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## Burlington Industries, Inc. v. Ellerth: “Whole-cloth Creation” or Manifestation of Congressional Intent?

John Corrington

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# ***Burlington Industries, Inc. v. Ellerth:* "Whole-cloth Creation" or Manifestation of Congressional Intent?**

## I. INTRODUCTION

Title VII of the Civil Rights Act of 1964 (hereinafter "Title VII") makes it unlawful for an employer to refuse to hire or otherwise discriminate against individuals based on race, color, religion, sex, or national origin.<sup>1</sup> The addition of the word "sex" to the statute by conservative members of Congress, in a last ditch attempt to torpedo the legislation, resulted in very little legislative history for courts to use in order to interpret the prohibition against employment discrimination based on sex.<sup>2</sup> Among other forms of employment discrimination based on sex addressed by the Act, Title VII eventually included sexual harassment.<sup>3</sup>

In 1986, the United States Supreme Court first tackled the issue of employer liability for sexual harassment under Title VII in *Meritor Savings Bank, FSB v. Vinson*.<sup>4</sup> In *Meritor Savings*, the Court affirmed the lower court's holding that sexual harassment which creates a hostile or abusive work environment violates Title VII.<sup>5</sup> However, the Court declined to issue a definitive ruling as to when an employer is liable for sexual harassment by employees in the workplace.<sup>6</sup> Instead, the Court chose to make a somewhat abstract reference to Congress' intention that courts utilize the principles of agency when deciding the issue, while indicating that not all common law agency principles would apply to Title VII.<sup>7</sup> This lack of guidance by the Court as to how and when agency principles should apply to employer liability

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1. See 42 U.S.C. § 2000e-2(a)(1) (1988). Title VII states in relevant part: "It is 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." *Id.*

2. See Ronald Turner, *Title VII and Hostile Work Environment Sexual Harassment: Mislabeled the Standard of Employer Liability*, 71 U. DET. MERCY L. REV. 817, 818 n.5 (1994) (stating that adding the prohibition against sexual discrimination to Title VII was an attempt to derail the legislation).

3. See David Schultz, *From Reasonable Man to Unreasonable Victim?: Assessing Harris Forklift Systems and Shifting Standards of Proof and Perspective in Title VII Sexual Harassment Law*, 27 SUFFOLK U. L. REV. 717, 722-23 (1993) ("[S]exual harassment has come to be included within the meaning of sex discrimination under Title VII.").

4. 477 U.S. 57, 57 (1986).

5. See *id.* at 66.

6. See *id.* at 72.

7. See *id.*

for sexual harassment left lower courts struggling with the issue.<sup>8</sup>

Twelve years later, the Court finally addressed this area of confusion when it decided *Burlington Industries, Inc. v. Ellerth*,<sup>9</sup> and its companion case, *Faragher v. City of Boca Raton*,<sup>10</sup> in order to define the appropriate standard of employer liability for sexual harassment claims under Title VII. In *Ellerth*, the Court determined that employers will be held vicariously liable for of supervisors conduct which creates a hostile and offensive work environment for subordinates, subject to a two-part affirmative defense.<sup>11</sup> In order to avoid liability for supervisor sexual harassment, employers must show the following: 1) that they acted reasonably to prevent or correct the supervisor's harassing behavior, and 2) that the employee acted unreasonably by not using any corrective procedures that were available.<sup>12</sup>

The Court's decision in *Ellerth* is important for the questions it answered as well as for those it left unanswered. The Court cleared up the following issues: 1) whether an employer must have knowledge of harassing conduct by a supervisor to be liable for sexual harassment;<sup>13</sup> and 2) which principles of agency should an analysis of sexual harassment claims under Title VII include.<sup>14</sup> However, the Court left wide open the question of what measures employers must take in order to meet the requirements of the new affirmative defense, thus leaving employers with very little guidance in this new area of law.<sup>15</sup>

This Note examines the Court's decision in *Ellerth* and discusses its potential impact from both a judicial and a practical business perspective. Part II traces the historical background that is responsible for the development of the Court's sexual harassment jurisprudence under Title VII.<sup>16</sup> Part III presents the facts and procedural history of *Ellerth*.<sup>17</sup> Part IV analyzes the majority and dissenting opinions in *Ellerth*.<sup>18</sup> Part V considers the potential judicial and economic impact of the *Ellerth* decision,<sup>19</sup> and Part VI concludes with speculation on how lower courts will deal with the Supreme Court's "whole-cloth creation" of new law involving Title VII sexual harassment claims.<sup>20</sup>

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8. See Turner, *supra* note 2, at 831.

9. 118 S. Ct. 2257, 2271 (1998).

10. 118 S. Ct. 2275, 2294 (1998).

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

12. See *id.*

13. See *id.* (noting that an employer does not need to have knowledge of the harassing conduct).

14. See *id.* at 2267-70.

15. See *id.* at 2273 (Thomas, J., dissenting).

16. See *infra* notes 21-47 and accompanying text.

17. See *infra* notes 48-55 and accompanying text.

18. See *infra* notes 56-97 and accompanying text.

19. See *infra* notes 98-140 and accompanying text.

20. See *infra* notes 141-144 and accompanying text.

## II. HISTORICAL BACKGROUND

### A. Title VII & Sexual Harassment

The Supreme Court announced its interpretation of Title VII in 1971 when it stated that the statute's purpose was to remove all "artificial, arbitrary, and unnecessary barriers to employment [specifically] when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classifications."<sup>21</sup> But even as late as 1976, some courts still refused to recognize sexual harassment as employment discrimination based on sex under Title VII.<sup>22</sup> One of three major events that shaped the evolution of sexual harassment litigation under Title VII occurred in 1980,<sup>23</sup> when the Equal Employment Opportunity Commission (hereinafter "EEOC") issued guidelines explicitly prohibiting workplace sexual harassment under Title VII.<sup>24</sup>

The EEOC guidelines provided, *inter alia*, that an employer should be held responsible for sexual harassment by supervisors regardless of whether the employer knew or should have known about the harassing conduct.<sup>25</sup> The guidelines also provide that an employer should be held responsible for harassment between fellow workers if the employer knew or should have known about the conduct.<sup>26</sup> The

21. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). Other impermissible classifications include religion, national origin or sex when used as criteria for employment decisions. *See* 42 U.S.C. § 2000e-2(a) (1988).

22. *See, e.g., Come v. Bausch & Lomb, Inc.*, 390 F. Supp. 161, 163 (D. Ariz. 1975), *vacated*, 562 F.2d 55 (9th Cir. 1979) (holding that a supervisor's sexual harassment of subordinate is not actionable under Title VII because the conduct was merely satisfying the supervisor's personal urges); *Tomkins v. Public Serv. Elec. & Gas Co.*, 422 F. Supp. 553, 556 (D. N.J. 1976), *rev'd*, 568 F.2d 1044, 1049 (3d Cir. 1977). ("The abuse of authority . . . for personal purposes is an unhappy and recurrent feature of our social experience . . . [but] [i]t is not . . . sex discrimination within the meaning of Title VII.").

23. *See* Schultz, *supra* note 3, at 723.

24. *See* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION'S GUIDELINES ON DISCRIMINATION BECAUSE OF SEX, 29 C.F.R. § 1604.11 (1991).

25. *See id.* at § 1604.11(c).

"[A]n 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."

*Id.*

26. *See id.* at § 1604.11(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.").

Supreme Court acknowledged the importance of the EEOC guidelines when it stated that they “constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.”<sup>27</sup> Subsequent to the release of these guidelines, lower courts began to uniformly allow Title VII discrimination claims based on allegations that sexual harassment created a hostile and abusive work environment.<sup>28</sup>

## B. Forms of Sexual Harassment

Another major event which shaped the evolution of sexual harassment litigation under Title VII occurred in 1979, when Professor Catherine MacKinnon published a book<sup>29</sup> which classified workplace sexual harassment into two possible forms: 1) quid pro quo; and 2) hostile work environment.<sup>30</sup> These classifications influenced the EEOC guidelines, which later recognized these two distinct forms of sexual harassment.<sup>31</sup>

### 1. Quid Pro Quo Sexual Harassment

Quid pro quo sexual harassment is generally described as adverse job action harassment where a supervisor retaliates for rejected sexual advances by firing, demoting, or failing to promote or to provide equal benefits to the harassed subordinate.<sup>32</sup> Quid pro quo harassment is violative of Title VII because it presents a barrier to equal employment treatment based on the sex of an employee.<sup>33</sup> Under a claim of quid pro quo sexual harassment, a single instance of harassment which results in adverse job action is considered actionable, and the employer is held strictly liable for the conduct of the supervisor or agent involved.<sup>34</sup>

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27. See *Meritor Savings, FSB v. Vinson*, 477 U.S. 57, 65 (1986) (quoting *General Elec. Co. v. Gilbert*, 429 U.S. 125, 141-42 (1976)).

28. See *Turner*, *supra* note 2, at 825; see also, *Horn v. Duke Homes, Inc.*, 755 F.2d 599, 605 (7th Cir. 1985); *Katz v. Dole*, 709 F.2d 251, 254 (4th Cir. 1983); *Henson v. City of Dundee*, 682 F.2d 897, 901 (11th Cir. 1982); *Bundy v. Jackson*, 641 F.2d 934, 943-44 (D.C. Cir. 1981).

29. See CATHERINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* (1979).

30. See *id.* at 32, 40.

31. See *Schultz*, *supra* note 3, at 723.

32. See Eugene Scalia, *The Strange Career of Quid Pro Quo Sexual Harassment*, 21 HARV. J.L. & PUB. POL'Y 307, 309 (1998) (discussing the definition of quid pro quo sexual harassment).

33. See *Turner*, *supra* note 2, at 820. Some courts require plaintiffs to prove 5 elements to establish a prima facie case of quid pro quo sexual harassment under Title VII: (1) the employee belonged to a protected group; (2) the employee was subjected to unwelcome sexual harassment; (3) the harassment was based upon sex; (4) the harassment affected a term, condition, or privilege of employment; and (5) the harasser was an agent or supervisor of the employer. See *Chamberlin v. 101 Realty, Inc.*, 915 F.2d 777, 783 (1st Cir. 1990) (applying the 5-part test for quid pro quo harassment); *Highlander v. K.F.C. Nat'l Management Co.*, 805 F.2d 644, 648 (6th Cir. 1986) (same); *Henson v. City of Dundee*, 682 F.2d 897, 903-05 (11th Cir. 1982) (same).

34. See *Turner*, *supra* note 2, at 821.

## 2. Hostile Work Environment Sexual Harassment

In 1971, the Fifth Circuit first recognized that Title VII protects employees from a hostile or offensive work environment in the context of racial discrimination.<sup>35</sup> In 1981, the D.C. Circuit was the first to recognize hostile or offensive work environment Title VII claims based on sexual harassment.<sup>36</sup> Hostile work environment claims usually involve complaints by an employee of repeated and unwelcome sexual comments or advances that result in an adverse affect in the terms or conditions of employment.<sup>37</sup> Lower courts have held that not all workplace conduct that an employee finds harassing rises to the level of actionable sexual harassment.<sup>38</sup> For sexual harassment to be actionable under Title VII, it must be so severe and pervasive that it "alter[s] the conditions of [the victim's] employment and create[s] an abusive working environment."<sup>39</sup> Most federal courts have refused to hold the employer strictly liable for hostile work environment claims.<sup>40</sup> The third major event which shaped the evolution of Title VII litigation occurred when the Supreme Court finally began to address the issue of hostile work environment sexual harassment.<sup>41</sup>

### C. The Supreme Court's Meritor Savings Bank Decision

The Supreme Court first addressed the issue of sexual harassment claims under Title VII when it decided *Meritor Savings Bank, FSB v. Vinson*.<sup>42</sup> In *Meritor*

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35. See *Rogers v. EEOC*, 454 F.2d 234, 240 (5th Cir. 1971) (holding that a racially segregated waiting room resulted in actionable employment discrimination under Title VII because of its effect on minority employees).

36. See *Bundy v. Jackson*, 641 F.2d 934, 943-44 (D.C. Cir. 1981) (holding that sexual harassment established through claim of hostile work environment was actionable under Title VII).

37. See *Turner*, *supra* note 2, at 821.

38. See *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971). "[M]ere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee" probably would not affect the conditions of employment to a sufficiently significant degree to violate Title VII. See *id.*

39. See *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982); accord *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986).

40. See *Turner*, *supra* note 2, at 821.

41. See *Schultz*, *supra* note 3, at 724.

42. 477 U.S. 57, 67 (1986). Mechelle Vinson was an employee of Meritor Savings Bank who brought a Title VII claim against her supervisor and her employer claiming that the supervisor subjected her to repeated acts of sexual harassment. See *id.* at 60. According to Vinson, her supervisor demanded sexual favors, had sex with her on forty to fifty occasions, fondled her in front of other employees, exposed himself to her, and forcibly raped her on several occasions. See *id.* The bank and the supervisor denied the allegations, and the bank further asserted that it had no knowledge and did not approve of any harassing conduct by the supervisor. See *id.* at 61. The district court denied relief, holding that because the bank had anti-sexual harassment policies in place and had no notice of

*Savings*, the Court affirmed that hostile and offensive work environment sexual harassment is actionable employment discrimination under Title VII.<sup>43</sup> Even though the Court acknowledged a “debate over the appropriate standard for employer liability,” it refused to issue a definitive ruling concerning this standard.<sup>44</sup> The Court stated that Congress intended courts to look to common law principles of agency for guidance on employer liability.<sup>45</sup> The Court indicated that not all common law principles of agency were applicable to Title VII claims, and that Congress clearly intended to limit liability when it defined “employer” to include agents.<sup>46</sup> Problematically, the Court gave no indication as to which principles of agency courts should use to determine employer liability for hostile work environment harassment under Title VII.

As a result of this analysis, the Court held as follows: 1) employers are not automatically vicariously liable for hostile work environment sexual harassment by supervisors, but that agency principles should be used to determine liability; 2) an employee’s failure to notify his employer of sexual harassment does not necessarily insulate an employer from liability; and 3) the existence of policies and procedures against discrimination, coupled with an employee’s failure to invoke the procedures, does not automatically preclude employer liability under Title VII.<sup>47</sup>

### III. FACTS OF THE CASE

Respondent Kimberly Ellerth quit her job as a salesperson at Burlington Industries after 15 months, allegedly because she was subjected to constant sexual harassment from one of her supervisors, Ted Slowick.<sup>48</sup> Slowick was a middle-level manager with authority to hire and promote employees, but was not a policy maker for Burlington.<sup>49</sup> Ellerth described many instances of crude sexual remarks and gestures on the part of Slowick, including an incident where Slowick made remarks about Ellerth’s breasts and told her to loosen up, warning that he could make her “life very hard or very easy at Burlington.”<sup>50</sup> While on one occasion Ellerth did tell Slowick that a comment he made was inappropriate, Ellerth never informed anyone at Burlington about Slowick’s conduct, despite knowing that there was a company

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Vinson’s claims of harassment, it could not be held liable for the actions of the supervisor. *See id.* at 62. The Court of Appeals for the District of Columbia reversed, holding that an employer is absolutely liable for supervisor sexual harassment, whether or not it knows about the misconduct. *See id.* at 63.

43. *See id.* at 65.

44. *See id.* at 72.

45. *See id.*

46. *See id.* The limitation on employer liability results from the fact that Congress did not make employers vicariously liable for the conduct of all employees, but only for those individuals considered to be agents under the principles of agency. *See id.* at 73.

47. *See id.* at 72.

48. *See Burlington Indus., Inc. v. Ellerth*, 118 S. Ct. 2257, 2262 (1998).

49. *See id.*

50. *See id.*

policy against sexual harassment.<sup>51</sup>

After Ellerth quit her job at Burlington in 1994, she filed suit in the United States District Court for the Northern District of Illinois, alleging that the company violated Title VII and caused her constructive discharge by engaging in sexual harassment.<sup>52</sup> The district court found that although Slowick's conduct did create a hostile work environment, Burlington neither knew nor should have known about the conduct, and granted summary judgment to Burlington.<sup>53</sup>

The Seventh Circuit Court of Appeals reversed the district court en banc, but without a controlling rationale as to the standard for an employer's liability for a sexual harassment claim under Title VII.<sup>54</sup> The United States Supreme Court granted Burlington's petition for writ of certiorari.<sup>55</sup>

#### IV. ANALYSIS OF THE COURT'S OPINION

##### A. *Majority Opinion*

Justice Kennedy delivered the opinion of the Court, in which Chief Justice Rehnquist and Justices Stevens, O'Connor, Souter, and Breyer joined.<sup>56</sup> Justice Kennedy began his analysis by discussing the differences between quid pro quo and hostile work environment sexual harassment.<sup>57</sup> Justice Kennedy stated that while both types of claims were actionable under Title VII, quid pro quo harassment was more obviously "discrimination with respect to terms or conditions of employment," and circuit courts have held employers vicariously liable for the conduct of their employees for such harassment.<sup>58</sup> However, Justice Kennedy noted that the issue before the court was not whether Ellerth could state a claim for quid pro quo sexual harassment in order to hold Burlington vicariously liable, but whether Burlington's liability was limited to its own negligence.<sup>59</sup>

Justice Kennedy addressed the issue of employer liability where a supervisor creates a hostile work environment by first acknowledging that Congress directed federal courts to interpret Title VII using general principles of agency, because Title

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51. *See id.* at 2262-63.

52. *See id.* at 2263.

53. *See id.*

54. *See id.*

55. *See id.* at 2264.

56. *See id.* at 2261.

57. *See id.* at 2264.

58. *See id.* (discussing *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986)).

59. *See id.* at 2265.

VII defines the term “employer” to include agents.<sup>60</sup> Justice Kennedy then turned to the Restatement of Agency to determine the applicable principles for Title VII hostile work environment claims against an employer.<sup>61</sup> Justice Kennedy indicated that the Restatement sets out the general rule that an employer is liable for the torts of its employees if they act within the scope of their employment.<sup>62</sup> However, he then reasoned that a supervisor acting out of a desire to fulfill some sexual urge would probably not be acting to further his employer’s interests, and stated that, as a general rule, “sexual harassment by a supervisor is not conduct within the scope of employment.”<sup>63</sup>

Justice Kennedy then examined other principles of agency that might still impose liability on an employer for the conduct of an employee, even if the employee is not acting within the scope of his employment.<sup>64</sup> The two rules he found generally applicable to sexual harassment cases against employers follow: 1) those involving negligence on the part of the employer for failing to stop the conduct; or 2) where the supervisor was aided in his conduct by the existence of the agency relationship.<sup>65</sup> Because Ellerth did not allege that Burlington was negligent in the present case, but rather was claiming it should be held to the stricter standard of vicarious liability, Justice Kennedy focused his analysis on the “aided in the agency relation” principle.<sup>66</sup>

Justice Kennedy noted that the aided in the agency relation standard required more than the employment relationship itself, otherwise the employer would be vicariously liable for the conduct of all employees, not just supervisors.<sup>67</sup> He stated that none of the circuit courts which considered the issue arrived at such a result.<sup>68</sup> Justice Kennedy then discussed the aided in the agency relation standard as it pertained to scenarios where a supervisor takes a tangible employment action against an employee.<sup>69</sup> He defined tangible employment actions as those resulting in a “significant change in employment status,” such as being fired or failing to be promoted.<sup>70</sup> Justice Kennedy stated that because tangible employment action can only be inflicted by a supervisor, or someone else with the authority of the company,

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60. *See id.*

61. *See id.* at 2266.

62. *See id.* The Restatement of Agency states that “[a] master is subject to liability for the torts of his servants committed while acting in the scope of their employment.” RESTATEMENT (SECOND) OF AGENCY, § 219(1) (1957).

63. *See Ellerth*, 118 S. Ct. at 2267.

64. *See id.*

65. *See id.* The Restatement states that “[a] master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless: . . . (b) the master was negligent or reckless, or . . . (d) the servant . . . was aided in accomplishing the tort by the existence of the agency relationship.” RESTATEMENT (SECOND) OF AGENCY, § 219(2) (1957).

66. *See Ellerth*, 118 S. Ct. at 2267.

67. *See id.* at 2268.

68. *See id.*

69. *See id.*

70. *See id.*

those actions will always meet the requirements of the aided in the agency relation standard.<sup>71</sup>

Justice Kennedy then discussed the application of the aided in the agency relation standard to supervisor harassment which did not include the implementation of tangible employment action.<sup>72</sup> He stated that this was a less obvious application of the standard, but that such harassing conduct is particularly threatening precisely because it comes from a supervisor, and it is therefore aided by the agency relation.<sup>73</sup> Justice Kennedy also noted that the purpose of Title VII is to deter exactly this sort of conduct in the workplace, as well as to encourage the creation of adequate anti-harassment policies and grievance procedures.<sup>74</sup>

In order to apply agency principles for vicarious liability of an employer, as well as to being about Title VII's purpose encouraging employers' proactive efforts to prevent workplace harassment, Justice Kennedy announced the Court's standard for holding employers vicariously liable for sexual harassment by a supervisor.<sup>75</sup> He stated that an employer would be subject to liability for hostile work environment created by a supervisor, but that if no tangible employment action was taken the employer can raise a two-part affirmative defense.<sup>76</sup> The employer must show the following: 1) that it acted reasonably to prevent or correct the supervisor's harassing behavior; and 2) that the employee acted unreasonably by not using any corrective procedures that were available or by otherwise avoiding the harm.<sup>77</sup>

Justice Kennedy noted that as a matter of law, every case would not require a showing of anti-harassment policies and grievance procedures. Instead, parties should litigate the adequacies of company policies as the first element of the affirmative defense.<sup>78</sup> Justice Kennedy also stated that an employer implementing a tangible employment action as a result of a supervisor's sexual harassment may not raise an affirmative defense.<sup>79</sup> In applying the Court's decision to the facts of the case at bar, Justice Kennedy stated that because Ellerth did not allege a tangible employment action against her, Burlington should be given the chance to assert and prove the affirmative defense against vicarious liability announced by the Court.<sup>80</sup> The Court remanded the case to the district court for that purpose.<sup>81</sup>

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71. *See id.* at 2269.

72. *See id.*

73. *See id.*

74. *See id.* at 2270.

75. *See id.*

76. *See id.*

77. *See id.*

78. *See id.*

79. *See id.*

80. *See id.* at 2271.

81. *See id.*

## B. Dissenting Opinion

Justice Thomas wrote a dissent to the majority opinion, in which Justice Scalia joined.<sup>82</sup> Justice Thomas began by discussing the history of employment discrimination claims under Title VII. He noted that racial discrimination provided the context in which courts first acknowledged disparate treatment claims<sup>83</sup> as well as hostile work environment claims.<sup>84</sup> He also noted that the standard for a hostile or offensive work environment under Title VII is the same for both racial and sexual discrimination claims.<sup>85</sup> Justice Thomas then stated that when an employee sues claiming a racially hostile work environment, the employer is liable for negligence “only if the employer knew, or in the exercise of reasonable care should have known, about the harassment and failed to take remedial action.”<sup>86</sup> He referenced and agreed with the Court’s statement that a supervisor who creates a hostile work environment does not act in the interest of his employer, and stated his own view that liability should only attach to the employer in such cases if it acts negligently.<sup>87</sup> Justice Thomas noted that the Court’s ruling will result in the utilization of different standards to determine employer liability for hostile work environment claims, depending on whether the claimed discrimination is racial or sexual.<sup>88</sup> He stated that the standard should be the same for both types of Title VII claims; the employer should be held liable only if it was negligent in permitting the conduct to occur.<sup>89</sup>

Justice Thomas then discussed the Court’s use of section 219(2)(d) of the Restatement of Agency in order to hold employers liable for the harassing conduct of supervisors. He took issue with the Court’s reasoning that a “supervisor is ‘aided . . . by . . . the agency relation’ when creating a hostile work environment because the supervisor’s ‘power and authority invests his or her harassing conduct with a particular threatening character.’”<sup>90</sup> He reasoned that the power and authority of a supervisor has no bearing on employer liability under section 219(2)(d); rather, liability depends on the claimant’s belief that “the agent acted in the ordinary course of business or within the scope of his apparent authority.”<sup>91</sup> Justice Thomas

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82. *See id.* (Thomas, J., dissenting).

83. “A disparate treatment claim required a plaintiff to prove an adverse employment consequence and discriminatory intent by his employer.” *Id.* at 2272 (Thomas, J., dissenting).

84. *See id.* (Thomas, J., dissenting).

85. *See id.* (Thomas, J., dissenting).

86. *Id.* (Thomas, J., dissenting).

87. *See id.* at 2272-73 (Thomas, J., dissenting).

88. *See id.* at 2271 (Thomas, J., dissenting).

89. *See id.* (Thomas, J., dissenting).

90. *See id.* at 2273-74 (Thomas, J., dissenting) (quoting *Ellerth*, 118 S. Ct. at 2269-70).

91. *See id.* at 2274 (Thomas, J., dissenting). While Justice Thomas includes a reference to the supervisor’s apparent authority in his analysis of section 219(d)(2), the Court dismissed that aspect of the section as being inapplicable in the context of supervisor sexual harassment. *See id.* at 2268. It is also interesting to note that Justice Thomas’ language concerning the agent “acting in the ordinary course of business” is not part of section 219(2)(d), which he was ostensibly analyzing. *See id.* at 2274;

indicated that no sexually harassed employee could reasonably believe that the supervisor's conduct was within the ordinary course of business or within the scope of his apparent authority.<sup>92</sup> Therefore, section 219(2)(d) could not be a basis for holding employers liable for that conduct.<sup>93</sup> He repeated his assertion that the only principle of agency under which an employer should be held liable for a supervisor's sexual harassment would be if the employer was negligent or reckless in allowing the harassment to occur.<sup>94</sup>

Justice Thomas concluded his analysis by voicing his concern that the Court's new rule of law essentially would equate to strict liability for employers, no matter how reasonably they act, "so long as the plaintiff in question fulfilled *her* duty of reasonable care to avoid harm."<sup>95</sup> He also expressed concern that the Court provided little guidance as to how employers might avoid vicarious liability, because the Court gave essentially no detail on how to assert the two-part affirmative defense.<sup>96</sup> Justice Thomas summarized his concerns with the following pronouncement:

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's intention to promote conciliation rather than litigation in the Title VII context."<sup>97</sup>

## V. IMPACT OF THE COURT'S OPINION

Because the Court's decision in *Ellerth*, which imposes vicarious liability on employers for supervisor sexual harassment subject to a two-part affirmative defense, is essentially a "whole-cloth creation," it seems clear that the decision will have

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*see also* RESTATEMENT (SECOND) OF AGENCY, § 219(2)(d) (1957). This wording is actually part of section 261, which concerns a principle's liability for an agent's fraud. *See* RESTATEMENT (SECOND) OF AGENCY, § 261 (1957) (stating that the principal is liable for the 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 the business* confided to him.") (emphasis added).

92. *See id.* (Thomas, J., dissenting).

93. *See Ellerth*, 118 S. Ct. at 2274 (Thomas, J., dissenting).

94. *See id.* (Thomas, J., dissenting).

95. *See id.* (Thomas, J., dissenting) (emphasis in original). This is a reference to the second prong of the two-prong affirmative defense announced by the Court. *See id.* at 2270. Because both prongs need to be met, the affirmative defense will only preclude employer liability if "the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise," no matter how reasonable the efforts of the employer to avoid and correct any sexually harassing behavior. *See id.*

96. *See id.* at 2274 (Thomas, J., dissenting).

97. *Id.* at 2274-75 (Thomas, J., dissenting) (quoting *Ellerth*, 118 S. Ct. at 2270).

significant impact on both employers and the lower courts.<sup>98</sup> The full extent of this impact will become known after sufficient time has passed for both employers and employees to react to the Court's pronouncements, but commentators have been quick to speculate on the potential ramifications of this significant decision.

## A. *Impact on Employers*

### 1. Increased Costs of Litigation

Prior to the Court's decision in *Ellerth*, employers were not subject to blanket vicarious liability in many circuits for the harassing conduct of supervisors unless the claimant could prove an actual adverse job action.<sup>99</sup> The fact that employers are now potentially liable for any harassing conduct by supervisors, whether quid pro quo sexual harassment can be proved or not, clearly seems to expose employers to many more sexual harassment lawsuits than they would have faced before *Ellerth*.<sup>100</sup> The obvious result of increased sexual harassment litigation for employers will be greater expenditures of time and money to defend themselves and higher insurance costs to cover their increased exposure.<sup>101</sup> As one commentator noted:

[P]laintiffs have the go-ahead from the Supreme Court to sue the employer and try their luck. Why not? Maybe the employer will settle, at a pretty price, just to avoid an expensive fight. Maybe the company's harassment policy or training can be considered defective in some way. Maybe the plaintiff can persuade a judge or jury that she is a victim who did all she could and the company should be responsible for whatever happened.<sup>102</sup>

There is also the potential that women will suffer in their employment prospects as employers react to increased costs of sexual harassment litigation by hiring fewer female employees and lowering salaries.<sup>103</sup>

### 2. Policy-Making Impact

One likely benefit of the Court's decision in *Ellerth* is that employers will be encouraged to promulgate more extensive anti-harassment policies and procedures

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98. See *id.* at 2273 (Thomas, J., dissenting).

99. See Turner, *supra* note 2, at 840 ("As we have witnessed in *Meritor* and other cases, employers are not necessarily strictly and automatically liable for hostile environment sexual harassment by an individual's . . . supervisor.").

100. See Anita K. Blair, *Harassment Law: More Confused Than Ever*, WALL ST. J., July 8, 1998, at A14.

101. See *id.*

102. *Id.*

103. See *id.*

in order to avoid liability for sexual harassment.<sup>104</sup> But company policies and procedures do not come without a cost: some large companies already spend millions of dollars each year on training programs and outside consultants in order to ensure that employees know the scope of permissible conduct.<sup>105</sup> The likelihood of expanded employer liability under the Court's holding in *Ellerth* has the potential to significantly increase this spending on training programs.<sup>106</sup> An interesting aspect of this potential increase in employer spending on policies, procedures and training is the possibility that a whole new industry of consultants and trainers will evolve in order to fill employers' needs in this area.<sup>107</sup> Professor David Oppenheimer of Golden Gate University School of Law commented that he believes the *Ellerth* decision is "going to have a very major impact in the legal community in terms of establishing a cottage industry of trainers who will develop and train employees on anti-sexual-harassment policies."<sup>108</sup>

While the Court's decision in *Ellerth* seems to encourage development of comprehensive anti-harassment policies, simply having procedures in place may not be sufficient.<sup>109</sup> The Court clearly stated in *Faragher v. City of Boca Raton*<sup>110</sup> that failure to communicate existing sexual harassment policies to all employees was unreasonable, and could result in employer liability for supervisor sexual harassment.<sup>111</sup> However, creating comprehensive anti-harassment policies and ensuring that all employees are aware of them may not be enough to shield employers from liability.<sup>112</sup> As Justice Thomas noted in his dissent in *Ellerth*, "employers will be liable notwithstanding the affirmative defense, *even though they acted reasonably*" by having adequate policies and procedures in place.<sup>113</sup> Unless an employer

104. See Robert D. Lipman & David A. Robins, *Court's Harassment Rulings Provide Ammunition for Both Sides*, N.Y.L.J., Oct. 1, 1998, at col. 1.

105. See Edward Felsenthal, *High Court Finishes Term With Decisions Involving Workplace Environment*, WALL ST. J., June 29, 1998, at A3 (discussing the impact of the Court's sexual harassment decision in *Ellerth* on employers).

106. See Blair, *supra* note 100 and accompanying text (discussing the potential for greatly increased litigation as a result of *Ellerth's* holding).

107. See Marcia Coyle, *Sex Harassment Redefined in Several Rulings, High Court Ends Confusion Over Employer Liability*, NAT'L L.J., July 6, 1998, at A1.

108. *Id.*

109. See *Burlington Indus., Inc. v. Ellerth*, 118 S. Ct. 2257, 2270 (1998) ("Title VII is designed to encourage the creation of antiharassment policies and effective grievance mechanisms.")

110. 118 S. Ct. 2275 (1998).

111. See *id.*; Amy Karff Halevy & Ryan J. Maierson, *The Supreme Court Changes the Rules on Employer Liability for Sexual Harassment*, 36 HOUS. LAW. REV. 53, 57 (1998) (stating that an employer was found liable for unreasonably failing to disseminate harassment policies to employees in remote locations).

112. See *id.* ("The Court apparently requires the employer to establish both its own reasonable conduct and the employee's unreasonable conduct.")

113. See *Ellerth.*, 118 S. Ct. at 2274 (Thomas, J., dissenting) (emphasis in original).

can also prove that the employee acted unreasonably by not availing himself or herself of the existing policies or procedures, the second prong of the employer's affirmative defense fails and the employer will be found liable.<sup>114</sup>

### 3. Alternative Dispute Resolution

One approach that employers may take in this area is to create alternative dispute resolution (hereinafter "ADR") procedures, such as arbitrating sexual harassment claims, in order to meet the Court's reasonable efforts prong of the affirmative defense.<sup>115</sup> One drawback to this scenario is the potential that employers will require submission of sexual harassment claims to an ADR process as a condition of employment, thus preventing individuals from having their day in court.<sup>116</sup> The employer would also likely point to a refusal by an employee to comply with such a procedure as being unreasonable, thereby satisfying the second prong of the employer's affirmative defense.<sup>117</sup>

This scenario, however, might not be as easy for employers as simply including a compulsory arbitration clause in all employment contracts. In *Duffield v. Robertson Stephens & Co.*,<sup>118</sup> the Ninth Circuit Court of Appeals held that compulsory arbitration clauses cannot be used in employment contracts to force employees to arbitrate sexual harassment or other civil rights claims under Title VII unless the employee enters arbitration voluntarily.<sup>119</sup> However, this holding is far from a consensus: as other courts of appeals addressing the issue have enforced compulsory arbitration clauses in employment contracts, even in the context of sexual harassment claims under Title VII.<sup>120</sup>

The Supreme Court has not directly addressed the issue of compulsory arbitration of Title VII claims, but it has held that discrimination claims brought under the Age Discrimination in Employment Act<sup>121</sup> are subject to compulsory

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114. See Halevy, *supra* note 111, at 57 (stating that the second prong of the affirmative defense requires the employer to show that the employee failed to use the employer's preventive or corrective opportunities).

115. See Dominic Bencivenga, *Workplace Harassment, Wise Employers Adopt Full Remedial Programs*, N.Y.L.J., Aug. 27, 1998, at col. 2.

116. See *id.*

117. See *id.*

118. 144 F.3d 1182, 1182 (9th Cir. 1998), *cert. denied*, 119 S. Ct. 445 (1998).

119. See *id.* at 1190 (holding that Civil Rights Act of 1991 precludes compulsory arbitration of civil rights claims).

120. See, e.g., *Seus v. John Nuveen & Co.*, 146 F.3d 175, 180 (3d Cir. 1998), *cert. denied*, 119 S. Ct. 1028 (1999) (holding that pre-dispute agreements to arbitrate Title VII claims are permissible); *Paladino v. Avnet Computer Tech., Inc.*, 134 F.3d 1054, 1057 (11th Cir. 1998) (same); *Gibson v. Neighborhood Health Clinics, Inc.*, 121 F.3d 1126, 1131 (7th Cir. 1997) (same); *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 837 (8th Cir. 1997) (same); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1473 (D.C. Cir. 1997) (same); *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 881 (4th Cir. 1996) (same); *Metz v. Merrill Lynch*, 39 F.3d 1482, 1487 (10th Cir. 1994) (same); *Willis v. Dean Witter Reynolds, Inc.*, 939 F.2d 229, 230 (5th Cir. 1991) (same).

121. 29 U.S.C. § 621-39 (1998).

arbitration pursuant to agreements in securities registration applications.<sup>122</sup> While this decision certainly is not dispositive as to the Court's position concerning compulsory arbitration agreements for Title VII claims, commentators claim that the Court's refusal to grant certiorari in *Duffield* was surprising.<sup>123</sup> By affirming the Ninth Circuit's decision, the Court essentially favors a dual system of justice for employees required to sign compulsory arbitration agreements: those who bring an action in the nine western states of the Ninth Circuit will be allowed access to the courts to pursue Title VII claims, while employees in all other circuits will not.<sup>124</sup> For national corporations with offices across the country this result is truly anomalous, because some employees will have the option to sue in court for Title VII claims while others in the same company will be forced into compulsory arbitration.<sup>125</sup>

## B. Judicial Impact

### 1. Differing Standards for Employer Liability

As Justice Thomas noted in his dissent in *Ellerth*, there seems to be no logic to different standards for employer liability under Title VII based on claims of racial versus sexual discrimination.<sup>126</sup> The likely result of the Court's holding in *Ellerth* is that plaintiffs in racial discrimination cases will argue in favor of an employers' strict liability for hostile environment harassment and sexual harassment claims. Consequently, courts will realize an expanded number of racial discrimination or harassment claims filed under Title VII.<sup>127</sup> How can judges argue with that logic? A Title VII claim should be a Title VII claim, whether based on sexual or racial harassment.<sup>128</sup>

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122. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (holding that compulsory arbitration of ADEA claims pursuant to arbitration agreements was not inconsistent with the purpose of the Act).

123. See Patrick McGeehan, *Ruling Stands on Arbitrating Bias Claims*, WALL ST. J., Nov. 10, 1998, at B12.

124. See *id.*

125. See *id.*

126. See *Burlington Indus., Inc. v. Ellerth*, 118 S. Ct. 2257, 2271 (1998) (Thomas, J., dissenting).

127. See Lipman, *supra* note 104.

128. See Edward T. Ellis & Tara L. Eyer, *Racial Harassment and How Employers Try to Prevent It*, SD06 ALI-ABA 695, 697, July 23, 1998 (stating that "courts have generally applied and transferred the same principles to workplace harassment claims regardless of whether the harassment was based on sex or race"); see also *Harrison v. Metro. Gov't of Nashville and Davidson Co.*, 80 F.3d 1107, 1118 (6th Cir. 1996), *cert. denied*, 117 S. Ct. 169 (1996) (stating that the elements and burdens of proof are the same for racial and sexual harassment claims under Title VII); *West v. Philadelphia Elec. Co.*, 45

## 2. Many Questions Left Unanswered

While the Court's decision in *Ellerth* resolved important issues concerning hostile work environment sexual harassment claims under Title VII, it also raised many others.<sup>129</sup> For example, when will the workplace harasser be considered a supervisor for purposes of holding the employer liable for the conduct?<sup>130</sup> The Court stated that an employer is vicariously liable for the harassing conduct of "a supervisor with immediate (or successively higher) authority over the employee."<sup>131</sup> In a company with a traditional linear hierarchy, the meaning of this language is clear.<sup>132</sup> But modern business structures do not always fit into such neat classifications.<sup>133</sup> Many modern companies have more flexible business structures, with employees working in team environments, and with a constant reshuffling of personnel.<sup>134</sup> As one commentator notes, "[i]n such cases, it is a sure bet employers will argue that their liability should be evaluated under the more forgiving traditional negligence standard which continues to apply when the harasser and the victim are coworkers."<sup>135</sup>

Another major issue resulting from the *Ellerth* decision is how lower courts should interpret and apply the two-part employer affirmative defense announced by the Court.<sup>136</sup> The Court stated that employers can assert this defense by proving "(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."<sup>137</sup> This definition further raises the following questions: 1) what constitutes reasonable measures taken by employers; 2) what steps must an employer take to correct harassing behavior; 3) what steps must an employee take to fulfill his or her requirement of reasonable conduct to avoid harm,<sup>138</sup> and 4) what does the phrase "avoid harm otherwise" mean? Does it require the employee

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F.3d 744, 753, n.7 (3d Cir. 1995) (stating that "[t]he Court has recognized no difference in standards applicable to racially and sexually hostile work environments").

129. See Michel Lee, *Last Term's Employment Decisions Have Shaken Up the Status Quo*, N.Y.L.J., Sept. 28, 1998, at col. 1.

130. See *id.*

131. See *Burlington Indus., Inc. v. Ellerth*, 118 S. Ct. 2257, 2270 (1998).

132. See Lee, *supra* note 129 (stating that "[a]ppplied to a traditionally chain-of-command structured workplace the import of this [the Court's] language is clear").

133. See *id.*

134. See *id.* ("Many organizations function along a more interactive or team approach method of operation. In some instances, an individual may report to a given manager only with respect to one aspect of a job.").

135. *Id.*

136. See *id.* (noting that "there is the conundrum of the Court's affirmative defense, virtually every word of which inspires questions").

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

138. See Lee, *supra* note 129.

to limit his or her contact with the harassing supervisor as much as possible, especially during nonworking hours?<sup>139</sup> Because these questions are fact specific determinations with which lower courts must now deal, it seems likely that summary judgment in sexual harassment cases will be much more difficult for litigants to obtain in the future.<sup>140</sup>

## VI. CONCLUSION

While the irony of Justice Thomas' whole-cloth creation idiom used in reference to the Court's decision in a case involving Burlington Industries should not be lost on us, his point should be taken seriously.<sup>141</sup> As discussed *supra*, with so many unanswered questions resulting from the Court's ruling in *Ellerth*, especially concerning the new affirmative defense, lower courts will likely struggle with the application of the new standards for employer vicarious liability for sexual harassment.<sup>142</sup> But when looking at the big picture, most commentators agree that the decision in *Ellerth* was a positive step by the Court to address the growing problem of workplace sexual harassment.<sup>143</sup> Despite the litany of questions left unanswered by *Ellerth*, the emphasis the Court placed on employers promulgating adequate anti-harassment policies and procedures can only help reduce the incidents of sexual harassment by supervisors in the workplace.<sup>144</sup>

JOHN CORRINGTON

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139. See Jason L. Gunter & Tammie L. Rattray, *Recent Developments in Employer Liability for Sexual Harassment - Ellerth and Faragher*, 72 FLA. B.J. 94, 98 (1998) (discussing potential problems with the *Ellerth* affirmative defense).

140. See Lee, *supra* note 129.

141. See *Burlington Indus., Inc. v. Ellerth*, 118 S. Ct. 2257, 2273 (1998) (Thomas, J., dissenting) ("This [vicarious employer liability] rule is a whole-cloth creation that draws no support from the legal principles on which the Court claims it is based.").

142. See discussion *supra*, Part V.B.2.

143. See Lee, *supra* note 129 ("The resulting ruling[] bring[s] a considerable measure of order and even a dollop of common sense to this increasingly active area of the federal law."); Lipman, *supra* note 104 ("[T]he Court has indeed clarified this murky area of the law."); Halevy, *supra* note 111 ("*Ellerth* . . . reinforce[s] the critical role of an effective anti-harassment policy and grievance procedure.").

144. See Felsenthal, *supra* note 105 (noting that "[t]he ruling will create a huge incentive for companies to establish tough anti-harassment programs with effective grievance procedures.").

