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Employer Liability for Employee Sexual Harassment: A Judicial Policy-Making Study

Since 1964 and 1972 when Congress passed key legislation concerning sex discrimination, the courts have been left to fashion policies on sexual harassment in employment. In 1998, the Supreme Court issued four major decisions in this area, one dealing with suits against school districts, one involving same-sex discrimination, and two pertaining to the application of common law to employer liability in sexual harassment cases. The ruling in the first case is at odds with the others, suggesting that Congress may need to intervene. The other three pose a series of complex issues that could benefit from congressional action and administrative guidance from the Equal Employment Opportunity Commission. The Court's rulings have answered some legal questions, but posed others that will produce extensive litigation in coming years.

Since 1991, sexual harassment has been one of the most hotly debated topics pertaining to employment discrimination. In that year, the Navy's Tailhook convention in Las Vegas revealed long-standing harassment of women naval officers. Also in 1991, the confirmation hearings for Clarence Thomas to become an associate justice on the Supreme Court raised the possibility that he had engaged in sexual harassment while at the Department of Education and the Equal Employment Opportunity Commission (EEOC). Later, Senator Bob Packwood was forced to resign due to substantiated claims of his having engaged in sexual harassment in numerous situations. President Clinton faced charges that he sexually harassed state employee, Paula Jones, while he was governor of Arkansas. In the latter half of the 1990s, the Defense Department, in particular the Army, received negative notoriety about possible widespread sexual harassment. In 1998, Mitsubishi Motor Manufacturing agreed in an out-of-court settlement to pay $34 million in damages to employees who were victims of widespread sexual harassment (EEOC 1998).

The courts have been struggling to determine when employers should be responsible for sexual misdeeds carried out by supervisors and lower-level employees. In doing so, the courts have been left to fashion policies without much guidance from Congress. In 1998, the Supreme Court issued four decisions involving sexual harassment. This article examines these new "policy directives" of the Court, assesses the current status of sexual harassment law in light of the decisions, identifies where confusion still exists as to when employers can be held liable for sexual harassment, and considers whether congressional and/or administrative action is needed.

Overview

The four cases raised these questions about the liability of employers for sexual harassment:

- Is a school district liable for a teacher engaging in sex with a high school student when school officials were unaware of the sexual conduct? This question was asked in *Gebser v. Lago Vista Independent School District* (106 F.3d 1223 [5th Cir. 1997]; 118 S.Ct. 1989 [1998]).
- Is an employer liable when a man is sexually harassed by his male boss and a male coworker? In other words, is same-sex discrimination proscribed under the law?

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This question was raised in *Oncale v. Sundowner Offshore Services, Inc.* (83 F.3d 118 [5thCir. 1996]; 118 S.Ct. 998 [1998]).

- Is an employer liable for sexual harassment of a woman by her male boss, when evidence is lacking that she was harmed by the harassment and indeed had been promoted during the period of alleged harassment? This was the question in *Burlington Industries v. Ellerth* (118 S.Ct. 2257 [1998]).
- Is an employer liable for sexual harassment of women by their male supervisors, when the women did not report the alleged abuse and evidence was lacking that superiors knew of the harassment? The case of *Faragher v. City of Boca Raton* (111 F.3d 1530 [11th Cir. 1997]; 118 S.Ct. 2275 [1998]) presented this question to the Court.

The fact that two of these cases involved private employers and two involved public employers is largely irrelevant, since sexual harassment law applies equally to most public and private employers.

What is relevant is how a law is applied in a specific situation. The first case to be reviewed, *Gebser*, was brought under the 1972 Title IX Amendments to the Education Act. The other three cases were brought under Title VII of the Civil Rights Act of 1964 (see Lee and Greenlaw 1997b).

Further, while the first two cases concentrated on the wording and application of these respective statutes, the other two cases involved not only Title VII but also common law or judge-made law. Common law originated centuries before statutory or legislatively made law. Common law is what courts create when ruling on cases, resulting in what is called precedent. As will be seen later, common law has produced a complex set of principles as to when an employer should be legally accountable for the actions of employees and supervisors. The *Burlington* and *Faragher* cases entail the application of Title VII and what is known as the "common law of agency" in sexual harassment situations.

Title IX, Employer Responsibility for Harassment, and the *Gebser* Case

The Title IX Amendments to the Education Act, passed in 1972, precluded any educational institution receiving federal financial assistance from discrimination based on sex. The amendments have been particularly important in the realm of financing male and female athletic programs in both high schools and higher education institutions. The amendments also have been extended to cover all aspects of institutions, including that of employment.

Right to Sue under Title IX

The main thrust of the amendments is that when sex-based discrimination is thought to have occurred, the educational institution is notified and given an opportunity to correct the situation. If appropriate action is not taken, then a cut-off of federal funding is required. Until 1992, Federal courts generally ruled that individuals could not sue for money damages when discriminated against because of their sex. The rationale was that the Title IX provisions were based on the Spending Clause of the Constitution, namely the right of Congress to provide funds for specified purposes, and that a right did not arise for individuals in such a situation.

That position of the courts was overturned in 1992 by the Supreme Court in *Franklin v. Gwinett County Public Schools* (503 U.S. 60 [1992]). Franklin was a high school girl who claimed that a teacher and athletic coach had sexually harassed her, including engaging her in "sexually oriented conversation" and subjecting her to "coercive intercourse" (*Franklin*, 63). The Court found there was an "implied right of action," meaning that while the statute did not specifically authorize Franklin to sue, the implication existed that Congress expected the federal courts to allow for "all appropriate remedies," including the right to sue (*Franklin*, 66).

The *Gebser* Ruling

In 1998, the Supreme Court dealt with Title IX sexual harassment in the case of *Gebser v. Lago Vista Independent School District*. A teacher first exposed Gebser and her fellow students to "sexually suggestive" comments while they were in eighth grade. When the girls enrolled in high school, the teacher pursued Gebser and had sexual intercourse with her on several occasions over a protracted period of time. The relationship was discovered when a police officer found the teacher and student engaged in sex. The teacher was fired and later lost his state teaching certificate. The Supreme Court ruled five to four that the school district was not liable. Had the Court held the district liable, then Gebser could have sued for damages. Justice O'Connor wrote the majority opinion, and the other four justices who joined her included the two dissenters, Thomas and Scalia, in two of the Title VII cases discussed below.

The Court in *Gebser* held that a school district cannot be held liable for the sexual harassment of a student by a teacher "... unless an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of discrimination in the recipient's programs and fails adequately to respond" (*Gebser*, 1999). The Court said that the *Franklin* case had only determined that a school district could be liable but had not determined under what circumstances. Since the right of individuals to sue had been implied by the Court in *Franklin*, the *Gebser* Court said it had "a measure of latitude to shape a sensible remedial scheme that best comports with the stat-

ute" (*Gebser,* 2001). The majority's view was that Title IX was modeled after Title VI of the Civil Rights Act of 1964. The latter prohibits federal agencies from supplying funds to any organization that discriminates on the basis of race. The Civil Rights Act at the time did not allow for the recovery of damages by those who were the brunt of discrimination. The Court emphasized that Title IX was aimed not at punishing school districts by denying them sorely needed federal dollars but at addressing discriminatory practices. It follows the Court reasoned that someone in authority at an educational institution needs to be aware of a situation and have an opportunity to correct it.

The *Gebser* Dissent

The four dissenting justices, led by Justice Stevens, said the Court's position was an "assertion of lawmaking authority" and "not faithful either to our precedents or to our duty to interpret, rather than to revise, congressional commands" (*Gebser,* 2001). The dissenters relied on the common law of torts that an employer could be liable for the actions of its "agent" or employee when the agent uses his authority in committing a tort. (A tort is a civil wrong independent of contract. Intentional torts include assault and libel, while negligence is the main unintentional tort. The concept of agent is discussed below more fully.) The minority said that the teacher's "gross misuse of that authority allowed him to abuse his young student's trust" (*Gebser,* 2004).

The dissenters accused the majority of not only setting policy but setting the wrong kind of policy. First, the *Gebser* decision may create an incentive for an educational institution to insulate itself from knowledge of sexual harassment as a means of avoiding liability. By not having a strong antidiscrimination policy and by not vigorously enforcing such a policy, a school district might have few, if any, cases brought to its attention. A district could use the ostrich defense, which simply contends that liability does not exist when knowledge of the discrimination was lacking.

Second, the victim of sexual harassment almost never could receive damages, since once a situation has been called to its attention, a school district would only need to take corrective action in order to escape liability. If harassment was called to the district's attention, it need only fire the harasser or take other disciplinary action. In the *Gebser* case, for instance, the teacher lost his job when school officials learned of his conduct. The Court's position, reasoned the minority, largely overturns the ruling in *Franklin* that victims of sex discrimination can sue for damages.

The dissenters criticized the majority for exaggerating the importance of denying federal grants to school districts. "... The Court ranks protection of the school district's purse above the protection of immature high school students.... [T]hat policy choice [on the part of the Court] is not faithful to the intent of the policy-making branch of our Government" (*Gebser,* 2007).

Title VII, Same-Sex Harassment, and the *Oncale* Case

Title VII of the Civil Rights Act of 1964 is the main workhorse of the federal government in combating a variety of forms of employment discrimination. In addition to protecting against sex discrimination, the law protects against discrimination based on "race, color, religion ... or national origin." The law covers discrimination in "compensation, terms, conditions, or privileges of employment," and the Supreme Court in *Meritor Savings Bank, FSB v. Vinson* (477 U.S. 57 [1986]) ruled that the law was intended to protect against "the entire spectrum of disparate treatment" (*Meritor,* 64).

A problem that has existed since passage of Title VII is that no guidance was provided as to the meaning of the law when it prohibits discrimination "because ... of sex." The sex provision was added to the legislation in the latter stages of its approval, and there is no clear record of what Congress intended. Of course, the main concern at the time was that men were discriminating against women in the workplace.

Quid-Pro-Quo and Hostile Environment Harassment

Sex discrimination in employment occurs in two basic forms. One is that of outright discrimination against workers of a particular sex in terms of their compensation, assignments, promotions, discharges, and the like (Greenlaw, Kohl, and Lee 1998). All too often women receive lower pay than men and are passed over for promotion, a phenomenon known as the "glass ceiling."

The other form of sex discrimination is sexual harassment. The Equal Employment Opportunity Commission's guidelines on sex discrimination state:

> 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. (EEOC 1990, §1604.11)

The first two items in the EEOC guidelines refer to what is called quid-pro-quo harassment and the last to hostile

environment harassment (Lee and Greenlaw 1997a).

Quid-pro-quo harassment is a form of sexual blackmail in which the target is expected to provide sexual favors under threat of sanctions such as the denial of a promotion or having disciplinary actions taken against the person for no valid reason. Federal courts have settled on a series of items that litigants must prove to claim successfully that they are victims of quid-pro-quo harassment (Lee and Greenlaw 1996).

While quid-pro-quo harassment occurs in situations in which a superior makes demands of an employee, hostile environment harassment can stem from the actions of a boss, coworkers, and others, such as clients (*Folkerson v. Circus*, 107 F.3d 754 [1997]). In a hostile environment, the workplace is sexually charged. As with quid-pro-quo harassment, federal courts have devised a series of items to determine when hostile environment harassment does and does not exist.

Since Title VII lacked a definition of sex discrimination, early cases under the law questioned whether sexual harassment was a form of prohibited sex discrimination. The Supreme Court ruled in the *Meritor* case that both quid-pro-quo and hostile environment harassment are proscribed.

The *Oncale* Ruling

In the 1998 case of *Oncale v. Sundowner Offshore Services, Inc.*, the Supreme Court addressed the straightforward question of whether Title VII protects against same-sex discrimination. The Court of Appeals for the Fifth Circuit, which had heard the *Oncale* case, had ruled earlier that same-sex cases are never cognizable, thereby barring Oncale's case (*Garcia v. Elf Atochem North America*, 28 F.3d 446 [5th Cir. 1994]). Other courts in contrast had found same-sex discrimination covered by Title VII (*Fredette v. BVP Management Associates*, 112 F.3d 1503 [11th Cir. 1997]; *Williams v. District of Columbia*, 916 F.Supp. 1 [D.D.C. 1996]).

Oncale was a man who worked with seven other men on an oil platform in the Gulf of Mexico. He claimed that one worker and two supervisors subjected him to humiliating behavior, assaulted him in a sexual manner, and threatened to rape him. His situation was a mix of both quid-pro-quo and hostile environment harassment. He claimed working conditions were intolerable, forcing him to quit his job. In technical terminology, such a condition is known as "constructive discharge." In other words, he was actually fired even though technically he resigned his job.

The Court in the *Oncale* case acknowledged, "...Male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII" (*Oncale*, 1002). The Court, however, ruled unanimously that the law protects against same-sex discrimination. "It is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed" (*Oncale*, 1002). In other words, what Congress intended in 1964 is of less importance three decades later than what Title VII states. The Court found that the language of the law must be read simply that any form of employment discrimination based on sex is barred.

Unresolved Same-Sex Issues

The *Oncale* decision resolves the major issue of whether same-sex discrimination is prohibited under the law but opens the door to a host of other issues. Indeed the decision is an invitation to suits filed by people who previously would have thought such suits would be a waste of time and financial resources.

The central problem in future cases will be determining what constitutes same-sex discrimination. The *Oncale* Court gave examples of both quid-pro-quo and hostile environment forms of same-sex discrimination. In the former situation, the supervisor might be motivated by sexual desire. In a hostile environment situation, the supervisor might discriminate against workers of his or her own gender. Proving that a male supervisor created a hostile environment for male workers might be proved more readily in mixed-gender workplaces than in one-gender workplaces, such as the one where Oncale worked. Regardless of whether the workplace consists of workers of one sex or both sexes, a "plaintiff need not show that every member of his or her sex was subject to the harassment, but only that 'but for the fact of [his or] her sex, [he or] she would not have been the object of harassment'" (*Henson v. City of Dundee*, 682 F.2d 897 [11th Cir. 1982]; *McCoy v. Macon Water Authority*, 966 F.Supp. 1209, 1216 [M.D.Ga. 1997]).

Cases are bound to multiply showing the variety of human interactions possible regarding sex. For example, workers might be discriminated against because they are gay or lesbian or are suspected to be (*Ralph v. Lucent Technologies*, 135 F.3d 166 [1st Cir. 1998]; *Sarff v. Continental Express*, 894 F.Supp. 1076 [S.D.Tex 1995]; *Doe by Doe v. City of Belleville, Illinois*, 119 F.3d 563 [7th Cir. 1997]). The argument can be made that a worker who is taunted and otherwise tormented by his fellow workers because he is suspected of being gay is not evidence that an anti-male environment exists or that the person is being discriminated against because of his sex (*Goluszek v. Smith*, 697 F.Supp. 1452 [N.D.Ill. 1988]; *McWilliams v. Fairfax County Board of Supervisors*, 72 F.3d 1191 [4th Cir. 1996]). It is possible to have a work situation involving a gay supervisor and several gay employees who together create a hostile work environment for heterosexual men (*Wrightson v. Pizza Hut of America, Inc.*, 99 F.3d 138 [4th Cir. 1996]).

With regard to hostile environment discrimination, one of the most difficult tasks facing the courts will be determining when so-called horseplay reaches the threshold of

being discrimination. Does discrimination exist when a male supervisor engages in a variety of sexually-tinged activities, such as looking at a fully-dressed male worker's groin with a magnifying glass or coming into a restroom with the worker and saying "Ah, alone at last" (*Hopkins v. Baltimore Gas and Electric Company*, 77 F.3d 745 [4th Cir. 1996], 747)? Does a hostile work environment exist when heterosexual men routinely grab one another in the buttocks or the crotch (known as "bagging") (*Johnson v. Hondo, Inc.*, 125 F.3d 408 [7th Cir. 1997])?

The Court of Appeals for the Fourth Circuit has taken the position that same-sex harassment is not covered under the law when the individuals are all heterosexual. The court said the harassment was "perhaps because of the victim's known prudery or shyness" or "the perpetrators' own sexual perversion and insensitivity and meanness of spirit" but not "because of sex" (*McWilliams*, 1196). The court seemed to suggest that "because of sex" in same-sex cases would require that one person, harasser or victim, be gay or lesbian. The Supreme Court's *Oncale* decision simply allowed for same-sex suits and did not hold that Oncale himself had been the victim of harassment in violation of Title VII.

The Supreme Court in *Oncale* cautioned that its ruling was not intended to "transform Title VII into a general civility code for the American workplace" (*Oncale*, 1002). The Court said a "reasonable adult" standard should be used within the "social context" of specific worksites. A coach swatting a football player on the buttocks before going onto the playing field might not be harassing behavior but such a swat by a male supervisor of a male worker in an office setting could be harassment. The Court called on courts to apply "common sense," although it offered no guidance as to what that meant.

Title VII, Employer Responsibility for Harassment, and the *Burlington* and *Faragher* Cases

The two remaining sexual harassment cases need to be considered jointly. They are *Burlington Industries v. Ellerth* and *Faragher v. City of Boca Raton* (118 S.Ct. 2275 [1998]). Indeed, it would have been helpful had the Court provided only one opinion for the two cases. Instead, it gave two separate opinions that referenced each other. Justice Kennedy wrote the *Burlington* opinion for the seven-member majority, with Thomas and Scalia dissenting. Justice Souter wrote the *Faragher* opinion, with Thomas and Scalia again dissenting. The former case involved a private employer, and the latter, a public employer.

The *Burlington* and *Faragher* Rulings

The two cases seem to present rather simple questions, but as will be seen, a complex set of concepts and issues underlie both cases. In *Burlington*, a woman alleged that her boss's boss had sexually harassed her on several occasions and threatened to make her job unpleasant. However, no tangible retaliation occurred, and she did receive one promotion during the period in question. She did not report the abusive behavior to her boss. After 15 months on the job, she resigned, citing reasons other than sexual harassment, but later notified the company that her main reason for quitting was the harassment. As in the *Oncale* case, constructive discharge was alleged in *Burlington*.

The question presented was under what grounds the employer might be liable in a situation where a supervisor allegedly engaged in sexual harassment and the employee suffered no adverse consequences. The case, after being heard by a U.S. district court and a three-member panel of the Court of Appeals for the Eleventh Circuit, was heard *en banc* by 12 circuit court judges. That body ruled that the woman could sue, but could not agree under what circumstances. Instead of a majority opinion, the twelve judges wrote eight minority opinions. The Supreme Court then heard the case and ruled that the employer could be held accountable without the employee having to prove the employer's negligence, but that the employer did have an opportunity to offer an affirmative defense (explained below).

In *Faragher*, two men in municipal supervisory positions allegedly engaged in offensive touching and made offensive comments to two female lifeguards, who eventually quit their positions. The events occurred at a beach, miles from the main offices of the city government and its parks and recreation department. The city had not disseminated its anti-harassment policy among its beach employees, and the lifeguards had not reported the harassing behavior until after resigning from their jobs. This case, like *Burlington*, went through the district court, circuit court, and *en banc* review. The last review, conducted by a panel of 12 circuit judges, resulted in opinions in which five judges dissented in part and concurred in part. In other words, this panel was nearly as badly split as the one in *Burlington* (*Jansen v. Packaging Corporation of America*, 123 F.3d 490 [7th Cir. 1997]). The Supreme Court decided that the city could be held liable, but as with *Burlington*, the city could under certain circumstances offer an affirmative defense.

Detrimental Effects of Harassment

The Supreme Court said in its 1986 case, *Meritor Savings Bank FSB v. Vinson*, that a hostile environment claim requires showing that the harassment was "sufficiently severe or pervasive" to affect the conditions of work (*Meritor*, 67). In its 1993 case, *Harris v. Forklift Systems, Inc.* (510 U.S. 17 [1993]), the Court said a person must show having been detrimentally affected but need not show economic or psychological injury (*Harris*, 21).

The Supreme Court, after having stated in the *Meritor* opinion that both quid-pro-quo and hostile environment harassment were actionable, returned to the subject twelve years later in *Burlington*. The Court noted that neither form of harassment is mentioned in the Civil Rights Act, which simply bans discrimination "because of ... sex." However, the *Meritor* opinion, according to the Court, had given the two forms of harassment "their own significance." A quid-pro-quo claim could more readily lead to holding the employer liable, regardless of whether the employer had been negligent. Since someone in a supervisory position was an "agent" of the employer, the employer should be held responsible for any harassing behavior. The result was to "put expansive pressure on the definition" of quid-pro-quo (*Meritor*, 2265). In other words, litigants attempted to broaden the definition of what constitutes quid-pro-quo harassment and thereby increase the potential for employers to be found liable.

Indeed, that was the focus of attention in the *Burlington* case, namely whether the woman, Ellerth, could sue on the basis of quid-pro-quo harassment. She claimed that threats had been made against her by a supervisor but could show no detrimental effects in terms of her job. Indeed, she had been promoted during the period in which she claimed a supervisor harassed her. The Court said, "Because Ellerth's claim involves only unfulfilled threat, it should be categorized as a hostile work environment claim which requires a showing of severe or pervasive conduct" (*Burlington*, 2265).

The Court said that the distinctions between the two forms of harassment are important "when there is a threshold question whether a plaintiff can prove discrimination..." (*Burlington*, 2265). Once a court is satisfied that discrimination can be proved, then the two forms of sexual harassment are not "controlling" as to the employer's liability.

The Court's position was a departure from what lower courts expected. A view expressed by several of the circuit court judges in the *Burlington* case was that employers should be strictly liable for quid-pro-quo harassment, but should only be held liable in hostile environment cases when they were negligent in allowing harassment to occur.

Restatement (Second) of Agency

Rather than hinging its *Burlington* and *Faragher* decisions on the distinctions between the two forms of sexual harassment, the Supreme Court focused its attention on the more general issue in common law regarding when employers should be liable for the actions of their employees. Title VII of the Civil Rights Act of 1964 describes an employer as including "any agent of such a person" (42 U.S.C. § 2000e(b)). The Supreme Court in *Meritor* said that the inclusion of the word agent in the law "surely evinces an intent to place some limits on the acts of employees for which employers ... are to be held responsible" (*Meritor*, 72). In other words, an employee needs to be acting as the employer's agent in order for the employer to be responsible. The Court then referred to the *Restatement (Second) of Agency*.

The American Law Institute, a prestigious body of judges, attorneys, and law professors, prepared the current *Restatement*. The result of eight years of study and promulgated in 1958, the *Restatement* synthesized the common law of the states regarding when the "master" or employer is responsible for the acts of the "servant" or employee. This fundamental document is considered authoritative, as evidenced by its having been cited in 14,000 court cases between 1958 and 1998, including 5,000 at the federal level (American Law Institute 1998). The document, however, was prepared at a time when the legal concept of sexual harassment was nonexistent. Since 1995, the American Law Institute has been at work on the development of a third *Restatement*.

The relevant section of the *Restatement (Second) of Agency* deals with employer (master) responsibility for torts committed by employees (servants) (§ 219). The complete section is as follows:

> (1) A master is subject to liability for the torts of his servants committed while acting in the scope of their employment.
> (2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:
> (a) the master intended the conduct or the consequences, or
> (b) the master was negligent or reckless, or
> (c) the conduct violated a non-delegable duty of the master, or
> (d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

Before proceeding to analyze this critical section of the *Restatement*, it is important to note that the Court rejected an alternative approach. The Court could have held that, since the law of torts and agency is fundamentally rooted in state common law, an employer's liability depends upon the state in which an event occurred. Some judges on the circuit panel that heard the *Burlington* case took this position. Had the Supreme Court taken such a position, it is likely that great inconsistencies would develop on liability across the states. A company such as Burlington Industries might be liable for its supervisors' actions in one state but not liable for the exact same form of actions by supervisors in another state. By relying on the *Restatement*, the Court hoped to fashion a "uniform and predictable standard" (*Burlington*, 2265).

Another approach would have been to rely upon guidance from the EEOC regarding employer liability. The pertinent sections of the sexual harassment guidelines read:

> An employer ... is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence.
>
> With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment ... where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.
>
> An employer may also be responsible for the acts of non-employees ... where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action. (29 C.F.R. §1604.11).

The Supreme Court dismissed the EEOC's regulations as providing "little guidance on the issue of employer liability for supervisor harassment" (*Burlington*, 2266).

Of interest is that five years earlier the EEOC had drafted general guidelines on harassment that would have applied not only to sex but also to race, color, religion, national origin, age, and disability (EEOC 1993). Those draft guidelines provided more specificity about employer liability, but for reasons never revealed by the commission, it chose not to adopt the guidelines in final form. That left a vacuum in policy that was partially filled by the Court's 1998 decisions.

Scope of Employment

Every supervisor has a set of duties that constitute the scope of his or her employment. The central concern of the *Restatement* is whether a supervisor acted within his or her scope of employment when engaging in harassing behavior. If the supervisor was within his or her scope of employment, then it follows that the employer should be liable for the harassment. The Supreme Court in the *Burlington* case, although recognizing that some courts have ruled that harassment was within the scope of employment, concluded that "sexual harassment by a supervisor is not conduct within the scope of employment" (*Burlington*, 2267). In taking this position, the Court recognized that it was at odds with some courts that have even included sexual assaults as within the scope of employment (*Faragher*, 1998, 2287).

Since harassment is outside of a supervisor's scope of employment, the attention then shifts to the second portion of § 219 of the *Restatement*, pertaining to when an employer might be liable even when an employee acts outside of his or her scope of employment. Of the four exceptions in this category, the first and third have no bearing. The first refers to a situation where "the master intended the conduct," which is inapplicable in a harassment situation. The third says the employer would be liable if "the [employee's] conduct violated a non-delegable duty of the master."

The second exception is negligence on the part of the master. In a negligence case, a worker would contend that he or she was harassed and that the employer failed to correct the situation. This type of suit is used in hostile environment cases involving coworkers.

The fourth exception is the critical one regarding employer responsibility for supervisory personnel. This is the exception that Ellerth chose to use in the *Burlington* case. The exception says in effect that either the supervisor relied upon "apparent authority" or "was aided" in committing sexual harassment "by the existence of the agency relation." If a plaintiff can show one of these conditions, then the employer is vicariously liable, a condition that is far more serious under the law than mere negligence (see *Fleming v. Boeing Co.*, 120 F.3d 242 [11th Cir. 1997]; *Gary v. Long*, 59 F.3d 1391 [D.C.Cir. 1995]; *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437 [10th Cir. 1997]; *Hirase-Doi v. U.S. West Communications, Inc.*, 61 F.3d 777 [10th Cir. 1995]).

The Court reasoned in *Faragher* that imposing a burden on a plaintiff to show that a supervisor had used his "apparent authority" would be onerous. The nature of supervision is such that threats of reprisals for not complying with sexual demands can be worded in the vaguest of terms and can be conveyed through a supervisor's facial expression as well as by the spoken word. Under such a burden, litigants most likely would lose a vast majority of cases. Therefore, the Court ruled that the employer would be responsible for the actions of supervisors when tangible employment actions were taken, such as reprimands, demotions, pay reductions, and unfavorable job reassignments. In *Faragher*, the tangible action was constructive discharge, meaning that the lifeguard had been forced to resign her position because of sex. In *Burlington*, no action was taken against the woman.

In situations such as the one in *Burlington*, the Court said that an employer could raise two defenses. One was "that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior" (*Burlington*, 2270). The other was "that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise" (*Burlington*, 2270).

Supervisors and Employees

When is an employee also a supervisor or manager? In quid-pro-quo harassment, an alleged harasser must be regarded as a supervisor, since that person has the employer's powers in taking actions to coerce an employee into submitting to sexual demands. Employers may be able to escape quid-pro-quo liability if they can show that the offending individual was not a supervisor (*Torres v. Pisano*, 116 F.3d 625 [2d Cir. 1997]). In some situations, nominal supervisors who lack authority to take action against workers may use their relationships with their supervisors to get them to act against employees who resist sexual demands (*Sparks v. Pilot Freight Carriers, Inc.*, 820 F.2d 1554 [11th Cir. 1987]). In the *Burlington* case, the Supreme Court accepted the concept used in the lower courts that when a supervisor does not follow through on threatened reprisals for failure to comply with sexual demands, quid-pro-quo harassment does not exist but hostile environment harassment may exist (*Burlington*, 2265).

The concept of *respondeat superior*, meaning "the master must answer," holds that the employer should be answerable for the action of supervisory and managerial personnel. Since the supervisor acts as the employer's agent and presumably the employer has control over the supervisor's action, the employer is vicariously liable for whatever the supervisor does. Sometimes respondeat superior and vicarious liability are considered synonyms. As noted above, however, the supervisor must be acting within his or her scope of employment for respondeat superior to apply. There is a divergence of opinion in the legal community as to how agency principles and respondeat superior principles do and should relate to one another; this is a complex topic that is beyond the scope of this analysis (Hager 1998). It should be noted, however, that the term respondeat superior was mentioned several times in the *Faragher* opinion and not once in the *Burlington* opinion, raising the unanswered question of "Why?"

Tangible Employment Actions

As a result of these two Supreme Court rulings, the courts will continue to struggle with determining when "tangible employment actions" have occurred. Being disciplined in any way or passed over for promotion can be evidence of retaliation by a supervisor. Receiving a pay raise but at the same time being given an unfavorable reassignment that will stymie one's career advancement can also be a tangible employment action (*Davis v. City of Sioux City*, 115 F.3d 1365 [8th Cir. 1997]).

Constructive discharge is one of the most common complaints of victims. They contend that although they resigned their positions, in reality they were forced to resign because of the intolerable nature of their work situations. Courts generally use the reasonable adult standard, in which it is determined whether a situation would be regarded as intolerable and whether resignation would be a logical response (*Andrade v. Mayfair Management, Inc.*, 88 F.3d 258 [4th Cir. 1996]; *Burns v. McGregor Electronic Industries, Inc.*, 955 F.2d 559 [8th Cir. 1992]; *Hirschfeld v. New Mexico Corrections Dept.*, 916 F.2d 572 [10th Cir. 1990]; *Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343 [4th Cir. 1995]). The courts ask whether a typical adult faced with the same set of circumstances would be so offended as to resign his or her job. Some courts—and the Supreme Court to some extent—have used the reasonable woman standard, holding that what men may consider reasonable behavior may be considered unreasonable by women (*Ellison v. Brady*, 924 F.2d 872 [9th Cir. 1991]; *Harris*, 20; Lee and Greenlaw 1995).

The reasonable adult or woman standard may be considered objective, but an alternative is a subjective standard that can be used in cases of alleged quid-pro-quo harassment. This standard inquires about what the accuser intended and what the alleged victim brought to the situation. Did the supervisor prey on his or her employee? Did the supervisor intend to take "advantage of some particular fear or weakness that afflicts the accuser" (*Nichols v. Frank*, 42 F.3d 503 [9th Cir. 1994])? Some courts have said that in order for a plaintiff to claim constructive discharge evidence must be presented showing that the employer attempted "to force the employee to quit" (*E.E.O.C. v. Federal Reserve Bank of Richmond*, 698 F.2d 633, 672 [4th Cir. 1983]).

Reasonable Action by the Employer

As noted above, the Supreme Court allowed for employers to mount affirmative defenses. The main thrusts of such a defense is that the employer took reasonable action and/or that the employee failed to take reasonable action.

The common position taken by a plaintiff is that the employer knew of the harassing behavior or should have known of it and failed to take appropriate action (*Allen v. Tyson Foods, Inc.*, 121 F.3d 642 [11th Cir. 1997]; *Kauffman v. Allied Signal, Inc., Autolite Division*, 970 F.2d 178 [6th Cir. 1992]; *Reynolds v. CSX Transportation, Inc.*, 115 F.3d 860 [11th Cir. 1997]). If an employee has filed a complaint using the organization's grievance system or equal employment opportunity procedure, the employer cannot claim lack of knowledge (*Farley v. American Cast Iron Pipe Co.*, 115 F.3d 1548 [11th Cir. 1997]). Large corporations cannot claim they were unaware of situations, because of their size and the complaining employee being too far down in the hierarchy (*Young v. Bayer Corporation*, 123 F.3d 672 [7th Cir. 1997]).

Taking disciplinary action against an employee is a major line of defense, although it should be kept in mind that this applies in situations involving hostile environments caused by coworkers and by supervisors who do *not* take tangible employment action against their workers. Reprimands are appropriate for minor offenses of sexual harassment by workers, whereas outright firings are appropriate for more serious or continued offenses (*Blankenship v. Parke Care Centers, Inc.*, 123 F.3d 868 [6th Cir. 1997]; *Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311 [11th Cir. 1989]).

Reasonable Action by the Employee

If an employer had a firm anti-harassment policy and publicized that policy among its workers, including the procedure to follow in filing complaints, then employees are expected to use the procedure. This not only provides the employer with knowledge about a possible problem, but also gives the employer an opportunity to investigate the situation and take corrective action. In the *Faragher* case, the Supreme Court said that, " ... The City [of Boca Raton] had entirely failed to disseminate its policy against sexual harassment among the beach employees and that its officials made no attempt to keep track of the conduct of supervisors.... The record also makes clear that the City's policy did not include any assurance that the harassing supervisors could be bypassed in registering complaints" (*Faragher*, 2293). In other words, the lifeguards were expected to complain to the very individuals who were harassing them.

The *Burlington* case presented a different situation. Ellerth, the woman who brought the suit, was expected by company policy to report claims of sexual harassment to her boss. Yet, the alleged harasser was her boss's boss. The Court held that Ellerth should have an opportunity to show that it was reasonable *not* to file a complaint with her boss but also that Burlington Industries should have a chance to defend itself. The company could claim she "failed to take advantage of any preventive or corrective opportunities provided by the employer" (*Burlington*, 2270).

A Harshly Worded Dissent

Justice Thomas, with Justice Scalia joining him, wrote a harsh dissent in the *Burlington* case. Rather than using the vicarious liability approach, said the dissenters, the Court should have relied on a negligence standard, in which the employer would be accused of failing to meet a duty to an employee by protecting against sexual harassment. The dissent said the majority's position was a "whole-cloth creation" that will ensure "a continuing reign of confusion" (*Burlington*, 2273). The Court's position was criticized as "a product of willful policy-making, pure and simple.... It provides shockingly little guidance about how employers can actually avoid vicarious liability. Instead, it issues only Delphic pronouncements and leaves the dirty work to the lower courts" (*Burlington*, 2274). The Court's guidance on how an employer can defend itself from suit was attacked as "a mystery" that not only places the employer in a difficult position but also forces lower courts to attempt to fashion some means for defense.

Discussion and Conclusion

The Supreme Court clearly made history in handing down its four sexual harassment rulings in 1998. The meaning of these decisions will be debated for years both within and outside courtrooms across the nation.

Consequences of the Four Cases

The bottom line in *Gebser v. Lago Vista Independent School District*, involving suits against educational institutions under the 1972 Title IX Amendments, is that employers have the upper hand. For an employer to be liable for the actions of its employees, the victim must not only demonstrate that sexual harassment has occurred but that an official who had the authority to correct the situation failed to do so. The four-member minority on the Court contended that this decision overturns for the most part the Court's 1992 ruling in *Franklin* that there was an "implied right of action" for victims to sue under Title IX.

The decision in *Oncale v. Sundowner Offshore Services, Inc.* settled an important issue by holding that same-sex sexual harassment is forbidden by Title VII of the Civil Rights Act of 1964. However, the decision opens the door to a plethora of cases that will focus on what constitutes same-sex harassment and when an employer is liable for such.

The remaining two cases have broad applicability for the future of sexual harassment litigation—*Burlington Industries v. Ellerth* and *Faragher v. City of Boca Raton*. First, the Court's decisions downplay the differences between and the significance of quid-pro-quo and hostile environment harassment. According to the Court, these forms of harassment are dispositive concerning issues over whether sexual harassment has occurred. The forms of harassment, however, have less bearing on whether an employer is liable. Instead, the vicarious liability of the employer hinges upon the application of the *Restatement (Second) of Agency*. Although an employer is not liable when an employee acts outside of his scope of employment, the employer can be vicariously liable under certain exceptions. Future litigation will focus upon those exceptions. The Court has allowed employers to defend themselves by arguing that they took reasonable action in harassment situations and/or that the complaining employ-

ees failed to take reasonable action, such as utilizing grievance and equal opportunity complaint procedures.

The Courts, Congress, and the EEOC

The field of sexual harassment law has been painfully slow in developing. Although the Civil Rights Act banned discrimination "because of ... sex" in 1964, a case involving sexual harassment did not reach the Supreme Court until 22 years later. In *Meritor Savings Bank, FSB v. Vinson*, the Court held that hostile environment sexual harassment was prohibited by the 1964 law. Seven years later, the Court ruled in *Harris v. Forklift Systems, Inc.*, that for an employer to be liable, the harassment in a hostile environment situation must be "sufficiently severe or pervasive." With regard to the 1972 Title IX Amendments to the Education Act, the Court first ruled on sexual harassment in 1992 in *Franklin v. Gwinnett County Public Schools*. Then in 1998, the Court ruled in three cases involving Title VII and one involving Title IX.

The argument can readily be made that Congress and/or the Equal Employment Opportunity Commission need to take action, rather than forcing the courts to fill the long-standing void in the area of sexual harassment. One line of action that Congress could take would be to allow for litigation in educational settings regardless of whether a school official failed to take corrective action. In other words, the Congress might consider overturning the *Gebser* decision. Such a law would erase the inconsistency that exists between Title VII and Title IX due to the Court's recent decisions.

Congressional action also might be warranted in the area of sexual orientation. Congress passed the Defense of Marriage Act in 1996 in response to a movement in some states to recognize same-sex marriages. The federal law relieves states from recognizing same-sex marriages that were performed in other states. It is important to employers who, under the law, are not required to provide employee benefits to same-sex partners as they would to spouses in heterosexual marriages.

Congress has been under pressure to enact the Employment Non-Discrimination Act (ENDA), which would bar discrimination based on sexual orientation, including homosexuality, bisexuality, and heterosexuality. Twelve states have already passed such a law (General Accounting Office 1997). The proposed law not only bans discrimination based on a person's sexual orientation but also "based on the sexual orientation of a person with whom the individual is believed to associate or to have associated." The proposed law would not extend employee benefits to an individual's partner and would not apply to the armed forces. The *Oncale* decision may relieve some pressure on Congress to enact ENDA, but it should be kept in mind that the proposal would apply to all forms of sexual orientation discrimination and not just sexual harassment.

An argument may be less persuasive for Congress to take legislative action in response to the *Burlington* and *Faragher* cases. As the Court indicated first in *Meritor* and later in the 1998 cases, the presumption is that Congress wanted to use the *Restatement (Second) of Agency* in determining when employers are and are not liable for the actions of their employees. As explained above, future cases will focus on the application of § 219 to specific situations.

Although there may be no compelling need for legislative action in this area, administrative guidelines would be helpful. As noted earlier, the EEOC issued draft guidelines on harassment in 1993. These would have applied to "race, color, religion, gender, national origin, age, or disability" (EEOC 1993). However, as is its right, the commission chose not to issue the guidelines in final form and chose not to provide any reason for its decision.

One set of provisions in the formerly proposed guidelines that could be useful in current litigation explained what constitutes harassment. It "is verbal or physical conduct that denigrates or shows hostility or aversion toward an individual ..." and (1) creates a hostile environment, or (2) interferes with a person's work performance, or (3) otherwise negatively affects employment opportunities. "Harassing conduct includes ... (1) epithets, slurs, negative stereotypes, or threatening, intimidating, or hostile acts" ... and (2) "written or graphic material that denigrates or shows hostility or aversion toward an individual or group" (EEOC 1993, 51269).

Even more helpful would be guidelines that explained what is meant by same-sex harassment. The 1993 draft guidelines did not address that matter, and as noted, the *Oncale* decision simply said that suits were possible for same-sex harassment.

One major point of diversion between the 1993 draft guidelines and the 1998 *Oncale* ruling relates to the standards used. The EEOC's discussion of its guidelines noticed "the importance of considering the perspective of the victim of the harassment" (51267). The commission referenced the "reasonable woman" case, noting that the standard should be in terms of what is reasonable to a typical person, which is usually a woman in harassment situations (*Ellison* 1991). The commission said that should be the standard rather than what might be "acceptable behavior that may prevail in a particular workplace" (51267). It is this latter standard that the Supreme Court adopted in *Oncale*. The Court instructed lower courts to use a "common sense" standard that some behavior may be acceptable in some locations and not in others. As cases develop, what is "common sense" may become elusive.

The four sexual harassment cases of 1998 underscore the Supreme Court's policy-making role in contemporary society. The decisions also underscore the fact that Con-

gress has been willing to leave matters to the courts rather than using the legislative process to set policy. The 1998 rulings will lead to greater litigation in the realm of sexual harassment and may emphasize the need for some action by Congress and/or the Equal Employment Opportunity Commission.

Advice to Administrators

Prevention is always the best policy in any situation, and that is particularly true regarding sexual harassment, whether one is considering the sexual harassment of "customers," as in the *Gebser* case of a high school girl being sexually harassed by her teacher, or harassment of subordinates (*Oncale*, *Burlington*, and *Faragher*), or harassment of coworkers (*Oncale*).

Ever since the law of sexual harassment began to emerge, employers have been put on notice that a clearly stated anti-discrimination policy is needed. The policy by itself, however, is insufficient in that mechanisms must exist for enforcing the policy. Employees and others must have reason to believe that the policy will be enforced when complaints are filed. Without such belief, people are necessarily reluctant to file complaints. In such situations, no corrective action would be expected and even worse, the harasser might take retaliatory action against anyone who did complain.

For the time being, a double standard may exist between schools and the rest of the public sector. Sexual harassment suits filed against school districts, colleges, and universities under the Title IX amendments are unlikely to be successful, while suits filed against other governments under Title VII may well be successful. Ethical school officials will not take comfort in this double standard and will be aggressive in combating sexual harassment by teachers and other school employees and supervisors.

All administrators must be wary of the murky world of same-sex discrimination. Suits that previously would have been dismissed by the courts will now proceed due to the *Oncale* decision. In addition to policy statements, training may be particularly important in instructing employees about both blatant and subtler forms of same-sex discrimination.

The *Burlington* and *Faragher* decisions have opened the courtroom doors to a host of new litigation pertaining to how agency law is to be applied in sex-discrimination cases. The Supreme Court has shifted attention away from what was the "traditional" approach of being concerned about quid-pro-quo and hostile environment cases. New attention will be given to how the common law should be applied in cases of alleged sexual harassment. It is uncertain as to when governments will be successful in presenting an affirmative defense.

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