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THERE'S NOTHING SPECIAL ABOUT SEX: THE SUPREME COURT MAINSTREAMS SEXUAL HARASSMENT

Rebecca Hanner White*

In this Essay, Professor White argues that the Supreme Court finally has merged analysis of sexual harassment law with other claims of intentional discrimination. Professor White contends that the Court's decision in Meritor Savings Bank, FSB v. Vinson created confusion over the proper analysis of sexual harassment claims by seemingly embracing quid pro quo and hostile work environment theories as distinct forms of discrimination and by suggesting that at least some sexual harassment claims may warrant a revised approach to employer liability. In the wake of Meritor, sexual harassment claims increasingly were evaluated differently from other claims of disparate treatment, both in determining whether harassment was because of sex and in determining employer liability for the harassment. Last term's decisions are aimed at ending that distinctive treatment, placing sexual harassment claims firmly in the mainstream of disparate treatment theory. Oncale v. Sundowner Offshore Services, Inc. teaches that unlawful motive in sexual harassment claims is to be evaluated on the same terms as other disparate treatment claims. Burlington Industries, Inc. v. Ellerth, and Faragher v. City of Boca Raton, while recognizing and clarifying vicarious employer liability principles for sexual harassment, also should be understood to govern employer liability for all disparate treatment occurring at the hands of supervisors, whether or not sexual harassment is involved. Professor White accordingly contends that the Court's decisions from last Term have clarified both sexual harassment in particular and disparate treatment law generally.

* * *

INTRODUCTION

Sexual harassment has bedeviled courts from the outset. Whether a result of national prudery or squeamishness about sex¹ or of a "boys will be boys" mentality,²

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¹ See Michael D. Vhay, Comment, *The Harms of Asking: Towards A Comprehensive Treatment of Sexual Harassment*, 55 U. CHI. L. REV. 328, 350 (1988) ("Because sexual harassment involves a subject that often embarrasses and perplexes American society—sexual behavior—its discriminatory aspects have been accorded special treatment."). America's "puritanical" approach to sexual behavior recently was the object of international comment as details concerning Bill Clinton's relationship with Monica

federal judges confronting sexual harassment cases have treated these claims as something special or different from run of the mill discrimination claims. From initially refusing to recognize sexual harassment as a form of sex discrimination,³ to constructing elaborate employer liability theories,⁴ courts have struggled with how sexual harassment fits into the Title VII landscape.

The Supreme Court has contributed to this notion that sexual harassment is a distinct form of discrimination. Its decision in *Meritor Savings Bank, FSB v. Vinson*,⁵ while recognizing sexual harassment as actionable under Title VII, eschewed the traditional Title VII categories of disparate treatment and disparate impact in discussing Vinson's allegations of sex discrimination. The Court instead accepted the Equal Employment Opportunity Commission's ("EEOC") division of sexual harassment claims into two categories: quid pro quo and hostile work environment.⁶

A "quid pro quo" claim would be present, the Court acknowledged, when the victim alleged that she suffered a tangible job detriment as a result of rejecting her employer's sexual advances.⁷ Although Vinson did not assert a quid pro quo claim, the Court in *Meritor* held that even when no tangible harm has occurred, a sexual harassment claim still may exist if a "hostile work environment" has been created.⁸ In *Meritor*, the Court set forth a standard for determining when a hostile work environment will be present: Unwelcome sexual conduct that is sufficiently severe

Lewinsky unfolded. See Andrew Marshall, *Let's Not Talk About Sex*, INDEPENDENT (London), Sept. 16, 1998, at 1; Tod Robberson, *Clinton Problems Barely Turns Heads in Latin America*, DALLAS MORNING NEWS, Feb. 14, 1998, at 37A.

² See *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987).

³ See *Tomkins v. Public Serv. Elec. & Gas Co.*, 422 F. Supp. 553 (D. N.J. 1976), *rev'd*, 568 F.2d 1044 (3d Cir. 1977); *Corne v. Bausch & Lomb, Inc.*, 390 F. Supp. 161 (D. Ariz. 1975), *vacated and remanded*, 562 F.2d 55 (9th Cir. 1977).

⁴ See *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437 (10th Cir. 1997), *vacated and remanded*, 118 S. Ct. 2364 (1998); *Faragher v. City of Boca Raton*, 111 F.3d 1530 (11th Cir. 1997) (en banc), *rev'd*, 118 S. Ct. 2275 (1998); *Gary v. Long*, 59 F.3d 1391 (D.C. Cir.), *cert. denied*, 516 U.S. 1011 (1995); *Karibian v. Columbia Univ.*, 14 F.3d 773 (2d Cir.), *cert. denied*, 512 U.S. 1213 (1994). These cases are all cited in *Faragher*, 118 S. Ct. at 2282, as exemplifying the "different approaches" to employer liability taken by the courts of appeals.

⁵ 477 U.S. 57 (1986).

⁶ See *id.* at 65. See EEOC Guidelines on Sexual Harassment, 29 C.F.R. § 1604.11 (1998).

⁷ See *Meritor*, 477 U.S. at 65. The Guidelines define quid pro quo harassment as conditioning a job benefit or detriment on the granting or withholding of sexual favors. See 29 C.F.R. § 1604.11.

⁸ *Meritor*, 477 U.S. at 66.

or pervasive so as to constitute a hostile or abusive working environment will support a Title VII claim.⁹

The Court in *Meritor* went on to address, albeit obliquely, the question of employer liability for sexual harassment. Although vicarious employer liability had been applied routinely in other employment discrimination contexts,¹⁰ the Court suggested that vicarious liability may not be appropriate in some sexual harassment cases.¹¹ It left unresolved, however, under what circumstances employer liability for sexual harassment would exist.

In the wake of *Meritor*, courts were left to decide a number of unresolved issues, such as whether conduct of a sexual nature was unwelcome,¹² whether such conduct was severe or pervasive enough to support a claim,¹³ whether severity or pervasiveness should be judged by a subjective or an objective standard,¹⁴ whether a "reasonable person" or a "reasonable woman" standard should govern assessment of severity or pervasiveness,¹⁵ whether a victim must establish psychological harm¹⁶ and, importantly, under which circumstances an employer may be held liable for sexual harassment engaged in by supervisors,¹⁷ coworkers,¹⁸ or even customers.¹⁹

⁹ See *id.* at 67-68.

¹⁰ See *Horn v. Duke Homes*, 755 F.2d 599 (7th Cir. 1985); *Miller v. Bank of Am.*, 600 F.2d 211 (9th Cir. 1979); *Flowers v. Crouch-Walker Corp.*, 552 F.2d 1277 (7th Cir. 1977). Vicarious liability holds a principal liable for the acts of its agents. As applied in the employment context, it would hold an employer liable for the acts of its employees. See W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* §§ 69-70, at 499-507 (5th ed. 1984).

¹¹ *Meritor*, 477 U.S. at 72.

We . . . decline the parties' invitation to issue a definitive rule on employer liability, but we do agree with the EEOC that Congress wanted courts to look to agency principles for guidance in this area. While such common-law principles may not be transferable in all their particulars to Title VII, Congress' decision to define 'employer' to include any 'agent' of an employer . . . surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible.

Id.

¹² See, e.g., *Burns v. McGregor Elec. Indus.*, 989 F.2d 959 (8th Cir. 1993).

¹³ See, e.g., *Jones v. Clinton*, 990 F. Supp. 657 (E.D. Ark.), *appeal dismissed*, 138 F.3d 758 (8th Cir. 1998).

¹⁴ See, e.g., *Saxton v. AT & T*, 10 F.3d 526 (7th Cir. 1993).

¹⁵ See, e.g., *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991); *Radtke v. Everett*, 501 N.W.2d 155 (Mich. 1993) (en banc).

¹⁶ See, e.g., *Harris v. Forklift Sys., Inc.*, 976 F.2d 733 (6th Cir. 1992), *rev'd*, 510 U.S. 17 (1993).

¹⁷ See sources cited *supra* note 10.

¹⁸ See, e.g., *Fleming v. Boeing Co.*, 120 F.3d 242 (11th Cir. 1997).

¹⁹ See *EEOC v. Sage Realty Corp.*, 507 F. Supp. 599 (S.D.N.Y. 1981).

Courts were not alone in exploring sexual harassment as a unique form of employment discrimination. Academic commentary addressing each of the above issues proliferated,²⁰ as did elaborate attempts to explain why sexual harassment is a legal wrong by reference to "subordinating" gender norms,²¹ sex stereotyping,²² or feminist legal theory.²³

The number of cases proliferated as well. Since Anita Hill's testimony during Clarence Thomas's confirmation hearings and continuing until today, the number of sexual harassment claims filed with the EEOC has increased dramatically.²⁴ Moreover, just as the theories in the law reviews grew more complex, so too did the factual scenarios presented to the courts. Cases straddling the divide between quid pro quo and hostile work environments arose: Employees who were asked to trade sex for jobs said "yes" and suffered no tangible harm,²⁵ and said "no" and suffered no tangible harm.²⁶ Men working in predominately female work environments alleged their workplace was sexually charged and hostile,²⁷ as did both men and women working in single sex settings.²⁸ Same-sex harassment cases involving both

²⁰ The academic commentary on many of these issues is far too voluminous to cite in full. A search of LEXIS's law review data base found 343 articles since 1986 dealing with issues involving sexual harassment. Illustrative of articles discussing the issues noted above are: Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813 (1991); Gillian K. Hadfield, *Rational Women: A Test for Sex-Based Harassment*, 83 CAL. L. REV. 1151 (1995); David Benjamin Oppenheimer, *Exacerbating and Exasperating: Title VII Liability of Employers for Sexual Harassment Committed By Their Supervisors*, 81 CORNELL L. REV. 66 (1995); Michael J. Phillips, *Employer Sexual Harassment Liability Under Agency Principles: A Second Look at Meritor Savings Bank, FSB v. Vinson*, 44 VAND. L. REV. 1229 (1991); Mary F. Radford, *By Invitation Only: The Proof of Welcomeness in Sexual Harassment Cases*, 72 N.C. L. REV. 499 (1994).

²¹ See CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED* (1987).

²² See Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691 (1997).

²³ See Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183 (1989).

²⁴ See Lisa Barre-Quick & Shannon Matthew Kasky, *The Road Less Traveled: Obstacles in the Path of the Effective Use of The Civil Rights Provision of the Violence Against Women Act in the Employment Context*, 8 SETON HALL CONST. L.J. 415, 422 n.26 (1998) (quoting EEOC statistics which show that sexual harassment charges filed by women increased from approximately 6,300 in 1991 to 14,140 in 1997).

²⁵ See *Karibian v. Columbia Univ.*, 14 F.3d 773, 778 (2d Cir.), *cert. denied*, 512 U.S. 1213 (1994).

²⁶ See *Ellerth v. Burlington Indus., Inc.*, 123 F.3d 490 (7th Cir. 1997) (*per curiam*), *aff'd*, 118 S. Ct. 2257 (1998).

²⁷ See Jane Gross, *Now Look Who's Taunting, Who's Suing*, N.Y. TIMES, Feb. 26, 1995, § 4, at 1 (describing the case of the "Jenny Craig Eight," a group of men who claimed they were harassed by women in their predominately female workplace).

²⁸ See, e.g., *Easton v. Crossland Mortgage Corp.*, 905 F. Supp. 1368 (C.D. Cal. 1995) (holding that female employees complaining of vulgar behavior by their female supervisor

quid pro quo and hostile work environment claims began growing in number.²⁹ Courts confronting these claims developed conflicting approaches to resolving them, adding to the confusion over when sexual harassment would be actionable. Sexual harassment law, in short, was fast becoming a topic that could be covered adequately only in a mini-course of its own, rather than as part of a standard course in employment discrimination.

The difficulties surrounding sexual harassment manifested themselves in the Supreme Court's docket last Term. With an unprecedented focus on a particular aspect of employment discrimination, the Court decided three Title VII claims involving sexual harassment.³⁰ While the Court's decisions by no means resolved all of the confusion swirling around sexual harassment, they did provide some much needed clarity.

Taken as a whole, the result of last Term's focus on sexual harassment is this: There's nothing special about sex; sexual harassment claims simply are disparate treatment claims. Accordingly, traditional disparate treatment analysis should guide their resolution.

This message from the Court should have been an unnecessary statement of the obvious,³¹ but it was not. In the years since sexual harassment claims first were recognized as actionable sex discrimination, the gap between how courts approach disparate treatment claims and how they approach sexual harassment claims had been growing wider.³² Last Term's opinions bridged that gap, asking courts to consider questions of unlawful motive in sexual harassment cases just as they would consider motivation questions in other Title VII claims.³³ Moreover, the Court confirmed that vicarious employer liability for sexual harassment, as for other forms of employment discrimination, is appropriate.³⁴

had no discrimination claim); *Goluszek v. H.P. Smith*, 697 F. Supp. 1452 (N.D. Ill. 1988) (holding that a male claiming harassment had no valid claim because he worked in a predominately male environment).

²⁹ See Richard F. Storrow, *Same-Sex Sexual Harassment Claims After Oncale: Defining the Boundaries of Actionable Conduct*, 47 AM. U. L. REV. 677, 689 n.61 (1998).

³⁰ See *Oncale v. Sundowner Offshore Servs., Inc.*, 118 S. Ct. 998 (1998); *Burlington Indus., Inc. v. Ellerth*, 118 S. Ct. 2257 (1998); *Faragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998). The Court also decided a sexual harassment case under Title IX, *see Gebser v. Lago Vista Indep. Sch. Dist.*, 118 S. Ct. 1989 (1998), bringing the number of sexual harassment cases decided last Term to four.

³¹ It is a premise that has been understood by some courts and some commentators for years. *See, e.g., McKinney v. Dole*, 765 F.2d 1129 (D.C. Cir. 1985); Vhay, *supra* note 1, at 337, 355.

³² See Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683 (1998) (criticizing courts for distinguishing allegations of sexual harassment from other allegations of sex discrimination).

³³ See *Oncale*, 118 S. Ct. 998.

³⁴ See *Ellerth*, 118 S. Ct. 2257; *Faragher*, 118 S. Ct. 2275.

At the same time, because sexual harassment claims are disparate treatment claims, the liability principles established in the Court's sexual harassment cases of last Term should be understood to apply to other Title VII disparate treatment claims as well.³⁵ Rather than viewing sexual harassment as a special and distinct category of claim deserving of special and distinct treatment on motive or liability questions, the Court sought to mainstream sexual harassment law, merging analysis of such claims with other claims of intentional discrimination.

While sexual harassment claims are simply disparate treatment claims, that does not mean such claims are simple. The Court left difficult evidentiary problems unresolved. Nonetheless, the Court's straightforward approach to sexual harassment cases was refreshing. A unified legal analysis to claims of disparate treatment, including those involving sexual harassment, is a step long overdue in the development of Title VII law.

This Essay explores the questions presented to the Court and explains how the Court's resolution of those issues clarifies and simplifies not only the law of sexual harassment but disparate treatment law in general. Rather than seeking to distinguish "quid pro quo" from "hostile work environment" claims, courts should ask instead whether an individual has experienced a tangible job action because of her sex (or race, color, religion, national origin, or complaint of retaliation).³⁶ If so, she has a Title VII claim. If not, she yet may have a discrimination claim if improperly motivated conduct, while resulting in no tangible job action, nonetheless is attributable to her employer, directly or vicariously.³⁷

I. *ONCALE V. SUNDOWNER OFFSHORE SERVICES, INC.*

*Oncale v. Sundowner Offshore Services, Inc.*³⁸ presented the Court with the question of whether same-sex harassment is actionable under Title VII. Joseph

³⁵ See *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 156 F.3d 581 (5th Cir. 1998) (holding that vicarious liability principles developed in *Ellerth* and *Faragher* were not limited to sexual harassment claims).

³⁶ See Eugene Scalia, *The Strange Career of Quid Pro Quo Sexual Harassment*, 21 HARV. J.L. & PUB. POL'Y 307 (1998) (urging abandonment of quid pro quo harassment as a separate category of disparate treatment claims).

³⁷ In *Ellerth* and *Faragher*, the Court considered the question of vicarious employer liability for supervisory harassment. Occasionally, however, an employer will be directly liable for intentional discrimination, usually in systemic cases in which a discriminatory policy or practice exists. In such cases, the employer will be liable, whether or not the discrimination results in a tangible, material harm. See Rebecca Hanner White, *De Minimis Discrimination*, 47 EMORY L.J. 1121 (1998).

When vicarious, not direct, liability is at issue, the employer may avoid liability, when no tangible employment action exists, by establishing the affirmative defense outlined by the Court this Term. See *infra* notes 144-48 and accompanying text.

³⁸ 118 S. Ct. 998 (1998).

Oncale, a roustabout on a males-only oil rig, alleged he had been the victim of unwelcome, severe, and pervasive conduct of a sexual nature from his male supervisor and male coworkers.³⁹ The Fifth Circuit dismissed Oncale's claim on summary judgment, reasoning that same-sex harassment was not actionable under Title VII.⁴⁰ In the Fifth Circuit's view, a man's harassment of a man because of sex, or a woman's harassment of a woman because of sex, was not unlawful discrimination within the meaning of Title VII.⁴¹

The Fifth Circuit's categorical rejection of same-sex harassment claims illustrates how far sexual harassment cases had drifted from disparate treatment theory.⁴² Disparate treatment, the Supreme Court explained over twenty years ago,

is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment.⁴³

Accordingly, if a man is treated less favorably than others because he is a man, or a woman is treated less favorably than others because she is a woman, a disparate treatment claim will exist. The sex of the person doing the discriminating is not an element of the claim.

Had the question of same-sex discrimination been presented to the Fifth Circuit in a scenario free from sexual harassment, that court surely would not have believed the discrimination to be outside the statute's reach. For example, had a woman refused to hire another woman because she believed women with young children should not work outside the home, it is difficult to imagine the Fifth Circuit rejecting that claim.⁴⁴ But when claims of same-sex discrimination involved claims of sexual harassment, the Fifth Circuit refused to find actionable discrimination. Presented with allegations from men who claimed they had been groped, fondled, or sexually

³⁹ See *id.* at 1000-01.

⁴⁰ See *Oncale v. Sundowner Offshore Servs., Inc.*, 83 F.3d 118 (5th Cir. 1996), *rev'd*, 118 S. Ct. 998 (1998).

⁴¹ See *id.* at 120. The Fifth Circuit was following established circuit precedent in denying Oncale's claim. See *Garcia v. Elf Atochem N. Am.*, 28 F.3d 446, 451-52 (5th Cir. 1994).

⁴² See Schultz, *supra* note 32, at 1714-15. ("Despite the origin of hostile work environment harassment in the law of disparate treatment, courts have developed analyses that distinguish the two causes of action and endow each with a life of its own; to many courts, the two claims have become 'factually and legally distinct.'").

⁴³ *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977).

⁴⁴ For example, in *Martinez v. El Paso County*, 710 F.2d 1102 (5th Cir. 1983), the Fifth Circuit affirmed a trial court's finding of sex discrimination brought by a male clerical worker who claimed his male boss had fired him because of his sex.

assaulted by other men and who sought recovery for a work environment they claimed was hostile or abusive, the Fifth Circuit saw not sex discrimination, but sexual horseplay.⁴⁵ Offensive and disgusting horseplay, perhaps, but still horseplay. From those cases evolved the Fifth Circuit's pronouncement in *Oncale* that male on male or female on female harassment could not support a Title VII claim.⁴⁶

Other circuits, too, struggled with how to address claims of same-sex harassment. The Fourth Circuit rejected claims of same-sex harassment in all but one situation. When the person doing the harassing was homosexual, his victim was entitled to a sexual harassment claim under either quid pro quo or hostile work environment theories.⁴⁷ In such cases, the Fourth Circuit reasoned, the claims were akin to those presented in a heterosexual context. But for the victim's gender, he would not have been propositioned sexually by his homosexual supervisor.⁴⁸ Thus, the Fourth Circuit, unlike the Fifth, envisioned male on male or female on female harassment claims that would be actionable, but only when those claims were the result of sexual desire. The sexual preference of the harasser supplied, for the Fourth Circuit, the necessary link between the victim's gender and the harassment.

Absent a homosexual harasser, however, the Fourth Circuit, like the Fifth, regarded same-sex harassment as mere horseplay not actionable under Title VII. The Fourth Circuit refused to recognize claims by employees who claimed they had been the target of same-sex harassment that was sexual in nature when the harasser was a heterosexual.⁴⁹

The Seventh Circuit took a decidedly different approach to such claims. For that court, when the harassment was sexual in nature, an actionable sexual harassment claim existed.⁵⁰ The court equated conduct of a sexual nature to gender-based conduct, reasoning that when harassment is accomplished through sexual conduct, the motivation behind the harassment is the victim's sex.⁵¹

The Supreme Court rejected each of these approaches in *Oncale*. In a unanimous decision by Justice Scalia, the Court began by stating what should have been obvious: "If our precedents leave any doubt on the question," said the Court, "we hold today that nothing in Title VII necessarily bars a claim of discrimination

⁴⁵ See, e.g., *Garcia*, 28 F.3d 446. See also Storrow, *supra* note 29, at 693 n.72 (collecting cases from the Fifth Circuit following *Garcia*).

⁴⁶ See *Oncale*, 83 F.3d at 120.

⁴⁷ See *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138 (4th Cir. 1996).

⁴⁸ See *id.* at 143-44; *Fredette v. BVP Management Assoc.*, 112 F.3d 1503 (11th Cir. 1997), *cert. denied*, 118 S. Ct. 1184 (1998) (explaining this line of reasoning); *Tietgen v. Brown's Westminster Motors, Inc.*, 921 F. Supp. 1495 (E.D. Va. 1996).

⁴⁹ See *McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191, 1195-96 (4th Cir.), *cert. denied*, 519 U.S. 819 (1996).

⁵⁰ See *Doe v. City of Belleville, Ill.*, 119 F.3d 563, 574 (7th Cir. 1997), *vacated and remanded*, 118 S. Ct. 1183 (1998).

⁵¹ See *id.* at 580.

'because of . . . sex' merely because the plaintiff and the defendant (or the person charged with acting on behalf of the defendant) are of the same sex."⁵² The Court then went on to reject the "bewildering variety" of approaches taken by the lower courts.⁵³ Because discrimination because of sex, not discrimination motivated by sexual desire, is what the statute prohibits, the notion that the harasser must be homosexual before a same-sex harassment claim may exist was wrong.⁵⁴ A fact finder may find discrimination, the Court reasoned, "if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace."⁵⁵ The Court also rejected the contention that when harassment is sexual it is necessarily gender-based. As Justice Scalia observed: "We have never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations."⁵⁶ The question is not whether the harassment is sexual but whether it is being directed against this particular individual because of his sex.

A. *Proving Unlawful Motive for Same-sex Harassment*

The *Oncale* holding thus makes liability for sexual harassment dependent, as it should be, on a finding of unlawful motive. The decision also explained, however, why that motive inquiry, usually central in disparate treatment cases,⁵⁷ often is not at issue in sexual harassment cases. When a male or female sexually propositions a member of the opposite sex, "it is reasonable to assume those proposals would not have been made to someone of the same sex."⁵⁸ So, too, when a homosexual harasser

⁵² *Oncale*, 118 S. Ct. at 1001-02. As the Court noted, "[b]ecause of the many facets of human motivation, it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of that [sic] group." *Id.* at 1001 (quoting *Castaneda v. Partida*, 430 U.S. 482, 499 (1977)).

⁵³ *Oncale*, 118 S. Ct. at 1002.

⁵⁴ *See id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ A search for unlawful motive is at the heart of most disparate treatment claims. Through a series of decisions, the Supreme Court has established a method for establishing unlawful motive in circumstantial evidence cases. *See St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

⁵⁸ *Oncale*, 118 S. Ct. at 1002. The *McDonnell Douglas/Burdine/Hicks* proof scheme is rarely, if ever, employed in sexual harassment cases. As the Court in *Oncale* recognized, when harassment of a sexual nature occurs between men and women, a reasonable assumption is that the harassment occurs because of sex. The "reasonableness" of this assumption reflects a presumption of heterosexuality. For criticism of the heterosexuality presumption, see Storrow, *supra* note 29, at 736-42.

sexually propositions someone of the same sex, "the same chain of inference would be available to a plaintiff . . ."⁵⁹ Sexual desire or overtly sexual conduct suggests that sex is the cause of the harassment. It is, however, only an inference of discriminatory motive that the sexual nature of the harassment provides;⁶⁰ the sexual nature of the harassment is not an independent statutory wrong.

In other words, sexual harassment is not something separate and apart from sex-based harassment.⁶¹ Rather, it is sex-based harassment. The fact that the harassment is sexual in nature may (and often will) be powerful evidence that the victim is suffering the harassment because of her sex. The defendant, however, may avoid liability if the fact finder is convinced that the victim was not a target of the harassment because of her sex, whether or not the harassment was sexual in nature.

Left unresolved by the Court in *Oncale*, however, was precisely how a victim of harassment, particularly in a single sex environment, could show the harassment was sex-based. As mentioned above, evidence of sexual desire and of sexual conduct may support an inference that the harassment was sex-based, but neither is an exclusive nor an outcome determinative method of proof. The question, as in other

⁵⁹ *Oncale*, 118 S. Ct. at 1002.

⁶⁰ *See id.*

⁶¹ *But see* Brief of Law Professors as Amici Curiae in Support of Petitioner at 8, *Oncale v. Sundowner Offshore Servs., Inc.*, 118 S. Ct. 998 (1998) (No. 96-568) (distinguishing sex-based harassment from sexual harassment). Amici were not alone, however, in making a distinction between the two situations. The EEOC long has treated sexual harassment as a distinct subset of sex-based harassment. *See* EEOC Compliance Manual (CCH) § 615.6; EEOC Guidelines on Sexual Harassment, 29 C.F.R. § 1604.11 (1998). Sex-based harassment, the EEOC reasons, is harassment that is directed toward a woman because of her sex but involves conduct that is not sexual in nature. *See id.*

Amici, however, would distinguish sex-based harassment from sexual harassment because they view sexual harassment as an independent wrong. As more fully explained in a law review article by Professor Katherine Franke, one of the Amici brief's coauthors, harassment is a wrong "when it reflects or perpetuates gender stereotypes in the workplace. . . . [t]hat is [when] it perpetuates, enforces and polices a set of gender norms that seek to feminize women and masculinize men." Franke, *supra* note 22, at 696. As she states:

It grossly oversimplifies a complex performative and regulatory practice like sexual harassment to demand that the law provide one formal and symmetrical account of the workplace harm, such as the jurisprudence of "but for" causation. . . . Conceiving of sexual harassment as a part of and as an instrument in the policing, enforcement, and perpetuation of hetero-patriarchal gender norms requires that we contextualize the conduct in order to understand it as sex discrimination.

Id. at 771. Professor Franke criticizes, moreover, the focus on motive in sexual harassment claims. *See id.* Contrary to her suggestion, in *Oncale* the Court regarded sexual harassment as sex-based disparate treatment, looking to the harasser's motive as critical to establishing a claim. *See Oncale*, 118 S. Ct. at 1002.

sex-based disparate treatment claims, is whether the plaintiff experienced the conduct because of her sex.

Potentially confusing is the Court's quotation of Justice Ginsburg's concurrence in *Harris v. Forklift Systems, Inc.*⁶² The Court in *Oncale* quoted Ginsburg's assertion that "[t]he critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."⁶³ Does this mean that evidence of disparate treatment *must* be presented before a successful sexual harassment claim may be stated? The answer, obviously, is no. The Court cannot mean this statement literally, or it would have dismissed *Oncale*'s claim. *Oncale*, after all, worked in a single sex environment and thus could not make a showing of differential treatment.

Rather, evidence of different treatment of the sexes simply is evidence that the treatment was motivated by sex, not an element of a disparate treatment claim. Just as the sexual nature of the harassment may supply proof of unlawful motive, so too can differences in treatment between men and women. But such differences are not an exclusive method of proof. The Court's decision went on to clarify this point by describing such comparative evidence as only one way in which unlawful motive may be proven. As the Court emphasized: "*Whatever* evidentiary route the plaintiff chooses to follow," discrimination because of sex must be proved.⁶⁴

Commentators have proposed other evidentiary routes. For example, Vicki Shultz suggests that when a woman suffers harassment, whether or not it has sexual overtones, in a male-dominated workplace, it is reasonable to infer that she is the victim of that harassment because of her sex.⁶⁵ Professor Shultz reasons that when women enter a traditionally segregated workplace, men often will try to drive women out by harassing them and, consequently, courts should be willing to infer that when such harassment occurs, it is because the victim is a woman.⁶⁶ This approach makes sense intuitively, and is consistent with *Oncale*, provided courts keep in mind that it is only an inference of sex-based discrimination that is created, not a conclusive method of proof.⁶⁷ After all, a woman in a male-dominated workplace may be

⁶² 510 U.S. 17 (1993).

⁶³ *Oncale*, 118 S. Ct. at 1002 (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)).

⁶⁴ *Id.* at 1002. Actionable discrimination need only be a difference in treatment the plaintiff is experiencing because he is a man. The absence of a comparator of the opposite sex does not mean that no discrimination has occurred.

⁶⁵ See Schultz, *supra* note 32, at 1801. Professor Schultz criticizes courts for paying too much attention to whether the harassment is sexual in nature and not enough attention to whether nonsexual harassment is in fact sex-based. See *id.*

⁶⁶ See *id.*

⁶⁷ Schultz recognizes this point, characterizing her suggestion that when harassing, nonsexual conduct is directed toward women in "traditionally segregated job categories," a rebuttable presumption that the conduct was because of sex should exist. *Id.*

harassed because she is a woman, or she may be harassed because she is a jerk. The former situation would support a Title VII claim; the latter would not.

B. *Causation: Burdens of Production and Proof*

Whatever evidentiary route is followed, the Court's placement of sexual harassment claims into the mainstream of disparate treatment theory clarifies the legal analysis to be employed. Because these are disparate treatment claims, it is the plaintiff who bears the burden of proving the harassment was because of sex. The burden of persuasion never shifts.⁶⁸

As a result of the 1991 Civil Rights Act's amendments to Title VII, however, it would seem that the plaintiff carries her burden by proving that her sex was a motivating factor in the harassment, not that it was the "but-for" cause of the harassment. Section 703(m) of the Civil Rights Act provides that an unlawful employment practice is established when the plaintiff proves her sex (or race, religion, color, or national origin) "was a motivating factor for any employment practice, even though other factors also motivated the practice."⁶⁹ Thus, to continue with the example above, if a woman were targeted for harassment not simply because she was a woman but because she was a woman who was a jerk, she could carry her burden of proving that her sex was a motivating factor for the harassment.

The courts have disagreed about the meaning of section 703(m) in disparate treatment cases. Some courts consider section 703(m) applicable only to cases involving "direct evidence" of unlawful motive, requiring plaintiffs to establish "but-for" causation in circumstantial evidence cases.⁷⁰ This reasoning is problematic, requiring fact finders not only to determine whether an unlawful motive exists but to

⁶⁸ See sources cited *supra* note 57.

⁶⁹ 42 U.S.C. § 2000e-2(m) (1994). The statute was amended in response to the Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). In *Price Waterhouse*, the Court found that when a plaintiff established that her sex was a substantial motivating factor for the challenged employment decision, liability was established unless the defendant could prove it would have made the same decision anyway. Under the amended statute, the defendant's satisfactory proof of this affirmative defense limits only remedies, not liability. See 42 U.S.C. § 2000e-5(g) (1994). See also *Doe v. City of Belleville, Ill.*, 119 F.3d 563, 593 (7th Cir. 1997), *vacated and remanded*, 118 S. Ct. 1183 (1998); Storrow, *supra* note 29, at 686 n.44 (assuming, without discussion, that section 703(m) will govern analysis of sexual harassment claims).

⁷⁰ See *Fuller v. Phipps*, 67 F.3d 1137, 1141 (4th Cir. 1995). Essentially, courts have found that only cases involving direct evidence properly can be regarded as "mixed motive" cases and further have found that only "mixed motive" cases qualify for the "motivating factor" approach of section 703(m). See *id.* at 1141-42. In circumstantial evidence, otherwise known as "pretext" cases, the plaintiff bears the burden of establishing the existence of "but-for" causation. See *id.* at 1141.

distinguish between the forms of evidence that led them to that conclusion.⁷¹ It is not unusual for a mixture of direct and circumstantial evidence to be presented in a single case. If the direct evidence is credited, these courts would allow plaintiffs to establish liability by showing that the unlawful motive was a motivating factor for the employment action, even though other factors also may have motivated the decision. If it is the circumstantial evidence that is credited, however, these courts would require the plaintiff to establish "but-for" causation.⁷² This approach makes little sense, particularly when one recognizes that it likely will be a combination of all of the evidence, direct and circumstantial, that causes a fact finder to accept or to reject the allegations of unlawful motive.

The better reasoned view applies section 703(m) to all disparate treatment cases, whether or not direct evidence is involved. Certainly, the statute itself makes no distinction between direct and circumstantial evidence cases. Instead, on its face, the statute makes unlawful any employment practice for which the protected trait is a motivating factor.⁷³

Moreover, courts have had difficulty distinguishing direct from circumstantial evidence in disparate treatment cases.⁷⁴ Sexual harassment cases, when considered as disparate treatment claims, exemplify this difficulty. Is "I want to have sex with you," when said by a male supervisor to his female subordinate, direct or circumstantial evidence that the woman has been the target of this conduct because of her sex? The Court's *Oncale* decision suggests it is merely circumstantial evidence of unlawful motive, but evidence that would be sufficient to establish unlawful motive.⁷⁵

⁷¹ See Michael J. Zimmer, *The Emerging Uniform Structure of Disparate Treatment Discrimination Litigation*, 30 GA. L. REV. 563, 600-21 (1996). Professor Zimmer outlines the problems of distinguishing between direct and circumstantial evidence cases in applying section 703(m) and further points out that, in actuality, all evidence of unlawful motive in fact is circumstantial. See *id.* at 614-16.

⁷² See *id.* at 603-04. See also *Miller v. Cigna Corp.*, 47 F.3d 586 (3d Cir. 1995) (exemplifying these difficulties).

⁷³ See *Curley v. St. John's Univ.*, 19 F. Supp. 2d 181, 188 (S.D.N.Y. 1998); Zimmer, *supra* note 71, at 601-02. As the court noted in *Curley*: "Overall, the 1991 Act has erased the key distinctions between parties' burdens in 'pretext' and 'mixed motive' analyses," an elimination that "has unified discrimination-law analysis." *Id.* at 188-89.

⁷⁴ Direct evidence, as defined by the EEOC, is evidence that both facially demonstrates bias and is linked to the complained of adverse action. See *EEOC: Revised Enforcement Guide on Recent Developments in Disparate Treatment Theory*, 8 Lab. Rel. Rep. (BNA) No. 859, 405:6915, at 6917 (July 7, 1992). For recent cases struggling with whether evidence is sufficiently direct, see *Walden v. Georgia-Pacific Corp.*, 126 F.3d 506, 521 n.13 (3d Cir. 1997), and *Fortier v. Ameritech Mobile Communications, Inc.*, 161 F.3d 1106 (7th Cir. 1998).

⁷⁵ See *Oncale v. Sundowner Offshore Servs., Inc.*, 118 S. Ct. 998, 1002 (1998). But see Scalia, *supra* note 36, at 313 (arguing that a quid pro quo proposition is "powerful direct

Recognizing that section 703(m) applies to whatever form the evidence takes relieves courts and juries from the necessity of drawing such artificial and unnecessary distinctions. Instead, the question in sexual harassment cases, *as in other disparate treatment cases*, is whether the plaintiff has proven her sex was a motivating factor for the complained of conduct.

Applying section 703(m) to cases of same-sex harassment also helps resolve the troubling analytical problem of distinguishing harassment based on sex from harassment based on sexual orientation.⁷⁶ A man who has been targeted for harassment because he is homosexual and because he is a man who fails to conform to gender stereotypes of masculine behavior would have a Title VII claim.⁷⁷ Untangling the two motivations is unnecessary for establishing liability. Recognizing that plaintiffs need only prove that their sex was a motivating factor for harassment answers the criticisms of those concerned about the difficulties of proving "but-for" causation in same-sex harassment cases,⁷⁸ while obtaining the simplicity of a unified approach to disparate treatment claims.

C. Remedial Implications

Burdens of production and proof aside, there is another important consequence of the Court's recognition in *Oncale* that sexual harassment claims are disparate treatment claims. Only successful claims of disparate treatment entitle the plaintiff to recovery of compensatory and punitive damages.⁷⁹ Disparate impact claims may not support such relief.⁸⁰

In the years since *Meritor*, courts have suggested from time to time that hostile work environment claims are akin to claims of disparate impact, asserting it is the effect on the victim, not the defendant's motivation, that gives rise to a claim.⁸¹ However, this impact approach to sexual harassment claims is incorrect. Sexual

evidence of discriminatory motive").

⁷⁶ The lower courts consistently have found discrimination based on sexual orientation outside the protections of Title VII. *See, e.g.,* DeSantis v. Pacific Tel. & Tel. Co., 608 F.2d 327, 329-30 (9th Cir. 1979).

⁷⁷ While sexual harassment is not a legal wrong because it is a product of sex-stereotyping, when it is proven to have been a product of such stereotyping, then the necessary link between the victim's sex and the harassment has been established. *Compare* Franke, *supra* note 22 (stating that sexual harassment is unlawful because it enforces stereotypical gender norms), *with* Schultz, *supra* note 32, at 1801 (stating that harassment that "denigrat[es] the harassee's manhood" should be viewed as sex-based, whether or not it is sexual in nature).

⁷⁸ *See* Franke, *supra* note 22, at 746, 756, 770 (criticizing "but-for" causation inquiry as underprotective of sexual harassment victims).

⁷⁹ 42 U.S.C. § 1981a(a)(1) (1994).

⁸⁰ *See id.*

⁸¹ *See* Ellison v. Brady, 924 F.2d 872, 878 (9th Cir. 1991).

harassment is intentional discrimination.⁸² Whether the perpetrator intends his victim to suffer is not the point; as with other disparate treatment claims, the question is whether or not the conduct was motivated by the victim's sex.⁸³ If so, then an intent to discriminate exists.

Moreover, it was the lack of a remedy for sexual harassment claims based on a hostile work environment that prompted, in large measure, Congress' willingness to amend Title VII to allow for recovery of compensatory and punitive damages. Such damages were necessary, Congress believed, because the victims of hostile work environment harassment often had no remedy for statutory violations, because Title VII only permitted recovery of equitable relief.⁸⁴ Because a hostile work environment plaintiff frequently suffered no out-of-pocket loss, she had no statutory remedy available for an acknowledged statutory violation.

In allowing for recovery of compensatory and punitive damages under Title VII, however, Congress expressly limited such recovery only to victims of "intentional discrimination (not an employment practice that is unlawful because of its disparate impact)."⁸⁵ Equating hostile work environment claims to those alleging disparate impact is inconsistent with recovering damages for such claims. The Court's recognition in *Oncale* that hostile work environment claims are disparate treatment claims precludes defendants from avoiding damages for hostile work environments by positioning such claims as impact, not treatment, based.

That sexual harassment claims are treatment, not impact claims, was further underscored by the Court's resolution, on the last day of the Term, of the question of employer liability for sexual harassment.⁸⁶ Those decisions, together with the *Oncale* decision, place sexual harassment cases squarely into the disparate treatment model of discrimination.

⁸² See *Burlington Indus., Inc. v. Ellerth*, 118 S. Ct. 2257, 2266 (1998).

⁸³ Animus, in the sense of hatred or ill-will, is not an element of a disparate treatment claim. The question, instead, is whether an employer's action was taken because of the victim's sex, race, or other protected characteristic. See *International Union v. Johnson Controls, Inc.*, 499 U.S. 187, 201 (1991); *City of Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978); *Phillips v. Martin-Marietta Corp.*, 400 U.S. 542, 544 (1971).

⁸⁴ See Civil Rights Act of 1991, Pub. L. No. 102-166, § 2(1), 105 Stat. 1071, 1071 ("The Congress finds that . . . additional remedies . . . are needed to deter unlawful harassment and intentional discrimination in the workplace."). See H.R. REP. NO. 102-40, pt. 1, at 66-69 (1991), reprinted in 1991 U.S.C.C.A.N. 549, 604-07; H.R. REP. NO. 102-40, pt. 2, at 24-29 (1991), reprinted in 1991 U.S.C.C.A.N. 694, 717-23.

⁸⁵ 42 U.S.C. § 1981a(a)(1) (1994).

⁸⁶ See *Ellerth*, 118 S. Ct. 2257; *Faragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998).

II. *BURLINGTON INDUSTRIES, INC. V. ELLERTH AND FARAGHER V. CITY OF BOCA RATON*

Perhaps the most troublesome issue to arise out of sexual harassment cases in the wake of *Meritor* was the question of employer liability for sexual harassment. Lower courts had assumed, with little discussion, that employers would be vicariously liable for quid pro quo sexual harassment.⁸⁷ Vicarious liability imposes liability on a principal (employer) for the torts of his agents (supervisory employees).⁸⁸ Courts routinely have applied vicarious employer liability to other claims of disparate treatment and similarly have viewed quid pro quo claims as meriting application of vicarious liability principles.⁸⁹ When a hostile work environment claim was at issue, however, lower courts generally refused to hold employers vicariously liable. Instead, an employer would be liable for a hostile work environment only if it knew or should have known of the harassment and failed to take steps to correct it.⁹⁰ Employer liability for hostile work environments was thus direct, not vicarious, because it was the employer's own wrongdoing, not that of its agents, for which liability was being imposed.

These different approaches by the lower courts to employer liability for quid pro quo and hostile work environment claims made it important to distinguish between the two forms of sexual harassment. That distinction, however, was not always easy to achieve. The facts in *Burlington Industries, Inc. v. Ellerth*⁹¹ exemplified the problem.

Kimberly Ellerth alleged that during her employment with Burlington Industries, a manager had threatened, on several occasions, to retaliate against her (in some unspecified way) if she refused his sexual advances.⁹² Ellerth refused the advances, yet no retaliation occurred.⁹³ The district court found, and the Supreme Court assumed for purposes of its decision, that the conduct was sufficiently severe or pervasive to constitute a hostile work environment.⁹⁴ Because Ellerth had never

⁸⁷ See *Horn v. Duke Homes*, 755 F.2d 599, 604 (7th Cir. 1985) (observing circuit court uniformity on this issue).

⁸⁸ See sources cited *supra* note 10.

⁸⁹ For discussion of this point, see Rebecca Hanner White, *Vicarious and Personal Liability for Employment Discrimination*, 30 GA. L. REV. 509 (1996).

⁹⁰ See Ronald Turner, *Title VII and Hostile Environment Sexual Harassment: Mislabeled the Standard of Employer Liability*, 71 U. DET. MERCY L. REV. 817, 829-32 (1994); Justin S. Weddle, Note, *Title VII Sexual Harassment: Recognizing an Employer's Non-Delegable Duty to Prevent a Hostile Workplace*, 95 COLUM. L. REV. 724, 734 (1995).

⁹¹ 118 S. Ct. 2257 (1998).

⁹² See *id.* at 2262. The Court suggested, however, that the tangible job action threatened "would have taken the form of a denial of a raise or a promotion." *Id.* at 2268.

⁹³ See *id.*

⁹⁴ See *id.* at 2265.

complained to anyone in authority about the manager's conduct, however, the district court found Burlington "neither knew nor should have known" of the harassment and, thus, could not be held liable for it.⁹⁵

Ellerth, however, contended that her manager's unfulfilled threats of retaliation constituted a quid pro quo claim. Arguing that employers are vicariously liable for quid pro quo harassment, Ellerth contended that Burlington Industries thus should be held responsible for its manager's conduct, despite its lack of knowledge of any harassment. The Seventh Circuit, en banc, employing a variety of rationales, agreed with Ellerth.⁹⁶

The question presented to the Supreme Court on certiorari was whether the facts alleged by Ellerth constituted a quid pro quo claim. As the Court recognized, however, the issue was not really about attaching labels to sexual harassment,⁹⁷ but was instead about employer liability for that harassment.⁹⁸ The question posed by the facts of *Ellerth* was whether an employer can be vicariously liable for a supervisor's unfulfilled threats to deny an employee tangible job benefits if she does not submit to his sexual demands.

Beth Faragher couched her case against the City of Boca Raton in different terms, overtly presenting the Court with the question of employer liability.⁹⁹ Faragher's was plainly a case of hostile work environment harassment, because no tangible job benefits, nor threats to deny those benefits, were at issue.¹⁰⁰ Faragher asked the Court to decide when an employer would be liable for a hostile work environment created by its supervisors.

⁹⁵ *Id.* at 2263.

⁹⁶ *See id.* at 2263-64.

⁹⁷ These labels have been criticized. As one commentator noted:

The snappy Latin name given these cases in an influential book about sexual harassment probably helped ensure that quid pro quo retaliation cases remained classified, as defendants had sought, as a kind of sexual harassment, rather than being trotted back to the adverse-job-action barn where they belonged. Thus was born a "class" of cases that was redundant virtually from its inception.

Scalia, *supra* note 36, at 311. Eugene Scalia advocated eliminating quid pro quo as a separate category of discrimination claims, as it "injects needless formalism and complexity to the analysis of employment discrimination." *Id.* at 319. Essentially, that is what the Court did in *Ellerth*.

⁹⁸ *See Ellerth*, 118 S. Ct. at 2265 ("The question presented on certiorari is whether Ellerth can state a claim of *quid pro quo* harassment, but the issue of real concern to the parties is whether Burlington has vicarious liability for Slowik's alleged misconduct, rather than liability limited to its own negligence.").

⁹⁹ *See Faragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998).

¹⁰⁰ Faragher alleged, and the trial court found, that her supervisors had groped her, made frequent and vulgar references to and about women, and engaged in other offensive conduct of a sexual nature. *See id.* at 2281.

The Eleventh Circuit had found that, although the harassment was severe or pervasive enough to constitute a hostile work environment, the employer could not be held vicariously liable for the harassment.¹⁰¹ The Eleventh Circuit, en banc, reasoned that the supervisors' conduct was outside the scope of their authority¹⁰² and further found that the agency relationship had not aided the supervisors in accomplishing the harassment.¹⁰³ It thus rejected vicarious employer liability for the supervisors' creation of a hostile working environment. Nor, found the Eleventh Circuit, could the employer be liable directly for the harassment because it lacked either actual or constructive knowledge that the harassment had occurred.¹⁰⁴

The Supreme Court resolved both the *Ellerth* and *Faragher* cases by adopting the following standard for employer liability, one that rejected the categories "quid pro quo" and "hostile work environment" as determinative. Under the Court's holdings in *Ellerth* and *Faragher*, an employer *always* will be vicariously liable when supervisory discrimination results in a *tangible job action*. Even when no tangible job action has occurred, an employer will be vicariously liable for supervisory discrimination that is sufficiently severe or pervasive so as to alter the terms and conditions of employment. When no tangible job action has occurred, however, the employer may mount an affirmative defense to liability. If an employer can prove, by a preponderance of the evidence, "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise," it may avoid liability.¹⁰⁵ This affirmative defense is unavailable when a tangible job action has occurred.¹⁰⁶

¹⁰¹ See *Faragher v. City of Boca Raton*, 111 F.3d 1530, 1536-37 (11th Cir. 1997) (en banc).

¹⁰² See *id.* at 1536 (classifying the harassment as a "frolic").

¹⁰³ See *id.* at 1537. The Eleventh Circuit found the supervisors' position had not aided them in accomplishing the harassment, as neither had threatened Faragher with the loss of her job or promotional opportunities. See *id.* Absent such overt threats, the court declined to find that the agency relationship had aided the harassment.

¹⁰⁴ See *id.* at 1538-89. The Eleventh Circuit refused to equate pervasive harassment with constructive employer knowledge. Faragher had not complained to officials at city hall, and the court thus found no direct knowledge. Although Faragher had complained to another supervisor, the Eleventh Circuit did not consider those complaints to be tantamount to complaints to the city itself. The Supreme Court did not resolve when an employee's complaints to a supervisor will be sufficient to establish employer knowledge of the harassment, given its adoption of the vicarious liability standard. See *Faragher v. City of Boca Raton*, 118 S. Ct. 2275, 2294 (1998).

¹⁰⁵ *Burlington Indus., Inc. v. Ellerth*, 118 S. Ct. 2257, 2269-70 (1998); *Faragher*, 118 S. Ct. at 2292-93.

¹⁰⁶ See *Ellerth*, 118 S. Ct. at 2270; *Faragher*, 118 S. Ct. at 2293.

Neither Kimberly Ellerth nor Beth Faragher alleged she had suffered a tangible job action. Because Ellerth never had made use of her employer's procedure for reporting harassment, her claim was remanded to permit her employer an opportunity to mount an affirmative defense to liability.¹⁰⁷ Faragher, however, was entitled to a verdict in her favor because the Court found, as a matter of law, that the employer could not prove the affirmative defense.¹⁰⁸ The City of Boca Raton had not communicated any policy against harassment at Faragher's work station nor had it made any effort to monitor its supervisors' conduct.¹⁰⁹ Thus, it could not show it had taken reasonable steps to prevent the harassment.¹¹⁰

The Court's decision to apply vicarious liability principles to hostile work environment claims bucked the trend in the lower courts and, accordingly, came as something of a surprise. But application of vicarious liability to hostile work environment claims was consistent with the Court's recognition in *Oncale* that such claims are disparate treatment claims and should be governed by disparate treatment principles. Indeed, the Court's adoption of an affirmative defense to employer liability in hostile work environment cases instead was the anomaly, reflecting an effort by the Court to reconcile its holding in *Ellerth* and *Faragher* with its dicta in *Meritor*.¹¹¹

Although both the *Ellerth* and *Faragher* decisions confronted employer liability for supervisory sexual harassment, the holdings in fact have a much broader sweep. The liability principles developed in these two cases should apply to all discrimination claims. The reasoning the Court used to justify vicarious liability in *Ellerth* and *Faragher* explains, in basic terms, why vicarious employer liability for supervisory discrimination generally is appropriate for disparate treatment claims. Additionally, the justification proffered for an affirmative defense to employer liability when a hostile work environment is present is one that should apply whenever a supervisor's discrimination does not result in a tangible job action, whether or not sexual harassment is involved.

¹⁰⁷ See *Ellerth*, 118 S. Ct. at 2271.

¹⁰⁸ See *Faragher*, 118 S. Ct. at 2293.

¹⁰⁹ See *id.*

¹¹⁰ See *id.* at 2293-94.

¹¹¹ "In particular, we are bound by our holding in *Meritor* that agency principles constrain the imposition of vicarious liability principles in cases of supervisory harassment. . . . Congress has not altered *Meritor's* rule even though it has made significant amendments to Title VII in the interim." *Ellerth*, 118 S. Ct. at 2270 (citations omitted). See also *Faragher*, 118 S. Ct. at 2291 ("We are not entitled to recognize this theory under Title VII unless we can square it with *Meritor's* holding that an employer is not 'automatically' liable for harassment by a supervisor who creates the requisite degree of discrimination . . .").

The decisions in *Ellerth* and *Faragher* leave the distinct impression that, had the question been presented to the Court as a matter of first impression, the Court would not have recognized the affirmative defense.

A. *Why Vicarious Liability?*

Although vicarious employer liability for supervisory discrimination is a well accepted principle in employment discrimination cases, the Court never had explained why an employer should be held liable for discriminatory actions by supervisors, particularly when the discrimination occurred without the employer's knowledge and was at odds with employer directives prohibiting discrimination.¹¹²

Title VII's definition of "employer" includes *any agent* of the employer.¹¹³ In *Meritor*, the Court looked to the statutory definition and suggested that common law agency principles serve as guidelines for determining when an employer would be liable for discrimination by its employees.¹¹⁴ The Court further observed that "Congress' decision to define 'employer' to include any 'agent' of an employer . . . surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible."¹¹⁵ The Court, however, offered no suggestion as to what those limits should be.

In a prior article, I offered an explanation, by reference to common law agency principles, of why vicarious employer liability for supervisory discrimination, including claims of quid pro quo sexual harassment, was appropriate.¹¹⁶ That analysis, briefly summarized, is as follows.

Vicarious employer liability for supervisory discrimination often will be based on the principle of respondeat superior.¹¹⁷ That principle is outlined in section 219 of the *Restatement (Second) of Agency*: "A master is subject to liability for the torts of his servants committed while acting in the scope of their employment."¹¹⁸ An action done for the purpose, in whole or in part, of serving the master is within the

¹¹² As the Court in *Ellerth* noted:

"[T]he courts have consistently held employers liable for the discriminatory discharges of employees by supervisory personnel, whether or not the employer knew, or should have known, or approved of the supervisor's actions." Although few courts have elaborated how agency principles support this rule, we think it reflects a correct application of the aided in the agency relation standard.

Ellerth, 118 S. Ct. at 2268 (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 70-71 (1986)).

¹¹³ "The term 'employer' means a person engaged in an industry affecting commerce . . . and any agent of such a person." 42 U.S.C. § 2000e(b) (1994).

¹¹⁴ See *Meritor*, 477 U.S. at 72.

¹¹⁵ *Id.* (citing 42 U.S.C. § 2000e(b)).

¹¹⁶ See *White*, *supra* note 89, at 526-38 and sources cited therein.

¹¹⁷ See *EEOC v. AIC Sec. Investigations, Ltd.*, 55 F.3d 1276, 1281 (7th Cir. 1995) (holding that respondeat superior applied under the Americans with Disabilities Act ("ADA")); *Miller v. Bank of Am.*, 600 F.2d 211, 213 (9th Cir. 1979) (holding that respondeat superior applies under Title VII).

¹¹⁸ 1 RESTATEMENT (SECOND) OF AGENCY § 219(1) (1959).

scope of employment and thus is an action for which the employer will be vicariously liable.

When a supervisor discriminates in order to further his employer's interests, the employer will be liable for that discrimination, even if the discrimination is prohibited by the employer.¹¹⁹ *Respondeat superior* thus offers an explanation for much vicarious employer liability. For example, a supervisor who refuses to hire a woman with small children because he believes women with small children will miss work more frequently than other workers has acted to further his employer's interests, even if he has acted unlawfully and against company directives.¹²⁰

What happens, though, when a supervisor discriminates not to further his employer's interests but solely to indulge his own biases? It is into this category of cases that virtually all sexual harassment claims fall, because a supervisor who denies a promotion to an employee who refuses his sexual advances or who sexually fondles a subordinate will not be acting, nor believe he is acting, to further his employer's interests.¹²¹ *Respondeat superior* thus provides no support for vicarious liability for sexual harassment.¹²²

Respondeat superior, however, is not an exclusive means of establishing vicarious liability. Even when conduct is outside the scope of an agent's

¹¹⁹ As explained by the Ninth Circuit, *respondeat superior* would be of little use if an employer could avoid its application by telling its agents: "[D]on't discriminate." See *Miller*, 600 F.2d at 213.

¹²⁰ See *White*, *supra* note 89, at 530-31.

¹²¹ See *id.* at 531-32. Sexual harassment, of course, is not the only category of cases to which this reasoning applies. Supervisors may discriminate based on their own biases, knowing their actions do not serve their masters' purposes, or may retaliate because they are angry at a subordinate who reported wrongdoing, knowing the retaliation is against the interests of their employer.

¹²² Some jurisdictions, however, have abandoned the traditional test in favor of a more expansive approach to scope of employment. If the employment relationship caused the harm (including by furnishing the wrongdoer access to the victim), then vicarious liability will exist. This approach allocates the costs of the harm that arise from the employment relationship to the employer. See *Horn v. Duke Homes*, 755 F.2d 599, 605 (7th Cir. 1985); KEETON ET AL., *supra* note 10, § 69, at 500; Alan O. Sykes, *The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines*, 101 HARV. L. REV. 563, 588-93 (1988); Katherine S. Anderson, Note, *Employer Liability Under Title VII for Sexual Harassment After Meritor Savings Bank v. Vinson*, 87 COLUM. L. REV. 1258, 1275-77 (1987).

In *Faragher*, Justice Souter recognized this more expansive approach to the scope of employment doctrine and that it could be justified as a reasonable allocation of the costs of doing business between the employer and the victim. Nonetheless, the Court accepted the traditional common law approach to the scope of employment and, thus, generally viewed sexual harassment as outside the scope of employment. See *Faragher v. City of Boca Raton*, 118 S. Ct. 2275, 2288-90 (1998); see also *White*, *supra* note 89, at 533 n.124 (noting that the Court accepted the "traditional approach to scope of employment").

employment, vicarious liability will exist, according to the *Restatement (Second) of Agency* section 219(2)(d), if the agent "was aided in accomplishing the tort by the existence of the agency relation."¹²³ It is *this* agency law principle that supports vicarious employer liability for any supervisory discrimination that results in a tangible job action, whether or not motivated by a purpose to serve the master. As I have explained:

Discrimination-at-large is not prohibited by federal law. For a violation of Title VII, the ADEA, or the ADA to occur, there must be discrimination in the terms, conditions, or privileges of employment. It is the supervisor's status *as supervisor* that gives him power over the terms, conditions, and privileges of another's employment. Without that status, he could not violate the statute.¹²⁴

Thus, whenever a supervisor's discrimination results in a job benefit or detriment that his status as supervisor enables him to grant or withhold, vicarious employer liability necessarily will exist because the agency relationship will have aided the supervisor in accomplishing the wrong.¹²⁵

In *Ellerth*, the Supreme Court, in an opinion by Justice Kennedy, used precisely this reasoning to explain why vicarious employer liability is present when a supervisor's discrimination results in a tangible employment action. The Court fashioned federal law principles from "the general common law of agency" in interpreting the statute's definition of employer.¹²⁶ First, whenever a supervisor's tangible job action is within the scope of his employment—i.e., done with a purpose at least in part to serve the master—respondeat superior will apply.¹²⁷ Second, an action that is unlawful or against company policy will not defeat respondeat superior liability if the discrimination is done with a purpose of furthering the employer's business.¹²⁸ Third, the Court recognized that respondeat superior will not apply to most sexual harassment cases, as a purpose to serve the employer's interests usually will be absent.¹²⁹ Fourth, the Court found that, even when respondeat superior is not

¹²³ 1 RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (1959).

¹²⁴ White, *supra* note 89, at 533-34.

¹²⁵ See *Henson v. City of Dundee*, 682 F.2d 897, 910 (11th Cir. 1982); Sykes, *supra* note 122, at 607; *EEOC: Policy Guidance on Sexual Harassment*, 8 Lab. Rel. Rep. (BNA) No. 645, 405:6681, at 6694-95 (Mar. 19, 1990).

¹²⁶ *Burlington Indus., Inc. v. Ellerth*, 118 S. Ct. 2257, 2265 (1998).

¹²⁷ See *id.* at 2266.

¹²⁸ See *id.* at 2266. See also *Faragher*, 118 S. Ct. at 2288-89.

¹²⁹ See *Ellerth*, 118 S. Ct. at 2266-67.

As Courts of Appeals have recognized, a supervisor acting out of gender-based animus or a desire to fulfill sexual urges may not be actuated by a purpose to serve the employer. . . . The harassing supervisor often acts for personal motives,

applicable, vicarious employer liability will exist when the agency relationship aided the supervisor in accomplishing the discrimination.¹³⁰ Thus, it is the *Restatement (Second) of Agency* section 219(2)(d) "aided in . . . the agency relation" rule that supports vicarious liability for sexual harassment.¹³¹

When will the agency relationship aid the supervisor in accomplishing the wrongdoing? The Court in *Ellerth* began by rejecting the argument that the agency relationship aids in accomplishing the tort because it furnishes proximity to and contact with the victim. Otherwise, an employer would be strictly liable for all workplace discrimination, including that by coworkers, a standard the Court rejected.¹³² As the Court noted, "[t]he aided in the agency relation standard . . . requires the existence of something more than the employment relation itself".¹³³ Something more necessarily will be present, the Court stated, "when a supervisor takes a tangible employment action against the subordinate."¹³⁴ In such cases, vicarious employer liability always will exist. This result holds because "[w]hen a supervisor makes a tangible employment decision, there is assurance the injury could not have been inflicted absent the agency relation."¹³⁵ Only supervisors, not coworkers, can take such actions that "fall within the special province of the supervisor."¹³⁶ By delegating to the supervisor the power to take such actions, the employer has enabled the agent to commit the wrong and, thus, is vicariously liable

motives unrelated and even antithetical to the objectives of the employer. . . . The general rule is that sexual harassment by a supervisor is not conduct within the scope of employment.

Id. (citations omitted).

¹³⁰ See *id.* at 2267-68. The Court rejected the "apparent authority" branch of vicarious liability, because it is the misuse of actual, not apparent, authority that is at issue in cases of supervisory harassment. See *id.*

¹³¹ 1 RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (1959).

¹³² See *Ellerth*, 118 S. Ct. at 2268. Although the Court did not address employer liability for coworker harassment in either *Ellerth* or *Faragher*, its opinions clearly suggest that employers will be only directly, not vicariously, liable for such harassment. Presumably, an employer will be directly liable for its own inaction if it knew or should have known of the harassment and failed to take steps to prevent or remedy it.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* at 2269. As the Court further explained:

A tangible employment action in most cases inflicts direct economic harm. As a general proposition, only a supervisor, or other person acting with the authority of the company, can cause this sort of injury. A co-worker can break a co-worker's arm as easily as a supervisor, and anyone who has regular contact with an employee can inflict psychological injuries by his or her offensive conduct. But one co-worker (absent some elaborate scheme) cannot dock another's pay, nor can one co-worker demote another.

Id. (citations omitted).

¹³⁶ *Id.*

for the discrimination. The supervisor's action "becomes for Title VII purposes the act of the employer."¹³⁷

Hostile work environment harassment, however, involves no tangible employment action. For that reason, the Court recognized that determining whether the agency relationship has aided the supervisor in committing the harassment is more difficult. Both supervisors and coworkers can utter epithets, grope or fondle, tell dirty jokes, leer, or be abusive to those with whom they work. That harassment, by either coworkers or supervisors, can be severe or pervasive enough to constructively alter working conditions. In reasoning fleshed out more fully by Justice Souter's opinion in *Faragher*,¹³⁸ however, the Court found vicarious liability appropriate when a supervisor creates a hostile work environment.¹³⁹ While both coworkers and supervisors can harass, harassing conduct by a supervisor is more threatening because of the supervisor's position.¹⁴⁰ In down-to-earth terms, the Court described the distinction:

When a fellow employee harasses, the victim can walk away or tell the offender where to go, but it may be difficult to offer such responses to a supervisor, whose "power to supervise—[which may be] to hire and fire, and to set work schedules and pay rates—does not disappear . . . when he chooses to harass through insults and offensive gestures rather than directly with threats of firing or promises of promotion."¹⁴¹

Moreover, the Court noted that "employers have greater opportunity and incentive to screen [supervisors], train them, and monitor their performance."¹⁴² Thus, vicarious employer liability for supervisory harassment severe or pervasive enough to alter the terms or conditions of employment and create a hostile environment is appropriate.¹⁴³

¹³⁷ *Id.*

¹³⁸ See *Faragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998).

¹³⁹ See *Ellerth*, 118 S. Ct. at 2270.

¹⁴⁰ See *Faragher*, 118 S. Ct. at 2291.

¹⁴¹ *Id.* (quoting *Estrich*, *supra* note 20, at 854).

¹⁴² *Id.*

¹⁴³ None of the Court's opinions last Term addressed the question of when harassment will rise to the requisite level of severity or pervasiveness, because none of the cases presented that question to the Court. When no tangible employment action exists, however, any discriminatory conduct, whether or not labeled "harassment," should be considered to determine whether it meets the severe or pervasive test. See Schultz, *supra* note 32, at 1711-29, who criticizes courts for "disaggregating" sexual conduct from nonsexual conduct and evaluating the conduct separately.

B. *Why an Affirmative Defense?*

Despite recognizing the appropriateness of vicarious employer liability for a hostile work environment created by a supervisor, in *Ellerth* and *Faragher* the Court nonetheless created an affirmative defense for employers. This defense arose from the Court's efforts to conform its holdings in *Ellerth* and *Faragher* "with *Meritor*'s holding that an employer is not 'automatically' liable for harassment by a supervisor who creates the requisite degree of discrimination."¹⁴⁴ Thus, stare decisis, in large part, explains the defense's creation. The defense, moreover, furthers the deterrence goals of Title VII by encouraging employers to adopt and to enforce stern antidiscrimination policies and by encouraging employees to minimize harm by reporting harassing activity to their employers.¹⁴⁵ Prompt reporting of such conduct often will prevent it from becoming severe or pervasive enough to support a claim.¹⁴⁶

The affirmative defense also is supported by the agency law analysis giving rise to vicarious liability. When a supervisor takes a tangible employment action against a subordinate, the Court knows the agency relationship has aided the discrimination. Without the authority to take the tangible employment action, no discrimination could have occurred.¹⁴⁷ In hostile work environment cases, however, the Court *assumes* the relationship has aided the supervisor in accomplishing the harassment. The Court *assumes* subordinates will be reluctant, in the words of the Court, to tell a supervisor "where to go."¹⁴⁸ Because this merely is an assumption, however, it is appropriate to give the employer the opportunity to dispel it. When an employer has an effective, well-publicized policy in place for reporting harassing behavior, then employees should be far less reluctant to tell their supervisors "where to go," or at least to tell their employers what their supervisors have been doing. The justification for vicarious liability in such cases becomes far more suspect, because courts have

¹⁴⁴ *Faragher*, 118 S. Ct. at 2291. In following *Meritor*, Justice Souter relied not only on stare decisis, which enjoys a heightened presumption in statutory cases, but also on the fact that Congress had amended Title VII in response to several of the Court's decisions. "The decision of Congress to leave *Meritor* intact is conspicuous." *Id.* at 2291 n.4.

¹⁴⁵ The deterrence policies of the statute that the Court believed would be furthered through encouragement of the promulgation and enforcement of antidiscrimination policies were invoked. *See id.* at 2292. That a victim has a duty to avoid or to minimize harm and/or damages was "imported from the general theory of damages." *Id.*

¹⁴⁶ It is the unusual occasion when a single incident will support a hostile work environment claim. *See Policy Guidance on Sexual Harassment, supra* note 125, at 6690. An employee who experiences harassing conduct and who takes steps to report it can prevent the conduct from becoming severe or pervasive enough to constructively alter her working conditions. Thus, if an employer has provided a means to avoid a claim from arising, an employee may not choose to sidestep those means and, instead, allow conduct to continue to the point at which a winning claim may exist.

¹⁴⁷ *See supra* notes 123-25 and accompanying text.

¹⁴⁸ *Faragher*, 118 S. Ct. at 2291.

less reason to believe that the agency relationship aided the supervisor in accomplishing the harassment.

C. Remedial Implications

The Court's recognition of vicarious employer liability for supervisory harassment has important remedial implications, although those implications went undiscussed in *Faragher* and *Ellerth*. Had the Court accepted the lower courts' negligence standard for imposing liability in hostile work environment cases, the basis for imposing compensatory and punitive damages in such cases would vanish. As mentioned above, only intentional discrimination can support a claim for compensatory or punitive damages under Title VII.¹⁴⁹ The Court's recognition that sexual harassment "presupposes intentional conduct"¹⁵⁰ and its willingness to impute that intent to the employer through vicarious liability enables recovery of these damages in the context in which they are perhaps most important: when no other remedy exists.

The "knew or should have known" standard adopted by the lower courts is one based in negligence.¹⁵¹ Thus, had the Court in *Faragher* and *Ellerth* found only direct, not vicarious, liability appropriate in hostile work environment cases, that finding would have circumvented Congress' intent to provide a remedy for the victims of hostile work environments. Recognition that vicarious liability is proper neatly avoids this dilemma.

D. The Bigger Picture

What does resolving the liability conundrum for sexual harassment have to do with other disparate treatment claims? Quite a bit. The question now is whether the supervisor's discriminatory conduct, whether based on the employee's sex, race, religion, national origin, or complaints of discrimination, has resulted in a tangible employment action. If so, then vicarious employer liability will exist, and no affirmative defense will be available.

Accordingly, the next major issue in disparate treatment cases will be distinguishing a tangible employment action from that which is not tangible.¹⁵²

¹⁴⁹ See *supra* note 85 and accompanying text.

¹⁵⁰ *Burlington Indus., Inc. v. Ellerth*, 118 S. Ct. 2257, 2266 (1998).

¹⁵¹ See *id.* at 2267.

¹⁵² In *Ellerth*, the Court defined a tangible employment action as follows: "A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Ellerth*, 118 S. Ct. at 2268. This language, viewed in isolation, suggests that an employment action must pose a significant disadvantage before it may be viewed as tangible.

Elsewhere I have suggested that "tangible employment action" must be understood broadly to encompass any action that supervisors alone can undertake, whether or not the action is "materially adverse."¹⁵³ The Court's reasoning in *Ellerth* for imposing vicarious liability for tangible employment actions is based on the fact that such discrimination necessarily will be aided by the agency relationship because it is the supervisor's status as supervisor that enables him to take the challenged action.¹⁵⁴ The agency principles justifying liability thus should inform the meaning of a "tangible employment action."

When no such tangible employment action exists, however that term ultimately is defined, the question becomes whether a supervisor's discriminatory conduct is sufficiently severe or pervasive to constructively alter the conditions of employment.¹⁵⁵ If so, then the employer will be vicariously liable, although it may mount an affirmative defense.

Application of these vicarious liability principles thus allows the employer to escape liability for a supervisor's impermissibly motivated conduct in two instances: first, when the conduct, although improperly motivated, is neither a tangible employment action nor severe or pervasive and, second, when the discriminatory conduct is severe or pervasive but the employer can establish its affirmative defense. One would expect prudent employers, following *Ellerth* and *Faragher*, to adopt antidiscrimination/retaliation policies, including but not limited to prohibitions on sexual harassment, and to disseminate and enforce those policies vigorously.¹⁵⁶

¹⁵³ White, *supra* note 37, at 1156-58. There are two problems with requiring a *materially* adverse action before a tangible employment action will be found. First, that approach is not fully in conformity with the agency principles that led the Court to impose vicarious liability. The touchstone for vicarious liability is supervisory authority—actions a supervisor, but not a coworker, has been empowered by the employer to undertake. While many, if not most of these, will bear economic consequences, not all will. The appropriate dividing line is not whether the action involves a significant change, but whether it is an action in which only supervisors, because they are supervisors, can engage.

Second, if supervisory discrimination is not viewed as a tangible employment action, then it falls wholly outside the statute, unless it is sufficiently severe or pervasive as to alter working conditions and create a hostile or abusive work environment.

¹⁵⁴ See *supra* notes 126-43 and accompanying text.

¹⁵⁵ This standard would apply to any discriminatory or retaliatory conduct by a supervisor not involving a tangible employment action, not simply to sexual harassment. If an employer is not vicariously liable for the discrimination, then no discrimination by a statutory employer has occurred. The conduct thus falls outside the statute if it is not severe or pervasive, even though it was improperly motivated.

¹⁵⁶ Another issue that will assume increasing importance in the wake of *Ellerth* and *Faragher* is the question of whether an employee's use of internal antidiscrimination procedures is to be viewed as participation conduct within the meaning of section 704, 42 U.S.C. § 2000e-3(a) (1994), which prohibits retaliation. Section 704 contains two clauses—the participation clause, which protects an employee who "has made a charge, testified, assisted or participated in any manner in an investigation, proceeding, or hearing

In summary, when allegations of supervisory discrimination or retaliation are made, the following analysis should be undertaken. First, has supervisory conduct been motivated by an unlawful purpose? Second, does this impermissibly motivated supervisory conduct involve a tangible employment action? If so, then the employer is liable automatically for the supervisor's discrimination. Third, if no tangible employment action exists, is the supervisor's improperly motivated conduct severe or pervasive enough to constructively alter the terms or conditions of employment? If so, then the employer should be vicariously liable because courts are willing to presume the supervisor's status as supervisor has enabled the conduct to reach the level necessary to constructively alter the terms or conditions of employment. Fourth, the employer may rebut that presumption by proving that it took reasonable care to prevent and to correct promptly the discriminatory conduct and the employee unreasonably failed to take advantage of those measures or otherwise failed to avoid the harm.

Suppose, for example, an employee alleges her employer has retaliated against her because she complained of discrimination. She alleges her supervisor gave her more onerous work assignments, referred to her as a "backstabbing bitch" and glared at her. Does she have a retaliation claim? Yes, if she can establish the actions she complains of were motivated by her discrimination complaints and that a tangible employment action has occurred. The more onerous work assignment should be viewed as such, as it is the supervisor's status as a supervisor that enables him to give the work assignment and, thus, employer liability will be established. Were the more onerous work assignment not viewed as a tangible employment action, however, then the supervisor's conduct, taken as a whole, should be evaluated to determine whether it is sufficiently severe or pervasive so as to alter work conditions. If so, then the employer will be vicariously liable for the supervisor's conduct. The employer, however, may avoid liability if it can show that it took reasonable steps to prevent the

under this subchapter," and the opposition clause, which protects an employee who "has opposed any practice made an unlawful employment practice by this subchapter." 42 U.S.C. § 2000e-3(a) (1994). Courts have viewed conduct under the participation clause as absolutely protected, while many view opposition conduct protected only if it is reasonable and in good faith. *See Little v. United Tech.*, 103 F.3d 956, 960 (11th Cir. 1997).

The Eleventh Circuit recently held that an employee's use of her employer's internal complaint procedures is not participation conduct and, thus, not protected against retaliation unless her allegations of sexual harassment are objectively reasonable. *See Clover v. Total Sys. Servs., Inc.*, 157 F.3d 824 (11th Cir. 1998). Such procedures should be expected to proliferate given the Court's recognition in *Ellerth* and *Faragher* of an affirmative defense for supervisory harassment that does not involve a tangible employment action, a defense that often will turn upon the existence of an internal complaint procedure. Moreover, an employee's failure to use those procedures can deprive her of a claim that may otherwise exist. Allowing an employer to discipline an employee who makes use of the procedure, if her allegations of discrimination are deemed not to be objectively reasonable, seems at odds with *Ellerth's* and *Faragher's* encouragement of the use of such procedures.

conduct and the employee failed to make use of those steps or otherwise to avoid the harm.

CONCLUSION

Taken together, the Court's recent sexual harassment decisions clarify the analysis to be used for sexual harassment cases and for disparate treatment cases generally. Rather than viewing sexual harassment as somehow different from other disparate treatment claims because it involves sexual conduct, sexual harassment should be understood as intentional discrimination because of sex. Although the evidentiary routes for proving unlawful motive may vary in these cases from others alleging unlawful motive, the legal analysis should be the same. As in other disparate treatment settings, the critical question is whether the employer did what it did because of the employee's sex, race, or other protected characteristic.

Whether or not a sexual harassment claim is present, when a supervisor's discrimination or retaliation results in a tangible employment action, the employer is vicariously liable, even when that discrimination occurs without the employer's knowledge and against its directives. Absent a tangible employment action, a supervisor's discriminatory or retaliatory conduct must be evaluated to determine whether it is severe or pervasive enough to alter an employee's working conditions. If it is, his employer is vicariously liable, although the employer may offer an affirmative defense to liability.

Understanding that disparate treatment principles apply to sexual harassment claims, and that employer liability principles developed in sexual harassment cases apply to disparate treatment claims outside the sexual harassment context, helps simplify and unify an area of the law growing needlessly complex. For that, the Court's decisions of this Term are to be commended.