Employment Law: *Gary v. Long* --Using Context to Analyze Threat in Sexual Harassment Cases

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NOTES

Employment Law: Gary v. Long — Using Context to Analyze Threat in Sexual Harassment Cases

I. Introduction

"No one fact may be decisive, but the sum total of them all might be . . . ." A play cannot be understood on the basis of some of its scenes but only on its entire performance, similarly, a discrimination analysis must concentrate not on individual incidents but on the 'overall scenario.'

Accurate consideration of an event requires more than an analysis of isolated facts. While facts form the basis for analysis and serve as a guide to reach legal conclusions, facts are devoid of true meaning without considering the context in which they evolved. The context allows the fact finder to gain a full and accurate vision of the occurrence and the effect it had on those involved. The importance and usefulness of context is evident during the analysis of a sexual harassment claim, where many of the conclusions rest on differing vantage points and varied social factors.

Unfortunately, context is often the forgotten component in courts' analyses of sexual harassment cases. The case of Gary v. Long illustrates the idea that unless courts recognize the vital importance of context in sexual harassment analysis and begin using context to color each harassment picture, harassment victims will not receive justice. Use of context to analyze threats in sexual harassment cases is critical despite the fact that the company had antiharassment procedures in place. The policies implemented by a company to deter and provide remedies for sexual harassment are of great value, and at times may weigh in favor of the defendant-corporation. However, deferring to the presence of such organizational safeguards, rather than engaging in a comprehensive contextual analysis of the underlying threat, will result in a skewed view of the incident.

In today's society it is rare to find an individual who has not been touched in some way by the social and legal phenomenon of sexual harassment. These two words have come together and now symbolize a plethora of situations and thoughts, each triggering a different interpretation according to the vantage point of the individual involved. The different vantage points in each situation create a vital

component of sexual harassment analysis — the context in which the threats were made. Context is the sum total of the entire setting in which something occurs. It may be comprised of the physical environment; individual personalities, sensitivities, relationships, and personal histories; employment, financial, and family status; or any other situations forming a background for the event or its reception. Analysis of a sexual harassment claim and its underlying threat is improper when it fails to consider the context in which the threat was made. The context can turn what one person considers mere "saber rattling" into a real threat. That threat is the foundation of a sexual harassment claim.

II. Historical Background

The United States Supreme Court has closely scrutinized sexual harassment claims in two cases. Both contribute to the basic framework by which sexual harassment claims are analyzed, as well as emphasize the importance of context in the analysis. In Meritor Savings Bank v. Vinson, the United States Supreme Court established that a hostile working environment claim is actionable under Title VII of the Civil Rights Act (Title VII). In addition, the Meritor Savings Bank Court established the importance of context in relation to such claims by holding that although an employer is not automatically liable for harassment by its supervisors, neither the existence of a grievance procedure nor lack of notice of the harassment insulates the employer from liability. The Court reasoned that facts such as those reflecting the existence of antiharassment policies were relevant but not totally dispositive on the issue of corporate liability, thus establishing the importance of context as a crucial element for complete analysis. Justice Rehnquist, writing for the majority in Meritor Savings Bank, specifically noted that the defendant's grievance procedure required the victim to complain to the same individual who was harassing her. Thus, the organizational safeguard established was not suited to assist the individual being harassed. In sum, the context largely dictated the success of the grievance procedure as a safeguard to liability as well as the success of the claim itself.

In Harris v. Forklift Systems, Inc., the Supreme Court reaffirmed the framework established by Meritor Savings Bank. The Harris Court held that Title VII is violated when the workplace is so filled with severe discriminatory behavior that a hostile working environment is created. The Harris Court reasoned that the standard required an objectively hostile or abusive environment, but that it was

3. See id. at 1396.
5. See id. at 64-65.
6. See id. at 72-73.
7. See id. at 73.
8. See id.
9. See id.
11. See id. at 21.
equally important to consider the victim's subjective perception of the abuse in that environment.\textsuperscript{12} Ultimately, the Court held that a determination of whether the environment was abusive or hostile could only be reached by an examination of all the circumstances, again emphasizing the importance of context as a tool of analysis.\textsuperscript{13}

Taken together, the Meritor Savings Bank and Harris decisions beg that context become a focus in sexual harassment analyses. These two cases specifically dealt with a determination of whether the context made the situation sufficiently hostile to satisfy that facet of a hostile working environment claim. However, context analysis should not be limited solely to that facet of hostile working environment claims but logically should extend to quid pro quo sexual harassment analyses as well. A necessary component of quid pro quo liability is that there be a real threat toward an individual's employment through sexual advances. An analysis of the context in which the threat was made is necessary to determine whether the threat was indeed real in the eyes of the victim. "The [Equal Employment Opportunity Commission] Compliance Manual strongly suggests that the conduct should be judged from the viewpoint of the woman employee: 'The reasonable person standard should consider the victim's perspective . . .'\textsuperscript{14} The decisions by the Supreme Court in these two cases direct us to begin the analysis with an important question: Given the context, why was the threat a real threat?

In Gary v. Long,\textsuperscript{15} the United States Court of Appeals for the District of Columbia Circuit, examined the liability of a corporation for a sexual harassment claim by one of its employees, Coramae Gary. The court ruled that the Washington Metropolitan Area Transit Authority (WMATA) was not liable to Gary for violation of Title VII.\textsuperscript{16} The court held that because Gary could not reasonably have believed her supervisor, Long, had the authority to carry out the threats made to her employment, there was no basis for a sexual harassment claim against the corporation.\textsuperscript{17} The Gary court reasoned that for a claim to be successful the supervisor must have misused authority delegated to him as a means to create an adverse job situation upon rejection of the sexual advances toward the victim.\textsuperscript{18}

Because the threats to Gary never actualized, the court denied her claim of quid pro quo sexual harassment.\textsuperscript{19} Gary suffered no actual job detriment; therefore, the court held that no valid quid pro quo claim materialized.\textsuperscript{20} Because, according to the court's reasoning, Gary should have known that the threat was not real, the court

\textsuperscript{12} See id. at 21-22.
\textsuperscript{13} See id. at 22.
\textsuperscript{14} Petrocelli & Repa, supra note 1, at 2/16.
\textsuperscript{16} See id. at 1398.
\textsuperscript{17} See id.
\textsuperscript{18} See id. at 1396.
\textsuperscript{19} See id.
\textsuperscript{20} See id.
then refused to find a hostile working environment claim.\textsuperscript{21} The court found that WMATA had procedures in place to deal with harassment and, because they were in place, Gary could not reasonably have believed that WMATA endorsed Long's behavior.\textsuperscript{22} However, the court failed to explore the context of the situation. No inquiry was made into the social, economic, or power factors that made the harassment and threats of job detriment very real to Gary, real enough that she felt she had no reasonable course of action.

By refusing to find an actionable sexual harassment claim because Gary lacked reasonableness in perceiving the veracity of the threat, the court placed a large burden on the victim. According to that reasoning, it is the victim's responsibility to analyze threats to determine the actual strength of the threat before a situation of sexual harassment may be considered real.

The \textit{Gary} decision implies that without suffering an actual detriment to employment the treatment endured was not sufficiently real to be actionable. This shifts the court's focus from an analysis of threat to a test for actual damage. How could a court determine what constitutes a real threat without an examination of the context of the threat? The reality of sexual threats is largely a personal matter from the victim's perspective, for example, "how it feels, [and] what you can do about it."\textsuperscript{23}

The \textit{Gary} decision seems to take a step away from the notion and importance of a person's right to work in an environment free from harassment. The decision further perpetuates the difficult social and cultural situations that many people have been forced to endure. Discrimination within corporate organizations continues to make it difficult for many women to compete with men for jobs.\textsuperscript{24} By ignoring contextual issues such as power, job status inequalities, financial dependence, and gender constructs, the reality of the harassment is not reflected.

This note will discuss the current standards used to analyze sexual harassment claims, and the necessity of determining the context to accurately apply those standards. Further, this note will present the facts, holding, and reasoning of \textit{Gary} and will give a critique on how the outcome of the decision could have been altered by careful consideration of the realistic social concerns that created the context of the threat in this case. The examination of social forces as part of the context in sexual harassment cases could well establish a more realistic system of review for future sexual harassment claims.

\textbf{III. Gary v. Long}

Coramae Gary, an employee of the defendant WMATA, brought an action against her employer and her supervisor, defendant James Edward Long. Gary alleged that the defendants violated Title VII of the federal Civil Rights Act and committed

\begin{itemize}
\item \textsuperscript{21} See id. at 1398.
\item \textsuperscript{22} See id.
\item \textsuperscript{23} PETROCELLI & REP, supra note 1, at 3/2.
\end{itemize}
various torts. These actions were brought because Gary was subjected to repeated sexual advances and job threats by Long. In 1983, Gary began working for WMATA as a custodian. 25 Four years later, she was promoted to the position of stock clerk for WMATA. Gary's immediate supervisor was Mr. Charles Brown. 26 The defendant, Long, was Brown's immediate supervisor and Gary's second-level supervisor. 27

In 1988, Long began what would become a pattern of sexual advances toward Gary. 28 Long told Gary that if she would engage in a sexual relationship with him, he would make her job easier. 29 Gary refused these advances. Upon Gary's refusal, Long repeatedly threatened her with detrimental job consequences, including termination of her employment with WMATA. 30 As part of the sexual advances, "Long made crude references to her body, regularly expressed his desire to have sex with her, [and] threatened to 'get' her for refusing to meet with him." 31 In addition, Long told Gary that if she informed anyone about his actions she and her husband, who also worked for WMATA, 32 would be fired. 33 Throughout the span of harassment, Gary made it apparent that she would not accept Long's advances and that they were not welcomed. 34

In June 1989, all of the employees were to take a tour of the new WMATA facility where the operations were being moved. 35 Long drove Gary to the new location for an individual tour, and while doing so he "fondled her breasts and rubbed his hands between her legs." 36 Upon reaching a secluded storage facility, Long raped Gary. 37 Again, Long threatened Gary with detrimental job consequences if she reported the incident. 38

Gary took a leave of absence following an automobile accident, and, upon her return in January 1990, verbal harassment by Long began again. 39 Gary anonymously reported Long's harassment on February 14, 1990, to a counselor provided by WMATA, stating that she had been afraid to tell anyone. 40 Gary took a leave of absence from WMATA on February 22, 1990, then filed a formal

25. See Gary, 59 F.3d at 1393.
27. See id.
28. See Gary, 59 F.3d at 1393.
29. See id.
30. See id. at 1394.
31. Id.
33. See Gary, 59 F.3d at 1394.
34. See id.
36. Gary, 59 F.3d at 1394.
37. See id.
38. See id.
39. See id.
grievance with WMATA. WMATA subsequently conducted its own investigation of the incident and found "no corroborating evidence" of the harassment. Gary was then transferred to another facility to avoid contact with Long. In May 1990, Gary filed her complaint with the Equal Employment Opportunity Commission (EEOC), a prerequisite to bringing a Title VII claim in court. Gary was given a right-to-sue letter by the EEOC, and her Title VII claim included allegations of hostile working environment and quid pro quo sexual harassment.

The United States District Court for the District of Columbia denied Long's motion for summary judgment on the Title VII issues but granted the summary judgment in favor of WMATA, holding the corporation could not be held liable for the conduct of Long. The court held that when an employer: (1) had done nothing to indicate that it approved of the actions of the supervisor; (2) had established a strong policy against sexual harassment including the implementation of a complaint procedure; and (3) took prompt remedial action, the company could not be held liable for the harassment by one of its supervisors. The court also held that because Gary had not notified WMATA while the harassment was taking place, no allegations could stand that WMATA knew or should have known that Gary was being harassed. The court found that this was an essential requisite to a hostile environment charge and, therefore, the claim must fail.

On appeal, the District of Columbia Circuit Court upheld the grant of summary judgment in favor of WMATA. The court held that Gary failed to make out a claim of quid pro quo sexual harassment. The court also held that although the harassment was sufficiently pervasive to constitute a hostile working environment, Gary "could not have reasonably believed that Long had the authority, apparent

41. See Gary, 59 F.3d at 1394.
42. Id.
43. See id.
44. See id.
45. Most states have fair employment practice (FEP) statutes that provide at a minimum the protection afforded under the Civil Rights Act. Filing a claim under the EEOC will protect your rights under both. However, an individual may not file a Civil Rights Claim for harassment directly in court. Filing a claim with the EEOC is a prerequisite to use of the Civil Rights Act. The EEOC will issue a "right-to-sue" letter which allows an individual to file a lawsuit to enforce his or her civil rights. If the EEOC feels an individual's claim cannot be proven it will then issue a "no cause" determination. See Petrocelli & Repa, supra note 1, at 5/2, 5/3, 6/3, 6/5.
46. See Gary, 59 F.3d at 1394.
48. See id.
49. See id.
50. See id.
51. See Gary, 59 F.3d at 1400.
52. See infra text accompanying notes 62-63.
53. See Gary, 59 F.3d at 1396.
54. The court's use of "apparent" refers to the legal definitions of "actual" and "apparent" under agency law — the lawful delegation of power by one person to another. Power of agent to affect legal relations of the principal by acts done in accordance with principal's manifestation of consent to agent. See RESTATEMENT (SECOND) OF AGENCY § 7 (1958).
or otherwise, to sexually harass her." Therefore, WMATA could not be held liable for Long's harassment of Gary.

Title VII of the Civil Rights Act of 1964 made it illegal "for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's . . . sex . . . ." In 1980, the EEOC issued guidelines for interpreting Title VII of the Act. Those guidelines are as follows:

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when
1. submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment;
2. submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such an 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.

In 1993, the EEOC included gender harassment in its guidelines. Examples of gender harassment include conduct such as "taunts and gestures" as well as "threatening, intimidating or hostile acts." The sexual harassment definitions are generally understood to include two types of claims: quid pro quo and hostile working environment. Quid pro quo sexual harassment consists of the grant or denial of an economic quid pro quo in exchange for sexual favors. The main impetus of a quid pro quo claim is that some tangible aspect of an employee's job is conditioned on submission to sexual advances and that detrimental employment consequences follow from the employee's refusal.

The Gary court reasoned that 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." The court relied on a Sixth Circuit case which held that for there to be liability, the employee must have suffered some actual job detriment as a result of failing to participate in the supervisor's demands. The court held that even though Long threatened Gary with

55. Gary, 59 F.3d at 1398.
57. See Mary P. Koss et al., No Safe Haven 115 (1994).
58. 29 C.F.R. § 1604.11(a) (1996).
59. See Koss et al., supra note 57, at 115.
60. Id.
61. See Gary, 59 F.3d at 1395.
64. Gary, 59 F.3d at 1396.
65. See id. (citing Kauffman v. Allied Signal, Inc., 970 F.2d 178, 186 (6th Cir. 1992)).
detrimental job consequences, those threats were never carried out; therefore, Gary failed to make out a sufficient quid pro quo claim. The Meritor Savings Bank v. Vinson, a supervisor's threats of job detriment or benefit conditioned on sexual advances may contribute to a hostile working environment, even if not actionable as quid pro quo sexual harassment. The Meritor Savings Bank Court continued that such conduct may support an action if it is "sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment." Title VII provides that employees have the right to work in an atmosphere devoid of "discriminatory intimidation, ridicule and insult." A hostile working environment claim is a middle standard of analysis of sexual harassment in the workplace. It encompasses those situations which fall between "making actionable any conduct merely offensive, and . . . [those] caus[ing] tangible psychological injury." Title VII guidelines provide that sexual harassment constituting a hostile working environment may be comprised of "sexual misconduct . . . whether or not it is directly linked to the grant or denial of an economic quid pro quo." In addition, the conduct must have the purpose or effect of "unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment." The Gary court held that Long's behavior was without a doubt sufficiently pervasive enough to constitute a hostile working environment sexual harassment claim. The court found the abuse that Long imposed on Gary, if proven true, to be "not only pervasive harassment but also criminal conduct of the most serious nature." However, because the court found that Gary could not reasonably have believed WMATA gave Long authority to sexually harass her, it would not extend liability to the company. In essence, the court found that the threats to Gary's employment were not real — that Gary should have realized the threats to her employment would never be carried out.

The Gary court reached its decision in part by applying common law principles of agency. According to these principles, an employer is not automatically liable for the acts committed by an employee outside the scope of employment.

66. See Gary, 59 F.3d at 1396. But see Nichols v. Frank, 42 F.3d 503, 513 (9th Cir. 1994) (holding discussions of job benefits or detriments in same sentence with request for sexual favors constitutes quid pro quo sexual harassment).
68. See id. at 65.
69. Id. at 67.
70. Id. at 65.
72. Id.
74. Id.
75. See Gary, 59 F.3d at 1397.
76. Id.
77. See id. at 1398.
78. See id.
79. The Restatement provides that "a master is not subject to liability for the torts of his servants
However, the *Restatement (Second) of Agency* provides three exceptions through which an employer may be held liable for such actions of an employee. The *Gary* court refused to apply the exception given in § 219(d) of the *Restatement* to find WMATA liable in this case. According to this exception, the employer may be held liable if "the servant purported to act on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation." The *Gary* court reasoned that Gary could not rely on the exception because "she could not have believed . . . that Long was acting within the color of his authority." The court relied on a 1994 Third Circuit decision in the case of *Bouton v. BMW of North America, Inc.*, which "requires the belief in the agent's apparent authority . . . before the principal will be bound." Without considering the context of the threats, the *Gary* court reasoned that because WMATA had in place policies and procedures to handle claims of sexual harassment, Gary should have known that WMATA did not tolerate such actions and that the threat was not real. The court further reasoned that Gary "could have report[ed] . . . [the threats] to the employer without fear of adverse consequences." The *Gary* court relied solely on the existence of policies against sexual harassment to conclude that Gary should have known that the threats were not real, regardless of how the threats were interpreted by Gary.

### IV. Analysis Through Context

By avoiding context, the *Gary* court foreclosed the most accurate result even though it applied the correct standards. Social influences such as power, gender, and job status inequalities, and their effect on targeting and victim responses, are essential to correctly frame and evaluate a harassment claim, as was emphasized in

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acting outside the scope of their employment." *Restatement (Second) of Agency* § 219(2) (1958).

80. In *Bouton*, the court recognized:

The *Restatement (Second) of Agency* § 219 provides three potential bases for holding employers liable for sexual harassment perpetrated by their employees. Section 219(1) holds employers responsible for torts committed by their employees within the scope of their employment. . . . Under § 219(2)(b), masters are liable for their own negligence or recklessness; in a harassment case, this is typically negligent failure to discipline or fire, or failure to take remedial action upon notice of harassment. Finally, under § 219(2)(d), if the servant relied upon apparent authority or was aided by the agency relationship, the master is required to answer.

*Bouton v. BMW of N. Am., Inc.*, 29 F.3d 103, 106 (3d Cir. 1994).

81. *See Gary*, 59 F.3d at 1397.


83. *See Gary*, 59 F.3d at 1397-98.

84. 29 F.3d 103 (3d Cir. 1994).

85. *Id.* at 109. *But see* Barnes v. Costle, 561 F.2d 983, 996 (D.C. Cir. 1977) (MacKinnon, J., concurring) ("In a sense, a supervisor is always 'aided in accomplishing the tort by the existence of the agency' because his responsibilities provide proximity to, and regular contact with the victim.").

86. *See Gary*, 59 F.3d at 1398.

87. *Id.*
Meritor Savings Bank and Harris. Through a careful contextual analysis, the threats to Gary, deemed to have been unrealistic by the court, could appear to be very real. With a determination that the threat was real to Gary, it is likely that WMATA would not have escaped liability for Long’s actions.

The Gary court missed the point because it did not treat context realistically. "The EEOC regulations make clear that most sexual harassment cases can only be resolved by looking at all the facts in context." The EEOC regulations specifically state:

In determining whether alleged conduct constitutes sexual harassment, the [EEOC] will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case-by-case basis.

The Supreme Court emphasized the EEOC’s position in Meritor Savings Bank by considering all the circumstances and the context in which the harassment took place. In Nichols v. Frank, the Ninth Circuit added that there is no justification for the lack of a detailed examination of all the "relevant facts and circumstances, as well as the application of common sense, sound general principles, and a true understanding of human nature." It logically follows that consideration of relevant social forces and an individual’s personal resources is necessary to adequately evaluate a sexual harassment claim.

The EEOC’s definition of sexual harassment clearly demonstrates that physical touching does not have to exist for there to be sexual harassment. In fact, "the non-touching forms of sexual harassment] may be just as intimidating." This "climate of intimidation" created by the harassment forms part of the context of the harassment and may establish the reality of the threat from the victim’s perspective.

88. PETROCELLI & REPA, supra note 1, at 2/3.
89. 29 C.F.R. § 1604.11(b) (1996) (emphasis added).
91. 42 F.3d 503 (9th Cir. 1994).
92. Id. at 513.
93. The EEOC defines sexual harassment in the Code of Federal Regulations:
Harassment on the basis of sex is a violation of [the law]. Unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature constitute sexual harassment when: (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual’s employment; (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or (3) such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile or offensive working environment.
29 C.F.R. § 1604.11(a) (1996).
94. PETROCELLI & REPA, supra note 1, at 1/5.
95. Id. at 1/9.
A. Victim's Personal Resources

One of the many factors creating the context of the harassment includes the manner in which individuals respond to the harassment. The choices individuals make in responding to harassment may indicate the degree of strength and reality with which the threat is received. The way in which a person responds in any situation is guided, at least in part, by societal forces that have influenced the person's life and created the point of reference from which that individual responds. "Personal resources are both social products and social forces;" they are "shaped by external forces and they guide and influence our behavior."96 Personal resources may be affected by several social, cultural, and organizational forces such as race, sex, social class, occupational status, education, and income, all of which, in turn, affect human behavior.97

When an incident of sexual harassment occurs, an individual's personal resources are invoked to guide his or her coping behavior. Studies have shown that "though all women who experience sexual harassment are faced with a potential loss of personal resources, not all women are affected in the same manner."98 The fact that women react differently when faced with sexual harassment stems in part from the fact that the personal resources that each individual draws from have varying support structures and have been shaped by different life experiences.99 A single parent on a fixed income may lack the support structure necessary to challenge or second-guess a threat to her employment.100 Different reactions to sexual harassment may indicate the "realness" of the threat as perceived by that particular victim.101 These aspects cannot be ignored, and as the Court in Harris v. Forklift Systems, Inc.102 indicated, should become an important part of the analysis.

The strength of personal resources may influence a person's ability to confront harassment and question the authority of the one making threats.103 These personal resources include the way each individual has been socialized to view his or her role in the workplace. A woman's view of her role in the workplace may have been

96. "The term 'personal' is used to refer to internal evaluations of ourselves and our lives, such as self-esteem, personal control, or satisfaction. The term 'resources' is used as opposed to psychological 'states' in order to stress the idea that they can be tapped by the individual during role playing, facework, or interpersonal negotiations." Gruber & Bjorn, supra note 24, at 815-16.


98. Gruber & Bjorn, supra note 24, at 815; see also Gruber & Smith, supra note 97, at 557.

99. See Gruber & Bjorn, supra note 24, at 815; see also Gruber & Smith, supra note 97, at 546-47.

100. The number of families in which a woman is the sole means of support is growing. "Between 1980 and 1990, the number of female-headed families in the U.S. increased by 27% until they now account for more than 21% of all families with children under 18." PETROCELLI & REPA, supra note 1, at 1/8.

101. The viewpoint of the victim, male or female, is a more accurate standard of review than of a reasonable person in general. See id. at 2/16.


103. "Surveys of women who have been sexually harassed indicate that less than 7% of them file a formal legal complaint or seek legal help." PETROCELLI & REPA, supra note 1, at 3/2 (quoting WOMEN'S LEGAL DEFENSE FUND, THE IMPACT OF SEXUAL HARASSMENT (1991)).
shaped through messages conveyed in the home from parents, as well as the media. These socialized roles have an impact on work situations, particularly as individuals consider challenging abuse. Each person in a harassment situation must decide whether to continue in these roles and must consider what risks are ahead should he or she challenge the harassment.

B. Power Inequalities

Another contextual factor that frames the harassment situation is the extent of power inequalities that exist between the harasser and the victim. Relative powerlessness has a large impact on which women are targeted for harassment and how they are able to respond. Women as a group do not possess as much organizational power as men. By possessing less power, an economic dependency is created, which may unfortunately lead to "sexual extortion." "Women with low seniority, . . . are more apt to be targets of sexual harassment." Studies reflect that "men in supervisory positions are overrepresented in harassment incidents." "[W]omen are more able to adapt a wider range of responses when the source does not have more organizational power." It becomes clear that a power inequality may work to suppress a victim and create a serious and real threat by limiting his or her available responses.

The status and character of a woman's job has a powerful effect on the way she interprets and responds to threats and harassment. Women who possess less "cultural power and status advantages are especially apt to be targets of sexual harassment." Women who are more likely to be targets of sexual harassment include those with low-skill and low-status jobs, or those who work in once male-dominated areas where they are now considered the "threatening minority." Jobs of this level include custodial and manual positions, such as the stock shelve position held by Gary.

104. See GINNY NICARTHY ET AL., YOU DON'T HAVE TO TAKE IT 92 (1993).
105. See id.
106. See id.
107. See Gruber & Bjorn, supra note 24, at 815; see also Gruber & Smith, supra note 97, at 547.
108. See Gruber & Bjorn, supra note 24, at 815; see also Gruber & Smith, supra note 97, at 547.
109. See Gruber & Bjorn, supra note 24, at 815.
110. See id.
111. Id. at 816; see also Mark L. Lengnick-Hall, Sexual Harassment Research: A Methodological Critique, 48 PERSONNEL PSYCHOL. 841, 847 (1995) ("Victims of harassment are usually those lowest in organizations (i.e., those with less status and power.").
112. Gruber & Bjorn, supra note 24, at 816.
113. Gruber & Smith, supra note 97, at 558.
114. See Gruber & Bjorn, supra note 24, at 816.
115. Id.; see also Lengnick-Hall, supra note 111, at 847.
116. See Gruber & Bjorn, supra note 24, at 816; see also Lengnick-Hall, supra note 111, at 847 ("Younger women who are single or divorced, working in either nontraditional jobs (e.g. blue collar jobs) or in a predominately male working environment or for a male supervisor, are more likely to be harassed than other women.").
Many of the factors that placed these women in the less powerful positions are the same factors that reduce and limit their "repertoire" of responses. This perpetuated harassment has been dubbed a "self-fulfilling link." The women who are in the low status jobs are the more frequent targets of sexual harassment in the workplace and respond to the harassment with "weak and nonconfrontational" responses that characterize those who are victimized. In general, "women harassed by supervisors give more passive responses than those harassed by co-workers." Women are also more likely to quit the job when harassed by a supervisor than when harassed by a co-worker. It has been posited that these weak responses create the ideal harassment situation for which the harasser is looking. When the context reveals an oppressive situation with passive responses such as this, the supervisor's threat may take on additional strength.

C. Victim's Perception of Authority

An employee may not be aware of where actual authority to make employment decisions within the organization lies. Under Title VII, only an employer is prohibited from creating a sexually discriminating situation. In addition, under Title VII "employers are held strictly accountable if they place in positions of authority persons who extract sexual favors from those over whom they exercise power." This language can be inferred that the power need not be an actual vested authority. Real or not, a supervisor could "exercise" authority in order to achieve his goals. The essence, then, is that "an individual relies upon his apparent or actual authority [in order] to extort sexual consideration from an

117. See Gruber & Bjorn, supra note 24, at 816.
118. Id. at 821.
119. See id.
120. Id. The Gruber and Bjorn study analyzed the responses of women to harassment.

The women who were harassed were asked "How did you handle this harassment?" The variable measuring the directness or assertiveness of the response to the harasser was developed by categorizing the 11 types of responses into three levels as follows: "passive" (ignoring it, walking away, pretending not to notice); "deflective" (using humor, stalling, telling co-workers or friends, responding mildly); and "assertive" (attacking verbally, responding physically, taking of threatening to take the matter to someone in a position of authority). Approximately 29 percent of the women gave passive responses; nearly 45 percent used deflective responses; and slightly less than 26 percent gave assertive responses.

Id.; see also Sarah Barton Samoluk & Grace M.H. Pretty, The Impact of Sexual Harassment Simulations on Women's Thoughts and Feelings, 30 Sex Roles 679, 693 (1994) ("Interpersonal sexual harassment by a boss is, on the average, more distressing.").

121. See Gruber & Smith, supra note 97, at 554 (stating that women in the study "were more likely to quit a job when the harasser was a supervisor (12.5%) as opposed to either a coworker (1.2%) or client/customer (8%)").
122. See Gruber & Bjorn, supra note 24, at 823.
124. Nichols v. Frank, 42 F.3d 503, 510 (9th Cir. 1994).
employee." Therefore, the essential question should not be whether the harassed employee should have known that the supervisor in question could actually have carried out all of his or her threats; rather, the question should be whether there was at least apparent authority to do so. It may seem apparent and unquestionable to a low-status employee that a second-level supervisor would have the power to terminate his or her employment.

Often the employer is not aware of the authority being flexed by a supervisory employee over others. However, under traditional agency principles, the concept of respondeat superior operates to create liability on the part of the employer for the exercise of actual or apparent authority by a supervisor.\textsuperscript{126} "Supervisors are in unique positions of power in the workplace."\textsuperscript{127} The victimizer is able to back up his or her threats only because of the actual or apparent authority that has been granted to him by his employer.\textsuperscript{128} The victim may know only that the person making the threats holds a position of some authority, and not necessarily where that individual's authority stops. Because of these contextual ambiguities, it is possible for a technically invalid threat to appear to have real force and consequence.

\textbf{D. Victim's Recourse}

When a worker is harassed in the workplace, he or she normally has little other recourse beyond that which the law provides.\textsuperscript{129} For economic reasons, leaving the job in which the harassment occurs may not be an option because of the difficulty in finding suitable employment.\textsuperscript{130} Corporations against whom sexual harassment claims have been alleged may try to ward off their liability by suggesting that the employee did not apprise himself or herself of antiharassment policies by reporting the incident. However, victims continue to reveal that fear of retaliation by the company is a major hindrance to reporting sexual harassment.\textsuperscript{131} The \textit{Chamberlin v. 101 Realty, Inc.}\textsuperscript{132} decision pointed out that the finder of fact must consider that the victim "may reasonably perceive that her recourse to more emphatic means of communicating the unwelcomeness of the supervisor's sexual advances, as by registering a complaint . . . may prompt the termination of her employment."\textsuperscript{133} A woman in a low-skill job likely will not have the financial stability to challenge a system that is providing the only monetary support immediately available to her.

\begin{footnotes}
\footnote{125. \textit{Id.} at 509 (quoting Henson \textit{v. City of Dundee}, 682 F.2d 897, 910 (11th Cir. 1982)).}
\footnote{126. \textit{See RESTATEMENT (SECOND) OF AGENCY} § 219(2)(d) (1983); \textit{see also} Miller \textit{v. Bank of Am.}, 600 F.2d 211, 213 (9th Cir. 1979)).}
\footnote{127. \textit{Petrocelli \& Repa}, \textit{supra} note 1, at 2/5.}
\footnote{128. \textit{See Nichols}, 42 F.3d at 514.}
\footnote{129. \textit{See id.} at 510.}
\footnote{130. \textit{See id.}}
\footnote{132. \textit{915 F.2d 777} (1st Cir. 1990).}
\footnote{133. \textit{Id.} at 784.}
\end{footnotes}
Other contextual factors, such as threats extending to a spouse's job, as was the case in *Gary*, may further compound the situation. Economic stress such as this may give additional strength to a supervisor's threat.

Research shows that men and women assign blame differently in situations involving harassment. In a study of the assignment of responsibility in sexual harassment, Inger W. Jensen and Barbara Gutek found that "more responsibility was assigned to the victim of sexual harassment by the male than the female respondents." This may carry over into the employment realm and manifest itself in company policy as a defensive means for a company to avoid blame. Women characterized into one of the two "self-blame" categories were found to be less likely to report the incident "to anyone in authority." The nonreporting is a result of "internalizing" the blame to find fault within herself. It is not surprising then to find that women often do not readily report situations of sexual harassment. If a woman views herself as having caused or invited the harassment, then why would she report the situation? This may also explain why many women do not report incidents of harassment through the institutional procedures put in place by their employers.

V. Context Applied to *Gary* v. *Long*

The *Gary* court's reasoning creates further victimization. According to its reasoning, in order for a threat to be the basis for a successful claim, the plaintiff must not only be subjected to the harassment, but further, the victim must accurately assess the actuality of the threat while experiencing it. In essence, the *Gary* court states that sexual harassment based on threats of tangible job detriment made with apparent authority to be carried out is not sufficient to satisfy a claim. However, this is in direct conflict with the Ninth Circuit decision in *Nichols v. Frank*, which held that a supervisor's "intertwining of a request for the performance of sexual favors with a discussion of actual or potential job benefit or detriments in a single conversation constitutes quid pro quo sexual harassment." This was the situation in the *Gary* case. The courts often fail to consider whether the harassed individual is in a position to take a risk that the threat might be carried out. *Gary* did not submit to the advances, but they were a constant and real threat to her employment.

The *Gary* court only used contextual factors that were written in policies, not the social context as it affected *Gary*. The *Gary* court held that *Gary* should have

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136. See id. at 121.

137. Id. at 126; see also Samoluk & Pretty, *supra* note 120, at 694.


139. 42 F.3d 503 (9th Cir. 1994).

140. Id. at 513.
known that Long did not have the power or authority to carry out the threats he imposed.\textsuperscript{141} In addition, the *Gary* court held that WMATA had implemented procedural safeguards to handle and prevent the harassment that Gary faced and, therefore, WMATA could not be held liable when Gary failed to make adequate use of those procedures.\textsuperscript{142} The *Gary* court deviated from the language of the Supreme Court in *Meritor Savings Bank v. Vinson*.\textsuperscript{143} In *Meritor Savings Bank*, the Court reasoned that the existence of a grievance procedure, though relevant, should not be totally dispositive on the issue of corporate liability for sexual harassment.\textsuperscript{144} Likewise, neither should the existence of an organizational policy or procedure be the sole consideration on an underlying issue such as threat, especially when that sole issue determines the outcome of the case. Consideration of the context should have been part of the analysis or the existence of threat and the fear of reporting experienced by Gary.

Even though Long did not actually have the authority to carry out his threats, his actions should satisfy a claim of sexual harassment because he presented himself as having the authority necessary to cause the threatened tangible detriments to Gary's employment. Long constructed the authority through his own portrayal of the power that was entrusted to him by WMATA as a second-level supervisor. It is not unreasonable that Gary would assume that her second-level supervisor would have sufficient power to effectuate his threats. These realistic contextual factors, when coupled with Gary's perception of the power hierarchy, could have been deemed quid pro quo sexual harassment where her employment success was conditioned on the sexual advances made.

Gary did not possess the power and resources necessary to respond to the harassment through the organizational procedures as the court held she should have. Had the court examined the context present in the *Gary* case, the threat could have been interpreted as real, and a different outcome might have been reached. Gary was a stock shelve for WMATA. Only a short time before the harassment began, Gary had been a custodian for WMATA. She did not possess a high-skilled job, nor one that was regarded with an appreciable degree of respect. This left her in a relatively powerless position to confront and handle the harassment that she faced. It is doubtful that Gary was familiar enough with the organizational structure of WMATA to know where the hiring and firing capabilities rested. Neither is it far-fetched to believe that even a second-level supervisor, who in reality could not have fired her, did have enough "pull" to affect her job situation. Long likely had the ability to give assignments and could reasonably have used this ability against Gary in her working capacity.

It cannot be expected that someone in Gary's position would have faith enough in a system which allowed Long to harass her, to partake of the institutional "safeguards" that WMATA provided. It is possible that from her perspective, Gary

\begin{itemize}
\item \textsuperscript{141} See *Gary v. Long*, 59 F.3d 1391, 1398 (D.C. Cir. 1995).
\item \textsuperscript{142} See id. at 1398.
\item \textsuperscript{143} 477 U.S. 57 (1936).
\item \textsuperscript{144} See id. at 72-73.
\end{itemize}
saw herself as becoming nothing more than a "troublemaker" in the company's eyes, holding a position that would not be difficult to replace. Gary might have felt her job was necessary to maintain a stable home life and provide the support her daughter needed to finish high school. These social factors might explain Gary's passive response and genuine fear of the harassment she endured. None of the contextual experiences discussed above were considered in Gary.

"In a supervisor-subordinate relationship, very little conduct of a sexual nature is needed to support a finding of sexual harassment."\(^{145}\) This being the case, "realness of threat" should never take over and become the focus of the analysis, and certainly not without considering context. Anytime a supervisor threatens a subordinate sexually it should be treated as an automatic indication of sexual harassment. The mere existence of such a threat should satisfy a threshold requirement for corporate liability. The court should then shift the burden to the defendant corporation to show that other factors existed to avoid liability. Context must then be used by the court to reach its decision.

VI. Conclusion

The eradication of discriminatory practices throughout society is of extreme importance. Sex discrimination in the form of sexual harassment is a real force that keeps people from achieving their rightful status in employment. To base a decision on the procedural and interpretative errors that Gary made is to deny her the protections offered by Title VII of the Civil Rights Act. Title VII represents an effort to protect individuals who are in weak positions from discriminatory situations that those individuals are not equipped to handle alone.

The decision in Gary is a deviation from the current trend of victim protection in sexual harassment cases. However, it does provide an opportunity to examine current standards and policies pertaining to the legal battle involved with sexual harassment. Corporations must be held accountable for the actions of those placed in positions of authority. Institutional procedures should be in place to cope with discrimination and harassment as these problems arise. Procedures and policies should not, however, be used as a means of freeing corporations from liability for sexual harassment that does occur. In the future, courts should give more consideration to the context in which the harassment occurred as part of an effort to more justly compensate those who have been wronged.

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145. PETROCELLI & REPA, supra note 1, at 2/6.