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Employers and Employees: *Meritor Savings Bank v. Vinson:* Needed Ammunition for the Fight Against Sexual Harassment in the Workplace

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Although women have been subjected to sexual harassment since they first entered the work force in significant numbers,[1] they did not seek redress from the courts until the early 1970s.[2] This late development of sexual harassment as a legal claim can partially be explained by women's fear of retaliation.[3] Women were also hesitant to call attention to the problem because supervisors treated complaints as trivial and labeled the complainants as troublemakers.[4] However, the problem is not trivial and a surprising number of women are affected. Of the working women who responded to a survey conducted in 1976, 92 percent viewed sexual harassment as a problem,[5] and actual experiences of sexual harassment were reported by 90 percent of these women.[6]

Sexual harassment reinforces sexual stereotypes of female inadequacy and fosters low self-esteem among women.[7] Because many of these women feel guilty and helpless, most have responded by quitting their jobs rather than seeking assistance from their employers. This allows the harasser to continue victimizing other women without ever suffering any consequences.[8] Not until

1. *See* L. FARLEY, SEXUAL SHAKEDOWN: THE SEXUAL HARASSMENT OF WOMEN ON THE JOB 12 (1978). Although sexual harassment claims can be maintained by males as well as females, this note focuses on harassment of females only because of the disproportionate number of women who report sexual harassment as compared to males. *See generally* B. BABCOCK, A. FREEDMAN, E. NORTON & S. ROSS, SEX DISCRIMINATION AND THE LAW: CAUSES AND REMEDIES 195 (1975) (historically inferior position of women in a male-dominated work force has resulted in the disproportionate exposure of women to sexual harassment).

2. The first reported sexual harassment case was Barnes v. Train, 13 Fair Empl. Prac. Cas. (BNA) 123 (D.D.C. 1974), *rev'd sub nom.* Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977). This case involved a black woman whose job was abolished because of her refusal to submit to the sexual advances of her male superior. The district court held that the Equal Employment Opportunity Act of 1972 did not offer redress for such claims; that decision was eventually reversed on appeal.

3. *See* C. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 52 (1979).

4. *Id.* at 49. As MacKinnon points out, women's fears of recrimination are justified by the evidence. Men treat sexual harassment as jokes, and a woman who speaks out against such behavior is often seen as emotionally unstable." Much of the information upon which MacKinnon bases her findings comes from the testimony of Lin Farley before the Commission on Human Rights of the City of New York, Hearings on Women in Blue-Collar, Service and Clerical Occupations. *See* FARLEY, *supra* note 1.

5. Allegretti, *Sexual Harassment of Female Employees by Nonsupervisory Coworkers: A Theory of Liability*, 15 CREIGHTON L. REV. 437, 437 n.4 (1981-82). Another author reports that as many as seven of every ten women are subjected to sexual harassment while employed. C. MACKINNON, *supra* note 3, at 3, 10.

6. Allegretti, *supra* note 5, at 437 n.4.

7. Frost, *Sexual Harassment in the Workplace*, 71 WOMEN LAW. J. 19 (1985). *See also* C. MACKINNON, *supra* note 3, at 47-55.

8. Frost, *supra* note 7, at 19.

1976, more than ten years after the enactment of Title VII of the Civil Rights Act of 1964,[9] did courts begin to offer hope to women who chose to take a stand.[10] Not until another ten years had passed, in its decision in *Meritor Savings Bank v. Vinson*, did the Supreme Court give concrete support to those who continue the fight.[11]

In *Meritor* the Supreme Court held that a violation of Title VII may be established by proving that discrimination on the basis of sex has created a hostile or abusive work environment.[12] This unanimous decision was hailed by women's groups as a major victory in the fight for equality in the workplace.[13] Those who have long crusaded to eliminate sexual harassment welcome the decision and believe it will influence employers to make the elimination of sexual harassment a significant factor in future policy-making decisions.[14]

The purpose of this note is to analyze the impact of *Meritor* on future sexual harassment claims. This is accomplished by providing the historical development of sexual harassment as a violation of Title VII, by discussing both the conduct that constitutes sexual harassment and the context in which the harassing conduct may occur, and by examining the various theories of employer liability adopted by the courts in sexual harassment cases. The note concludes with a discussion of two cases decided since *Meritor*.

Historical Development of Sexual Harassment as a Violation of Title VII

Sexual Harassment Defined

Sexual harassment has been broadly defined as "the unwanted imposition of sexual requirements in the context of a relationship of unequal power."[15] A definition that specifically addresses sexual harassment in employment situations has been issued by the Equal Employment Opportunity Commission (EEOC). In its "Guidelines on Discrimination Because of Sex," the EEOC states that:

> 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

9. 42 U.S.C. §§ 2000(e)-2000(e)(17) (1982).

10. *See* Williams v. Saxbe, 413 F. Supp. 654 (D.D.C. 1976), *rev'd sub nom.* Williams v. Bell, 587 F.2d 1240 (D.C. Cir. 1978). The reversal was on procedural grounds rather than on the merits.

11. 106 S. Ct. 2399 (1986).

12. *Id.* at 2405-06.

13. *E.g.*, N.Y. Times, June 20, 1986, at A1, col. 3.

14. Wash. Post, June 20, 1986, at A1, col. 2.

15. C. MACKINNON, *supra* note 3, at 1.

> unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.[16]

Since this section of the guidelines was not promulgated by the EEOC until 1980,[17] it provided no assistance to courts in rendering earlier decisions.

Relevant Legislative History

Just prior to enactment of Title VII of the Civil Rights Act of 1964, an unsuccessful attempt to defeat the bill was made by adding sex discrimination to the list of prohibitions.[18] As a result, Congress provided no legislative history to guide courts in considering sexual harassment as a violation of Title VII.[19] To compound the problem of interpretation, Title VII does not expressly prohibit sexual harassment.[20] The only significant legislative history to which the courts can turn was generated in conjunction with the passage of the Equal Employment Opportunity Act of 1972.[21] In discussing the issue, the House Committee on Education and Labor declared that "[d]iscrimination against women is no less serious than other forms of prohibited employment practices and is to be accorded the same degree of social concern given to any type of unlawful discrimination."[22] Again, no specific reference was made to sexual harassment. With so little guidance from legislative history, courts were free to determine that sexual harassment was not prohibited by Title VII. This is exemplified by a 1975 decision in which the United States District Court in Arizona held that sexual harassment is a matter of "personal proclivity, peculiarity, or mannerism" and not a company policy to deprive women of employment opportunities.[23]

16. 29 C.F.R. § 1604.11(a) (1986).

17. Cohen & Vincelete, *Notice, Remedy, and Employer Liability for Sexual Harassment*, 35 LAB. L.J. 301 (1984).

18. Note, *Employment Discrimination—Defining an Employer's Liability Under Title VII for On-the-Job Sexual Harassment: Adoption of a Bifurcated Standard*, 62 N.C.L. REV. 795, 797 n.19 (1984).

19. *Id.*

20. Section 703(a) of Title VII provides:

> It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000-2(a) (1982) (section 703 of Title VII has been repealed and is now contained in this section).

21. 42 U.S.C. §§ 2000e-2016(a) (1982).

22. H.R. REP. No. 238, 92d Cong., 1st Sess. 5, *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 2137, 2141.

23. Corne v. Bausch & Lomb, Inc., 390 F. Supp. 161, 163 (D. Ariz. 1975), *vacated mem.*, 562 F.2d 55 (9th Cir. 1977).

Application of the Theory of Disparate Treatment to Sexual Harassment Claims

The current trend is for courts to recognize sexual harassment by a supervisor as a discriminatory employment practice under a theory of disparate treatment.[24] Under this theory, three obstacles must be overcome before a claim for sexual harassment is actionable under Title VII.[25] A court must find (1) that the plaintiff has suffered adverse treatment because of her sex, (2) that the acts alleged in the plaintiff's complaint were a "term, condition, or privilege of employment," and (3) that the acts are attributable to the employer.

The first case in which a court surmounted these obstacles was *Williams v. Saxbe*.[26] The court ruled that the conduct about which the plaintiff complained was "an artificial barrier to employment which was placed before one gender and not the other."[27] This barrier was considered a condition of employment imposed on only one gender and, therefore, a violation of Title VII.[28] All jurisdictions that have considered this question since *Williams* have recognized sexual harassment by a supervisor as discrimination on the basis of sex in violation of Title VII.[29]

Applying the theory of disparate treatment was complicated when the EEOC promulgated its guidelines in 1980. The EEOC guidelines recognized that sexual harassment could also constitute discrimination on the basis of sex when it unreasonably interfered with an employee's working conditions. Unreasonable interference occurred when the conduct of a supervisor or coworker created an "intimidating, hostile or offensive work environment."[30] Under the theory of disparate treatment, an employee had been required to

24. Disparate treatment is the label applied to employment discrimination that occurs when an employer treats some employees less favorably than others because of their membership in a particular social group. Although discriminatory intent is usually critical to a disparate treatment claim, discriminatory intent may be inferred from evidence that group members have been treated differently from others. Disparate treatment is distinguished from disparate impact, which is the label applied to employment practices that are facially neutral but which disproportionately burden a particular group. Such claims do not require discriminatory intent. *See* International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

25. *See* Allegretti, *supra* note 5, at 438-40.

26. 413 F. Supp. 654 (D.D.C. 1976).

27. *Id.* at 657-58.

28. *Id.* at 659, 661.

29. *See* Katz v. Dole, 709 F.2d 251 (4th Cir. 1983) (female air traffic controller subjected to sexual abuse by supervisors and coworkers found to have been discriminated against on basis of sex); Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982) (female police dispatcher subjected to sexual abuse by chief and coworkers established a claim for sexual harassment); Miller v. Bank of Am., 600 F.2d 211 (9th Cir. 1979) (female employee who was rated as superior fired for refusing her supervisor's sexual demands for favors from a "black chick"); Tompkins v. Public Serv. Elec. & Gas Co., 568 F.2d 1044 (3d Cir. 1977) (supervisor who fired female employee in retaliation for complaints of sexual harassment held to have violated Title VII); Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977) (black female's position abolished for refusal to submit to sexual advances found to constitute a claim for sex discrimination).

30. 29 C.F.R. § 1604.11(a)(3) (1986).

show a tangible job loss.[31] This "intimidating, hostile or offensive work environment" harassment existed regardless of whether the female was required to submit to sexual advances in exchange for job benefits. Therefore, courts frequently held that this form of harassment did not meet the requirements for a disparate treatment theory because the "terms, conditions or privileges" of employment were not affected.[32]

Several more recent decisions, however, have found that this new kind of harassment is actionable under Title VII.[33] These courts have relied on *Rogers v. EEOC*,[34] which holds that Title VII affords an employee the right to work in an environment free from discriminatory intimidation, ridicule, and insult. *Rogers* involved a Hispanic employee harassed because of her ethnic origin.[35] Because such harassment affects a "condition" of employment, *Rogers* held that it falls within the proscriptions of Title VII.[36] The *Rogers* court also found that an employee's protection under Title VII against ethnic or racial discrimination is not limited to economic aspects of a job.[37] Thus, the need to suffer tangible job loss is no longer requisite to a claim for discrimination. Courts presented with similar discriminatory behavior in sexual harassment cases have applied *Rogers* to expand Title VII proscriptions to sex discrimination.[38]

One of the first courts to apply *Rogers* and adopt the EEOC guidelines in a sexual harassment case was the United States District Court for the Western District of Oklahoma. In *Brown v. City of Guthrie*,[39] a police dispatcher was asked on two occasions by a superior officer to remove her clothes. When she complained, the superior officer teased her with magazine pictures of nude women and directed lewd remarks and gestures toward her.[40] The *Brown* court found that this conduct created an intimidating and offensive work environment.[41] Because this affected a condition of work, the police

31. The concept of "tangible job loss" can include any economic deprivation that results from the refusal to grant sexual favors. This economic deprivation might be the loss of a job but could also include a demotion, loss of promotion or salary increase, or loss of other benefits.

32. *See* Allegretti, *supra* note 5, at 442-43.

33. *See, e.g.*, Katz v. Dole, 709 F.2d 251 (4th Cir. 1983) (when work environment pervaded with sexual slur, insult, and innuendo, plaintiff may establish claim for relief under Title VII); Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982) (employer liable where creates or condones intimidating, hostile, or offensive work environment); Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981) (condition of work includes psychological and emotional work environment, and stereotypical insults and demeaning insults constitute sex discrimination).

34. 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972).

35. *Id.*

36. *Id.* at 238.

37. *Id.*

38. *See* sources cited *supra* note 33.

39. 22 Fair. Empl. Prac. Cas. (BNA) 1627 (W.D. Okla. 1980).

40. *Id.* at 1629. In addition to the sexually abusive behavior discussed in the text, the plaintiff was videotaped while conducting a search of a female prisoner. This videotape was played back frequently thereafter, with the commander commenting on the physical attributes of the prisoner. *Id.*

41. *Id.* at 1632.

dispatcher had established a claim for relief under Title VII for sexual harassment.[42]

Another case often cited for the proposition that an intimidating or offensive work environment is actionable under Title VII is *Bundy v. Jackson*.[43] Relying on *Rogers*, the *Bundy* court found that conditions of employment include the psychological and emotional work environment.[44] The court held that an employee suffers sex discrimination when stereotypical insults and demeaning propositions result in anxiety and debilitation.[45] Thus, the "terms, conditions or privileges" of employment are affected regardless of whether the employee suffers the loss of tangible job benefits,[46] and the requirements for applying the theory of disparate treatment discrimination are met.

The Meritor Facts

Although the trial court made no factual findings, a look at the alleged facts is important to an understanding of the *Meritor* decision. The events began in September of 1974, when Mechelle Vinson was hired as a teller-trainee by Sidney Taylor, branch manager and vice-president of what is now Meritor Savings Bank. During the course of her employment, which lasted four years, Vinson was promoted to teller, head teller, and then assistant branch manager. The parties did not dispute that each of these promotions was based on merit. The parties also did not dispute that Vinson's termination came after an indefinite sick leave that began in September of 1978. What transpired from the time Vinson was hired in September of 1974 until taking sick leave in September of 1978 is still in dispute.

According to Vinson, Taylor was a father figure to her during her 90-day probationary period as a teller-trainee. Initially he was helpful to her and did not request sexual favors. However, in May of 1975, he took her to dinner and requested that she go with him to a motel for the purpose of having sex. When she declined the request, Taylor told her that she "owed" him because he had given her a job. Out of fear that she would be fired, Vinson eventually accompanied Taylor to a motel where they had sexual intercourse.

Taylor continued to demand sexual favors, forcing Vinson to have sexual intercourse with him forty to fifty times from May of 1975 until the end of 1977. Taylor's sexual advances also included his fondling Vinson's breasts in the presence of coworkers, entering the ladies' room when she was alone, and exposing himself to her. Vinson participated in this sexual relationship because she feared Taylor, who allegedly had assaulted and raped her several times. On one occasion Vinson suffered vaginal bleeding that required medical attention. The sexual relationship between Taylor and Vinson stopped in 1977 when Vinson began a steady relationship with another man.

42. *Id.*
43. 641 F.2d 934 (D.C. Cir. 1981).
44. *Id.* at 944.
45. *Id.*
46. *Id.*

Taylor denied Vinson's allegations and testified that he never had any sexual relations with her. He denied fondling her, requesting sexual favors, or even making suggestive remarks. He admitted only to taking her to lunch along with another female coworker. Problems did not begin until Vinson took excessive sick leave after she and Taylor had a disagreement as to which of two employees should be trained as head teller. Taylor argued that Vinson was asserting this claim in retribution for his instructing her about who to train as head teller.

The trial court did not resolve these factual issues because it held that even if her allegations were true, Vinson had not established a Title VII claim. Both the court of appeals and the United States Supreme Court disagreed. The rationale for their disagreement and its impact on future sexual harassment claims are demonstrated by a further discussion of the development of sexual harassment as a violation of Title VII.

Elements of a Sexual Harassment Claim

Sexual harassment has been a violation of Title VII since 1976. Sexually harassing conduct was initially considered actionable under Title VII only when a supervisor made the granting of sexual favors a term or condition of employment, which in turn had an economic effect. After the promulgation of the EEOC guidelines in 1980, courts began to recognize that sexual harassment also affected a condition of employment when it created a sexually hostile work environment, even though it did not result in loss of tangible job benefits. In *Henson v. City of Dundee*,[47] the two contexts in which harassment may occur were distinguished and labeled. The first is labeled "quid pro quo" harassment, and the second is labeled "condition of work" harassment.[48]

These contextual settings, originally suggested in 1979 by Catherine MacKinnon in her writings on sexual harassment,[49] are reflected by the EEOC's definition of sexual harassment set out in the guidelines. Although not specifically identified as such by the EEOC, "quid pro quo" is the label applied to harassment when submission to the sexual advances is made "explicitly or implicitly a term or condition of an individual's employment."[50] Harassment also occurs in a quid pro quo context when "submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual."[51] Harassment occurs in the "condition of work" context when the conduct of a supervisor or coworkers creates an "intimidating, hostile, or offensive working environment."[52]

The elements for a sexual harassment claim, first refined in *Henson*, provide that a violation of Title VII for condition-of-work harassment occurs

47. 682 F.2d 897 (11th Cir. 1982).
48. *Id.* at 903-04.
49. C. MACKINNON, *supra* note 3, at 211.
50. 29 C.F.R. § 1604.11(a)(1) (1986).
51. *Id.* § 1604.11(a)(2).
52. *Id.* § 1604.11(a)(3).

when a plaintiff establishes (1) that she belongs to a protected group, (2) that she was subjected to unwelcome sexual harassment, (3) that the harassment was based upon sex, and (4) that the harassment affected a term, condition, or privilege of employment.[53] *Henson* would hold the employer liable in these cases if the employer knew or should have known of the harassment in question and failed to take prompt remedial action.[54] The first three elements are the same when quid pro quo harassment is the complaint.[55] The fourth requirement for quid pro quo harassment enumerated in *Henson* is that the employee's reaction to the harassment affected tangible job aspects of the employee's compensation, terms, conditions, or privileges.[56] In such cases *Henson* would hold the employer strictly liable if the harassing supervisor relied on "his apparent or actual authority to exert sexual consideration."[57]

If an employee receives promotions or other job benefits for submitting to the sexual advances, or if she is fired for refusing to submit, then the harassment falls within the quid pro quo category. When harassment falls within the condition-of-work category, the employee is required to work in an environment that is sexually hostile or abusive. Although the employee is not promoted in exchange for submitting to sexual advances or fired for refusing, she frequently resigns to escape the harassment.

Before the decision rendered in *Meritor*, some circuit courts of appeals had recognized that condition-of-work harassment constituted a claim of sex discrimination only if the employee had suffered tangible job loss.[58] In most of these cases, because the abuse had become intolerable, the woman resigned from the job voluntarily. Because she had not been fired or demoted, she could not show that she had suffered any economic loss attributable to her refusal to submit to sexual advances. Some courts, therefore, turned to the theory of constructive discharge in order to meet the economic loss requirement.[59]

The inconsistency created by the varying requirements for a showing of tangible job loss has been resolved by *Meritor*. In recognizing a sexual harassment claim when a hostile work environment exists, the Supreme Court also found that no tangible job loss need be suffered. In so holding

53. 682 F.2d at 903-04.

54. *Id.* at 905.

55. *Id.* at 909.

56. *Id.*

57. *Id.* at 910.

58. An example of such a case is Vinson v. Taylor, 23 Fair. Empl. Prac. Cas. (BNA) 37, 43 (D. D.C. 1980), the lower court decision from which the *Meritor* appeal was taken. Surprisingly, this decision came from the same circuit which decided *Bundy v. Jackson*, one of the first cases to recognize a condition-of-work harassment claim. *See* 641 F.2d 934 (D.C. Cir. 1981).

59. 682 F.2d at 907. An employee is constructively discharged from her position when the work environment is so pervaded with sexually harassing conduct that a reasonable person would find the working conditions intolerable. The plaintiff in *Henson* was not found to have been so discharged. This standard for determining constructive discharge was recently adopted by the Tenth Circuit in Derr v. Gulf Oil Corp., 796 F.2d 340 (10th Cir. 1986); however, *Derr* was not a sexual harassment case.

the Court adopted the rationale of *Rogers* and *Bundy* that Title VII affords an employee the right to work in an environment free from discrimination and that conditions of employment include the psychological and emotional work environment.[60]

In *Meritor*, Mechelle Vinson agreed that Taylor's conduct had ceased more than one year before her discharge. She also agreed that her dismissal came as the result of matters unrelated to her claim of sexual harassment. The district court ruled against Vinson because she had failed to establish a claim, in part because there was no showing of tangible job loss resulting from the sexual harassment.[61] The court of appeals disagreed that such a showing is necessary,[62] and the Supreme Court upheld that decision. Thus, the need to prove economic loss is no longer necessary if a plaintiff can show that the harassing conduct created a sexually hostile work environment that affected the conditions of her employment.

Standard to Determine Conduct Constituting Sexual Harassment

Because the conduct usually encountered by the courts is so blatant, they have generally applied a subjective standard rather than an objective one in determining that the conduct is sexually harassing.[63] Examples of this blatant conduct include express requests for sexual intercourse,[64] discussions about a woman's means for sexual relief,[65] inquiries into private sexual activities,[66] wagers about a woman's virginity,[67] and sexual slurs, innuendoes, and insults.[68] A subjective standard requires that the courts consider the facts peculiar to each case.[69] Factors suggested for courts to consider include: the severity of the conduct, the number and frequency of the encounters, the relationship between the parties, any provocation by the victim, the response of the victim to the conduct, the apparent reaction of the victim, the general working environment, the location of the conduct, and the male-female ratio in the workplace.[70]

The *Meritor* Court has now established that "[t]he gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome'."[71] This test, however, raises the question of what proof will be permitted to show the unwelcome nature of the conduct. *Meritor* provides a partial

60. See *supra* text accompanying notes 33-46.
61. Vinson v. Taylor, 23 Fair Empl. Prac. Cas. (BNA) 37, 43 (D.D.C. 1980).
62. Vinson v. Taylor, 753 F.2d 141 (D.C. Cir. 1985).
63. Note, *supra* note 18, at 796.
64. Tompkins v. Public Serv. Elec. & Gas Co., 568 F.2d 1044, 1045 (3d Cir. 1977).
65. Bundy v. Jackson, 641 F.2d 934, 940 n.2 (D.C. Cir. 1981).
66. Henson v. City of Dundee, 682 F.2d 897, 899 (11th Cir. 1982).
67. Kyriazi v. Western Elec. Co., 461 F. Supp. 894, 934 (D.N.J. 1978), *modified*, 473 F. Supp. 786 (D.N.J. 1979), *aff'd* 647 F.2d 388 (3d Cir. 1981).
68. Katz v. Dole, 709 F.2d 251, 254 (4th Cir. 1983).
69. Note, *supra* note 18, at 796.
70. *Id.*
71. 106 S. Ct. 2399, 2406 (1986).

answer by holding that testimony regarding a victim's sexually provocative speech or dress is relevant to a finding that the conduct was unwelcome.[72] This issue was presented to the Court because of a disagreement between the trial court and the court of appeals as to the issue of "voluntariness."[73]

The district court had determined that because Vinson had voluntarily submitted to any requests for sexual favors Taylor might have made, she could not maintain the action.[74] The court of appeals, however, reasoned that because the definition of sexual harassment is "unwelcome sexual advances" voluntariness is not relevant to the issue of harassment.[75] The court of appeals observed that "a victim's capitulation to on-the-job sexual advances cannot work a forfeiture of her opportunity for redress," so evidence as to voluntariness should not be admitted.[76] The Supreme Court disagreed, finding that although voluntariness is not a defense to sexual harassment, such evidence is not irrelevant as a matter of law in determining whether the sexual advances were unwelcome.[77]

The Court also suggested that the trier of fact should look to the "totality of circumstances" to determine the existence of sexual harassment. The totality of circumstances should include the nature of the advances and the context in which they were made.[78] In the case of sexual harassment, for the conduct to be actionable under Title VII, it must be so pervasive that it "'alter[s] the conditions of [the victim's] employment and create[s] an abusive working environment'."[79] The district court had not made this determination because it had decided that the voluntary nature of Vinson's submission precluded recovery.

For purposes of future sexual harassment claims, voluntary participation in a sexual relationship will not be a defense. The standard for determining whether conduct constitutes sexual harassment will be whether the advances or other sexually oriented behavior is unwelcome. This means that if the sexual behavior is welcomed by the recipient, then no claim for sexual harassment arises. In determining whether the conduct was welcomed, a defendant will be permitted to introduce evidence as to the plaintiff's dress, speech, and mannerisms that led him to believe that she welcomed his advances.

Theories of Employer Liability

Two theories of employer liability have traditionally been applied to sexual harassment claims. The first is that the employer should be held strictly

72. *Id.* at 2407.

73. Vinson v. Taylor, 753 F.2d 141 (D.C. Cir. 1985); Vinson v. Taylor, 23 Fair Empl. Prac. Cas. (BNA) 37 (D.D.C. 1980).

74. 23 Fair Empl. Prac. Cas. at 42.

75. 753 F.2d at 146.

76. *Id.*

77. 106 S. Ct at 2407.

78. *Id.* Not all harassment is actionable under Title VII. In Rogers v. EEOC, 454 F.2d 234 (5th Cir.), *cert. denied*, 406 U.S. 957 (1972), the court had determined that a "mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee" might not affect a condition of employment so as to constitute discrimination. 106 S. Ct. at 2406.

79. *Id.* (citing Rogers v. EEOC, 454 F.2d 234 (5th Cir.), *cert. denied*, 406 U.S. 957 (1972)).

liable. The second is that the employer should be held liable only if it knew or should have known of the harassment. A bifurcated standard of liability has recently been adopted by the Eleventh Circuit that varies the application of the theories depending on the type of harassing conduct involved.[80] The EEOC resorts to a different bifurcation, but this one varies depending on who performs the harassing conduct. Although the *Meritor* Court declined to decide the issue of employer liability, a discussion of these theories is appropriate because the implications of *Meritor* are significant in this area.

Strict Liability Theory

In *Barnes v. Costle*, the employer was held strictly liable for the discriminatory practice of one of its supervisors who made sexual advances to an employee and then abolished her job when she refused them.[81] The reason for holding an employer strictly liable in situations where a supervisor harasses a female employee is that the employer has delegated the authority to hire, fire, or promote the employee to the supervisor. Since the supervisor is relying on this authority to demand sexual favors, he is acting within the scope of his employment, making the employer liable. This follows from the common law doctrine of respondeat superior, which provides that the liability for acts of a supervisor under such circumstances would be imputed to the employer.[82] *Barnes* implied, however, that an employer might not be held liable if the supervisor was not acting in accord with company policy and the employer was without knowledge.[83]

A more stringent version of this theory was applied in *Miller v. Bank of America*. An employer was held liable when a female employee was fired for refusing the sexual requests of her supervisor even though the employee had failed to seek relief through the company's grievance procedure.[84] Although no other circuit has explicitly adopted the *Miller* standard of liability,[85] an equivalent standard has been suggested by the EEOC in its guidelines.[86] The adoption of strict liability by the EEOC is significant because although the guidelines themselves carry no legal authority and are merely advisory,[87] they are given great deference by the courts.[88]

Actual or Constructive Knowledge Theory

The second theory of employer liability was first espoused in *Tompkins v. Public Service Electric & Gas Co.* The court formulated the following test:

> Title VII is violated when a supervisor, with the actual or constructive knowledge of the employer, makes sexual advances or

80. Note, *supra* note 18, at 795.
81. 561 F.2d 983 (D.C. Cir. 1977).
82. *See generally* RESTATEMENT (SECOND) OF AGENCY §§ 219-237 (1958).
83. 561 F.2d at 993.
84. 600 F.2d 211, 214 (9th Cir. 1979).
85. Note, *supra* note 18, at 799.
86. 29 C.F.R. § 1604.11(c) (1986).
87. Albemarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975).
88. Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971).

> demands toward a subordinate employee and conditions that employee's job status—evaluation, continued employment, promotion, or other aspects of career development—on a favorable response to those advances or demands, and the employer does not take prompt and appropriate remedial action after acquiring such knowledge.[89]

Actual knowledge can be shown by complaints or other communications to company management, and constructive knowledge will be inferred when the harassment is so open and pervasive that the employer should have known about it.[90] Although this theory of liability is unique to sexual harassment cases,[91] it has been applied by most district courts considering the question.[92]

Bifurcation of Employer Liability Theories Based on Kind of Harassment

In *Henson v. City of Dundee*, the Eleventh Circuit postulates that both theories of employer liability are applicable to sexual harassment cases. This bifurcated standard distinguishes between the kinds of harassment involved and determines which theory of liability to apply. Strict liability should be applied in cases of quid pro quo harassment,[93] whereas in condition-of-work harassment the employer should be held liable only when it has actual or constructive knowledge of the behavior and takes no steps to remedy the situation.[94]

Justification for this bifurcated theory comes from the difference in the use of delegated authority in quid pro quo harassment versus condition-of-work harassment.[95] In quid pro quo harassment, the supervisor uses authority vested in him by the employer to confront the victim with threats of employment sanctions for refusal to submit to the requests. Applying strict liability in these situations would encourage employers to more closely

89. 568 F.2d 1044, 1048 (1977).

90. *Id.*

91. The argument for this standard of liability is that sexual harassment cases are a unique form of discrimination to which strict liability should not be applied. In a concurring opinion filed by Judge MacKinnon in Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977), three reasons for applying strict liability in discrimination cases were espoused. First, the employer is in the best position to explain the discriminatory behavior. Second, the employer is in the best position to control and eliminate the discrimination. Third, because the conduct involved is "questionable at best," errors should be made on the side of avoiding conduct which may be violative. *Id.* at 999-1001. These reasons for applying strict liability to discrimination cases are not present in sexual harassment cases. First, the behavior is usually not conducted openly and frequently does not occur at the workplace. Second, because of the private nature of the conduct, the employer lacks the ability to control it. Third, the acts themselves are not intrinsically offensive, but only become so if they are unwelcomed by the respondent. For a further discussion of Judge MacKinnon's opinion see Note, *supra* note 18, at 803-05.

92. Note, *supra* note 18, at 803.

93. 682 F.2d 897, 909 (11th Cir. 1982).

94. *Id.* at 905, 910.

95. Note, *supra* note 18, at 809-11.

monitor the acts of its supervisory personnel, to review employment decisions made by supervisors, and to implement programs designed to deter adverse behavior.

Conversely, in condition-of-work harassment, no official actions are taken over which the employer can exert direct control. Nor can the employer implement methods for acquiring independent knowledge. The responsibility for notifying the employer falls to the victim. Allocating liability to an employer in such situations only if it has notice would encourage employees to come forward with complaints. This, of course, would be true only if an effective grievance procedure was available to handle such complaints.

Bifurcation of Employer Liability Theories Based on Identity of Harasser

The EEOC guidelines advocate that strict liability is the standard that should be applied when a supervisor is the one performing the harassing acts.[96] This is so regardless of whether the harassment falls within the quid pro quo or the condition-of-work category. If, on the other hand, the harassment comes from coworkers, the guidelines require an employer to be held liable only if it knew or should have known of the harassing conduct and "did not take immediate and appropriate corrective action."[97] The EEOC espouses that if an employer is responsible for the acts of its supervisors regardless of notice, then the employer will seek to prevent the conduct. This rationale reflects the argument that in any situation where a supervisor is responsible for the harassment, he is relying on his delegated authority.[98] Use of this power should be prevented and the most effective way to do this is to require strict liability for all forms of supervisory harassment.

Implications of Meritor to Employer Liability

The inconsistency of courts in defining the conditions under which employers will be held liable for sexual harassment has left unsettled this important question of employer liability. Although this is now one of the most significant problem areas generated by sexual harassment claims, the *Meritor* Court declined to decide the issue.[99] The reason the Court gives for this is that the conflicting testimony as to whether Taylor had actually made sexual advances toward Vinson had not been resolved. The Court did, however, give some insight into how it might decide the issue when it finally confronts it.

The Supreme Court acknowledged that Congress must have intended an employer's liability to be limited in some way when it included in the definition of "employer" any "agent" of the employer.[100] The Court also found

96. 29 C.F.R. § 1604.11(c) (1986).
97. *Id.* § 1604.11(d).
98. Note, *supra* note 18, at 810.
99. 106 S. Ct. 2399, 2408 (1986).
100. *Id.*

that the court of appeals erred in determining that employers are "always automatically liable for sexual harassment by their supervisors."[101] The court of appeals had placed heavy emphasis on the EEOC guidelines. Although the Supreme Court also refers to the guidelines, it indicates that courts should look to agency principles for guidance. When these principles are applied, an employer is not necessarily insulated from liability simply because it is without notice. The implication is that if a supervisor is acting in a position of delegated authority, then he acts as the employer's agent and the employer is liable regardless of notice. However, lack of notice will not necessarily insulate the employer from liability in cases where the supervisor is not using this authority or where the harassment comes from a coworker. As the Court states, the "mere existence of a grievance procedure and a policy against discrimination" will not be sufficient for the employer to escape liability.[102]

In *Meritor* testimony was offered by the bank to show that it had a policy against discriminatory employment practices and a grievance procedure to handle complaints. The bank had received no written complaints from either Vinson or other female employees. The Court, however, found that the bank's particular policy against discrimination did not specifically address sexual harassment claims and that it required an employee to complain to her immediate supervisor first. Since the alleged perpetrator was Vinson's supervisor, the Court indicated no surprise at Vinson's not having reported her grievance. The Court did imply, however, that a grievance procedure "calculated to encourage victims of harassment to come forward" might provide a "substantially stronger" defense against employer liability.[103]

The Court leaves open the question of what grievance procedures would be calculated to encourage victims of harassment to come forward. However, the implications are that an employer should have a policy directly addressing sexual harassment claims, and the person to whom a victim reports the incident should be someone other than her supervisor. A procedure in which the victim's identity remains anonymous would also be more likely to encourage victims to complain and would provide a "substantially stronger" defense to employer liability.

Meritor Applied

Because the district court had not determined whether Taylor's alleged conduct had actually happened or was sufficiently pervasive so as to alter the conditions of Vinson's employment, the Supreme Court affirmed the decision of the court of appeals and remanded the case. The district court's failure to make a determination leaves unanswered the question of what conduct a court will consider sufficiently pervasive so as to be actionable under a "hostile work environment" claim. Two decisions rendered subsequent to *Meritor* may give some guidance.

101. *Id.*
102. *Id.* at 2408-09.
103. *Id.* at 2409.

In *Rabidue v. Osceola Refining Co.*,[104] the Sixth Circuit addressed the issue of hostile work environment harassment for the first time. Although Rabidue had been fired by her employer for reasons unrelated to the harassment, she alleged the acts of a fellow worker created an offensive work environment. The acts she considered offensive included vulgar, crude, and obscene comments made by a male employee who was not in a position of authority over Rabidue. Additionally, Rabidue complained that other male employees displayed pictures of nude and scantily clad women in their offices.

The *Rabidue* court held that the conduct must do more than create an intimidating, hostile, or offensive work environment. Not only must the conduct be of a kind to have a serious effect on a reasonable person's psychological well-being, it must have an *actual* effect. In taking the totality of circumstances approach suggested in *Meritor*, the court said it should consider the "lexicon of obscenity" present in the workplace at the time a plaintiff is hired and compare this to the plaintiff's reasonable expectations. In the words of one judge:

> [I]t cannot seriously be disputed that in some work environments, humor and language are rough hewn and vulgar. Sexual jokes, sexual conversations and girlie magazines may abound. Title VII was not meant to—or can—change this. It must never be forgotten that Title VII is the federal court mainstay in the struggle for equal employment opportunity for the female workers of America. But [it] is quite different to claim that Title VII was designed to bring about a magical transformation in the social mores of American workers.[105]

The *Rabidue* court found that the harassment of which the plaintiff complained was annoying but "not so startling as to have affected seriously the psyches of the plaintiff or other female employees."[106]

Another case, *Scott v. Sears, Roebuck & Co.*,[107] involved a female auto mechanic who alleged she was sexually harassed by other mechanics. The harassing acts included winks, propositions, slaps on the buttocks, and suggestions as to her behavior while engaging in sex. The Seventh Circuit stated that the threshold question for sexual harassment claims is whether the acts rise to a level of hostility offensive enough to be actionable. The acts must also cause such anxiety and debilitation that the work environment is "poisoned."[108] The *Scott* court held that the plaintiff's allegations had not risen to the required level, and it ruled in favor of the defendant on a motion for summary judgment.

104. 805 F.2d 611 (6th Cir. 1986).
105. *Id.* at 626.
106. *Id.* at 622.
107. 798 F.2d 210 (7th Cir. 1986).
108. *Id.* at 213.