Quid Pro Quo Sexual Harassment: A New Standard

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QUID PRO QUO SEXUAL HARASSMENT:
A NEW STANDARD

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Under Title VII of the Civil Rights Act, courts have formulated two categories of workplace sexual harassment. The first category, hostile environment, makes actionable a work environment that is "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" The inquiry is objective: the harassment must be sufficiently severe and pervasive that a reasonable person would be offended. The second category, quid pro quo, "something for something," makes actionable what some have called "sexual blackmail." That is, an employer or supervisor conditions employment benefits on the employee's submission to unwelcome sexual conduct.

On the surface, the availability of legal recourse for these categories of harassment appears to prohibit all workplace sexual harassment. As currently construed by some courts, however, the quid pro quo cause of action fails to address adequately situations in which workers are subjected to subtle forms of sexual coercion or do not suffer traditional tangible harms.

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   (a) 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 .
   § 2000(e)-2(a)(1).
3. Id. at 67 (quoting Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).
Specifically, quid pro quo is inadequate in two ways: first, it has been construed too narrowly, often precluding recovery when the conditioning of the employment benefit upon sex was implied; and second, it arbitrarily limits recovery to specific economic or tangible harm, denying a remedy for other legitimate harms.

This Note proposes a standard for quid pro quo cases that more effectively determines whether a benefit was conditioned on sex and whether the victim was harmed. Part I provides the legal background of quid pro quo sexual harassment. Part II describes the standards courts currently apply to cases in which the employer merely implied that job benefits were conditioned on sex, and argues that courts should adopt a new standard to determine whether the employer actually did condition the receipt of a job benefit on sex. Part III discusses the different types of harm potentially suffered by victims of quid pro quo sexual harassment, analyzes the strict standards currently used by courts to determine whether a legally cognizable injury has been suffered, and argues that the current standards should be replaced by one that allows recovery for intangible, but nevertheless real, harms. Part IV concludes that one new standard, combining the standards discussed in Parts II and III, would most effectively achieve the purposes of Title VII, and therefore should be adopted by the courts in order to better remedy all forms of quid pro quo sexual harassment.

I. QUID PRO QUO: THE LEGAL STANDARDS

To determine whether a plaintiff has proven quid pro quo sexual harassment, most courts use the following five-part test:

1. The employee belongs to a protected group.
2. The employee was subject to unwelcome sexual harassment.
3. The harassment complained of was based upon sex.
4. The employee's reaction to [the] harassment complained of

She adds that courts incorrectly use the hostile environment category as a "catch-all" for sexual harassment, consequently denying plaintiffs recovery under the quid pro quo cause of action. Id. Specifically, she asserts that courts, by denying recovery under quid pro quo, have abandoned plaintiffs who resign due to harassment and prove hostile environment sexual harassment, but cannot prove constructive discharge. Id. at 1736. Because hostile environment recoveries do not include back pay, this reduces a plaintiff's pecuniary relief. Id. at 1718-19.

9. These cases are referred to as "implied conditioning" cases.
10. See Nichols v. Frank, 42 F.3d 503, 511-12 (9th Cir. 1994).
affected tangible aspects of the employee's compensation, terms, conditions, or privileges of employment. The acceptance or rejection of the harassment by an employee must be an express or implied condition to the receipt of a job benefit or the cause of a tangible job detriment in order to create liability under this theory of sexual harassment....

(5) *Respondeat superior.*

Courts have had great difficulty applying the fourth prong of the quid pro quo test, which attempts to determine whether a benefit was conditioned on sex and whether the victim was harmed. As a result, three different tests have evolved, each analyzing the conduct from a different perspective. Some courts follow the Equal Employment Opportunity Commission (EEOC) Guidelines, which state that sexual harassment is unlawful when "submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment ... [or] submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual."12 Focusing on the employer's perspective, this test asks whether the employer committed the illegal act of improperly using sexual conduct as a criterion in its decision making. Other courts use a slightly different test, requiring the employee to show that "her reaction to these advances affected tangible aspects of ... her compensation, terms, conditions, or privileges of employment."13 This test focuses on the employee's point of view, inquiring whether the employer's conduct affected the employee in a tangible way. A third test was created by one court that required the plaintiff to show that "she was deprived of a job benefit which she was otherwise qualified to receive because of the employer's use of a prohibited criterion in making the employment decision."14 Considering the perspectives of both the employer and the employee, this test asks two questions: first, whether the employee suffered a particular loss; and second,

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13. Chamberlin, 915 F.2d at 784 (quoting Lipsett v. University of P.R., 864 F.2d 881, 897 (1st Cir. 1988)).
14. Spencer, 894 F.2d at 658.
whether the employee's loss was caused by the employer's use of an improper criterion in its decision making.

Because the three tests adopted by the courts examine conduct from different perspectives, they produce a wide variety of results. Courts should adopt a new standard that would provide greater consistency, prohibit implied conditioning, and remedy intangible harm.

II. IMPLIED CONDITIONING

A. The Current Legal Standards

In most cases, courts purport to acknowledge that a cause of action arises when an employer merely implies that the plaintiff's submission to sexual advances is a condition of receiving tangible job benefits. Predicting what facts will be defined as an implied condition in a given case is difficult, however, because some courts require the implication to be so clear that it is virtually explicit. A strong implication was required in Spencer v. General Electric, for example, where the Fourth Circuit held that quid pro quo harassment had not occurred. In Spencer, the employee was subjected to repeated sexual advances and was eventually raped by her supervisor. Declining to find a causal nexus because the supervisor "never mentioned sex in connection with a promotion," the court enunciated an onerous burden of proof to

15. An example of an improper criterion is the employee's rejection of the harassment.
16. See, e.g., Chamberlin, 915 F.2d at 784; Spencer, 894 F.2d at 658; Hicks v. Gates Rubber Co., 833 F.2d 1406, 1414 (10th Cir. 1987); Jones v. Flagship Int'l, 793 F.2d 714, 722 (5th Cir. 1986), cert. denied, 479 U.S. 1065 (1987); Highlander v. K.F.C. Nat'l Management Co., 805 F.2d 644, 648 (6th Cir. 1986); Henson v. City of Dundee, 682 F.2d 897, 909 (11th Cir. 1982).
17. See, e.g., Chamberlin, 915 F.2d at 784 (recognizing that the conditioning of job benefits can be express or implied but holding that there had been quid pro quo harassment on other grounds: the plaintiff's reaction to the harassment, her refusal to acquiesce in her supervisor's conduct, affected tangible aspects of her employment because she was fired); Spencer, 894 F.2d at 659 (holding that the plaintiff submitted sufficient evidence to create an inference that the benefit was implicitly conditioned on sex, but subsequently finding that the defendant rebutted that inference); Hicks, 833 F.2d at 1414 (holding that neither explicit nor implicit conditioning occurred); Jones, 793 F.2d at 722 (holding that the plaintiff "failed to establish that [she] was required to accept sexual harassment as a condition to the receipt of a job benefit").
18. 894 F.2d 651 (4th Cir. 1990).
19. Id. at 659.
20. Id. at 654.
21. Id. at 659.
show implied conditioning. As a result, the burden of proof used in the Fourth Circuit requires a showing of verbal requests for sex "in connection with" a particular job benefit.

The fourth prong of quid pro quo was applied differently by the Sixth Circuit in Highlander v. K.F.C. National Management Co., where the court created another standard for proving implied conditioning. In Highlander, the plaintiff invited her supervisor out for a drink to discuss her promotion possibilities. Declining the invitation, the supervisor placed his arm around the plaintiff and said that "if she was interested in becoming a co-manager, 'there is a motel across the street.'" In spite of this verbal statement implying that an encounter at the motel was a condition of obtaining a promotion, the court held that there was no quid pro quo sexual harassment, in part because "[the plaintiff] placed no serious implications upon [her supervisor's] conduct." The plaintiff had told an area manager that she did not want to "mak[e] an issue of the incident because she did not 'think it was that big of a deal.'" When she was fired one month after reporting the harassment to the company president, however, the plaintiff decided to sue. In holding that there was no express or implied conditioning of job benefits, the court inserted a new factor into the test: whether the plaintiff thought the conditioning had "serious implications." The addition of this "serious implications" element is inappropriate because even if the plaintiff thought the implied conditioning did not have serious implications, the plaintiff should have a cause of action if the unlawful

22. See id.
23. See id.
24. 805 F.2d 644 (6th Cir. 1986).
25. See id. at 649.
26. Id. at 646.
27. Id.
28. Id. at 649.
29. Id. at 646.
30. Id. at 647.
31. See id. at 649. Under this analysis, the "serious implications" factor would probably negate even explicit conditioning. If there was evidence that after the supervisor explicitly offered to exchange sex for a job benefit, the plaintiff said she did not think her supervisor's offer had serious implications, for example, the supervisor would not be liable. By focusing on the plaintiff's evaluation of the event, the court would permit a supervisor to commit the unlawful act of conditioning a job benefit on sex.
32. Many reasons exist, all of which should be considered irrelevant when deciding whether the harassment occurred, to explain why the plaintiff may have stated that she thought her supervisor's conduct did not have serious implications. See Kathryn Abrams, Gender Discrimination and the Transformation of Workplace Norms, 42 Vand. L. Rev.
implied conditioning nevertheless occurred. Regardless of how serious she thought the treatment was, a person who is subjected to treatment that Congress and the EEOC have declared unlawful is entitled to state a claim.\textsuperscript{33} Surely Congress and the EEOC thought the act of conditioning employment benefits was serious when they chose to make it unlawful.\textsuperscript{34} In the Sixth Circuit, therefore, it is not enough for a supervisor to request sex verbally in connection with a job benefit, as is required by the Fourth Circuit;\textsuperscript{35} the plaintiff must also realize that her supervisor's conduct has serious implications.\textsuperscript{36}

In stark contrast to the heightened burdens imposed by Spencer and Highlander, the United States District Court for the Middle District of Tennessee, in Wilson v. Wayne County,\textsuperscript{37} construed the fourth prong of quid pro quo to require a much lower burden of proof.\textsuperscript{38} In Wilson, the plaintiff had planned to cease working for the defendant and to return to college but later decided to continue working.\textsuperscript{39} Shortly after a conversation during which the plaintiff asked her employer for extended employment, the defendant called the plaintiff into his office and raped her.\textsuperscript{40} Noting that "[m]inutes after she raised the issue again, the [defendant] called her into his office for sex,"\textsuperscript{41} the court found that the defendant "had made submission to his sexual advances the test for whether [the plaintiff] would stay on as [an employee]."\textsuperscript{42} In

\textsuperscript{33} See Spencer v. General Elec., 894 F.2d 651, 659 (4th Cir. 1990).
\textsuperscript{34} See Highlander, 805 F.2d at 649.
\textsuperscript{35} See 856 F. Supp. 1254 (M.D. Tenn. 1994).
\textsuperscript{36} See id. at 1260.
\textsuperscript{37} Id. at 1257.
\textsuperscript{38} Id. at 1257-58.
\textsuperscript{39} Id. at 1260.
\textsuperscript{40} Id.
this case, there was neither a verbal statement implying that the plaintiff's continued employment was conditioned upon her performing sexual favors, as required by the Fourth Circuit, nor any evidence specifically proving that the plaintiff placed serious implications on the conduct, as required by the Sixth Circuit. The implication was based purely on evidence of a temporal link. In the Middle District of Tennessee, therefore, a mere temporal link between a conversation about a job benefit and an unwelcome sexual act permits a holding that implied conditioning occurred.

These three cases exemplify the wide variety of outcomes that result under the fourth prong of the quid pro quo test. This unpredictable, and often unjust, test should be replaced by a standard that provides a more effective remedy and greater predictability.

B. A New Standard: The Reasonable Person

The purposes of the quid pro quo cause of action are to prevent a supervisor from using employment-related authority to obtain sexual favors from a subordinate employee and to prohibit the use of the employee's reaction to such conduct as the basis for employment decisions affecting that employee. Because supervisors can abuse their power explicitly or implicitly, blatantly or subtly, courts must permit recovery even when no express agreement to trade sexual favors for job benefits was made. Although most courts do recognize a cause of action for implied conditioning, the heavy burdens of proof imposed severely narrow the

43. See id.
45. See Wilson, 856 F. Supp. at 1260.
47. See Wilson, 856 F. Supp. at 1260.
48. See id.
49. See Henson v. City of Dundee, 682 F.2d 897, 910 (11th Cir. 1982) (emphasizing that the wrong in quid pro quo cases is the supervisor's use of his authority to extort sex from the employee).
51. Wilson, 856 F. Supp. at 1260.
52. See, e.g., Chamberlin v. 101 Realty, Inc., 915 F.2d 777, 784 (1st Cir. 1990); Spencer
scope of Title VII protection, undermining its effectiveness. Courts can reinvigorate the quid pro quo cause of action by adopting a clear objective standard.

Such an objective standard was adopted by the Ninth Circuit in *Nichols v. Frank*. Recognizing the need for a better standard, Judge Reinhardt explained that it is precisely because it is difficult to identify implied conditioning that it is “far more likely to take place than ... the explicit variety.” According to the court, because harassers have learned that they can no longer overtly harass their victims without facing legal repercussions, they now use subtle techniques. Whether the accused harasses his victim implicitly or explicitly, however, the result for the victim is the same. She is still forced to choose “between acceding to sexual demands and forfeiting job benefits ... or otherwise suffering tangible job detriments.” Because one purpose of the quid pro quo cause of action is to prevent employees from being confronted with these untenable options, a cause of action arises when the employee reasonably feels she is faced with this choice.

Finding the five-part test “unnecessarily complicated and overly formalistic,” Judge Reinhardt articulated a new standard that fully embodies the purposes of the quid pro quo cause of action. Judge Reinhardt stated that in deciding whether an individual conditioned a job benefit on an employee’s acceptance of sexual conduct,

we may reach our conclusion by either of two means. We can apply an objective standard, under which we determine whether a reasonable person in the accuser’s position would have believed that he or she was the subject of quid pro quo sexual

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53. See supra part II.A.
54. 42 F.3d 503, 511-12 (9th Cir. 1994).
55. Id. at 512.
56. Id.
57. Id.
59. See id. (stating that quid pro quo is “anchored in” an employer forcing the employee to choose between sex and employment benefits).
60. Nichols, 42 F.3d at 511-12.
61. Id. at 511.
62. See id. at 511-12.
harassment. ... In the alternative, we can apply a subjective standard, under which the fact finder may inquire into whether the alleged harasser actually intended to subject the accuser to quid pro quo sexual harassment.63

In articulating this new standard, the Ninth Circuit addressed the difficulties courts face in implied conditioning cases.64 The court emphasized that judges must use the utmost care in examining these cases because implied conditioning is often difficult to identify.65 In the absence of an express statement conditioning benefits on sex, courts must analyze the facts and circumstances of each particular case to decide whether a condition was nevertheless implied.66 The court suggested that one way to establish a violation is by examining the "verbal nexus."67 The verbal nexus recognizes that implied conditioning becomes more likely as the amount of time between a conversation about benefits and a request for sex decreases.68 The court emphasized, however, that examining the verbal nexus is only one possible method that may not apply in all circumstances.69 The court stated, "no rule or set of rules will provide an answer in all circumstances.... [T]here is no substitute for a rigorous examination in each instance of all of the relevant facts and circumstances."70

The objective test created by the Ninth Circuit best serves the purposes of Title VII because it is satisfied at the precise moment when the harm of the harassment is inflicted: when the reasonable employee would perceive that her benefit is conditioned upon sex. When the reasonable employee reaches that conclusion, she must choose between having sex and forfeiting a job benefit,71 the very dilemma Title VII seeks to prevent.72

Because this reasonable employee test excludes the various factors courts have inappropriately included in the inquiry,73 and

63. Id.
64. See id. at 512.
65. Id.
66. Id.
67. Id. at 512-13.
68. See id. at 513.
69. Id.
70. Id.
71. For a discussion of the harm a woman suffers from facing that choice, see infra part III.B.1.
73. Not only do courts insert the factors illustrated in the above cases, courts also insert the issue of tangible or economic harm. Many courts determine liability, not damages, based on the plaintiff's reaction to the conditioning. The appropriate inquiry, however, is whether the illegal conditioning actually occurred. The plaintiff's reaction should only be relevant when determining the amount of her damages. See infra part III.
asks only the relevant question, it will produce more accurate and predictable results. In addition, this test provides better guidance to courts without favoring either party. Whereas its focus on the employee’s perspective will provide better guidance to courts by channeling their analysis, its objectivity also will protect employers from a hypersensitive employee. Finally, this test appropriately allows recovery when a victim, who may be having difficulty confronting her predicament, denies the severity of her harm. Courts should adopt this standard because it most effectively serves the purposes of Title VII.

III. TANGIBLE HARM

A. The Current Legal Standards

When determining whether there has been quid pro quo sexual harassment, courts focus heavily on actual tangible or economic harm. Because quid pro quo is based on an exchange of an employment benefit for sex, many courts infer that no cause of action can lie unless the employee actually forfeited an employment benefit or suffered another tangible loss. In the area of hostile environment sexual harassment, the United States Supreme Court has held that tangible harm is not required. Because the Supreme Court has not directly addressed this issue in the quid pro quo context, however, the question has produced

74. See Andrews v. City of Phila., 895 F.2d 1469, 1483 (3d Cir. 1990) (using an objective standard in a hostile environment sexual harassment case); see also Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991) (using the objective reasonable woman standard to protect the employer from a hypersensitive employee).

75. See, e.g., Jones v. Flagship Int'l, 793 F.2d 714, 722 (5th Cir. 1986) (holding that no quid pro quo occurred in part because the plaintiff failed to prove that the harassment resulted in a tangible job detriment), cert. denied, 479 U.S. 1065 (1987); Highlander, 805 F.2d at 649 (holding that no quid pro quo occurred in part because there was no evidence that the plaintiff suffered a job detriment); Anderson v. State Univ. of N.Y. Health Science Ctr., 826 F. Supp. 625, 629 (N.D.N.Y. 1993) (holding that no quid pro quo occurred because negative work evaluations did not directly alter the plaintiff's economic status), appeal dismissed, 23 F.3d 396 (2d Cir.), cert. denied, 114 S. Ct. 2763 (1994); Ridge v. HCA Health Servs., Inc., 64 Empl. Prac. Dec. (CCH) ¶ 43.071, at 79,979-80 (D. Kan. 1992) (holding that quid pro quo did occur because the plaintiff's work schedule constituted a concrete job benefit).

76. See, e.g., Jones, 793 F.2d at 722; Highlander, 805 F.2d at 649; Anderson, 826 F. Supp. at 629; Ridge, 64 Empl. Prac. Dec. (CCH) at 79,979-80.

confusion among courts. As a result, courts have developed a variety of approaches in deciding whether a plaintiff suffered a legally cognizable harm.

The Fifth Circuit set forth one approach in Jones v. Flagship International. In Jones, the plaintiff had been subjected to several sexual advances by her supervisor. The court held that to prove quid pro quo "the employee must prove that she was deprived of a job benefit which she was otherwise qualified to receive." In finding no quid pro quo harassment, the court explained that the "[plaintiff] failed to demonstrate that the incidents ... resulted in a tangible job detriment." The high standard espoused by the Fifth Circuit, therefore, precludes a plaintiff from claiming quid pro quo unless she can show she actually suffered a tangible job detriment.

One United States District Court adopted a more narrow interpretation by completely barring recovery because the plaintiff's "economic status was not altered." The court stated:

Nonetheless, even assuming arguendo that the advances occurred and that plaintiff received negative evaluations because of his rejection thereof, the evidence shows that his economic status was not altered as a result. Plaintiff was not demoted, passed over for promotion, suspended, laid-off, or discharged as a direct result of [his supervisor's] evaluations.

Here, the Northern District of New York set forth a list of possible "economic" harms, explicitly excluding negative job evaluations. Under this standard, therefore, it is permissible for the employer to consider the employee's refusal to grant sexual favors when evaluating that employee's job performance.

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78. Because the holding in Meritor was not expressly limited to hostile environment cases, courts could extend its decision not to require tangible harm to quid pro quo as well. Despite this possibility, most courts continue to require a tangible or economic harm without addressing Meritor. See, e.g., Anderson, 826 F. Supp. at 629; Ridge, 64 Empl. Prac. Dec. (CCH) at 79,979-80.
79. 793 F.2d at 721-22.
80. Id. at 716-17.
81. Id. at 722.
82. Id.
83. See id.
85. Id.
86. See id.
87. See id.
cause a job performance evaluation is equivalent to an employment decision, however, this standard directly conflicts with the EEOC Guidelines, which provide that basing employment decisions on submission to unwelcome sexual conduct is unlawful. Furthermore, employment evaluations can give the employer legitimate reasons to pass over for promotion, demote, or discharge the employee, decisions that do make the court's list of actionable harms. According to the Northern District of New York, therefore, tangible harm is not only required, but it must be in the form of direct harm to the employee's economic status. The court's narrow interpretation of harm is entirely inconsistent with Title VII's goal "to strike at the entire spectrum of disparate treatment of men and women," because it severely limits that "spectrum."

Another court espoused a broader interpretation of job benefits and held that a plaintiff's work schedule was a tangible job benefit. The court noted that the "[p]laintiff's major job benefit was that she could work at the job and have her schedule coincide with her ability to attend local university classes." Recognizing that this convenience was a concrete benefit and that it was conditioned upon sex, the court held that the plaintiff had alleged a prima facie case of quid pro quo sexual harassment. This more lenient definition of job benefits, which includes factors that are

88. Title VII prohibits discrimination "with respect to [an employee's] compensation, terms, conditions, or privileges of employment," 42 U.S.C. § 2000(e)-2(a)(1) (1988), and the EEOC Guidelines refer to these as "employment decisions." 29 C.F.R. § 1604.11(a)(2) (1995). Job performance evaluations must be treated as "employment decisions" because evaluations are used to make Title VII "employment decisions." See Shrout v. Black Clawson Co., 689 F. Supp. 774, 780 (S.D. Ohio 1988) (holding that the plaintiff proved a cause of action in quid pro quo sexual harassment when she proved that her refusal to submit to her supervisor's demands resulted in his withholding performance evaluations and salary reviews, which caused plaintiff to receive no pay increases). Allowing employers to base their evaluations on sex would completely eviscerate the statute.


90. The court itself admits that job evaluations form the basis of employment decisions by holding that the plaintiff was discharged due to the negative evaluations submitted by his other supervisors. Anderson, 826 F. Supp. at 629.

91. Id.

92. See id.


95. Id. at 79,980.

96. Id.
not directly "economic" but nevertheless are "terms" of employment, is more aligned with the purposes of Title VII.\textsuperscript{97}

The variety of definitions of the harm required to prove quid pro quo sexual harassment reveals that courts need better guidance on this issue. Likewise, plaintiffs deserve more predictability. Most importantly, women are entitled to a remedy that effectively protects them from the entire realm of sexual harassment.

B. A New Standard

Because the purpose of Title VII is to ensure that women and men have equal employment opportunities,\textsuperscript{98} courts should interpret the statute to prohibit any acts or practices that disparately impede the ability of one group to succeed.\textsuperscript{99} The harm targeted should be the creation of an uneven playing field for men and women, in whatever form it appears.\textsuperscript{100} Limiting recovery to tangible or economic harm is inconsistent with the goal of eliminating inequality\textsuperscript{101} because opportunities can be rendered unequal in a multitude of intangible and noneconomic ways.\textsuperscript{102} Courts

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\textsuperscript{97} See Meritor, 477 U.S. at 64 (stating that the purpose of Title VII is to prevent all forms of unequal treatment).

\textsuperscript{98} Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971) ("The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of employees over other employees.").

\textsuperscript{99} See id. at 431 ("What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.").

\textsuperscript{100} One author has explained that all forms of gender differences, cultural and biological, should be considered when seeking to create symmetry. Christine A. Littleton, Reconstructing Sexual Equality, 75 Calif. L. Rev. 1279, 1296 (1987). She stated:

[T]he function of equality is to make gender differences, perceived or actual, costless relative to each other, so that anyone may follow a male, female, or androgynous lifestyle according to their natural inclination or choice without being punished for following a female lifestyle or rewarded for following a male one.

\textit{Id.} at 1297.

\textsuperscript{101} See Meritor, 477 U.S. at 64 (noting congressional intent to focus on the entire spectrum of disparate treatment); accord Lehmann v. Toys "R" Us, Inc., 626 A.2d 445, 457 (N.J. 1993) ("Because discrimination itself is the harm that the LAD [Law Against Discrimination] seeks to eradicate, additional harms need not be shown ....").

\textsuperscript{102} One writer has argued that women who are harassed at work suffer economic effects even when their employers do not directly take action against them. See L. Camille Hebert, The Economic Implications of Sexual Harassment for Women, Kan. J.L. & Pub. Pol'y, Spring 1994, at 41, 44. L. Camille Hebert attributes this loss to the employee's diminished job performance that results from the stress caused by the harassment. \textit{Id.} at 46.
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should recognize a quid pro quo cause of action in two situations that do not involve tangible or economic harm: first, when a supervisor attempts to force an employee to choose between a job detriment and sex, but the employee refuses and neither provides sex nor suffers any job detriment; and second, when an employee submits to the demand for sex and thereby avoids any job detriment.\(^{103}\)

1. Refusal: Facing a Hobson’s Choice Is a Legitimate Harm

Judge Bowen, of the United States District Court for the Southern District of Georgia, recognized a quid pro quo cause of action in *Mills v. Amoco Performance Products*\(^{104}\) even though the employee did not suffer a tangible job detriment.\(^{105}\) In *Mills*, the plaintiff based her quid pro quo claim on her supervisor’s statement that “women could sometimes get out of having to do [the undesirable job duty] if they had sex with their supervisor.”\(^{106}\) Although the plaintiff refused the defendant’s request for sex,\(^{107}\) she was never forced to do the unwanted job duty.\(^{108}\) Thus, the defendant argued that because the plaintiff neither submitted to his sexual demands nor performed the unwanted job duty, no quid pro quo occurred.\(^{109}\) Nevertheless, the court recognized that harm occurred when the defendant committed the illegal act of conditioning.\(^{110}\) Reasoning that incurring a tangible detriment\(^{111}\) is not a critical element of quid pro quo sexual harassment, the court emphasized that it is the act of conditioning the job benefit which is the “quintessence of *quid pro quo* sexual harassment.”\(^{112}\) The plaintiff had properly alleged a claim of quid pro quo sexual harassment by asserting that such conditioning occurred.\(^{113}\)

\(^{103}\) See Karibian v. Columbia Univ., 14 F.3d 773, 778-80 (2d Cir.) (noting the difference between “refusal” cases and “submission” cases, and holding that a quid pro quo claim can be made out in both), *cert. denied*, 114 S. Ct. 2693 (1994).
\(^{105}\) Id. at 989.
\(^{106}\) Id. at 981 n.4.
\(^{107}\) Id. at 981.
\(^{108}\) Id. at 989.
\(^{109}\) Id.
\(^{110}\) Id.
\(^{111}\) The plaintiff had not incurred a tangible detriment because she was neither forced to do the undesirable job duty nor forced to have sex with her supervisor. Id. However, having to confront this Hobson’s choice is an intangible harm. See infra note 116 and accompanying text.
\(^{112}\) *Mills*, 872 F. Supp. at 989.
\(^{113}\) Id.
Allowing a quid pro quo claim to prevail when the harm suffered was not tangible is appropriate because it remedies the wrongful act, the act of conditioning. Because it is the misappropriation of authority which is prohibited under quid pro quo, a cause of action should lie whenever conditioning occurs, regardless of whether the employee's harm was tangible. Requiring tangible harm ignores the fact that the employee was harmed by being forced to choose between a job detriment and sex. Conditioning causes an intangible harm by "sexualizing" the employee and consequently preventing her from feeling equal to her male coworkers who are not forced to make this choice. Limiting recovery to tangible or economic harm ignores the intangible and noneconomic harms that sexual harassment causes, legitimate harms that Title VII was also intended to prevent. Courts should follow the reasoning applied in Mills and allow recovery for the intangible harms caused by the imposition of the unfair choice between a job detriment and sex.

2. Submission. Having Unwanted Sex Is a Legitimate Harm

Judge McLaughlin, of the United States Court of Appeals for the Second Circuit, allowed a quid pro quo claim to prevail in Karibian v. Columbia University when the plaintiff submitted to her supervisor's demands for sex in order to avoid suffering a tangible job detriment. In Karibian, the plaintiff's supervisor

114. See id.; see also Henson v. City of Dundee, 682 F.2d 897, 910 (11th Cir. 1982) (explaining that in quid pro quo the supervisor uses his authority to "extort" sexual consideration from the employee).

115. See Mills, 872 F. Supp. at 989 (focusing on the act of conditioning rather than the nature of the harm it caused).

116. Catharine MacKinnon has argued that the injury caused by sexual harassment should be defined as "being placed in the position of having to choose between unwanted sex and employment benefits or favorable conditions." Catharine A. MacKinnon, Sexual Harassment of Working Women 37 (1979).

117. Abrams, supra note 32, at 1209. Kathryn Abrams has argued that sexual remarks "remind[] a woman that she is viewed as an object of sexual derision rather than as a credible coworker." Id. at 1208.


119. Catharine MacKinnon described the need for a remedy in these "submission" cases when she argued that sexual harassment recovery should not be limited to women who successfully refuse the harassment because "women who are forced to submit to sex must be understood as harmed not less, but as much or more, than those who are able to make their refusals effective." Catharine A. MacKinnon, Feminism Unmodified 110 (1987).

120. 14 F.3d 773 (2d Cir.), cert. denied, 114 S. Ct. 2693 (1994).

121. Id. at 778-79.
“coerced her into a violent sexual relationship by telling her that she ‘owed him’ for all he was doing for her as her supervisor.”122 In overruling the trial court’s assertion that quid pro quo requires proof of “actual—rather than threatened—economic loss,”123 the appeals court noted that “[t]here is nothing in the language of Title VII or the EEOC Guidelines to support such a requirement.”124

The court explained that in refusal cases, those in which the plaintiff rebuffs her employer’s demands for sex, evidence of a job detriment is usually readily accessible.126 When the plaintiff submits to her employer’s unlawful requests, on the other hand, such evidence is usually not available.128 Noting that the absence of such evidence renders the supervisor’s conduct no less wrongful127 the court held that evidence of a tangible job detriment is not always essential to a quid pro quo claim.128 The court stated:

Under the district court’s rationale, only the employee who successfully resisted the threat of sexual blackmail could state a quid pro quo claim. We do not read Title VII to punish the victims of sexual harassment who surrender to unwelcome sexual encounters. . . .

. . . [O]nce an employer conditions any terms of employment upon the employee’s submitting to unwelcome sexual advances, a quid pro quo claim is made out, regardless of whether the employee (a) rejects the advances and suffers the consequences, or (b) submits to the advances in order to avoid those consequences.129

In ruling on quid pro quo cases, courts should follow the Second Circuit’s approach and focus on whether the prohibited conduct

122. Id. at 776.
124. Id. at 778. In making this assertion, the court cited Meritor Savings Bank v. Vinson, 477 U.S. 57, 64 (1986), and quoted the Supreme Court’s assertion that “the language of Title VII is not limited to ‘economic’ or ‘tangible’ discrimination.” Karibian, 14 F.3d at 778 (quoting Meritor, 477 U.S. at 64). This quotation, which actually refers to hostile environment cases, see Meritor, 477 U.S. at 64, is here being applied, by analogy, to quid pro quo cases. See Karibian, 14 F.3d at 778.
125. Karibian, 14 F.3d at 778.
126. Id.
127. Id.
128. Id.
129. Id. at 778-79.
occurred, without regard to the plaintiff's reaction.\textsuperscript{130} The victim's response to the unlawful conditioning after it has occurred, i.e., whether she refused or submitted, has no bearing on the defendant's liability;\textsuperscript{131} the defendant's liability depends on whether he conditioned benefits on sex.\textsuperscript{132}

Furthermore, the harm caused by submission to unwanted sex must be remedied. Being forced to engage in unwanted sexual intercourse or other unwanted sexual conduct is a serious violation of an individual's physical autonomy. When an employee submits to unwanted sexual intercourse, it is rape.\textsuperscript{133} Rather than using physical force, however, a supervisor in the employment context uses economic force. Because the violation of an individual's body is arguably a more fundamental harm than any economic or tangible loss, courts should follow the Second Circuit's reasoning and provide a remedy. Finally, the United States Supreme Court has already held that no tangible job detriment is required in hostile environment cases.\textsuperscript{134} Extending that holding to the quid pro quo arena would provide consistency in this increasingly complex area of law.

IV. Conclusion

The tests put forth in Nichols \textit{v. Frank},\textsuperscript{135} Mills \textit{v. Amoco Performance Products},\textsuperscript{136} and Karibian \textit{v. Columbia University},\textsuperscript{137} when combined, provide a useful and effective standard for courts to apply in quid pro quo sexual harassment cases. The new analysis asks whether a reasonable person\textsuperscript{138} in the victim's

\textsuperscript{130} See \textit{id.} at 779. Catharine MacKinnon has argued that "[w]hether or not the woman complies, the crucial issue is whether she was sexually coerced by economic threats or promises.... Her compliance does not mean it is not still blackmail." \textit{MacKinnon, supra} note 116, at 37.

\textsuperscript{131} Karibian, 14 F.3d at 779.

\textsuperscript{132} Id.

\textsuperscript{133} \textit{Black's Law Dictionary} 1260 (6th ed. 1990) defines rape as "[t]he act of sexual intercourse committed by a man with a woman not his wife and without her consent, committed when the woman's resistance is overcome by force or fear, or under other prohibitive conditions."


\textsuperscript{135} 42 F.3d 503 (9th Cir. 1994).


\textsuperscript{137} 14 F.3d 773 (2d Cir.), \textit{cert. denied}, 114 S. Ct. 2693 (1994).

\textsuperscript{138} Some courts incorporate the victim's gender into this objective standard, creating a "reasonable woman standard." \textit{E.g.,} Ellison \textit{v. Brady}, 924 F.2d 872, 878-79 (9th Cir. 1991) (holding that when examining the severity of hostile environment sexual harassment, courts should consider the victim's gender to avoid permitting conduct males find unoffensive but women find objectionable). This standard could be used in this new quid pro quo standard as well. \textit{See Nichols}, 42 F.3d at 512.
situation would infer that job benefits were conditioned on sex.  
This first step is the only part of the analysis that examines the victim’s perspective. If the reasonable person would make this inference, the conditioning did occur and the defendant is liable, regardless of how the plaintiff responded to the conduct. Issues such as whether she incurred tangible or intangible loss, and whether she refused or submitted to the harassment are irrelevant; the employer is liable for the supervisor’s unlawful abuse of authority.

The United States Supreme Court should grant certiorari in a quid pro quo case to clarify the law in this area. Plaintiffs need to know when they have been wronged, and employers need to know at what point they become liable. Most importantly, the purposes of quid pro quo must be reflected in the analysis used by the courts. By granting certiorari and adopting a standard that incorporates the holdings of Nichols, Mills, and Karibian, the Court could bring much needed predictability to the law of sexual harassment and revitalize the true purposes of the quid pro quo cause of action.

139. See Nichols, 42 F.3d at 511-13.
140. See Karibian, 14 F.3d at 779 (noting that “[t]he focus should be on the prohibited conduct, not the victim’s reaction”).
141. See Nichols, 42 F.3d at 511-13.
142. See Karibian, 14 F.3d at 778-79.
144. See Karibian, 14 F.3d at 778-79.
145. See Mills, 872 F. Supp. at 989.
146. 42 F.3d 503, 511-12 (9th Cir. 1994).
147. 872 F. Supp. at 975.
148. 14 F.3d at 773.