it pointed to the impact on vital job decisions as the source of the supervisor's power to perpetrate sexual harassment. See footnote 8 above.

[24] *Id.*, at 4638. Justice Kennedy writing for the Court also cited §219(2) of the Restatement which recognizes employer liability for actions taken outside of the scope of employment when the following conditions are met:

"(2)(a) the master intended the conduct or the consequences, or (b) the master was negligent or reckless, or (c) the conduct violated a non-delegable duty of the master, or (d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation."

Ibid. In the *Faragher* case, the Court discusses three separate cases to demonstrate the line between scope of employment and "frolic and detour." The first two cases involve scenarios where a supervisor discriminates in job assignments or reprimands women in harsh and vulgar tones while men receive a different form of reprimand. These two cases would be within the scope of employment, albeit nevertheless offensive. The third category of case is where the supervisor "expresses his sexual interests in ways having no apparent object whatever of serving an interest of the employer." *Faragher*, 66 LW at 4649.

[25] *Faragher*, 66 LW at 4647.

cused of engaging in sexual harassment was the president of the company. The essence of the proxy theory of liability is that a corporation, while theoretically an independent legal person, can only act through its designated representatives. When the highest class of corporate representatives (e.g., sole proprietors, and officers, directors and other top management personnel of corporations) creates a hostile environment, then the company should assume responsibility. These representatives are in a very real sense the human embodiment of the corporation and they act as its proxy.

The merger rationale, which is a variation on the proxy theory, has been used when the supervisor makes certain types of decisions so closely identified with the employer that it can be said the supervisor and the company have merged their interests. In the employment context, this theory has been applied when a supervisor makes "decisions that affect the economic status of the employee."[26] Again, a company can only hire, fire, promote or demote an employee through the actions of a supervisory employee. Employer liability in cases involving *quid pro quo* sexual harassment is often based on this theory.

Borrowing a page from the Court's race discrimination jurisprudence, federal courts have traditionally held employers to be strictly liable for the actions of supervisors in cases where tangible results (i.e., hiring, firing, promoting, compensating, etc.) have been shown to result from the discrimination. Hence, in *quid pro quo* cases, if the employee can show that he or she actually suffered tangible harm, then federal courts have been willing to hold the company strictly liable.

Finally, courts have found employers to be liable when the supervisor who has harassed the employee was aided in the improper behavior by the power he or she possesses by virtue of being in a supervisory position. The essence of this theory is that without the implied power of the supervisor to alter the terms and conditions of employment the supervisor would not have been in a position to harass the employee.

All five of these theories (scope of employment, proxy, merger, strict liability, and abuse of power) have considerable merit, but none

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[26] *Ibid.*

proved able to produce a totally satisfactory and consistent rationale for holding employers liable for the behavior of their supervisors. It was the absence of a consistent rationale that ultimately drove the Supreme Court to take the *Burlington Industries* and *Faragher* cases. However, before the Court could resolve the issue of the legal standard for vicarious liability, it was necessary to address one other theme running through the decisions of the lower courts, to wit, the difference in treatment between *quid pro quo* and hostile environment cases.

c) *Quid Pro Quo* versus Hostile Environment

The statutory language of Title VII regarding sexual harassment does not expressly mention either a *quid pro quo* or hostile environment cause of action. These two analytically separate, but often related, theories have been developed by the courts. In its simplest terms, a *quid pro quo* case arises whenever the terms and conditions of employment are conditioned on the granting of sexual favors. In other words, it is the power to make employment decisions impacting on the victim coupled with the abuse of that power in demanding sexual favors in return for rewards or under threat of retaliation that constitutes the improper behavior. A hostile environment can, in contrast, exist with or without an actual threat to the job status or terms and conditions of the employment of the victim.

The lines are not always so clearly drawn, as can be seen from the facts of *Burlington Industries*. There, Ellerth believed her indirect supervisor was making implied threats, but the threats were never actually carried out. The thinly veiled threats, perhaps insufficient to amount to a *quid pro quo* case, nonetheless contributed to the overall hostile environment experienced by Ellerth.

In *Burlington Industries*, the Supreme Court acknowledged that the terms *quid pro quo* and hostile environment have been helpful to the lower courts in demarcating the line between cases where threats were carried out and where they were not. In the former, the federal courts have tended to hold the employer vicariously liable because the actions of the supervisor directly impacted on the terms and conditions of employment. This, in turn, amounted to an employment decision of the company. In hostile environment cases, on the other hand,

when the employee does not suffer a change in the terms and condition of employment, courts have had considerably more difficulty deciding whether or not the employer should be vicariously liable.

Even the EEOC has expressed a measure of confusion in this area. In its *amici curiae* brief submitted to the Court in *Meritor* the EEOC argued that: "If the employer has an expressed policy against sexual harassment and has implemented a procedure specifically designed to resolve sexual harassment claims, and if the victim does not take advantage of that procedure, the employer should be shielded from liability absent actual knowledge of the sexually hostile environment (obtained, e.g., by the filing of a charge with the EEOC or a comparable state agency)."[27] This position was taken notwithstanding §1604.11(c) of the EEOC Guidelines which would impose strict liability on the employer for sexual harassment (which includes *quid pro quo* and hostile environment harassment under §1604.11(a)) whether or not the employer had actual or constructive knowledge of the situation.

After reviewing a number of lower court decisions in this area, the Court concluded that the distinction between *quid pro quo* and hostile environment was "of limited utility"[28] in deciding the standard of vicarious liability to be imposed on employers. This is because *quid pro quo* and hostile environment often amount to the same thing when the threats are not carried out. The employee suffers from sexual harassment to be sure in such cases. Whether or not he or she can prevail against the company should not turn on whether the threats were carried out. Damage is done whenever a supervisor uses his or her position to demand sexual favors from an underling.

d) The *Burlington Industries* and *Faragher* Rule

The new rule announced by the Supreme Court, and intended to resolve the confusion in the lower courts, was identical, word for word, in both the *Burlington Industries* and the *Faragher* cases. The Court held as follows:

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[27] *Meritor*, 477 US at 62, quoting from the Brief for United States and EEOC as *Amici Curiae* 26.

[28] *Burlington Industries*, 66 LW at 4636.

> "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 evidence, see Fed. Rule Civ. Pro. 8(c). The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."[29]

The first sentence of the quoted portion of the Court's opinions merely restates the existing rule without giving any insight into the proper standard of liability. It is in the second sentence that we can see the Court apparently adopting a tort rationale in hostile environment cases involving no tangible employment action. Tangible employment action means in the broadest sense the employee's terms and conditions (pay, demotion, dismissal, transfer, lack of promotion, etc.) of employment have been altered by the hostile environment. When there is no tangible employment action, the employer will be able to assert an affirmative defense to vicarious liability.

The affirmative defense is comprised of two parts. Again using conventional tort analysis, the Supreme Court says the employer must

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[29] *Faragher*, 66 LW at 4652, and *Burlington Industries*, 66 LW at 4640. Rule 8(c) of the Federal Rules of Civil Procedure provides as follows:

"Rule 8. General Rules of Pleading (c) Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation."

use reasonable care to prevent and to correct the offensive behavior. This prong of the defense can be established by showing the existence of a policy prohibiting sexual harassment. However, in order to escape liability, the employer must also be able to show that the employee, in essence, failed to mitigate his or her damages by unreasonably failing to utilize the company's policies and procedures, or to otherwise avoid the harm. The Court does not explain what is meant by the obligation to "avoid harm otherwise." In any event, what is reasonable will always depend on the totality of facts and circumstances presented by each case.

The Court went on to elucidate the manner in which the employer might satisfy its burden of proof under the first and second prongs of the affirmative defense as follows:

> "While proof that an employer had promulgated an antiharassment policy with complaint procedures 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 employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense."[30]

While the above quoted language leaves future cases to be resolved on their particular facts and circumstances, it is reasonable to assume that after *Faragher* and *Burlington Industries* companies with a state of the art anti-harassment policy[31] that goes unused by the

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[30] *Ibid.*

[31] An effective anti-sexual harassment policy will do the following: (1) clearly and explicitly state that the company will not tolerate sexual harassment, (2) define sexual harassment to include *quid pro quo* and hostile environment behavior with illustrative examples, (3) establish a formal process for reporting sexual harassment that allows the victim to by-pass the person alleged to have committed the harassment, (4) provide for a prompt and confidential investigation of the allega-

complaining employee will enjoy a measure of relief from the risk of liability for the actions of their supervisory employees. In order to achieve this result, however, the policy should clearly, expressly and unambiguously prohibit the kinds of sexual comments and actions in the work place that might lead to a hostile working environment. Harkening back to the *Meritor* case, it was the bank's failure to specify sexual harassment in particular in its employment policies, exacerbated by the requirement of reporting the situation to the very person accused of practicing the harassment, that led the Court, in substantial part, to conclude the bank "did not alert employees to their employer's interest in correcting that form of discrimination" and "it is not altogether surprising that [Vinson] failed to invoke the procedure and report her grievance to [Taylor]. [The bank's] contention that [Vinson's] failure should insulate it from liability might be substantially stronger if its procedures were better calculated to encourage victims of harassment to come forward."[32]

Finally, the Court reaffirmed the prevailing rule of strict liability for employers in cases where the actions of supervisory personnel result in tangible employment action writing that: "No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment."[33]

Applying the rules set forth above, the Court affirmed Faragher's victory in her suit against the City of Boca Raton. The City did not disseminate its policy to the Marine Safety employees, therefore the City forfeited its affirmative defense. Ms. Ellerth was also victorious insofar as the summary judgment entered against her by the District Court was reversed. Although Ellerth had not alleged tangible employment action (she actually received a job promotion during her tenure at Burlington Industries), her employer could still be subject to vicar-

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tion, (5) prohibit retaliation against the party making the complaint, and (6) punish the accused if the charges are founded. For an example of a comprehensive anti-harassment policy in the university context see the policy of Purdue University at www.purdue.edu/humanrel/policy and at www.purdue.edu/humanrel/proc1-96.

[32] 477 US, at 72-73.

[33] *Faragher*, 66 LW at 4652, and *Burlington Industries*, 66 LW at 4640.

ious liability unless the company was able to establish its affirmative defense.

e) The Dissenting Opinions

Justices Thomas and Scalia dissented from the majority opinions in *Faragher* and *Burlington Industries*.[34] The basis of their dissent is the belief that: "An employer should be liable if, and only if, the plaintiff proves that the employer was negligent in permitting the supervisor's conduct to occur."[35] The Court should, in their view, apply the same standard for a sexually hostile environment as used in racially hostile environment cases. In the opinion of the dissenters, a supervisory employee who creates a hostile environment is not acting on behalf of the employer. Under such circumstances, "liability should attach only if the employer either knew, or in the exercise of reasonable care should have known, about the hostile environment and failed to take remedial action."[36]

The nub of the dissent is an objection to the majority's adoption of a vicarious liability rule that is subject to an affirmative defense. The affirmative defense is too vague to provide adequate guidance or insulation to employers according to the dissenters.[37] By forcing employers to rely on an affirmative defense in order to escape vicarious liability, the only guaranteed result, in the words of Justice Thomas, is that: "There will be more and more litigation to clarify applicable legal rules in an area in which both practitioners and the courts have long been begging for guidance."[38] With respect to the *Faragher* case, the dissenters would go even further to hold that "absent an adverse employment consequence, an employer cannot be held vicariously liable if a supervisor creates a hostile work environment."[39]

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[34] The majority in *Faragher* consisted of the remaining seven Justices of the Supreme Court. In *Burlington Industries*, the majority was made up of six Justices with Justice Ginsburg filing a separate two line concurring opinion.

[35] *Burlington Industries*, 66 LW, at 4641 (dissenting opinion).

[36] *Ibid.* (footnote omitted).

[37] *Id.*, at 4642.

[38] *Ibid.*

[39] *Faragher*, 66 LW at 4653.

3. The Argument for Strict Liability

There seems to be little question, as the dissenters in *Faragher* and *Burlington Industries* forcefully warn, that the rule announced by the majority will result in more, rather than less, litigation. By effectively referring future Title VII harassment cases to conventional principles of agency and tort law, employees and employers alike will be required to litigate, at considerable expense and uncertainty, both the existence of the sexual harassment and then the affirmative defense granted to the employer by the Supreme Court. Since the elements of the affirmative defense are highly fact specific, a court or jury will be required to determine in each case (1) the employer's reasonableness in preventing and correcting sexual harassment, and (2) the employee's unreasonable failure to take advantage of the preventive and corrective mechanisms. It is hard to see how this will result in anything other than more inconsistency and injustice while sexual harassment continues to plague the American workplace.

A fairer, more efficient and better approach would have been for the Court to adopt the strict liability[40] standard used by some lower courts prior to *Burlington Industries* and *Faragher* in sexual harassment cases, and now applied uniformly to companies in the area of products liability. The argument for analogizing to products liability law is particularly persuasive.

Courts have asserted a variety of rationales in support of holding companies that put defective goods on the market strictly liable for any harm resulting therefrom. Chief among these are (1) the risk of harm from defective products that an ordinary consumer cannot protect against, (2) the superior position (as opposed to that of the injured consumer) of the company to prevent the harm, and (3) the ability of the company to spread the cost of compensating injured parties as a cost of doing business.[41] In part, products liability law developed in

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[40] Strict liability traces its origins in tort to the doctrine of *res ipsa loquitur* meaning literally that "the thing speaks for itself."

[41] For an eloquent exposition of the rationales for strict liability in cases of products liability see the concurring opinion of California Supreme Court Justice

response to the perceived injustice of allowing manufacturers of defective products to escape liability (with the resultant increase of dangerous products on the market) because of the difficulties faced by consumers in proving negligence.

When the arguments for imposing strict liability in products liability cases are examined in the context of sexual harassment the parallels, while not exact, are too close to ignore. As the Court properly recognized in *Faragher*, "hostile environment sexual harassment by supervisors (and, for that matter, co-employees) is a persistent problem in the workplace."(42) Society can ill afford the damage to individual workers (men and women alike), as well as to the overall productivity of America industry, which necessarily results from allowing the workplace to be contaminated by pervasive and oppressive sexual harassment. Yet, this vexatious problem continues to persist by the Supreme Court's own admission making the situation one which is ripe for a wide-sweeping and prophylactic remedy.

When we consider the party who is in the best position to take responsibility for the conditions of the workplace, clearly only the employer has that authority. Indeed, the victims of sexual harassment by superiors are virtually powerless to protect themselves without incurring some risk, directly or indirectly, to their continued livelihood. This is true whether or not the company has a policy prohibiting sexual harassment. Even assuming the company has a state of the art policy prohibiting sexual harassment and retaliation for reporting, many victims may be embarrassed and reluctant to report on a supervisor. The reality is that sexual harassment in the workplace is very difficult to uncover and, like many crimes involving sex, undoubtedly goes seriously under-reported.

Finally, the company is in the best position to bear the cost of inappropriate behavior as a cost of doing business. The company is the party responsible for hiring, training and supervising the activities of its supervisors. As with a defective product, if a person with a defec-

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Roger Traynor in *Escola v. Coca Cola Bottling Co. of Fresno*, 150 P.2d 436 (Cal. 1944), and his subsequent majority opinion in *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897 (Cal. 1963).

(42) *Faragher*, 66 LW, at 4649 (citations omitted).

tive personality is placed in a supervisory role, then it is neither unjust nor unreasonable to require the company to bear the cost of any damage incurred.

The Supreme Court recognized, but unfortunately did not accept this last argument, when it wrote that: "An employer can, in a general sense, reasonably anticipate the possibility of such conduct occurring in its workplace, and one might justify the assignment of the burden of the untoward behavior to the employer as one of the costs of doing business, to be charged to the enterprise rather than the victim."[43] However, the Court stated two reasons for rejecting the argument for strict liability. First, it argued that there is no statutory basis in Title VII for making employers strictly liable. Second, to hold employers strictly liable would be contrary to lower court decisions holding sexual harassment to be outside the scope of employment, particularly with respect to non-supervisory employees. "As between an innocent employer and an innocent employee, if we use scope of employment reasoning to require the employer to bear the cost of an actionably hostile workplace created by one class of employees (i.e., supervisors), it could appear just as appropriate to do the same when the environment was created by another class (i.e., co-workers)."[44]

The arguments advanced by the Court are, however, not convincing when weighed against the scope and intractability of the problem of sexual harassment in the workplace. As with defective products, the best cure is to place the burden for preventing it on the company. The most effective manner of doing that is to make the company liable in damages for harm caused by its supervisory personnel. When, and only when, companies are required to pay for the harm caused by their supervisors will they institute effective hiring, training and operating procedures designed to eliminate sexual harassment from the workplace once and for all.

4. Conclusion

The Supreme Court in *Burlington Industries* and *Faragher* an-

[43] *Ibid.*

[44] *Id.*, at 4649–4650.

nounced a rule that appears to sound in traditional theories of agency and tort. An employer is vicariously liable for sexual harassment perpetuated by its supervisory employees. If the actions of the supervisor result in tangible employment action, the employer will be strictly liable. However, if no tangible employment action occurs, the employer can assert an affirmative defense based (1) on the exercise of reasonable care in preventing and curing improper behavior, and (2) on the failure of the employee to take reasonable steps to prevent the harm such as by filing a complaint with the employer and giving the employer an opportunity to correct the situation.

This rule is certain to result in increased litigation and uncertainty on the part of the litigants. From that perspective alone, the decision of the Court is disappointing. More importantly, the attempt by the Court to distinguish between cases involving tangible employment action and those with none does not really address the underlying problem. It is true that when coupled with tangible job action the victim will experience two types of harm, one physical in the form of lost employment opportunities and the other psychological. However, the overriding priority of the law should be the eradication of sexual harassment from the workplace. The accomplishment of this paramount objective is unrelated to the other terms and conditions of employment and only a rule of strict liability will guarantee success. Perhaps, after experiencing the glut of litigation certain to flow from the Supreme Court's decisions in *Burlington Industries* and *Faragher*, the Court will once again revisit this issue and resolve it in favor of the rights of the victims of sexual harassment.