

ALEXANDER HAMILTON INN OF COURT  
AMERICAN INNS OF COURT

OPENING AND CLOSING STATEMENTS  
PROGRAM MATERIALS  
September 23, 2009

D. Daniel Engstrand, Jr., Esq.  
Eugene D. Berman, Esq.

# CONTENTS

	<i>Page</i>
Facts of the Case .....	1
Problems .....	7
Openings – An overview .....	8
Closing Statements.....	11
Statutes and Rules	
CPLR Rule 4011 .....	17
CPLR Rule 4016.....	18
CPLR Rule 4401 .....	19
CPL § 260.30 .....	20
Federal Rules of Criminal Procedure Rule 29.1 .....	21
E.D.N.Y. and S.D.N.Y. Local Civil Rule 39.2 .....	22
Rules Of Professional Conduct Rule 3.4, 22 NYCRR § 1200.26.....	23
42 USC 2000e-2.....	25
29 C.F.R. § 1604.11 .....	30
Executive L. § 296 (1) & (1-a).....	31
Cases	
<i>Thoreson v. Penthouse International, Ltd.</i> , 80 N.Y.2d 490, 591 N.Y.S.2d 978 (1992).....	33
<i>Faragher v. City of Boca Raton</i> , 524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998).....	38
<i>Burlington Industries, Inc. v. Ellerth</i> , 524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998).....	58
<i>Meritor Savings Bank, FSB v. Vinson</i> , 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986).....	77
Speakers’ Bios .....	90

## **Facts of the Case**

In July 2006, Sonia Bolster answered a “Help Wanted” newspaper ad for a position as a laboratory technician in the pathology lab at Health Solutions, a mid-sized (150 employee) hospital on Long Island. Sonia had applied for the position to increase her income and opportunities for the future, as her husband’s business was faltering and they were having marital problems.

Shortly after receiving her resume, the hospital contacted her to set up an interview with David Mercury, the lab supervisor. She ultimately went through three interviews before receiving an offer of employment. The first interview was held at David Mercury’s office at the hospital. She was asked to return to the office for a second interview with Mercury as well as the lab director. The third and final interview was held off-site at Sonia’s then place of employment to “accommodate her schedule”. Following her last interview, Sonia was hired. She was to report directly to David Mercury.

Within the first two weeks of employment, Mercury asked Sonia to meet at the gym where she worked out. Two weeks later, he asked and Sonia agreed, to accompany him “as a friend” on an overnight trip to Toronto to attend a folk festival. A week later, she agreed to attend a similar festival, also overnight, in Boston. There was a “problem” with the accommodations during the Boston trip. Only one room was available, and Mercury was too tired to drive home to Long Island.

During this trip, Sonia confided to Mercury that she was having marital problems and that her husband was somewhat abusive. Mercury later stated that he and Sonia had had sexual relations during the Boston trip. Sonia categorically denied intimate sexual contact. Photographs of the pair at both the Toronto and Boston fairs show them to be relaxed and smiling.

Sonia's first written evaluation was completed and prepared by Mercury in February 2007. She was rated "good to satisfactory" and was given a raise. Her salary was increased again in July 2007.

Mercury sent her a birthday card and balloons on her birthday on September 17, 2007. He brought her to his parent's house after a restaurant meal they had shared around that time. There was no significant contact between them outside of the work environment for the remainder of 2007, although Sonia continued to sense that Mercury was interested in her socially.

During the aforementioned period, Sonia complained to Mercury that she was receiving harassing phone calls and was being taunted at work by another female co-worker, Suzie Robin, whom Sonia felt was motivated by jealousy over her perceived relationship with Mercury. She complained to Mercury about Robin's conduct. She also complained to the Lab Director and the HR director about Robin, to no avail.

In November 2007, her evaluation indicated that she "needed improvement." She complained about her November 2007 evaluation and Mercury's conduct toward her to the hospital's Executive Vice President. (The Hospital prided itself on its "open door" accessibility.) In her complaint, she told

the Executive Vice President that she was extremely uncomfortable working for Mercury and that she believed that she had to accompany him on trips and could not refuse him anything without jeopardizing her employment. She also said that he had shared his pictures of nude women as well as pornography with her and that she was disgusted but did not voice any objection to Mercury or any other employees. After her complaint, Sonia was transferred to another hospital location and Mercury was suspended for 10 days.

In early 2008, Mercury accompanied Sonia to a driver's training course. Shortly thereafter, Mercury asked Sonia to accompany him, during work hours, to one of the hospital's other locations. She declined.

Sonia filed a sexual harassment complaint with the New York State Human Rights Commission in April 2008. She claimed that Mercury had sexually harassed her and that a sexually hostile work environment was caused by his persistent pursuit and the harassment of a co-worker. In the complaint she claimed that she had been subject to overt acts of harassment, including Mercury's constant touching when speaking with her, including on one occasion when he touched her buttocks while complimenting her for a job "well done." On another occasion, Mercury asked her to come into his office and watch some pornography on his computer (which she declined to do, claiming she was too busy with work). On numerous other occasions, she alleged that he would engage her in conversation and discuss female anatomy, notably breasts and nipples. Additionally, she claimed that she received email messages from Mercury implicitly suggesting that they engage in sexual activity. She claimed

that she was suffering from anxiety and depression, emotional distress, stomach/intestinal problems and was receiving therapy from a psychiatrist.

On June 6, 2008, she sprained her ankle at work. She received Worker's Compensation and initially claimed that she could not return to work. She failed to respond to written inquiries concerning her fitness for employment. She enrolled in college as a full-time student in September 2008.

As a result of her complaint with the New York State Human Rights Commission, Sonia's received a "right to sue" letter. Thereafter, she filed a lawsuit against Mercury and Health Solutions in the United States District Court.

#### **Health Solutions' Sexual Harassment Policy**

Health Solutions circulated its first written Personnel Practices Manual on April 1, 1995. The Manual contained a provision dealing with Sexual Harassment, prohibiting unwelcome sexual advances, requests of sexual favors and other verbal or physical conduct of a sexual nature. An employee alleging that he/she has been subjected to sexual harassment was encouraged to report any such harassment to any supervisor. If desired, employees were advised that they could file a complaint directly with the Director of Employment Actions and Appeals. The policy also asserted that anyone who in good faith reported sexual harassment would not be subject to any retaliation or reprisal of any kind. The complaint and any subsequent reports would be treated with reasonable confidentiality. Additionally, the complainants and or witnesses to such incidents would be protected from retaliation. As a condition of employment, all employees

are required to sign a form acknowledging that they had read the policy and understood that sexual harassment was a basis for disciplinary action.

### **Health Solutions' Policy on Usage of Company Issued Computers**

For a number of years, Mercury had complete use of his company issued lap top computer, which he used at the office, at home and while on trips. Health Solutions' policy indicated that the computers were for business use only and subject to monitoring by the company. The policy was never enforced, and it was common practice for employees (including management) to use the computers for personal and recreational use. Supervisors and Managers were aware of this personal use. Mercury had used his computer for the transmission and receipt of nude pictures of women and pornography.

Additionally, when the first complaint was made by Sonia, he communicated directly with his attorney from the company lap top, using both his personal email account, as well as the company email account (e.g., Mercury@HealthSolutions.com). He conveyed information to the attorney which constituted admissions because he believed that those communications were confidential and privileged. During the litigation, discovery of the communications on Mercury's computer was the subject of a Discovery Demand.

### **Other Information**

Upon service of Sonia's lawsuit, Mercury and the Health Solutions retained a private investigator who learned that Sonia had a child born out of wedlock and had been divorced based upon a determination that she had been engaged in an adulterous relationship. Additionally, in a prior employment, she had complained to management that she had been sexually harassed by a fellow employee who was not her supervisor.

## **OPENING AND CLOSING STATEMENTS**

### **Problems**

Presentation of Opening and Closing Statements for Sonia Bolster, David Mercury, and Health Solutions based on the Facts of the Case.

## Openings—An overview

©2009 D. Daniel Engstrand, Jr.

By: D. Daniel Engstrand, Jr., Esq.

Doniger & Engstrand, LLP

12 Bayview Avenue

Northport, NY 11768

631.262.7400

dengstrand@donigerlaw.com

Openings are the factual roadmap that you would like a jury to follow as the trial proceeds to verdict. It details the factual route you intend to follow and you hope, as an advocate, that the jury will follow you toward your intended conclusion. Openings must be persuasive, yet not argumentative.

Motions *in limine*: If planning on discussing questionable evidence or if you want to prohibit opposing counsel from making mention of such evidence during opening, consider making a motion *in limine* to obtain an advance evidentiary ruling. Improper to discuss inadmissible evidence or

Planning & Preparation: Know the facts of your case thoroughly. Know the law applicable to your case thoroughly.

Applicable Law: Research Pattern Jury Instructions (PJI) since this is what the court will more than likely read to the jury. Also research case law. Make certain that you include all the essential elements of the law needed to state a *prima facie* case in your opening—the building blocks of your case. However, failure to state every element of the law in your opening will not be fatal to your case. See *Stines v. The Hertz Corp.*, 45 A.D.2d 751, 356 N.Y.S.2d 649 (2d Dep't 1974) (“counsel's failure to state every item necessary to establish a *prima facie* case in his opening should not, *Ipso facto*, be deemed fatal to his case”).

Order of Openings: Party with burden of proof—the plaintiff--opens first.

Command the courtroom: Go right up to the jury box and look each juror in the eye and begin your opening. Unless the court otherwise directs, don't hide behind a lectern! Be careful not to invade a juror's personal space by getting too close to them.

Be Persuasive: The best openings are extemporaneous—that which comes from your heart. With that in mind, prepare your extemporaneous opening thoroughly—do not read to the jury; it will only put them to sleep. Okay to have a checklist so that you know that you've covered everything. Nevertheless, talking to the jury without notes, maintaining eye contact, modulating your voice during the delivery of your opening—in effect, being a super salesperson, is the best.

Admissions: Be careful, as the attorney for your client, you are his agent. Therefore, if you make an admission during opening, it will be binding against your client. See *DeVito v. Katsch*, 157 A.D.2d 413, 416, 556 N.Y.S.2d 649, 652 (2d Dep't 1990) ("There is no CPLR provision for the dismissal of a complaint based on the plaintiff's opening statement. CPLR 4401, however, contemplates judgment for a party on the strength of 'admissions' which, at least theoretically, includes dismissal of a complaint upon the basis of a plaintiff's opening statement . . . . If, however, CPLR 4401 is to be relied upon, the admissions must be so self-defeating as to irreparably preclude all possibility of judgment. . . ."); *Gleyzer v. Steinberg*, 254 A.D.2d 455, 679 N.Y.S.2d 154 (2d Dep't 1998); *Rivera v. NYC Board of Ed.*, 11 A.D.2d 7, 201 N.Y.S.2d 372 (1<sup>st</sup> Dep't 1960). See also, CPLR 4401 ("Any party may move for judgment with respect to a cause of action or issue upon the ground that the moving party is entitled to judgment as a matter of law, after the close of the evidence presented by an opposing party with respect to such cause of action or issue, or at any time on the basis of admissions. Grounds for the motion shall be specified. The motion does not waive the right to trial by jury or to present further evidence even where it is made by all parties.")

Introduction: After preliminary introductions—introducing yourself and your client--get right into the heart of the story. Make your story compelling to grab the jury's attention. Use buzz words that cut to the chase. Establish a theory of the case and stick with it!

\*Introduce critical witnesses and a synopsis of their anticipated testimony so that the jurors will be prepared in advance for their testimony.

\*Conflicts/Disputes in Testimony—let the jury know where there is a conflict or dispute in testimony so that they know that this is an issue for them to decide.

\*Caveat—Identifying a witness during opening commits you to calling that witness; make certain that the witness is available.

Do Not Argue the Case—Just present the facts and NEVER EXAGGERATE or it will come back to bite you when opposing counsel highlights your shortcomings in his/her closing argument!!!

Describe the Event(s) and Location(s). Pretend you are a movie director and set the scene. Set out the facts that you are prepared to prove.

Use pre-marked exhibits only if your adversary has consented to their being admitted into evidence in advance.

Use the journalistic style of who, what, when, where and why when telling your story as to what happened and why your client is in court.

Weaknesses in case—don’t try to hide them. Let the jury know what the weaknesses in your case are so that they will know that you are sincere and not trying to hide something from them.

Law—Briefly discuss how the law applies to the facts without usurping Court’s role. Remember, before you opened, the Judge will give the jury a brief overview of the law and what their function is as the finder of fact.

Conclusion—Discuss damages and injuries if not bifurcated. Can either ask for a specific dollar amount or, if not, you can ask for an amount (punitive damages) which will punish the defendant or an amount which is fair and reasonable. If bifurcated, ask the jury after they have considered all the evidence to return a verdict in favor of your client. Don’t forget to thank the jury for their time before you sit down.

# EUGENE D. BERMAN, P.C.

LAW OFFICE

445 BROADHOLLOW ROAD • SUITE 200 • MELVILLE, NEW YORK • 11747-3601

TEL: 631.420.1080 FAX: 631.466.3345 EMAIL: edb@edbpc.com

## CLOSING STATEMENTS

Eugene D. Berman, Esq.

### The Right to, and Order of, Closing Statements

The denial of the right to make a closing statement is reversible error. *Ross v. Manhattan Chelsea Associates*, 194 A.D.2d 332, 598 N.Y.S.2d 502 (First Dept 1993); CPLR 4016(a) (“At the close of all the evidence on the issues tried, an attorney for each such party may make a closing statement in inverse order to opening statements.”).<sup>1</sup> But see Local Civil Rule 39.2 of the United States District Courts for the Southern and Eastern Districts of New York (“After the close of evidence in civil trials, the order of summation shall be determined in the discretion of the court.”).

### Scope and Purpose of Closing Statements

The closing statement provides the parties the opportunity to:

Summarize the evidence;

Communicate contentions to the jury;

Comment on the witnesses’ credibility; and

Request the jurors to draw certain inferences in their favor.

*Miller v. Owen*, 184 Misc.2d at 571, 709 N.Y.S.2d at 379.

---

<sup>1</sup> The order of opening (and closing) is based on the burden of proof. The plaintiff, who normally carries the burden of proof, also called the “affirmative of the issue,” will therefore usually open first. But a defendant can have the right to open first where, for example, the only trial issue is an affirmative defense for which the defendant bears the burden. The court determines the order of opening. CPLR 4011 (“The court may determine the sequence in which the issues shall be tried and otherwise regulate the conduct of the trial in order to achieve a speedy and unprejudiced disposition of the matters at issue in a setting of proper decorum.”).

## Comments, Fair and Foul

During summation, counsel may comment “upon every pertinent matter of fact bearing upon the questions the jury have to decide” *Roseingrave v. Massapequa General Hospital*, 298 A.D.2d 377, 381, 751 N.Y.S.2d 218, 222 (Second Dept. 2002) (citations omitted). Counsel may also comment on his or her contentions concerning the sum believed appropriate compensation for the injuries sustained and the amount of damages demanded. *Tate v. Colabello*, 58 N.Y.2d 84, 87, 459 N.Y.S.2d 422, 424 (1983); *Braun v. Ahmed*, 127 A.D.2d 418, 515 N.Y.S.2d 473 (Second Dept. 1987).

In this regard, CPLR 4016(b) provides:

In any action to recover damages for personal injuries or wrongful death, the attorney for a party shall be permitted to make reference, during closing statement, to a specific dollar amount that the attorney believes to be appropriate compensation for any element of damage that is sought to be recovered in the action. In the event that an attorney makes such a reference in an action being tried by a jury, the court shall, upon the request of any party, during the court’s instructions to the jury at the conclusion of all closing statements, instruct the jury that:

- (1) the attorney’s reference to such specific dollar amount is permitted as argument;
- (2) the attorney’s reference to a specific dollar amount is not evidence and should not be considered by the jury as evidence; and
- (3) the determination of damages is solely for the jury to decide.

*But see Bartoli v. Asto Construction Corp.*, 22 A.D.3d 437, 802 N.Y.S.2d 463 (Second Dept. 2005), in which, among the Court’s bases for ordering a new trial on the issue of damages, the jury “at the prompting of the plaintiff’s counsel ... improperly applied a ‘time-unit’ method of calculating future damages.”

### **Credibility of Counsel**

It is improper to comment on the opposing counsel's credibility. Thus, in *Vazquez v. Costco Companies, Inc.*, 17 A.D.3d 350, 792 N.Y.S.2d 593 (Second Dept. 2005), the defense counsel's summation that suggested, without evidence, that the plaintiff or his attorney coached a potential witness improperly invited the jury to speculate and therefore stepped over the bounds of legitimate advocacy. Similarly, the plaintiff's judgment was reversed in *Berkowitz v. Marriott Corp.*, 163 A.D.2d 52, 558 N.Y.S.2d 511 (First Dept. 1990) where his attorney's summation referred to matters not in evidence and engaged in an unfair and highly prejudicial attack upon the credibility and competence of defendants' expert witnesses and attorneys.

But such improper comment does not necessitate a reversal. *Pareja v. City of New York*, 49 A.D.3d 470, 854 N.Y.S.2d 380, 382 (First Dept. 2008) ("Although '[t]here is no justification for attacking the credibility of opposing counsel,' a reversal was not warranted where there was no evidence that the brief remarks during the defendant's summation, made after a 12-day trial with numerous witnesses, improperly affected the verdict.").

### **Prejudicial, and Inflammatory Statements**

Counsel's summation may not resort to inflammatory remarks based on irrelevant matters. Thus the Second Department instructed counsel to "refrain [on retrial] from repeating her prejudicial, inflammatory remarks which were designed to, and did, impugn the plaintiff's character, by referring to irrelevant matters such as his immigration status and alcohol abuse, as this likely tainted the jury's verdict." *Kaminski v. Modern Italian Bakery of West Babylon*, 270 A.D.2d 232, 233, 704 N.Y.S.2d 275, 277 (Second Dept. 2000). And in *McArdle v. Hurley*, 51 A.D.3d 741, 743, 858 N.Y.S.2d 690, 692 (Second Dept. 2008), the Court ordered a new trial on damages where "[t]he inflammatory conduct of defense counsel, including his use of the

plaintiff's husband's disability retirement as evidence that her entire family were seeking to 'max out in the civil justice system,' so contaminated the proceedings as to deprive the plaintiff of a fair trial."

### **Appeals to Bias and Passion**

Remarks made for the sole purpose of inducing the jury to decide the case on passion or bias, rather than on the basis of the evidence, are improper. *Tehozol v. Anand Realty Corp.*, 41 A.D.3d 151, 152, 838 N.Y.S.2d 32, 33 (First Dept. 2007); *Johnson v. Lazarowitz*, 4 A.D.3d 334, 771 N.Y.S.2d 534 (Second Dept. 2004).

In *O'Connor v. Incorporated Village of Port Jefferson*, 104 A.D.2d 861, 863, 480 N.Y.S.2d 376, 378-79 (Second Dept. 1984), the Second Department found the defendant's following attempt to dispel a jury's sympathy to be "completely outside the realm of fair comment on the evidence."

I have been in this business for more than 30 years, and when a lawyer hears of a boy who was injured the way Danny was injured and he knows that if he can bring a suit against somebody, he can bring Danny into court in a wheelchair to sit through the whole thing, and it's going to work on the human, inescapable human feelings, I have no question in my mind you are all human beings, and you must be affected, as I have been affected and everybody in the courtroom by having Danny here to hear all this and to sit through all this.

And then the lawyer has a problem. Whom can I sue, whom can I blame this on and who has a deep pocket who can pay if we can only get to the jury? Because if we show Danny long enough, day after day, the jury is going to say, we can't send him away with nothing.

### **Cured by Instruction**

Defense counsel's comment during summation that the relevant code provision was a "stupid law" was improper, but the First Department in *Boruch v. Morawiec*, 51 A.D.3d 429, 429-30, 857 N.Y.S.2d 103, 104 (First Dept. 2008) found that the trial court's instruction cured any prejudice that the comment occasioned. *See also, Caraballo v. City of New York*, 86 A.D.2d

580, 583, 446 N.Y.S.2d 318, 320 (First Dept. 1982) (“prejudicial remarks can, in the context of a given case, be insignificant where the record adequately supports the jury’s verdict.... Here an experienced trial judge promptly gave proper instructions and declined to grant a mistrial or to set the verdict aside. We should follow his lead.... This court [has] emphasized the weight to be given to the views of the trial judge.”).

### **Waived by Failure to Preserve**

An objection to improper comments or a request for a curative jury instruction are needed to preserve the issue for appeal.

More egregious were the comments of defense counsel on summation suggesting that the measure of damages should be based upon the jurors’ work experience and financial status and that the jurors should discount any future damages award to present value. Although it is not improper for defense counsel to suggest an appropriate award ..., it is ‘extremely prejudicial’ to misrepresent the method by which the jury is to assess damages.... Plaintiffs failed, however, to object to counsel’s comments or to request a curative jury instruction and the issue, therefore, is not preserved.

*Stangl v. Compass Transportation*, 221 A.D.2d 909, 635 N.Y.S.2d 376, 378 (Fourth Dept. 1995)  
(internal citations omitted).

### **Ethical Considerations**

*See*, Rules of Professional Conduct, Rule 3.4(d) (Fairness to Opposing Party and Counsel), that provides:

A lawyer shall not:

(d) in appearing before a tribunal on behalf of a client:

- (1) state or allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence;
- (2) assert personal knowledge of facts in issue except when testifying as a witness;
- (3) assert a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused but the lawyer

may argue, upon analysis of the evidence, for any position or conclusion with respect to the matters stated herein; ...

C

**Effective:[See Text Amendments]**

McKinney's Consolidated Laws of New York Annotated [Currentness](#)

Civil Practice Law and Rules [\(Refs & Annos\)](#)

Chapter Eight. Of the Consolidated Laws

[Article 40](#). Trial Generally [\(Refs & Annos\)](#)

→ **Rule 4011. Sequence of trial**

The court may determine the sequence in which the issues shall be tried and otherwise regulate the conduct of the trial in order to achieve a speedy and unprejudiced disposition of the matters at issue in a setting of proper decorum.

CREDIT(S)

(L.1962, c. 308.)



**Effective: August 17, 2004**

McKinney's Consolidated Laws of New York Annotated [Currentness](#)

Civil Practice Law and Rules ([Refs & Annos](#))

Chapter Eight. Of the Consolidated Laws

[Article 40](#). Trial Generally ([Refs & Annos](#))

→ **Rule 4016. Opening and closing statements**

(a) Before any evidence is offered, an attorney for each plaintiff having a separate right, and an attorney for each defendant having a separate right, may make an opening statement. At the close of all the evidence on the issues tried, an attorney for each such party may make a closing statement in inverse order to opening statements.

(b) In any action to recover damages for personal injuries or wrongful death, the attorney for a party shall be permitted to make reference, during closing statement, to a specific dollar amount that the attorney believes to be appropriate compensation for any element of damage that is sought to be recovered in the action. In the event that an attorney makes such a reference in an action being tried by a jury, the court shall, upon the request of any party, during the court's instructions to the jury at the conclusion of all closing statements, instruct the jury that:

(1) the attorney's reference to such specific dollar amount is permitted as argument;

(2) the attorney's reference to a specific dollar amount is not evidence and should not be considered by the jury as evidence; and

(3) the determination of damages is solely for the jury to decide.

CREDIT(S)

(Formerly § 4016, L.1962, c. 308; redesignated Rule 4016, L.1962, c. 318, § 19; amended [L.2003, c. 694, § 2, eff. Nov. 27, 2003](#); [L.2004, c. 372, § 1, eff. Aug. 17, 2004](#).)

## C

**Effective:[See Text Amendments]**

McKinney's Consolidated Laws of New York Annotated [Currentness](#)

Civil Practice Law and Rules [\(Refs & Annos\)](#)

Chapter Eight. Of the Consolidated Laws

[Article 44](#). Trial Motions [\(Refs & Annos\)](#)

→ **Rule 4401. Motion for judgment during trial**

Any party may move for judgment with respect to a cause of action or issue upon the ground that the moving party is entitled to judgment as a matter of law, after the close of the evidence presented by an opposing party with respect to such cause of action or issue, or at any time on the basis of admissions. Grounds for the motion shall be specified. The motion does not waive the right to trial by jury or to present further evidence even where it is made by all parties.

CREDIT(S)

(L.1962, c. 308; amended L.1962, c. 315, § 1.)



**Effective:[See Text Amendments]**

McKinney's Consolidated Laws of New York Annotated [Currentness](#)

Criminal Procedure Law ([Refs & Annos](#))

Chapter 11-A. Of the Consolidated Laws ([Refs & Annos](#))

Part Two. The Principal Proceedings

[Title J](#). Prosecution of Indictments in Superior Courts--Plea to Sentence

[Article 260](#). Jury Trial--Generally ([Refs & Annos](#))

**→ § 260.30 Jury trial; in what order to proceed**

The order of a jury trial, in general, is as follows:

1. The jury must be selected and sworn.
2. The court must deliver preliminary instructions to the jury.
3. The people must deliver an opening address to the jury.
4. The defendant may deliver an opening address to the jury.
5. The people must offer evidence in support of the indictment.
6. The defendant may offer evidence in his defense.
7. The people may offer evidence in rebuttal of the defense evidence, and the defendant may then offer evidence in rebuttal of the people's rebuttal evidence. The court may in its discretion permit the parties to offer further rebuttal or surrebuttal evidence in this pattern. In the interest of justice, the court may permit either party to offer evidence upon rebuttal which is not technically of a rebuttal nature but more properly a part of the offering party's original case.
8. At the conclusion of the evidence, the defendant may deliver a summation to the jury.
9. The people may then deliver a summation to the jury.
10. The court must then deliver a charge to the jury.
11. The jury must then retire to deliberate and, if possible, render a verdict.

United States Code Annotated [Currentness](#)Federal Rules of Criminal Procedure for the United States District Courts ([Refs & Annos](#))

VI. Trial

→ **Rule 29.1. Closing Argument**

Closing arguments proceed in the following order:

- (a) the government argues;
- (b) the defense argues; and
- (c) the government rebuts.

CREDIT(S)

(Added Apr. 22, 1974, eff. Dec. 1, 1975, and amended Apr. 29, 2002, eff. Dec. 1, 2002.)

## ADVISORY COMMITTEE NOTES

**1974 Addition**

This rule is designed to control the order of closing argument. It reflects the Advisory Committee's view that it is desirable to have a uniform federal practice. The rule is drafted in the view that fair and effective administration of justice is best served if the defendant knows the arguments actually made by the prosecution in behalf of conviction before the defendant is faced with the decision whether to reply and what to reply.

**1975 Enactment**

**A. Amendments Proposed by the Supreme Court.** Rule 29.1 is a new rule that was added to regulate closing arguments. It prescribes that the government shall make its closing argument and then the defendant shall make his. After the defendant has argued, the government is entitled to reply in rebuttal.

**B. Committee Action.** The Committee endorses and adopts this proposed rule in its entirety. The Committee believes that as the Advisory Committee Note has stated, fair and effective administration of justice is best served if the defendant knows the arguments actually made by the prosecution in behalf of conviction before the defendant is faced with the decision whether to reply and what to reply. Rule 29.1 does not specifically address itself to what happens if the prosecution waives its initial closing argument. The Committee is of the view that the prosecutor, when he waives his initial closing argument, also waives his rebuttal. [See the remarks of Senior United States Circuit Judge J. Edward Lumbard in Hearings II, at 207.] House Report No. 94-247.

## 2002 Amendments

The language of Rule 29.1 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

## HISTORICAL NOTES

## Effective and Applicability Provisions

1975 Acts. This rule effective Dec. 1, 1975, see § 2 of Pub.L. 94-64, set out as a note under rule 4 of these rules.



New York Federal Court Rules [Currentness](#)

Local Rules of the United States District Courts for the Southern and Eastern Districts of New York

[Local Civil Rules](#)

→ **Rule 39.2 Order of Summation**

After the close of evidence in civil trials, the order of summation shall be determined in the discretion of the court.

[Source: Former Local Civil Rule 44.]

U. S. Dist. Ct. Rules S. & E.D.N.Y., Civ Rule 39.2, NY R USDCTS&ED Civ Rule 39.2

Current with amendments received through 9/15/2008.

(C) 2009 Thomson Reuters. No claim to orig. U.S. govt. works.

END OF DOCUMENT

N.Y. Comp. Codes R. &amp; Regs. tit. 22, § 1200.26

**C**OMPILATION OF CODES, RULES AND  
REGULATIONS OF THE STATE OF NEW  
YORK  
TITLE 22. JUDICIARY  
SUBTITLE B. COURTS.  
CHAPTER IV. SUPREME COURT  
SUBCHAPTER E. ALL DEPARTMENTS  
PART 1200. RULES OF PROFESSIONAL  
CONDUCT

Current through amendments included in the New York State Register, Volume XXXI, Issue 19, dated May 13, 2009.

**Section 1200.26. Rule 3.4: Fairness to opposing party and counsel**

A lawyer shall not:

(a) (1) suppress any evidence that the lawyer or the client has a legal obligation to reveal or produce;

(2) advise or cause a person to hide or leave the jurisdiction of a tribunal for the purpose of making the person unavailable as a witness therein;

(3) conceal or knowingly fail to disclose that which the lawyer is required by law to reveal;

(4) knowingly use perjured testimony or false evidence;

(5) participate in the creation or preservation of evidence when the lawyer knows or it is obvious that the evidence is false; or

(6) knowingly engage in other illegal conduct or conduct contrary to these Rules;

(b) offer an inducement to a witness that is prohibited by law or pay, offer to pay or acquiesce in the payment of compensation to a witness

contingent upon the content of the witness's testimony or the outcome of the matter. A lawyer may advance, guarantee or acquiesce in the payment of:

(1) reasonable compensation to a witness for the loss of time in attending, testifying, preparing to testify or otherwise assisting counsel, and reasonable related expenses; or

(2) a reasonable fee for the professional services of an expert witness and reasonable related expenses;

(c) disregard or advise the client to disregard a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding, but the lawyer may take appropriate steps in good faith to test the validity of such rule or ruling;

(d) in appearing before a tribunal on behalf of a client:

(1) state or allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence;

(2) assert personal knowledge of facts in issue except when testifying as a witness;

(3) assert a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused but the lawyer may argue, upon analysis of the evidence, for any position or conclusion with respect to the matters stated herein; or

(4) ask any question that the lawyer has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person; or

(e) present, participate in presenting, or threaten to present criminal charges solely to obtain an

N.Y. Comp. Codes R. & Regs. tit. 22, § 1200.26

advantage in a civil matter.

**CREDIT(S)**

Sec. filed April 5, 1990; amd. filed July 19, 1999;  
repealed, new filed Jan. 7, 2009 eff. April 1, 2009.

<General Materials (GM) - References, Annotations,  
or Tables>

22 NYCRR 1200.26, 22 NY ADC 1200.26

22 NY ADC 1200.26  
END OF DOCUMENT

**Effective:[See Text Amendments]**

United States Code Annotated [Currentness](#)  
Title 42. The Public Health and Welfare  
     [Chapter 21](#). Civil Rights ([Refs & Annos](#))  
         [Subchapter VI](#). Equal Employment Opportunities ([Refs & Annos](#))  
            **→ § 2000e-2. Unlawful employment practices**

(a) Employer practices

It shall be an unlawful employment practice for an employer--

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

(b) Employment agency practices

It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) Labor organization practices

It shall be an unlawful employment practice for a labor organization--

- (1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;
- (2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or
- (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Training programs

It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management com-

mittee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religion

Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

(f) Members of Communist Party or Communist-action or Communist-front organizations

As used in this subchapter, the phrase “unlawful employment practice” shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950 [[50 U.S.C.A. § 781 et seq.](#)].

(g) National security

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if--

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

(h) Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention

to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of [section 206\(d\) of Title 29](#).

(i) Businesses or enterprises extending preferential treatment to Indians

Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

(j) Preferential treatment not to be granted on account of existing number or percentage imbalance

Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

(k) Burden of proof in disparate impact cases

**(1)(A)** An unlawful employment practice based on disparate impact is established under this subchapter only if--

**(i)** a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

**(ii)** the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

**(B)(i)** With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.

**(ii)** If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

**(C)** The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of "alternative employment practice".

(2) A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this subchapter.

(3) Notwithstanding any other provision of this subchapter, a rule barring the employment of an individual who currently and knowingly uses or possesses a controlled substance, as defined in schedules I and II of section 102(6) of the Controlled Substances Act ([21 U.S.C. 802\(6\)](#)), other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession authorized by the Controlled Substances Act [[21 U.S.C.A. § 801 et seq.](#)] or any other provision of Federal law, shall be considered an unlawful employment practice under this subchapter only if such rule is adopted or applied with an intent to discriminate because of race, color, religion, sex, or national origin.

(l) Prohibition of discriminatory use of test scores

It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin.

(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices

Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

(n) Resolution of challenges to employment practices implementing litigated or consent judgments or orders

(1)(A) Notwithstanding any other provision of law, and except as provided in paragraph (2), an employment practice that implements and is within the scope of a litigated or consent judgment or order that resolves a claim of employment discrimination under the Constitution or Federal civil rights laws may not be challenged under the circumstances described in subparagraph (B).

(B) A practice described in subparagraph (A) may not be challenged in a claim under the Constitution or Federal civil rights laws--

(i) by a person who, prior to the entry of the judgment or order described in subparagraph (A), had--

(I) actual notice of the proposed judgment or order sufficient to apprise such person that such judgment or order might adversely affect the interests and legal rights of such person and that an opportunity was available to present objections to such judgment or order by a future date certain; and

(II) a reasonable opportunity to present objections to such judgment or order; or

(ii) by a person whose interests were adequately represented by another person who had previously challenged the judgment or order on the same legal grounds and with a similar factual situation, unless there has been an intervening change in law or fact.

(2) Nothing in this subsection shall be construed to--

(A) alter the standards for intervention under [rule 24 of the Federal Rules of Civil Procedure](#) or apply to the rights of parties who have successfully intervened pursuant to such rule in the proceeding in which the parties inter-

vened;

(B) apply to the rights of parties to the action in which a litigated or consent judgment or order was entered, or of members of a class represented or sought to be represented in such action, or of members of a group on whose behalf relief was sought in such action by the Federal Government;

(C) prevent challenges to a litigated or consent judgment or order on the ground that such judgment or order was obtained through collusion or fraud, or is transparently invalid or was entered by a court lacking subject matter jurisdiction; or

(D) authorize or permit the denial to any person of the due process of law required by the Constitution.

(3) Any action not precluded under this subsection that challenges an employment consent judgment or order described in paragraph (1) shall be brought in the court, and if possible before the judge, that entered such judgment or order. Nothing in this subsection shall preclude a transfer of such action pursuant to [section 1404 of Title 28](#).

CREDIT(S)

(Pub.L. 88-352, Title VII, § 703, July 2, 1964, 78 Stat. 255; Pub.L. 92-261, § 8(a), (b), Mar. 24, 1972, 86 Stat. 109; [Pub.L. 102-166, Title I, §§ 105\(a\)](#), 106, 107(a), 108, Nov. 21, 1991, 105 Stat. 1074-1076.)

Current through P.L. 111-62 approved 8-19-09

Westlaw. (C) 2009 Thomson Reuters. No Claim to Orig. U.S. Govt. Works.

END OF DOCUMENT

## C

**Effective:[See Text Amendments]**

Code of Federal Regulations [Currentness](#)

Title 29. Labor

Subtitle B. Regulations Relating to Labor

[Chapter XIV](#). Equal Employment Opportunity Commission

[Part 1604](#). Guidelines on Discrimination Because of Sex ([Refs & Annos](#))

→ **§ 1604.11 Sexual harassment.**

(a) Harassment on the basis of sex is a violation of section 703 of title VII. [\[FN1\]](#) Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

<sup>1</sup> The principles involved here continue to apply to race, color, religion or national origin.

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

(c) [Reserved]

(d) With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it

took immediate and appropriate corrective action.

(e) An employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing these cases the Commission will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees.

(f) Prevention is the best tool for the elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under title VII, and developing methods to sensitize all concerned.

(g) Other related practices: Where employment opportunities or benefits are granted because of an individual's submission to the employer's sexual advances or requests for sexual favors, the employer may be held liable for unlawful sex discrimination against other persons who were qualified for but denied that employment opportunity or benefit.

[45 FR 74677, Nov. 10, 1980; [64 FR 58334](#), Oct. 29, 1999]

SOURCE: 37 FR 6836, April 5, 1972, unless otherwise noted.

AUTHORITY: Sec. 713(b), 78 Stat.265, [42 U.S.C. 2000e-12](#).

29 C. F. R. § 1604.11, 29 CFR § 1604.11

Current through September 4, 2009; 74 FR 45975

© 2009 Thomson Reuters  
END OF DOCUMENT



**Effective: July 7, 2009**

McKinney's Consolidated Laws of New York Annotated [Currentness](#)

Executive Law ([Refs & Annos](#))

Chapter Eighteen. Of the Consolidated Laws

 [Article 15](#). Human Rights Law ([Refs & Annos](#))

→ **§ 296. Unlawful discriminatory practices**

1. It shall be an unlawful discriminatory practice:

(a) For an employer or licensing agency, because of an individual's age, race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, marital status, or domestic violence victim status, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.

(b) For an employment agency to discriminate against any individual because of age, race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, or marital status, in receiving, classifying, disposing or otherwise acting upon applications for its services or in referring an applicant or applicants to an employer or employers.

(c) For a labor organization, because of the age, race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, or marital status of any individual, to exclude or to expel from its membership such individual or to discriminate in any way against any of its members or against any employer or any individual employed by an employer.

(d) For any employer or employment agency to print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for employment or to make any inquiry in connection with prospective employment, which expresses directly or indirectly, any limitation, specification or discrimination as to age, race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, or marital status, or any intent to make any such limitation, specification or discrimination, unless based upon a bona fide occupational qualification; provided, however, that neither this paragraph nor any provision of this chapter or other law shall be construed to prohibit the department of civil service or the department of personnel of any city containing more than one county from requesting information from applicants for civil service examinations concerning any of the aforementioned characteristics, other than sexual orientation, for the purpose of conducting studies to identify and resolve possible problems in recruitment and testing of members of minority groups to insure the fairest possible and equal opportunities for employment in the civil service for all persons, regardless of age, race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, or marital status.

(e) For any employer, labor organization or employment agency to discharge, expel or otherwise discriminate against any person because he or she has opposed any practices forbidden under this article or because he or she has filed a complaint, testified or assisted in any proceeding under this article.

(f) Nothing in this subdivision shall affect any restrictions upon the activities of persons licensed by the state liquor authority with respect to persons under twenty-one years of age.

(g) For an employer to compel an employee who is pregnant to take a leave of absence, unless the employee is prevented by such pregnancy from performing the activities involved in the job or occupation in a reasonable manner.

1-a. It shall be an unlawful discriminatory practice for an employer, labor organization, employment agency or any joint labor-management committee controlling apprentice training programs:

(a) To select persons for an apprentice training program registered with the state of New York on any basis other than their qualifications, as determined by objective criteria which permit review;

(b) To deny to or withhold from any person because of race, creed, color, national origin, sexual orientation, military status, sex, age, disability, or marital status, the right to be admitted to or participate in a guidance program, an apprenticeship training program, on-the-job training program, executive training program, or other occupational training or retraining program;

(c) To discriminate against any person in his or her pursuit of such programs or to discriminate against such a person in the terms, conditions or privileges of such programs because of race, creed, color, national origin, sexual orientation, military status, sex, age, disability or marital status;

(d) To print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for such programs or to make any inquiry in connection with such program which expresses, directly or indirectly, any limitation, specification or discrimination as to race, creed, color, national origin, sexual orientation, military status, sex, age, disability or marital status, or any intention to make any such limitation, specification or discrimination, unless based on a bona fide occupational qualification.

...



Court of Appeals of New York.  
 Marjorie L. THORESON, Also Known as Anneka  
 DiLorenzo, Appellant-Respondent,  
 v.  
 PENTHOUSE INTERNATIONAL, LTD., et al.,  
 Respondents-Appellants.  
 Dec. 21, 1992.

Aspiring actress and model formerly employed by men's magazine brought action against former employer and its chairman to recover for, inter alia, sexual harassment. The Supreme Court, New York County, Wilk, J., [149 Misc.2d 150](#), [563 N.Y.S.2d 968](#), awarded compensatory and punitive damages on sexual harassment claim, and defendants appealed. The Supreme Court, Appellate Division, First Department, [179 A.D.2d 29](#), [583 N.Y.S.2d 213](#), modified and affirmed. Appeals were taken. The Court of Appeals, [Hancock, J.](#), held that punitive damages are not permissible in court action for Human Rights Law violations.

Affirmed.

#### West Headnotes

### [\[1\]](#) Appeal and Error [30](#) [1008.1\(1\)](#)

#### [30](#) Appeal and Error

##### [30XVI](#) Review

[30XVI\(1\)](#) Questions of Fact, Verdicts, and Findings

##### [30XVI\(1\)3](#) Findings of Court

##### [30k1008](#) Conclusiveness in General

##### [30k1008.1](#) In General

##### [30k1008.1\(1\)](#) k. In General. [Most](#)

#### [Cited Cases](#)

Decision of fact-finding court should not be disturbed upon appeal unless it is obvious that court's conclusions could not be reached under any fair interpretation of evidence, especially when findings of fact rest in large measure on considerations relating to credibility of witnesses.

### [\[2\]](#) Damages [115](#) [87\(1\)](#)

#### [115](#) Damages

##### [115V](#) Exemplary Damages

[115k87](#) Nature and Theory of Damages Additional to Compensation

##### [115k87\(1\)](#) k. In General. [Most Cited Cases](#)

### Damages [115](#) [91.5\(1\)](#)

#### [115](#) Damages

##### [115V](#) Exemplary Damages

##### [115k91.5](#) Grounds for Exemplary Damages

[115k91.5\(1\)](#) k. In General. [Most Cited Cases](#)

(Formerly 115k91(1))

To determine whether punitive damages are legally permissible in court action, court will look to statute, not to whether nature of wrong alleged would permit recovery under traditional concepts of punitive damages in tort law.

### [\[3\]](#) Civil Rights [78](#) [1711](#)

#### [78](#) Civil Rights

##### [78V](#) State and Local Remedies

[78k1705](#) State or Local Administrative Agencies and Proceedings

##### [78k1711](#) k. Hearing, Determination, and Relief; Costs and Fees. [Most Cited Cases](#)

(Formerly 78k446)

Punitive damages are not allowed in action for discriminatory practices before State Division of Human Rights. [McKinney's Executive Law § 297, subd. 4.](#)

### [\[4\]](#) Statutes [361](#) [188](#)

#### [361](#) Statutes

##### [361VI](#) Construction and Operation

##### [361VI\(A\)](#) General Rules of Construction

##### [361k187](#) Meaning of Language

[361k188](#) k. In General. [Most Cited Cases](#)

### Statutes [361](#) [208](#)

#### [361](#) Statutes

(Cite as: 80 N.Y.2d 490, 606 N.E.2d 1369, 591 N.Y.S.2d 978)

[361VI](#) Construction and Operation  
[361VI\(A\)](#) General Rules of Construction  
[361k204](#) Statute as a Whole, and Intrinsic Aids to Construction  
[361k208](#) k. Context and Related Clauses. [Most Cited Cases](#)  
 In searching for legislative intent, court will first examine words of statute both for their meaning as used in specific section and in their context as part of statutory scheme.

**[5] Civil Rights 78 1768**

[78](#) Civil Rights  
[78V](#) State and Local Remedies  
[78k1767](#) Exemplary or Punitive Damages  
[78k1768](#) k. In General. [Most Cited Cases](#)  
 (Formerly 78k454)

Punitive damages are not permissible in discrimination action pursuant to Human Rights Law. [McKinney's Executive Law § 297, subd. 9](#).  
 \*\*\*[979\\*491\\*\\*1370 Murray Schwartz](#) and [Davida S. Perry](#), New York City, for appellant-respondent.

Proskauer Rose Goetz & Mendelsohn, New York City ([Bettina B. Plevan](#) and [Myron D. Rumeld](#), of counsel), and Carb, Luria, Glassner, Cook & Kufeld ([Jeffrey H. Daichman](#), of counsel), for respondents-appellants.

\*[492 George W. Madison](#), [Herbert Semmel](#) and [Ellen M. Saideman](#), New York City, for Association of the Bar of the City of New York, amicus curiae.

\*[493 Dorchen A. Leidholdt](#) and [Wendy C. Lecker](#), New York City, for Women's Bar Association of the State of N.Y. and another, amici curiae.

\*[494 Nadine Taub](#), of the New Jersey Bar, Newark, NJ, admitted pro hac vice, for Women's Rights Litigation Clinic of Rutgers Law School-Newark and another, amici curiae.

**OPINION OF THE COURT**

[HANCOCK](#), Judge.

This appeal presents a question of statutory construction which we have not addressed: whether a person

aggrieved by a discriminatory practice in violation of the Human Rights Law may recover punitive damages in a court action brought pursuant to [Executive Law § 297\(9\)](#). Based on our analysis of the statutory language and the relevant legislative history, we conclude that such damages are not recoverable.

I

Plaintiff-alleging sexual harassment in violation of the Human Rights Law-brought an action in Supreme Court pursuant to [Executive Law § 297\(9\)](#) against her former employer,\*[495 Penthouse International, Ltd.](#), and its chairman and principal shareholder, Robert Guccione, the publisher of Penthouse Magazine. After a nonjury trial, the court found that defendants had exploited plaintiff as an employee by, among other things, coercing her, as an implicit condition of her employment, into having sexual liaisons with two of Guccione's business associates. The court granted plaintiff \$60,000 for compensatory and \$4,000,000 for punitive damages.

A majority at the Appellate Division found sufficient evidence in the record to support the conclusion of Supreme Court that plaintiff was the victim of *quid pro quo* sexual harassment and, with one Justice dissenting, affirmed the award of compensatory damages (see, [Thoreson v. Penthouse, Intl.](#), 179 A.D.2d 29, 31, 583 N.Y.S.2d 213). The Appellate Division, however, held unanimously that punitive damages were not recoverable and vacated that part of the award. Both plaintiff and defendants have appealed to this Court by leave of the Appellate Division.

[1] We agree with the majority at the Appellate Division that “ ‘the decision of the fact-finding court should not be disturbed upon appeal unless it is obvious that the court's conclusions could not be reached under any fair interpretation of the evidence, especially when the findings of fact rest in large measure on considerations relating to the credibility of witnesses’ ” (*id.*, at 31, 583 N.Y.S.2d 213 [quoting [Claridge Gardens v. Menotti](#), 160 A.D.2d 544, 544-545, 554 N.Y.S.2d 193]). Based on our review of the record, we hold, as did the Appellate Division majority, “that the totality of the circumstances, as perceived by the Trial Justice from the testimony, [permits] the conclusion that plaintiff was the victim of *quid pro quo* sexual harassment” (*id.*, at 31, 583

[N.Y.S.2d 213](#)) and that “it cannot be said that the amount of the compensatory damages awarded by the Trial Justice is without foundation” (*id.*, at 31, [583 N.Y.S.2d 213](#)). We, therefore, affirm the compensatory damages award. Further discussion on this point is unnecessary.

The only question to be addressed is whether punitive damages are permissible in a statutory action under [Executive Law § 297\(9\)](#). For reasons which follow, we concur with the Appellate Division that such damages are not permitted and, accordingly, **\*\*980\*\*** **\*\*1371** affirm that portion of the order also.

II

In approaching the subject of punitive damages in a court action for Human Rights Law violations, it must be understood that we are discussing an action to enforce substantive **\*496** legal rights and duties created solely by statute. When it enacted [Executive Law § 297\(9\)](#) to provide a judicial remedy for discriminatory practices in addition to the existing administrative remedies, the Legislature created a new statutory cause of action not previously cognizable at common law (*see*, [Murphy v. American Home Prods. Corp.](#), 58 N.Y.2d 293, 307, 461 N.Y.S.2d 232, 448 N.E.2d 86; [Matter of State Div. of Human Rights v. Luppino](#), 35 A.D.2d 107, 112, 313 N.Y.S.2d 28 [Hopkins, J., dissenting in part], *rev'd sub nom. State Commn. for Human Rights v. Speer*, 29 N.Y.2d 555, 324 N.Y.S.2d 297, 272 N.E.2d 884).

[\[2\]\[3\]](#) Thus, to determine whether punitive damages are legally permissible in a court action we look to the statute-not to whether the nature of the wrong alleged would permit recovery under traditional concepts of punitive damages in tort law (*see, e.g., Home Ins. Co. v. American Home Prods. Corp.*, 75 N.Y.2d 196, 203-204, 551 N.Y.S.2d 481, 550 N.E.2d 930). It is settled that if an aggrieved person seeks relief for discriminatory practices before the State Division of Human Rights rather than in a court of law, punitive damages *are not allowed* (*see*, [Executive Law § 297\[4\]\[c\]](#); [Matter of New York City Tr. Auth. v. State Div. of Human Rights](#), 78 N.Y.2d 207, 216, 573 N.Y.S.2d 49, 577 N.E.2d 40). The precise question before us, then, is: did the Legislature, in creating the cause of action in [Executive Law § 297\(9\)](#), intend that an aggrieved person could recover punitive dam-

ages in a court action when, if that person had chosen the administrative alternative, such damages could not be recovered?

[\[4\]\[5\]](#) In searching for the legislative intent we, of course, first examine the words of the statute both for their meaning as used in the specific section and in their context as part of the statutory scheme (*see*, [Price v. Price](#), 69 N.Y.2d 8, 13, 511 N.Y.S.2d 219, 503 N.E.2d 684). Here, the particular language to be interpreted is:

“Any person *claiming to be aggrieved* by an unlawful discriminatory practice *shall have a cause of action* in any court of appropriate jurisdiction *for damages and such other remedies as may be appropriate*, unless such person had filed a complaint hereunder or with any local commission on human rights, or with the superintendent pursuant to the provisions of section two hundred ninety-six-a of this chapter” ([Executive Law § 297\[9\]](#) [emphasis added] ).

From the statutory language, it is evident that the word “damages” relates to one of the “remedies” for which a person “aggrieved by” an unlawful practice “shall have a cause of **\*497** action”. Nothing in the statute indicates that the Legislature, in making legal remedies available in a judicial proceeding, contemplated that the courts would grant relief for a purpose other than alleviating or rectifying the harm done to the person aggrieved by the discrimination. Certainly, no language suggests that the Legislature intended to authorize punitive relief in the nature of a fine for the purpose of punishing the wrongdoer or deterring similar conduct by others. Punitive damages, it has been held, are to:

“serve as a warning to others. They are intended as punishment for gross misbehavior for the good of the public and have been referred to as ‘a sort of hybrid between a display of ethical indignation and the imposition of a criminal fine’. Punitive damages are allowed on the ground of public policy and not because the plaintiff had suffered any monetary damages for which he is entitled to reimbursement; the award goes to him simply because it is assessed in his particular suit. The damages may be considered expressive of the community attitude towards one who wilfully and wantonly causes hurt or injury to another” ([Reynolds v. Pegler](#), 123 F.Supp. 36, 38**\*\*1372**

\*\*\*981 [S.D.N.Y.1954],*aff'd* [223 F.2d 429](#) [2d Cir.1955], *cert. denied* [350 U.S. 846, 76 S.Ct. 80, 100 L.Ed. 754](#) [quoted in [Toomey v. Farley, 2 N.Y.2d 71, 83, 156 N.Y.S.2d 840, 138 N.E.2d 221](#)]; *see, Home Ins. Co. v. American Home Prods. Corp., 75 N.Y.2d 196, 203-204, 551 N.Y.S.2d 481, 550 N.E.2d 930, supra ).*

In administrative proceedings before the State Division, the purpose of the permissible remedies is solely to right the wrong done to the aggrieved person, not to punish the wrongdoer. This is reflected in the statute itself which limits the relief available to the aggrieved person to measures which will remedy the injurious effect of the discriminatory practice such as requiring that the practice cease ([Executive Law § 297\(4\)\(c\)\(i\)](#) ), or that an aggrieved employee be rehired or upgraded ([§ 297\(4\)\(c\)\(ii\)](#) ), or that “compensatory damages” be awarded ([§ 297\(4\)\(c\)\(iii\)](#) ).

That the Legislature has consistently been concerned with rectifying the wrong to the injured party caused by the discriminatory practice-not punishing the transgressor-is borne out by the relevant history of the Human Rights Law from the time of its original enactment in 1951 (L.1951, ch. 800). For example, the report of the Governor's committee \*498 recommending the adoption of the 1968 amendment authorizing aggrieved persons to bring court actions ([Executive Law § 297\(9\)](#) ) makes it plain that the measure was designed to give aggrieved persons “a right of action in a court of competent jurisdiction for damages caused by such discriminatory practice” <sup>FN\*</sup> (emphasis added) as an alternative to a proceeding before the Division. Significantly, in 1982 the Legislature rejected the recommendation of the State Assembly Subcommittee on Human Rights that it adopt an amendment empowering the State Division “to award exemplary damages for willful and persistent conduct to prevailing complainants in human rights cases” (*In the Pursuit of Justice*, Report of N.Y. State Assembly Subcommittee on Human Rights [Mar. 25, 1982], at 10).

<sup>FN\*</sup> The Report of the Governor's Committee to Review New York Laws and Procedures in the Area of Human Rights (Mar. 27, 1968) part V(A), entitled “Remedies Available to Complainants” states:

“Recommendation: Aggrieved persons should have a private cause of action for damages or equitable relief as an alternative to a proceeding before the Division.

“The Committee recommends that any individual subjected to a discriminatory practice should have a right of action in a court of competent jurisdiction for damages caused by such discriminatory practice or other appropriate relief, including the relief set forth in the proposed Human Rights Law. Although we would expect most aggrieved persons to use the less formal administrative procedures of the Division or a local human rights agency, they should not be required to do so” (Governor's Committee Report, *op. cit.*, at 41).

Finally, in a development which confirms that the Legislature never contemplated punitive damages as an appropriate remedy, in 1991 it amended the Human Rights Law (L.1991, ch. 368, § 6) to add a *specific provision* for the award of punitive damages not to exceed the amount of \$10,000, *in cases of housing discrimination only* ([Executive Law § 297\(4\)\(c\)\(iv\)](#) ). The logical inference, of course, from the Legislature's action in expressly permitting punitive damages in housing cases is that such damages were not then recoverable for discrimination in other areas including employment (*see, McKinney's Cons. Laws of N.Y., Book 1, Statutes § 240*[*expressio unius est exclusio alterius*] ). Indeed, from the legislative history it appears that the inference is justified. The amendment was adopted at the instance of the State Division of Human Rights so as to bring the Human Rights Law into compliance with the applicable Federal Fair Housing Amendments Act \*499 *see, 42 U.S.C. § 3601 et seq.*). In its memorandum recommending adoption of [section 297\(4\)\(c\)\(iv\)](#), the State Division, in commenting on existing law, noted: “At present the Human Rights Law \* \* \* [*permits only compensatory damages to aggrieved persons*]” (1991 McKinney's Session Laws of N.Y., at 2030, 2031 [emphasis added] ).

We thus conclude that permitting an aggrieved person to recover punitive damages in a court action would be incompatible \*\*\*982 \*\*1373 with the nature of the remedial relief which the Legislature has

(Cite as: 80 N.Y.2d 490, 606 N.E.2d 1369, 591 N.Y.S.2d 978)

consistently deemed appropriate for violations of the Human Rights Law. It would seem highly improbable that the Legislature in adopting [Executive Law § 297\(9\)](#) could have intended to permit the recovery of punitive damages in a court proceeding when that relief is expressly excluded in a proceeding before the State Division. Such a construction of the statute would inevitably encourage aggrieved persons *to avoid the administrative channel before the State Division* and to bring their complaints instead in court proceedings where they might collect punitive damages. No reason has been suggested as to why the Legislature would have intended this consequence; on the contrary, the history surrounding the addition of [section 297\(9\)](#) indicates that this was not its purpose and that it was expected that after its adoption “most aggrieved persons [would continue] to use the less formal administrative procedures of the Division or a local human rights agency” (Governor’s Committee Report, *op. cit.*, at 41).

In sum, we agree with the Appellate Division that punitive damages are not permitted in a court action pursuant to [Executive Law § 297\(9\)](#) (*accord, Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1190-1191 [2d Cir.1992]; *Conan v. Equitable Capital Mgt. Corp.*, 774 F.Supp. 209, 211 [S.D.N.Y.1991] ).

The order of the Appellate Division should be affirmed, without costs.

[SIMONS](#), Acting C.J., and [TITONE](#), [BELLACOSA](#) and [SMITH, JJ.](#), concur.

[KAYE](#), J., taking no part.

Order affirmed, without costs.

N.Y.,1992.

Thoreson v. Penthouse Intern., Ltd.

80 N.Y.2d 490, 606 N.E.2d 1369, 591 N.Y.S.2d 978, 60 Fair Empl.Prac.Cas. (BNA) 955, 61 Empl. Prac. Dec. P 42,107, 61 USLW 2395

END OF DOCUMENT

▶ Supreme Court of the United States  
Beth Ann FARAGHER, Petitioner,  
v.  
CITY OF BOCA RATON.  
No. 97-282.

Argued March 25, 1998.

Decided June 26, 1998.

Former city lifeguard sued city under Title VII for sexual harassment based on conduct of supervisors. Following bench trial, the United States District Court for the Southern District of Florida, [864 F.Supp. 1552](#), [Shelby Highsmith](#), J., entered judgment for lifeguard. Appeal was taken. A panel of the Court of Appeals for the Eleventh Circuit reversed in part, [76 F.3d 1155](#). After vacation of panel opinion and granting of rehearing en banc, the Court of Appeals for the Eleventh Circuit, [Cox](#), Circuit Judge, reversed decision of District Court in part, [111 F.3d 1530](#). Granting certiorari, the Supreme Court, Justice [Souter](#), held that: (1) employer is subject to vicarious liability under Title VII to a victimized employee for actionable discrimination caused by a supervisor, but employer may raise an affirmative defense that looks to the reasonableness of employer's conduct in seeking to prevent and correct harassing conduct and to the reasonableness of employee's conduct in seeking to avoid harm, and (2) city was vicariously liable to lifeguard in view of its failure to exercise reasonable care to prevent harassing behavior.

Judgment of Court of Appeals for the Eleventh Circuit reversed; case remanded for reinstatement of judgment of District Court.

Justice [Thomas](#) filed a dissenting opinion in which Justice [Scalia](#) joined.

#### West Headnotes

[\[1\] Civil Rights](#)  **1119**  
[78k1119 Most Cited Cases](#)  
(Formerly 78k141)

Although employment discrimination provisions of

Title VII mention specific employment decisions with immediate consequences, scope of the prohibition is not limited to "economic" or "tangible" discrimination and covers more than terms and conditions of employment in the contractual sense. Civil Rights Act of 1964, § 703(a)(1), [42 U.S.C.A. § 2000e-2\(a\)\(1\)](#).

[\[2\] Civil Rights](#)  **1185**  
[78k1185 Most Cited Cases](#)

(Formerly 78k167)

In order to be actionable under Title VII, a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so; courts must determine whether an environment is sufficiently hostile or abusive by looking at all the circumstances, including frequency of discriminatory conduct, its severity, whether it is physically threatening or humiliating or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance. Civil Rights Act of 1964, § 703(a)(1), [42 U.S.C.A. § 2000e-2\(a\)\(1\)](#).

[\[3\] Civil Rights](#)  **1185**  
[78k1185 Most Cited Cases](#)

(Formerly 78k167)

Antidiscrimination provisions of Title VII do not prohibit genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex; simple teasing, offhand comments, and isolated incidents, unless extremely serious, will not amount to discriminatory changes in the terms and conditions of employment. Civil Rights Act of 1964, § 703(a)(1), [42 U.S.C.A. § 2000e-2\(a\)\(1\)](#).

[\[4\] Civil Rights](#)  **1119**  
[78k1119 Most Cited Cases](#)

(Formerly 78k145)

[\[4\] Civil Rights](#)  **1147**  
[78k1147 Most Cited Cases](#)

(Formerly 78k145)

Conduct must be extreme to amount to a change in

524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662, 66 USLW 4643, 77 Fair Empl.Prac.Cas. (BNA) 14, 157 A.L.R. Fed. 663, 73 Empl. Prac. Dec. P 45,341, 98 Cal. Daily Op. Serv. 5048, 98 Daily Journal D.A.R. 7009, 98 CJ C.A.R. 3375, 11 Fla. L. Weekly Fed. S 699  
**(Cite as: 524 U.S. 775, 118 S.Ct. 2275)**

the terms and conditions of employment, within context of antidiscrimination provisions of Title VII. Civil Rights Act of 1964, § 703(a)(1), [42 U.S.C.A. § 2000e-2\(a\)\(1\)](#).

**[5] Civil Rights**  **1104**

[78k1104 Most Cited Cases](#)

(Formerly 78k141)

Although Title VII seeks to make persons whole for injuries suffered on account of unlawful employment discrimination, its primary objective, like that of any statute meant to influence primary conduct, is not to provide redress but to avoid harm. Civil Rights Act of 1964, § 703(a)(1), [42 U.S.C.A. § 2000e-2\(a\)\(1\)](#).

**[6] Civil Rights**  **1189**

[78k1189 Most Cited Cases](#)

(Formerly 78k167)

**[6] Civil Rights**  **1528**

[78k1528 Most Cited Cases](#)

(Formerly 78k371)

Under antidiscrimination provisions of Title VII, employer is subject to vicarious liability to victimized employee for an actionable hostile environment created by a supervisor with immediate or successively higher authority over employee; when no tangible employment action is taken, employer may raise an affirmative defense to liability or damages, subject to proof by preponderance of evidence and comprising two necessary elements: (a) that employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by employer or to avoid harm otherwise. Civil Rights Act of 1964, § 703(a)(1), [42 U.S.C.A. § 2000e-2\(a\)\(1\)](#).

**[7] Civil Rights**  **1149**

[78k1149 Most Cited Cases](#)

(Formerly 78k167)

**[7] Civil Rights**  **1189**

[78k1189 Most Cited Cases](#)

(Formerly 78k167)

**[7] Civil Rights**  **1528**

[78k1528 Most Cited Cases](#)

(Formerly 78k371)

Under antidiscrimination provisions of Title VII, while proof that an employer has promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law for asserting an affirmative defense to vicarious liability for an actionable hostile environment created by a supervisor, the need for a stated policy suitable to the employment circumstances may appropriately be addressed when litigating that element of the defense. Civil Rights Act of 1964, § 703(a)(1), [42 U.S.C.A. § 2000e-2\(a\)\(1\)](#).

**[8] Civil Rights**  **1189**

[78k1189 Most Cited Cases](#)

(Formerly 78k167)

**[8] Civil Rights**  **1528**

[78k1528 Most Cited Cases](#)

(Formerly 78k371)

Demonstration that an employee failed to use a complaint procedure provided by the employer in response to sexual harassment by a supervisor will normally suffice to satisfy the employer's burden of demonstrating lack of reasonable care by employee to avoid harm, as element of affirmative defense to a vicarious liability claim under Title VII. Civil Rights Act of 1964, § 703(a)(1), [42 U.S.C.A. § 2000e-2\(a\)\(1\)](#).

**[9] Civil Rights**  **1528**

[78k1528 Most Cited Cases](#)

(Formerly 78k371)

Under Title VII, no affirmative defense is available to an employer on an employee's claim of vicarious liability for an actionable hostile environment created by a supervisor when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment. Civil Rights Act of 1964, § 703(a)(1), [42 U.S.C.A. § 2000e-2\(a\)\(1\)](#).

**[10] Civil Rights**  **1528**

[78k1528 Most Cited Cases](#)

(Formerly 78k371)

City was vicariously liable under Title VII for sexual harassment of female city lifeguard over five-year period by male supervisors in form of uninvited and offensive touching, lewd remarks, and offensive ref-

524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662, 66 USLW 4643, 77 Fair Empl.Prac.Cas. (BNA) 14, 157 A.L.R. Fed. 663, 73 Empl. Prac. Dec. P 45,341, 98 Cal. Daily Op. Serv. 5048, 98 Daily Journal D.A.R. 7009, 98 CJ C.A.R. 3375, 11 Fla. L. Weekly Fed. S 699

(Cite as: 524 U.S. 775, 118 S.Ct. 2275)

ferences to women; degree of hostility in work environment rose to actionable level and was attributable to supervisors, supervisors were granted virtually unchecked authority over subordinates, and lifeguard was completely isolated from city's higher management. Civil Rights Act of 1964, § 703(a)(1), [42 U.S.C.A. § 2000e-2\(a\)\(1\)](#).

**[11] Civil Rights**  **1189**

[78k1189 Most Cited Cases](#)

(Formerly 78k167)

**[11] Civil Rights**  **1528**

[78k1528 Most Cited Cases](#)

(Formerly 78k167)

City could not be found to have exercised reasonable care to prevent male supervisors' harassing conduct toward female city lifeguard, as necessary to establish affirmative defense to vicarious liability for supervisors' conduct in Title VII action; city failed entirely to disseminate its policy against sexual harassment among beach employees, its officials made no attempt to keep track of conduct of supervisors in question, and city's sexual harassment policy did not include any assurance that harassing supervisors could be bypassed in registering complaints. Civil Rights Act of 1964, § 703(a)(1), [42 U.S.C.A. § 2000e-2\(a\)\(1\)](#).

**\*\*2277 \*775 Syllabus [FN\*]**

**[FN\*]** The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See [United States v. Detroit Timber & Lumber Co.](#), 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

After resigning as a lifeguard with respondent City of Boca Raton (City), petitioner Beth Ann Faragher brought an action against the City and her immediate supervisors, Bill Terry and David Silverman, for nominal damages and other relief, alleging, among other things, that the supervisors had created a "sexually hostile atmosphere" at work by repeatedly subjecting Faragher and other female lifeguards to "uninvited and offensive touching," by making lewd remarks, and by speaking of women in offensive terms, and that this conduct constituted discrimination in the "terms, conditions, and privileges" of her employment in violation of Title VII of the Civil Rights Act

of 1964, [42 U.S.C. § 2000e-2\(a\)\(1\)](#). Following a bench trial, the District Court concluded that the supervisors' conduct was discriminatory harassment sufficiently serious to alter the conditions of Faragher's employment and constitute an abusive working environment. The District Court then held that the City could be held liable for the harassment of its supervisory employees because the harassment was pervasive enough to support an inference that the City had "knowledge, or constructive knowledge," of it; under traditional agency principles Terry and Silverman were acting as the City's agents when they committed the harassing acts; and a third supervisor had knowledge of the harassment and failed to report it to City officials. The Eleventh Circuit, sitting en banc, reversed. Relying on [Meritor Savings Bank, FSB v. Vinson](#), 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49, and on the [Restatement \(Second\) of Agency § 219 \(1957\)](#) (Restatement), the Court of Appeals held that Terry and Silverman were not acting within the scope of their employment when they engaged in the harassing conduct, that their agency relationship with the City did not facilitate the harassment, that constructive knowledge of it could not be imputed to the City because of its pervasiveness or the supervisor's knowledge, and that the City could not be held liable for negligence in failing to prevent it.

*Held:* An employer is vicariously liable for actionable discrimination caused by a supervisor, but subject to an affirmative defense looking to the reasonableness of the employer's conduct as well as that of the plaintiff victim. Pp. 2282-2294.

(a) While the Court has delineated the substantive contours of the hostile environment Title VII forbids, see, e.g., [Harris v. Forklift Systems, Inc.](#), 510 U.S. 17, 21-22, 114 S.Ct. 367, 370-371, 126 L.Ed.2d 295, its cases have established few definitive rules for determining when an employer will be liable for a discriminatory environment that is otherwise actionably abusive. The Court's only discussion to date of the standards of employer liability came in [Meritor, supra](#), where the Court held that traditional agency principles were relevant for determining employer liability. Although the Court cited the Restatement §§ 219-237 with general approval, the Court cautioned that common-law agency principles might not be transferable in all their particulars. Pp. 2282-

524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662, 66 USLW 4643, 77 Fair Empl.Prac.Cas. (BNA) 14, 157 A.L.R. Fed. 663, 73 Empl. Prac. Dec. P 45,341, 98 Cal. Daily Op. Serv. 5048, 98 Daily Journal D.A.R. 7009, 98 CJ C.A.R. 3375, 11 Fla. L. Weekly Fed. S 699

(Cite as: 524 U.S. 775, 118 S.Ct. 2275)

2286.

(b) Restatement [§ 219\(1\)](#) provides that "a master is subject to liability for the torts of his servants committed while acting in the scope of their employment." Although Title VII cases in the Courts of Appeals have typically held, or assumed, that supervisory sexual harassment falls outside the scope of employment because it is motivated solely by individual desires and serves no purpose of the employer, these cases appear to be in tension with others defining the scope of the employment broadly to hold employers vicariously liable for employees' intentional torts, including sexual assaults, that were not done **\*\*2278** to serve the employer, but were deemed to be characteristic of its activities or a foreseeable consequence of its business. This tension is the result of differing judgments about the desirability of holding an employer liable for his subordinates' wayward behavior. The proper analysis here, then, calls not for a mechanical application of indefinite and malleable factors set forth in the Restatement, but rather an inquiry into whether it is proper to conclude that sexual harassment is one of the normal risks of doing business the employer should bear. An employer can reasonably anticipate the possibility of sexual harassment occurring in the workplace, and this might justify the assignment of the costs of this behavior to the employer rather than to the victim. Two things counsel in favor of the contrary conclusion, however. First, there is no reason to suppose that Congress wished courts to ignore the traditional distinction between acts falling within the scope of employment and acts amounting to what the older law called frolics or detours from the course of employment. Second, the lower courts, by uniformly judging employer liability for co-worker harassment under a negligence standard, have implicitly treated such harassment outside the scope of employment. It is unlikely that such treatment would escape efforts to render them obsolete if the Court held that harassing supervisors necessarily act within the scope of their employment. The rationale for doing so would apply when the behavior was that of coemployees, because the employer generally benefits from the work of common employees as from the work of supervisors. The answer to this argument might be that the scope of supervisory employment may be treated separately because supervisors **\*777** have special authority enhancing their capacity to harass

and the employer can guard against their misbehavior more easily. This answer, however, implicates an entirely separate category of agency law, considered in the next section. Given the virtue of categorical clarity, it is better to reject reliance on misuse of supervisory authority (without more) as irrelevant to the scope-of-employment analysis. Pp. 2286-2290.

(c) The Court of Appeals erred in rejecting a theory of vicarious liability based on [§ 219\(2\)\(d\)](#) of the Restatement, which provides that an employer "is not subject to liability for the torts of his servants acting outside the scope of their employment unless ... the servant purported to act or speak on behalf of the principal and there was reliance on apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation." It makes sense to hold an employer vicariously liable under Title VII for some tortious conduct of a supervisor made possible by use of his supervisory authority, and the aided-by-agency-relation principle of [§ 219\(2\)\(d\)](#) provides an appropriate starting point for determining liability for the kind of harassment presented here. In a sense a supervisor is always assisted in his misconduct by the supervisory relationship; however, the imposition of liability based on the misuse of supervisory authority must be squared with *Meritor's* holding that an employer is not "automatically" liable for harassment by a supervisor who creates the requisite degree of discrimination. There are two basic alternatives to counter the risk of automatic liability. The first is to require proof of some affirmative invocation of that authority by the harassing supervisor; the second is to recognize an affirmative defense to liability in some circumstances, even when a supervisor has created the actionable environment. The problem with the first alternative is that there is not a clear line between the affirmative and merely implicit uses of supervisory power; such a rule would often lead to close judgment calls and results that appear disparate if not contradictory, and the temptation to litigate would be hard to resist. The second alternative would avoid this particular temptation to litigate and implement Title VII sensibly by giving employers an incentive to prevent and eliminate harassment and by requiring employees to take advantage of the preventive or remedial apparatus of their employers. Thus, the Court adopts the following holding in this case and in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 118 S.Ct. 2257, 141

524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662, 66 USLW 4643, 77 Fair Empl.Prac.Cas. (BNA) 14, 157 A.L.R. Fed. 663, 73 Empl. Prac. Dec. P 45,341, 98 Cal. Daily Op. Serv. 5048, 98 Daily Journal D.A.R. 7009, 98 CJ C.A.R. 3375, 11 Fla. L. Weekly Fed. S 699

(Cite as: 524 U.S. 775, 118 S.Ct. 2275)

[L.Ed.2d 633](#), also decided today. An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with **\*\*2279** immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance **\*778** of the evidence. See [Fed. Rule Civ. Proc. 8\(c\)](#). The defense comprises two necessary elements: (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. While proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense. No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment. Pp. 2289-2293.

(d) Under this standard, the Eleventh Circuit's judgment must be reversed. The District Court found that the degree of hostility in the work environment rose to the actionable level and was attributable to Silverman and Terry, and it is clear that these supervisors were granted virtually unchecked authority over their subordinates and that Faragher and her colleagues were completely isolated from the City's higher management. While the City would have an opportunity to raise an affirmative defense if there were any serious prospect of its presenting one, it appears from the record that any such avenue is closed. The District Court found that the City had entirely failed to disseminate its sexual harassment policy among the beach employees and that its officials made no attempt to keep track of the conduct of

supervisors, and the record makes clear that the City's policy did not include any harassing supervisors assurance that could be bypassed in registering complaints. Under such circumstances, the Court holds as a matter of law that the City could not be found to have exercised reasonable care to prevent the supervisors' harassing conduct. Although the record discloses two possible grounds upon which the City might seek to excuse its failure to distribute its policy and to establish a complaint mechanism, both are contradicted by the record. The City points to nothing that might justify a conclusion by the District Court on remand that the City had exercised reasonable care. Nor is there any reason to remand for consideration of Faragher's efforts to mitigate her own damages, since the award to her was solely nominal. Pp. 2293-2294.

**\*779** e) There is no occasion to consider whether the supervisors' knowledge of the harassment could be imputed to the City. Liability on that theory could not be determined without further factfinding on remand, whereas the reversal necessary on the supervisory harassment theory renders any remand for consideration of imputed knowledge (or of negligence as an alternative to a theory of vicarious liability) entirely unjustifiable. P. 2294.

[111 F.3d 1530](#), reversed and remanded.

[SOUTER](#), J., delivered the opinion of the Court, in which [REHNQUIST](#), C.J., and [STEVENS](#), [O'CONNOR](#), [KENNEDY](#), [GINSBURG](#), and [BREYER](#), JJ., joined. [THOMAS](#), J., filed a dissenting opinion, in which [SCALIA](#), J., joined, *post*, p. 2294.

[William R. Amlong](#), Ft. Lauderdale, FL, for Petitioner.

[Irving L. Gornstein](#), Washington, DC, for U.S.

[Harry A. Risetto](#), Washington, DC, for Respondent.

**\*780** Justice [SOUTER](#) delivered the opinion of the Court.

This case calls for identification of the circumstances under which an employer may be held liable under Title VII of the Civil Rights Act of 1964, 78 Stat.

524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662, 66 USLW 4643, 77 Fair Empl.Prac.Cas. (BNA) 14, 157 A.L.R. Fed. 663, 73 Empl. Prac. Dec. P 45,341, 98 Cal. Daily Op. Serv. 5048, 98 Daily Journal D.A.R. 7009, 98 CJ C.A.R. 3375, 11 Fla. L. Weekly Fed. S 699

(Cite as: 524 U.S. 775, 118 S.Ct. 2275)

253, as amended, [42 U.S.C. § 2000e et seq.](#), for the acts of a supervisory employee whose sexual harassment of subordinates has created a hostile work environment amounting to employment discrimination. We hold that an employer is vicariously liable for actionable discrimination caused by a supervisor, but subject to an affirmative defense looking to the reasonableness of the employer's conduct as well as that of a plaintiff victim.

### I

Between 1985 and 1990, while attending college, petitioner Beth Ann Faragher worked part time and during the summers as an ocean lifeguard for the Marine Safety Section of the Parks and Recreation Department of respondent, the City of Boca Raton, Florida (City). During this period, Faragher's immediate supervisors were Bill Terry, David Silverman, and Robert Gordon. In June 1990, Faragher resigned.

In 1992, Faragher brought an action against Terry, Silverman, and the City, asserting claims under Title VII, Rev.Stat. § 1979, [42 U.S.C. § 1983](#), and Florida law. So far as it concerns the Title VII claim, the complaint alleged that Terry and Silverman created a "sexually hostile atmosphere" at the beach by repeatedly subjecting Faragher and other female lifeguards to "uninvited and offensive touching," by making lewd remarks, and by speaking of women in offensive terms. The complaint contained specific allegations that Terry once said that he would never promote a woman to the rank of lieutenant, and that Silverman had said to Faragher, "Date me or clean the toilets for a year." Asserting that \*781 Terry and Silverman were agents of the City, and that their conduct amounted to discrimination in the "terms, conditions, and privileges" of her employment, [42 U.S.C. § 2000e-2\(a\)\(1\)](#), Faragher sought a judgment against the City for nominal damages, costs, and attorney's fees.

Following a bench trial, the United States District Court for the Southern District of Florida found that throughout Faragher's employment with the City, Terry served as Chief of the Marine Safety Division, with authority to hire new lifeguards (subject to the approval of higher management), to supervise all aspects of the lifeguards' work assignments, to engage in counseling, to deliver oral reprimands, and to make a record of any such discipline. [864 F.Supp.](#)

[1552, 1563-1564 \(1994\)](#). Silverman was a Marine Safety lieutenant from 1985 until June 1989, when he became a captain. [Id., at 1555](#). Gordon began the employment period as a lieutenant and at some point was promoted to the position of training captain. In these positions, Silverman and Gordon were responsible for making the lifeguards' daily assignments, and for supervising their work and fitness training. [Id., at 1564](#).

The lifeguards and supervisors were stationed at the city beach and worked out of the Marine Safety Headquarters, a small one-story building containing an office, a meeting room, and a single, unisex locker room with a shower. [Id., at 1556](#). Their work routine was structured in a "paramilitary configuration," [id., at 1564](#), with a clear chain of command. Lifeguards reported to lieutenants and captains, who reported to Terry. He was supervised by the Recreation Superintendent, who in turn reported to a Director of Parks and Recreation, answerable to the City Manager. [Id., at 1555](#). The lifeguards had no significant contact with higher city officials like the Recreation Superintendent. [Id., at 1564](#).

In February 1986, the City adopted a sexual harassment policy, which it stated in a memorandum from the City Manager \*782 addressed to all employees. [Id., at 1560](#). In May 1990, the City revised the policy and reissued a statement of it. [Ibid.](#) Although the City may actually have circulated the memos and statements to some employees, it completely failed to disseminate its policy among employees of the Marine Safety Section, with the result that Terry, Silverman, \*\*2281 Gordon, and many lifeguards were unaware of it. [Ibid.](#)

From time to time over the course of Faragher's tenure at the Marine Safety Section, between 4 and 6 of the 40 to 50 lifeguards were women. [Id., at 1556](#). During that 5-year period, Terry repeatedly touched the bodies of female employees without invitation, [ibid.](#), would put his arm around Faragher, with his hand on her buttocks, [id., at 1557](#), and once made contact with another female lifeguard in a motion of sexual simulation, [id., at 1556](#). He made crudely demeaning references to women generally, [id., at 1557](#), and once commented disparagingly on Faragher's shape, [ibid.](#) During a job interview with a woman he hired as a lifeguard, Terry said that the

524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662, 66 USLW 4643, 77 Fair Empl.Prac.Cas. (BNA) 14, 157 A.L.R. Fed. 663, 73 Empl. Prac. Dec. P 45,341, 98 Cal. Daily Op. Serv. 5048, 98 Daily Journal D.A.R. 7009, 98 CJ C.A.R. 3375, 11 Fla. L. Weekly Fed. S 699

(Cite as: 524 U.S. 775, 118 S.Ct. 2275)

female lifeguards had sex with their male counterparts and asked whether she would do the same. [Ibid.](#)

Silverman behaved in similar ways. He once tackled Faragher and remarked that, but for a physical characteristic he found unattractive, he would readily have had sexual relations with her. [Ibid.](#) Another time, he pantomimed an act of oral sex. [Ibid.](#) Within earshot of the female lifeguards, Silverman made frequent, vulgar references to women and sexual matters, commented on the bodies of female lifeguards and beachgoers, and at least twice told female lifeguards that he would like to engage in sex with them. [Id.](#), at 1557- 1558.

Faragher did not complain to higher management about Terry or Silverman. Although she spoke of their behavior to Gordon, she did not regard these discussions as formal complaints to a supervisor but as conversations with a person she held in high esteem. [Id.](#), at 1559. Other female \*783 lifeguards had similarly informal talks with Gordon, but because Gordon did not feel that it was his place to do so, he did not report these complaints to Terry, his own supervisor, or to any other city official. [Id.](#), at 1559- 1560. Gordon responded to the complaints of one lifeguard by saying that "the City just [doesn't] care." [Id.](#), at 1561.

In April 1990, however, two months before Faragher's resignation, Nancy Ewanchew, a former lifeguard, wrote to Richard Bender, the City's Personnel Director, complaining that Terry and Silverman had harassed her and other female lifeguards. [Id.](#), at 1559.

Following investigation of this complaint, the City found that Terry and Silverman had behaved improperly, reprimanded them, and required them to choose between a suspension without pay or the forfeiture of annual leave. [Ibid.](#)

On the basis of these findings, the District Court concluded that the conduct of Terry and Silverman was discriminatory harassment sufficiently serious to alter the conditions of Faragher's employment and constitute an abusive working environment. [Id.](#), at 1562-1563. The District Court then ruled that there were three justifications for holding the City liable for the harassment of its supervisory employees.

First, the court noted that the harassment was pervasive enough to support an inference that the City had "knowledge, or constructive knowledge," of it. [Id.](#), at 1563. Next, it ruled that the City was liable under traditional agency principles because Terry and Silverman were acting as its agents when they committed the harassing acts. [Id.](#), at 1563-1564. Finally, the court observed that Gordon's knowledge of the harassment, combined with his inaction, "provides a further basis for imputing liability on [sic] the City." [Id.](#), at 1564. The District Court then awarded Faragher \$1 in nominal damages on her Title VII claim. [Id.](#), at 1564-1565.

A panel of the Court of Appeals for the Eleventh Circuit reversed the judgment against the City. \*78476 F.3d 1155 1996). Although the panel had "no trouble concluding that Terry's and Silverman's conduct ... was severe and pervasive enough to create an objectively abusive work environment," [id.](#), at 1162, it overturned the District Court's conclusion that the City was liable. The panel ruled that Terry and Silverman were not acting within the scope of their employment when they engaged in the harassment, [id.](#), at 1166, that they were not aided in their actions by the agency relationship, [id.](#), at 1166, n. 14, and that the City had no constructive knowledge of the harassment by virtue of its pervasiveness or Gordon's actual knowledge, [id.](#), at 1167, and n. 16.

\*\*2282 In a 7-to-5 decision, the full Court of Appeals, sitting en banc, adopted the panel's conclusion. 111 F.3d 1530 (1997). Relying on our decision in [Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 \(1986\)](#), and on the [Restatement \(Second\) of Agency § 219 \(1957\)](#) (hereinafter Restatement), the court held that "an employer may be indirectly liable for hostile environment sexual harassment by a superior: (1) if the harassment occurs within the scope of the superior's employment; (2) if the employer assigns performance of a nondelegable duty to a supervisor and an employee is injured because of the supervisor's failure to carry out that duty; or (3) if there is an agency relationship which aids the supervisor's ability or opportunity to harass his subordinate." 111 F.3d, at 1534-1535.

Applying these principles, the court rejected Faragher's Title VII claim against the City. First, invoking

524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662, 66 USLW 4643, 77 Fair Empl.Prac.Cas. (BNA) 14, 157 A.L.R. Fed. 663, 73 Empl. Prac. Dec. P 45,341, 98 Cal. Daily Op. Serv. 5048, 98 Daily Journal D.A.R. 7009, 98 CJ C.A.R. 3375, 11 Fla. L. Weekly Fed. S 699

(Cite as: 524 U.S. 775, 118 S.Ct. 2275)

standard agency language to classify the harassment by each supervisor as a "frolic" unrelated to his authorized tasks, the court found that in harassing Faragher, Terry and Silverman were acting outside of the scope of their employment and solely to further their own personal ends. *Id.*, at 1536-1537. Next, the court determined that the supervisors' agency relationship with the City did not assist them in perpetrating their harassment. *Id.*, at 1537. Though noting that "a supervisor is always aided in accomplishing hostile environment sexual\*785 harassment by the existence of the agency relationship with his employer because his responsibilities include close proximity to and regular contact with the victim," the court held that traditional agency law does not employ so broad a concept of aid as a predicate of employer liability, but requires something more than a mere combination of agency relationship and improper conduct by the agent. *Ibid.* Because neither Terry nor Silverman threatened to fire or demote Faragher, the court concluded that their agency relationship did not facilitate their harassment. *Ibid.*

The en banc court also affirmed the panel's ruling that the City lacked constructive knowledge of the supervisors' harassment. The court read the District Court's opinion to rest on an erroneous legal conclusion that any harassment pervasive enough to create a hostile environment must *a fortiori* also suffice to charge the employer with constructive knowledge. *Id.*, at 1538. Rejecting this approach, the court reviewed the record and found no adequate factual basis to conclude that the harassment was so pervasive that the City should have known of it, relying on the facts that the harassment occurred intermittently, over a long period of time, and at a remote location. *Ibid.* In footnotes, the court also rejected the arguments that the City should be deemed to have known of the harassment through Gordon, *id.*, at 1538, n. 9, or charged with constructive knowledge because of its failure to disseminate its sexual harassment policy among the lifeguards, *id.*, at 1539, n. 11.

Since our decision in *Meritor*, Courts of Appeals have struggled to derive manageable standards to govern employer liability for hostile environment harassment perpetrated by supervisory employees. While following our admonition to find guidance in the common law of agency, as embodied in the Restatement, the Courts of Appeals have adopted differ-

ent approaches. Compare, e.g., *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437 (C.A.10 1997), vacated, 524 U.S. 947, 118 S.Ct. 2364, 141 L.Ed.2d 732 (1998); 111 F.3d 1530 (C.A.11 1997) (case below); \*786 *Gary v. Long*, 59 F.3d 1391 (C.A.D.C.), cert. denied, 516 U.S. 1011, 116 S.Ct. 569, 133 L.Ed.2d 493 (1995); and *Karibian v. Columbia University*, 14 F.3d 773 (C.A.2), cert. denied, 512 U.S. 1213, 114 S.Ct. 2693, 129 L.Ed.2d 824 (1994). We granted certiorari to address the divergence, 522 U.S. 978, 118 S.Ct. 438, 139 L.Ed.2d 337 (1997), and now reverse the judgment of the Eleventh Circuit and remand for entry of judgment in Faragher's favor.

## II A

[1] Under Title VII of the Civil Rights Act of 1964, "[i]t shall be an unlawful employment practice for an employer ... to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual \*\*2283 with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). We have repeatedly made clear that although the statute mentions specific employment decisions with immediate consequences, the scope of the prohibition " 'is not limited to "economic" or "tangible" discrimination,' " *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21, 114 S.Ct. 367, 370, 126 L.Ed.2d 295 (1993) (quoting *Meritor Savings Bank, FSB v. Vinson, supra*, at 64, 106 S.Ct., at 2404), and that it covers more than " 'terms' and 'conditions' in the narrow contractual sense." *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 78, 118 S.Ct. 998, 1001, 140 L.Ed.2d 201 (1998). Thus, in *Meritor* we held that sexual harassment so "severe or pervasive" as to "alter the conditions of [the victim's] employment and create an abusive working environment" "violates Title VII. 477 U.S., at 67, 106 S.Ct., at 2405-2406 (quoting *Henson v. Dundee*, 682 F.2d 897, 904 (C.A.11 1982)).

In thus holding that environmental claims are covered by the statute, we drew upon earlier cases recognizing liability for discriminatory harassment based on race and national origin, see, e.g., *Rogers v. EEOC*, 454 F.2d 234 (C.A.5 1971), cert. denied, 406 U.S. 957, 92 S.Ct. 2058, 32 L.Ed.2d 343 (1972); *Firefighters Institute for Racial Equality v. St. Louis*,

524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662, 66 USLW 4643, 77 Fair Empl.Prac.Cas. (BNA) 14, 157 A.L.R. Fed. 663, 73 Empl. Prac. Dec. P 45,341, 98 Cal. Daily Op. Serv. 5048, 98 Daily Journal D.A.R. 7009, 98 CJ C.A.R. 3375, 11 Fla. L. Weekly Fed. S 699

(Cite as: 524 U.S. 775, 118 S.Ct. 2275)

[549 F.2d 506 \(C.A.8\)](#), cert. denied *sub nom. Banta v. United States*, 434 U.S. 819, 98 S.Ct. 60, 54 L.Ed.2d 76 (1977), \*787 just as we have also followed the lead of such cases in attempting to define the severity of the offensive conditions necessary to constitute actionable sex discrimination under the statute. See, e.g., [Rogers, supra, at 238](#) ("[M]ere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee" would not sufficiently alter terms and conditions of employment to violate Title VII). [FN1] See also [Daniels v. Essex Group, Inc.](#), 937 F.2d 1264, 1271-1272 (C.A.7 1991); [Davis v. Monsanto Chemical Co.](#), 858 F.2d 345, 349 (C.A.6 1988), cert. denied, 490 U.S. 1110, 109 S.Ct. 3166, 104 L.Ed.2d 1028 (1989); [Snell v. Suffolk County](#), 782 F.2d 1094, 1103 (C.A.2 1986); 1 B. Lindemann & P. Grossman, *Employment Discrimination Law* 349, and nn. 36-37 (3d ed.1996) (hereinafter *Lindemann & Grossman*) (citing cases instructing that "[d]iscourtesy or rudeness should not be confused with racial harassment" and that "a lack of racial sensitivity does not, alone, amount to actionable harassment").

[FN1] Similarly, Courts of Appeals in sexual harassment cases have properly drawn on standards developed in cases involving racial harassment. See, e.g., [Carrero v. New York City Housing Auth.](#), 890 F.2d 569, 577 (C.A.2 1989) (citing [Lopez v. S.B. Thomas, Inc.](#), 831 F.2d 1184, 1189 (C.A.2 1987), a case of racial harassment, for the proposition that incidents of environmental sexual harassment "must be more than episodic; they must be sufficiently continuous and concerted in order to be deemed pervasive"). Although racial and sexual harassment will often take different forms, and standards may not be entirely interchangeable, we think there is good sense in seeking generally to harmonize the standards of what amounts to actionable harassment.

[2][3] So, in [Harris](#), we explained that in order to be actionable under the statute, a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so. [510 U.S.](#), at 21-22, 114 S.Ct., at 370-371. We directed courts to determine whether

an environment is sufficiently hostile or abusive by "looking at all the circumstances," including the "frequency of the discriminatory conduct; its severity; whether it is physically threatening \*788 or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Id.*, at 23, 114 S.Ct., at 371. Most recently, we explained that Title VII does not prohibit "genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex." [Oncale](#), 523 U.S., at 81, 118 S.Ct., at 1003. A recurring point in these opinions is that "simple teasing," *id.*, at 82, 118 S.Ct., at 1003, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the "terms and conditions of employment."

[4] These standards for judging hostility are sufficiently demanding to ensure that Title VII does not become a "general civility \*\*2284 code." *Id.*, at 80, 118 S.Ct., at 1002. Properly applied, they will filter out complaints attacking "the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing." B. Lindemann & D. Kadue, *Sexual Harassment in Employment Law* 175 (1992) (hereinafter *Lindemann & Kadue*) (footnotes omitted). We have made it clear that conduct must be extreme to amount to a change in the terms and conditions of employment, and the Courts of Appeals have heeded this view. See, e.g., [Carrero v. New York City Housing Auth.](#), 890 F.2d 569, 577-578 (C.A.2 1989); [Moylan v. Maries County](#), 792 F.2d 746, 749-750 (C.A.8 1986); See also 1 *Lindemann & Grossman* 805-807, n. 290 (collecting cases granting summary judgment for employers because the alleged harassment was not actionably severe or pervasive).

While indicating the substantive contours of the hostile environments forbidden by Title VII, our cases have established few definite rules for determining when an employer will be liable for a discriminatory environment that is otherwise actionably abusive. Given the circumstances of many of the litigated cases, including some that have come to us, it is not surprising that in many of them, the issue has been joined over the sufficiency of the abusive conditions, not the \*789 standards for determining an employer's liability for them. There have, for example, been

524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662, 66 USLW 4643, 77 Fair Empl.Prac.Cas. (BNA) 14, 157 A.L.R. Fed. 663, 73 Empl. Prac. Dec. P 45,341, 98 Cal. Daily Op. Serv. 5048, 98 Daily Journal D.A.R. 7009, 98 CJ C.A.R. 3375, 11 Fla. L. Weekly Fed. S 699

(Cite as: 524 U.S. 775, 118 S.Ct. 2275)

myriad cases in which District Courts and Courts of Appeals have held employers liable on account of actual knowledge by the employer, or high-echelon officials of an employer organization, of sufficiently harassing action by subordinates, which the employer or its informed officers have done nothing to stop. See, e.g., [Katz v. Dole](#), 709 F.2d 251, 256 (C.A.4 1983) (upholding employer liability because the "employer's supervisory personnel manifested unmistakable acquiescence in or approval of the harassment"); [EEOC v. Hacienda Hotel](#), 881 F.2d 1504, 1516 (C.A.9 1989) (employer liable where hotel manager did not respond to complaints about supervisors' harassment); [Hall v. Gus Constr. Co.](#), 842 F.2d 1010, 1016 (C.A.8 1988) (holding employer liable for harassment by co-workers because supervisor knew of the harassment but did nothing). In such instances, the combined knowledge and inaction may be seen as demonstrable negligence, or as the employer's adoption of the offending conduct and its results, quite as if they had been authorized affirmatively as the employer's policy. Cf. [Oncale, supra](#), at 77, 118 S.Ct., at 1001 (victim reported his grounds for fearing rape to company's safety supervisor, who turned him away with no action on complaint).

Nor was it exceptional that standards for binding the employer were not in issue in [Harris, supra](#). In that case of discrimination by hostile environment, the individual charged with creating the abusive atmosphere was the president of the corporate employer, 510 U.S., at 19, 114 S.Ct., at 369, who was indisputably within that class of an employer organization's officials who may be treated as the organization's proxy. [Burns v. McGregor Electronic Industries, Inc.](#), 955 F.2d 559, 564 (C.A.8 1992) (employer-company liable where harassment was perpetrated by its owner); see [Torres v. Pisano](#), 116 F.3d 625, 634-635, and n. 11 (C.A.2) (noting that a supervisor may hold a sufficiently high position "in the management hierarchy of the company for his actions to be imputed \*790 automatically to the employer"), cert. denied, 522 U.S. 997, 118 S.Ct. 563, 139 L.Ed.2d 404 (1997); cf. [Katz, supra](#), at 255 ("Except in situations where a proprietor, partner or corporate officer participates personally in the harassing behavior," an employee must "demonstrat[e] the propriety of holding the employer liable").

Finally, there is nothing remarkable in the fact that

claims against employers for discriminatory employment actions with tangible results, like hiring, firing, promotion, compensation, and work assignment, have resulted in employer liability once the discrimination was shown. See [Meritor](#), 477 U.S., at 70- 71, 106 S.Ct., at 2407-2408 (noting that "courts have consistently held employers liable for the discriminatory discharges of employees by supervisory personnel, whether or not the employer knew, should have known, or approved of the supervisor's actions"); [id.](#), at 75, 106 S.Ct., at 2409-2410 (Marshall, J., concurring in judgment) ("[W]hen a supervisor \*\*2285 discriminatorily fires or refuses to promote a black employee, that act is, without more, considered the act of the employer"); see also [Anderson v. Methodist Evangelical Hospital, Inc.](#), 464 F.2d 723, 725 (C.A.6 1972) (imposing liability on employer for racially motivated discharge by low-level supervisor, although the "record clearly shows that [its] record in race relations ... is exemplary").

A variety of reasons have been invoked for this apparently unanimous rule. Some courts explain, in a variation of the "proxy" theory discussed above, that when a supervisor makes such decisions, he "merges" with the employer, and his act becomes that of the employer. See, e.g., [Kotcher v. Rosa and Sullivan Appliance Ctr., Inc.](#), 957 F.2d 59, 62 (C.A.2 1992) ("The supervisor is deemed to act on behalf of the employer when making decisions that affect the economic status of the employee. From the perspective of the employee, the supervisor and the employer merge into a single entity"); [Steele v. Offshore Shipbuilding, Inc.](#), 867 F.2d 1311, 1316 (C.A.11 1989) ("When a supervisor requires sexual favors as a *quid pro quo* for job benefits, the supervisor, by definition, acts as the company"); see also Lindemann & \*791 Grossman 776 (noting that courts hold employers "automatically liable" in *quid pro quo* cases because the "supervisor's actions, in conferring or withholding employment benefits, are deemed as a matter of law to be those of the employer"). Other courts have suggested that vicarious liability is proper because the supervisor acts within the scope of his authority when he makes discriminatory decisions in hiring, firing, promotion, and the like. See, e.g., [Shager v. Upjohn Co.](#), 913 F.2d 398, 405 (C.A.7 1990) ("[A] supervisory employee who fires a subordinate is doing the kind of thing that he is authorized to do,

524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662, 66 USLW 4643, 77 Fair Empl.Prac.Cas. (BNA) 14, 157 A.L.R. Fed. 663, 73 Empl. Prac. Dec. P 45,341, 98 Cal. Daily Op. Serv. 5048, 98 Daily Journal D.A.R. 7009, 98 CJ C.A.R. 3375, 11 Fla. L. Weekly Fed. S 699

(Cite as: 524 U.S. 775, 118 S.Ct. 2275)

and the wrongful intent with which he does it does not carry his behavior so far beyond the orbit of his responsibilities as to excuse the employer" (citing Restatement § 228)). Others have suggested that vicarious liability is appropriate because the supervisor who discriminates in this manner is aided by the agency relation. See, e.g., Nichols v. Frank, 42 F.3d 503, 514 (C.A.9 1994). Finally, still other courts have endorsed both of the latter two theories. See, e.g., Harrison, 112 F.3d, at 1443; Henson, 682 F.2d, at 910.

The soundness of the results in these cases (and their continuing vitality), in light of basic agency principles, was confirmed by this Court's only discussion to date of standards of employer liability, in Meritor, supra, which involved a claim of discrimination by a supervisor's sexual harassment of a subordinate over an extended period. In affirming the Court of Appeals's holding that a hostile atmosphere resulting from sex discrimination is actionable under Title VII, we also anticipated proceedings on remand by holding agency principles relevant in assigning employer liability and by rejecting three *per se* rules of liability or immunity. 477 U.S., at 70-72, 106 S.Ct., at 2407-2408. We observed that the very definition of employer in Title VII, as including an "agent," id., at 72, 106 S.Ct., at 2408, expressed Congress's intent that courts look to traditional principles of the law of agency in devising standards of employer liability in those instances where liability for the actions of a supervisory \*792 employee was not otherwise obvious, ibid., and although we cautioned that "**common-law principles may not be transferable in all their particulars to Title VII**," we cited the Restatement §§ 219-237 with general approval. Ibid.

We then proceeded to reject two limitations on employer liability, while establishing the rule that some limitation was intended. We held that neither the existence of a company grievance procedure nor the absence of actual notice of the harassment on the part of upper management would be dispositive of such a claim; while either might be relevant to the liability, neither would result automatically in employer immunity. Ibid. Conversely, we held that Title VII placed some limit on employer responsibility for the creation of a discriminatory environment by a supervisor, and we held that Title VII does not make employers "**always automatically liable for sexual**

**harassment by their supervisors,"** ibid., contrary to the view of the Court of Appeals, which had held that "**an employer is strictly liable for a hostile environment created by a supervisor's sexual advances, even though the employer neither knew nor \*\*2286 reasonably could have known of the alleged misconduct,"** id., at 69- 70, 106 S.Ct., at 2406-2407.

Meritor's statement of the law is the foundation on which we build today. Neither party before us has urged us to depart from our customary adherence to *stare decisis* in statutory interpretation, Patterson v. McLean Credit Union, 491 U.S. 164, 172-173, 109 S.Ct. 2363, 2370-2371, 105 L.Ed.2d 132 (1989) (*stare decisis* has "special force" in statutory interpretation). And the force of precedent here is enhanced by Congress's amendment to the liability provisions of Title VII since the Meritor decision, without providing any modification of our holding. Civil Rights Act of 1991, § 102, 105 Stat. 1072, 42 U.S.C. § 1981a; see Keene Corp. v. United States, 508 U.S. 200, 212, 113 S.Ct. 2035, 2043, 124 L.Ed.2d 118 (1993) (applying the "presumption that Congress was aware of [prior] judicial interpretations and, in effect, adopted them"). See also *infra*, at 2291, n. 4.

#### \*793 B

The Court of Appeals identified, and rejected, three possible grounds drawn from agency law for holding the City vicariously liable for the hostile environment created by the supervisors. It considered whether the two supervisors were acting within the scope of their employment when they engaged in the harassing conduct. The court then inquired whether they were significantly aided by the agency relationship in committing the harassment, and also considered the possibility of imputing Gordon's knowledge of the harassment to the City. Finally, the Court of Appeals ruled out liability for negligence in failing to prevent the harassment. Faragher relies principally on the latter three theories of liability.

1

A "master is subject to liability for the torts of his servants committed while acting in the scope of their employment." Restatement § 219(1). This doctrine has traditionally defined the "scope of employment" as including conduct "of the kind [a servant] is employed to perform," occurring "substantially within

524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662, 66 USLW 4643, 77 Fair Empl.Prac.Cas. (BNA) 14, 157 A.L.R. Fed. 663, 73 Empl. Prac. Dec. P 45,341, 98 Cal. Daily Op. Serv. 5048, 98 Daily Journal D.A.R. 7009, 98 CJ C.A.R. 3375, 11 Fla. L. Weekly Fed. S 699

(Cite as: 524 U.S. 775, 118 S.Ct. 2275)

the authorized time and space limits," and "actuated, at least in part, by a purpose to serve the master," but as excluding an intentional use of force "unexpectable by the master." *Id.*, § 228(1).

Courts of Appeals have typically held, or assumed, that conduct similar to the subject of this complaint falls outside the scope of employment. See, e.g., [Harrison](#), 112 F.3d, at 1444 (sexual harassment "simply is not within the job description of any supervisor or any other worker in any reputable business"); 111 F.3d, at 1535-1536 (case below); [Andrade v. Mayfair Management, Inc.](#), 88 F.3d 258, 261 (C.A.4 1996) ("[I]llegal sexual harassment is ... beyond the scope of supervisors' employment"); [Gary](#), 59 F.3d, at 1397 (harassing supervisor acts outside the scope of his employment \*794 in creating hostile environment); [Nichols v. Frank](#), 42 F.3d 503, 508 (C.A.9 1994) ("The proper analysis for employer liability in hostile environment cases is ... not whether an employee was acting within his 'scope of employment'"); [Bouton v. BMW of North Am., Inc.](#), 29 F.3d 103, 107 (C.A.3 1994) (sexual harassment is outside scope of employment); see also [Burlington Industries, Inc. v. Ellerth](#), decided with [Jansen v. Packaging Corp. of America](#), 123 F.3d 490, 561 (C.A.7 1997) (en banc) (Manion, J., concurring and dissenting) (supervisor's harassment would fall within scope of employment only in "the rare case indeed"), aff'd, 524 U.S. 1086, 118 S.Ct. 876, 139 L.Ed.2d 865 (1998); Lindemann & Grossman 812 ("Hostile environment sexual harassment normally does not trigger respondeat superior liability because sexual harassment rarely, if ever, is among the official duties of a supervisor"). But cf. [Martin v. Cavalier Hotel Corp.](#), 48 F.3d 1343, 1351- 1352 (C.A.4 1995) (holding employer vicariously liable in part based on finding that the supervisor's rape of employee was within the scope of employment); [Kauffman v. Allied Signal, Inc.](#), 970 F.2d 178, 184 (C.A.6) (holding that a supervisor's harassment was within the scope of his employment, but nevertheless requiring the victim to show that the employer failed to respond adequately when it learned of the harassment), cert. denied, 506 U.S. 1041, 113 S.Ct. 831, 121 L.Ed.2d 701 (1992). In so doing, the courts have emphasized that harassment consisting of unwelcome remarks \*\*2287 and touching is motivated solely by individual desires and serves no purpose of the employer. For this reason, courts have likened hostile environment sexual ha-

arrassment to the classic "frolic and detour" for which an employer has no vicarious liability.

These cases ostensibly stand in some tension with others arising outside Title VII, where the scope of employment has been defined broadly enough to hold employers vicariously liable for intentional torts that were in no sense inspired by any purpose to serve the employer. In [Ira S. Bushey & Sons, Inc. v. United States](#), 398 F.2d 167 (C.A.2 1968), for example, \*795 the Second Circuit charged the Government with vicarious liability for the deprecation of a drunken sailor returning to his ship after a night's carouse, who inexplicably opened valves that flooded a drydock, damaging both the drydock and the ship. Judge Friendly acknowledged that the sailor's conduct was not remotely motivated by a purpose to serve his employer, but relied on the "deeply rooted sentiment that a business enterprise cannot justly disclaim responsibility for accidents which may fairly be said to be characteristic of its activities," and imposed vicarious liability on the ground that the sailor's conduct "was not so 'unforeseeable' as to make it unfair to charge the Government with responsibility." *Id.*, at 171. Other examples of an expansive sense of scope of employment are readily found, see, e.g., [Leonbruno v. Champlain Silk Mills](#), 229 N.Y. 470, 128 N.E. 711 (1920) (opinion of Cardozo, J.) (employer was liable under worker's compensation statute for eye injury sustained when employee threw an apple at another; the accident arose "in the course of employment" because such horseplay should be expected); [Carr v. Wm. C. Crowell Co.](#), 28 Cal.2d 652, 171 P.2d 5 (1946) (employer liable for actions of carpenter who attacked a co-employee with a hammer). Courts, in fact, have treated scope of employment generously enough to include sexual assaults. See, e.g., [Primeaux v. United States](#), 102 F.3d 1458, 1462-1463 (C.A.8 1996) (federal police officer on limited duty sexually assaulted stranded motorist); [Mary M. v. Los Angeles](#), 54 Cal.3d 202, 216-221, 285 Cal.Rptr. 99, 107-111, 814 P.2d 1341, 1349-1352 (1991) (en banc) (police officer raped motorist after placing her under arrest); [Doe v. Samaritan Counseling Cr.](#), 791 P.2d 344, 348-349 (Alaska 1990) (therapist had sexual relations with patient); [Turner v. State](#), 494 So.2d 1292, 1296 (La.App.1986) (National Guard recruiting officer committed sexual battery during sham physical examinations); [Lyon v. Carey](#), 533 F.2d 649, 655 (C.A.D.C.1976) (furniture delive-

524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662, 66 USLW 4643, 77 Fair Empl.Prac.Cas. (BNA) 14, 157 A.L.R. Fed. 663, 73 Empl. Prac. Dec. P 45,341, 98 Cal. Daily Op. Serv. 5048, 98 Daily Journal D.A.R. 7009, 98 CJ C.A.R. 3375, 11 Fla. L. Weekly Fed. S 699

(Cite as: 524 U.S. 775, 118 S.Ct. 2275)

ryman raped recipient of furniture); [Samuels v. Southern Baptist Hospital](#), 594 So.2d 571, 574 (La.App.1992) (nursing \*796 assistant raped patient). [FN2] The rationales for these decisions have varied, with some courts echoing [Bushey](#) in explaining that the employee's acts were foreseeable and that the employer should in fairness bear the resulting costs of doing business, see, e.g., [Mary M., supra](#), at 218, 285 Cal.Rptr., at 108, 814 P.2d, at 1350, and others finding that the employee's sexual misconduct arose from or was in some way related to the employee's essential duties. See, e.g., [Samuels, supra](#), at 574 (tortious conduct was "reasonably incidental" to the performance of the nursing assistant's duties in caring for a "helpless" patient in a "locked environment").

[FN2]. It bears noting that many courts in non-Title VII cases have held sexual assaults to fall outside the scope of employment. See Note, "[Scope of Employment](#)" [Redefined: Holding Employers Vicariously Liable for Sexual Assaults Committed by their Employees](#), 76 Minn. L.Rev. 1513, 1521-1522, and nn. 33, 34 (1992) (collecting cases).

An assignment to reconcile the run of the Title VII cases with those just cited would be a taxing one. Here it is enough to recognize that their disparate results do not necessarily reflect wildly varying terms of the particular employment contracts involved, but represent differing judgments about the desirability of holding an employer liable for his subordinates' wayward behavior. In the instances in which there is a genuine question about the employer's responsibility for harmful conduct he did not in fact authorize, a holding that the conduct falls within the scope of employment ultimately expresses a conclusion not of fact but of law. As one eminent authority has observed, the "highly indefinite phrase" is "devoid of meaning in \*\*2288 itself" and is "obviously no more than a bare formula to cover the unordered and unauthorized acts of the servant for which it is found to be expedient to charge the master with liability, as well as to exclude other acts for which it is not." W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keaton on Law of Torts* 502 (5th ed.1984); see also Seavey, *Speculations as to "Respondeat Superior,"* in *Studies in Agency* 129, 155 \*797 (1949) ("The liability of a master to a third person for the torts of a ser-

vant has been widely extended by aid of the elastic phrase 'scope of the employment' which may be used to include all which the court wishes to put into it"). Older cases, for example, treated smoking by an employee during working hours as an act outside the scope of employment, but more recently courts have generally held smoking on the job to fall within the scope. *Prosser & Keeton, supra*, at 504, and n. 23. It is not that employers formerly did not authorize smoking but have now begun to do so, or that employees previously smoked for their own purposes but now do so to serve the employer. We simply understand smoking differently now and have revised the old judgments about what ought to be done about it.

The proper analysis here, then, calls not for a mechanical application of indefinite and malleable factors set forth in the Restatement, see, e.g., §§ 219, 228, 229, but rather an inquiry into the reasons that would support a conclusion that harassing behavior ought to be held within the scope of a supervisor's employment, and the reasons for the opposite view. The Restatement itself points to such an approach, as in the commentary that the "ultimate question" in determining the scope of employment is "whether or not it is just that the loss resulting from the servant's acts should be considered as one of the normal risks to be borne by the business in which the servant is employed." *Id.*, § 229, Comment *a*. See generally [Taber v. Maine](#), 67 F.3d 1029, 1037 (C.A.2 1995) ("As the leading Torts treatise has put it, 'the integrating principle' of *respondeat superior* is 'that the employer should be liable for those faults that may be fairly regarded as risks of his business, whether they are committed in furthering it or not' " (quoting 5 F. Harper, F. James, & O. Gray, *Law of Torts* § 26.8, pp. 40-41 (2d ed.1986)).

In the case before us, a justification for holding the offensive behavior within the scope of Terry's and Silverman's employment was well put in Judge Barrett's dissent: "[A] \*798 pervasively hostile work environment of sexual harassment is never (one would hope) authorized, but the supervisor is clearly charged with maintaining a productive, safe work environment. The supervisor directs and controls the conduct of the employees, and the manner of doing so may inure to the employer's benefit or detriment, including subjecting the employer to Title VII liabili-

524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662, 66 USLW 4643, 77 Fair Empl.Prac.Cas. (BNA) 14, 157 A.L.R. Fed. 663, 73 Empl. Prac. Dec. P 45,341, 98 Cal. Daily Op. Serv. 5048, 98 Daily Journal D.A.R. 7009, 98 CJ C.A.R. 3375, 11 Fla. L. Weekly Fed. S 699

(Cite as: 524 U.S. 775, 118 S.Ct. 2275)

ty." [111 F.3d, at 1542](#) (opinion dissenting in part and concurring in part). It is by now well recognized that hostile environment sexual harassment by supervisors (and, for that matter, coemployees) is a persistent problem in the workplace. See Lindemann & Kadue 4-5 (discussing studies showing prevalence of sexual harassment); [Ellerth, 123 F.3d, at 511](#) (Posner, C.J., concurring and dissenting) ("[E]veryone knows by now that sexual harassment is a common problem in the American workplace"). An employer can, in a general sense, reasonably anticipate the possibility of such conduct occurring in its workplace, and one might justify the assignment of the burden of the untoward behavior to the employer as one of the costs of doing business, to be charged to the enterprise rather than the victim. As noted, *supra*, at 2287-2288, developments like this occur from time to time in the law of agency.

Two things counsel us to draw the contrary conclusion. First, there is no reason to suppose that Congress wished courts to ignore the traditional distinction between acts falling within the scope and acts amounting to what the older law called frolics or detours from the course of employment. Such a distinction can readily be applied to the spectrum of possible harassing conduct by supervisors, as the following examples show. First, a supervisor might discriminate racially in job assignments in order to placate the prejudice pervasive in the labor force. Instances of this variety of the heckler's veto \*\*2289 would be consciously intended to further the employer's interests by preserving peace in the workplace. Next, supervisors might reprimand male employees for workplace failings with banter, but respond to women's \*799 shortcomings in harsh or vulgar terms. A third example might be the supervisor who, as here, expresses his sexual interests in ways having no apparent object whatever of serving an interest of the employer. If a line is to be drawn between scope and frolic, it would lie between the first two examples and the third, and it thus makes sense in terms of traditional agency law to analyze the scope issue, in cases like the third example, just as most federal courts addressing that issue have done, classifying the harassment as beyond the scope of employment.

The second reason goes to an even broader unanimity of views among the holdings of District Courts and

Courts of Appeals thus far. Those courts have held not only that the sort of harassment at issue here was outside the scope of supervisors' authority, but, by uniformly judging employer liability for co-worker harassment under a negligence standard, they have also implicitly treated such harassment as outside the scope of common employees' duties as well. See [Blankenship v. Parke Care Centers, Inc., 123 F.3d 868, 872-873 \(C.A.6 1997\)](#), cert. denied, [522 U.S. 1110, 118 S.Ct. 1039, 140 L.Ed.2d 105 \(1998\)](#); [Fleming v. Boeing Co., 120 F.3d 242, 246 \(C.A.11 1997\)](#); [Perry v. Ethan Allen, Inc., 115 F.3d 143, 149 \(C.A.2 1997\)](#); [Yamaguchi v. United States Dept. of Air Force, 109 F.3d 1475, 1483 \(C.A.9 1997\)](#); [Varner v. National Super Markets, Inc., 94 F.3d 1209, 1213 \(C.A.8 1996\)](#), cert. denied, [519 U.S. 1110, 117 S.Ct. 946, 136 L.Ed.2d 835 \(1997\)](#); [McKenzie v. Illinois Dept. of Transp., 92 F.3d 473, 480 \(C.A.7 1996\)](#); [Andrade, 88 F.3d, at 261](#); [Waymire v. Harris County, 86 F.3d 424, 428-429 \(C.A.5 1996\)](#); [Hirase-Doi v. U.S. West Communications, Inc., 61 F.3d 777, 783 \(C.A.10 1995\)](#); [Andrews v. Philadelphia, 895 F.2d 1469, 1486 \(C.A.3 1990\)](#); cf. [Morrison v. Carleton Woolen Mills, Inc., 108 F.3d 429, 438 \(C.A.1 1997\)](#) (applying "knew or should have known" standard to claims of environmental harassment by a supervisor); see also [29 CFR § 1604.11\(d\) \(1997\)](#) (employer is liable for co-worker harassment if it "knows or should have known of the conduct, unless it can show that it took immediate and appropriate\*800 corrective action"); 3 L. Larson & A. Larson, *Employment Discrimination* § 46.07[4][a], p. 46-101 (2d ed.1998) (courts "uniformly" apply Equal Employment Opportunity Commission (EEOC) rule; "[i]t is not a controversial area"). If, indeed, the cases did not rest, at least implicitly, on the notion that such harassment falls outside the scope of employment, their liability issues would have turned simply on the application of the scope-of-employment rule. Cf. [Hunter v. Allis-Chalmers, Corp., 797 F.2d 1417, 1422 \(C.A.7 1986\)](#) (noting that employer will not usually be liable under *respondeat superior* for employee's racial harassment because it "would be the rare case where racial harassment ... could be thought by the author of the harassment to help the employer's business").

It is quite unlikely that these cases would escape efforts to render them obsolete if we were to hold that supervisors who engage in discriminatory harassment are necessarily acting within the scope of their em-

524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662, 66 USLW 4643, 77 Fair Empl.Prac.Cas. (BNA) 14, 157 A.L.R. Fed. 663, 73 Empl. Prac. Dec. P 45,341, 98 Cal. Daily Op. Serv. 5048, 98 Daily Journal D.A.R. 7009, 98 CJ C.A.R. 3375, 11 Fla. L. Weekly Fed. S 699

(Cite as: 524 U.S. 775, 118 S.Ct. 2275)

ployment. The rationale for placing harassment within the scope of supervisory authority would be the fairness of requiring the employer to bear the burden of foreseeable social behavior, and the same rationale would apply when the behavior was that of coemployees. The employer generally benefits just as obviously from the work of common employees as from the work of supervisors; they simply have different jobs to do, all aimed at the success of the enterprise. As between an innocent employer and an innocent employee, if we use scope-of-employment reasoning to require the employer to bear the cost of an actionably hostile workplace created by one class of employees (*i.e.*, supervisors), it could appear just as appropriate to do the same when the environment was created by another class (*i.e.*, co-workers).

The answer to this argument might well be to point out that the scope of supervisory employment may be treated separately by recognizing that supervisors have special authority enhancing their capacity to harass, and that the \*801 employer can guard against their misbehavior more easily because their \*\*2290 numbers are by definition fewer than the numbers of regular employees. But this answer happens to implicate an entirely separate category of agency law (to be considered in the next section), which imposes vicarious liability on employers for tortious acts committed by use of particular authority conferred as an element of an employee's agency relationship with the employer. Since the virtue of categorical clarity is obvious, it is better to reject reliance on misuse of supervisory authority (without more) as irrelevant to scope-of-employment analysis.

## 2

The Court of Appeals also rejected vicarious liability on the part of the City insofar as it might rest on the concluding principle set forth in [§ 219\(2\)\(d\)](#) of the Restatement, that an employer "is not subject to liability for the torts of his servants acting outside the scope of their employment unless ... the servant purported to act or speak on behalf of the principal and there was reliance on apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation." Faragher points to several ways in which the agency relationship aided Terry and Silverman in carrying out their harassment. She argues that in general offending supervisors can abuse their authority to keep subordinates in their

presence while they make offensive statements, and that they implicitly threaten to misuse their supervisory powers to deter any resistance or complaint. Thus, she maintains that power conferred on Terry and Silverman by the City enabled them to act for so long without provoking defiance or complaint.

The City, however, contends that [§ 219\(2\)\(d\)](#) has no application here. It argues that the second qualification of the subsection, referring to a servant "aided in accomplishing the tort by the existence of the agency relation," merely "refines" the one preceding it, which holds the employer vicariously \*802 liable for its servant's abuse of apparent authority. Brief for Respondent 30-31, and n. 24. But this narrow reading is untenable; it would render the second qualification of [§ 219\(2\)\(d\)](#) almost entirely superfluous (and would seem to ask us to shut our eyes to the potential effects of supervisory authority, even when not explicitly invoked). The illustrations accompanying this subsection make clear that it covers not only cases involving the abuse of apparent authority, but also cases in which tortious conduct is made possible or facilitated by the existence of the actual agency relationship. See Restatement [§ 219](#), Comment *e* (noting employer liability where "the servant may be able to cause harm because of his position as agent, as where a telegraph operator sends false messages purporting to come from third persons" and where the manager who operates a store "for an undisclosed principal is enabled to cheat the customers because of his position"); *id.*, [§ 247](#), Illustration 1 (noting a newspaper's liability for a libelous editorial published by an editor acting for his own purposes).

We therefore agree with Faragher that in implementing Title VII it makes sense to hold an employer vicariously liable for some tortious conduct of a supervisor made possible by abuse of his supervisory authority, and that the aided-by-agency-relation principle embodied in [§ 219\(2\)\(d\)](#) of the Restatement provides an appropriate starting point for determining liability for the kind of harassment presented here. [\[FN3\]](#) Several courts, indeed, have noted what Faragher has argued, that there is a sense in which a harassing supervisor is always assisted in his misconduct by the supervisory relationship. See, *e.g.*, \*803 [Rodgers v. Western-Southern Life Ins. Co.](#), 12 F.3d 668, 675 (C.A.7 1993); [Taylor v. Metzger](#), 152 N.J. 490, 505, 706 A.2d 685, 692 (1998) (emphasiz-

524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662, 66 USLW 4643, 77 Fair Empl.Prac.Cas. (BNA) 14, 157 A.L.R. Fed. 663, 73 Empl. Prac. Dec. P 45,341, 98 Cal. Daily Op. Serv. 5048, 98 Daily Journal D.A.R. 7009, 98 CJ C.A.R. 3375, 11 Fla. L. Weekly Fed. S 699

(Cite as: **524 U.S. 775, 118 S.Ct. 2275**)

ing that a supervisor's conduct may have a greater impact than that of colleagues at the same level); cf. [Torres](#), 116 F.3d, at 631. See also [White v. Monsanto Co.](#), 585 So.2d 1205, 1209-1210 (La.1991) (a supervisor's harassment of a subordinate is more apt to rise to **\*\*2291** the level of intentional infliction of emotional distress than comparable harassment by a coemployee); [Contreras v. Crown Zellerbach Corp.](#), 88 Wash.2d 735, 740, 565 P.2d 1173, 1176 (1977) (same); [Alcorn v. Anbro Engineering, Inc.](#), 2 Cal.3d 493, 498-499, and n. 2, 86 Cal.Rptr. 88, 90-92, and n. 2, 468 P.2d 216, 218-219, and n. 2 (1970) (same). The agency relationship affords contact with an employee subjected to a supervisor's sexual harassment, and the victim may well be reluctant to accept the risks of blowing the whistle on a superior. When a person with supervisory authority discriminates in the terms and conditions of subordinates' employment, his actions necessarily draw upon his superior position over the people who report to him, or those under them, whereas an employee generally cannot check a supervisor's abusive conduct the same way that she might deal with abuse from a co-worker. 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." Estrich, [Sex at Work](#), 43 *Stan. L.Rev.* 813, 854 (1991). Recognition of employer liability when discriminatory misuse of supervisory authority alters the terms and conditions of a victim's employment is underscored by the fact that the employer has a greater opportunity to guard against misconduct by supervisors than by common workers; employers have greater opportunity and incentive to screen them, train them, and monitor their performance.

**FN3.** We say "starting point" because our obligation here is not to make a pronouncement of agency law in general or to transplant [§ 219\(2\)\(d\)](#) into Title VII. Rather, it is to adapt agency concepts to the practical objectives of Title VII. As we said in [Meritor Savings Bank, FSB v. Vinson](#), 477 U.S. 57, 72, 106 S.Ct. 2399, 2408, 91 L.Ed.2d 49 (1986), "common-law principles may

**not be transferable in all their particulars to Title VII."**

**\*804** In sum, there are good reasons for vicarious liability for misuse of supervisory authority. That rationale must, however, satisfy one more condition. 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, [\[FN4\]](#) and there is obviously some tension between that holding and the position that a supervisor's misconduct aided by supervisory authority subjects the employer to liability vicariously; if the "aid" may be the unspoken suggestion of retaliation by misuse of supervisory authority, the risk of automatic liability is high. To counter it, we think there are two basic alternatives, one being to require proof of some affirmative invocation of that authority by the harassing supervisor, the other to recognize an affirmative defense to liability in some circumstances, even when a supervisor has created the actionable environment.

**FN4.** We are bound to honor [Meritor](#) on this point not merely because of the high value placed on *stare decisis* in statutory interpretation, *supra*, at 2286, but for a further reason as well. With the amendments enacted by the Civil Rights Act of 1991, Congress both expanded the monetary relief available under Title VII to include compensatory and punitive damages, see § 102, 105 Stat. 1072, [42 U.S.C. § 1981a](#), and modified the statutory grounds of several of our decisions, see § 101 *et seq.* The decision of Congress to leave [Meritor](#) intact is conspicuous. We thus have to assume that in expanding employers' potential liability under Title VII, Congress relied on our statements in [Meritor](#) about the limits of employer liability. To disregard those statements now (even if we were convinced of reasons for doing so) would be not only to disregard *stare decisis* in statutory interpretation, but to substitute our revised judgment about the proper allocation of the costs of harassment for Congress's considered decision on the subject.

There is certainly some authority for requiring active

524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662, 66 USLW 4643, 77 Fair Empl.Prac.Cas. (BNA) 14, 157 A.L.R. Fed. 663, 73 Empl. Prac. Dec. P 45,341, 98 Cal. Daily Op. Serv. 5048, 98 Daily Journal D.A.R. 7009, 98 CJ C.A.R. 3375, 11 Fla. L. Weekly Fed. S 699

(Cite as: 524 U.S. 775, 118 S.Ct. 2275)

or affirmative, as distinct from passive or implicit, misuse of supervisory authority before liability may be imputed. That is the way some courts have viewed the familiar cases holding the employer liable for discriminatory employment **\*805** action with tangible consequences, like firing and demotion. See *supra*, at 2284. And we have already noted some examples of liability provided by the Restatement itself, which suggest that an affirmative misuse of power might be required. See *supra*, at 2290 (telegraph operator sends false messages, a store manager cheats customers, editor publishes libelous editorial).

But neat examples illustrating the line between the affirmative and merely implicit uses of power are not easy to come by in considering management behavior. Supervisors do not make speeches threatening sanctions whenever they make requests in the **\*\*2292** legitimate exercise of managerial authority, and yet every subordinate employee knows the sanctions exist; this is the reason that courts have consistently held that acts of supervisors have greater power to alter the environment than acts of coemployees generally, see *supra*, at 2290-2291. How far from the course of ostensible supervisory behavior would a company officer have to step before his orders would not reasonably be seen as actively using authority? Judgment calls would often be close, the results would often seem disparate even if not demonstrably contradictory, and the temptation to litigate would be hard to resist. We think plaintiffs and defendants alike would be poorly served by an active-use rule.

The other basic alternative to automatic liability would avoid this particular temptation to litigate, but allow an employer to show as an affirmative defense to liability that the employer had exercised reasonable care to avoid harassment and to eliminate it when it might occur, and that the complaining employee had failed to act with like reasonable care to take advantage of the employer's safeguards and otherwise to prevent harm that could have been avoided. This composite defense would, we think, implement the statute sensibly, for reasons that are not hard to fathom.

[5] Although Title VII seeks "to make persons whole for injuries suffered on account of unlawful employment discrimination," **\*806** *Albemarle Paper Co. v.*

*Moody*, 422 U.S. 405, 418, 95 S.Ct. 2362, 2372, 45 L.Ed.2d 280 (1975), its "primary objective," like that of any statute meant to influence primary conduct, is not to provide redress but to avoid harm. *Id.*, at 417, 95 S.Ct., at 2371. As long ago as 1980, the EEOC, charged with the enforcement of Title VII, 42 U.S.C. § 2000e-4, adopted regulations advising employers to "take all steps necessary to prevent sexual harassment from occurring, such as ... informing employees of their right to raise and how to raise the issue of harassment." 29 CFR § 1604.11(f) (1997), and in 1990 the EEOC issued a policy statement enjoining employers to establish a complaint procedure "designed to encourage victims of harassment to come forward [without requiring] a victim to complain first to the offending supervisor." EEOC Policy Guidance on Sexual Harassment, 8 FEP Manual 405:6699 (Mar. 19, 1990) (internal quotation marks omitted). It would therefore implement clear statutory policy and complement the Government's Title VII enforcement efforts to recognize the employer's affirmative obligation to prevent violations and give credit here to employers who make reasonable efforts to discharge their duty. Indeed, a theory of vicarious liability for misuse of supervisory power would be at odds with the statutory policy if it failed to provide employers with some such incentive.

The requirement to show that the employee has failed in a coordinate duty to avoid or mitigate harm reflects an equally obvious policy imported from the general theory of damages, that a victim has a duty "to use such means as are reasonable under the circumstances to avoid or minimize the damages" that result from violations of the statute. *Ford Motor Co. v. EEOC*, 458 U.S. 219, 231, n. 15, 102 S.Ct. 3057, 3065, n. 15, 73 L.Ed.2d 721 (1982) (quoting C. McCormick, *Law of Damages* 127 (1935) (internal quotation marks omitted)). An employer may, for example, have provided a proven, effective mechanism for reporting and resolving complaints of sexual harassment, available to the employee without undue risk or expense. If the plaintiff unreasonably **\*807** failed to avail herself of the employer's preventive or remedial apparatus, she should not recover damages that could have been avoided if she had done so. If the victim could have avoided harm, no liability should be found against the employer who had taken reasonable care, and if damages could reasonably have been mitigated no award against a liable em-

524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662, 66 USLW 4643, 77 Fair Empl.Prac.Cas. (BNA) 14, 157 A.L.R. Fed. 663, 73 Empl. Prac. Dec. P 45,341, 98 Cal. Daily Op. Serv. 5048, 98 Daily Journal D.A.R. 7009, 98 CJ C.A.R. 3375, 11 Fla. L. Weekly Fed. S 699

(Cite as: 524 U.S. 775, 118 S.Ct. 2275)

ployer should reward a plaintiff for what her own efforts could have avoided.

[6][7][8][9] In order to accommodate the principle of vicarious liability for harm caused by misuse of supervisory authority, as well as Title VII's equally basic policies of encouraging forethought by employers and saving action by objecting employees, we adopt the following holding in this case and in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998), also decided today. An employer is subject **\*\*2293** to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence, see *Fed. Rule Civ. Proc. 8(c)*. The defense comprises two necessary elements: (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. While proof that an employer had promulgated an anti-harassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, a **\*808** demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense. No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment. See *Burlington*, 524 U.S., at 762-763, 118 S.Ct., at 2269.

[10] Applying these rules here, we believe that the judgment of the Court of Appeals must be reversed. The District Court found that the degree of hostility in the work environment rose to the actionable level and was attributable to Silverman and Terry. It is

undisputed that these supervisors "were granted virtually unchecked authority" over their subordinates, "directly controll[ing] and supervis[ing] all aspects of [Faragher's] day-to-day activities." 111 F.3d, at 1544 (Barkett, J., dissenting in part and concurring in part). It is also clear that Faragher and her colleagues were "completely isolated from the City's higher management." *Ibid*. The City did not seek review of these findings.

[11] While the City would have an opportunity to raise an affirmative defense if there were any serious prospect of its presenting one, it appears from the record that any such avenue is closed. The District Court found that the City had entirely failed to disseminate its policy against sexual harassment among the beach employees and that its officials made no attempt to keep track of the conduct of supervisors like Terry and Silverman. The record also makes clear that the City's policy did not include any assurance that the harassing supervisors could be bypassed in registering complaints. App. 274. Under such circumstances, we hold as a matter of law that the City could not be found to have exercised reasonable care to prevent the supervisors' harassing conduct. Unlike the employer of a small work force, who might expect that sufficient care to prevent tortious behavior could be exercised informally, those responsible for city operations could not reasonably have thought that precautions against hostile environments in any one of many departments in far-**\*809** flung locations could be effective without communicating some formal policy against harassment, with a sensible complaint procedure.

We have drawn this conclusion without overlooking two possible grounds upon which the City might argue for the opportunity to litigate further. There is, first, the Court of Appeals's indulgent gloss on the relevant evidence: "There is some evidence that the City did not effectively disseminate among Marine Safety employees its sexual harassment policy." 111 F.3d, at 1539, n. 11. But, in contrast to the Court of Appeals's characterization, the District Court made an explicit finding of a "complete failure on the part of the City to disseminate said policy among Marine Safety Section employees." 864 F.Supp., at 1560. The evidence supports the District Court's finding and there is no contrary claim before us.

524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662, 66 USLW 4643, 77 Fair Empl.Prac.Cas. (BNA) 14, 157 A.L.R. Fed. 663, 73 Empl. Prac. Dec. P 45,341, 98 Cal. Daily Op. Serv. 5048, 98 Daily Journal D.A.R. 7009, 98 CJ C.A.R. 3375, 11 Fla. L. Weekly Fed. S 699  
**(Cite as: 524 U.S. 775, 118 S.Ct. 2275)**

The second possible ground for pursuing a defense was asserted by the City in its argument addressing the possibility of negligence liability in this case. It said that it should not be held liable for failing to promulgate an antiharassment policy, because there was no apparent duty to do so in the 1985- 1990 period. The City purports to rest this argument on the position of the EEOC during the period mentioned, but it turns out that the record on this point is quite against the **\*\*2294** City's position. Although the EEOC issued regulations dealing with promulgating a statement of policy and providing a complaint mechanism in 1990, see *supra*, at 2292, ever since 1980 its regulations have called for steps to prevent violations, such as informing employees of their rights and the means to assert them, *ibid.* The City, after all, adopted an antiharassment policy in 1986.

The City points to nothing that might justify a conclusion by the District Court on remand that the City had exercised reasonable care. Nor is there any reason to remand for consideration of Faragher's efforts to mitigate her own damages, since the award to her was solely nominal.

### \*810 3

The Court of Appeals also rejected the possibility that it could hold the City liable for the reason that it knew of the harassment vicariously through the knowledge of its supervisors. We have no occasion to consider whether this was error, however. We are satisfied that liability on the ground of vicarious knowledge could not be determined without further factfinding on remand, whereas the reversal necessary on the theory of supervisory harassment renders any remand for consideration of imputed knowledge entirely unjustifiable (as would be any consideration of negligence as an alternative to a theory of vicarious liability here).

### III

The judgment of the Court of Appeals for the Eleventh Circuit is reversed, and the case is remanded for reinstatement of the judgment of the District Court.

It is so ordered.

Justice [THOMAS](#), with whom Justice [SCALIA](#)

joins, dissenting.

For the reasons given in my dissenting opinion in [Burlington Industries, Inc. v. Ellerth](#), 524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998), absent an adverse employment consequence, an employer cannot be held vicariously liable if a supervisor creates a hostile work environment. Petitioner suffered no adverse employment consequence; thus the Court of Appeals was correct to hold that the City of Boca Raton (City) is not vicariously liable for the conduct of Chief Terry and Lieutenant Silverman. Because the Court reverses this judgment, I dissent.

As for petitioner's negligence claim, the District Court made no finding as to the City's negligence, and the Court of Appeals did not directly consider the issue. I would therefore remand the case to the District Court for further proceedings on this question alone. I disagree with the Court's **\*811** conclusion that merely because the City did not disseminate its sexual harassment policy, it should be liable as a matter of law. See *ante*, at 2293. [\[FN1\]](#) The City should be allowed to show either that: (1) there was a reasonably available avenue through which petitioner could have complained to a City official who supervised both Chief Terry and Lieutenant Silverman, see Brief for United States and EEOC as *Amici Curiae* in [Meritor Savings Bank, FSB v. Vinson](#), O.T.1985, No. 84-1979, p. 26, [\[FN2\]](#) or (2) it would not have learned of the harassment even if the policy had been distributed. [\[FN3\]](#) Petitioner, as the plaintiff, would of course bear the burden of proving the City's negligence.

[FN1.](#) The harassment alleged in this case occurred intermittently over a 5-year period between 1985 and 1990; the District Court's factual findings do not indicate when in 1990 it ceased. It was only in March 1990 that the Equal Employment Opportunity Commission (EEOC) issued a "policy statement" "enjoining" employers to establish complaint procedures for sexual harassment. See *ante*, at 2292. The 1980 Guideline on which the Court relies--because the EEOC has no substantive rule-making authority under Title VII, the Court is inaccurate to refer to it as a "regulatory [n]," see *ante*, at 2294--was wholly precatory

524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662, 66 USLW 4643, 77 Fair Empl.Prac.Cas. (BNA) 14, 157 A.L.R. Fed. 663, 73 Empl. Prac. Dec. P 45,341, 98 Cal. Daily Op. Serv. 5048, 98 Daily Journal D.A.R. 7009, 98 CJ C.A.R. 3375, 11 Fla. L. Weekly Fed. S 699

(Cite as: 524 U.S. 775, 118 S.Ct. 2275)

ry and as such cannot establish negligence *per se*. See [29 CFR § 1604.11\(f\) \(1997\)](#) ("An employer should take all steps necessary to prevent sexual harassment from occurring ...").

[FN2](#). The City's Employment Handbook stated that employees with "complaints or grievances" could speak to the City's Personnel and Labor Relations Director about problems at work. See App. 280. The District Court found that the City's Personnel Director, Richard Bender, moved quickly to investigate the harassment charges against Terry and Silverman once they were brought to his attention. See App. to Pet. for Cert. 80a.

[FN3](#). Even after petitioner read the City's sexual harassment policy in 1990, see App. 188, she did not file a charge with City officials. Instead, she filed suit against the City in 1992.

For U.S. Supreme Court Briefs See:

[1997 WL 793076 \(Appellate Brief\)](#), BRIEF FOR PETITIONER, (December 29, 1997)

[1997 WL 33485651](#) (Appellate Petition, Motion and Filing), Petition for a Writ of Certiorari, (August 13, 1997)

For Transcript of Oral Argument See:

[1998 WL 146704 \(U.S.Oral.Arg.\)](#), Oral Argument, (March 25, 1998)

524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662, 66 USLW 4643, 77 Fair Empl.Prac.Cas. (BNA) 14, 157 A.L.R. Fed. 663, 73 Empl. Prac. Dec. P 45,341, 98 Cal. Daily Op. Serv. 5048, 98 Daily Journal D.A.R. 7009, 98 CJ C.A.R. 3375, 11 Fla. L. Weekly Fed. S 699

END OF DOCUMENT

Supreme Court of the United States  
 BURLINGTON INDUSTRIES, INC., Petitioner,  
 v.  
 Kimberly B. ELLERTH.  
 No. 97-569.

Argued April 22, 1998.

Decided June 26, 1998.

Employee who had suffered no adverse job consequences as result of alleged sexual harassment by supervisor brought suit against former employer under Title VII alleging that sexual harassment forced her constructive discharge. The United States District Court for the Northern District of Illinois, [Castillo, J., 912 F.Supp. 1101](#), entered summary judgment in favor of employer. The Seventh Circuit Court of Appeals, [123 F.3d 490](#), reversed. Employer petitioned for certiorari. The Supreme Court, Justice [Kennedy](#), held that: (1) employer is subject to vicarious liability for an actionable hostile environment created by a supervisor with immediate or successively higher authority over employee; (2) in those cases in which employee has suffered no tangible job consequences as result of supervisor's actions, employer may raise an affirmative defense to liability or damages; and (3) affirmative defense requires employer to show that it exercised reasonable care to prevent and correct promptly any sexually harassing behavior and that employee unreasonably failed to take advantage of any preventive or corrective opportunities provided or to avoid harm otherwise.

Affirmed.

Justice [Ginsburg](#) filed opinion concurring in judgment.

Justice [Thomas](#) filed dissenting opinion, in which Justice [Scalia](#) joined.

West Headnotes

[\[1\] Civil Rights](#)  **1184**  
[78k1184 Most Cited Cases](#)

(Formerly 78k167)

[\[1\] Civil Rights](#)  **1185**  
[78k1185 Most Cited Cases](#)  
 (Formerly 78k167)

[\[1\] Civil Rights](#)  **1528**  
[78k1528 Most Cited Cases](#)  
 (Formerly 78k371)

Terms quid pro quo and hostile work environment are not controlling for purposes of determining employer liability for harassment by supervisor; however, terms are helpful in making rough demarcation between Title VII cases in which sexual harassment threats are carried out and where they are not or are absent altogether, and thus terms are relevant when there is threshold question whether employee can prove discrimination in violation of Title VII. Civil Rights Act of 1964, § 701 et seq., [42 U.S.C.A. § 2000e](#) et seq.

[\[2\] Civil Rights](#)  **1183**  
[78k1183 Most Cited Cases](#)  
 (Formerly 78k167)

[\[2\] Civil Rights](#)  **1184**  
[78k1184 Most Cited Cases](#)  
 (Formerly 78k167)

[\[2\] Civil Rights](#)  **1185**  
[78k1185 Most Cited Cases](#)  
 (Formerly 78k167)

When employee proves that tangible employment action resulted from refusal to submit to supervisor's sexual demands, he or she establishes that employment decision itself constitutes change in terms and conditions of employment that is actionable under Title VII; however, for any sexual harassment preceding employment decision to be actionable, conduct must be severe or pervasive. Civil Rights Act of 1964, § 701 et seq., [42 U.S.C.A. § 2000e](#) et seq.

[\[3\] Civil Rights](#)  **1528**  
[78k1528 Most Cited Cases](#)  
 (Formerly 78k371)

524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633, 66 USLW 4634, 77 Fair Empl.Prac.Cas. (BNA) 1, 170 A.L.R. Fed. 677, 73 Empl. Prac. Dec. P 45,340, 98 Cal. Daily Op. Serv. 5029, 98 Daily Journal D.A.R. 6991, 98 CJ C.A.R. 3405, 11 Fla. L. Weekly Fed. S 692

(Cite as: 524 U.S. 742, 118 S.Ct. 2257)

Federal law, based on general common law principles of agency, governs employer's vicarious liability under Title VII for sexual harassment by supervisor, although common law principles may not be wholly transferable to Title VII. Civil Rights Act of 1964, § 701 et seq., [42 U.S.C.A. § 2000e](#) et seq.

**[4] Labor and Employment** 🔑3026

[231Hk3026](#) [Most Cited Cases](#)

(Formerly 255k306 Master and Servant)

**[4] Labor and Employment** 🔑3045

[231Hk3045](#) [Most Cited Cases](#)

(Formerly 255k302(2) Master and Servant)

Employer may be liable for both negligent and intentional torts committed by employee within scope of his or her employment.

**[5] Civil Rights** 🔑1528

[78k1528](#) [Most Cited Cases](#)

(Formerly 78k371)

General rule is that sexual harassment by supervisor is not conduct within scope of employment for purposes of employer liability under agency principles.

**[6] Civil Rights** 🔑1189

[78k1189](#) [Most Cited Cases](#)

(Formerly 78k167)

Although supervisor's sexual harassment is outside scope of employment because conduct was for personal motives, employer can be liable, nonetheless, where its own negligence is cause of harassment; employer is negligent with respect to sexual harassment if it knew or should have known about the conduct and failed to stop it.

**[7] Principal and Agent** 🔑159(1)

[308k159\(1\)](#) [Most Cited Cases](#)

Apparent authority is relevant to principal's vicarious liability where agent purports to exercise power which he or she does not have, as distinct from where agent threatens to misuse actual power.

**[8] Civil Rights** 🔑1528

[78k1528](#) [Most Cited Cases](#)

(Formerly 78k371)

Under "aided in the agency relation" standard for vicarious liability, more than mere presence of employment relation that aids in commission of harass-

ment is necessary to hold employer liable for supervisor's action; however, whatever exact contours of standard, vicarious liability may be found under standard when supervisor's discriminatory act results in tangible employment action against employee.

**[9] Civil Rights** 🔑1528

[78k1528](#) [Most Cited Cases](#)

(Formerly 78k371)

Tangible employment action taken by supervisor becomes for Title VII purposes the act of employer. Civil Rights Act of 1964, §§ 701 et seq., 701(b), [42 U.S.C.A. §§ 2000e](#) et seq., [2000e\(b\)](#).

**[10] Civil Rights** 🔑1147

[78k1147](#) [Most Cited Cases](#)

(Formerly 78k167)

**[10] Civil Rights** 🔑1185

[78k1185](#) [Most Cited Cases](#)

(Formerly 78k167)

**[10] Civil Rights** 🔑1528

[78k1528](#) [Most Cited Cases](#)

(Formerly 78k371)

**[10] Civil Rights** 🔑1549

[78k1549](#) [Most Cited Cases](#)

(Formerly 78k387)

Employer is subject to vicarious liability to victimized employee for actionable hostile environment created by supervisor with immediate (or successively higher) authority over employee; when no tangible employment action is taken, employer may raise affirmative defense to liability or damages, subject to proof by preponderance of the evidence. Civil Rights Act of 1964, § 701 et seq., [42 U.S.C.A. § 2000e](#) et seq.

**[11] Civil Rights** 🔑1189

[78k1189](#) [Most Cited Cases](#)

(Formerly 78k167)

**[11] Civil Rights** 🔑1528

[78k1528](#) [Most Cited Cases](#)

(Formerly 78k371)

Employer's affirmative defense to vicarious liability for supervisor's creation of hostile work environment

524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633, 66 USLW 4634, 77 Fair Empl.Prac.Cas. (BNA) 1, 170 A.L.R. Fed. 677, 73 Empl. Prac. Dec. P 45,340, 98 Cal. Daily Op. Serv. 5029, 98 Daily Journal D.A.R. 6991, 98 CJ C.A.R. 3405, 11 Fla. L. Weekly Fed. S 692

(Cite as: 524 U.S. 742, 118 S.Ct. 2257)

comprises two necessary elements: (a) that employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by employer or to avoid harm otherwise. Civil Rights Act of 1964, § 701 et seq., [42 U.S.C.A. § 2000e](#) et seq.

**[12] Civil Rights**  **1528**  
[78k1528 Most Cited Cases](#)

(Formerly 78k371)

Employer has no affirmative defense to vicarious liability for supervisor's harassing conduct in violation of Title VII when supervisor's harassment culminates in tangible employment action, such as discharge, demotion, or undesirable reassignment. Civil Rights Act of 1964, § 701 et seq., [42 U.S.C.A. § 2000e](#) et seq.

**[13] Civil Rights**  **1185**  
[78k1185 Most Cited Cases](#)

(Formerly 78k167)

**[13] Civil Rights**  **1189**  
[78k1189 Most Cited Cases](#)

(Formerly 78k167)

**[13] Civil Rights**  **1528**  
[78k1528 Most Cited Cases](#)

(Formerly 78k371)

Employer might be held vicariously liable under Title VII for supervisor's making unwelcome and threatening sexual advances to employee, even though conduct did not result in tangible job consequences for employee; however, employer could avoid liability by showing by preponderance of evidence that it exercised reasonable care to prevent and correct promptly any sexually harassing behavior and employee unreasonably failed to use preventive or corrective measures provided by employer. Civil Rights Act of 1964, § 701 et seq., [42 U.S.C.A. § 2000e](#) et seq.

**\*\*2259 \*742 Syllabus** [\[FN\\*\]](#)

[FN\\*](#) The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See [United States v.](#)

[Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.](#)

Respondent Kimberly Ellerth quit her job after 15 months as a salesperson in one of petitioner Burlington Industries' many divisions, allegedly because she had been subjected to constant sexual harassment by one of her supervisors, Ted Slowik. Slowik was a midlevel manager who had authority to hire and promote employees, subject to higher approval, but was not considered a policymaker. Against a background of repeated boorish and offensive remarks and gestures allegedly made by Slowik, Ellerth places particular emphasis on three incidents where Slowik's comments could be construed as threats to deny her tangible job benefits. Ellerth refused all of Slowik's advances, yet suffered no tangible retaliation and was, in fact, promoted once. Moreover, she never informed anyone in authority about Slowik's conduct, despite knowing Burlington had a policy against sexual harassment. In filing this lawsuit, Ellerth alleged Burlington engaged in sexual harassment and forced her constructive discharge, in violation of Title VII of the Civil Rights Act of 1964, [42 U.S.C. § 2000e](#) et seq. The District Court granted Burlington summary judgment. The Seventh Circuit en banc reversed in a decision that produced eight separate opinions and no consensus for a controlling rationale. Among other things, those opinions focused on whether Ellerth's claim could be categorized as one of *quid pro quo* harassment, and on whether the standard for an employer's liability on such a claim should be vicarious liability or negligence.

*Held:* Under Title VII, an employee who refuses the unwelcome and threatening sexual advances of a supervisor, yet suffers no adverse, tangible job consequences, may recover against the employer without showing the employer is negligent or otherwise at fault for the supervisor's actions, but the employer may interpose an affirmative defense. Pp. 2264-2271.

(a) The Court assumes an important premise yet to be established: A trier of fact could find in Slowik's remarks numerous threats to retaliate against Ellerth if she denied some sexual liberties. The threats, however, were not carried out. Cases based on carried-out threats are referred to often as "*quid pro quo*" cases, as distinct from bothersome attentions or sexual remarks sufficient to create a "hostile work

524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633, 66 USLW 4634, 77 Fair Empl.Prac.Cas. (BNA) 1, 170 A.L.R. Fed. 677, 73 Empl. Prac. Dec. P 45,340, 98 Cal. Daily Op. Serv. 5029, 98 Daily Journal D.A.R. 6991, 98 CJ C.A.R. 3405, 11 Fla. L. Weekly Fed. S 692

(Cite as: 524 U.S. 742, 118 S.Ct. 2257)

environment." Those two terms do not appear in Title VII, which forbids only \*743 "discriminat[ion] against any individual with respect to his ... terms [or] conditions ... of employment, because of ... sex." § 2000e-2(a)(1). In Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 65, 106 S.Ct. 2399, 2404-2405, 91 L.Ed.2d 49, this Court distinguished between the two concepts, saying both are cognizable under Title VII, though a hostile environment claim requires harassment that is severe or pervasive. Meritor did not discuss the distinction for its bearing upon an employer's liability for discrimination, but held, with no further specifics, that agency principles controlled on this point. Id., at 72, 106 S.Ct., at 2408-2409. Nevertheless, in Meritor's wake, Courts of Appeals held that, if the plaintiff established a *quid pro quo* claim, the employer was subject to vicarious liability. This rule encouraged Title VII plaintiffs to state their claims in *quid pro quo* terms, which in turn \*\*2260 put expansive pressure on the definition. For example, the question presented here is phrased as whether Ellerth can state a *quid pro quo* claim, but the issue of real concern to the parties is whether Burlington has vicarious liability, rather than liability limited to its own negligence. This Court nonetheless believes the two terms are of limited utility. To the extent they illustrate the distinction between cases involving a carried-out threat and offensive conduct in general, they are relevant when there is a threshold question whether a plaintiff can prove discrimination. Hence, Ellerth's claim involves only unfulfilled threats, so it is a hostile work environment claim requiring a showing of severe or pervasive conduct. This Court accepts the District Court's finding that Ellerth made such a showing. When discrimination is thus proved, the factors discussed below, not the categories *quid pro quo* and hostile work environment, control on the issue of vicarious liability. Pp. 2264-2265.

(b) In deciding whether an employer has vicarious liability in a case such as this, the Court turns to agency law principles, for Title VII defines the term "employer" to include "agents." § 2000e(b). Given this express direction, the Court concludes a uniform and predictable standard must be established as a matter of federal law. The Court relies on the general common law of agency, rather than on the law of any particular State. Community for Creative Non-Violence v. Reid, 490 U.S. 730, 740, 109 S.Ct. 2166,

2172, 104 L.Ed.2d 811. The Restatement (Second) of Agency (hereinafter Restatement) is a useful beginning point, although common-law principles may not be wholly transferable to Title VII. See Meritor, supra, at 72, 106 S.Ct., at 2408. Pp. 2265-2266.

(c) A master is subject to liability for the torts of his servants committed while acting in the scope of their employment. Restatement § 219(1). Although such torts generally may be either negligent or intentional, sexual harassment under Title VII presupposes intentional conduct. An intentional tort is within the scope of employment when \*744 actuated, at least in part, by a purpose to serve the employer. Id., §§ 228(1)(c), 230. Courts of Appeals have held, however, a supervisor acting out of gender-based animus or a desire to fulfill sexual urges may be actuated by personal motives unrelated and even antithetical to the employer's objectives. Thus, the general rule is that sexual harassment by a supervisor is not conduct within the scope of employment. Pp. 2265-2267.

(d) However, scope of employment is not the only basis for employer liability under agency principles. An employer is subject to liability for the torts of its employees acting outside the scope of their employment when, *inter alia*, the employer itself was negligent or reckless, Restatement § 219(2)(b), or the employee purported to act or to speak on behalf of the employer and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation, id., § 219(2)(d). An employer is negligent, and therefore subject to liability under § 219(2)(b), if it knew or should have known about sexual harassment and failed to stop it. Negligence sets a minimum standard for Title VII liability; but Ellerth seeks to invoke the more stringent standard of vicarious liability. Section 219(2)(d) makes an employer vicariously liable for sexual harassment by an employee who uses apparent authority (the apparent authority standard), or who was "aided in accomplishing the tort by the existence of the agency relation" (the aided in the agency relation standard). P. 2267.

(e) As a general rule, apparent authority is relevant where the agent purports to exercise a power which he or she does not have, as distinct from threatening to misuse actual power. Compare Restatement § 6 with § 8. Because supervisory harassment cases

524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633, 66 USLW 4634, 77 Fair Empl.Prac.Cas. (BNA) 1, 170 A.L.R. Fed. 677, 73 Empl. Prac. Dec. P 45,340, 98 Cal. Daily Op. Serv. 5029, 98 Daily Journal D.A.R. 6991, 98 CJ C.A.R. 3405, 11 Fla. L. Weekly Fed. S 692

(Cite as: 524 U.S. 742, 118 S.Ct. 2257)

involve misuse of actual power, not the false impression of its existence, apparent authority analysis is inappropriate. When a party seeks to impose vicarious liability based on an agent's misuse of delegated authority, the Restatement's aided in the agency relation rule provides the appropriate analysis. Pp. 2267-2268.

(f) That rule requires the existence of something more than the employment relation itself because, in a sense, most workplace\*\*2261 tortfeasors, whether supervisors or co-workers, are aided in accomplishing their tortious objective by the employment relation: Proximity and regular contact afford a captive pool of potential victims. Such an additional aid exists when a supervisor subjects a subordinate to a significant, tangible employment action, *i.e.*, a significant change in employment status, such as discharge, demotion, or undesirable reassignment. Every Federal Court of Appeals to have considered the question has correctly found vicarious liability in that circumstance. This Court imports the significant, tangible employment action concept for resolution of the vicarious \*745 liability issue considered here. An employer is therefore subject to vicarious liability for such actions. However, where, as here, there is no tangible employment action, it is not obvious the agency relationship aids in commission of the tort. Moreover, *Meritor* holds that agency principles constrain the imposition of employer liability for supervisor harassment. Limiting employer liability is also consistent with Title VII's purpose to the extent it would encourage the creation and use of antiharassment policies and grievance procedures. Thus, in order to accommodate the agency principle of vicarious liability for harm caused by misuse of supervisory authority, as well as Title VII's equally basic policies of encouraging forethought by employers and saving action by objecting employees, the Court adopts, in this case and in *Faragher v. Boca Raton*, 524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998), the following holding: An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence, see *Fed. Rule Civ. Proc. 8(c)*. The defense comprises two

necessary elements: (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. While proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense. No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action. Pp. 2268- 2270.

(g) Given the Court's explanation that the labels *quid pro quo* and hostile work environment are not controlling for employer-liability purposes, Ellerth should have an adequate opportunity on remand to prove she has a claim which would result in vicarious liability. Although she has not alleged she suffered a tangible employment action at Slowik's hands, which would deprive Burlington of the affirmative defense, this is not dispositive. In light of the Court's decision, Burlington is still \*746 subject to vicarious liability for Slowik's activity, but should have an opportunity to assert and prove the affirmative defense. P. 2271.

[123 F.3d 490](#), affirmed.

[KENNEDY](#), J., delivered the opinion of the Court, in which [REHNQUIST](#), C. J., and [STEVENS](#), [O'CONNOR](#), [SOUTER](#), and [BREYER](#), JJ., joined. [GINSBURG](#), J., filed an opinion concurring in the judgment, *post*, p. 2271. [THOMAS](#), J., filed a dissenting opinion, in which [SCALIA](#), J., joined, *post*, p. 2271.

James J. Casey, for petitioner.

[Ernest T. Rossiello](#), Chicago, IL, for respondent.

524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633, 66 USLW 4634, 77 Fair Empl.Prac.Cas. (BNA) 1, 170 A.L.R. Fed. 677, 73 Empl. Prac. Dec. P 45,340, 98 Cal. Daily Op. Serv. 5029, 98 Daily Journal D.A.R. 6991, 98 CJ C.A.R. 3405, 11 Fla. L. Weekly Fed. S 692

(Cite as: 524 U.S. 742, 118 S.Ct. 2257)

[Barbara D. Underwood](#), Brooklyn, NY, for United States as amicus curiae by special leave of this Court.

\*\*2262 Justice [KENNEDY](#) delivered the opinion of the Court.

We decide whether, under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, [42 U.S.C. § 2000e](#) et \*747 seq., an employee who refuses the unwelcome and threatening sexual advances of a supervisor, yet suffers no adverse, tangible job consequences, can recover against the employer without showing the employer is negligent or otherwise at fault for the supervisor's actions.

## I

Summary judgment was granted for the employer, so we must take the facts alleged by the employee to be true. [United States v. Diebold, Inc.](#), 369 U.S. 654, 655, 82 S.Ct. 993, 994, 8 L.Ed.2d 176 (1962) (*per curiam*). The employer is Burlington Industries, the petitioner. The employee is Kimberly Ellerth, the respondent. From March 1993 until May 1994, Ellerth worked as a salesperson in one of Burlington's divisions in Chicago, Illinois. During her employment, she alleges, she was subjected to constant sexual harassment by her supervisor, one Ted Slowik.

In the hierarchy of Burlington's management structure, Slowik was a midlevel manager. Burlington has eight divisions, employing more than 22,000 people in some 50 plants around the United States. Slowik was a vice president in one of five business units within one of the divisions. He had authority to make hiring and promotion decisions subject to the approval of his supervisor, who signed the paperwork. See [912 F.Supp. 1101, 1119, n. 14 \(N.D.Ill.1996\)](#). According to Slowik's supervisor, his position was "not considered an upper-level management position," and he was "not amongst the decision-making or policy-making hierarchy." [Ibid.](#)

Slowik was not Ellerth's immediate supervisor. Ellerth worked in a two-person office in Chicago, and she answered to her office colleague, who in turn answered to Slowik in New York.

Against a background of repeated boorish and offensive remarks and gestures which Slowik allegedly

made, Ellerth places particular emphasis on three alleged incidents where Slowik's comments could be construed as threats to deny her \*748 tangible job benefits. In the summer of 1993, while on a business trip, Slowik invited Ellerth to the hotel lounge, an invitation Ellerth felt compelled to accept because Slowik was her boss. App. 155. When Ellerth gave no encouragement to remarks Slowik made about her breasts, he told her to "loosen up" and warned, "you know, Kim, I could make your life very hard or very easy at Burlington." *Id.*, at 156.

In March 1994, when Ellerth was being considered for a promotion, Slowik expressed reservations during the promotion interview because she was not "loose enough." *Id.*, at 159. The comment was followed by his reaching over and rubbing her knee. *Ibid.* Ellerth did receive the promotion; but when Slowik called to announce it, he told Ellerth, "you're gonna be out there with men who work in factories, and they certainly like women with pretty butts/legs." *Id.*, at 159-160.

In May 1994, Ellerth called Slowik, asking permission to insert a customer's logo into a fabric sample. Slowik responded, "I don't have time for you right now, Kim ...--unless you want to tell me what you're wearing." *Id.*, at 78. Ellerth told Slowik she had to go and ended the call. *Ibid.* A day or two later, Ellerth called Slowik to ask permission again. This time he denied her request, but added something along the lines of, "are you wearing shorter skirts yet, Kim, because it would make your job a whole heck of a lot easier." *Id.*, at 79.

A short time later, Ellerth's immediate supervisor cautioned her about returning telephone calls to customers in a prompt fashion. [912 F.Supp., at 1109](#). In response, Ellerth quit. She faxed a letter giving reasons unrelated to the alleged sexual harassment we have described. [Ibid.](#) About three weeks later, however, she sent a letter explaining she quit because of Slowik's behavior. [Ibid.](#)

During her tenure at Burlington, Ellerth did not inform anyone in authority about Slowik's conduct, despite knowing Burlington had a policy against sexual harassment. [Ibid.](#) \*749 In fact, she chose not to inform her \*\*2263 immediate supervisor (not Slo-

524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633, 66 USLW 4634, 77 Fair Empl.Prac.Cas. (BNA) 1, 170 A.L.R. Fed. 677, 73 Empl. Prac. Dec. P 45,340, 98 Cal. Daily Op. Serv. 5029, 98 Daily Journal D.A.R. 6991, 98 CJ C.A.R. 3405, 11 Fla. L. Weekly Fed. S 692

(Cite as: 524 U.S. 742, 118 S.Ct. 2257)

wik) because " 'it would be his duty as my supervisor to report any incidents of sexual harassment.' " *Ibid.* On one occasion, she told Slowik a comment he made was inappropriate. *Ibid.*

In October 1994, after receiving a right-to-sue letter from the Equal Employment Opportunity Commission (EEOC), Ellerth filed suit in the United States District Court for the Northern District of Illinois, alleging Burlington engaged in sexual harassment and forced her constructive discharge, in violation of Title VII. The District Court granted summary judgment to Burlington. The court found Slowik's behavior, as described by Ellerth, severe and pervasive enough to create a hostile work environment, but found Burlington neither knew nor should have known about the conduct. There was no triable issue of fact on the latter point, and the court noted Ellerth had not used Burlington's internal complaint procedures. *Id.*, at 1118. Although Ellerth's claim was framed as a hostile work environment complaint, the District Court observed there was a *quid pro quo* "component" to the hostile environment. *Id.*, at 1121.

Proceeding from the premise that an employer faces vicarious liability for *quid pro quo* harassment, the District Court thought it necessary to apply a negligence standard because the *quid pro quo* merely contributed to the hostile work environment. See *id.*, at 1123. The District Court also dismissed Ellerth's constructive discharge claim.

The Court of Appeals en banc reversed in a decision which produced eight separate opinions and no consensus for a controlling rationale. The judges were able to agree on the problem they confronted: Vicarious liability, not failure to comply with a duty of care, was the essence of Ellerth's case against Burlington on appeal. The judges seemed to agree Ellerth could recover if Slowik's unfulfilled threats to deny her tangible job benefits was sufficient to impose vicarious liability on Burlington. \*750 *Jansen v. Packaging Corp. of America*, 123 F.3d 490, 494 (C.A.7 1997) (*per curiam*). With the exception of Judges Coffey and Easterbrook, the judges also agreed Ellerth's claim could be categorized as one of *quid pro quo* harassment, even though she had received the promotion and had suffered no other tangible retaliation. *Ibid.*

The consensus disintegrated on the standard for an

employer's liability for such a claim. Six judges, Judges Flaum, Cummings, Bauer, Evans, Rovner, and Diane P. Wood, agreed the proper standard was vicarious liability, and so Ellerth could recover even though Burlington was not negligent. *Ibid.* They had different reasons for the conclusion. According to Judges Flaum, Cummings, Bauer, and Evans, whether a claim involves a *quid pro quo* determines whether vicarious liability applies; and they in turn defined *quid pro quo* to include a supervisor's threat to inflict a tangible job injury whether or not it was completed. *Id.*, at 499. Judges Wood and Rovner interpreted agency principles to impose vicarious liability on employers for most claims of supervisor sexual harassment, even absent a *quid pro quo*. *Id.*, at 565.

Although Judge Easterbrook did not think Ellerth had stated a *quid pro quo* claim, he would have followed the law of the controlling State to determine the employer's liability, and by this standard, the employer would be liable here. *Id.*, at 552. In contrast, Judge Kanne said Ellerth had stated a *quid pro quo* claim, but negligence was the appropriate standard of liability when the *quid pro quo* involved threats only. *Id.*, at 505.

Chief Judge Posner, joined by Judge Manion, disagreed. He asserted Ellerth could not recover against Burlington despite having stated a *quid pro quo* claim. According to Chief Judge Posner, an employer is subject to vicarious liability for "act[s] that significantly alte[r] the terms or conditions of employment," or "company act[s]." *Id.*, at 515. In the emergent terminology, an unfulfilled *quid pro quo* is a \*751 mere threat to do a company act rather than the act itself, and in these circumstances, an employer can be found liable for its negligence only. *Ibid.* Chief Judge Posner also found Ellerth failed to create a triable issue of fact as to Burlington's negligence. *Id.*, at 517.

Judge Coffey rejected all of the above approaches because he favored a uniform \*\*2264 standard of negligence in almost all sexual harassment cases. *Id.*, at 518.

The disagreement revealed in the careful opinions of the judges of the Court of Appeals reflects the fact that Congress has left it to the courts to determine

524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633, 66 USLW 4634, 77 Fair Empl.Prac.Cas. (BNA) 1, 170 A.L.R. Fed. 677, 73 Empl. Prac. Dec. P 45,340, 98 Cal. Daily Op. Serv. 5029, 98 Daily Journal D.A.R. 6991, 98 CJ C.A.R. 3405, 11 Fla. L. Weekly Fed. S 692

(Cite as: 524 U.S. 742, 118 S.Ct. 2257)

controlling agency law principles in a new and difficult area of federal law. We granted certiorari to assist in defining the relevant standards of employer liability. [522 U.S. 1086](#), [118 S.Ct. 876](#), [139 L.Ed.2d 865](#) (1998).

## II

[1] At the outset, we assume an important proposition yet to be established before a trier of fact. It is a premise assumed as well, in explicit or implicit terms, in the various opinions by the judges of the Court of Appeals. The premise is: A trier of fact could find in Slowik's remarks numerous threats to retaliate against Ellerth if she denied some sexual liberties. The threats, however, were not carried out or fulfilled. Cases based on threats which are carried out are referred to often as *quid pro quo* cases, as distinct from bothersome attentions or sexual remarks that are sufficiently severe or pervasive to create a hostile work environment. The terms *quid pro quo* and hostile work environment are helpful, perhaps, in making a rough demarcation between cases in which threats are carried out and those where they are not or are absent altogether, but beyond this are of limited utility.

Section 703(a) of Title VII forbids

"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 \*752 privileges of employment, because of such individual's ... sex." [42 U.S.C. § 2000e-2\(a\)\(1\)](#).

"*Quid pro quo*" and "hostile work environment" do not appear in the statutory text. The terms appeared first in the academic literature, see C. MacKinnon, *Sexual Harassment of Working Women* (1979); found their way into decisions of the Courts of Appeals, see, e.g., [Henson v. Dundee](#), [682 F.2d 897](#), [909 \(C.A.11 1982\)](#); and were mentioned in this Court's decision in [Meritor Savings Bank, FSB v. Vinson](#), [477 U.S. 57](#), [106 S.Ct. 2399](#), [91 L.Ed.2d 49](#) (1986). See generally E. Scalia, *The Strange Career of Quid Pro Quo Sexual Harassment*, 21 Harv. J.L. & Pub. Policy 307 (1998).

In [Meritor](#), the terms served a specific and limited purpose. There we considered whether the conduct in question constituted discrimination in the terms or

conditions of employment in violation of Title VII. We assumed, and with adequate reason, that if an employer demanded sexual favors from an employee in return for a job benefit, discrimination with respect to terms or conditions of employment was explicit. Less obvious was whether an employer's sexually demeaning behavior altered terms or conditions of employment in violation of Title VII. We distinguished between *quid pro quo* claims and hostile environment claims, see [477 U.S., at 65](#), [106 S.Ct., at 2404-2405](#), and said both were cognizable under Title VII, though the latter requires harassment that is severe or pervasive. *Ibid.* The principal significance of the distinction is to instruct that Title VII is violated by either explicit or constructive alterations in the terms or conditions of employment and to explain the latter must be severe or pervasive. The distinction was not discussed for its bearing upon an employer's liability for an employee's discrimination. On this question [Meritor](#) held, with no further specifics, that agency principles controlled. *Id.*, [at 72](#), [106 S.Ct., at 2408](#).

Nevertheless, as use of the terms grew in the wake of [Meritor](#), they acquired their own significance. The standard of employer responsibility turned on which type of harassment \*753 occurred. If the plaintiff established a *quid pro quo* claim, the Courts of Appeals held, the employer was subject to vicarious liability. See [Davis v. Sioux City](#), [115 F.3d 1365](#), [1367 \(C.A.8 1997\)](#); [Nichols v. Frank](#), [42 F.3d 503](#), [513-514 \(C.A.9 1994\)](#); [Bouton v. BMW of North America, Inc.](#), [29 F.3d 103](#), [106-107 \(C.A.3 1994\)](#); [Sauers v. Salt Lake County](#), [1 F.3d 1122](#), [1127 \(C.A.10 1993\)](#); [Kauffman v. Allied Signal, Inc.](#), [970 F.2d 178](#), [185-186 \(C.A.6\)](#), cert. denied, [506 U.S. 1041](#), [113 S.Ct. 831](#), [121 L.Ed.2d 701](#) (1992); \*\*[2265 Steele v. Offshore Shipbuilding, Inc.](#), [867 F.2d 1311](#), [1316 \(C.A.11 1989\)](#). The rule encouraged Title VII plaintiffs to state their claims as *quid pro quo* claims, which in turn put expansive pressure on the definition. The equivalence of the *quid pro quo* label and vicarious liability is illustrated by this case. 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. The question presented for certiorari asks:

524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633, 66 USLW 4634, 77 Fair Empl.Prac.Cas. (BNA) 1, 170 A.L.R. Fed. 677, 73 Empl. Prac. Dec. P 45,340, 98 Cal. Daily Op. Serv. 5029, 98 Daily Journal D.A.R. 6991, 98 CJ C.A.R. 3405, 11 Fla. L. Weekly Fed. S 692

(Cite as: 524 U.S. 742, 118 S.Ct. 2257)

"Whether a claim of *quid pro quo* sexual harassment may be stated under Title VII ... where the plaintiff employee has neither submitted to the sexual advances of the alleged harasser nor suffered any tangible effects on the compensation, terms, conditions or privileges of employment as a consequence of a refusal to submit to those advances?" Pet. for Cert. i.

[2] We do not suggest the terms *quid pro quo* and hostile work environment are irrelevant to Title VII litigation. To the extent they illustrate the distinction between cases involving a threat which is carried out and offensive conduct in general, the terms are relevant when there is a threshold question whether a plaintiff can prove discrimination in violation of Title VII. When a plaintiff proves that a tangible employment action resulted from a refusal to submit to a supervisor's sexual demands, he or she establishes that the \*754 employment decision itself constitutes a change in the terms and conditions of employment that is actionable under Title VII. For any sexual harassment preceding the employment decision to be actionable, however, the conduct must be severe or pervasive. Because Ellerth's claim involves only unfulfilled threats, it should be categorized as a hostile work environment claim which requires a showing of severe or pervasive conduct. See *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 81, 118 S.Ct. 998, 1002-1003, 140 L.Ed.2d 201, (1998); *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21, 114 S.Ct. 367, 370, 126 L.Ed.2d 295 (1993). For purposes of this case, we accept the District Court's finding that the alleged conduct was severe or pervasive. See *supra*, at 2262-2263. The case before us involves numerous alleged threats, and we express no opinion as to whether a single unfulfilled threat is sufficient to constitute discrimination in the terms or conditions of employment.

When we assume discrimination can be proved, however, the factors we discuss below, and not the categories *quid pro quo* and hostile work environment, will be controlling on the issue of vicarious liability. That is the question we must resolve.

### III

[3] We must decide, then, whether an employer has vicarious liability when a supervisor creates a hostile work environment by making explicit threats to alter

a subordinate's terms or conditions of employment, based on sex, but does not fulfill the threat. We turn to principles of agency law, for the term "employer" is defined under Title VII to include "agents." [42 U.S.C. § 2000e\(b\)](#); see *Meritor, supra*, at 72, 106 S.Ct., at 2408-2409. In express terms, Congress has directed federal courts to interpret Title VII based on agency principles. Given such an explicit instruction, we conclude a uniform and predictable standard must be established as a matter of federal law. We rely "on the general common law of agency, rather than on the law of any particular State, to give meaning to these \*755 terms." *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 740, 109 S.Ct. 2166, 2173, 104 L.Ed.2d 811 (1989). The resulting federal rule, based on a body of case law developed over time, is statutory interpretation pursuant to congressional direction. This is not federal common law in "the strictest sense, *i.e.*, a rule of decision that amounts, not simply to an interpretation of a federal statute ..., but, rather, to the judicial 'creation' of a special federal rule of decision." *Atherton v. FDIC*, 519 U.S. 213, 218, 117 S.Ct. 666, 670, 136 L.Ed.2d 656 (1997). State-court decisions, applying state employment discrimination law, may be instructive in applying general agency principles, but, it is interesting to note, in many cases their determinations of employer liability under state law rely in large part on \*\*2266 federal-court decisions under Title VII. *E.g.*, *Arizona v. Schallock*, 189 Ariz. 250, 259, 941 P.2d 1275, 1284 (1997); *Lehmann v. Toys 'R' Us, Inc.*, 132 N.J. 587, 622, 626 A.2d 445, 463 (1993); *Thompson v. Berta Enterprises, Inc.*, 72 Wash.App. 531, 537-539, 864 P.2d 983, 986-988 (1994).

As *Meritor* acknowledged, the Restatement (Second) of Agency (1957) (hereinafter Restatement) is a useful beginning point for a discussion of general agency principles. [477 U.S., at 72, 106 S.Ct., at 2408](#). Since our decision in *Meritor*, federal courts have explored agency principles, and we find useful instruction in their decisions, noting that "**common-law principles may not be transferable in all their particulars to Title VII.**" *Ibid.* The EEOC has issued Guidelines governing sexual harassment claims under Title VII, but they provide little guidance on the issue of employer liability for supervisor harassment. See [29 CFR § 1604.11\(c\) \(1997\)](#) (vicarious liability for supervisor harassment turns on "the particular employment relationship and the job functions per-

524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633, 66 USLW 4634, 77 Fair Empl.Prac.Cas. (BNA) 1, 170 A.L.R. Fed. 677, 73 Empl. Prac. Dec. P 45,340, 98 Cal. Daily Op. Serv. 5029, 98 Daily Journal D.A.R. 6991, 98 CJ C.A.R. 3405, 11 Fla. L. Weekly Fed. S 692

(Cite as: 524 U.S. 742, 118 S.Ct. 2257)

formed by the individual").

A

Section 219(1) of the Restatement sets out a central principle of agency law:

\*756 "A master is subject to liability for the torts of his servants committed while acting in the scope of their employment."

[4] An employer may be liable for both negligent and intentional torts committed by an employee within the scope of his or her employment. Sexual harassment under Title VII presupposes intentional conduct. While early decisions absolved employers of liability for the intentional torts of their employees, the law now imposes liability where the employee's "purpose, however misguided, is wholly or in part to further the master's business." W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on Law of Torts* § 70, p. 505 (5th ed.1984) (hereinafter *Prosser and Keeton on Torts*). In applying scope of employment principles to intentional torts, however, it is accepted that "it is less likely that a willful tort will properly be held to be in the course of employment and that the liability of the master for such torts will naturally be more limited." F. Mechem, *Outlines of the Law of Agency* § 394, p. 266 (P. Mechem 4th ed. 1952). The Restatement defines conduct, including an intentional tort, to be within the scope of employment when "actuated, at least in part, by a purpose to serve the [employer]," even if it is forbidden by the employer. Restatement §§ 228(1)(c), 230. For example, when a salesperson lies to a customer to make a sale, the tortious conduct is within the scope of employment because it benefits the employer by increasing sales, even though it may violate the employer's policies. See *Prosser and Keeton on Torts* § 70, at 505-506.

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. See, e.g., [Harrison v. Eddy Potash, Inc.](#), 112 F.3d 1437, 1444 (C.A.10 1997), vacated on other grounds, 524 U.S. 947, 118 S.Ct. 2364, 141 L.Ed.2d 732 (1998); [Torres v. Pisano](#), 116 F.3d 625, 634, n. 10 (C.A.2 1997). But see [Kauffman v. Allied Signal, Inc.](#), 970 F.2d, at 184- 185 (holding harassing supervisor acted within scope of employment, \*757 but employer was not liable be-

cause of its quick and effective remediation). The harassing supervisor often acts for personal motives, motives unrelated and even antithetical to the objectives of the employer. Cf. Mechem, *supra*, § 368 ("[F]or the time being [the supervisor] is conspicuously and unmistakably seeking a personal end"); see also Restatement § 235, Illustration 2 (tort committed while "[a]cting purely from personal ill will" not within the scope of employment); *id.*, Illustration 3 (tort committed in retaliation for failing to pay the employee a bribe not within the scope of employment). There are instances, of course, where a supervisor engages in unlawful discrimination with the purpose, mistaken or otherwise, to serve the employer. E.g., [Sims v. Montgomery County Comm'n](#), 766 F.Supp. 1052, 1075 (M.D.Ala.1990) (supervisor acting in scope of employment where employer has a policy of discouraging women from seeking advancement \*\*2267 and "sexual harassment was simply a way of furthering that policy").

The concept of scope of employment has not always been construed to require a motive to serve the employer. E.g., [Ira S. Bushey & Sons, Inc. v. United States](#), 398 F.2d 167, 172 (C.A.2 1968). Federal courts have nonetheless found similar limitations on employer liability when applying the agency laws of the States under the Federal Tort Claims Act, which makes the Federal Government liable for torts committed by employees within the scope of employment. 28 U.S.C. § 1346(b); see, e.g., [Jamison v. Wiley](#), 14 F.3d 222, 237 (C.A.4 1994) (supervisor's unfair criticism of subordinate's work in retaliation for rejecting his sexual advances not within scope of employment); [Wood v. United States](#), 995 F.2d 1122, 1123 (C.A.1 1993) (BREYER, C.J.) (sexual harassment amounting to assault and battery "clearly outside the scope of employment"); see also 2 L. Jayson & R. Longstreth, *Handling Federal Tort Claims* § 9.07[4], p. 9-211 (1998).

[5] The general rule is that sexual harassment by a supervisor is not conduct within the scope of employment.

\*758 B

Scope of employment does not define the only basis for employer liability under agency principles. In limited circumstances, agency principles impose liability on employers even where employees commit

524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633, 66 USLW 4634, 77 Fair Empl.Prac.Cas. (BNA) 1, 170 A.L.R. Fed. 677, 73 Empl. Prac. Dec. P 45,340, 98 Cal. Daily Op. Serv. 5029, 98 Daily Journal D.A.R. 6991, 98 CJ C.A.R. 3405, 11 Fla. L. Weekly Fed. S 692

(Cite as: 524 U.S. 742, 118 S.Ct. 2257)

torts outside the scope of employment. The principles are set forth in the much-cited § 219(2) of the Restatement:

"(2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:

"(a) the master intended the conduct or the consequences, or

"(b) the master was negligent or reckless, or

"(c) the conduct violated a non-delegable duty of the master, or

"(d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation."

See also § 219, Comment *e* (Section 219(2) "enumerates the situations in which a master may be liable for torts of servants acting solely for their own purposes and hence not in the scope of employment").

Subsection (a) addresses direct liability, where the employer acts with tortious intent, and indirect liability, where the agent's high rank in the company makes him or her the employer's alter ego. None of the parties contend Slowik's rank imputes liability under this principle. There is no contention, furthermore, that a nondelegable duty is involved. See § 219(2)(c). So, for our purposes here, subsections (a) and (c) can be put aside.

[6] Subsections (b) and (d) are possible grounds for imposing employer liability on account of a supervisor's acts and must be considered. Under subsection (b), an employer is liable when the tort is attributable to the employer's own negligence. \*759 § 219(2)(b). Thus, although a supervisor's sexual harassment is outside the scope of employment because the conduct was for personal motives, an employer can be liable, nonetheless, where its own negligence is a cause of the harassment. An employer is negligent with respect to sexual harassment if it knew or should have known about the conduct and failed to stop it. Negligence sets a minimum standard for employer liability under Title VII; but Ellerth seeks to invoke the more stringent standard of vicarious liability.

Section 219(2)(d) concerns vicarious liability for intentional torts committed by an employee when the employee uses apparent authority (the apparent authority standard), or when the employee "was aided

in accomplishing the tort by the existence of the agency relation" (the aided in the agency relation standard). *Ibid.* As other federal decisions have done in discussing vicarious liability for supervisor harassment, *e.g.*, [Henson v. Dundee](#), 682 F.2d 897, 909 (C.A.11 1982), we begin with § 219(2)(d).

#### C

[7] As a general rule, apparent authority is relevant where the agent purports to exercise a power which he or she does not have, \*\*2268 as distinct from where the agent threatens to misuse actual power. Compare Restatement § 6 (defining "power") with § 8 (defining "apparent authority"). In the usual case, a supervisor's harassment involves misuse of actual power, not the false impression of its existence. Apparent authority analysis therefore is inappropriate in this context. If, in the unusual case, it is alleged there is a false impression that the actor was a supervisor, when he in fact was not, the victim's mistaken conclusion must be a reasonable one. Restatement § 8, Comment *c* ("Apparent authority exists only to the extent it is reasonable for the third person dealing with the agent to believe that the agent is authorized"). When a party seeks to impose vicarious liability \*760 based on an agent's misuse of delegated authority, the Restatement's aided in the agency relation rule, rather than the apparent authority rule, appears to be the appropriate form of analysis.

#### D

[8] We turn to the aided in the agency relation standard. In a sense, most workplace tortfeasors are aided in accomplishing their tortious objective by the existence of the agency relation: Proximity and regular contact may afford a captive pool of potential victims. See [Gary v. Long](#), 59 F.3d 1391, 1397 (C.A.D.C.1995). Were this to satisfy the aided in the agency relation standard, an employer would be subject to vicarious liability not only for all supervisor harassment, but also for all co-worker harassment, a result enforced by neither the EEOC nor any court of appeals to have considered the issue. See, *e.g.*, [Blankenship v. Parke Care Centers, Inc.](#), 123 F.3d 868, 872 (C.A.6 1997), cert. denied, 522 U.S. 1110, 118 S.Ct. 1039, 140 L.Ed.2d 105 (1998) (sex discrimination); [McKenzie v. Illinois Dept. of Transp.](#), 92 F.3d 473, 480 (C.A.7 1996) (sex discrimination); [Daniels v. Essex Group, Inc.](#), 937 F.2d 1264, 1273 (C.A.7 1991) (race discrimination); see also [29](#)

524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633, 66 USLW 4634, 77 Fair Empl.Prac.Cas. (BNA) 1, 170 A.L.R. Fed. 677, 73 Empl. Prac. Dec. P 45,340, 98 Cal. Daily Op. Serv. 5029, 98 Daily Journal D.A.R. 6991, 98 CJ C.A.R. 3405, 11 Fla. L. Weekly Fed. S 692

(Cite as: 524 U.S. 742, 118 S.Ct. 2257)

[C.F.R. § 1604.11\(d\) \(1997\)](#) ("knows or should have known" standard of liability for cases of harassment between "fellow employees"). The aided in the agency relation standard, therefore, requires the existence of something more than the employment relation itself.

At the outset, we can identify a class of cases where, beyond question, more than the mere existence of the employment relation aids in commission of the harassment: when a supervisor takes a tangible employment action against the subordinate. Every Federal Court of Appeals to have considered the question has found vicarious liability when a discriminatory act results in a tangible employment action. See, e.g., [Sauers v. Salt Lake County](#), 1 F.3d 1122, 1127 (C.A.10 1993) ("If the plaintiff can show that she suffered an economic injury from her supervisor's actions, the employer becomes strictly liable without any further showing ..."). \*761 In [Meritor](#), we acknowledged this consensus. See [477 U.S., at 70-71, 106 S.Ct., at 2407- 2408](#) ("[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.

In the context of this case, a tangible employment action would have taken the form of a denial of a raise or a promotion. The concept of a tangible employment action appears in numerous cases in the Courts of Appeals discussing claims involving race, age, and national origin discrimination, as well as sex discrimination. Without endorsing the specific results of those decisions, we think it prudent to import the concept of a tangible employment action for resolution of the vicarious liability issue we consider here. 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. Compare [Crary v. Liberty Nat. Bank & Trust Co. of Ind.](#), 993 F.2d 132, 136 (C.A.7 1993) ("A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in

wage or salary, a less distinguished title, a material loss of benefits, significantly \*\*2269 diminished material responsibilities, or other indices that might be unique to a particular situation"), with [Flaherty v. Gas Research Institute](#), 31 F.3d 451, 456 (C.A.7 1994) (a "bruised ego" is not enough), [Kocsis v. Multi-Care Management, Inc.](#), 97 F.3d 876, 887 (C.A.6 1996) (demotion without change in pay, benefits, duties, or prestige insufficient), and [Harlston v. McDonnell Douglas Corp.](#), 37 F.3d 379, 382 (C.A.8 1994) (reassignment to more inconvenient job insufficient).

When a supervisor makes a tangible employment decision, there is assurance the injury could not have been inflicted \*762 absent the agency relation. 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. See [Gary, supra, at 1397](#); [Henson](#), 682 F.2d, at 910; [Barnes v. Costle](#), 561 F.2d 983, 996 (C.A.D.C.1977) (MacKinnon, J., concurring). But one co-worker (absent some elaborate scheme) cannot dock another's pay, nor can one co-worker demote another. Tangible employment actions fall within the special province of the supervisor. The supervisor has been empowered by the company as a distinct class of agent to make economic decisions affecting other employees under his or her control.

Tangible employment actions are the means by which the supervisor brings the official power of the enterprise to bear on subordinates. A tangible employment decision requires an official act of the enterprise, a company act. The decision in most cases is documented in official company records, and may be subject to review by higher level supervisors. E.g., [Shager v. Upjohn Co.](#), 913 F.2d 398, 405 (C.A.7 1990) (noting that the supervisor did not fire plaintiff; rather, the Career Path Committee did, but the employer was still liable because the committee functioned as the supervisor's "cat's-paw"). The supervisor often must obtain the imprimatur of the enterprise and use its internal processes. See [Kocher v. Rosa & Sullivan Appliance Center, Inc.](#), 957 F.2d 59, 62

524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633, 66 USLW 4634, 77 Fair Empl.Prac.Cas. (BNA) 1, 170 A.L.R. Fed. 677, 73 Empl. Prac. Dec. P 45,340, 98 Cal. Daily Op. Serv. 5029, 98 Daily Journal D.A.R. 6991, 98 CJ C.A.R. 3405, 11 Fla. L. Weekly Fed. S 692

(Cite as: 524 U.S. 742, 118 S.Ct. 2257)

(C.A.2 1992) ("From the perspective of the employee, the supervisor and the employer merge into a single entity").

[9] For these reasons, a tangible employment action taken by the supervisor becomes for Title VII purposes the act of the employer. Whatever the exact contours of the aided in the agency relation standard, its requirements will always be met when a supervisor takes a tangible employment action \*763 against a subordinate. In that instance, it would be implausible to interpret agency principles to allow an employer to escape liability, as *Meritor* itself appeared to acknowledge. See, *supra*, at 2268.

Whether the agency relation aids in commission of supervisor harassment which does not culminate in a tangible employment action is less obvious. Application of the standard is made difficult by its malleable terminology, which can be read to either expand or limit liability in the context of supervisor harassment. On the one hand, a supervisor's power and authority invests his or her harassing conduct with a particular threatening character, and in this sense, a supervisor always is aided by the agency relation. See *Meritor*, 477 U.S., at 77, 106 S.Ct., at 2410-2411 (Marshall, J., concurring in judgment) ("[I]t is precisely because the supervisor is understood to be clothed with the employer's authority that he is able to impose unwelcome sexual conduct on subordinates"). On the other hand, there are acts of harassment a supervisor might commit which might be the same acts a coemployee would commit, and there may be some circumstances where the supervisor's status makes little difference.

It is this tension which, we think, has caused so much confusion among the Courts of Appeals which have sought to apply the aided in the agency relation standard to Title VII cases. The aided in the agency relation standard, however, is a developing feature of agency law, and we hesitate to render a definitive explanation of our understanding of the standard in an area where other important considerations must affect our judgment. \*\*2270 In particular, we are bound by our holding in *Meritor* that agency principles constrain the imposition of vicarious liability in cases of supervisory harassment. See *id.*, at 72, 106 S.Ct., at 2408 ("Congress' decision to define 'employer' to include any 'agent' of an employer, 42

U.S.C. § 2000e(b), surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible"). Congress has not altered *Meritor's* \*764 rule even though it has made significant amendments to Title VII in the interim. See *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736, 97 S.Ct. 2061, 2069-2070, 52 L.Ed.2d 707 (1977) ("[W]e must bear in mind that considerations of stare decisis weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation").

Although *Meritor* suggested the limitation on employer liability stemmed from agency principles, the Court acknowledged other considerations might be relevant as well. See 477 U.S., at 72, 106 S.Ct., at 2408 ("common-law principles may not be transferable in all their particulars to Title VII"). For example, Title VII is designed to encourage the creation of antiharassment policies and effective grievance mechanisms. Were employer liability to depend in part on an employer's effort to create such procedures, it would effect Congress' intention to promote conciliation rather than litigation in the Title VII context, see *EEOC v. Shell Oil Co.*, 466 U.S. 54, 77, 104 S.Ct. 1621, 1635, 80 L.Ed.2d 41 (1984), and the EEOC's policy of encouraging the development of grievance procedures. See 29 C.F.R. § 1604.11(f) (1997); EEOC Policy Guidance on Sexual Harassment, 8 BNA FEP Manual 405:6699 (Mar. 19, 1990). To the extent limiting employer liability could encourage employees to report harassing conduct before it becomes severe or pervasive, it would also serve Title VII's deterrent purpose. See *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 358, 115 S.Ct. 879, 884-885, 130 L.Ed.2d 852 (1995). As we have observed, Title VII borrows from tort law the avoidable consequences doctrine, see *Ford Motor Co. v. EEOC*, 458 U.S. 219, 232, n. 15, 102 S.Ct. 3057, 3066, n. 15, 73 L.Ed.2d 721 (1982), and the considerations which animate that doctrine would also support the limitation of employer liability in certain circumstances.

[10][11][12] In order to accommodate the agency principles of vicarious liability for harm caused by misuse of supervisory authority, as well as Title VII's equally basic policies of encouraging forethought by employers and saving action by objecting employees,

524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633, 66 USLW 4634, 77 Fair Empl.Prac.Cas. (BNA) 1, 170 A.L.R. Fed. 677, 73 Empl. Prac. Dec. P 45,340, 98 Cal. Daily Op. Serv. 5029, 98 Daily Journal D.A.R. 6991, 98 CJ C.A.R. 3405, 11 Fla. L. Weekly Fed. S 692

(Cite as: 524 U.S. 742, 118 S.Ct. 2257)

we adopt the following holding in this case and in [Faragher v. Boca Raton](#), 524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998), also decided today.

\*765 An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence, see [Fed. Rule Civ. Proc. 8\(c\)](#). The defense comprises two necessary elements: (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. While proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing any unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense. No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment.

#### \*\*2271 IV

Relying on existing case law which held out the promise of vicarious liability for all *quid pro quo* claims, see *supra*, at 2264-2265, Ellerth focused all her attention in the Court of Appeals on proving her claim fit within that category. Given our explanation that the labels *quid pro quo* and hostile work environment are not controlling for purposes of establishing employer liability, see *supra*, at 2265, Ellerth \*766 should have an adequate opportunity to prove she has a claim for which Burlington is liable.

[13] Although Ellerth has not alleged she suffered a tangible employment action at the hands of Slowik, which would deprive Burlington of the availability of

the affirmative defense, this is not dispositive. In light of our decision, Burlington is still subject to vicarious liability for Slowik's activity, but Burlington should have an opportunity to assert and prove the affirmative defense to liability. See *supra*, at 2270.

For these reasons, we will affirm the judgment of the Court of Appeals, reversing the grant of summary judgment against Ellerth. On remand, the District Court will have the opportunity to decide whether it would be appropriate to allow Ellerth to amend her pleading or supplement her discovery.

The judgment of the Court of Appeals is affirmed.

*It is so ordered.*

Justice [GINSBURG](#), concurring in the judgment.

I agree with the Court's ruling that "the labels *quid pro quo* and hostile work environment are not controlling for purposes of establishing employer liability." *Ante*, at 2271. I also subscribe to the Court's statement of the rule governing employer liability, *ante*, at 2270, which is substantively identical to the rule the Court adopts in [Faragher v. Boca Raton](#), 524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998).

Justice [THOMAS](#), with whom Justice [SCALIA](#) joins, dissenting.

The Court today manufactures a rule that employers are vicariously liable if supervisors create a sexually hostile work environment, subject to an affirmative defense that the Court barely attempts to define. This rule applies even if the employer has a policy against sexual harassment, the employee knows about that policy, and the employee never \*767 informs anyone in a position of authority about the supervisor's conduct. As a result, employer liability under Title VII is judged by different standards depending upon whether a sexually or racially hostile work environment is alleged. The standard of employer liability should be the same in both instances: An employer should be liable if, and only if, the plaintiff proves that the employer was negligent in permitting the supervisor's conduct to occur.

524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633, 66 USLW 4634, 77 Fair Empl.Prac.Cas. (BNA) 1, 170 A.L.R. Fed. 677, 73 Empl. Prac. Dec. P 45,340, 98 Cal. Daily Op. Serv. 5029, 98 Daily Journal D.A.R. 6991, 98 CJ C.A.R. 3405, 11 Fla. L. Weekly Fed. S 692

(Cite as: 524 U.S. 742, 118 S.Ct. 2257)

## I

Years before sexual harassment was recognized as "discriminat[ion] ... because of ... sex," [42 U.S.C. § 2000e-2\(a\)\(1\)](#), the Courts of Appeals considered whether, and when, a racially hostile work environment could violate Title VII. [\[FN1\]](#) In the landmark case [Rogers v. EEOC, 454 F.2d 234 \(1971\)](#), cert. denied, [406 U.S. 957, 92 S.Ct. 2058, 32 L.Ed.2d 343 \(1972\)](#), the Court of Appeals for the Fifth Circuit held that the practice of racially segregating patients in a doctor's office could amount to discrimination in " 'the terms, conditions, or privileges' " of employment, thereby violating Title VII. [454 F.2d, at 238](#) (quoting [42 U.S.C. § 2000e-2\(a\)\(1\)](#)). The principal opinion in the case concluded that employment discrimination was not limited to the "isolated and distinguishable events" of "hiring, firing, and promoting." [454 F.2d, at 238](#) (opinion of Goldberg, J.). Rather, Title VII could also be violated by a work environment "heavily polluted with discrimination," because of the deleterious effects of such an **\*\*2272** atmosphere on an employee's well-being. [Ibid.](#)

[FN1.](#) This sequence of events is not surprising, given that the primary goal of the Civil Rights Act of 1964 was to eradicate race discrimination and that the statute's ban on sex discrimination was added as an eleventh-hour amendment in an effort to kill the bill. See [Barnes v. Costile, 561 F.2d 983, 987 \(C.A.D.C.1977\)](#).

Accordingly, after [Rogers](#), a plaintiff claiming employment discrimination based upon race could assert a claim for a racially hostile work environment, in addition to the classic **\*768** claim of so-called "disparate treatment." A disparate treatment claim required a plaintiff to prove an adverse employment consequence and discriminatory intent by his employer. See 1 B. Lindemann & P. Grossman, *Employment Discrimination Law* 10-11 (3d ed.1996). A hostile environment claim required the plaintiff to show that his work environment was so pervaded by racial harassment as to alter the terms and conditions of his employment. See, e.g., [Snell v. Suffolk Cty., 782 F.2d 1094, 1103 \(C.A.2 1986\)](#) ("To establish a hostile atmosphere, ... plaintiffs must prove more than a few isolated incidents of racial enmity"); [Johnson v. Bunny Bread Co., 646 F.2d 1250, 1257 \(C.A.8 1981\)](#) (no violation of Title VII from infrequent use of racial

slurs). This is the same standard now used when determining whether sexual harassment renders a work environment hostile. See [Harris v. Forklift Systems, Inc., 510 U.S. 17, 21, 114 S.Ct. 367, 370-371, 126 L.Ed.2d 295 \(1993\)](#) (actionable sexual harassment occurs when the workplace is "permeated with discriminatory intimidation, ridicule, and insult" (emphasis added; internal quotation marks and citation omitted)).

In race discrimination cases, employer liability has turned on whether the plaintiff has alleged an adverse employment consequence, such as firing or demotion, or a hostile work environment. If a supervisor takes an adverse employment action because of race, causing the employee a tangible job detriment, the employer is vicariously liable for resulting damages. See *ante*, at 2268. This is because such actions are company acts that can be performed only by the exercise of specific authority granted by the employer, and thus the supervisor acts as the employer. If, on the other hand, the employee alleges a racially hostile work environment, the employer is liable only for negligence: that is, only if the employer knew, or in the exercise of reasonable care should have known, about the harassment and failed to take remedial action. See, e.g., [Dennis v. Cty. of Fairfax, 55 F.3d 151, 153 \(C.A.4 1995\)](#); **\*769** [Davis v. Monsanto Chemical Co., 858 F.2d 345, 349 \(C.A.6 1988\)](#), cert. denied, [490 U.S. 1110, 109 S.Ct. 3166, 104 L.Ed.2d 1028 \(1989\)](#). Liability has thus been imposed only if the employer is blameworthy in some way. See, e.g., [Davis v. Monsanto Chemical Co., supra](#), at 349; [Snell v. Suffolk Cty., supra](#), at 1104; [DeGrace v. Rumsfeld, 614 F.2d 796, 805 \(C.A.1 1980\)](#).

This distinction applies with equal force in cases of sexual harassment. [\[FN2\]](#) When a supervisor inflicts an adverse employment consequence upon an employee who has rebuffed his advances, the supervisor exercises the specific authority granted to him by his company. His acts, therefore, are the company's acts and are properly chargeable to it. See [123 F.3d 490, 514 \(C.A.7 1997\)](#) (Posner, C. J., dissenting); *ante*, at 2269 ("Tangible employment actions fall within the special province of the supervisor. The supervisor has been empowered by the company as a distinct class of agent to make economic decisions affecting other employees under his or her control").

524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633, 66 USLW 4634, 77 Fair Empl.Prac.Cas. (BNA) 1, 170 A.L.R. Fed. 677, 73 Empl. Prac. Dec. P 45,340, 98 Cal. Daily Op. Serv. 5029, 98 Daily Journal D.A.R. 6991, 98 CJ C.A.R. 3405, 11 Fla. L. Weekly Fed. S 692

(Cite as: 524 U.S. 742, 118 S.Ct. 2257)

[FN2](#). The Courts of Appeals relied on racial harassment cases when analyzing early claims of discrimination based upon a supervisor's sexual harassment. For example, when the Court of Appeals for the District of Columbia Circuit held that a work environment poisoned by a supervisor's "sexually stereotyped insults and demeaning propositions" could itself violate Title VII, its principal authority was Judge Goldberg's opinion in [Rogers v. EEOC](#), 454 F.2d 234 (C.A.5 1971). See [Bundy v. Jackson](#), 641 F.2d 934, 944 (C.A.D.C.1981); see also [Henson v. Dundee](#), 682 F.2d 897, 901 (C.A.11 1982). So, too, this Court relied on [Rogers](#) when in [Meritor Savings Bank, FSB v. Vinson](#), 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986), it recognized a cause of action under Title VII for sexual harassment. See [id.](#), at 65-66, 106 S.Ct., at 2404-2405.

If a supervisor creates a hostile work environment, however, he does not act for the employer. As the Court concedes, a supervisor's creation of a hostile work environment is neither within the scope of his employment, nor part of his apparent authority. See *ante*, at 2265-2268. Indeed, a hostile work environment is antithetical to the interest of the employer. In such circumstances, an employer should be liable only if it has been negligent. That is, liability should attach **\*\*2273** only if the employer either knew, or in the exercise of **\*770** reasonable care should have known, about the hostile work environment and failed to take remedial action. [\[FN3\]](#)

[FN3](#). I agree with the Court that the doctrine of *quid pro quo* sexual harassment is irrelevant to the issue of an employer's vicarious liability. I do not, however, agree that the distinction between hostile work environment and *quid pro quo* sexual harassment is relevant "when there is a threshold question whether a plaintiff can prove discrimination in violation of Title VII." *Ante*, at 2265. A supervisor's threat to take adverse action against an employee who refuses his sexual demands, if never carried out, may create a hostile work environment, but that is all. Cases involving such threats, without

more, should therefore be analyzed as hostile work environment cases only. If, on the other hand, the supervisor carries out his threat and causes the plaintiff a job detriment, the plaintiff may have a disparate treatment claim under Title VII. See E. Scalia, *The Strange Career of Quid Pro Quo Sexual Harassment*, 21 Harv. J.L. & Pub. Policy 307, 309-314 (1998).

Sexual harassment is simply not something that employers can wholly prevent without taking extraordinary measures--constant video and audio surveillance, for example--that would revolutionize the workplace in a manner incompatible with a free society. See [123 F.3d, at 513](#) (Posner, C.J., dissenting). Indeed, such measures could not even detect incidents of harassment such as the comments Slowik allegedly made to respondent in a hotel bar. The most that employers can be charged with, therefore, is a duty to act reasonably under the circumstances. As one court recognized in addressing an early racial harassment claim:

"It may not always be within an employer's power to guarantee an environment free from all bigotry.... [H]e can let it be known, however, that racial harassment will not be tolerated, and he can take all reasonable measures to enforce this policy.... But once an employer has in good faith taken those measures which are both feasible and reasonable under the circumstances to combat the offensive conduct we do not think he can be charged with discriminating on the basis of race." [De-Grace v. Rumsfeld](#), 614 F.2d 796, 805 (1980).

**\*771** Under a negligence standard, Burlington cannot be held liable for Slowik's conduct. Although respondent alleged a hostile work environment, she never contended that Burlington had been negligent in permitting the harassment to occur, and there is no question that Burlington acted reasonably under the circumstances. The company had a policy against sexual harassment, and respondent admitted that she was aware of the policy but nonetheless failed to tell anyone with authority over Slowik about his behavior. See *ante*, at 2262. Burlington therefore cannot be charged with knowledge of Slowik's alleged harassment or with a failure to exercise reasonable care in not knowing about it.

524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633, 66 USLW 4634, 77 Fair Empl.Prac.Cas. (BNA) 1, 170 A.L.R. Fed. 677, 73 Empl. Prac. Dec. P 45,340, 98 Cal. Daily Op. Serv. 5029, 98 Daily Journal D.A.R. 6991, 98 CJ C.A.R. 3405, 11 Fla. L. Weekly Fed. S 692

(Cite as: 524 U.S. 742, 118 S.Ct. 2257)

## II

Rejecting a negligence standard, the Court instead imposes a rule of vicarious employer liability, subject to a vague affirmative defense, for the acts of supervisors who wield no delegated authority in creating a hostile work environment. This rule is a whole-cloth creation that draws no support from the legal principles on which the Court claims it is based. Compounding its error, the Court fails to explain how employers can rely upon the affirmative defense, thus ensuring a continuing reign of confusion in this important area of the law.

In justifying its holding, the Court refers to our comment in [Meritor Savings Bank, FSB v. Vinson](#), 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986), that the lower courts should look to "agency principles" for guidance in determining the scope of employer liability, *id.*, at 72, 106 S.Ct., at 2408. The Court then interprets the term "agency principles" to mean the Restatement (Second) of Agency (1957). The Court finds two portions of the Restatement to be relevant: § 219(2)(b), which provides that a master is liable for his servant's torts if the master is reckless or negligent, and § 219(2)(d), which states that a master is liable for his servant's torts when the servant is "aided in accomplishing the tort by the existence of the agency relation." The Court \*772 appears to reason that a supervisor is "aided ... by ... the agency relation" in creating a hostile work environment because the supervisor's \*\*2274 "power and authority invests his or her harassing conduct with a particular threatening character." *Ante*, at 2269.

Section 219(2)(d) of the Restatement provides no basis whatsoever for imposing vicarious liability for a supervisor's creation of a hostile work environment. Contrary to the Court's suggestions, the principle embodied in § 219(2)(d) has nothing to do with a servant's "power and authority," nor with whether his actions appear "threatening." Rather, as demonstrated by the Restatement's illustrations, liability under § 219(2)(d) depends upon the plaintiff's belief that the agent acted in the ordinary course of business or within the scope of his apparent authority. [FN4] In this day and age, no sexually harassed employee can reasonably believe that a harassing supervisor is conducting the official business of the company or acting on its behalf. Indeed, the Court admits as much in demonstrating why sexual harassment is not commit-

ted within the scope of a supervisor's employment and is not part of his apparent authority. See *ante*, at 2265-2268.

[FN4]. See Restatement § 219, Comment *e*; § 261, Comment *a* (principal liable for an agent's fraud if "the agent's position facilitates the consummation of the fraud, in that from the point of view of the third person the transaction seems regular on its face and the agent appears to be acting in the ordinary course of business confided to him"); § 247, Illustrations (newspaper liable for a defamatory editorial published by editor for his own purposes).

Thus although the Court implies that it has found guidance in both precedent and statute--see *ante*, at 2265 ("The resulting federal rule, based on a body of case law developed over time, is statutory interpretation pursuant to congressional direction")--its holding is a product of willful policymaking, pure and simple. The only agency principle that justifies imposing employer liability in this context is the principle \*773 that a master will be liable for a servant's torts if the master was negligent or reckless in permitting them to occur; and as noted, under a negligence standard, Burlington cannot be held liable. See *supra*, at 2273.

The Court's decision is also in considerable tension with our holding in [Meritor](#) that employers are not strictly liable for a supervisor's sexual harassment. See [Meritor Savings Bank, FSB v. Vinson](#), *supra*, at 72, 106 S.Ct., at 2408. Although the Court recognizes an affirmative defense--based solely on its divination of Title VII's *gestalt*, see *ante*, at 2270--it provides shockingly little guidance about how employers can actually avoid vicarious liability. Instead, it issues only Delphic pronouncements and leaves the dirty work to the lower courts:

"While proof that an employer had promulgated an anti-harassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to

524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633, 66 USLW 4634, 77 Fair Empl.Prac.Cas. (BNA) 1, 170 A.L.R. Fed. 677, 73 Empl. Prac. Dec. P 45,340, 98 Cal. Daily Op. Serv. 5029, 98 Daily Journal D.A.R. 6991, 98 CJ C.A.R. 3405, 11 Fla. L. Weekly Fed. S 692

(Cite as: 524 U.S. 742, 118 S.Ct. 2257)

showing an unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense." *Ante*, at 2270.

What these statements mean for district courts ruling on motions for summary judgment--the critical question for employers now subject to the vicarious liability rule--remains a mystery. Moreover, employers will be liable notwithstanding the affirmative defense, *even though they acted reasonably*, so long as the plaintiff in question fulfilled *her* duty of reasonable care to avoid harm. See *ibid*. In practice, therefore, employer liability very well may be the rule. \*774 But as the Court acknowledges, this is the one result that it is clear Congress did *not* intend. See *ante*, at 2269-2270; [Meritor Savings Bank, FSB v. Vinson, supra, at 72, 106 S.Ct., at 2408.](#)

The Court's holding does guarantee one result: There will be more and more litigation to clarify applicable legal rules in an area in which both practitioners and the courts have long been begging for guidance. It thus truly boggles the mind that the Court can claim that its holding will effect "Congress' intention to promote conciliation rather \*\*2275 than litigation in the Title VII context." *Ante*, at 2270. All in all, today's decision is an ironic result for a case that generated eight separate opinions in the Court of Appeals on a fundamental question, and in which we granted certiorari "to assist in defining the relevant standards of employer liability." *Ante*, at 2263-2264.

\* \* \*

Popular misconceptions notwithstanding, sexual harassment is not a freestanding federal tort, but a form of employment discrimination. As such, it should be treated no differently (and certainly no better) than the other forms of harassment that are illegal under Title VII. I would restore parallel treatment of employer liability for racial and sexual harassment and hold an employer liable for a hostile work environment only if the employer is truly at fault. I therefore respectfully dissent.

For U.S. Supreme Court Briefs See:

[1998 WL 90827 \(Appellate Brief\)](#), BRIEF FOR PETITIONER BURLINGTON INDUSTRIES, INC.,

(March 3, 1998)

[1998 WL 93294 \(Appellate Brief\)](#), BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER, (March 4, 1998)

[1998 WL 93296 \(Appellate Brief\)](#), BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER, (March 4, 1998)

[1998 WL 145325 \(Appellate Brief\)](#), BRIEF FOR RESPONDENT, (March 30, 1998)

[1998 WL 145348 \(Appellate Brief\)](#), BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENT, (March 30, 1998)

[1998 WL 145349 \(Appellate Brief\)](#), BRIEF AMICI CURIAE OF EQUAL RIGHTS ADVOCATES, NOW LEGAL DEFENSE AND EDUCATION FUND, NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES and NATIONAL WOMEN'S LAW CENTER ON BEHALF OF RESPONDENT, (March 30, 1998)

[1998 WL 145353 \(Appellate Brief\)](#), BRIEF AMICUS CURIAE OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENT, (March 30, 1998)

[1998 WL 151471 \(Appellate Brief\)](#), BRIEF AMICUS CURIAE IN SUPPORT OF RESPONDENT KIMBERLY B. ELLERTH, (March 30, 1998)

[1998 WL 151472 \(Appellate Brief\)](#), BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE SUPPORTING RESPONDENT, (March 30, 1998)

[1998 WL 173106 \(Appellate Brief\)](#), REPLY BRIEF FOR PETITIONER BURLINGTON INDUSTRIES, INC., (April 13, 1998)

524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633, 66 USLW 4634, 77 Fair Empl.Prac.Cas. (BNA) 1, 170 A.L.R. Fed. 677, 73 Empl. Prac. Dec. P 45,340, 98 Cal. Daily Op. Serv. 5029, 98 Daily Journal D.A.R. 6991, 98 CJ C.A.R. 3405, 11 Fla. L. Weekly Fed. S 692  
(Cite as: 524 U.S. 742, 118 S.Ct. 2257)

[1997 WL 33485629](#) (Appellate Petition, Motion and Filing), Respondent's Brief in Opposition, (December 1, 1997)

For Transcript of Oral Argument See:

[1998 WL 202275 \(U.S.Oral.Arg.\)](#), Oral Argument, (April 22, 1998)

524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633, 66 USLW 4634, 77 Fair Empl.Prac.Cas. (BNA) 1, 170 A.L.R. Fed. 677, 73 Empl. Prac. Dec. P 45,340, 98 Cal. Daily Op. Serv. 5029, 98 Daily Journal D.A.R. 6991, 98 CJ C.A.R. 3405, 11 Fla. L. Weekly Fed. S 692

END OF DOCUMENT



Supreme Court of the United States  
MERITOR SAVINGS BANK, FSB, Petitioner

v.  
Mechelle VINSON et al.  
**No. 84-1979.**

Argued March 25, 1986.  
Decided June 19, 1986.

Female bank employee brought sexual harassment suit against bank and supervisor under employment discrimination statute. The United States District Court for the District of Columbia entered judgment in favor of employer and supervisor and employee appealed. The Court of Appeals, Spottswood W. Robinson, III, Chief Judge, [753 F.2d 141](#), reversed and remanded. Motion for rehearing was denied. [760 F.2d 1330](#). On grant of certiorari, the Supreme Court, Justice Rehnquist, held that: (1) claim of hostile environment sexual harassment is form of sex discrimination actionable under Title VII employment discrimination statute; (2) employee's allegations were sufficient to state claim for hostile environment sexual harassment; (3) district court's erroneous belief that sexual harassment claim will not lie absent economic effect on employee required remand; (4) correct inquiry on issue of sexual harassment was whether sexual advances were unwelcome, not whether employee's participation in them was voluntary; (5) evidence of employee's sexually provocative speech and dress was not per se inadmissible; and (6) mere existence of grievance procedure in bank and bank's policy against discrimination, coupled with employee's failure to invoke that procedure, did not necessarily insulate bank from liability.

Affirmed and remanded.

Justice Marshall filed opinion concurring in judgment, in which Justices Brennan, Blackmun and Stevens joined.

Justice Stevens filed concurring opinion.

West Headnotes

### [\[1\] Civil Rights 78](#) [1185](#)

#### [78](#) Civil Rights

##### [78II](#) Employment Practices

[78k1181](#) Sexual Harassment; Work Environment

[78k1185](#) k. Hostile Environment; Severity, Pervasiveness, and Frequency. [Most Cited Cases](#)  
(Formerly 78k167, 78k9.14)

Plaintiff may establish violation of Title VII prohibiting sex discrimination in employment by proving that discrimination based on sex has created hostile or abusive work environment. Civil Rights Act of 1964, § 701 et seq., as amended, [42 U.S.C.A. § 2000e](#) et seq.

### [\[2\] Civil Rights 78](#) [1185](#)

#### [78](#) Civil Rights

##### [78II](#) Employment Practices

[78k1181](#) Sexual Harassment; Work Environment

[78k1185](#) k. Hostile Environment; Severity, Pervasiveness, and Frequency. [Most Cited Cases](#)  
(Formerly 78k167, 78k9.14)

For sexual harassment to be actionable under statute prohibiting sexual discrimination in employment, it must be sufficiently severe or pervasive to alter conditions of victim's employment and create abusive working environment. Civil Rights Act of 1964, § 701 et seq., as amended, [42 U.S.C.A. § 2000e](#) et seq.

### [\[3\] Civil Rights 78](#) [1532](#)

#### [78](#) Civil Rights

[78IV](#) Remedies Under Federal Employment Discrimination Statutes

##### [78k1532](#) k. Pleading. [Most Cited Cases](#)

(Formerly 78k375, 78k42)

Bank employee's allegations that supervisor made repeated demands for sexual favors, both during and after business hours, and that supervisor fondled her in front of other employees, followed her into women's restroom when she went there alone, exposed himself to her, and even forcibly raped her on several

(Cite as: 477 U.S. 57, 106 S.Ct. 2399)

occasions, was sufficient to state claim for “hostile environment” sexual harassment in violation of Title VII prohibiting sex discrimination in employment. Civil Rights Act of 1964, § 701 et seq., as amended, [42 U.S.C.A. § 2000e](#) et seq.

#### [\[4\] Federal Courts 170B](#) 🔑462

##### [170B](#) Federal Courts

###### [170BVII](#) Supreme Court

##### [170BVII\(B\)](#) Review of Decisions of Courts of Appeals

[170Bk462](#) k. Determination and Disposition of Cause. [Most Cited Cases](#)

District court's apparent belief that sexual harassment claim will not lie absent economic effect on employee, without ever making findings considering “hostile environment” theory of sexual harassment required remand of bank employee's sex discrimination in employment action. Civil Rights Act of 1964, § 701 et seq., as amended, [42 U.S.C.A. § 2000e](#) et seq.

#### [\[5\] Civil Rights 78](#) 🔑1188

##### [78](#) Civil Rights

###### [78II](#) Employment Practices

##### [78k1181](#) Sexual Harassment; Work Environment

[78k1188](#) k. Welcomeness; Consent. [Most Cited Cases](#)

(Formerly 78k167, 78k9.14)

Fact that sex-related conduct was “voluntary” in sense that complainant was not forced to participate against her will, is not defense to sexual harassment suit brought under Title VII prohibiting sex discrimination in employment, rather, gravamen of any sexual harassment claim is that alleged sexual advances were unwelcome. Civil Rights Act of 1964, § 701 et seq., as amended, [42 U.S.C.A. § 2000e](#) et seq.

#### [\[6\] Civil Rights 78](#) 🔑1188

##### [78](#) Civil Rights

###### [78II](#) Employment Practices

##### [78k1181](#) Sexual Harassment; Work Environment

[78k1188](#) k. Welcomeness; Consent. [Most Cited Cases](#)

(Formerly 78k167, 78k9.14)

In determining whether sexual advances alleged in sex discrimination in employment action were unwelcome, correct inquiry was whether bank employee, by her conduct, indicated that sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary. Civil Rights Act of 1964, § 701 et seq., as amended, [42 U.S.C.A. § 2000e](#) et seq.

#### [\[7\] Civil Rights 78](#) 🔑1542

##### [78](#) Civil Rights

##### [78IV](#) Remedies Under Federal Employment Discrimination Statutes

[78k1542](#) k. Admissibility of Evidence; Statistical Evidence. [Most Cited Cases](#)

(Formerly 78k381, 78k43)

While voluntariness in sense of consent is not defense to sexual harassment claim, it does not follow that complainant's sexually provocative speech or dress is irrelevant as matter of law in determining whether he or she found particular sexual advances unwelcome. Civil Rights Act of 1964, § 701 et seq., as amended, [42 U.S.C.A. § 2000e](#) et seq.

#### [\[8\] Civil Rights 78](#) 🔑1542

##### [78](#) Civil Rights

##### [78IV](#) Remedies Under Federal Employment Discrimination Statutes

[78k1542](#) k. Admissibility of Evidence; Statistical Evidence. [Most Cited Cases](#)

(Formerly 78k381, 78k43)

Bank employee's dress and personal fantasies were not per se inadmissible in bank employee's sex discrimination in employment action brought against bank. Civil Rights Act of 1964, § 701 et seq., as amended, [42 U.S.C.A. § 2000e](#) et seq.

#### [\[9\] Civil Rights 78](#) 🔑1528

##### [78](#) Civil Rights

##### [78IV](#) Remedies Under Federal Employment Discrimination Statutes

###### [78k1526](#) Persons Liable

[78k1528](#) k. Vicarious Liability; Respondeat Superior. [Most Cited Cases](#)

(Formerly 78k167, 78k9.14)

Employers are not always automatically liable for sexual harassment by their supervisors. Civil Rights

(Cite as: 477 U.S. 57, 106 S.Ct. 2399)

Act of 1964, § 701 et seq., as amended, [42 U.S.C.A. § 2000e](#) et seq.

**[10] Civil Rights 78 🔑1189**

**78** Civil Rights

**78II** Employment Practices

**78k1181** Sexual Harassment; Work Environment

**78k1189** k. Knowledge or Notice; Preventive or Remedial Measures. [Most Cited Cases](#)  
(Formerly 78k167, 78k9.14)

Absence of notice to employer does not necessarily insulate employer from liability for sexual harassment. Civil Rights Act of 1964, § 701 et seq., as amended, [42 U.S.C.A. § 2000e](#) et seq.

**[11] Civil Rights 78 🔑1189**

**78** Civil Rights

**78II** Employment Practices

**78k1181** Sexual Harassment; Work Environment

**78k1189** k. Knowledge or Notice; Preventive or Remedial Measures. [Most Cited Cases](#)  
(Formerly 78k167, 78k9.14)

Mere existence of grievance procedure and policy against discrimination, coupled with bank employee's failure to invoke that procedure, did not insulate bank from liability under Title VII prohibiting sexual discrimination in employment for sexual harassment by employee's supervisor. Civil Rights Act of 1964, § 701 et seq. as amended, [42 U.S.C.A. § 2000e](#) et seq.

**\*\*2400 \*57 Syllabus** <sup>FN\*</sup>

**FN\*** The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See [United States v. Detroit Lumber Co.](#), [200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.](#)

Respondent former employee of petitioner bank brought an action against the bank and her supervisor at the bank, claiming that during her employment at the bank she had been subjected to sexual harassment by the supervisor in violation of Title VII of the Civil Rights Act of 1964, and seeking injunctive relief and damages. At the trial, the parties presented conflict-

ing testimony about the existence of a sexual relationship between respondent and the supervisor. The District Court denied relief without resolving the conflicting testimony, holding that if respondent and the supervisor did have a sexual relationship, it was voluntary and had nothing to do with her continued employment at the bank, and that therefore respondent was not the victim of sexual harassment. The court then went on to hold that since the bank was without notice, it could not be held liable for the supervisor's alleged sexual harassment. The Court of Appeals reversed and remanded. Noting that a violation of Title VII may be predicated on either of two types of sexual harassment-(1) harassment that involves the conditioning of employment benefits on sexual favors, and (2) harassment that, while not affecting economic benefits, creates a hostile or offensive working environment-the Court of Appeals held that since the grievance here was of the second type and the District **\*\*2401** Court had not considered whether a violation of this type had occurred, a remand was necessary. The court further held that the need for a remand was not obviated by the fact that the District Court had found that any sexual relationship between respondent and the supervisor was a voluntary one, a finding that might have been based on testimony about respondent's "dress and personal fantasies" that "had no place in the litigation." As to the bank's liability, the Court of Appeals held that an employer is absolutely liable for sexual harassment by supervisory personnel, whether or not the employer knew or should have known about it.

*Held:*

1. A claim of "hostile environment" sexual harassment is a form of sex discrimination that is actionable under Title VII. Pp. 2404-2407.

(a) The language of Title VII is not limited to "economic" or "tangible" discrimination. Equal Employment Opportunity Commission Guidelines fully support the view that sexual harassment leading to non-economic\***58** injury can violate Title VII. Here, respondent's allegations were sufficient to state a claim for "hostile environment" sexual harassment. Pp. 2404-2406.

(b) The District Court's findings were insufficient to dispose of respondent's "hostile environment" claim.

(Cite as: 477 U.S. 57, 106 S.Ct. 2399)

The District Court apparently erroneously believed that a sexual harassment claim will not lie absent an *economic* effect on the complainant's employment, and erroneously focused on the "voluntariness" of respondent's participation in the claimed sexual episodes. The correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome, not whether her participation in them was voluntary. Pp. 2406.

(c) The District Court did not err in admitting evidence of respondent's sexually provocative speech and dress. While "voluntariness" in the sense of consent is no defense to a sexual harassment claim, it does not follow that such evidence is irrelevant as a matter of law in determining whether the complainant found particular sexual advances unwelcome. Pp. 2406-2407.

2. The Court of Appeals erred in concluding that employers are always automatically liable for sexual harassment by their supervisors. While common-law agency principles may not be transferable in all their particulars to Title VII, Congress' decision to define "employer" to include any "agent" of an employer evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible. In this case, however, the mere existence of a grievance procedure in the bank and the bank's policy against discrimination, coupled with respondent's failure to invoke that procedure, do not necessarily insulate the bank from liability. Pp. 2407-2408.

[243 U.S.App.D.C. 323, 753 F.2d 141](#), affirmed and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C.J., and WHITE, POWELL, STEVENS, and O'CONNOR, JJ., joined. STEVENS, J., filed a concurring opinion, *post*, p. ---. MARSHALL, J., filed an opinion concurring in the judgment, in which BRENNAN, BLACKMUN, and STEVENS, JJ., joined, *post*, p. ---.

*F. Robert Troll, Jr.*, argued the cause for petitioner. With him on the briefs were *Charles H. Fleischer* and *Randall C. Smith*.

*Patricia J. Barry* argued the cause for respondent Vinson. With her on the brief was *Catherine A.*

*MacKinnon*.\*

\* Briefs of *amici curiae* urging reversal were filed for the United States et al. by *Solicitor General Fried, Assistant Attorneys General Reynolds and Willard, Deputy Solicitor General Kuhl, Albert G. Lauber, Jr., John F. Cordes, John F. Daly, and Johnny J. Butler*; for the Equal Employment Advisory Council by *Robert E. Williams, Douglas S. McDowell, and Garen E. Dodge*; for the Chamber of Commerce of the United States by *Dannie B. Fogleman*; *Stephen A. Bokak*; and for the Trustees of Boston University by *William Burnett Harvey* and *Michael B. Rosen*.

Briefs of *amici curiae* urging affirmance were filed for the State of New Jersey et al. by *W. Cary Edwards, Attorney General of New Jersey, James J. Ciancia, Assistant Attorney General, Susan L. Reischer and Lynn B. Norcia, Deputy Attorneys General, John Van de Kamp, Attorney General of California, Joseph I. Lieberman, Attorney General of Connecticut, Neil F. Hartigan, Attorney General of Illinois, Hubert H. Humphrey III, Attorney General of Minnesota, Paul Bardacke, Attorney General of New Mexico, Robert Abrams, Attorney General of New York, Jeffrey L. Amestoy, Attorney General of Vermont, and Elisabeth S. Shuster*; for the *America Federation of Labor and the Congress of Industrial Organizations et al.* by *Marsha S. Berzon, Joy L. Koletsky, Laurence Gold, Winn Newman, and Sarah E. Burns*; for the *Women's Bar Association of Massachusetts et al.* by *S. Beville May*; for the *Women's Bar Association of the State of New York* by *Stephen N. Shulman and Lynda S. Mounts*; for the *Women's Legal Defense Fund et al.* by *Linda R. Singer, Anne E. Simon, Nadine Taub, Judith Levin, and iBarry H. Gottfried*; for the *Working Women's Institute et al.* by *Laurie E. Foster*; and for Senator Paul Simon et al. by *Michael H. Salisbury*.

\*59 Justice REHNQUIST delivered the opinion of the Court.

This case presents important questions concerning claims of workplace "sexual harassment" brought under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, [42 U.S.C. § 2000e](#) et seq.

I

(Cite as: 477 U.S. 57, 106 S.Ct. 2399)

In 1974, respondent Mechelle Vinson met Sidney Taylor, a vice president of what is now petitioner Meritor Savings Bank \*\*2402 (bank) and manager of one of its branch offices. When respondent asked whether she might obtain employment at the bank, Taylor gave her an application, which she completed and returned the next day; later that same day Taylor called her to say that she had been hired. With Taylor as her supervisor, respondent started as a teller-trainee, and thereafter was promoted to teller, head teller, and assistant \*60 branch manager. She worked at the same branch for four years, and it is undisputed that her advancement there was based on merit alone. In September 1978, respondent notified Taylor that she was taking sick leave for an indefinite period. On November 1, 1978, the bank discharged her for excessive use of that leave.

Respondent brought this action against Taylor and the bank, claiming that during her four years at the bank she had “constantly been subjected to sexual harassment” by Taylor in violation of Title VII. She sought injunctive relief, compensatory and punitive damages against Taylor and the bank, and attorney’s fees.

At the 11-day bench trial, the parties presented conflicting testimony about Taylor’s behavior during respondent’s employment.<sup>FN‡</sup> Respondent testified that during her probationary period as a teller-trainee, Taylor treated her in a fatherly way and made no sexual advances. Shortly thereafter, however, he invited her out to dinner and, during the course of the meal, suggested that they go to a motel to have sexual relations. At first she refused, but out of what she described as fear of losing her job she eventually agreed. According to respondent, Taylor thereafter made repeated demands upon her for sexual favors, usually at the branch, both during and after business hours; she estimated that over the next several years she had intercourse with him some 40 or 50 times. In addition, respondent testified that Taylor fondled her in front of other employees, followed her into the women’s restroom when she went there alone, exposed himself to her, and even forcibly raped her on several occasions. These activities ceased after 1977, respondent stated, when she started going with a steady boyfriend.

<sup>FN‡</sup> Like the Court of Appeals, this Court was not provided a complete transcript of

the trial. We therefore rely largely on the District Court’s opinion for the summary of the relevant testimony.

Respondent also testified that Taylor touched and fondled other women employees of the bank, and she attempted to \*61 call witnesses to support this charge. But while some supporting testimony apparently was admitted without objection, the District Court did not allow her “to present wholesale evidence of a pattern and practice relating to sexual advances to other female employees in her case in chief, but advised her that she might well be able to present such evidence in rebuttal to the defendants’ cases.” *Vinson v. Taylor*, 22 EPD ¶ 30,708, p. 14,693, n. 1, 23 FEP Cases 37, 38-39, n. 1 (DC 1980). Respondent did not offer such evidence in rebuttal. Finally, respondent testified that because she was afraid of Taylor she never reported his harassment to any of his supervisors and never attempted to use the bank’s complaint procedure.

Taylor denied respondent’s allegations of sexual activity, testifying that he never fondled her, never made suggestive remarks to her, never engaged in sexual intercourse with her, and never asked her to do so. He contended instead that respondent made her accusations in response to a business-related dispute. The bank also denied respondent’s allegations and asserted that any sexual harassment by Taylor was unknown to the bank and engaged in without its consent or approval.

The District Court denied relief, but did not resolve the conflicting testimony about the existence of a sexual relationship between respondent and Taylor. It found instead that

“[i]f [respondent] and Taylor did engage in an intimate or sexual relationship during the time of [respondent’s] employment\*\*2403 with [the bank], that relationship was a voluntary one having nothing to do with her continued employment at [the bank] or her advancement or promotions at that institution.” *Id.*, at 14,692, 23 FEP Cases, at 42 (footnote omitted).

The court ultimately found that respondent “was not the victim of sexual harassment and was not the victim of sexual discrimination” while employed at the

(Cite as: 477 U.S. 57, 106 S.Ct. 2399)

bank. *Ibid.*, 23 FEP Cases, 43.

\*62 Although it concluded that respondent had not proved a violation of Title VII, the District Court nevertheless went on to address the bank's liability. After noting the bank's express policy against discrimination, and finding that neither respondent nor any other employee had ever lodged a complaint about sexual harassment by Taylor, the court ultimately concluded that "the bank was without notice and cannot be held liable for the alleged actions of Taylor." *Id.*, at 14,691, 23 FEP Cases, at 42.

The Court of Appeals for the District of Columbia Circuit reversed. 243 U.S.App.D.C. 323, 753 F.2d 141 (1985). Relying on its earlier holding in *Bundy v. Jackson*, 205 U.S.App.D.C. 444, 641 F.2d 934 (1981), decided after the trial in this case, the court stated that a violation of Title VII may be predicated on either of two types of sexual harassment: harassment that involves the conditioning of concrete employment benefits on sexual favors, and harassment that, while not affecting economic benefits, creates a hostile or offensive working environment. The court drew additional support for this position from the Equal Employment Opportunity Commission's Guidelines on Discrimination Because of Sex, 29 CFR § 1604.11(a) (1985), which set out these two types of sexual harassment claims. Believing that "Vinson's grievance was clearly of the [hostile environment] type," 243 U.S.App.D.C., at 327, 753 F.2d, at 145, and that the District Court had not considered whether a violation of this type had occurred, the court concluded that a remand was necessary.

The court further concluded that the District Court's finding that any sexual relationship between respondent and Taylor "was a voluntary one" did not obviate the need for a remand. "[U]ncertain as to precisely what the [district] court meant" by this finding, the Court of Appeals held that if the evidence otherwise showed that "Taylor made Vinson's toleration of sexual harassment a condition of her employment," her voluntariness "had no materiality whatsoever." \*63 *Id.*, at 328, 753 F.2d, at 146. The court then surmised that the District Court's finding of voluntariness might have been based on "the voluminous testimony regarding respondent's dress and personal fantasies," testimony that the Court of Appeals believed "had no place in this litigation." *Id.*, at 328, n. 36, 753 F.2d, at 146, n. 36.

As to the bank's liability, the Court of Appeals held that an employer is absolutely liable for sexual harassment practiced by supervisory personnel, whether or not the employer knew or should have known about the misconduct. The court relied chiefly on Title VII's definition of "employer" to include "any agent of such a person," 42 U.S.C. § 2000e(b), as well as on the EEOC Guidelines. The court held that a supervisor is an "agent" of his employer for Title VII purposes, even if he lacks authority to hire, fire, or promote, since "the mere existence-or even the appearance-of a significant degree of influence in vital job decisions gives any supervisor the opportunity to impose on employees." 243 U.S.App.D.C., at 332, 753 F.2d, at 150.

In accordance with the foregoing, the Court of Appeals reversed the judgment of the District Court and remanded the case for further proceedings. A subsequent suggestion for rehearing en banc was denied, with three judges dissenting. 245 U.S.App.D.C. 306, 760 F.2d 1330 (1985). We granted certiorari, 474 U.S. 1047, 106 S.Ct. 57, 88 L.Ed.2d 46 (1985), and now affirm but for different reasons.

## \*\*2404 II

Title VII of the Civil Rights Act of 1964 makes it "an unlawful employment practice for an employer ... 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." 42 U.S.C. § 2000e-2(a)(1). The prohibition against discrimination based on sex was added to Title VII at the last minute on the floor of the House of Representatives. 110 Cong.Rec. 2577-2584 (1964). The principal argument in opposition\*64 to the amendment was that "sex discrimination" was sufficiently different from other types of discrimination that it ought to receive separate legislative treatment. See *id.*, at 2577 (statement of Rep. Celler quoting letter from United States Department of Labor); *id.*, at 2584 (statement of Rep. Green). This argument was defeated, the bill quickly passed as amended, and we are left with little legislative history to guide us in interpreting the Act's prohibition against discrimination based on "sex."

Respondent argues, and the Court of Appeals held,

(Cite as: 477 U.S. 57, 106 S.Ct. 2399)

that unwelcome sexual advances that create an offensive or hostile working environment violate Title VII. Without question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor "discriminate[s]" on the basis of sex. Petitioner apparently does not challenge this proposition. It contends instead that in prohibiting discrimination with respect to "compensation, terms, conditions, or privileges" of employment, Congress was concerned with what petitioner describes as "tangible loss" of "an economic character," not "purely psychological aspects of the workplace environment." Brief for Petitioner 30-31, 34. In support of this claim petitioner observes that in both the legislative history of Title VII and this Court's Title VII decisions, the focus has been on tangible, economic barriers erected by discrimination.

We reject petitioner's view. First, the language of Title VII is not limited to "economic" or "tangible" discrimination. The phrase "terms, conditions, or privileges of employment" evinces a congressional intent " 'to strike at the entire spectrum of disparate treatment of men and women' " in employment. Los Angeles Dept. of Water and Power v. Manhart, 435 U.S. 702, 707, n. 13, 98 S.Ct. 1370, 1375, n. 13, 55 L.Ed.2d 657 (1978), quoting Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (CA7 1971). Petitioner has pointed to nothing in the Act to suggest that Congress contemplated the limitation urged here.

\*65 Second, in 1980 the EEOC issued Guidelines specifying that "sexual harassment," as there defined, is a form of sex discrimination prohibited by Title VII. As an "administrative interpretation of the Act by the enforcing agency," Griggs v. Duke Power Co., 401 U.S. 424, 433-434, 91 S.Ct. 849, 855, 28 L.Ed.2d 158 (1971), these Guidelines, " 'while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.' " General Electric Co. v. Gilbert, 429 U.S. 125, 141-142, 97 S.Ct. 401, 410-11, 50 L.Ed.2d 343 (1976), quoting Skidmore v. Swift & Co., 323 U.S. 134, 140, 65 S.Ct. 161, 164, 89 L.Ed.124 (1944). The EEOC Guidelines fully support the view that harassment leading to noneconomic injury can violate Title VII.

In defining "sexual harassment," the Guidelines first describe the kinds of workplace conduct that may be

actionable under Title VII. These include "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature." 29 CFR § 1604.11(a) (1985). Relevant to the charges at issue in this case, the Guidelines provide that such sexual misconduct constitutes prohibited "sexual harassment," whether or not it is directly linked to the grant or denial of an economic *quid pro quo*, where "such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, \*\*2405 hostile, or offensive working environment." § 1604.11(a)(3).

In concluding that so-called "hostile environment" (*i.e.*, non *quid pro quo*) harassment violates Title VII, the EEOC drew upon a substantial body of judicial decisions and EEOC precedent holding that Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult. See generally 45 Fed.Reg. 74676 (1980). Rogers v. EEOC, 454 F.2d 234 (CA5 1971), cert. denied, 406 U.S. 957, 92 S.Ct. 2058, 32 L.Ed.2d 343 (1972), was apparently the first case to recognize a cause of action based upon a discriminatory work environment. In Rogers, the Court of Appeals for the Fifth \*66 Circuit held that a Hispanic complainant could establish a Title VII violation by demonstrating that her employer created an offensive work environment for employees by giving discriminatory service to its Hispanic clientele. The court explained that an employee's protections under Title VII extend beyond the economic aspects of employment:

"[T]he phrase 'terms, conditions or privileges of employment' in [Title VII] is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination.... One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers...." 454 F.2d, at 238.

Courts applied this principle to harassment based on race, *e.g.*, Firefighters Institute for Racial Equality v. St. Louis, 549 F.2d 506, 514-515 (CA8), cert. denied *sub nom. Banta v. United States*, 434 U.S. 819, 98 S.Ct. 60, 54 L.Ed.2d 76 (1977); Gray v. Greyhound Lines, East, 178 U.S.App.D.C. 91, 98, 545 F.2d 169, 176 (1976), religion, *e.g.*, Compston v. Borden, Inc.,

(Cite as: 477 U.S. 57, 106 S.Ct. 2399)

[424 F.Supp. 157 \(SD Ohio 1976\)](#), and national origin, *e.g.*, [Cariddi v. Kansas City Chiefs Football Club, 568 F.2d 87, 88 \(CA8 1977\)](#). Nothing in Title VII suggests that a hostile environment based on discriminatory sexual harassment should not be likewise prohibited. The Guidelines thus appropriately drew from, and were fully consistent with, the existing case law.

[1] Since the Guidelines were issued, courts have uniformly held, and we agree, that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment. As the Court of Appeals for the Eleventh Circuit wrote in [Henson v. Dundee, 682 F.2d 897, 902 \(1982\)](#):

\*67 “Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.”

Accord, [Katz v. Dole, 709 F.2d 251, 254-255 \(CA4 1983\)](#); [Bundy v. Jackson, 205 U.S.App.D.C., at 444-454, 641 F.2d, at 934-944; Zabkovicz v. West Bend Co., 589 F.Supp. 780 \(ED Wis.1984\)](#).

[2][3] Of course, as the courts in both *Rogers* and *Henson* recognized, not all workplace conduct that may be described as “harassment” affects a “term, condition, or privilege” of employment within the meaning of Title VII. See [Rogers v. EEOC, supra, at 238](#) (“mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee” would not affect the conditions of employment to sufficiently significant degree to violate Title VII); [Henson, 682 F.2d, at 904](#) (quoting same). For sexual harassment to be actionable, it must be sufficiently severe or pervasive “to alter the conditions of [the victim's] employment and create an abusive working environment.” *Ibid.* Respondent's allegations in this case—which include not only pervasive harassment but \*\*2406 also criminal conduct of the most serious nature—are plainly sufficient to state a claim for “hostile environment” sexual harassment.

[4] The question remains, however, whether the District Court's ultimate finding that respondent “was not the victim of sexual harassment,” [22 EPD ¶ 30,708, at 14,692-14,693, 23 FEP Cases, at 43](#), effectively disposed of respondent's claim. The Court of Appeals recognized, we think correctly, that this ultimate finding was likely based on one or both of two erroneous views of the law. First, the District Court apparently believed that a claim for sexual harassment will not lie \*68 absent an *economic* effect on the complainant's employment. See *ibid.* (“It is without question that sexual harassment of female employees in which they are asked or required to submit to sexual demands as a *condition to obtain employment or to maintain employment or to obtain promotions* falls within protection of Title VII”) (emphasis added). Since it appears that the District Court made its findings without ever considering the “hostile environment” theory of sexual harassment, the Court of Appeals' decision to remand was correct.

[5][6] Second, the District Court's conclusion that no actionable harassment occurred might have rested on its earlier “finding” that “[i]f [respondent] and Taylor did engage in an intimate or sexual relationship ..., that relationship was a voluntary one.” [Id., at 14,692, 23 FEP Cases, at 42](#). But the fact that sex-related conduct was “voluntary,” in the sense that the complainant was not forced to participate against her will, is not a defense to a sexual harassment suit brought under Title VII. The gravamen of any sexual harassment claim is that the alleged sexual advances were “unwelcome.” [29 CFR § 1604.11\(a\) \(1985\)](#). While the question whether particular conduct was indeed unwelcome presents difficult problems of proof and turns largely on credibility determinations committed to the trier of fact, the District Court in this case erroneously focused on the “voluntariness” of respondent's participation in the claimed sexual episodes. The correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary.

[7][8] Petitioner contends that even if this case must be remanded to the District Court, the Court of Appeals erred in one of the terms of its remand. Specifically, the Court of Appeals stated that testimony about respondent's “dress and personal fantasies,” [243 U.S.App.D.C., at 328, n. 36, 753 F.2d, at 146, n.](#)

(Cite as: 477 U.S. 57, 106 S.Ct. 2399)

36, which the District Court apparently admitted\*69 into evidence, “had no place in this litigation.” *Ibid.* The apparent ground for this conclusion was that respondent’s voluntariness *vel non* in submitting to Taylor’s advances was immaterial to her sexual harassment claim. While “voluntariness” in the sense of consent is not a defense to such a claim, it does not follow that a complainant’s sexually provocative speech or dress is irrelevant as a matter of law in determining whether he or she found particular sexual advances unwelcome. To the contrary, such evidence is obviously relevant. The EEOC Guidelines emphasize that the trier of fact must determine the existence of sexual harassment in light of “the record as a whole” and “the totality of circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred.” 29 CFR § 1604.11(b) (1985). Respondent’s claim that any marginal relevance of the evidence in question was outweighed by the potential for unfair prejudice is the sort of argument properly addressed to the District Court. In this case the District Court concluded that the evidence should be admitted, and the Court of Appeals’ contrary conclusion was based upon the erroneous, categorical view that testimony about provocative dress and publicly expressed sexual fantasies “had no place in this litigation.” 243 U.S.App.D.C., at 328, n. 36, 753 F.2d, at 146, n. 36. While the District Court must carefully weigh the \*\*2407 applicable considerations in deciding whether to admit evidence of this kind, there is no *per se* rule against its admissibility.

III

Although the District Court concluded that respondent had not proved a violation of Title VII, it nevertheless went on to consider the question of the bank’s liability. Finding that “the bank was without notice” of Taylor’s alleged conduct, and that notice to Taylor was not the equivalent of notice to the bank, the court concluded that the bank therefore could not be held liable for Taylor’s alleged actions. The Court of Appeals took the opposite view, holding that an employer is \*70 strictly liable for a hostile environment created by a supervisor’s sexual advances, even though the employer neither knew nor reasonably could have known of the alleged misconduct. The court held that a supervisor, whether or not he possesses the authority to hire, fire, or promote, is necessarily an “agent” of his employer for all Title VII

purposes, since “even the appearance” of such authority may enable him to impose himself on his subordinates.

The parties and *amici* suggest several different standards for employer liability. Respondent, not surprisingly, defends the position of the Court of Appeals. Noting that Title VII’s definition of “employer” includes any “agent” of the employer, she also argues that “so long as the circumstance is work-related, the supervisor is the employer and the employer is the supervisor.” Brief for Respondent 27. Notice to Taylor that the advances were unwelcome, therefore, was notice to the bank.

Petitioner argues that respondent’s failure to use its established grievance procedure, or to otherwise put it on notice of the alleged misconduct, insulates petitioner from liability for Taylor’s wrongdoing. A contrary rule would be unfair, petitioner argues, since in a hostile environment harassment case the employer often will have no reason to know about, or opportunity to cure, the alleged wrongdoing.

The EEOC, in its brief as *amicus curiae*, contends that courts formulating employer liability rules should draw from traditional agency principles. Examination of those principles has led the EEOC to the view that where a supervisor exercises the authority actually delegated to him by his employer, by making or threatening to make decisions affecting the employment status of his subordinates, such actions are properly imputed to the employer whose delegation of authority empowered the supervisor to undertake them. Brief for United States and EEOC as *Amici Curiae* 22. Thus, the courts have consistently held employers liable for the discriminatory discharges of employees by supervisory personnel,\*71 whether or not the employer knew, should have known, or approved of the supervisor’s actions. *E.g.*, *Anderson v. Methodist Evangelical Hospital, Inc.*, 464 F.2d 723, 725 (CA6 1972).

The EEOC suggests that when a sexual harassment claim rests exclusively on a “hostile environment” theory, however, the usual basis for a finding of agency will often disappear. In that case, the EEOC believes, agency principles lead to

“a rule that asks whether a victim of sexual harass-

(Cite as: 477 U.S. 57, 106 S.Ct. 2399)

ment had reasonably available an avenue of complaint regarding such harassment, and, if available and utilized, whether that procedure was reasonably responsive to the employee's complaint. If the employer has an expressed policy against sexual harassment and has implemented a procedure specifically designed to resolve sexual harassment claims, and if the victim does not take advantage of that procedure, the employer should be shielded from liability absent actual knowledge of the sexually hostile environment (obtained, *e.g.*, by the filing of a charge with the EEOC or a comparable state agency). In all other cases, the employer will be liable if it has actual knowledge of the harassment or if, considering all the facts of the case, the victim in question had no reasonably available avenue for making his or her complaint known to appropriate\*\*2408 management officials." Brief for United States and EEOC as *Amici Curiae* 26.

As respondent points out, this suggested rule is in some tension with the EEOC Guidelines, which hold an employer liable for the acts of its agents without regard to notice. [29 CFR § 1604.11\(c\) \(1985\)](#). The Guidelines do require, however, an "examin[ation of] the circumstances of the particular employment relationship and the job [f]unctions performed by the individual in determining whether an individual acts in either a supervisory or agency capacity." *Ibid*.

\*72 This debate over the appropriate standard for employer liability has a rather abstract quality about it given the state of the record in this case. We do not know at this stage whether Taylor made any sexual advances toward respondent at all, let alone whether those advances were unwelcome, whether they were sufficiently pervasive to constitute a condition of employment, or whether they were "so pervasive and so long continuing ... that the employer must have become conscious of [them]," [Taylor v. Jones](#), [653 F.2d 1193, 1197-1199 \(CA8 1981\)](#) (holding employer liable for racially hostile working environment based on constructive knowledge).

[9][10] We therefore 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, [42 U.S.C. § 2000e\(b\)](#), surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible. For this reason, we hold that the Court of Appeals erred in concluding that employers are always automatically liable for sexual harassment by their supervisors. See generally [Restatement \(Second\) of Agency §§ 219-237 \(1958\)](#). For the same reason, absence of notice to an employer does not necessarily insulate that employer from liability. *Ibid*.

[11] Finally, we reject petitioner's view that the mere existence of a grievance procedure and a policy against discrimination, coupled with respondent's failure to invoke that procedure, must insulate petitioner from liability. While those facts are plainly relevant, the situation before us demonstrates why they are not necessarily dispositive. Petitioner's general nondiscrimination policy did not address sexual harassment in particular, and thus did not alert employees to their employer's\*73 interest in correcting that form of discrimination. App. 25. Moreover, the bank's grievance procedure apparently required an employee to complain first to her supervisor, in this case Taylor. Since Taylor was the alleged perpetrator, it is not altogether surprising that respondent failed to invoke the procedure and report her grievance to him. Petitioner's contention that respondent's failure should insulate it from liability might be substantially stronger if its procedures were better calculated to encourage victims of harassment to come forward.

#### IV

In sum, we hold that a claim of "hostile environment" sex discrimination is actionable under Title VII, that the District Court's findings were insufficient to dispose of respondent's hostile environment claim, and that the District Court did not err in admitting testimony about respondent's sexually provocative speech and dress. As to employer liability, we conclude that the Court of Appeals was wrong to entirely disregard agency principles and impose absolute liability on employers for the acts of their supervisors, regardless of the circumstances of a particular case.

Accordingly, the judgment of the Court of Appeals reversing the judgment of the District Court is affirmed, and the case is remanded for further proceedings consistent with this opinion.

(Cite as: 477 U.S. 57, 106 S.Ct. 2399)

*It is so ordered.*

\*\*2409 Justice STEVENS, concurring.

Because I do not see any inconsistency between the two opinions, and because I believe the question of statutory construction that Justice MARSHALL has answered is fairly presented by the record, I join both the Court's opinion and Justice MARSHALL's opinion.

\*74 Justice MARSHALL, with whom Justice BRENNAN, Justice BLACKMUN, and Justice STEVENS join, concurring in the judgment.

I fully agree with the Court's conclusion that workplace sexual harassment is illegal, and violates Title VII. Part III of the Court's opinion, however, leaves open the circumstances in which an employer is responsible under Title VII for such conduct. Because I believe that question to be properly before us, I write separately.

The issue the Court declines to resolve is addressed in the EEOC Guidelines on Discrimination Because of Sex, which are entitled to great deference. See [Griggs v. Duke Power Co.](#), 401 U.S. 424, 433-434, 91 S.Ct. 849, 854-55, 28 L.Ed.2d 158 (1971) (EEOC Guidelines on Employment Testing Procedures of 1966); see also *ante*, at 2404. The Guidelines explain:

“Applying general Title VII principles, an employer ... is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence. The Commission will examine the circumstances of the particular employment relationship and the job [f]unctions performed by the individual in determining whether an individual acts in either a supervisory or agency capacity.

“With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.” 29 CFR §§ 1604.11(c), (d) (1985).

The Commission, in issuing the Guidelines, explained that its rule was “in keeping with the general standard of employer\*75 liability with respect to agents and supervisory employees.... [T]he Commission and the courts have held for years that an employer is liable if a supervisor or an agent violates the Title VII, regardless of knowledge or any other mitigating factor.” 45 Fed.Reg. 74676 (1980). I would adopt the standard set out by the Commission.

An employer can act only through individual supervisors and employees; discrimination is rarely carried out pursuant to a formal vote of a corporation's board of directors. Although an employer may sometimes adopt companywide discriminatory policies violative of Title VII, acts that may constitute Title VII violations are generally effected through the actions of individuals, and often an individual may take such a step even in defiance of company policy. Nonetheless, Title VII remedies, such as reinstatement and backpay, generally run against the employer as an entity.<sup>FN1</sup> The question thus arises as to the circumstances under which an employer will be held liable under Title VII for the acts of its employees.

<sup>FN1</sup> The remedial provisions of Title VII were largely modeled on those of the National Labor Relations Act (NLRA). See [Albemarle Paper Co. v. Moody](#), 422 U.S. 405, 419, and n. 11, 95 S.Ct. 2362, 2372, and n. 11 (1975); see also [Franks v. Bowman Transportation Co.](#), 424 U.S. 747, 768-770, 96 S.Ct. 1251, 1266-67, 47 L.Ed.2d 444 (1976).

The answer supplied by general Title VII law, like that supplied by federal labor law, is that the act of a supervisory employee or agent is imputed to the employer.<sup>FN2</sup> Thus, \*\*2410 for example, when a supervisor discriminatorily fires or refuses to promote a black employee, that act is, without more, considered the act of the employer. The courts do not stop to consider whether the employer otherwise had “notice” of the action, or even whether the supervisor had actual authority to act as he did. *E.g.*, \*76 [Flowers v. Crouch-Walker Corp.](#), 552 F.2d 1277, 1282 (CA7 1977); [Young v. Southwestern Savings and Loan Assn.](#), 509 F.2d 140 (CA5 1975); [Anderson v. Methodist Evangelical Hospital, Inc.](#), 464 F.2d 723 (CA6 1972). Following that approach, every Court of Appeals that has considered the issue has held that

sexual harassment by supervisory personnel is automatically imputed to the employer when the harassment results in tangible job detriment to the subordinate employee. See [Horn v. Duke Homes, Inc., Div. of Windsor Mobile Homes](#), 755 F.2d 599, 604-606 (CA7 1985); [Craig v. Y & Y Snacks, Inc.](#), 721 F.2d 77, 80-81 (CA3 1983); [Katz v. Dole](#), 709 F.2d 251, 255, n. 6 (CA4 1983); [Henson v. Dundee](#), 682 F.2d 897, 910 (CA11 1982); [Miller v. Bank of America](#), 600 F.2d 211, 213 (CA9 1979).

FN2. For NLRA cases, see, e.g., [Graves Trucking, Inc. v. NLRB](#), 692 F.2d 470 (CA7 1982); [NLRB v. Kaiser Agricultural Chemical, Division of Kaiser Aluminum & Chemical Corp.](#), 473 F.2d 374, 384 (CA5 1973); [Amalgamated Clothing Workers of America v. NLRB](#), 124 U.S.App.D.C. 365, 377, 365 F.2d 898, 909 (1966).

The brief filed by the Solicitor General on behalf of the United States and the EEOC in this case suggests that a different rule should apply when a supervisor's harassment "merely" results in a discriminatory work environment. The Solicitor General concedes that sexual harassment that affects tangible job benefits is an exercise of authority delegated to the supervisor by the employer, and thus gives rise to employer liability. But, departing from the EEOC Guidelines, he argues that the case of a supervisor merely creating a discriminatory work environment is different because the supervisor "is not exercising, or threatening to exercise, actual or apparent authority to make personnel decisions affecting the victim." Brief for United States and EEOC as *Amici Curiae* 24. In the latter situation, he concludes, some further notice requirement should therefore be necessary.

The Solicitor General's position is untenable. A supervisor's responsibilities do not begin and end with the power to hire, fire, and discipline employees, or with the power to recommend such actions. Rather, a supervisor is charged with the day-to-day supervision of the work environment and with ensuring a safe, productive workplace. There is no reason why abuse of the latter authority should have different consequences than abuse of the former. In both cases it is the authority\*77 vested in the supervisor by the employer that enables him to commit the wrong: it is precisely because the supervisor is understood to be clothed with the employer's authority that he is able

to impose unwelcome sexual conduct on subordinates. There is therefore no justification for a special rule, to be applied *only* in "hostile environment" cases, that sexual harassment does not create employer liability until the employee suffering the discrimination notifies other supervisors. No such requirement appears in the statute, and no such requirement can coherently be drawn from the law of agency.

Agency principles and the goals of Title VII law make appropriate some limitation on the liability of employers for the acts of supervisors. Where, for example, a supervisor has no authority over an employee, because the two work in wholly different parts of the employer's business, it may be improper to find strict employer liability. See [29 CFR § 1604.11\(c\)](#) (1985). Those considerations, however, do not justify the creation of a special "notice" rule in hostile environment cases.

Further, nothing would be gained by crafting such a rule. In the "pure" hostile environment case, where an employee files an EEOC complaint alleging sexual harassment in the workplace, the employee seeks not money damages but injunctive relief. See [Bundy v. Jackson](#), 205 U.S.App.D.C. 444, 456, n. 12, 641 F.2d 934, 946, n. 12 (1981). Under Title VII, the EEOC must notify an employer of charges made against it within 10 days after receipt of the complaint. [42 U.S.C. § 2000e-5\(b\)](#). If the charges appear to be based on "reasonable cause," the EEOC must attempt to \*\*2411 eliminate the offending practice through "informal methods of conference, conciliation, and persuasion." *Ibid*. An employer whose internal procedures assertedly would have redressed the discrimination can avoid injunctive relief by employing these procedures after receiving notice of the complaint or during the conciliation period. Cf. Brief for United \*78 States and EEOC as *Amici Curiae* 26. Where a complainant, on the other hand, seeks backpay on the theory that a hostile work environment effected a constructive termination, the existence of an internal complaint procedure may be a factor in determining not the employer's liability but the remedies available against it. Where a complainant without good reason bypassed an internal complaint procedure she knew to be effective, a court may be reluctant to find constructive termination and thus to award reinstatement or backpay.

I therefore reject the Solicitor General's position. I

**(Cite as: 477 U.S. 57, 106 S.Ct. 2399)**

would apply in this case the same rules we apply in all other Title VII cases, and hold that sexual harassment by a supervisor of an employee under his supervision, leading to a discriminatory work environment, should be imputed to the employer for Title VII purposes regardless of whether the employee gave “notice” of the offense.

U.S.Dist.Col.,1986.

Meritor Sav. Bank, FSB v. Vinson

477 U.S. 57, 106 S.Ct. 2399, 40 Fair Empl.Prac.Cas. (BNA) 1822, 40 Empl. Prac. Dec. P 36,159, 91 L.Ed.2d 49, 54 USLW 4703

END OF DOCUMENT



## **D. Daniel Engstrand, Jr.**

12 Bayview Avenue  
 Northport, NY 11768  
 631.262.7400  
 Toll Free 1.800.437.8833  
 e-mail: [dengstrand@donigerlaw.com](mailto:dengstrand@donigerlaw.com)  
[www.donigerlaw.com](http://www.donigerlaw.com)

### **Professional License and Bar Admissions**

All New York State Courts United States District Court for the Southern and Eastern Districts of New York, United States Court of Appeals for the Second Circuit, U.S. Supreme Court, United States Court of Appeals for the Federal Circuit, United States Court of Appeals for the Armed Forces and the United States Court of Federal Claims

### **Professional Experience**

1990-current 1991-2001	Partner in Doniger & Engstrand, LLP Adjunct Professor of Law, St. John's University School of Law (Advanced Trial Advocacy)
1987-1989 1986-1987 1985-1987	Senior Trial Attorney, N.Y.C. Law Department Special Assistant District Attorney, New York County Trial Attorney, Sullivan & Cromwell

### **Professional Education**

1981-1985	St. John's University School of Law, <i>Juris Doctorate, magna cum laude</i> (Class Rank: 2 <sup>nd</sup> ) Dean's Scholarship and St. Thomas Moore Scholarship (full academic tuition scholarship) Member of St. John's Law Review
-----------	---

### **Undergraduate Education**

1973-1977	St. John's University, Bachelor of Arts, <i>summa cum laude</i>
-----------	---

### **American Jurisprudence Awards**

Civil Practice I and II, Evidence I and II, Commercial Transactions, Corporations, Administrative Law, Agency, Estate and Trusts, and Real Property

### **Professional memberships**

2009-current	Member, American Inns of Court
2006-current	Officer, Suffolk Academy of Law for the Suffolk County Bar Association
2006-current	Co-chairperson, Federal Court Committee,

Suffolk County Bar Association

2006-current Liaison to Federal Court Committee, Suffolk County Bar Association

2006-current Liaison to Health and Hospital Committee, Suffolk County Bar Association

Member of the New York County Lawyers Association

Member of the American Immigration Law Association

Former Vice President and Secretary for the New York Society of Medical Jurisprudence

**Publications,  
Presentations and  
Clinical  
Demonstrations**

D. Daniel Engstrand, Jr., "Federal Practice Under the December 2007 Amended Rules", Suffolk Academy of Law Bridge the Gap Program, presented on February 28, 2009.

D. Daniel Engstrand, Jr., "Federal Practice Under the December 2007 Amended Rules", Suffolk Academy of Law Bridge the Gap Program, presented on March 1, 2008.

D. Daniel Engstrand, Jr., "Potpourri of Miscellaneous Motions", presented at the Suffolk Academy of Law's program, "Motion Practice Series: Discovery & More", on November 26, 2007, along with Hon. Thomas F. Whelan and James F. Farrell, Jr., Esq.

D. Daniel Engstrand, Jr., "Trial Objections", presented at the Nassau Academy of Law's program, "Objection! A Trial Skills Program", on September 10, 2007, along with Hon. Joel Asarch, Hon. Mark Cohen and William T. Ferris, Esq.

D. Daniel Engstrand, Jr., "Declaring War on Those Who Enable Identity Theft—New Laws and Victim's Rights", (third of a three-part series), The Suffolk Lawyer,, Vol.23, No. 10, June 2007 issue at p.12.

D. Daniel Engstrand, Jr., "Declaring War on Those Who Enable Identity Theft—New Laws and Victim's Rights", (second of a three-part series), The Suffolk Lawyer,, Vol.23, No. 9, May 2007 issue at p.7.

D. Daniel Engstrand, Jr., "Declaring War on Those Who Enable Identity Theft—New Laws and Victim's Rights", (first of a three-part series), The Suffolk Lawyer,, Vol.23, No. 8, April 2007 issue at p.7.

D. Daniel Engstrand, Jr., "Declaring War on Businesses Whose Negligence Has Enabled Identity Theft", presented at the Suffolk Academy of Law's program, "Identity Theft: Recovering Civil Damages", on March 15, 2007, along with Hon. Walter B. Tolub,

Hon. Philip S. Straniere and Joseph Mauro, Esq.

D. Daniel Engstrand, Jr., “Trial Objections”, presented at the Suffolk Academy of Law’s program, “Objection!”, on March 6, 2007, along with Hon. Joel Asarch, Hon. Mark Cohen and William T. Ferris, Esq.

D. Daniel Engstrand, Jr., “Introduction to Federal Practice” presented at the Suffolk Academy of Law’s program, The Federal Trial Tips & Strategies from A to Z, on December 6, 2006, along with Hon. Joanna Seybert, United States District Judge (E.D.N.Y.), Scott Michael Mishkin, Esq., Gary Lee Steffanetta, Esq., Yeltje DeJong, Esq., and Lewis M. Wasserman, Esq.

D. Daniel Engstrand, Jr., “Identity Theft—Fight Back and Erase the Damage”, Second Annual Legal Trade Show, sponsored by the State Bank of Long Island and Suffolk Academy of Law, Sheraton Hotel, Smithtown, presented on May 17, 2006 along with Hon. Steve Levy, Suffolk County Executive, Hon. Jeanine F. Pirro, former Westchester County District Attorney and candidate for N.Y.S. Attorney General, and Robert Guido, former Special Counsel for Grievance Matters, State of New York, Appellate Division.

D. Daniel Engstrand, Jr. and John P. Bracken, “Program on Jury Selection”, Alexander Hamilton Inn of the American Inns of Court, presented on April 5, 2006.

D. Daniel Engstrand, Jr., Workshop Facilitator in “Taking and Defending Depositions”, Suffolk Academy of Law, on March 4, 2006

D. Daniel Engstrand, Jr., “Introduction to Federal Practice”, Suffolk Academy of Law Bridging the Gap, presented on February 4, 2006

D. Daniel Engstrand, Jr. and John P. Bracken, “Introduction and Overview of Discovery Under Article 31 of the N.Y. Civil Practice Law and Rules”, Suffolk Academy of Law Discovery Under the CPLR, presented on January 31, 2006 along with Hon. Leonard B. Austin, Hon. Elizabeth Hazlitt Emerson, Hon. Thomas F. Whelan, Hon. F. Dana Winslow and John P. Bracken, Esq.

D. Daniel Engstrand, Jr., “Residential Homeowner Held to Same Standards as Commercial Pool Operator—Far-Reaching Implications of Accident at Quogue Share-House as Decided in *Fornaro v. Azar*”, The Suffolk Lawyer, Vol.22, No.3, November 2005

D. Daniel Engstrand, Jr. presented “Contribution, Apportionment, Joint Liability, Comparative Negligence and Settlement”, Touro College Jacob D. Fuchsberg Law Center, September 29, 2005

D. Daniel Engstrand, Jr., “Voir Dire: Jury Selection in New York State Supreme Court”, Touro College Jacob D. Fuchsberg Law Center, presented at the Second Annual Summer Trial Advocacy Program,

July 20, 2005

Instructor at the Trial Advocacy Institute, Touro Law Center, July 18, 20 and 22, 2005

D. Daniel Engstrand, Jr., "Identity Theft and What to do to Erase the Damage", Touro College Jacob D. Fuchsberg Law Center, presented on June 23, 2005.

D. Daniel Engstrand, Jr., "Overview of New York Law on Contribution, Apportionment, Joint Liability, Comparative Negligence and Settlement (CPLR Articles 14 through 16 and GOL §15-108)", Suffolk Academy of Law, presented on April 20, 2005

D. Daniel Engstrand, Jr., "Introduction to Federal Practice", Suffolk Academy of Law Bridging the Gap, presented on February 5, 2005

D. Daniel Engstrand, Jr., "How To Set Up A Corporation In Anticipation Of And Prior To Filing For IRC §501(C)(3) Tax-Exempt Status", Nassau Bar Association and Suffolk Academy of Law, presented on January 18, 2005

D. Daniel Engstrand, Jr. and Scott M. Mishkin, "Introduction to Federal Practice", Suffolk Academy of Law Nuts and Bolts Series, presented on May 6, 2004

Opening Statements demonstration for Trial Advocacy Institute, Touro Law Center, August 2, 2004

Instructor at the Trial Advocacy Institute, Touro Law Center, August 2, 3 and 5, 2004

***Pro Bono Activities***

Equine Advisory Committee to Suffolk County Parks Department (2005-current)

Corporate Counsel to Smithtown Hunt, Inc. (501(c)(3) organization) (1999-current)

Attorney Advisor for the N.Y.S. Annual High School Mock Trial Tournament (2005 to current)

Lead Trial Attorney in the Sea Shanty common-law trademark infringement litigation in Supreme Court, Suffolk County (2004 -2005).

**Interests**

Fox Hunting, Sporting Clays and Sailing

**Marital Status**

Married to law partner Wende A. Doniger, Ph.D., J.D.

## EUGENE D. BERMAN

445 BROADHOLLOW ROAD • SUITE 200 • MELVILLE, NEW YORK • 11747  
TEL: 631.420.1080 FAX: 631.466.3345 EMAIL: edb@edbpc.com

DEPINTO, NORNES & ASSOCIATES, LLP, MELVILLE, NEW YORK  
OF COUNSEL

CIVIL APPEALS AND LITIGATION INCLUDING TRUST, ESTATE, AND MEDICAID CLAIMS AND ARTICLE 78 PROCEEDINGS

EUGENE D. BERMAN, P.C., MELVILLE, NEW YORK

CIVIL APPEALS AND LITIGATION INCLUDING BUSINESS TORT, BREACH OF CONTRACT, UNFAIR COMPETITION, AND THEFT OF TRADE SECRET CLAIMS

HAS ARGUED FEDERAL APPEALS BEFORE THE SUPREME COURT OF THE UNITED STATES AND THE UNITED STATES COURTS OF APPEALS FOR THE SECOND AND FEDERAL CIRCUITS.

AUTHOR: *SECOND CIRCUIT BRIEFS* (A MONTHLY COLUMN APPEARING IN *THE SUFFOLK LAWYER* ADDRESSING RECENTLY ISSUED OPINIONS OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT) (SINCE JAN. 2005).

HAS REPRESENTED A DIVERSE LITIGATION AND COUNSELING CLIENTELE, INCLUDING APPAREL, BIOTECHNOLOGY, COMPUTER HARDWARE AND SOFTWARE, COSMETICS, FINANCIAL CONSULTING AND ADVISORY, GRAPHIC DESIGN, HEALTH & FITNESS, INFORMATION TECHNOLOGY, PACKAGING & LABELING, PUBLISHING, AND TOY COMPANIES.

SUFFOLK COUNTY DISTRICT COURT

SMALL CLAIMS ARBITRATOR (SINCE NOV. 2006)

PREVIOUS

2003-2007 FINE, FINE & BERMAN, LLP, MELVILLE, NEW YORK  
PARTNER

1998-2002 FINE HUMMEL, P.C., HUNTINGTON, NEW YORK  
PRINCIPAL (1999 - 2002)  
OF COUNSEL (NOV. - DEC. 1998)

1998 BROWN RAYSMAN MILLSTEIN FELDER & STEINER, LLP, NEW YORK, NEW YORK  
CONTRACT ATTORNEY (FEB. - OCT. 1998)

1997 - 1998 LAW OFFICE OF EUGENE D. BERMAN, HUNTINGTON, NEW YORK (AUG. 1997 - FEB. 1998)

1997 BAKER & MCKENZIE, NEW YORK, NEW YORK  
CONTRACT ATTORNEY, INTELLECTUAL PROPERTY GROUP (FEB. - AUG. 1997)

1989 - 1997 ROSEN, DAINOW & JACOBS LLP, NEW YORK, NEW YORK  
PARTNER (1993 - 1997)  
SENIOR ASSOCIATE (1989 - 1992)

1987 - 1989 AMSTER, ROTHSTEIN & EBENSTEIN, NEW YORK, NEW YORK  
ASSOCIATE

1982 - 1987 RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC., NEW YORK, NEW YORK  
ASSOCIATE GENERAL COUNSEL (1984 - 1987)  
ASSOCIATE SPECIAL COUNSEL-ANTI PIRACY (1982 - 1987)

1974 - 1982 OFFICE OF THE NEW YORK STATE ATTORNEY GENERAL, BUREAU OF INVESTOR PROTECTION AND SECURITIES, NEW YORK, NEW YORK  
ASSISTANT ATTORNEY GENERAL (1976 - 1982)  
CHIEF, ENFORCEMENT DIVISION (1981 - 1982)  
CHIEF, CORPORATE TAKEOVER SECTION (1979 - 1981)  
DEPUTY ASSISTANT ATTORNEY GENERAL (1974 - 1976)

BAR ASSOCIATION CHAIRS  
CO-CHAIR, INTELLECTUAL PROPERTY LAW COMMITTEE, SUFFOLK COUNTY BAR ASSOCIATION (2003 - 2005)  
CHAIR, TECHNOLOGY AND THE LAW COMMITTEE, SUFFOLK COUNTY BAR ASSOCIATION (1998 - 2000)  
CHAIR, COMMITTEE ON CONSUMER AFFAIRS, NEW YORK COUNTY LAWYERS' ASSOCIATION (1982 - 1983)

SELECTED PUBLICATIONS  
*AN INTRODUCTION TO TRADE SECRET PROTECTION*, THE SUFFOLK LAWYER, NOVEMBER 2003, p. 21; *HERE COMES THE WIZARD: NEW INTERNET ISSUES*, THE SUFFOLK LAWYER (LAW TECH SUPP.), APRIL 1999, p. 4 (COAUTHOR); *HIGHLIGHTS OF DMCA [DIGITAL MILLENNIUM COPYRIGHT ACT] OF 1998*, MULTIMEDIA & WEB STRATEGIST, OCTOBER 1998, p.1; *REVISED NSI DOMAIN DISPUTE POLICY RAISES HOST OF ISSUES*, MULTIMEDIA & WEB STRATEGIST, FEBRUARY 1998, p.1

BAR MEMBERSHIPS  
NEW YORK STATE, U.S. SUPREME COURT, U.S. COURTS OF APPEALS FOR THE SECOND AND FEDERAL CIRCUITS, U.S. DISTRICT COURTS FOR THE SOUTHERN AND EASTERN DISTRICTS OF NEW YORK

EDUCATION  
NEW YORK UNIVERSITY SCHOOL OF LAW, LL.M. (CORPORATION LAW) 1974  
BROOKLYN LAW SCHOOL, J.D. 1973  
BROOKLYN COLLEGE (CITY UNIVERSITY OF NEW YORK), B.A. 1970