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SYMPOSIUM: "HARM IN ASKING": A REPLY TO EUGENE SCALIA AND AN ANALYSIS OF THE PARADIGM SHIFT IN THE SUPREME COURT'S TITLE VII SEXUAL HARASSMENT JURISPRUDENCE

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Text

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I. Introduction

In a recent influential article in the Harvard Journal of Law & Public Policy, "The Strange Career of Quid Pro Quo Sexual Harassment," ¹ **Eugene Scalia** called for an abandonment of the concept of quid pro quo as a functional category of sexual harassment discrimination in Title VII jurisprudence. ² He charges that "those who would retain separate standards of liability for quid pro quo and environmental harassment have failed to "question[] the legal basis of the distinction between "quid pro quo" and "hostile environment" claims,' a distinction "now some eighteen years old...." ³ Scalia's well-reasoned and insightful article enjoys the distinction of having been cited in both the opinion of the Court and that of the dissent in one of the Supreme Court's recent companion cases addressing sexual harassment liability, *Burlington Industries, Inc. v. Ellerth*. ⁴ It has also contributed substantially to the ongoing debate over the validity of the concepts of quid pro quo and hostile work environment as structural

¹ **Eugene Scalia**, *The Strange Career of Quid Pro Quo Sexual Harassment*, [21 Harv. J.L. & Pub. Pol'y 307 \(1998\)](#). **Eugene Scalia** is an Associate at Gibson Dunn & Crutcher LLP, Washington, D.C. See [id. at 308](#), n.*.

² See [id. at 308](#).

³ [Id. at 323-24](#) (quoting [Jansen v. Packaging Corp. of Am., 123 F.3d 490, 567, 569 \(7th Cir. 1997\)](#) (Wood, J., concurring and dissenting, joined by Easterbrook and Rovner, JJ.)).

⁴ [118 S. Ct. 2257 \(1998\)](#) [hereinafter *Ellerth*]. See [118 S. Ct. at 2264](#) (Kennedy, J., for the majority); [118 S. Ct. at 2273, n.3](#) (Thomas, J., dissenting, joined by Scalia, J.).

categories of employer liability and the respective standards of liability expressed by the terms. ⁵ Since the publication of Scalia's article, the debate [*478] has been further fueled by the Supreme Court's treatment of the terms in *Ellerth and Faragher v. City of Boca Raton*, ⁶ and in particular by Justice Kennedy's rather Delphic comment in *Ellerth* that the terms "are helpful, perhaps, in making a rough demarcation between cases in which threats are carried out and those where they are not or are absent altogether, but beyond this are of limited utility."⁷

This article is intended not as a complete rebuttal to Scalia's article, for there is much in it that I agree with. It is meant rather as a reflective response to the questions he has raised, presented in an effort to facilitate the continued dialogue on this issue between commentators, practitioners and jurists. In particular, I will consider what continued vitality now remains in the quid pro quo/hostile environment framework for sexual harassment that has been so criticized by Scalia, and called into question by the High Court.

I will begin by reviewing Scalia's perspective on the historical genesis of the categorical distinctions, and ask whether his conclusions may not have been derived from an overly cynical view of the substantive meaning and intent of the "quid pro quo" rubric. My direct critique of Scalia's conclusions follows, centering on Scalia's view (now apparently shared by the High Court) that tangible job detriment is a required element of a prima facie case of quid pro quo harassment, and that absent it, there is "no harm in asking" for quid pro quo sexual favors. I will examine the Supreme Court's recent [*479] opinions in *Ellerth and Faragher* and consider whether and to what degree Scalia's criticisms of the state of sexual harassment theory have been answered in Justices Kennedy and Souter's carefully crafted opinions. ⁸ I argue that the quid pro quo distinction will continue to serve as an integral aspect of Title VII sexual harassment analysis after *Ellerth and Faragher*, and for as long as the Supreme Court holds to differing standards of liability for different types of harassing conduct; no longer as a prescriptive cause of action,

⁵ See, e.g., Jeanne-Marie Bates, *Feminist Methodology: Influencing Hostile Environment Sexual Harassment Claims*, 15 *Women's Rts. L. Rep.* 143 (1993-94); James A. Burns, Jr., *Should Employers Ever Be Automatically Liable for Sexual Harassment?*, 24 *Employee Rel. L.J.* 147 (1998); Stacy J. Cooper, *Sexual Harassment and the Swedish Bikini Team: A Reevaluation of the "Hostile Environment" Doctrine*, 26 *Colum. J.L. & Soc. Probs.* 387 (1993); Stacey Dansky, *Eliminating Strict Employer Liability in Quid Pro Quo Sexual Harassment Cases*, [76 *Tex. L. Rev.* 435 \(1997\)](#); Jill W. Henken, *Hostile Environment Claims of Sexual Harassment: The Continuing Expansion of Sexual Harassment Law*, 34 *Vill. L. Rev.* 1243 (1989); Donald J. Peterson & Douglas P. Massengill, *Sexual Harassment Cases Five Years After Meritor Savings Bank v. Vinson*, 18 *Employee Rel. L.J.* 489 (1992); Nicole D. Rizzolo, *A Right with Questionable Bite: The Future of "Abusive or Hostile Work Environment" Sexual Harassment as a Cause of Action for Women in a Gender-Biased Society and Legal System*, 23 *New Eng. L. Rev.* 263 (1988); Bruce C. Smith, *When Should an Employer be Held Liable for the Sexual Harassment by a Supervisor Who Creates a Hostile Work Environment? A Proposed Theory of Liability*, 19 *Ariz. St. L.J.* 285 (1987) (discussing [Meritor Savings Bank v. Vinson](#), 477 U.S. 57 (1986)); Ronald Turner, *Title VII and Hostile Environment Sexual Harassment: Mislabeled the Standard of Employer Liability*, 71 *Univ. Det. Mercy L. Rev.* 817 (1994); Michael S. Cohen, Note, *Civil Rights - A Hostile Environment Standard Too Hostile to Employers - Fuller v. City of Oakland*, 47 *F.3d 1522 (9th Cir. 1995)*, 69 *Temp. L. Rev.* 1501 (1996); Note, *Sexual Harassment - Highlander v. K.F.C. National Management Co.: Quid Pro Quo and Hostile Work Environment Distinctions*, 18 *Memphis St. Univ. L. Rev.* 183 (1987); Amanda D. Smith, Note, *Supervisor's Hostile Environment Sexual Harassment Claims, Liability Insurance and the Trend Towards Negligence*, [31 *U. Mich. J.L. Reform* 263 \(1997\)](#); Martha Sperry, Comment, *Hostile Environment Sexual Harassment and the Imposition of Liability Without Notice: A Progressive Approach to Traditional Gender Roles and Power Based Relationships*, [24 *New Eng. L. Rev.* 917 \(1990\)](#); Barbara Verdonik, Comment, *Abolishing the Quid Pro Quo and Work Environment Distinctions in Sexual Harassment Cases Under the Civil Rights Act of 1964: Vinson v. Taylor*, 60 *St. John's L. Rev.* 177 (1985) (discussing [Vinson v. Taylor](#), 753 F.2d 141 (D.C. Cir. 1985)); Trivializing Harassment: The Trouble with the "Hostile Environment" Test, 104 *Los Angeles Daily J.* 6 (1991).

⁶ [118 S. Ct. 2275 \(1998\)](#).

⁷ See [Ellerth](#), 118 S. Ct. at 2264.

⁸ I recognize and hope to avoid the temptation to "Monday morning quarterback" Scalia's game plan in light of the Supreme Court's thorough treatment of these issues shortly after publication of his article. My purpose is to facilitate movement of the discussion of the issues raised by Scalia through and beyond the Supreme Court's pronouncements toward a new (and hopefully more workable) way of thinking about employer liability.

but now as a descriptive paradigm of a type of harassment sufficiently egregious to impose strict liability on the employer.

//. An Alternative History of the Quid Pro Quo/Hostile Work Environment Framework

The principal thesis of Scalia's article is "Whatever the origin of the quid pro quo test for women who suffer adverse job action because they refuse to trade sex for work, today no reason exists to treat quid pro quo retaliation cases as a category of discrimination separate and apart from adverse job action simple."⁹ While Scalia acknowledges that the ascendant view treats both retaliation and submission cases as quid pro quo harassment, he finds this definition "affirmatively confusing"¹⁰ because it thereby encompasses conduct that goes beyond the original intent of the term.¹¹ Scalia would treat the quid pro quo retaliation case as adverse job action and the submission case as hostile work environment discrimination, thereby obviating, in his view, the need to retain quid pro quo as a separate category of discrimination.¹²

I believe the difficulty expressed by Scalia and other commentators in reconciling the expansive reading of the quid pro quo rubric with its comparatively limited germinal context stems from attempting to stretch the definition to reach all factual situations in which it has been held to apply. It is and has always been meant to be not a "definition," but a post hoc conclusory label for the range of factual situations involving the conditioning of terms of employment on sexual favors sufficient to give rise to employer liability. To borrow a phrase from Justice Souter's opinion in *Faragher*, quid pro quo is a judicial policy conclusion that courts use "to cover the unordered and unauthorized acts of the servant for which it is found to be expedient to [*480] charge the master with liability...."¹³ Viewing quid pro quo liability in this manner allows the Court and the practitioner to go beyond the question of which label is appropriate for the particular type of harassing conduct presented to issues more germane to determining liability, such as the degree of authority possessed by the harasser over the victim and the extent to which the harassment altered the terms and conditions of the victim's employment.

A. Hostile Work Environment Liability as an Extension of Race-Based Harassment

Scalia begins his article with the optimistic contention that Title VII's command is "simple" and can be reduced to a maxim, "don't treat employees differently because of race or sex."¹⁴ Scalia further explains that it is the courts that have obscured this simple rule with "an array of terms, tests and categories."¹⁵ Unfortunately, it is only a simple rule stated thusly - in the inactive voice - that avoids naming who is engaging in the "different treatment," i.e., the improper disparate treatment. It is in fact not a simple command to interpret in the context of sexual harassment. For example, the Equal Employment Opportunity Commission's ("EEOC") interpretive regulations defining when actionable harassment occurs consist of three descriptive categories of harassing conduct followed

⁹ Scalia, *supra* note 1, at 313.

¹⁰ See *id.* at 315.

¹¹ See *id.* at 316 (discussing how "quid pro quo" now includes cases in which both actual economic harm and threatened economic harm occur, cases involving both threats and promises, and cases in which harassment resulted in either submission or non-submission).

¹² See *id.* at 320.

¹³ *Faragher*, 118 S. Ct. at 2287, 2288, (quoting W. Keeton, et al., *Prosser & Keeton on the Law of Torts* 502 (5th ed. 1984)).

¹⁴ Scalia, *supra* note 1, at 307. Title VII renders it unlawful for any public or private employer with more than fifteen employees to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin...." 42 U.S.C. 2000e-2(a)(1). Scalia apparently referred only to Title VII's race and gender proscriptions because the other protected classes were not germane to his discussion.

¹⁵ Scalia, *supra* note 1, at 307

by three conditional clauses. ¹⁶ Scalia referred to these regulations, ¹⁷ and they were, in part, the source for the analytical framework adopted by the Supreme Court in *Meritor Savings Bank, F.S.B. v. Vinson*. ¹⁸ Delineating the provisions of the command has always been more problematic in the concrete because courts generally have found it easier to identify illegal harassment by supervisory employees and co-workers of the victim than to determine whether to hold [*481] an employer liable for it. ¹⁹ The standard of liability for employers has been the stumbling block for courts since *Meritor*, and a consistent source of confusion for practitioners. A review of the history of the development of sexual harassment law, and particularly the quid pro quo/hostile environment framework of liability, will aid in understanding the roots of the confusion and point to some possible ways to facilitate a more coherent approach.

Scalia contends that early court decisions addressing sexual harassment, and in particular *Henson v. City of Dundee*, ²⁰ adopted quid pro quo as a discrete category of liability largely to avoid interpreting retaliatory conduct as purely personal behavior outside the scope of employment and hence not attributable to the employer or its "agents" under Title VII. ²¹ With this generally accepted view I have no quarrel. But Scalia goes on to argue that *Henson* added a "redundant" element for its quid pro quo cause of action to the classic disparate treatment cause of action set out in *McDonnell Douglas Corp. v. Green*, ²² that of "subjection to unwelcome sexual harassment to which members of the opposite sex had not been subjected." ²³ In Scalia's view, sexual harassment law is greatly simplified and made to correlate more closely to its gender discrimination roots when quid pro quo retaliatory conduct is analyzed as classic *McDonnell Douglas*-type gender discrimination and submission cases are analyzed as hostile work environment causes of action, and by adhering to one rule of employer liability for both - that of liability for intentionally disregarding an employee's rights after notice of the [*482] fact. ²⁴ This approach allows for the elimination of quid pro quo as a functional category of sexual harassment discrimination.

One problem with treating quid pro quo cases in this fashion is that the rule of *McDonnell Douglas* itself provides no relief for a substantial portion of non-hiring and retaliation actions based upon repudiation of sexual advances - those in which the harassment serves as a selection criteria between female applicants or employees, as opposed

¹⁶ See *id.* at 308.

Sexual harassment is said to consist of unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature... when (1) submission to such conduct is made either explicitly or implicitly a term or condition by 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.

Id. (quoting [29 C.F.R. 1604.11\(a\) \(1997\)](#)).

¹⁷ See *id.*

¹⁸ [477 U.S. 57 \(1986\)](#).

¹⁹ Compare [Todd v. Ortho Biotech, Inc. 138 F.3d 733 \(8th Cir. 1998\)](#) (reversing hostile work environment jury verdict for employee where appellate court concluded plaintiff did not show harasser was in her supervisory "chain of command" and company took action against him by terminating him on learning of harassment even though plaintiff suffered physical sexual advances culminating in attempted rape by supervisor); [Reynolds v. CSX Transp., Inc., 115 F.3d 860 \(11th Cir. 1997\)](#) (holding employee failed to show employer knew or should have known of harassing environment, despite acknowledged longstanding practice of male supervisor giving female subordinates massages); [Gary v. Long, 59 F.3d 1391, 1396 \(D.C. Cir. 1995\)](#) (holding repeated threats of termination for noncompliance with sexual advances, culminating in rape, did not state claim for quid pro quo harassment because "it takes more than saber rattling alone to impose quid pro quo liability on an employer; the supervisor must have wielded the authority entrusted to him to subject the victim to adverse job consequences as a result of her refusal to submit to unwelcome sexual advances"); [Kotcher v. Rosa & Sullivan Appliance Ctr., Inc., 957 F.2d 59, 61 \(2d Cir. 1992\)](#) (concluding pattern of sexual remarks, gestures, and physical contact by store manager to female sales clerks was "exactly the sort of demeaning behavior that Title VII was meant to address," and holding employer was not liable because employees did not "promptly" report behavior to corporate headquarters, and once employees did report conduct, manager was transferred and demoted; ignoring fact of manager's reinstatement five months later), and [Sauers v. Salt Lake County, 1 F.3d 1122, 1125 \(10th](#)

to between female and male applicants and employees.²⁵ Under *McDonnell Douglas*, and its progeny, where an employer declines to hire an apparently qualified female applicant, then hires another female applicant, it is apparent that a subjective factor other than sex was determinative, and no liability results.²⁶ However, under the Henson Court's re-characterization of the *McDonnell Douglas* test for purposes of sexual harassment liability, the rejected applicant may still state a claim for relief if she can demonstrate that the hired female applicant either did not suffer sexual advances or did suffer them and submitted.²⁷ Thus, contrary to Scalia's assertion, *McDonnell Douglas* cannot serve as the standard for liability in all quid pro quo retaliation cases, and at least one reason for retaining the quid pro quo distinctive becomes apparent: to distinguish between disparate treatment cases in which the negative employment decision was based upon gender alone and those in which it was based on the competing employees' responses to the employer's sexual advances.²⁸

My own view of the historical development of the quid pro quo/hostile [*483] environment framework differs from Scalia's in sufficient measure to find a more than adequate basis for the retention of the quid pro quo label as a separate proscription under Title VII. Of the two terms, only the quid pro quo terminology and elements were created virtually out of whole cloth. The hostile work environment rubric, on the other hand, was imported in form and substance from Title VII's existing racial harassment law, making the extension of hostile environment jurisprudence into the law of gender discrimination a natural progression.²⁹

The peaceful anti-segregation protests, in the late 1950s and early 1960s, provided the political context for passage of the 1964 Civil Rights Act, including Title VII. The Act was enacted to do what the Reconstruction era Fourteenth Amendment could not completely do - "eliminate all badges of slavery"³⁰ - because the Amendment applied only to governmental agents, [*484] not private actors.³¹ Title VII of the Act was intended to achieve equality in employment opportunities through the eradication of discriminatory barriers in private sector workplaces. The bill creating Title VII was originally targeted at racial discrimination and the prohibition on gender-based discrimination was added by motion on the floor of the House of Representatives.³² Virtually no legislative discussion of the

[Cir. 1993](#)) (holding defendant county could be liable as "employer" for acts of supervisory employees who had control over victim's firing or conditions of employment because "in such a situation, the individual operates as the alter ego of the employer, and the employer is liable for the unlawful employment practices of the individual without regard to whether the employer knew of individual's conduct.").

²⁰ [682 F.2d 897 \(11th Cir. 1982\)](#).

²¹ See Scalia, *supra* note 1, at 310.

²² [411 U.S. 792, 802-04 & n.13 \(1973\)](#).

²³ Scalia, *supra* note 1, at 313.

²⁴ See *id.* at 314-16. On retaliation cases, Scalia posits that "no reason exists to treat quid pro quo retaliation cases as a category of discrimination separate and apart from adverse job action simple," because the requirement of subjection to unwelcome sexual harassment is "analytically superfluous and burdensome." *Id.* at 313-14. Scalia explains his views on submissions cases thusly:

Environmental harassment exists when "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct... has the effect of... creating an intimidating, hostile, or offensive working environment." The woman who is forced to engage in unwanted sex with her boss to keep her job has satisfied these elements. She can state a claim for environmental harassment.

Id. at 316 (quoting [29 C.F.R. 1604.11\(a\) \(1997\)](#)). Finally, on the issue of the standard of employer liability, Scalia says, "I believe the employer should not be liable... unless it endorsed the conduct." *Id.* at 323. See also *infra* pp. 494-501, for further discussion of Scalia's views on these issues.

²⁵ See generally [McDonnell Douglas Corp v. Green, 411 U.S. 792 \(1973\)](#).

²⁶ See [id. at 802](#).



intent and scope of the prohibition on gender discrimination exists, and this area of law has been almost entirely developed by the courts. ³³

By 1980, while courts differed widely on the actionability of sexual harassment as a form of sex discrimination, employer liability for environmental racial harassment was well-established. ³⁴ *DeGrace v. Rumsfeld*, ³⁵ an early influential racial harassment case, is illustrative. An African-American civilian firefighter at a naval air station alleged he had been subjected to repeated racial slurs, threatening notes, hostile actions, and the "silent treatment" on the job, which culminated in his discharge on the pretext of absenteeism. ³⁶ The First Circuit directed that "an employer may not stand by and allow an employee to be subjected to a course of racial harassment by co-workers...." ³⁷ The court remanded for a determination of whether the employer had notice of the harassment and failed to take reasonable steps to deal with it, and whether the plaintiff himself had acted reasonably under the circumstances. ³⁸ The court qualified the rule of liability by stating that "an employer who has taken reasonable steps under the circumstances to correct and/or prevent racial harassment by its nonsupervisory personnel has not violated Title VII." ³⁹ This rule of liability remains the rule for racial hostile environment cases today. ⁴⁰

In its seminal sexual harassment decision, *Henson v. City of Dundee*, ⁴¹ the *Eleventh* Circuit found that allegations of supervisor harassment of a police dispatcher were sufficient for a prima facie showing of discrimination under Title VII without proof that the employee suffered tangible job detriment. ⁴² The court drew from the well-developed body of case law ⁴³ that co-workers can create a racially hostile work environment. ⁴⁴ The *Henson* [*485] Court looked principally to *Rogers v. EEOC*, ⁴⁵ to determine that

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. ⁴⁶

²⁷ See *Henson*, 682 F.2d at 911, 912.

²⁸ Scalia seems to combine and thereby confuse non-hiring cases with the universe of all retaliation cases. See Scalia, supra note 1, at 313. The two factual situations actually warrant separate analysis because of important distinctions between them. A prospective supervisor has only one way to retaliate against a non-complying applicant, by denying employment; a supervisor of one who is already an employee has a multitude. Also, the damage that may be done by a prospective discriminating supervisor is limited, since the employee cannot be said to have relied on the prospect of employment and invested herself in the job. On the other hand, an employee victim has much more to lose. From the point of view of the applicant or employee, the positional relationship with the harassing supervisor changes tremendously what I call the "submission/retaliation wager." See discussion infra p. 498.

²⁹ See generally *Faragher*, 118 S. Ct. at 2283, n.1 ("Courts of appeals in sexual harassment cases have properly drawn on standards developed in cases involving racial harassment."); *Ellerth*, 118 S. Ct. at 2271-72 (Thomas, J., dissenting).

³⁰ These actions, for example, the 1956 Montgomery bus boycott and the nearly contemporaneous restaurant sit-ins throughout the South, were targeted primarily at integration of commercial facilities. See *Boynton v. Virginia*, 364 U.S. 454 (1960) (holding conviction of black protestor for trespass for refusing to leave segregated lunch counter in bus terminal violated Interstate Commerce Act (49 U.S.C. 316(d))); *Garner v. Louisiana*, 368 U.S. 157 (1963) (finding convictions of lunch counter sit-in protestors for "disturbing the peace" so totally devoid of evidentiary support as to violate Due Process Clause of Fourteenth Amendment); *Peterson v. City of Greenville*, 373 U.S. 244 (1963) (finding convictions of lunch counter sit-in protestors for trespass violated Equal Protection clause of Fourteenth Amendment where manager's decision to exclude black customers because of race was in furtherance of local ordinance requiring segregation in restaurants); *Avent v. North Carolina*, 373 U.S. 375 (1963) (vacating conviction of lunch counter sit-in protestors for trespass and remanding in light of *Peterson*); *Gober v. City of Birmingham*, 373 U.S. 374 (1963) (same); *Lombard v. Louisiana*, 373 U.S. 267 (1963) (holding even in absence of ordinance requiring segregation, state convictions of protestors for violating statute requiring persons to leave premises after being so ordered by proprietor cannot stand where city officials directed continuance of segregated service in restaurants and prohibited any conduct directed toward discontinuance); *Shuttlesworth v. City of Birmingham*, 373 U.S. 262 (1963) (reversing convictions of two black ministers for "aiding and abetting" protestors whose convictions were overturned in *Gober*); *Bouie v. City of Columbia*,

The court was "bolstered in [its] conclusion" by the D.C. Circuit Court's decision in *Bundy v. Jackson*,⁴⁷ which held a year earlier that the equation of "illegal sex discrimination with a hostile work environment caused by sexual harassment "follows ineluctably from numerous cases finding Title VII violations where an employer created or condoned a substantially [racially] discriminatory environment...."⁴⁸ When "seeking to hold the employer responsible for the hostile environment created by the plaintiff's supervisor or co-worker," the court stated, a Title VII claimant must show the employer knew or should have known of the harassment in question and failed to take prompt remedial action.⁴⁹ The rule for hostile environment liability for acts of co-worker sexual harassment was thus identical in substance to the rule in racial harassment cases.⁵⁰ Hence, it is apparent that both the law of racial harassment and the then nascent law of sexual harassment contemplated the creation of a hostile work environment by an employer that knows of an abusive environment inflicted by its employees, but fails to take corrective action.

By 1986, the Supreme Court was able to unanimously concur in *Meritor* that a right of action existed for sexual harassment as a form of sex discrimination under Title VII.⁵¹ The Court did so by observing ipso facto that sexual harassment was a type of gender-based discrimination. The Court stated "without question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminates' on the basis of sex."⁵² The Court relied on the by-then-familiar language of *Henson v. City of Dundee* that "'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."⁵³ *Meritor*, like *Henson*, expressly approved the incorporation of the line of authority relating to racial harassment in a co-worker setting.⁵⁴ [*486] Likewise, in *Harris v. Forklift Systems*,⁵⁵ which affirmed compensation for subjective emotional distress was recoverable under Title VII for hostile work environment sexual harassment, the Court again cited the *Rogers* line of authority with approval.⁵⁶

[378 U.S. 347 \(1964\)](#) (overturning convictions of lunch counter sit-in protestors on due process grounds); [Bell v. Maryland, 378 U.S. 226 \(1964\)](#) (same); [Robinson v. Florida, 378 U.S. 153 \(1964\)](#) (same); [Barr v. City of Columbia, 378 U.S. 146 \(1964\)](#) (same). See also [Hamm v. City of Rock Hill, 379 U.S. 306 \(1964\)](#) (holding passage of 1964 Civil Rights Act abated convictions of protestors for trespass at lunch counters). Title II of the 1964 Civil Rights Act specifically targeted segregated restaurant facilities in commerce. Section 201 of the Act provided:

(b) Each of the following establishments which serves the public is a place of public accommodation within the meaning of this title if its operations affect commerce...

(2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment...

[Id. at 310](#) (quoting 1964 Civil Rights Act, 201). The Supreme Court upheld the constitutionality of the public accommodation provisions of the 1964 Civil Rights Act in [Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241\(1964\)](#), in part relying on extensive legislative history documenting the burdens segregation placed on interstate commerce. See [id. at 244-46](#).

³¹ See [U.S. Const. amend. XIV](#).

³² See 110 Cong. Rec. 2577-84 (1964); [Meritor, 477 U.S. at 63-64](#).

³³ See 110 Cong. Rec. 2577-84 (1964).

³⁴ See Barbara Lindemann & David D. Kadue, Sexual Harassment in Employment Law 236-37 (1992) (citing [DeGrace v. Rumsfeld, 614 F.2d 796 \(1st Cir. 1980\)](#)).

B. Quid Pro Quo as a Sui Generis Cause of Action

That hostile environment claims had an extensive case law history prior to Henson gives rise to an obvious question: Why did the Henson Court, and others following it, believe it necessary to create a second category of liability beyond the extant hostile environment cause of action? If, as Scalia contends, quid pro quo liability was initially limited to the retaliatory context, and all other similar conduct could well have been covered by the hostile work environment cause of action, why develop and then expand a "superfluous" category at all? I believe the quid pro quo cause of action was forged as a theoretical construct from the legal literature in an effort to impose liability for a circumstance that neither racial nor sex-based hostile environment liability addressed, but was regarded with near-unanimity (at least at the appellate level) as too reprehensible to escape liability; that is, a demand that a female employee subjugate herself sexually in exchange for career favors or non-retaliation. Only the emerging law of gender discrimination could posit such a theory of recovery, since in the racial context there was no special favor a supervisor could demand of an employee that was correlative to sexual favors in the gender context.

One of the main distinctives of the quid pro quo rubric, and a reflection of the heightened disapprobation with which this form of harassment is viewed, has been the automatic liability imposed on employers where quid pro quo harassment is proved. The categories of quid pro quo and hostile environment are kept from being redundant in function by the requirement that a hostile work environment must be sufficiently "severe and pervasive" to alter the terms and conditions of employment. All quid pro quo harassment, when so defined, is actionable; not all workplace hostility is, only that which is found to be sufficiently severe and pervasive.⁵⁷ As Scalia himself observes, "it is crucial to determine which theory (or theories) apply... [because] in quid pro quo cases employer liability is automatic... [*487] [whereas] employer liability in hostile environment cases depends on agency principles."⁵⁸ For this reason, the predominate method for analyzing quid pro quo and hostile work environment harassment causes of action has been to analyze each cause of action separately, applying strict liability in quid pro quo cases and agency principles in hostile environment cases.⁵⁹ As courts have frequently noted, many cases require analysis of the employee's claims under both standards since "hostile environment and quid pro quo harassment causes of action are not always clearly distinct and separate."⁶⁰

³⁵ [614 F.2d 796 \(1st Cir. 1980\)](#).

³⁶ See [DeGrace, 614 F.2d at 800](#).

³⁷ [Id. at 803](#).

³⁸ See [id. at 804](#).

³⁹ [Id. at 805](#).

⁴⁰ See generally, [Ellerth, 118 S. Ct. at 2271-72](#) (Thomas, J., dissenting).

⁴¹ [682 F.2d 897 \(11th Cir. 1982\)](#).

⁴² See [Henson, 682 F.2d at 901](#).

⁴³ Employer liability for unchecked racial harassment by co-workers was well-established by 1980, when the First Circuit decided [DeGrace v. Rumsfeld \[614 F.2d 796 \(1st Cir. 1980\)\]](#)." Lindemann & Kadue, *supra* note 34, at 236-37.

⁴⁴ See [DeGrace, 614 F.2d at 804 n.4](#).

⁴⁵ [454 F.2d 234 \(5th Cir. 1971\)](#).

⁴⁶ [Henson, 682 F.2d at 902](#).

⁴⁷ [641 F.2d 934 \(D.C. Cir. 1981\)](#).



Quid pro quo harassment has generally been held to occur where "tangible job benefits are conditioned on an employee's submission to conduct of a sexual nature and that adverse job consequences result from the employee's refusal to submit to the conduct."⁶¹ In fact, conditioning has been regarded as the sine qua non of a quid pro quo cause of action. In a quid pro quo harassment case, a supervisor either expressly or impliedly makes an employee's access to job benefits or avoidance of negative job consequences contingent upon acquiescence to the harasser's sexual demands.⁶² Thus, in a quid pro quo cause of action, the relevant inquiry is "whether the supervisor has linked tangible job benefits to the acceptance or rejection of sexual advances."⁶³ In other words, the court considers whether the "supervisor used the employee's acceptance or rejection of his advances as the basis for a decision affecting the compensation, terms, conditions or privileges of the [*488] employee's job."⁶⁴ In contrast, a hostile work environment claim must establish that the sexual conduct "has the purpose or effect of unreasonably interfering with an individual's work or performance or creating an intimidating, hostile, or offensive working environment."⁶⁵ The Court, in *Meritor*, declined to adopt a rule of automatic employer liability for hostile work environment sexual harassment by supervisors. Instead it directed lower courts to consult agency principles for guidance on the issue of employer liability.⁶⁶ Because the Court did not specify whether courts should refer to agency principles only in hostile work environment cases or in quid pro quo cases as well, this issue was left for the circuit courts to determine.

C. The Difference a Label Makes

In response to the Court's apparent structuralization of the quid pro quo and hostile environment categories in *Meritor*, the federal courts have typically treated these two kinds of harassment as subject to two separate regimes of employer liability. As one commentator has observed, "there is little controversy regarding the effect of quid pro quo harassment by supervisors; in quid pro quo harassment cases, courts readily impose liability on the employer without regard to the agency issues."⁶⁷ It is predominantly in hostile environment harassment cases that courts have followed *Meritor*'s directive and engage in lengthy analyses regarding common law agency principles.

⁴⁸ [Henson, 682 F.2d at 902](#) (quoting [Bundy, 641 F.2d at 943-44](#)).

⁴⁹ *Id.* at 905.

⁵⁰ See [DeGrace, 614 F.2d at 804](#); [Rogers, 454 F.2d at 234, 237-38](#).

⁵¹ See [Meritor, 477 U.S. at 58](#).

⁵² [Id. at 64](#)

⁵³ [Id. at 67](#) (quoting [Henson, 682 F.2d at 902](#)).

⁵⁴ See *id.* at 65-66; [Henson, 682 F.2d at 902](#).

⁵⁵ [510 U.S. 17 \(1993\)](#).

⁵⁶ See [id. at 22](#) (citing [Rogers, 454 F.2d at 234, 238](#)).

⁵⁷ See [Meritor, 477 U.S. at 67](#). See also Susan Estrich, Sex at Work, [43 Stan. L. Rev. 813, 834 \(1991\)](#) (stating quid pro quo plaintiffs not required to show harassment was severe and pervasive). For a discussion of the degree of severity and pervasiveness required, see Lindemann & Kadue, *supra* note 34, at 174-85. But cf. [Rabidue v. Osceola Refining Co., 805 F.2d 611, 622 \(6th Cir. 1986\)](#) (Krupansky, J., dissenting) (stating actionability, which required harassment "unreasonably interfered with the plaintiff's work performance and created an intimidating, hostile, or offensive working environment that affected seriously the psychological well-being of the plaintiff."). The Supreme Court's opinion in *Faragher*, by using the disjunctive phrase, "severe or pervasive," apparently continues to leave open the possibility of proving liability based on non-recurring conduct. [118 S. Ct. at 2283](#) (emphasis added). See also discussion *infra* pp. 510-12.



The rationale by which courts establish employer liability in quid pro quo cases has varied.⁶⁸ Some courts have called quid pro quo liability a form of respondeat superior.⁶⁹ Courts utilizing this rationale hold that employers [*489] are liable for the quid pro quo harassment of their supervisors because the "supervisor is deemed to act on behalf of the employer when making decisions that affect the economic status of the employee. From the perspective of the employee, the supervisor and the employer merge into a single entity."⁷⁰ For example, in *Highlander v. KFC National Management Co.*,⁷¹ the [Sixth](#) Circuit held that respondeat superior imposes strict liability upon an employer for the conduct of supervisory employees having plenary authority to hire, fire, promote, and discipline.⁷² In other words, strict liability stems from the harasser's authority, not from his actions.⁷³ Other courts have referred to common law agency principles set forth in the Restatement in their brief analyses.⁷⁴

[*490] Regardless of the rationale employed, the federal appellate courts have held, by and large, that employers are strictly liable for quid pro quo sexual harassment, predominantly even where no tangible job detriment resulted.⁷⁵ Notably, even in applying agency principles to hostile work environment harassment by supervisory employees, several circuit courts have imposed strict liability upon employers.⁷⁶ This was the Supreme Court's approach in *Ellerth and Faragher*, but with something of a twist: vicarious liability for supervisor hostile environment harassment that may be avoided by demonstrating that the employer acted "reasonably" to prevent or correct the harassment (i.e., that the employer was without fault); and strict liability (liability without regard to fault) for supervisor harassment that results in tangible job detriment.

III.

"Harm in Asking": The "Tangible Job Detriment" Element Then and Now

In practice, the traditional rule was (and remains) that soliciting sexual favors is not extreme and outrageous conduct, because [*491] "there is no harm in asking."⁷⁷

⁵⁸ Scalia, *supra* note 1, at 321, (quoting Barbara Lindemann & Paul Grossman, 1 *Employment Discrimination Law* 770 (1996)). This method of analysis is exemplified in [Karibian v. Columbia University](#), 14 F.3d 773, 777 (2d Cir. 1994), in which the Second Circuit began by holding that the quid pro quo harasser subjects his employer to strict liability. The court further held that only the plaintiff's hostile work environment claims were to be analyzed under common law principles of agency as directed by *Meritor*. See *id.* at 779-80. See also, [Torres v. Pisano](#), 116 F.3d 625, 633-34 (2d Cir. 1997); [Harrison v. Eddy Potash, Inc.](#), 112 F.3d 1437, 1443-48 (10th Cir. 1997), vacated, 118 S. Ct. 2364 (1998); [Gary v. Long](#), 59 F.3d 1391, 1395-99 (D.C. Cir. 1995); [Kauffman v. Allied Signal, Inc.](#), 970 F.2d 178, 181-87 (6th Cir. 1992); [Kotcher v. Rosa and Sullivan Appliance Ctr., Inc.](#), 957 F.2d 59, 62-63 (2d Cir. 1992); [Hicks v. Gates](#), 833 F.2d 1406, 1413-18 (10th Cir. 1987).

⁵⁹ Recall Justice Kennedy's admonishment, in *Ellerth*, of the plaintiff and the courts below for, in his view, trying to shoehorn the factual presentation into a quid pro quo cause of action:

As the use of the terms [quid pro quo and hostile work environment] grew in the wake of *Meritor*, they acquired their own significance. The standard of employer responsibility turned on which type of harassment occurred. If the plaintiff established a quid pro quo claim, the Courts of Appeals held, the employer was subject to vicarious liability. The rule encouraged Title VII plaintiffs to state their claims as quid pro quo claims, which in turn put expansive pressure on the definition.

[Ellerth](#), 118 S. Ct. at 2264-65.

⁶⁰ [Carrero v. New York City Hous. Auth](#), 890 F.2d 569, 579 (2d Cir. 1989).

⁶¹ [Hicks v. Gates Rubber Co.](#), 833 F.2d 1406, 1414 (10th Cir. 1987). See also generally [Meritor](#), 477 U.S. at 65.

⁶² See [Karibian v. Columbia Univ](#), 14 F.3d 773, 777 (2d Cir. 1994) (stating "Quid pro quo sexual harassment occurs when an employer conditions, explicitly or implicitly, the receipt of a job benefit or a tangible job detriment on the employee's acceptance



While Scalia has much to say that is valuable and helpful in highlighting the analytical dissonance created by competing views of the meaning of the quid pro quo/hostile environment framework, I believe his article is an example of thinking inside the box of structuralism without regard to the intent of sexual harassment methodology. As the review of the history of Title VII sexual harassment law suggested, Scalia's attempt to banish the quid pro quo harassment retaliation case to the gender discrimination rubric, and to treat all other harassment cases as hostile work environment cases, while appearing to deconstructualize sexual harassment law, is really an argument for returning to a single structure of liability for both race and gender discrimination cases. He tips his hand to his real purpose when he declares, "My concern is not what standard should apply, but whether different standards should apply in quid pro quo and environmental cases, for only in that event is there reason to retain quid pro quo as a discrete category of discrimination... I believe the employer should not be liable... unless it endorsed the conduct."⁷⁸ Scalia's argument is nothing less than a well-cloaked assault upon the citadel of sexual harassment law itself. In tearing down the quid pro quo/hostile environment superstructure, Scalia ignores or redefines several types of sexual harassment claims, leaving them either without adequate remedy or with heightened standards of employer liability to meet. I will address his approach to one particular issue in this section, the "tangible job detriment requirement" for establishing a quid pro quo claim.

A. The Quid Pro Quo Demand as Malum in Se

While Scalia assures his readers in discussing the history of sexual harassment theory that "the courts were bound to find it illegal under Title VII to terminate a woman for refusing sexual favors,"⁷⁹ he does not satisfactorily explain why this is so. Under the conventional early view, a quid pro quo demand, and any retaliation for refusing the demand, was considered personal conduct outside the scope of employment, and hence unremediable. The first case to recognize a Title VII claim for sexual harassment rejected the employer's contention that the plaintiff was denied employment opportunities not because of her gender, but because of her refusal to provide "sexual consideration."⁸⁰ Although the argument was [*492] unsuccessful, it could easily have cut both ways.⁸¹ The

or rejection of sexual advances."); *Reinhold v. Commonwealth of Va*, No. 96-2816, 1998 WL 45247, slip. op at 12 (4th Cir. Feb. 6, 1998).

⁶³ [Karibian, 14 F.3d at 778.](#)

⁶⁴ *Id.*

⁶⁵ [Meritor, 477 U.S. at 65.](#)

⁶⁶ See [id. at 72-73](#). The Meritor Court reasoned that because Title VII's definition of "employer" included any "agent" of the employer, Congress intended to apply agency principles when determining the scope of an employer's liability for sexual harassment. See [id. at 72](#). The Court recommended that the lower courts refer to sections 219-237 of the Restatement of Agency. See *id.* These sections are found in Chapter Seven, Topic Two, Title B of the Restatement entitled, "Liability of Principal to Third Persons - Liability for Authorized Conduct of Conduct Incidental Thereto - Torts of Servants." [Restatement \(Second\) of Agency 219-237](#) (1958).

In an interesting historical footnote to Meritor, three influential conservative jurists, whose careers were soon to take different paths - Antonin Scalia, Robert Bork, and Kenneth Starr - dissented from the D.C. Circuit's denial of rehearing en banc of the panel's decision imposing vicarious liability for supervisor harassment. See [Vinson v. Taylor, 760 F.2d 1330](#), (D.C. Cir. 1985) (Bork, J., dissenting, Scalia & Starr, JJ., joining).

⁶⁷ David B. Oppenheimer, Exacerbating the Exasperating: Title VII Liability of Employers for Sexual Harassment Committed by their Supervisors, [81 Cornell L. Rev. 66, 71 n.32 \(1995\)](#). See also [Harrison, 112 F.3d at 1443](#) ("In cases involving quid pro quo harassment, courts routinely hold, with little or no discussion, that the employer is 'strictly liable' for the supervisor's wrongful conduct."); Anita Bernstein, Treating Sexual Harassment with Respect, [111 Harv. L. Rev. 445, 496 \(1997\)](#).

main reason for the brief rise of the argument and for its demise as a recognized defense was the same: Title VII's requirement that to be actionable, conduct must be "based on sex." In rejecting the "sexual consideration" defense, the courts of appeal could very well have nonetheless adopted "sexual consideration" as a rationale for finding quid pro quo conduct actionable, insofar as certainly, "but for" the employee's gender, the supervisor would not have imposed such a condition. In fact, this rationale seems to be a tacit impetus for the courts that did hold quid pro quo conduct actionable. As the Eleventh Circuit stated in *Henson*, "An employer may not require sexual consideration for an employee as a quid pro quo for job benefits." ⁸²

Recall the discussion of the history of the quid pro quo cause of action earlier in this article. ⁸³ Quid pro quo - together with its heightened standard of liability - was developed in spite of the view that demanding sexual consideration was outside the scope of employment and hence unremediable. Imposing such a sexual condition was viewed as harmful and intolerable regardless of the legal theory employed. It was proscribed, to borrow a phrase from the criminal law, as conduct *malum in se* - wrongful in and of itself, regardless of circumstances or proffered defenses. As Professor Estrich observed of these early cases:

None of [the] early cases involved what anyone would consider minor episodes of harassment. All of them involved, as early test cases often do, rather egregious incidents in which, at least for motion purposes, courts accepted as true complaints that women were being coerced into sexual intercourse with their bosses as a condition of keeping their jobs or receiving a promotion. ⁸⁴

The problem with the conventional view - that quid pro quo harassment was proscribable as sex discrimination because "but for" the victim's sex she would not suffer sexual extortion - is it does not sufficiently explain why the conduct was considered sanctionable in the first place. Professor Estrich thus **[*493]** criticizes the conventional view, contending that the problem is that it "ignores the 'sexual' aspect of sexual harassment." ⁸⁵ "What makes sexual harassment more offensive, more debilitating, and more dehumanizing to its victims than other forms of discrimination is precisely the fact that it is sexual...." ⁸⁶ The early cases employing the conventional view of

⁶⁸ See Rachel E. Lutner, *Employer Liability for Sexual Harassment: The Morass of Agency Principles and Respondeat Superior*, [1993 U. Ill. L. Rev. 589, 602 \(1993\)](#).

⁶⁹ See, e.g., [Nichols v. Frank, 42 F.3d 503, 514 \(9th Cir. 1994\)](#) (citing [Restatement \(Second\) of Agency 219\(2\)\(d\)](#) (1958)) ("Under traditional agency principles, the exercise of such actual or apparent authority gives rise to liability on the part of the employer under a theory of respondeat superior.") (emphasis added); [Chamberlin v. 101 Realty, Inc., 915 F.2d 777, 784 \(1st Cir. 1990\)](#) (describing as one of the elements of a viable quid pro quo harassment claim that "respondeat superior has been established").

⁷⁰ [Karibian, 14 F.3d at 780](#) (quoting [Kotcher v. Rosa and Sullivan Appliance Center, Inc., 957 F.2d 59, 62 \(2d Cir. 1992\)](#)). See also [Carrero, 890 F.2d at 579](#); [Steele v. Offshore Building, 867 F.2d 1311, 1316 \(11th Cir. 1989\)](#) (explaining employer is strictly liable for supervisor's quid pro quo harassment because supervisor, "by definition, acts as the company").

⁷¹ [805 F.2d 644 \(6th Cir. 1986\)](#).

⁷² See [id. at 648](#).

⁷³ See Lutner, *supra* note 68, at 602 n.110. But cf. [Chamberlin, 915 F.2d at 785](#), in which the First Circuit analyzed the strict liability rule under a slightly different theory, holding that respondeat superior stems from a finding of tangible job detriment to the harassed employee because an employer is strictly liable for the actions of its supervisors that constitute sexual harassment. See *id.*

⁷⁴ The provisions of the Restatement (Second) of Agency most often relied upon are found in Section 219, which reads in pertinent part:

(1) A master is subject to liability for the torts of his servants committed while acting in the scope of their employment. (2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless: (d)... he was aided in accomplishing the tort by the existence of the agency relation.



liability, she maintains, were "a disaster in doctrinal terms precisely because, as with rape, they involve sex and sexuality." ⁸⁷

An excellent illustration of a decision reflective of the normative view of quid pro quo harassment is *King v. Board of Regents of University of Wisconsin System*. ⁸⁸ Rejecting the argument that the harassing supervisor's actions were not sex-based harassment because they were merely the result of his romantic desire for plaintiff, the court stated its moral outrage in nearly Puritanical language:

This argument... misses the point. Sonstein wanted to have an affair, a liaison, illicit sex, a forbidden relationship. His actions are not consistent with platonic love. His actions were based on her gender and motivated by his libido. ⁸⁹

This normative view of the demand for sexual consideration helps explain the rise of the quid pro quo/hostile environment dichotomy. A one-time act, or a single environmental factor, that is insufficient by itself to give rise to a hostile work environment, such as the display of a sexually charged poster or the telling of a sexist or vulgar joke is not necessarily *malum in se*, but only *malum prohibitum* - prohibited not because it is wrong in and of itself, but because of the negative effects that are associated with it. ⁹⁰ Singularly, these actions do not demotivate or hinder female employees' performance on the job. They are prohibited in the workplace by employers because, taken together, they may create a pervasive atmosphere of hostility [*494] that amounts to a hostile work environment. On the other hand, the conduct that we label quid pro quo conduct has the power to brutalize and demotivate immediately and regardless of whether it is repeated, and hence may appropriately be proscribed *malum in se* - harmful in essence.

Scalia actually states quite well my position on the necessity of retaining the quid pro quo distinction: "Retaining the quid pro quo 'category' of discrimination for the sake of the actionability of the quid pro quo proposition reflects the normative judgment that the proposition has so serious an effect on the employment relationship that it should not go unremedied." ⁹¹ I strenuously disagree with his conclusion, however, which is that "by this argument the

[*Restatement \(Second\) of Agency 219\(1\)*](#) & (2)(d) (1958). Before *Meritor*, the Eleventh Circuit in *Henson* referred to *Restatement 219(2)(d)* to explain its rationale for subjecting the employer to strict liability for quid pro quo harassment. See [*Henson*, 682 F.2d at 910 n.21](#). The court reasoned that because the supervisor used the means furnished to him by the employer to extort sexual consideration from the employee, he was "aided in accomplishing the tort by the existence of the agency relation." [*Id.* at 910 n.21](#) (quoting [*Restatement \(Second\) of Agency 219\(2\)\(d\)*](#)). Accord [*Harrison*, 112 F.3d at 1443](#) (strict liability rule justified as "presumably resting upon the fact that the supervisor was acting within the scope of his actual or apparent authority when he committed the harassment,... or because the supervisor "was aided in accomplishing the [harassment] by the existence of the agency relation"); [*Davis v. City of Sioux City*, 115 F.3d 1365, 1368 \(8th Cir. 1997\)](#) (holding employee's transfer to higher paying position after complaining of sexual harassment was sufficiently adverse to support retaliation claim); [*Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343, 1353 \(4th Cir. 1995\)](#) (holding employer liable for employee's actions because employee "relied on the authority vested in him by Cavalier to coerce [plaintiff] to comply with his demands"); [*Bouton v. BMW of North America*, 29 F.3d 103, 106-07 \(3d Cir. 1994\)](#) ("Scope-of-employment liability is often involved in quid pro quo cases because the supervisor has used his authority over the employee's job to extort sexual favors. Without the agency relationship, quid pro quo harassment would be impossible."); [*Nichols*, 42 F.3d at 514](#) ("Under traditional agency principles, the exercise of such actual or apparent authority gives rise to liability on the part of the employer under a theory of respondeat superior.").

⁷⁵ See [*Meritor*, 477 U.S. at 75](#) (Marshall, J., concurring) ("Every Court of Appeals that has considered this issue has held that sexual harassment by supervisory personnel is automatically imputed to the employer when the harassment results in tangible job detriment to the subordinate employee.") See also [*Torres v. Pisano*, 116 F.3d 625, 633 \(2d Cir. 1997\)](#); [*Davis*, 115 F.3d at 1367](#); [*Harrison*, 112 F.3d at 1443](#); [*Gary*, 59 F.3d at 1395-96](#); [*Martin*, 48 F.3d at 1351 n.3](#); [*Nichols*, 42 F.3d at 513](#); [*Karibian*, 14 F.3d at 777](#); [*Sauers v. Salt Lake County*, 1 F.3d 1122, 1127 \(10th Cir. 1993\)](#); [*Kauffman v. Allied Signal, Inc.*, 970 F.2d 178, 185-86 \(6th Cir. 1992\)](#); [*Chamberlin*, 915 F.2d at 785](#); [*Carrero*, 890 F.2d at 579](#); [*Steele*, 867 F.2d at 1316](#); [*Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1564 n. 22 \(11th Cir. 1987\)](#); [*Highlander*, 805 F.2d at 648](#); [*Henson*, 682 F.2d at 909-10](#). See generally [*Ellerth*, 118 S. Ct. at 2268-69](#) (citing cases in Justice Kennedy's majority opinion for same proposition), [*Faragher*, 118 S. Ct. at 2285](#) (citing cases in Justice Souter's majority opinion).



proposition should rise or fall as environmental harassment, a category of harassment devoted to conduct so 'severe' as to alter the conditions of employment."⁹² In my view, relegation of non-retaliatory quid pro quo conduct to the hostile work environment rubric would allow to go unremedied a great deal of conduct that is harmful to the point of creating workplace barriers to women.

B. On the Meaning of "Submission," "Rejection," and "Retaliation"

One commentator frames the issue this way:

If as most of the judges acknowledged, [in [Jansen v. Packaging Corporation of America, 123 F.3d 490 \(7th Cir. 1997\)](#) (en banc), cert. granted, 118 S. Ct. 876 (1998), appeal dismissed, 118 S. Ct. ____ (1998)] threats and acts by supervisors function in the same way, the distinction between quid pro quo and hostile work environment sexual harassment by supervisors fades, becoming a matter only of whether the threat is implicit or explicit. This difference should not have legal significance in determining employer liability for harassment by supervisors.⁹³

[*495] I submit that there is tremendous significance, legal and otherwise, in retaining the quid pro quo distinctive to refer to threats alone.

Scalia posits that "if the retaliation case is treated as adverse job action, and the submission case is handled as environmental discrimination, it is difficult to see how the quid pro quo threat alone is substantial enough, or different enough, to constitute a separate 'form' or 'category' of discrimination."⁹⁴ Scalia consistently employs categorical terms such as "retaliation" and "submission" with seeming confidence in their substantive delimitation as discrete kinds of harassment cases. Particularly egregious is his use of the illustration of submission to a demand for sexual relations as if it encompasses the entirety of the "submission" set of cases.⁹⁵ It does not. An exchange of sexual relations for job benefits or to avoid retaliation is actually the rare case. Sexual aggression is not so much about satisfying sexual appetite, but about wielding power.⁹⁶ Far more common are the submissions to advances

The Harris Court affirmed that compensation for subjective emotional distress alone is recoverable under Title VII in the context of hostile work environment claims by recognizing that "[a] discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers." [Harris, 510 U.S. at 22](#). Before Ellerth clarified the standard, many cases relied upon for the position that tangible job detriment was required for a finding of quid pro quo harassment were inapposite because they predated both Harris and the 1991 amendments to Title VII; at that time only equitable relief such as back pay and reinstatement was available to prevailing plaintiffs, and non-economic compensatory damages for emotional distress were not available. See, e.g., [Spencer v. General Elec. Co., 894 F.2d 651 \(4th Cir. 1990\)](#); [Chamberlin v. 101 Realty, 915 F.2d 777 \(1st Cir. 1990\)](#); [Hicks v. Gates Rubber Co., 833 F.2d 1406 \(10th Cir. 1987\)](#); [Sparks v. Pilot Freight Carriers, 830 F.2d 1554 \(11th Cir. 1987\)](#); [Highlander v. KFC Nat'l Management Co., 805 F.2d 644 \(6th Cir. 1986\)](#); [Jones v. Flagship International, 793 F.2d 714 \(5th Cir. 1986\)](#). As the Seventh Circuit observed, "In that context, it arguably made sense to require some realized adverse action. Now that emotional damage is compensable, the scope of quid pro quo should encompass clear unfulfilled threats that cause serious emotional harm." [Jansen v. Packaging Corp. of America, 123 F.3d 490, 499 \(7th Cir. 1997\)](#) (plurality opinion).

⁷⁶ See Bernstein, *supra* note 67, at 599-600.

⁷⁷ Estrich, *supra* note 57, at 818 (quoting Calvert Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 Harv. L. Rev. 1033, 1055 (1936)). See generally Bernstein, *supra* note 67, at 448-49 n.16 (citing cases).

⁷⁸ Scalia, *supra* note 1, at 324 n.62.

⁷⁹ *Id.* at 312 n.23.

⁸⁰ Vicki Schultz observes:



by way of permitting an aggressor to fondle, to intimidate with sexual banter, and to dehumanize in other ways. Complex variations and combinations of the standard paradigms are far more common, with perhaps the most common of these being a repeated pattern of various forms of harassment (occasionally including sexual relations) which is suffered in silence by the victim employee because of a combination of threats and promises; followed by a precipitating event that causes the employee to cease submission and either report the behavior (risking discharge or other retaliation) or quit.⁹⁷ As Professor Estrich observes:

The division between quid pro quo harassment and hostile environment harassment rests on the assumption that only in the former, and not the latter, does harassment directly determine economic benefits and losses. In practice, this is rarely so; the distinction between these two forms of harassment takes the form of a continuum rather than a divide. When a woman is told to have sex or be fired (the classic quid pro quo), economic benefits are undoubtedly affected. But is the case so different when a boss propositions a female employee daily, or when in order to do her job, a woman must endure a range of physical and emotional abuse? There may be no manifest threat, at least in legal terms, to fire or not promote her. In practical terms, however, the impact on the [*496] woman will often be virtually identical: The victim will submit, quit, or end up being fired or held back for "cause," such as working too slowly, making too many mistakes, or taking too many sick days.⁹⁸

This real-world inability to conveniently catalog harassment as quid pro quo or hostile work environment cases based upon factors such as "severity or pervasiveness" and the existence of resulting tangible job detriment is a compelling reason by itself to refrain from re-categorizing these cases into outmoded causes of action. If courts frequently experience difficulty analyzing sexual harassment cases using systems of analysis specifically developed for that context, there is no reason to believe the task of the bench and jury would be simplified by resort to a system that requires labeling all harassment as "retaliation" or "submission" cases.

Scalia further compounds the difficulties presented by his hyper-structural approach by contending that a submission case will automatically satisfy the hostile environment elements.⁹⁹ "The woman who is forced to

[*Barnes v. Costle*, 561 F.2d 983 \(D.C. Cir. 1977\)](#) ushered in the new legal paradigm. Its reasoning formed the basis for recognizing quid pro quo harassment - a supervisor's attempt to condition employment benefits on sexual favors - as a violation of Title VII. Within three years, at least two other courts of appeal had followed its reasoning.

Vicki Schultz, Reconceptualizing Sexual Harassment, [107 Yale L.J. 1683, 1704 \(1998\)](#). Courts came to accept sexual harassment as gender bias because it is based on sexual stereotyping and objectifying female subordinates. See *id.* See, e.g., [Miller v. Bank of America](#), 600 F.2d 211 (9th Cir. 1979); [Tomkins v. Public Serv. Elec. & Gas Co.](#), 568 F.2d 1044 (3d Cir. 1977). The EEOC subsequently issued guidelines that defined sexual harassment as, inter alia:

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature... 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...

Guidelines on Discrimination Because of Sex, [62 Fed. Reg. 63,622 \(1980\)](#) ([29 C.F.R. 1604.11 \(1997\)](#)).

⁸¹ See [Williams v. Saxbe](#), 413 F. Supp. 654, 657 (D.D.C. 1976), rev'd sub nom [Williams v. Bell](#), 587 F.2d 1240 (D.C. Cir. 1978) (on procedural grounds), on remand, [Williams v. Civilett](#), 413 F. Supp. 1387 (D.D.C. 1980).

⁸² [Henson v. City of Dundee](#), 682 F.2d 897, 908 (11th Cir. 1982).

⁸³ See supra notes 14-76 and accompanying text.

⁸⁴ Estrich, supra note 57, at 822.

⁸⁵ *Id.* at 819.

⁸⁶ *Id.* at 820. To be fair to Professor Estrich, on the other hand, the author should point out that her position should not be construed as a didactic criticism that sexual harassment is wrong because it is sexual in nature. Her view is more akin to the prevailing "sexual desire-dominance paradigm," Schultz, supra note 80, at 1686, which Professor Schultz describes thusly:



engage in unwanted sex with her boss to keep her job has satisfied these elements. She can state a claim for environmental harassment," he argues. ¹⁰⁰ But Scalia does not explain why she can. Is it because such submission alters the victim's terms and conditions of employment by virtue of the severity of the act and its emotional effect on the employee? ¹⁰¹ If so, many single acts short of his categorical view of "submission" as accession to sexual favors may be comparably devastating, such as sexual assault or indecent exposure. ¹⁰² Scalia's rule of liability would allow these acts to avoid legal consequences unless they are held to actually alter the terms and conditions of employment, a standard that is frequently insurmountable. Nor is it clear that submission to a demand for intercourse will always generate emotional distress severe enough to alter terms and conditions of employment, in cases, for example, when the line between a personal intimate relationship shared by a supervisor and a subordinate, on one hand, and accession to demands for sexual favors in exchange for special treatment on the other, is unclear. ¹⁰³

Scalia credits Professor MacKinnon as the source for his view on non-liability where no tangible job detriment occurs:

Professor MacKinnon identified quid pro quo as taking three forms. In the first, there is a proposition, rejection, and retaliation. In the second, the woman complies and does not receive a job benefit. In the third, the woman complies and does benefit. MacKinnon identified a "fourth logical possibility" that, in her words, "does not [***497**] require further discussion": "the woman refuses to comply, receives completely fair treatment on the job, and is never harassed again... In this one turn of events, there truly is "no harm in asking." ¹⁰⁴

The problem with Scalia's application of MacKinnon's analysis is that it dismisses with a flippant phrase a large volume of harassing conduct that in fact results in obstacles to female job performance and success. MacKinnon surely does not mean there is no moral harm in asking for a quid pro quo, because she and all enlightened commentators would agree that emotional harm and demotivation may result to an employee victimized by such a demand. ¹⁰⁵ The statement that there is "no harm" must refer then to the lack of tangible legal detriment ostensibly

Articulating the new line within cultural-radical feminism, [Professor Catherine] MacKinnon argued that harassment is problematic precisely because it is sexual in nature - and because heterosexual sexual relations are the primary mechanism through which male dominance and female subordination are maintained. In MacKinnon's words, "A major substantive element in the social meaning of masculinity, what men learn makes them 'a man,' is sexual conquest of women; in turn, women's femininity is defined in terms of acquiescence to male sexual advances."

Id. at 1705 (quoting Catherine A. MacKinnon, *Sexual Harassment of Working Women: A Case of Sex Discrimination* 178 (1979)). See also Katherine Franke, *What's Wrong With Sexual Harassment?*, [49 Stan. L. Rev. 691 \(1997\)](#).

⁸⁷ Estrich, *supra* note 57, at 820.

⁸⁸ [898 F.2d 533 \(7th Cir. 1990\)](#).

⁸⁹ [Id. at 539](#).

⁹⁰ See, e.g., [Barnes v. Costle, 561 F.2d 983, 1001 \(D.C. Cir. 1977\)](#) (MacKinnon, J., concurring) (noting sexual advances may not be "intrinsically offensive" in that they may involve conduct that is "normal and expectable"). See also [Franke, supra](#) note 86.

⁹¹ Scalia, *supra* note 1, at 320 n.48.

⁹² Id. An often heard argument opposing liability for a quid pro quo threat alone is that allowing such claims would engender litigation. See e.g., Michael S. Greve, *Sexual Harassment: Telling the Other Victim's Story*, [23 N. Ky. L. Rev. 523 \(1996\)](#); Mark McLaughlin Hager, *Harassment as a Tort: Why Title VII Hostile Work Environment Liability Should be Curtailed*, [30 Conn. L. Rev. 375 \(1998\)](#); Smith, *supra* note 5. While a proper response to this attack is beyond the scope of this article, allow me to quote the Seventh Circuit, somewhat out of context but an analogous and therefore fair use, when it responded to early similar concerns by federal courts, after Meritor, anticipating a flood of sexual harassment litigation:



required to make a quid pro quo case. This renders the proposition a tautology, since it only begs the question whether a one-time demand for sexual favors absent tangible job detriment should be sufficient to impose liability. The statement is merely descriptive of the prevailing law on this issue, but is quoted by Scalia as if it were a didactic imperative.

Furthermore, Scalia's interpretation of MacKinnon's views condones workplace conduct that has detrimental effects far beyond the immediate instance of harassment. In the first form of quid pro quo harassment posited by MacKinnon - a proposition followed by rejection and retaliation¹⁰⁶ - the victimized employee suffers tangible economic and emotional detriment. In the second form - submission without subsequent benefit¹⁰⁷ - the victimized employee submits and suffers only emotional detriment. It cannot properly be said that she suffers a cognizable job detriment for failing to receive the promised illegal consideration.¹⁰⁸ The third scenario, in which the victimized employee submits to the proposition and receives tangible economic benefit (but emotional detriment)¹⁰⁹ also creates another class of victimized employees - those employees who have failed to receive the job benefits [*498] based on merit that she instead received based on her illegal contract. In the fourth scenario, in which Scalia finds "no harm,"¹¹⁰ the victimized employee resists the improper advance and suffers emotional detriment.

What MacKinnon's fourth scenario has in common with the first three, which are clearly actionable, is the imposition on the employee of the illegal condition and the consequent infliction of emotional detriment.¹¹¹ Scalia's statement, "the essence of quid pro quo is conditioning a job benefit on sex,"¹¹² is accurate in this sense. But his view of the nature of the "condition" is puzzling:

In the retaliation case, the condition is enforced. In the submission case, it is satisfied. In the quid without quo scenario, however, the conditioning never occurs.¹¹³

Here we are, twenty years later, and the sky has not fallen. [Federal judges] are not, it turns out, incapable of distinguishing between the occasional off-color joke, stray remark, or rebuffed proposition, and a work environment that is rendered hostile by severe or pervasive harassment. We are well practiced in examining sexual harassment from the objective viewpoint of the reasonable individual as well as the subjective view of the plaintiff.

Doe by Doe v. City of Belleville, Ill., 119 F.3d 563, 591 (7th Cir. 1997) (Opinion of the court by Rovner, J.), vacated, **118 S. Ct. 1183 (1998)**. I submit that the same holds true for the federal bench's ability to distinguish between a threat designed to condition job benefits or non-retaliation on sexual favors - whether explicit or implicit - from sexual conduct.

⁹³ Note, Title VII - Sexual Harassment - Seventh Circuit Adopts Employer Liability Standards for Sexual Harassment by Supervisory Employees - *Jansen v. Packaging Corp. of Am.*, 123 F.3d 490 (7th Cir. 1997) (en banc), cert. granted, *118 S. Ct. 876 (1998)*, 111 Harv. L. Rev. 1602, 1606 (1998).

⁹⁴ Id. at 320.

⁹⁵ See Scalia, supra note 1, at 314.

⁹⁶ This is the predominant paradigm of sexual harassment among legal scholars See, e.g., Catherine MacKinnon, Sexual Harassment of Working Women a Case of Sex Discrimination 1 (1979) (stating sexual harassment is "the unwanted imposition of sexual requirements in the context of a relationship of unequal power."). See also supra note 86.

⁹⁷ See, e.g., *Faragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998); *Burlington Indus., Inc. v. Ellerth*, 118 S. Ct. 2257 (1998); *Harris v. Forklift Sys.*, 510 U.S. 17 (1993); *Meritor v. Vinson*, 447 U.S. 57 (1986); *Nichols v. Frank*, 42 F.3d 503 (9th Cir. 1994); *Lipsett v. University of Puerto Rico*, 864 F.2d 881 (1st Cir. 1988).

⁹⁸ Estrich, supra note 57, at 834.

Scalia's position implies that the harassing threat or promise is insufficient standing alone to accomplish conditioning. To the contrary, "conditioning" occurs in this instance. For the employee who resists, the threat continues to hang over her like a sword of Damocles, and may cause repeated and pervasive stress arising out of her inability to predict his response to her resistance. A supervisor brutal enough to impose an unconscionable sexual term of employment must reasonably be perceived as brutal enough to exact the consequences for non-compliance. Whether he ultimately does so or not, the employee thereafter labors under the condition that her prospects for advancement have been severely diminished by her non-compliance, and may yet again be elevated by a decision to provide the sexual favors demanded.

To place the issue in stark relief: standing at the moment of the initial threat or promise, a victimized employee has only two choices, to submit or resist.¹¹⁴ Her response will obviously depend upon a constellation of factors both personal to her and imposed upon her by the work environment, but in all circumstances, she will have no way of predicting the harasser's next **[*499]** move. For this reason, her response may be called the "submission/resistance wager." If she submits, she is wagering that her supervisor is likely to make good on his threat or promise. If she resists, she may be wagering that he will not do so.¹¹⁵ Power over the terms and conditions of her employment remains solely in the hands of her supervisor in either case. The harassing supervisor's authority places a broad range of potential rewards and punishments at his disposal. Rewards for submission may take the form of any number of the following, or a pattern or combination of them: more lenient job assignments or working hours; enhanced performance reviews; and advances in position, compensation or title.¹¹⁶ Likewise, punishments may take the form of a number of potential negative consequences, or a pattern or combination of them: burdensome increases in the employee's workload or changes in the employee's tasks; detrimental performance reviews; and demotions, suspensions, or stripping of titles and responsibilities.¹¹⁷

⁹⁹ See Scalia, *supra* note 1, at 316.

¹⁰⁰ *Id.* at 316.

¹⁰¹ See [Harris, 510 U.S. at 22.](#)

¹⁰² See generally, Catherine M. Maraist, *Faragher v. City of Boca Raton: An Analysis of the Subjective Perception Test Required by Harris v. Forklift Systems, Inc.*, [57 La. L. Rev. 1343, 1366-68 \(1997\)](#) (citing authorities). For a somewhat notorious example of exposure and its effects, see [Jones v. Clinton, 990 F. Supp. 657 \(E. D. Ark. 1998\).](#)

¹⁰³ See, e.g., [Karibian v. Columbia Univ., 14 F.3d 773 \(2d Cir. 1994\)](#); [Ellison v. Brady, 924 F.2d 872 \(9th Cir. 1991\).](#)

¹⁰⁴ Scalia, *supra* note 1, at 309 (quoting Catherine MacKinnon, *Sexual Harassment of Working Women: A Case of Sex Discrimination* 33 (1979)).

¹⁰⁵ See MacKinnon, *supra* note 96, at 47 ("Like women who are raped, sexually harassed women feel humiliated, degraded, ashamed, embarrassed, and cheap, as well as angry.").

¹⁰⁶ See *id.* at 32.

¹⁰⁷ See *id.* at 32-33.

¹⁰⁸ That it is not the transfer of sexual "consideration" that makes the submission claim actionable, but the recognition that a one-time "submission" is severe enough to warrant hostile environment liability, raises interesting questions. If it is not the proffer of sexual "consideration" and completion of the illegal "contract" that allows recovery (an alternative too odious to consider, let alone adopt as an element of the law), why does the law punish the fulfillment of an odious and illegal contract but fail to punish the proffer of such a contract? Shouldn't the law recognize that certain acts are similar in their abusiveness and reprehensibility as forced intercourse? Scalia is correct in asserting that "discrimination requires discrimination, not a fully-executed contract." Scalia, *supra* note 1, at 319. If this is the case, why doesn't an executory, though unperformed, "contract" of adhesion imposed on an employee not give rise to liability? Such overtures modify the contextual understanding that formed the basis for the contract the employee freely agreed to and hence they "alter[] the terms and conditions of employment." [29 C.F.R. 1604.11\(a\) \(1977\).](#)

Furthermore, abusive supervisors rarely exhibit isolated instances of either the "carrot" or the "stick" approach; typically, a combination of both are used, as the employee alternately submits and resists depending upon the severity of the consequences and the degree of control the supervisor wields. The abusive supervisor is not concerned with advancing the employee-victim's career, but with self-gratification. Consequently, he may withhold promised favors even after the employee submits, or may arbitrarily punish the employee despite her acquiescence to his demands. In some cases, he may even permit the resisting employee to advance because he fears the potential consequences that retribution may pose to his own career prospects.¹¹⁸ The employee-victim, on the other hand, remains subject to his power in all situations. She cannot predict the outcome of her submission or resistance to her supervisor's demands, and she cannot "enforce" a quid pro quo "contract" for career favors procured by her submission. The only power she possesses is the power of resistance, either by repudiation or by reporting his conduct. Her situation is made even more problematic by the [*500] fact that reporting requirements and statutes of limitation may operate to time bar her claims if she does not act on them promptly - a fact which she may or may not know.¹¹⁹ It is the threat of withholding job favors or imposing retaliation that places the employee in the position of making this Hobson's choice, and consequently it is these types of demands that the provisions of Title VII should be construed to "strike at the heart of."¹²⁰ If, [*501] as Scalia acknowledges, threatened harm is sufficient when it causes submission regardless of resulting tangible job detriment because "we "do not read Title VII to punish the victims of sexual harassment who surrender to unwelcome sexual encounters,"¹²¹ why is it insufficient when it fails to force submission? Why should the law of sexual harassment deny relief to the victim simply because the aggressor failed to follow through and act upon his threat or promise? Why should her right of relief depend on his lack of will, or his cagey knowledge of just how far the law will allow him to go before imposing liability on his employer?

C. The Tangible Job Detriment Requirement Before Ellerth

Before Ellerth, the prevalent and better-reasoned rule among the circuit courts was to impose strict liability upon an employer for acts of a supervisor that amounted to quid pro quo sexual harassment.¹²² Traditionally, proof of

¹⁰⁹ See MacKinnon, *supra* note 96, at 33.

¹¹⁰ See *id.* MacKinnon clarified her intention in using the phrase "no harm in asking," in a footnote:

The reference is to the classic formulation by Herbert [sic] Magruder of the position that a man should not be liable in tort for emotional harm resulting from his sexual advances. Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 *Harv. L. Rev.* 1033, 1055 (1936).

Id. at 251-52 n.35. Nor should MacKinnon be taken to intend that no means of asking - however harmful or offensive - should engender liability in light of her extended discussion of this issue elsewhere in her book. See *id.* at 167-74 (discussing rule of tort liability for purely emotional disturbance and quoting Magruder: "If there has been no incidental assault or battery, or perhaps trespass to land, recovery is generally denied, the view being apparently, that there is no harm in asking.").

¹¹¹ See generally *supra* notes 104, 107, 109-10 and accompanying text.

¹¹² Scalia, *supra* note 1, at 317.

¹¹³ *Id.*

¹¹⁴ Reporting should be regarded as a form of resistance, and non-reporting a form of submission. Whether a victim employee informs her employer or refrains from doing so, she is continually submitting or resisting. Thus, the "resistance/submission" rubric and the "reporting/non-reporting" rubric are one and the same, and should be treated as such.

¹¹⁵ Of course, she may also be expressing her refusal to accede to his conditions on any terms.

¹¹⁶ See, e.g., [Jansen v. Packaging Corp. of Am., 123 F.3d 490, 503 \(7th Cir. 1997\)](#) (recounting facts where supervisor said to his secretary, "I haven't forgotten your [performance] review, it's here on my desk," while patting his crotch); [Karibian, 14 F.3d at 777](#) (recounting supervisor's intertwining of request for performance of sexual favors with discussion of actual or potential job benefits or detriments in single conversation).



tangible job detriment was required by the circuit courts only where the issue before the court was whether threats and conduct of a supervisor may be [*502] attributed to the employer under agency principles.¹²³ Rather than examining the record for some form of objective job detriment suffered by the employee, however subtle,¹²⁴ the courts assumed strict liability for the employer where the harassing employee had authority to alter the terms and conditions of the employee's workplace, and evidence was adduced that he used that authority to demand submission to sexual desires as a condition of receiving favors or avoiding sanctions. This was not the direction the Supreme Court chose to take, however. It elected instead to impliedly limit quid pro quo actions to those factual situations involving tangible job detriment ensuing after supervisor sexual advances.¹²⁵ As will be seen, however, by leaving unclear the role of sexual demands and conditioning in establishing a quid pro quo claim, the Court's decisions may have raised as many questions as they answered.

IV. Burlington Industries, Inc. v. Ellerth and Faragher v. City of Boca Raton: The Supreme Court Seeks Higher Ground Against the Flood of Conflicting Liability Standards

A. Burlington Industries, Inc. v. Ellerth

Ellerth addressed the issue of whether an employee who refuses the unwelcome and threatening sexual advances of a supervisor and suffers no adverse tangible job consequences may recover against the employer without having to demonstrate that the employer is negligent or otherwise at fault for the supervisor's actions.¹²⁶ The plaintiff, Kimberly Ellerth, quit her job after fifteen months as a salesperson in one of Burlington Industries' divisions, allegedly because she had been subjected to constant sexual harassment by a supervisor, Ted Slowik.¹²⁷ "Against a background of repeated boorish and offensive remarks and gestures" made by Slowik, "Ellerth placed particular emphasis on three incidents" involving comments by Slowik that "could be construed as threats to deny her job benefits."¹²⁸ First, while on a business trip, Slowik made remarks about Ellerth's breasts and told her to "loosen up" and warned, "I could make your life very hard or very easy at Burlington."¹²⁹ Second, when Ellerth was being considered for a promotion, Slowik expressed reservations during a promotion interview because she was not "loose enough."¹³⁰ He then reached over and rubbed her knee.¹³¹ Ellerth did [*503] receive the

¹¹⁷ See, e.g., [Bryson v. Chicago State Univ.](#), 96 F.3d 912, 914 (7th Cir. 1996) (recounting plaintiff university professor alleged that Provost made sexual overtures toward her, threatening, "you had better do what I say or you're going to be sorry."); [Nichols](#), 42 F.3d at 507 (9th Cir. 1994) (recounting incident where post office supervisor repeatedly demanded and obtained oral sex from deaf-mute postal employee over period of six months; plaintiff submitted because she feared losing her job and did not know how she could get another). Justice Souter seems to recognize this problem, and bases his delineation of the standard of liability in supervisor hostile work environment cases in part on the need to encourage prompt reporting. See [Faragher](#), 118 S. Ct. at 2293. In his view, his articulation of the standard would do so. See id.

¹¹⁸ See, e.g., [Jansen](#), 123 F.3d at 493; [Ellerth](#), 123 F.3d at 494-95 (1997).

¹¹⁹ Title VII generally time bars claims based on events before the 300-day period prior to filing with the appropriate agency. See [42 U.S.C. 2000e-5\(e\)\(1\)](#). Bringing a claim within the 300-day period is considered a jurisdictional prerequisite, [Alexander v. Gardner-Denver Co.](#), 415 U.S. 36, 47 (1974), and plaintiffs are prohibited from recovering for conduct that arose before this period. See [Van Zant v. KLM Royal Dutch Airlines](#), 80 F.3d 708, 712 (2d Cir. 1996); [Lambert v. Genesee Hospital](#), 10 F.3d 46, 53 (2d Cir. 1993). An exception, the "continuing violation exception," applies to cases involving specific discrimination policies or mechanisms such as discriminatory seniority lists, or discriminatory employment tests. However, "multiple incidents of discrimination, even similar ones, that are not the result of a discriminatory policy or mechanism do not amount to a continuing violation." [Lambert](#), 10 F.3d at 53 (internal citations omitted). Cf. [Lightfoot v. Union Carbide Corp.](#), 110 F.3d 898, 907 (2d Cir. 1997) (quoting [Van Zant](#), 80 F.2d 708, 713) ("Discrete incidents of discrimination that are unrelated to an identifiable policy... 'will not ordinarily amount to a continuing violation,' unless such incidents are specifically related and are allowed to continue unremedied for 'so long as to amount to a discriminatory policy or practice.'") For other constructions of the continuing violation exception, see [Martin v. Nannie and Newborns, Inc.](#), 3 F.3d 1410, 1415 (10th Cir. 1993), stating exception requires "at least one instance of the discriminatory practice within the filing period... and the earlier acts must be part of a continuing policy or practice that includes the act or acts within the statutory period." See also [Berry v. Board of Supervisors of Louisiana State Univ.](#), 715 F.2d 971, 981 (5th Cir. 1983) (requiring courts to consider whether alleged violations constitute same type of discrimination; whether they were isolated and infrequent or recurring; and whether nature of alleged violations was such that it should trigger

promotion. ¹³² Finally, when Ellerth called Slowik to ask permission on a business matter, Slowik responded, "I don't have time for you right now, Kim - unless you want to tell me what you're wearing." ¹³³ When Ellerth called later to make the same request, Slowik denied her request and said, "Are you wearing shorter skirts yet, Kim, because it would make your job a whole heck of a lot easier." ¹³⁴

Ellerth informed no one in authority about Slowik's conduct, despite knowing that Burlington had a policy against sexual harassment. ¹³⁵ She quit shortly after the third incident, ¹³⁶ and filed suit in federal district court. ¹³⁷ The court granted summary judgment in favor of Burlington, reasoning that although Slowik's behavior was severe and pervasive enough to create a hostile work environment, Burlington neither knew nor should have known about the conduct. ¹³⁸ A severely divided Seventh Circuit Court of Appeals was able to provide no controlling direction on the issue and suggested that the Supreme Court accept certiorari to "bring order to the chaotic case law" in this area. ¹³⁹

The Supreme Court took up the challenge and held that a Title VII claimant who refuses the unwelcome and threatening sexual advances of a supervisor, yet suffers no adverse tangible job consequences may indeed recover against the employer without showing the employer is negligent or otherwise at fault for the supervisor's actions. ¹⁴⁰ However, in such circumstances, the employer may interpose an affirmative defense comprised of two necessary elements. First, the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and second, that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. ¹⁴¹

The Court took the opportunity to clarify that the labels "quid pro quo" and "hostile work environment" were not controlling for employer liability purposes. ¹⁴² Although Ellerth had not alleged that she suffered a tangible employment action that would deprive Burlington of the affirmative defense, Burlington would still be subject to vicarious liability for Slowik's activity; but on remand Burlington would have an opportunity to assert and prove the [*504] affirmative defenses. ¹⁴³

employee's awareness of need to assert her rights and would consequences of act continue in absence of continuing intent to discriminate).

In light of these limitations on liability, the Supreme Court's joint opinions in Ellerth and Faragher raise an issue relating to the employer defenses established by the Court. See generally [Ellerth, 118 S. Ct. 2257](#); [Faragher, 118 S. Ct. 2275](#). If the employee's failure to report harassing conduct was "reasonable," no defense is available; if unreasonable, the employer avoids liability. See [Ellerth, 118 S. Ct. at 2270](#); [Faragher, 118 S. Ct. 2293](#). But the Court failed to provide guidelines as to what would be "reasonably" suffered. See [Ellerth, 118 S. Ct. at 2270-71](#); [Faragher, 118 S. Ct. at 2293-94](#). Would a failure to report repeated sexual assaults by a high-ranking supervisor against a low-level economically disadvantaged employee be termed "reasonable" from an objective standpoint? At what point does the law determine that an employee "suffered too much" to be permitted redress? What rules are to be followed to determine liability when the case presents a confluence of types of harassment, levels of authority exercised by multiple harassers and personal circumstances of the employee?

¹²⁰ [Meritor, 477 U.S. at 64](#). As many courts and commentators have argued, one way to make this imbalance of power more equitable is to view the facts and circumstances from the standpoint of the employee whom Title VII primarily seeks to protect. See [Burns v. McGregor Electronic Industries, 989 F.2d 959, 962 \(8th Cir. 1993\)](#) (finding reasonable person would find employer's behavior sufficiently severe to alter conditions of employment and create abusive work environment); [Andrews v. Philadelphia, 895 F.2d 1469, 1482 \(3d Cir. 1990\)](#) (finding hostile work environment claim must demonstrate alleged conduct would detrimentally affect reasonable person of the same sex in that position); [Yates v. Avco Corp., 819 F.2d 630, 636-37 \(6th Cir. 1987\)](#) (requiring inquiry into both objective feelings of employee, and intent of employer for finding of constructive discharge); [Robinson v. Jacksonville Shipyards, Inc, 760 F. Supp. 1486 \(M.D. Fla. 1991\)](#) (adopting "reasonable woman standard" in light of expert testimony as to research reflecting that 11-12% more women than men characterized sexual remarks or materials of sexual nature in workplace as sexual harassment); [Barbetta v. Chemlawn Servs. Corp., 669 F. Supp. 569, 572 \(W.D.N.Y. 1987\)](#) (finding sexually offensive working environment which reasonable woman could have found intolerable). The view expressed by the First Circuit in Lipsett, is in a similar vein. The court noted that while the holding of Meritor "leaves open the question of whose perspective - that of the harasser or that of the victim - should be used in assessing "unwelcomeness,"

B. Faragher v. City of Boca Raton

In Faragher, the Supreme Court addressed the standard of employer liability where a supervisory employee has created a hostile work environment.¹⁴⁴ After resigning her position as a lifeguard with defendant City of Boca Raton, Faragher brought an action against the city and her immediate supervisors alleging that the supervisors had created a "sexually hostile atmosphere" at work by repeatedly subjecting Faragher and other female lifeguards to "uninvited and offensive touching," by making lewd remarks, and by speaking of women in offensive terms.¹⁴⁵ The district court found that the supervisors' conduct was discriminatory harassment and held the city liable.¹⁴⁶ The Eleventh Circuit Court of Appeals reversed.¹⁴⁷

The Supreme Court restated its Ellerth holding in Faragher, a companion decision.¹⁴⁸ The Court further held that proof that an employer had promulgated an anti-harassment policy with complaint procedures was not necessary in every instance, as a matter of law, but the need for a stated policy suitable to the employment circumstances might appropriately be addressed in any case when litigating the defense of the reasonableness of the employer's conduct.¹⁴⁹ While proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm was not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such a failure would normally suffice to satisfy the employer's burden under the second element of the defense.¹⁵⁰ No affirmative defense would be available, however, when the supervisor's harassment culminated in a tangible employment action, such as discharge, demotion, or undesirable reassignment.¹⁵¹

The Court stated, on remand, that the city would have an opportunity to raise an affirmative defense if there were any serious prospect of its presenting one; however, it appeared from the record that any such avenue [*505] was closed.¹⁵² The city entirely failed to disseminate its policy among beach employees, and it made no attempt to keep track of the conduct of supervisors.¹⁵³ The city's policy did not include any assurance that the harassing supervisors could be bypassed in registering complaints.¹⁵⁴ Under such circumstances, the Supreme Court held,

the First Circuit concluded that "unless the fact finder [must keep] both the man's and the woman's perspective in mind, "defendants as well as the courts [will be] permitted to sustain ingrained notions of reasonable behavior fashioned by the offenders...." [Lipsett, 864 F.2d at 898](#) (citing [Rabidue v. Osceola Refining Co., Div. of Texas American Petrochemicals, 805 F.2d 611, 626 \(6th Cir. 1986\)](#) (Keith, J., dissenting), cert. denied, **481 U.S. 1041 (1987)** (proposing adoption of the reasonable victim/woman standard)). Some courts hold to a standard that instructs the finder of fact to view the alleged harassment from the standpoint of the reasonable person in the plaintiff's position, a position that may come close to the "reasonable woman" standard. See, e.g., [Ellison v. Brady, 924 F.2d 872, 879 \(9th Cir. 1991\)](#) (adopting standard of reasonable person with same fundamental characteristics); [Lynch v. General Motors Corp., 42 F. Supp. 503, 506 \(D. Mass. 1994\)](#) (using reasonable person in plaintiff's position); [Bennett v. New York City Dep't of Corrections, 705 F. Supp. 979, 982 \(S.D.N.Y. 1989\)](#) (reasonable person in similar environment under similar circumstances). The Ninth Circuit has gone a step further by calling for review of the alleged conduct from the standpoint of the reasonable person who possesses the defining traits, including race, sex, age disability, and sexual orientation. See [Nichols v. Frank, 42 F.3d 503 \(9th Cir. 1994\)](#). But see for cases adopting the reasonable person standard in hostile work environment cases, [Morgan v. Massachusetts General Hosp., 901 F.2d 186 \(1st Cir. 1990\)](#); [Tunis v. Coming Glass Works, 747 F. Supp. 951 \(S.D.N.Y. 1990\)](#), aff'd without op., **930 F.2d 910 (2d Cir. 1991)**. For an argument in favor of adoption of a "respectful person" standard over the "reasonable person" standard, see Anita Bernstein, *Treating Sexual Harassment With Respect*, [111 Harv. L. Rev. 445 \(1997\)](#). Lindemann and Kadue's treatise contains an excellent discussion of this issue. Lindemann & Kadue, *supra* note 34, at 179-81 & (Supp. 1997) at 45-46.

¹⁴¹ See Scalia, *supra* note 1, at 315 n.32, (quoting [Robinson v. Pittsburgh, 120 F.3d 1286, 1297 \(3d Cir. 1997\)](#)).

¹⁴² See, e.g., [Jansen, 123 F.3d 490](#). See generally, Note, Title VII - Sexual Harassment - Seventh Circuit Adopts Employer Liability Standards for Sexual Harassment by Supervisory Employees, [111 Harv. L. Rev. 1602, 1606 \(1998\)](#).

¹⁴³ See generally *supra* note 75.

¹⁴⁴ See, e.g., [Bryson v. Chicago State, 96 F.3d 912, 914 \(7th Cir. 1996\)](#) (removing faculty member is sufficient tangible detriment).

¹⁴⁵ See discussion *infra* IV.

as a matter of law, that the city could not be found to have exercised reasonable care to prevent the supervisors' harassing conduct. ¹⁵⁵

C. The Road Ahead for Supervisory Harassment Liability

1. The Supreme Court's New Paradigmatic View of the Quid Pro Quo/Hostile Work Environment Framework

Title VII ordinarily provides liability only for the employer as an entity, and not for individual supervisors or fellow workers. ¹⁵⁶ Consequently, any useful construct of liability under the Act must answer two questions with a high degree of predictability for employers and legal practitioners. First, what kind of conduct is proscribed by the statute? Second, under what circumstances is the employer subject to liability for the conduct?

Under the traditional approach that treats quid pro quo and hostile work environment as discrete causes of action, the categories stand for the two regimes of liability and the terms of legal art act as semantic gatekeepers to establishing a claim against the employer under one or the other standard of liability. The Supreme Court took a different approach to answering these questions in *Ellerth* and *Faragher* by banishing the labels of quid pro quo and hostile work environment from the liability analysis altogether and relegating them to the status of descriptive terms:

To the extent they illustrate the distinction between cases involving a threat which is carried out and offensive conduct in general, the terms are relevant when there is a threshold question whether a plaintiff can prove discrimination in violation of Title VII. ¹⁵⁷

When it is assumed discrimination can be proved, however, the Court **[*506]** directed that its ensuing discussion of agency principles should control whether vicarious liability will be imposed, and not the "categories" of quid pro quo and hostile work environment. ¹⁵⁸

¹²⁶ See [Ellerth, 118 S. Ct. at 2259.](#)

¹²⁷ See [id. at 2262.](#)

¹²⁸ Id.

¹²⁹ Id.

¹³⁰ See id.

¹³¹ See id.

¹³² See id.

¹³³ [Id. at 2266.](#)

¹³⁴ Id. The record reflects that Ellerth quit shortly after being reprimanded for not returning telephone calls. See id. It is unclear whether the unreturned calls were from the customers on whose behalf Ellerth could not get approvals from Slowik. If so, one may query whether her inability to do this component of her job could be viewed as a sufficient tangible job detriment to give rise to strict liability under the rule enunciated by the Court.

¹³⁵ See [id. at 2262.](#)

¹³⁶ See id.

¹³⁷ See [id. at 2263.](#)



Consequently, after *Ellerth* and *Faragher* and for as long as courts determine that there is more than one standard of liability depending on the type of conduct and/or the identity of the harasser, it will be necessary to separate quid pro quo claims from hostile work environment claims. Under the new regime, the more workable approach is to disregard the labels of quid pro quo and hostile work environment. Instead, the inquiry should be whether, at a point within the statutory claim period, a supervisory employee engaged in a retaliatory "company act" against the plaintiff. If not, then the inquiry should be whether the conduct as alleged was severe or pervasive enough to alter the terms and conditions of the claimant's employment, thereby making out a hostile work environment claim. The standard for employer quid pro quo liability - and the concomitant higher standard of strict liability - will depend not upon the characterization of the conduct as quid pro quo harassment, but on the authority of the harasser to alter the terms and conditions of the victim's employment, and whether the harassing conduct was in fact followed by an alteration in the terms and conditions of employment - i.e., some form of tangible detriment.

The language of the joint decisions is worth setting out in detail, as it will provide the road map for supervisor-perpetrated sexual harassment liability for some time to come. The Court stated:

In order to accommodate the agency principles of vicarious liability for harm caused by misuse of supervisory authority, as well as Title VII's equally basic policies of encouraging forethought by employers and saving action by objecting employees, we adopt the following holding in this case and in *Faragher v. Boca Raton*, post, also decided today. 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, see [Fed. Rule Civ. Proc. 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... No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment. ¹⁵⁹

¹³⁸ See *id.*

¹³⁹ See [Jansen, 123 F.3d at 495](#).

¹⁴⁰ [Ellerth, 118 S. Ct. at 2270](#).

¹⁴¹ See *id.*

¹⁴² See [id. at 2271](#).

¹⁴³ See *id.*

¹⁴⁴ [118 S. Ct. 2275, 2280 \(1998\)](#).

¹⁴⁵ See [id. at 2280](#).

¹⁴⁶ See [id. at 2281](#) See also [Faragher v. City of Boca Raton, 864 F. Supp. 1552, 1562-63 \(S.D. Fla. 1994\)](#), aff'd in part, rev'd in part, [76 F.3d 1155 \(11th Cir. 1996\)](#), aff'd in part, rev'd in part, [111 F.3d 1530 \(11th Cir. 1997\)](#) (en banc), rev'd, [118 S. Ct. 2275 \(1998\)](#).

¹⁴⁷ See [Faragher, 118 S. Ct. at 2281-82](#). See also [Faragher v. City of Boca Raton, 76 F.3d 1155](#), aff'd in part, rev'd in part, [111 F.3d 1530 \(11th Cir. 1997\)](#) (en banc), rev'd, [118 S. Ct. 2275](#).

¹⁴⁸ See [Faragher, 118 S. Ct. at 2292-93](#). The Court reiterated that an employee who refuses the unwelcome and threatening sexual advances of a supervisor, yet suffers no adverse tangible job consequences, may recover against the employer without proving the employer was negligent or otherwise at fault for the supervisor's actions, but the employer may interpose the affirmative defenses outlined in *Ellerth*. See *id.*

[*507] It is now apparent that Ellerth and Faragher were regarded by the Court as appropriate cases for companion decision treatment because a majority of the Court was unwilling to regard the allegations of threats and promises present only in Ellerth as determinative of a differing rule of liability for the two cases. In order to posture Ellerth as a hostile work environment case only, and to align the ensuing analysis to conform to Justice Souter's analysis in Faragher, Justice Kennedy began by re-characterizing the definition of a quid pro quo claim to exclude the conduct alleged by Kimberly Ellerth. The means by which he did this is a study in judicial subtlety. Justice Kennedy began by first "assuming an important proposition," that "a trier of fact could find in Slowik's remarks numerous threats to retaliate against Ellerth if she denied some sexual liberties."¹⁶⁰ However, he noted, the threats in this case were left unfulfilled.¹⁶¹ Justice Kennedy followed with a sweeping re-characterization of the quid pro quo/hostile work environment framework, without elaboration or citation to a single authority:

Cases based on threats, which are carried out, are referred to often as quid pro quo cases, as distinct from bothersome attentions or sexual remarks that are sufficiently severe or pervasive to create a hostile work environment.¹⁶²

Then Kennedy delivered the coup de grace to the prevailing view that quid pro quo and hostile work environment claims were separate and distinct causes of action. Justice Kennedy put the lie to a decade of reliance on the seeming categorical approach established by the Court in Meritor, by chiding, "the terms quid pro quo and hostile work environment are helpful, perhaps, in making a rough demarcation between cases in which threats are carried out and those where they are not or are absent altogether, but beyond this are of limited utility."¹⁶³

Justice Kennedy revisited Meritor to clarify that the quid pro quo/hostile work environment distinction was discussed in that case not for its bearing on the standard of employer liability, but "to instruct that Title VII is violated by either explicit or constructive alterations in the terms and conditions of employment and to explain that the latter must be severe or pervasive."¹⁶⁴ He laid responsibility for development of the categorical approach to liability squarely at the feet of the circuit courts:

¹⁴⁹ See [id. at 2293](#).

¹⁵⁰ See *id.*

¹⁵¹ See *id.*

¹⁵² See *id.*

¹⁵³ See *id.*

¹⁵⁴ See *id.*

¹⁵⁵ See *id.*

¹⁵⁶ The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such person...." [42 U.S.C. 2000e\(b\)](#) (1981). Courts generally construe this definition to impose liability only on the employer as an entity, and not on individual supervisors or other agents. See, e.g., [Tomka v. Seiler Corp., 66 F.3d 1295 \(2d Cir. 1995\)](#); [Garcia v. Elf Atochem N. Am., 28 F.3d 446 \(5th Cir. 1994\)](#). However, the Fifth Circuit has construed the term "agent" to include immediate supervisors when they are delegated the employer's traditional right of hiring and firing. See [Hamilton v. Rodgers, 791 F.2d 439, 442-43 \(5th Cir. 1986\)](#); [Quijano v. University Fed. Credit Union, 617 F.2d 129 \(5th Cir. 1980\)](#). Even in that circuit, however, there is no Title VII liability "for the actions of mere co-workers." [Harvey v. Blake, 913 F.2d 226, 228 \(5th Cir. 1990\)](#).

¹⁵⁷ [Ellerth, 118 S. Ct. at 2265](#)

¹⁵⁸ See *id.*

¹⁵⁹ [Ellerth, 118 S. Ct. at 2270](#); [Faragher, 118 S. Ct. at 2292-93](#). In the omitted text, the Court warned that although proof of an anti-harassment policy with a complaint procedure is not required, the existence of a policy is germane to establishing whether



Nevertheless, as use of the terms ["quid pro quo" and "hostile work environment"] grew in the wake of Meritor, they acquired their own significance. The standard of employer responsibility turned on [*508] which type of harassment occurred. If the plaintiff established a quid pro quo claim, the Courts of Appeals held, the employer was subject to vicarious liability... The rule encouraged Title VII plaintiffs to state their claims as quid pro quo claims, which in turn put expansive pressure on the definition.¹⁶⁵

The federal courts have already begun to acknowledge the Court's destructuralization of the quid pro quo/hostile environment framework and to cast about for ways to enunciate the new paradigmatic treatment of the terms.¹⁶⁶

2. The "Tangible Job Detriment" Requirement Revisited

In its realignment of the substantive meaning of the quid pro quo/hostile environment construct, the Court left unanswered a number of questions raised by its new paradigmatic approach. Several of these issues will be discussed in the balance of this article. Chief among these, in my view, is the question of what the Court considers to be the required nexus between the presence of a hostile work environment and ensuing tangible job detriment for establishing strict liability. The language of the opinion does not begin to identify the quantum of causation required between the hostility created or permitted by a supervisor and any tangible job detriment suffered by the employee. In theory, a victim who suffers an extensive history of outrageous sexual conduct that never culminates in a cognizable negative job action is subject to the employer's defenses, while the victim of a supervisor's one-time slur or threat - e.g., being called an "incompetent stupid female bitch"¹⁶⁷ - which is followed at some late point by a negative job action may state a claim without regard to the employer's fault. This is a windfall to her if she does not have to prove a nexus between the harassing behavior and the negative job action, particularly if she was in fact terminated for incompetence.

But how could that nexus be established? The harassment is evidence of motive to terminate, as Scalia notes,¹⁶⁸ but there are a number of other possible explanations for the correlation. The statements by the harasser may have merely been displays of undirected misogyny, unrelated to the actual and legitimate reasons for firing. If the behavior was reported at some point before the firing, a retaliation claim is possible. If the harassment included implicit or explicit demand for sexual favors, her non-compliance - interpreted as non-submission - may have been the impetus for the negative action, in which case it should likewise be viewed as a retaliation action. The [*509]

the employer acted reasonably. See [Ellerth, 118 S. Ct. at 2270](#); [Faragher, 118 S. Ct. at 2293](#). Likewise, while proof that the employee failed to act with reasonable care to avoid harm is not limited to showing an unreasonable failure to use available complaint procedures, such failure will normally satisfy the employer's burden of proving this defense. See [Ellerth, 118 S. Ct. at 2270](#); [Faragher, 118 S. Ct. at 2293](#)

¹⁶⁰ [Ellerth, 118 S. Ct. at 2264](#).

¹⁶¹ See *id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ [Id. at 2264-65](#).

¹⁶⁶ See, e.g., [Schmitz v. Ing Sec., Futures & Options, Inc., 10 F. Supp.2d 982, 983 \(N.D. Ill. 1998\)](#) ("In part Burlington serves to limit the significance of the dichotomy between 'quid pro quo' and 'hostile environment' sexual harassment...") See also [Fierro v. Saks Fifth Ave., 13 F. Supp.2d 481, 492 \(S.D.N.Y. 1998\)](#) (applying Faragher defense to racial hostile work environment claim).

¹⁶⁷ Scalia, *supra* note 1, at 320

¹⁶⁸ See *id.* at 317

Court gives no guidelines for understanding these distinctions. ¹⁶⁹ In my view, the Court has taken a right-angle turn into a morass of ill-defined standards by employing the term "tangible job detriment" solely out of context. As we have seen in the discussion above, the term has heretofore served as a sometime linchpin for strict employer liability for quid pro quo harassment. ¹⁷⁰ The term has now been pressed into service as the benchmark for strict liability for supervisor hostile work environment liability, a usage that so departs from the role it was crafted for as to render the substance of its new meaning highly speculative.

This brings us to the second question raised by Ellerth and Faragher: What now remains of the scope of the quid pro quo cause of action itself? If the Court's decisions can be read to imply that for quid pro quo claims as well as for hostile work environment claims, the Court has removed the requirement of proving a nexus between the acceptance or rejection of a sexual advance and a job benefit or loss, how then will a quid pro quo "contract" or condition be established? How is it to be termed a "contract" or a "quid pro quo" at all? If the Court has indeed eliminated it, what remains of the definition of "quid pro quo" at all outside of the most extreme cases of forced sexual capitulation? ¹⁷¹ After the recent decisions, it appears that at a minimum, the quid pro quo rubric will consist of some form of conditioning by the harasser and a tangible job detriment ensuing. But if the employer is subject to strict liability for a hostile work environment created by a supervisor that is followed by a tangible job detriment, the only [*510] distinguishing characteristic left of the quid pro quo rubric is that of the conditioning, i.e., the explicit or implicit threat or promise itself. In the new regime of liability, the impetus for plaintiffs to attempt to prove conditioning as an element for recovery will be greatly reduced, because strict liability will be imposed on the employer regardless of conditioning if a tangible job detriment follows the environmental supervisory harassment. ¹⁷² Under these circumstances, the "expansive pressure" Justice Kennedy spoke of in Ellerth ¹⁷³ will be transferred from the definition of quid pro quo harassment to the hostile work environment claim and, specifically, the quantum of proof required to demonstrate the existence of a tangible job detriment.

¹⁶⁹ Nor did the Court supply any guidance on these questions in its other sexual harassment decisions of the term. In [Oncale v. Sundowner, 118 S. Ct. 998 \(1998\)](#), the Court held that Title VII's prohibition on discrimination "because of sex" extends to harassment between members of the same sex. See [id. at 1001-02](#).

Male-on-male sexual harassment was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.

[id. at 1002](#). But the Court did not expand on the rule of liability for the harassment presented in Oncale, which included improper conduct by both the plaintiff's supervisor and his co-workers. The Court's fourth sexual harassment decision of the term, [Gebser v. Lago Vista, 118 S. Ct. 1989 \(1998\)](#), is of limited utility in ascertaining the scope of Title VII harassment liability, insofar as the majority's view of the standard of liability for school districts under Title IX of the Education Amendments of 1972 turned more upon the contract notice requirements inherent in the Spending Clause case law than on analogizing Title VII's liability structure to Title IX cases. See [id. at 1996](#).

The Ninth Circuit is the first of the federal courts of appeal to weigh in on this issue. In [Burrell v. Star Nursery, Inc., 170 F.3d 951 \(9th Cir. 1999\)](#), the court appeared to construe the rule in Ellerth to require a causative relationship between the supervisor's hostile environment harassment and the subsequent tangible detriment suffered by the victim employee to impose strict liability on the employer. See [id. at 956](#). The court found the record insufficiently developed on this issue, however, and remanded for proceedings consistent with Ellerth, leaving it unclear how the court would apply the rule to the facts at hand. See [id. at 957](#).

¹⁷⁰ See discussion supra II.

¹⁷¹ See Estrich, supra note 57, at 831.

¹⁷² The motivation for establishing conditioning may not be totally negated, however, since such conduct would be probative to establishing the requisite degree of employer culpability to make a claim for punitive damages. While the circuit courts differ on the standard for imposing punitive damages liability under Title VII, compare [Jackson v. Pool Mortgage Co, 868 F.2d 1178, 1182 \(10th Cir. 1989\)](#) (stating issue of sufficiency of evidence to justify award of punitive damages is issue of law for court); [Stephens v. South Atl. Cannery, Inc, 848 F.2d 484, 489 \(4th Cir. 1988\)](#) (stating remedies under Title VII are limited to equitable relief, such

3. One-Time Acts of Harassment: Liability or "One Free Feel?"

What the ruling [federal district court's dismissal of *Jones v. Clinton*] means is that women think they're going to have to put up with men exposing themselves at work because that isn't bad enough to be considered severe by the courts. ¹⁷⁴

It [the dismissal of *Jones v. Clinton*] could be seen as everyone gets one free feel and if the woman says, "No," and you take that, then you're OK. But I don't think that's what the law meant, or what we want it to mean. ¹⁷⁵

[*511] The Supreme Court's recent decisions appear to leave open the question of whether one particularly egregious incident of sexual harassment may constitute the creation of a hostile work environment, albeit not a *quid pro quo* claim outright. ¹⁷⁶ Justice Kennedy noted, in *Ellerth*, "The case before us involves numerous alleged threats, and we express no opinion as to whether a single unfulfilled threat is sufficient to constitute discrimination in the terms or conditions of employment." ¹⁷⁷ The Court's unwillingness to rule out this possibility since the issue was first raised in *Harris v. Forklift Systems*, ¹⁷⁸ seems to invite acceptance of this view by accession, and several of the Circuits Courts have taken this approach. ¹⁷⁹ For example, in *Tomka v. Seiler Corp.*, ¹⁸⁰ the [Second](#) Circuit stated that "even a single incident of sexual assault sufficiently alters the conditions of the victim's employment and clearly creates an abusive work environment for purposes of Title VII liability." ¹⁸¹ Likewise, in *Bohen v. City of East Chicago*, ¹⁸² the [Seventh](#) Circuit observed that "as a general matter, a single discriminatory act against one individual can amount to intentional discrimination for equal protection purposes." ¹⁸³

In the oral argument before the Supreme Court in *Ellerth*, several of the Justices took issue with counsel for the employer's statement that no liability arises if no tangible job detriment results. ¹⁸⁴ One Justice pointed out that a decision on whether to impose negative consequences for non-submission may await a formal review or promotion, and queried whether a cause of action would arise in the interim. ¹⁸⁵ When counsel replied in the negative, stating that no "harm" had then resulted to the employee, and that one **[*512]** incident was insufficient to give rise to

as: backpay, injunctive relief, or reinstatement); [Beauford v. Sisters of Mercy-Province of Detroit](#), 816 F.2d 1104, 1109 (6th Cir. 1987) (stating punitive damages are limited to cases involving egregious conduct or a showing of willfulness or malice on behalf of defendant); [Walters v. City of Atlanta](#), 803 F.2d 1135, 1147 (11th Cir. 1986) (stating egregious misconduct beyond mere intent to discriminate required for punitive damages) with [Barbour v. Merrill](#), 48 F.3d 1270, 1277 (D.C. Cir. 1995) (intentional discrimination, without more, sufficient to put the question of punitive damages before the jury); [Rowlett v. Anheuser-Busch, Inc.](#), 832 F.2d 194, 205 (1st Cir. 1987) (stating trier of fact has discretion in determining whether punitive damages are required to punish defendant for intentional wrongdoing); [Williamson v. Handy Button Mach. Co.](#), 817 F.2d 1290, 1296 (7th Cir. 1987) (stating standard for awarding punitive damages is willful wrongdoing or reckless indifference to plaintiff's known rights), it is clear that under either standard, a showing of egregious conduct on the part of the employer would be probative on this issue. The Supreme Court addressed this issue in the 1998 term in *Kolstad v. American Dental Ass'n*, S. Ct. No. 98-208 (Oct. Term 1998). The Supreme Court has heard oral arguments in this case, but as of the date of this article has not yet issued an opinion. The question presented was: "In what circumstances may punitive damages be awarded under Title VII of the 1964 Civil Rights Act, as amended, for unlawful intentional discrimination?" Brief for Petitioner at i, *Kolstad v. American Dental Ass'n*, (No. 98-208), available in 1998 WL 890113.

¹⁷³ See [Ellerth](#), 118 S. Ct. at 2265.

¹⁷⁴ Michelle Boorstein, *Feminist Leaders' Opinions Split on Paula Jones Ruling*, *Chattanooga Times*, Apr. 8, 1998, at A5 (quoting Professor Catherine A. MacKinnon), available in LEXIS, News Library, Papers File.

¹⁷⁵ *Id.* (quoting Patricia Ireland, President, National Organization for Women).

¹⁷⁶ See Scalia, *supra* note 1, at 316, n.38 (discussing cases and authorities for proposition one incident may give rise to hostile work environment claim).

¹⁷⁷ [Ellerth](#), 118 S. Ct. at 2265.

¹⁷⁸ [510 U.S. at 23](#) (stating whether environment is hostile can be determined only by examination of all circumstances, including, *inter alia*, "the frequency of the discriminatory conduct").



hostile work environment liability, this in turn provoked a general reaction from the Court. ¹⁸⁶ Counsel was presented with the interesting hypothetical of a supervisor using his authority to have an employee brought to an isolated place, where he demanded sexual favors in an egregious manner. ¹⁸⁷ Counsel stated that this might be sufficient for a quid pro quo claim. ¹⁸⁸ A Justice then asked a similar hypothetical involving a clear one-time demand and threat in a supervisor's office, in which another Justice participated approvingly, with the response this time from counsel that a single incident could not give rise to a hostile work environment claim. ¹⁸⁹ This exchange suggests that at least part of the Court would view an egregious single act of harassment, procured or facilitated by supervisor authority, as potentially creating a hostile work environment if sufficiently outrageous to alter the "terms and conditions" of the subordinate's employment.

Conclusion

Currently, despite a great deal of dicta concerning the nature and scope of a quid pro quo cause of action, the Supreme Court still has not addressed the standard of liability for sexual harassment in the context of a clear quid pro quo demand resulting in a tangible job detriment or submission to sexual demands. ¹⁹⁰ Until it does, the legal effect of such a demand, and the degree of retaliation required to phrase it as quid pro quo harassment, will remain unclear. While, as Scalia puts it, Ellerth was expected to allow the Court "[to] address quid pro quo head-on," ¹⁹¹ the Court seems to have dodged this missile through a subtle redefinition of the quid pro quo rubric. A case that was considered a well-presented opportunity to elucidate the quid pro quo cause of action became the companion case to a rather garden variety hostile environment decision, and the context for the Supreme Court's clarification of hostile work environment liability standards. Like the mythic Proteus, ¹⁹² **[*513]** just as legal analysts and practitioners began to believe that a predictable, structural system of liability could be hammered into form out of the quid pro quo/hostile work environment hermeneutic, the structure has dissolved again into metaphor. Unlike the mythic figure, no coherent structure is likely to form again from the mist for all of our grasping onto it.

¹⁷⁹ See, e.g., Reid v. O'Leary, No. CIV.A.96-401(GK), [1996 WL 411494](#), at *4 (D. D.C. July 15, 1996) (stating possibility for single incident generally does not create hostile work environment); [Tomka v. Seiler Corp](#), *66 F.3d 1295, 1305 (2d Cir. 1995)* (stating "even a single incident of sexual assault sufficiently alters the conditions of the victim's employment and clearly creates an abusive work environment for purposes of Title VII liability"); [Bohen v. City of E. Chicago](#), *799 F.2d 1180, 1186 (7th Cir. 1986)* (stating "as a general matter, a single discriminatory act against one individual can amount to intentional discrimination for equal protection purposes"). Accord, [King v. Board of Regents of the Univ. of Wis. Sys.](#), *898 F.2d 533, 537 (7th Cir. 1990)* (stating "a single act [of discrimination] can be enough" to state hostile environment claim).

¹⁸⁰ [66 F.3d 1295 \(2d Cir. 1995\)](#).

¹⁸¹ [Id. at 1305](#).

¹⁸² [799 F.2d 1180 \(7th Cir. 1986\)](#).

¹⁸³ [Id. at 1186-87](#). See also [Reid](#), [1996 WL 411494](#) at *3 (stating plaintiff only needs to establish alleged conduct is unreasonably abusive, offensive, or affected reasonable employee's capacity to work).

¹⁸⁴ See [Transcript of Oral Arguments at 6-8, Burlington Indus., Inc. v. Ellerth](#), *118 S. Ct. 2257 (1998)* (No. 97-569), available in 1998 U.S. TRANS LEXIS 35.

¹⁸⁵ See *id.* at *7.

¹⁸⁶ See *id.* at *7-11.

¹⁸⁷ See *id.* at *7.

¹⁸⁸ See *id.*

¹⁸⁹ See *id.* at *8-9.



Whether the rules of liability enunciated by the Court in *Ellerth* and *Faragher* will "bring order to the chaotic case law"¹⁹³ in this area remains the subject of conjecture. The author hopes that at a minimum, the Court's new direction will clarify for employees when their supervisors and co-workers have crossed the line from "horseplay" and general offensive conduct to illegal sexual harassment; thereby fostering employer compliance with Title VII obligations to "take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned."¹⁹⁴

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¹⁹⁰ Although *Meritor* certainly involved allegations of submission to sexual demands, the Supreme Court's recitation of the facts seems to reflect the Court's perception that Vinson's supervisor did not attempt to condition job benefits or non-retaliation on her submission. See [Meritor, 477 U.S. at 57.](#)

¹⁹¹ Scalia, *supra* note 1, at 309.

¹⁹² According to Bulfinch's retelling of the Greek myth, Aristaeus, a beekeeper, sought of the Nymphs the reason why his bee colonies were dying. They responded thusly:

There is an old prophet named Proteus, who dwells in the sea and is a favourite of Neptune, whose herd of sea-calves he pastures. We nymphs hold him in great respect, for he is a learned sage and knows all things, past, present, and to come. He can tell you, my son, the cause of the mortality among you bees, and how you may remedy it. But he will not do it voluntarily, however you may entreat him. You must compel him by force. If you seize him and chain him, he will answer your questions in order to get released, for he cannot by all his arts get away if you hold fast the chains... But when he finds himself captured, his resort is to a power he possesses of changing himself into various forms. He will become a wild boar or a fierce tiger, a scaly dragon or lion with yellow mane. Or he will make a noise like the crackling of flames or the rush of water, so as to tempt you to let go the chain, when he will make his escape. But you have only to keep him fast bound, and at last when he finds all his arts unavailing, he will return to his own figure and obey your commands.

Thomas Bulfinch, *The Golden Age of Myth and Legend* 235 (1994).

¹⁹³ [Jansen, 123 F.3d at 494-95.](#)

¹⁹⁴ Equal Employment Opportunity Commission, "Guidelines on Discrimination Because of Sex," [29 C.F.R. 1604.11\(f\) \(1978\).](#)

