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# Meritor Savings Bank v. Vinson: The Supreme Court's Recognition of the Hostile Environment in Sexual Harassment Claims

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## **MERITOR SAVINGS BANK v. VINSON: THE SUPREME COURT'S RECOGNITION OF THE HOSTILE ENVIRONMENT IN SEXUAL HARASSMENT CLAIMS**

Sexual harassment in employment is a serious and widespread problem, which is of concern to both employees and employers.<sup>1</sup> In broad terms, sexual harassment is “the unwanted imposition of sexual requirements in the context of a relationship of unequal power.”<sup>2</sup> It may involve the explicit conditioning of tangible employment benefits upon acquiescence to a supervisor’s sexual demands.<sup>3</sup> Alternatively, sexual harassment may, without tangible effect, create an abusive work environment characterized by sexual innuendo, insults, unwelcome advances, physical contact, and other offensive conduct.<sup>4</sup> Title VII of the Civil Rights Act of 1964, as amended, prohibits sex discrimination in employment.<sup>5</sup> In *Meritor Savings Bank v. Vinson*,<sup>6</sup> the United States Supreme Court considered for the first time whether, absent the explicit conditioning of employment benefits upon sexual receptivity, sexual harassment falls within that prohibition.<sup>7</sup>

In *Meritor*, the Court established that sexual harassment which creates a hostile or abusive work environment is a violation of Title VII.<sup>8</sup> However, the Court declined to issue a definitive rule on the liability of an employer for “hostile environment” sexual harassment perpetrated by an employee.<sup>9</sup> Noting that the gravamen of a sexual harassment complaint is the unwelcome character of the sexual conduct, the Court similarly avoided issuing a definitive rule governing the evidence which an employer may introduce to show that conduct was welcome.<sup>10</sup>

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<sup>1</sup>Brief for the United States and E.E.O.C. as *amici curiae*, *Meritor Savings Bank v. Vinson*, 106 S.Ct. 2399 (1986) (available on LEXIS) (hereinafter cited as Brief of E.E.O.C.); C. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION 1, 25 (1979) (hereinafter cited as C. MACKINNON); McLain, *The E.E.O.C. Sexual Harassment Guidelines: Welcome Advances Under Title VII?*, 10 U. BALT. L. REV. 275, 275-76 (1981). For a discussion of the sociological patterns of sexual harassment and its effect upon women, see Brief of Working Women’s Institute, et al. as *amici curiae*, *Meritor Savings Bank v. Vinson*, 106 S.Ct. 2399 (1986) (hereinafter cited as Brief of W.W.I.) (available on LEXIS).

<sup>2</sup>C. MACKINNON, *supra* note 1, at 1.

<sup>3</sup>C. MACKINNON, *supra* note 1, at 2.

<sup>4</sup>C. MACKINNON, *supra* note 1, at 2.

<sup>5</sup>Civil Rights Act of 1964 §§ 701 *et seq.*, as amended, 42 U.S.C. §§ 2000e *et seq.* (1983). Title VII provides:

(a) It shall be an unlawful employment practice for an employer —

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation terms, conditions or privileges of employment, because of such individual’s race, color, religion, sex, or national origin . . . .

42 U.S.C. § 2000e-2 (1983).

<sup>6</sup>106 S.Ct. 2399 (1986).

<sup>7</sup>Brief of Petitioner, *Meritor Savings Bank v. Vinson*, 106 S.Ct. 2399 (1986) (available on LEXIS).

<sup>8</sup>*Meritor Savings Bank v. Vinson*, 106 S.Ct. 2399, 2405-06 (1986).

<sup>9</sup>*Id.* at 2408.

<sup>10</sup>*Id.* at 2406-07.

This casenote will examine *Meritor* in light of the brief legal history of Title VII sexual harassment claims and will consider the implications of both the Court's holding and its dicta regarding the undecided issues.

### HISTORY

Although the Civil Rights Act of 1964, as amended, prohibits sex discrimination in employment,<sup>11</sup> courts have recognized only recently that sexual harassment is a discriminatory practice actionable under Title VII. Many cases were dismissed at least partly because the courts viewed supervisors' sexual demands upon subordinates as personal rather than employment related.<sup>12</sup> Employers have argued, and courts have held, that firing a female employee for refusing to submit to sexual demands did not constitute a Title VII violation because the class discriminated against was defined by willingness to perform sexual favors, rather than by gender.<sup>13</sup> The courts' reluctance to uphold Title VII sexual harassment claims may stem partly from Congress' failure to define "discrimination" in Title VII<sup>14</sup> and partly from well-established and widespread views on women's sexuality.<sup>15</sup>

As courts began to view sexual harassment as stating a claim under Title VII, the courts restricted findings of discrimination to cases in which the plaintiff could show a tangible loss as a consequence of the harassment.<sup>16</sup> Now, however, federal courts recognize two distinct forms of sexual harassment: "harassment that creates an offensive environment ('condition of work') and harassment in which a supervisor demands sexual consideration in exchange for [tangible] job benefits ('quid pro quo')."<sup>17</sup>

<sup>11</sup>42 U.S.C. § 2000e *et seq.* (1983).

<sup>12</sup>*See, e.g., Barnes v. Train*, 13 Fair Empl. Prac. Cas. (BNA) 123 (D.D.C. 1974), *rev'd*, *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977); *Corne v. Bausch & Lomb*, 390 F. Supp. 161 (D. Ariz. 1975); *Miller v. Bank of America*, 418 F. Supp. 233 (N.D. Cal. 1977), *rev'd*, 600 F.2d 211 (1979); *Tomkins v. Public Serv. Elec. & Gas Co.*, 422 F. Supp. 553 (D.N.J. 1976), *rev'd*, 568 F.2d 1044 (3d Cir. 1977). *See generally* C. MACKINNON, *supra* note 1, at 59-60, 83-92.

<sup>13</sup>*Barnes*, 561 F.2d at 986; *Bundy v. Jackson*, 641 F.2d 934, 942 (D.C. Cir. 1981); *Tomkins*, 568 F.2d at 1047; *Williams v. Saxbe*, 413 F. Supp. 654, 658 (D.D.C. 1976), *rev'd on other grounds*, *Williams v. Bell*, 587 F.2d 1240 (D.C. Cir. 1978).

<sup>14</sup>*General Electric Co. v. Gilbert*, 429 U.S. 125, 133 (1976), *reh'g denied*, 429 U.S. 1079 (1977).

<sup>15</sup>C. MACKINNON, *supra* note 1, at 7.

<sup>16</sup>*See, e.g., Barnes*, 561 F.2d at 989-90 n.49.

The first instance in which a hostile environment was found to constitute sex discrimination was a 1976 unemployment appeal. C. MACKINNON, *supra* note 1, at 77. Although other plaintiffs attempted to ground sex discrimination complaints on a hostile environment theory, *see, e.g., Tomkins*, 568 F.2d at 1046 n.1 (finding tangible detriment, the court declined to rule on the environmental question), no federal court adopted this position until 1980, when an Oklahoma district court stated that a discriminatory environment "created an 'impermissible condition of employment.'" Note, *New EEOC Guidelines on Discrimination Because of Sex: Employer Liability for Sexual Harassment Under Title VII*, 61 B.U.L. REV. 535, 555 (1981) (citing *Brown v. City of Guthrie*, 22 Fair Empl. Prac. Cas. 162 (W.D. Okla. 1980)). However, in *Brown*, the employee had resigned because of the work environment. *Id.* *See also Heelan v. Johns-Manville Corp.*, 451 F. Supp. 1382, 1390 (D. Colo. 1978); *Bundy*, 641 F.2d at 942.

<sup>17</sup>*Henson v. City of Dundee*, 682 F.2d 897, 908 n.18 (11th Cir. 1982). *See generally* C. MACKINNON, *supra* note 1, at 32-40 (quid pro quo), 40-47 (condition of work).

*Bundy v. Jackson* was the first sexual harassment case in which a plaintiff who had remained employed succeeded in federal court on a hostile environment theory.<sup>18</sup> Consistent with extensive case law involving racial discrimination,<sup>19</sup> the *Bundy* court held that Title VII's reference to "conditions of employment" includes the work environment, and that "sexual harassment, which injects the most demeaning sexual stereotypes into the general work environment and which always represents an intentional assault on an individual's innermost privacy" is illegal.<sup>20</sup> The court noted that to deny recovery in hostile environment cases would permit employers to "sexually harass a female employee with impunity by carefully stopping short of . . . taking any . . . tangible actions against her in response to her resistance . . . ."<sup>21</sup>

The federal appellate courts, which have since decided cases involving hostile environment claims, have consistently followed *Bundy*.<sup>22</sup> Accordingly, courts have approved employers' termination of male supervisors whose sexual behavior created an offensive work environment.<sup>23</sup> Most courts have required a showing of five elements to state a sexual harassment claim. The necessary elements are (1) that the employee belonged to a protected group; (2) that the employee was subjected to unwelcome sexual harassment; (3) that the harassment was based on sex; (4) that the harassment affected a "term, condition or privilege of employment"; and (5) that the employer knew or should have known of the harassment, and failed to take prompt remedial action.<sup>24</sup> In the absence of a tangible job detriment, courts have required a stronger showing that the sexually harassing conduct was pervasive and created an abusive working environment.<sup>25</sup>

### *Meritor Savings Bank v. Vinson*

In 1974, Mechelle Vinson met Sidney Taylor, a branch manager and assistant vice president for Meritor Savings Bank.<sup>26</sup> Taylor gave Vinson an employment application and later informed her of the bank's decision to hire her.<sup>27</sup> During the next four years, under Taylor's supervision, Vinson rose from teller-trainee to assistant branch manager.<sup>28</sup> Her advancement was based solely

<sup>18</sup>See Significant Development, *supra* note 16, at 555; *Bundy*, 641 F.2d at 943-44.

<sup>19</sup>*Id.* at 944-45.

<sup>20</sup>*Id.*

<sup>21</sup>*Id.*

<sup>22</sup>See, e.g., *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982); *Katz v. Dole*, 709 F.2d 251 (4th Cir. 1983); *Moylan v. Maries County*, 792 F.2d 746 (8th Cir. 1986).

<sup>23</sup>See *Snipes v. United States Postal Serv.*, 677 F.2d 374 (4th Cir. 1981); *Whitaker v. Carney*, 778 F.2d 216 (5th Cir. 1985).

<sup>24</sup>*Henson*, 682 F.2d at 903-05; *Jones v. Flagship Int'l*, 793 F.2d 714, 719-20 (1986).

<sup>25</sup>*Id.* at 720.

<sup>26</sup>*Meritor*, 106 S.Ct. at 2402.

<sup>27</sup>*Id.*

<sup>28</sup>*Id.*

on merit.<sup>29</sup> On September 21, 1978, Vinson notified Taylor that she would be on sick leave indefinitely.<sup>30</sup> The following day, Vinson filed suit against Taylor and the bank, alleging that Taylor had subjected her to sexual harassment in violation of Title VII.<sup>31</sup> On November 1, 1978, the bank terminated Vinson.<sup>32</sup>

Vinson asserted that Taylor had conditioned her employment on the performance of sexual favors.<sup>33</sup> Vinson testified that in May, 1975, Taylor began making various sexual demands on her, and that she had complied for fear of losing her job.<sup>34</sup> Vinson additionally alleged that Taylor had assaulted and raped her, and that one rape had required medical attention.<sup>35</sup> According to Vinson's testimony, the sexual incidents ceased when she began seeing a steady boyfriend in 1977.<sup>36</sup>

Vinson never reported Taylor's conduct to any of his supervisors.<sup>37</sup> Although the bank had an internal grievance procedure, Vinson stated that she never attempted to use the procedure because she feared reprisals from Taylor.<sup>38</sup> She contended that because Taylor was a branch manager and vice president, his knowledge of the alleged harassment constituted notice to the bank.<sup>39</sup> Vinson did not file a charge with the E.E.O.C. until after she had instituted the lawsuit.<sup>40</sup>

Taylor denied Vinson's allegations, asserting that he had neither asked for nor engaged in sexual activities with Vinson.<sup>41</sup> He testified that Vinson had made sexual advances toward him, and that he had declined.<sup>42</sup> Taylor stated that Vinson's charges stemmed from her desire to retaliate as a result of a business dispute.<sup>43</sup>

The bank also denied Vinson's allegations, and argued that even if Taylor had made advances toward Vinson, Taylor's activities were unknown to the

<sup>29</sup>*Id.*

<sup>30</sup>*Id.*; Brief of Respondent Mechelle Vinson, *Meritor Savings Bank v. Vinson*, 106 S.Ct. 2399 (1986) (available on LEXIS).

<sup>31</sup>*Meritor*, 106 S.Ct. at 2402.

<sup>32</sup>*Id.*

<sup>33</sup>*Vinson v. Taylor*, 23 Fair Empl. Prac. Cas. 37, 38 (D.D.C. 1980), *rev'd*, 753 F.2d 141 (D.C. Cir. 1985), *reh'g en banc denied*, 760 F.2d 1330 (D.C. Cir. 1985), *aff'd*, *Meritor Savings Bank v. Vinson*, 106 S.Ct. 2399 (1986).

<sup>34</sup>*Id.*

<sup>35</sup>*Id.*

<sup>36</sup>*Id.*

<sup>37</sup>*Id.* at 39.

<sup>38</sup>*Id.*

<sup>39</sup>*Id.* at 41. Although Vinson contended that third parties had notified Taylor's supervisors at the bank of the alleged harassment, the trial court found that the bank had not received notice of sexual harassment.

<sup>40</sup>*Vinson v. Taylor*, 753 F.2d 141, 144 n.20 (D.C. Cir. 1985).

<sup>41</sup>*Vinson*, 23 Fair Empl. Prac. Cas. at 39.

<sup>42</sup>*Id.*

bank, and were not carried out with the bank's approval.<sup>44</sup>

The district court admitted "voluminous testimony" concerning Vinson's dress and sexual fantasies.<sup>45</sup> Vinson testified that Taylor had made sexual advances to other female employees at the bank, and she attempted to call other witnesses to support this claim.<sup>46</sup> Although the court admitted some of this testimony, the district court refused to allow Vinson "to present wholesale evidence of a pattern and practice" of harassment at the bank.<sup>47</sup>

The district court decided the case prior to the *Bundy* decision. The court found that Vinson's employment and status were not conditioned on her granting Taylor sexual favors; that any sexual relationship between Vinson and Taylor was voluntary; that the bank had an express policy of non-discrimination and a grievance procedure of which Vinson had failed to take advantage; and that Vinson was not the victim of sexual harassment or sex discrimination.<sup>48</sup> The court further found that the bank had not received notice of the alleged misconduct, and that therefore the bank could not be liable.<sup>49</sup>

Almost five years later, and after rendering its decision in *Bundy*, the appellate court reversed.<sup>50</sup> Finding that the district court had failed to determine whether a "hostile environment" violation of Title VII had occurred, the court of appeals remanded.<sup>51</sup>

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<sup>44</sup>*Id.*

<sup>45</sup>*Vinson*, 753 F.2d at 146 n.36.

<sup>46</sup>*Vinson*, 23 Fair Empl. Prac. Cas. at 38.

<sup>47</sup>*Id.* at 38-39 n.1.

<sup>48</sup>The District Court found:

4. Plaintiff was not required to grant Taylor or any other member of [the bank] sexual favors as a condition of either her employment or in order to obtain promotion.
5. If the plaintiff and Taylor did engage in an intimate sexual relationship during the time of plaintiff's employment with [the bank], that relationship was a voluntary one by plaintiff having nothing to do with her continued employment at [the bank] or her advancement or promotions at that institution. (footnote omitted)
9. All raises, bonuses and promotions were determined by officials at the [bank], not Mr. Taylor, who only made written recommendations.
12. The alleged sexual harassment involving Mechelle Vinson was not reported by her or by anyone on her behalf to the police or to any officials at the [bank].
13. The [bank]'s Employee Manual provides a grievance procedure whereby any employee may state a grievance and have it resolved, if not by a supervisor, then by the division head or the president.
14. Mechelle Vinson never filed an informal or formal grievance against defendant, Sidney L. Taylor, pursuant to the [bank]'s Employee Manual.
15. The express policy of the defendant [bank] is one of nondiscrimination in employment practices.
21. Plaintiff was not the victim of sexual harassment and was not the victim of sexual discrimination while employed at [the bank] during the period September 9, 1974 through November 1978.

*Id.* at 42-43.

<sup>49</sup>*Vinson*, 23 Fair Empl. Prac. Cas. at 42.

<sup>50</sup>*Vinson*, 753 F.2d at 141.

<sup>51</sup>*Id.* at 145. The appellate court viewed the district court's finding that Vinson "was not the victim of sexual harassment and was not the victim of sexual discrimination while employed at [the bank] . . ." as susceptible to several interpretations. *Id.* at 145 n.32. The district court could have meant that Vinson was not victimized in the legal sense, either because she failed to qualify under the quid pro quo standard, or because the court found her relationship with Taylor to have been voluntary. *Id.* Alternatively, the lower court could have intended this finding as "the ultimate resolution of the conflicting evidence on Taylor's behavior toward Vinson." *Id.* Noting that "[a] finding of fact must, at minimum, furnish enough detail to disclose the

The appellate court stated that evidence regarding Vinson's dress and personal fantasies was irrelevant and should not have been admitted.<sup>52</sup> Surmising that that evidence had been material to the district court's finding of "voluntariness," the court stated that a victim's "voluntary" submission to unlawful discrimination had no bearing on whether toleration of an abusive environment had been made a condition of her employment.<sup>53</sup> The court of appeals held that the district court had erred in excluding evidence concerning Taylor's harassment of other female employees.<sup>54</sup> Under *Bundy*, such evidence was directly relevant to the hostile environment question.<sup>55</sup>

Finally, the appellate court held that an employer is strictly liable for the sexual harassment of any employee by a "supervising superior."<sup>56</sup> In reaching this conclusion, the court relied heavily on the E.E.O.C.'s *Guidelines on Discrimination Because of Sex*, which propose vicarious liability even when the employer is without notice of discriminatory conduct.<sup>57</sup> The appellate court's holding was consistent with case law involving racial and religious discrimination.<sup>58</sup>

The court of appeals did not limit its holding to supervisory employees with the authority to hire and fire.<sup>59</sup> The court noted that the mere appearance of influence in vital employment decisions creates an opportunity for the supervisor to "coerce, intimidate and harass" employees.<sup>60</sup> A supervisor lacking the authority to hire and fire may still direct employees in their work, and provide evaluations and recommendations to those possessing that authority.<sup>61</sup> The court believed its ruling would provide employers with incentive to actively protect employees from discriminatory work environments.<sup>62</sup>

It is not clear why the Supreme Court selected *Meritor* for its first con-

steps by which the court arrived at its conclusion . . .," the appellate court stated that the district court's finding indicated neither the underlying facts on which that court had relied, nor the statutory standards which the court had applied. *Id.*

<sup>52</sup>*Id.* at 146.

<sup>53</sup>*Id.*

<sup>54</sup>*Id.*

<sup>55</sup>*Id.*

<sup>56</sup>*Id.* at 147, 150.

<sup>57</sup>*Id.* at 148-50.

The *Guidelines* provide:

- (c) 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. . . .

29 C.F.R. § 1604.11(c) (1985).

<sup>58</sup>*Vinson*, 753 F.2d at 149.

<sup>59</sup>*Id.* at 149-50.

<sup>60</sup>*Id.* at 150.

<sup>61</sup>*Id.*

<sup>62</sup>*Id.* at 151.

sideration of sexual harassment. The district court failed to explain the rationale behind its findings or clarify its factual determinations.<sup>63</sup> Neither the court of appeals nor the Supreme Court received a complete trial transcript.<sup>64</sup> There were no factual findings on whether Vinson and Taylor engaged in any sexual activity, whether any sexual conduct which occurred was unwelcome, or whether the workplace was characterized by pervasive sexual harassment.<sup>65</sup> The absence of factual findings regarding the harassment limited the Supreme Court to a purely hypothetical consideration of the liability question.<sup>66</sup>

### HOSTILE ENVIRONMENT

The Supreme Court affirmed the appellate court's holding that unwelcome sexual advances which create an offensive working environment violate Title VII.<sup>67</sup> The Court rejected the bank's argument that the reference in Title VII to the "compensation, terms, conditions, or privileges" of employment was limited to tangible economic factors.<sup>68</sup> The Court noted that the language of Title VII "evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment."<sup>69</sup> The E.E.O.C. *Guidelines on Discrimination Because of Sex*<sup>70</sup> define sexual harassment and specify that Title VII prohibits sexual harassment.<sup>71</sup> The Court noted that, although not controlling, the *Guidelines* are consistent with both judicial decisions and E.E.O.C. precedent establishing that Title VII prohibits employers from maintaining offensive or intimidating work environments.<sup>72</sup> The Court agreed with earlier decisions that the phrase "terms, conditions, or privileges of employment" includes the "state of psychological well-being at the workplace."<sup>73</sup>

The Supreme Court noted that not all harassment constitutes a Title VII violation.<sup>74</sup> To fall within the Title VII prohibition, the harassment must be

<sup>63</sup>See *supra* note 51.

<sup>64</sup>*Meritor*, 106 S.Ct. at 2402.

<sup>65</sup>*Id.* at 2408.

<sup>66</sup>*Id.*

<sup>67</sup>*Id.* at 2404.

<sup>68</sup>*Id.*

<sup>69</sup>*Id.*

<sup>70</sup>29 C.F.R. § 1604.11. § 1604.11(a) (1985) provides:

Harassment on the basis of sex is a violation of Sec. 703 of Title VII. 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>71</sup>*Meritor*, 106 S.Ct. at 2405.

<sup>72</sup>*Id.*

<sup>73</sup>*Id.* at 2405-06. See *Henson*, 682 F.2d at 901.



"sufficiently severe or pervasive 'to alter the conditions of . . . employment and create an abusive working environment.'" <sup>75</sup> Because Vinson's allegations included not only pervasive harassment, but also forcible rape, the Court found that in this case, the harassment was actionable. <sup>76</sup>

Unfortunately, the Court did not elaborate on the degree of pervasiveness required to state a claim. Other courts have held that "isolated incidents," "mere flirtation[s]," <sup>77</sup> and the "mere utterance of epithets" <sup>78</sup> will not support a finding of harassment. The conduct complained of must "illegally poison the atmosphere . . . from the viewpoint of the reasonable victim." <sup>79</sup>

One court found a supervisor's occasional advances, coupled with the employer's use of bare-breasted female figurines as table decorations at an office party, insufficient to constitute a hostile work environment. <sup>80</sup> Purporting to apply *Meritor*, the Seventh Circuit Court of Appeals held that an environment characterized by a supervisor's repeated sexual propositions and requests for sexual favors in exchange for advice and assistance was not sufficiently pervasive to be actionable under Title VII. <sup>81</sup> The court noted that the employee had considered the supervisor to be her friend. <sup>82</sup> Additionally, the supervisor had willingly advised and assisted the employee despite her refusal to comply with his sexual requests. <sup>83</sup>

In *Bundy*, it was "standard operating procedure" for supervisors to solicit sexual favors from female employees. <sup>84</sup> The plaintiff's supervisor repeatedly asked her to engage in sex with him, and often questioned her about her sexual proclivities. <sup>85</sup> When she complained to his superior, she was told that "any man in his right mind would want to rape you." <sup>86</sup>

In *Henson*, the plaintiff's supervisor subjected her to "numerous harangues of demeaning sexual inquiries and vulgarities" over a two-year period. <sup>87</sup> He requested sexual favors, <sup>88</sup> used "crude and vulgar language," and

<sup>75</sup>*Id.*

<sup>76</sup>*Id.*

<sup>77</sup>*Heelan v. Johns-Manville Corp.*, 451 F. Supp. 1382, 1388 (D. Colo. 1978). *See also* *Katz v. Dole*, 709 F.2d 251, 256 (4th Cir. 1983); *Moylan v. Maries County*, 792 F.2d 746, 749 (8th Cir. 1986).

<sup>78</sup>*Henson*, 682 F.2d at 904.

<sup>79</sup>E.E.O.C. Brief, *Meritor*, (citing *Katz* and *Henson*).

<sup>80</sup>*Jones*, 793 F.2d at 716, 721.

<sup>81</sup>*Scott v. Sears, Roebuck & Co.*, No. 85-1722, slip op., (7th Cir. Aug. 11, 1986), *aff'g* 605 F. Supp. 1047 (N.D. Ill. 1985) (available on LEXIS).

<sup>82</sup>*Id.*

<sup>83</sup>*Id.*

<sup>84</sup>*Bundy*, 641 F.2d at 939.

<sup>85</sup>*Id.* at 940.

<sup>86</sup>*Id.*

<sup>87</sup>*Henson*, 682 F.2d at 899.

made daily inquiries about her sexual habits.<sup>89</sup> The court held that the employee's allegations were sufficient to make out a Title VII claim.<sup>90</sup>

In *Katz*, the plaintiff alleged that her workplace was "pervaded with sexual slur, insult and innuendo."<sup>91</sup> Both her supervisor and fellow workers used sexual epithets when speaking to her or about her.<sup>92</sup> The words used were "widely recognized as intensely degrading," vulgar in meaning, and phonetically expressive of "disgust and violence."<sup>93</sup> When the employee complained to a superior, he responded with a sexual invitation.<sup>94</sup> The court found this harassment to constitute a hostile environment.<sup>95</sup>

### THE "WELCOME" DEFENSE

To be actionable under Title VII, sexual harassment must be not only severe, but also unwelcome.<sup>96</sup> In *Meritor*, the Supreme Court distinguished between "voluntary" and "welcome" sexual conduct.<sup>97</sup> A claimant's "voluntary" participation in, as opposed to forced submission to, sexual activity is not a defense to a sexual harassment claim under Title VII.<sup>98</sup> The proper inquiry is whether, by her conduct, the claimant indicated that the sexual advances were unwelcome — not whether her participation was "voluntary."<sup>99</sup> The Court agreed with the appellate court's affirmance of the *Bundy* holding that an employee could establish a sexual harassment claim without a showing that she resisted her employer's sexual overtures.<sup>100</sup>

However, the Court did not accept the appellate court's ruling that testimony concerning Vinson's dress and fantasies "had no place in this litigation."<sup>101</sup> Instead, the Court found evidence of Vinson's sexually provocative speech or dress to be "obviously relevant" to the question of whether she found particular sexual advances unwelcome.<sup>102</sup> In reaching its conclusion, the Court referred to the E.E.O.C. *Guidelines*,<sup>103</sup> which "emphasize that the trier of fact

<sup>89</sup>*Id.* at 900-01.

<sup>90</sup>*Id.* at 905.

<sup>91</sup>*Katz*, 709 F.2d at 254.

<sup>92</sup>*Id.*

<sup>93</sup>*Id.*

<sup>94</sup>*Id.*

<sup>95</sup>*Id.* at 256.

<sup>96</sup>*Meritor*, 106 S.Ct. at 2406.

<sup>97</sup>*Id.*

<sup>98</sup>*Id.*

<sup>99</sup>*Id.*

<sup>100</sup>*Id.*; *Vinson*, 753 F.2d at 146. See *Bundy*, 641 F.2d at 946. See also C. MACKINNON, *supra* note 1, at 164.

<sup>101</sup>*Vinson*, 753 F.2d at 146; *Meritor*, 106 S.Ct. at 2407.

<sup>102</sup>*Id.*

<sup>103</sup>29 C.F.R. § 1604.11. § 1604.11(b) provides:

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 ad-

must determine the existence of sexual harassment in light of 'the record as a whole' and 'the totality of [sic] circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred.'"<sup>104</sup> Whether the potential for unfair prejudice outweighs the relevance of the evidence is a question for the district court to determine.<sup>105</sup>

In its brief with the United States as *amici curiae*,<sup>106</sup> the E.E.O.C. stated that evidence that the plaintiff's "sexually suggestive conduct" contributed to the objectionable environment is relevant to the question of whether alleged sexual advances were unwelcome."<sup>107</sup> *Henson* offers further support for the Supreme Court ruling. In that case, the court stated that unwelcome sexual conduct is that which the employee "did not solicit or incite," and which the employee regarded as "undesirable or offensive."<sup>108</sup> Thus, any evidence suggesting that the employee solicited or incited the sexual advances might be seen as relevant.

Vinson argued strongly in favor of the appellate court's ruling that the evidence be excluded. In her brief, she equated the trial court's finding of consent with "an atavism from the law of rape that 'a rape accusation . . . [is] the product of a woman's over-active fantasy life or . . . [the] consequence of a woman's communication of her sexual desires, subtly or otherwise, to a hapless male.'"<sup>109</sup> Pointing to the analogy between sexual harassment and rape, Vinson asserted that under present rape law, only evidence of previous consensual sex with the defendant would generally be held to be admissible.<sup>110</sup> Evidence of prior unchastity or sexual relations with others is generally considered more prejudicial than probative.<sup>111</sup>

In *Priest v. Rotary*,<sup>112</sup> the defendant in a sexual harassment case attempted to discover evidence regarding the plaintiff's past sexual history, to support

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vances 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.

<sup>104</sup>*Meritor*, 106 S.Ct. at 2407.

<sup>105</sup>*Id.*

<sup>106</sup>The United States and E.E.O.C. argued that the appellate court's decision should be reversed, primarily on the ground that the district court's finding of a voluntary relationship between Vinson and Taylor was not clearly erroneous. E.E.O.C. Brief, *Meritor*.

<sup>107</sup>E.E.O.C. Brief.

<sup>108</sup>*Henson*, 682 F.2d at 903.

<sup>109</sup>Brief of Respondent, *Meritor*.

<sup>110</sup>*Id.*

<sup>111</sup>*Id.* See generally Annot., *Admissibility in Rape Case, Under Rule 412 of Federal Rules of Evidence, of Evidence of Victim's Past Sexual Behavior*, 65 A.L.R. FED. 519 (1983); Annot., *Modern Status of Admissibility, in Forcible Rape Prosecution, of Complainant's General Reputation for Unchastity*, 95 A.L.R. 3d 1181 (1979 & Supp. 1986); Annot., *Modern Status of Admissibility, in Forcible Rape Prosecution, of Complainant's Prior Sexual Acts*, 94 A.L.R. 3d 257 (1979 & Supp. 1986); Annot., *Admissibility of Evidence of Character or Reputation of Party in Civil Action for Sexual Assault on Issues Other than Impeachment*, 100 A.L.R. 3d 569 (1980).

his claim that the plaintiff had been the sexual aggressor in their relationship.<sup>113</sup> The court noted the similarity of position between a sexual harassment plaintiff and a rape victim.<sup>114</sup> In granting the plaintiff's motion for a protective order, the court stated:

Sexual harassment plaintiffs would appear to require particular protection from this sort of intimidation and discouragement if the statutory cause of action for such claims is to have meaning. Without such protection from the courts, employees whose intimate lives are unjustifiably and offensively intruded upon in the workplace might face the "Catch-22" of invoking their statutory remedy only at the risk of enduring further intrusions into irrelevant details of their personal lives in discovery, and, presumably, in open court.<sup>115</sup>

Meritor contended that evidence concerning Vinson's sexually oriented conversations at the bank was admissible.<sup>116</sup> None of the conversations involved Taylor, but instead concerned medical experiences, fantasies about Vinson's grandfather, and another employee's sexual interest in Vinson.<sup>117</sup> There was no evidence that Taylor was aware of these conversations during Vinson's tenure at the bank.<sup>118</sup> Meritor additionally sought to introduce testimony that Vinson's revealing clothing provoked customer comments at the bank.<sup>119</sup> Vinson asserted that the sole purpose of this evidence was "to provide a pornographic image" of her.<sup>120</sup> Vinson argued that this type of character evidence was inadmissible under the Federal Rules of Evidence.<sup>121</sup>

Evidence of Vinson's dress at her place of employment should have no bearing on whether Taylor's alleged advances were welcome. For women, "attractiveness" can have economic consequences: offers of employment and promotions may in many instances turn on the woman's appearance.<sup>122</sup> Many women have been led to believe that success in their careers depends on an appearance of sexual receptivity.<sup>123</sup> Thus, Vinson's allegedly provocative attire could have reflected a desire to further her career rather than a sexual interest in Taylor. Either view is speculative at best. Just as employment decisions

<sup>113</sup>*Id.* at 738-39.

<sup>114</sup>*Id.* at 746-47.

<sup>115</sup>*Id.* at 746.

<sup>116</sup>Brief of Respondent, *Meritor*, Brief of Petitioner, *Meritor*.

<sup>117</sup>*Id.*

<sup>118</sup>Brief of Respondent, *Meritor*.

<sup>119</sup>Brief of Petitioner, *Meritor*.

<sup>120</sup>Brief of Respondent, *Meritor*.

<sup>121</sup>*Id.* Vinson additionally asserted that the fact that she is Black played a role in her being "victimized by the invidious stereotype of being [a] scandalous and lewd [woman] . . ." thereby undermining her credibility. *Id.* See generally C. MACKINNON, *supra* note 1, at 53-54. See also Brief of W.W.I., *Meritor*.

<sup>122</sup>C. MACKINNON, *supra* note 1, at 20-23.

“cannot be predicated on mere ‘stereotyped’ impressions about the characteristics of males and females,”<sup>124</sup> a supervisor’s decision to repeatedly make sexual advances toward a female subordinate cannot be predicated on an impression derived from the clothing she wears to work.

It is not clear why the Supreme Court chose to review the admissibility of this evidence. There was other evidence more responsive to the question of whether Taylor’s alleged advances were “welcome.” Vinson declined a job transfer during the period of the alleged harassment.<sup>125</sup> It was undisputed that the alleged harassment ended after a change in Vinson’s personal circumstances — her involvement with a steady boyfriend<sup>126</sup> — not as the result of an event within Taylor’s sphere of influence. The Supreme Court did not consider whether testimony regarding Taylor’s alleged advances toward other employees, which the district court had excluded, should be admitted upon remand.<sup>127</sup> That Taylor allegedly engaged in similar conduct with Vinson’s co-workers would support the view that Vinson did not “solicit or incite” his advances. Further, insofar as Vinson’s claim included allegations of forcible rape, the question of whether Taylor’s alleged impositions were “welcome” would appear to be moot. Most likely, the Court’s primary intent was to strike down the appellate court’s ruling that evidence of a claimant’s dress or sexually oriented conversations is *per se* inadmissible.

### LIABILITY

The issue of liability posed an interesting dilemma for the Supreme Court. Title VII does not directly address the question of whether an employer is strictly liable for a sexually discriminatory work environment created or condoned by supervisory personnel.<sup>128</sup> In both *quid pro quo* and hostile environment cases involving racial and religious discrimination, both the courts and the E.E.O.C. have held employers strictly liable.<sup>129</sup> In *quid pro quo* cases of sexual harassment, courts have found employers strictly liable, while in hostile environment cases, courts have required actual or constructive knowledge.<sup>130</sup> In *Vinson*, the appellate court extended vicarious liability to hostile environment sexual harassment.<sup>131</sup> The appellate court’s holding was largely based on the

<sup>124</sup>City of Los Angeles v. Manhart, 435 U.S. 702, 707 (1978).

<sup>125</sup>Brief of Petitioner, *Meritor*, Brief of E.E.O.C., *Meritor*, 106 S.Ct. 2399 (1986), available on Lexis.

<sup>126</sup>*Vinson*, 23 Fair Empl. Prac. Cas. at 38.

<sup>127</sup>Unlike the question concerning Vinson’s dress and conversations, this issue was not raised in the briefs of the parties.

<sup>128</sup>42 U.S.C. § 2000e *et seq.* (1983).

<sup>129</sup>*Vinson*, 753 F.2d at 149 n.67.

<sup>130</sup>See, e.g., *Henson*, 682 F.2d at 909-10; *Miller*, 600 F.2d at 213; *Horn v. Duke Homes, Inc.*, 755 F.2d 599, 604-06 (7th Cir. 1985); *Jones*, 793 F.2d at 720. See generally McLain, *supra* note 1, at 317-22; Note, *Employment Discrimination — Defining an Employer’s Liability Under Title VII for On-the-Job Sexual Harassment: Adoption of a Bifurcated Standard*, 62 N.C.L. REV. 795, 803-11 (1984).

<sup>131</sup>*Vinson*, 753 F.2d at 148-50. See also Significant Development, *supra* note 16, at 538.

E.E.O.C. *Guidelines*, which provide:

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 (emphasis added).<sup>132</sup>

However, the E.E.O.C. asserted in its *amicus* brief that the appellate court's theory of strict liability was "erroneous as a matter of statutory construction."<sup>133</sup> Pointing to Title VII's definition of employer as including "any agent of such a person,"<sup>134</sup> the E.E.O.C. stated that an employer's liability for its employees' acts should be determined in light of traditional agency principles.<sup>135</sup> A principal is liable for only those acts within the scope of the agent's employment representing the exercise of actual or apparent authority vested in the agent.<sup>136</sup> The E.E.O.C. argued that in hostile environment sexual harassment cases, the supervisor is not exercising, or threatening to exercise, actual or apparent authority to make personnel decisions affecting the victim.<sup>137</sup> By interjecting agency principles into the apparently unambiguous language of the *Guidelines*, the E.E.O.C. concluded that in sexual harassment claims based on a hostile environment theory, the usual grounds for imputing the supervisor's actions to the employer may not exist.<sup>138</sup> The E.E.O.C. asserted that because the supervisor is not exercising the authority vested in him by the employer, employer liability should be predicated on actual or constructive knowledge of the offensive atmosphere.<sup>139</sup>

Thus, with the appellate court's holding, the Supreme Court faced a precedent which was both in harmony and in conflict with existing case law.<sup>140</sup> Title VII is ambiguous.<sup>141</sup> The argument presented by the E.E.O.C. controverted the clear language of that commission's own guidelines.<sup>142</sup> Further,

<sup>132</sup>29 C.F.R. § 1604.11(c) (1985).

<sup>133</sup>Brief of E.E.O.C., *Meritor*.

<sup>134</sup>*Id.*; 42 U.S.C. § 2000e-2(b) (1983).

<sup>135</sup>Brief of E.E.O.C., *Meritor*.

<sup>136</sup>*Id.*

<sup>137</sup>*Id.* But see Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV. L. REV. 1449, 1461 (1984); *Henson*, 682 F.2d at 913 (Clark, J. concurring).

<sup>138</sup>Brief of E.E.O.C., *Meritor*.

<sup>139</sup>*Id.*

<sup>140</sup>See *supra* note 130.

<sup>141</sup>See *supra* note 128 and accompanying text.

<sup>142</sup>29 C.F.R. § 1604.11(c) (1985); Brief of E.E.O.C., *Meritor*.

the case before the Court was essentially hypothetical. The Court did not know whether Taylor had made any sexual advances towards Vinson, much less "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]' . . . ." <sup>143</sup>

It is therefore not surprising that the Court declined to issue a definitive rule on employer liability.<sup>144</sup> Agreeing with the E.E.O.C.'s proposal that decisions regarding employer liability be guided by agency principles, the Court held that employers are not always automatically liable for sexual harassment by their supervisors.<sup>145</sup> However, in a concurring opinion, Justices Marshall, Brennan, Blackmun and Stevens rejected the E.E.O.C.'s position and stated that when a supervisor's sexual harassment of an employee under his supervision creates a discriminatory work environment, the harassment should be imputed to the employer for Title VII purposes.<sup>146</sup>

Noting that the E.E.O.C.'s position on liability as expressed in its amicus brief appeared inconsistent with the *Guidelines*, the Court quoted the commission's brief with apparent approval.<sup>147</sup> According to the E.E.O.C., the court should base any determination of employer liability on whether the employer has an express policy against sexual harassment and a procedure "specifically designed to resolve sexual harassment claims."<sup>148</sup> The E.E.O.C. asserted that any employer with such a policy and procedure in place should be immune from liability for hostile environment sexual harassment if the victim fails to invoke the procedure and the employer lacks actual knowledge of the harassment.<sup>149</sup>

The Court rejected Meritor's view that the existence of a general non-discrimination policy and an employee grievance procedure should insulate an employer from liability if the employee fails to invoke the grievance procedure.<sup>150</sup> In accord with the E.E.O.C. position, the Court suggested that a policy which fails to explicitly address sexual harassment, and procedures not calculated to encourage sexually harassed employees to complain, may be insufficient to protect an employer from liability.<sup>151</sup>

<sup>143</sup> *Id.*; see *supra* note 66.

<sup>144</sup> *Meritor*, 106 S.Ct. at 2408.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 2411 (Marshall, J. concurring).

<sup>147</sup> *Id.* at 2408.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*; Brief of E.E.O.C., *Meritor*.

<sup>150</sup> *Meritor*, 106 S.Ct. at 2408-09.

<sup>151</sup> *Id.*  
<http://ideaexchange.uakron.edu/akronlawreview/vol20/iss3/11>

## CONCLUSION

In *Meritor*, the U.S. Supreme Court recognized that a hostile environment sexual harassment claim is actionable under Title VII.<sup>152</sup> Although the Court held that to constitute a Title VII violation, the harassment must be pervasive,<sup>153</sup> the Court failed to elaborate on the degree of pervasiveness necessary to state a claim. As appellate courts had already begun to recognize hostile environment sexual harassment claims as actionable,<sup>154</sup> the Supreme Court's holding does not represent a major change in employment discrimination law.

Although the Supreme Court's decision considerably diminishes the force of the E.E.O.C. *Guidelines* with respect to employer liability, the Court's holding may serve to further the goals of Title VII.<sup>155</sup> The ultimate goal of Title VII is to eliminate discriminatory employment practices.<sup>156</sup> The preferred methods of promoting that goal are cooperation and voluntary compliance.<sup>157</sup> By suggesting that an employer may avoid liability by implementing a policy and procedure directed specifically at the elimination of sexual harassment and designed to encourage employee complaints, the Court has created incentive for employers to voluntarily comply with Title VII.

In one case involving a supervisor who sexually harassed female subordinates, the employer's prompt investigation of the employees' complaints culminated in the discharge of the supervisor. Apparently, as a result of the employer's prompt remedial action, none of the employees filed formal complaints.<sup>158</sup> By providing employees with an opportunity to voice their complaints, free from fear of reprisals, employers may possibly avoid liability for sexual harassment, not through a shield of procedural safeguards, but by eliminating the need for employees to resort to the courts.

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<sup>152</sup> *Id.* at 2405-06.

<sup>153</sup> *Id.* at 2406.

<sup>154</sup> *See supra* notes 18-23.

<sup>155</sup> *Meritor*, 106 S.Ct. at 2408-09.

<sup>156</sup> *Jones*, 793 F.2d at 726.

<sup>157</sup> *Id.*

<sup>158</sup> *Whitaker*, 778 F.2d at 218.



