10-1985

# Meritor Savings Bank, FSB v. Vinson

Lewis F. Powell Jr.

Court CA - D.C.  Voted on ....., 19...

Argued ....., 19...  Assigned ....., 19...  No. 84-1979

Submitted ....., 19...  Announced ....., 19...

PSFS SAVINGS BANK, FSB, Petitioner

vs.

MECHELLE VINSON, ET AL.

06/21/85 - Cert.

e Signature complete

Grant

| | HOLD FOR | CERT. G | CERT. D | JURISDICTIONAL STATEMENT N | JURISDICTIONAL STATEMENT POST | JURISDICTIONAL STATEMENT DIS | JURISDICTIONAL STATEMENT AFF | MERITS REV | MERITS AFF | MOTION G | MOTION D | ABSENT | NOT VOTING |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Burger, Ch. J. | | | ✓ | (wrong but w c/w) | | | | | | | | | |
| Brennan, J. | | ✓ | | | | | | | | | | | |
| White, J. | | ✓ | | | | | | | | | | | |
| Marshall, J. | | | ✓ | | | | | | | | | | |
| Blackmun, J. | | ✓ | | | | | | | | | | | |
| Powell, J. | | ✓ | | | | | | | | | | | |
| Rehnquist, J. | | ✓ | | | | | | | | | | | |
| Stevens, J. | | ✓ | | | | | | | | | | | |
| O'Connor, J. | | ✓ | | | | | | | | | | | |
| | | | | | | | | | | | | | |

issue #2 below.
Square conflict with CA 11

Resp., female employee, sued the Bank under Title VII alleging sex discrimination in the form of "sexual harassment by her supervisor" — even though she made no complaint to anyone until she was fired for taking excessive & unauthorized leave. The Bank had no knowledge of the extensive sexual relationship between Resp & her Supervisor — also most of it was voluntary. Her claim of rape was never reported to Bank or police.

PRELIMINARY MEMORANDUM

September 30, 1985 Conference
Summer List 21, Sheet 1

No. 84-1979

PSFS Savings Bank, FSB et al. (former employer)

v.

Vinson (Title VII plaintiff)

Cert. to CADC (Robinson, Wright, Northrop [DJ])

Federal/Civil Timely

1. SUMMARY: Petrs challenge the CADC's conclusions that (1) resp alleged sufficient facts to state a cognizable Title VII claim of sex discrimination; (2) any discriminatory activity by a supervisor is attributable to the employer; and (3) evidence of resp's voluntary participation in work place sexual activity is immaterial and inadmissible.

CADC held that rape

GRANT on one issue only: Supervisor liability for "hostile environment" sexual discrimination under Title VII.

Mike

2. FACTS AND DECISION BELOW: Resp met petr Taylor, vice-president of petr PSFS and manager of one of its branch offices, and applied for a job. After filling out an application, resp was hired as a teller-trainee under Taylor's supervision. Thereafter, she was promoted to teller, head teller, and ultimately assistant branch manager. It is undisputed that resp's advancement was solely a function of merit. Resp worked for petr for four years, when she took "indefinite sick leave." Petr fired her two months later for excessive use of that leave.

Resp then brought this action under Title VII, alleging sexual discrimination in the form of sexual harassment by Taylor. In her original complaint, resp also alleged violations of the Fifth Amendment and 42 U.S.C. § 1985(2). These claims were abandoned on appeal.

Conflicting testimony was presented at trial. Resp claimed that Taylor had made sexual advances to which she ultimately yielded because she feared that refusal would jeopardize her job. She was then forced to have sex with Taylor both during and after business hours and both on and off the bank premises. According to resp, Taylor would fondle her in front of other employees, make lewd remarks, and would follow her to the women's restroom and expose himself to her. He would also fondle other women employees. She also claimed that Taylor forcibly raped her on more than one occasion. These activities stopped once resp began seeing her boyfriend. Resp never complained to any bank official, filed a grievance, or reported being attacked to the police.

Taylor denied engaging in any of this activity, and claimed that resp brought such charges against him in retaliation for a business-related dispute. The bank asserted that it was unaware of any sexual misconduct or harassment by Taylor, and that if any such conduct was performed, it was completely unauthorized by the bank. Finally, both Taylor and the bank presented evidence that resp often wore provocative clothing at work, entertained bizarre sexual fantasies, and continually volunteered intimate details of her sex life to other employees.

The district court (J. Penn) held for petrs. The court found that resp had not been subject to "quid pro quo" sexual harassment (giving sex as a condition of employment) and could not come under the protection afforded by Title VII. If resp did engage in sexual relations with Taylor, their relationship was purely voluntary and not job-related. The court also found that the bank was without notice of any unlawful conduct, and could not be held liable.

The CADC reversed and remanded. The court did not fault the district judge's finding of no "quid pro quo" sexual discrimination, but noted that Title VII also provides a remedy for pervasive, on-the-job sexual harassment, independent of any threatened loss of job benefits ("hostile environment" sexual harassment). The CADC also held that any discriminatory activity by Taylor was attributable to the bank. Finally, the CA made two evidentiary rulings: (1) evidence of resp's "sartorial or whimsical proclivities" was immaterial; and (2) on remand, resp should be allowed

to introduce evidence that Taylor sexually abused other female employees.

The CADC denied rehearing en banc. In dissent, J. Bork focused first on the panel's ruling that "a plaintiff's voluntariness in participating in a sexual relationship with her supervisor can have no bearing on the pertinent inquiry in a sexual harassment suit brought under Title VII." This holding "rigged" the rules of evidence "so that dalliance is automatically harassment because no one is allowed to deny it." J. Bork also took exception with the panel's imposition of vicarious liability on the bank for the acts of a supervisor. The panel's rule is inconsistent with traditional tort law, and forces the employer into becoming "an insurer that all relationships between supervisors and employees are entirely asexual."

3. CONTENTIONS: Petrs argue that the CADC erred in extending Title VII to cover "hostile environment" claims of sexual harassment. Although the CADC relied on its own ruling in Bundy v. Jackson, 641 F.2d 934 (CADC 1981) to support its conclusion, there is no other case support for it, and this Court should decide whether this kind of harassment constitutes discrimination for purposes of Title VII.

If Title VII does apply to this type of suit, an employer cannot be held vicariously liable for the violation. This rule of absolute employer liability conflicts with the decisions of the CA3, Craig v. Y & Y Snacks, Inc., 721 F.2d 77 (CA3 1983); Tompkins v. Public Service Elec. & Gas Co., 568 F.2d 1044 (CA3

1977), the CA4, Katz v. Dole, 709 F.2d 251 (CA4 1983), and the CA11, Henson v. City of Dundee, 682 F.2d 987 (CA11 1982).

Finally, the CADC's ruling that evidence of voluntary participation in work-place sexual activity is immaterial to a Title VII claim also conflicts with the rule in other circuits. See, e.g., Henson, supra, 682 F.2d at 903; Katz, supra, 709 F.2d at 254 n.3. This holding precludes any defense on critical elements of a Title VII action.

Resp contends that all sexual harassment, whether "quid pro quo" or "hostile environment", is prohibited under Title VII, and every circuit to have addressed this issue agrees. It is also consistent with Title VII law to hold the employer strictly liable for acts of sexual harassment committed by supervisory personnel. The alleged circuit split described by petrs simply does not exist. Even if a "notice requirement" for employer liability is applied in this case, however, the facts clearly support the conclusion that the bank had both actual and constructive notice of Taylor's misconduct.

Petrs misread the CADC opinion on the voluntariness issue. The court correctly insisted that the complaining employee in a Title VII action must establish that the sexual advances complained of were unwelcomed. The court did not hold, therefore that evidence of the plaintiff's voluntary sexual conduct was inadmissible.

4. DISCUSSION: Petrs' claim that Title VII does not afford a remedy for "hostile environment" sexual harassment is without foundation. In Bundy v. Jackson, 641 F.2d 934 (CADC 1981), the

CADC reasoned that the "conditions of employment" protected under Title VII "include the psychological and emotional work environment." Id. at 944, citing, Rogers v. EEOC, 454 F.2d 234, 238 (CA5 1971), cert. denied, 406 U.S. 957 (1972). It followed, therefore, that "where an employer created or condoned a substantially discriminatory work environment, regardless of whether the complaining employees lost any tangible job benefits as a result of the discrimination," Title VII had been violated. Id. at 943-44 (emphasis in original). "Hostile environment" sexual harassment thus amounts to sexual discrimination with respect to the "terms, conditions or privileges of employment" no less than "quid pro quo" sexual harassment. The court concluded that any other rule would allow an employer "sexually [to] harass a female employee with impunity by carefully stopping short of firing [her], or taking any other tangible actions against her in response to her resistance." Id. at 945.

This reasoning has been endorsed by the only two other circuits (CA4 and CA11) which have considered this question. See Katz v. Dole, 709 F.2d 251, 254 (CA4 1983); Henson v. City of Dundee, 682 F.2d 897, 901, 903-905 (CA11 1982). This development is also consistent with EEOC Guidelines which provide that "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when ... (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." 29 C.F.R. § 1604.11(a) (1985). Given the uniform devel-

opment of this area of the law, the issue does not appear to cert worthy at this time.

There is a circuit split, however, on the issue of an employer's vicarious liability in a "hostile environment" sexual harassment suit. In the instant case, the CADC held that "Title VII imposes upon an employer without specific notice of sexual harassment by supervisory personnel responsibility for that species of discrimination." Op., App. at 12a. The CA11 in Henson, however, held that "where the plaintiff seeks to hold the employer responsible for the hostile environment created by the plaintiff's supervisor ... she must show that the employer knew or should have known of the harassment in question and failed to take prompt remedial action." Henson, supra, 682 F.2d at 897.

Katz is inapplicable on this point, as the plaintiff there alleged a "hostile environment" as the result of actions by her co-employees, not by supervisory personnel. Katz, supra, 709 F.2d at 255. Such claims are governed by separate vicarious liability regulations. Compare 29 C.F.R § 1604.11(d) with Id. §1604.11(c). Similarly, nearly all of the cases cited by both petrs and resp are inapplicable to this discussion. These cases involve "quid pro quo" claims of sexual harassment, not "hostile environment" claims. In that situation, the uniform rule is one of strict liability for employers for the acts of sexual harassment committed by their supervisory personnel. See generally Horn v. Duke Homes, 755 F.2d 599, 604-606 (CA7 1985) (collecting cases).

The different holdings by the CA11 and the CADC reflect fundamentally different approaches to the problem of employer liability in Title VII actions. In Henson, the CA11 distinguished between "quid pro quo" and "hostile environment" sexual harassment in fashioning its vicarious liability rule under traditional notions of respondeat superior. In "quid pro quo" cases,

> the supervisor relies upon his apparent or actual authority to extort sexual consideration from an employee. ... In that case, the supervisor uses the means furnished to him by the employer to accomplish the prohibited purpose. ... Because the supervisor is acting within at least the apparent scope of the authority entrusted to him by the employer when he makes his employment decisions, his conduct can fairly be imputed to the source of his authority.

Id. at 910. These circumstances justify the imposition of absolute vicarious liability for employers in "quid pro quo" sexual harassment cases under Title VII.

In "hostile environment" claims, however, "[t]he capacity of any person to create a hostile or offensive environment is not necessarily enhanced or diminished by any degree of authority which the employer confers upon that individual." Id. The CA11 reasoned that, by creating a hostile environment, the supervisor acts outside the scope of his authority, and thus "[h]is conduct cannot automatically be imputed to the employer any more so than can the conduct of an ordinary employee." Id.

The CADC completely rejected this reasoning. The court refused to rely on the tort concept of respondeat superior in construing Title VII cases. The court found that common-law tort concepts are not applicable, without clear Congressional author-i-

zation, to interpret a statutory scheme designed to cure a specific evil. Op., App. at 18a-19a, citing NLRB v. Hearst Publications, Inc., 322 U.S. 111, 124-125 (1944). On a broader level, the court determined that "confining liability, as the common law would do, to situations in which a supervisor acted within the scope of his authority conceivably could lead to the ludicrous result that employers would become accountable only if they explicitly require or consciously allow their supervisors to molest women employees." Id. at 19a-20a. An employer could thus ensure his immunity from claims for which he is unaware "by the simple expedient of looking the other way," a rule which provides an incentive for employers not to take a more active role in freeing the work place from illegal sex discrimination.

Relying instead on the language of Title VII, the court noted that in "quid pro quo" cases, the uniform rule was to impose strict liability on employers independent of their knowledge of the alleged sexual harassment. Id. at 15a, quoting 29 C.F.R. § 1604.11(c). The court saw no reason not to apply this rule to all instances where Title VII applies to charges of sexual discrimination, in the same manner as adopted for "transgressions arising out of racial or religious discrimination." Id. at 16a.

The conflict between the CAll and the CADC is thus significant, both in reasoning and in the results achieved. This case provides a proper vehicle for resolving this conflict, as it is clear that resp can only prevail under the strict liability approach adopted by the CADC. Despite resp's contentions to the contrary, there appears to be little, if any, evidence to indi-

cate that the petr bank had either actual or constructive knowledge of petr Taylor's conduct to justify imposing liability under the CAll's reasoning. This issue is cert worthy.

The CADC's evidentiary rulings are confusing, but not cert

. In that part of the opinion, the court was explaining the difference between "quid pro quo" and "hostile environment" sexual harassment, and indicating that the district court had not properly considered resp's claims under the latter theory. The court found that "[i]f ... the evidence warranted a finding of sexual harassment [under the "hostile environment" standard, resp's] 'voluntariness' had no materiality whatsoever." Op., App. at 9a.

This seemingly absolute language, however, is undercut later in the opinion where the court noted:

> In determining the appropriateness of attribution, enough specificity must be imparted to 'harassment' to filter out personal relationships that are not products of employment-related intimidation. For purposes of this case, we are well-served by the criteria reflected in the EEOC Guidelines. The touchstone of these criteria is that sexual advances must be unwelcome, and must in some way amount to an explicit or implicit term or condition of employment in the sense either of job status or work environment.

Id. at 17a n.68, citing 29 C.F.R. § 1604.11(a). This language implies that an employer may still defend a Title VII charge of sexual harassment by showing that the sexual advances were not "unwelcome" (i.e., that such advances were welcomed by the employee). See Henson, supra, 682 F.2d at 903. Given the internal inconsistency on this issue within the opinion, the Court should

allow the CADC to interpret its own holding on this issue before expressing a view on its appropriateness.

5. RECOMMENDATION: I recommend granting cert on the issue of supervisory liability for "hostile environment" sexual discrimination under Title VII. I recommend denial on the other issues.

There is a response.

September 1, 1985 Schultz Opin in petn.

March 18, 1986

PSFS GINA-POW

84-1979 PSFS Savings Bank Associatioin v. Mechelle Vinson (CADC)

To be argued March 25

MEMO TO BOB:

This is a case in which CADC (Robinson, Wright, and Northrop (district judge)), found petitioner guilty of a Title VII violation because of sex discrimination. Although the petition and various briefs state the questions somewhat differently, I think the amicus brief by the SG perhaps best identifies the questions presented. I will not, in this uniquely brief memo, identify the questions in full detail. Rather, it may be helpful to you if I state first my tentative views:

1. CADC held that where unwelcome sexual advances have been made by a supervisor to subordinate female employees the result may be an "offensive work environment", that constitutes employee discrimination in violation of Title VII. There is a split of authority on this question. I am inclined to agree, however, with the SG (actually EEOC) that where there is adequate proof of such an offensive working environment, there is a

violation of Title VII. On the basis of my reading of the findings of the DC, I do not think there was adequate proof of any such environment in this case.

2. The second question identified by the SG also is a factual one. I have read the findings of fact explicitly made in a rather careful opinion by the DC. At least on their face, these facts support the judgment of the DC in favor of petitioner, and dismissal of respondent's complaint with prejudice. The DC found, in addition to other facts, the following:

(i). Respondent's promotions were based on merit alone, and not as a result of sexual favors to her supervisor Taylor or anyone else.

(ii). If the plaintiff and Taylor engaged in sexual relationships, "that relationship was a voluntary one by plaintiff having nothing to do with her continued employment at Capital or her advancements or promotions at that institution."

(iii). Raises, bonuses and promotions were determined by officials of the Association, and not by Taylor who only made written recommendations. Moreover, throughout respondent's employment, she received the usual and

customary increases in salary, bonuses and promotions "on the basis of merit".

(iv). The petitioner'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.

(v). Respondent "never filed" an informal or formal grievance against defendant, Taylor, pursuant to the Employee Manual.

(vi). The "expressed policy of the defendant association is one of non-discrimination in employment practices."

(vii). "No female employment of petitioner 'filed an EEOC complaint or formal grievance procedure charging defendant Taylor with sexual harrassment during the period in question'"; and finally

(viii). Respondent was "not the victim of sexual harrassment and was not the victim of sexual discrimination" during her employment.

Although I must reread the opinion of CADC, and also that of Judge Bork (with which I generally agree), I do not think the court of appeals expressly found any of these findings to be clearly erroneous. Rather, more

generally, it considered the entire scope of such evidence to be irrelevant or inadmissible. For reasons certainly not clear to me (particularly in view of some inconsistencies in its opinion), CADC seem to have accepted respondent's opinion testimony that there was an "offensive working environment" and that once this finding was made, the facts found by the DC were irrelevant. (Bob: I would particularly like your comments on this).

3. Finally, perhaps the most important question is whether (Bob: Ginny tells me the remainder of my dictation did not record. I will not try to repeat it. My tentative view is to reverse, but I remain open to consider - as always - a different view.)

LFP, Jr.

rbs 03/24/86 Reviewed

Bob would affirm:

1. Aff me CADC holding that a claim of sexual harassment ~~&~~ states a claim cognizable under Title VII. I agree, but ~~the~~ DC's findings are inadequate to show that.

2. Aff in CADC's holding that ~~a supervisor's~~ ~~co-employee's~~ sexual harassment may be imputed to the employer who has no knowledge of them. I'm not persuaded, & will discuss with Bob. In this case ~~there~~ no claim of harassment had ever been made to management.

BENCH MEMORANDUM

To: Mr. Justice Powell March 24, 1986

From: Bob

No.84-1979 Meritor Savings Bank v. Vinson

TO BE ARGUED: Tuesday, March 25, 1986

QUESTIONS PRESENTED

Whether creation of an "offensive working environment" independent of any loss of promotion or other pecuniary harm states a cause of action for sex discrimination under Title VII. Whether an employer is liable under Title VII for sexual harassment by supervisors which create a discriminatory working environment even where the employer is unaware of such conduct. Whether evidence of complainant's dress, conduct, and proclivities along

with the voluntariness of her activities are admissible in defense of a Title VII claim.

## I. BACKGROUND

In 1974 appellant Mechelle Vinson obtained a job at appellee Capital City Federal Savings Bank through Sidney L. Taylor, who was a vice president of appellee. Respondent began her employment as a teller-trainee, and thereafter was promoted successively to teller, head teller, and finally to assistant branch manager. Respondent worked in the branch for four years, after which she took indefinite sick-leave which ultimately led to her dismissal for excessive use of that leave.

Respondent then brought an action against Talor and the bank, alleging that she had been victimized by sex discrimination in the form of sexual harassment by Taylor in violation of Title VII. At trial, the evidence bearing on Taylor's behavior towards Vinson was sharply contrasting. Respondent claimed that Taylor and Vinson had sex numerous times both at the bank and away from it, with respondent going along merely out of fear of reprisal. Respondent testified to several other sexually demeaning, and sometimes violent, acts on the part of Taylor directed towards respondent as well as other women. Taylor denied that he ever had any sexual relations with respondent; he claimed that these charges were aired in retaliation for a work-related dispute.

Review of this case is hampered somewhat by the unorthodox form of opinion used by the DC. Rather than making clearly labeled finding of facts, and then applying the facts found to the law as it understood it, the opinion discusses one legal issue

relevant here, which is whether the employer had notice of the harassment. The DC found that the employer had no notice of the harassment at issue. Specifically, it rejected respondent's claim that notice to Mr. Taylor a supervisor, was notice to the bank. Because it held there was no notice to the bank, the DC concluded that the bank could not be held liable for the acts of Taylor. The DC then goes on to make additional findings of fact which are unrelated to any legal discussion found in the opinion. Of those findings, the following are arguably relevant to this case here: Respondent's advancement was achieved solely on the basis of merit; raises and bonuses were not determined by Taylor, and, in any event, respondent received the usual amounts of these; respondent never availed herself of any bank procedures to complain about the harassment. In addition, the DC found

> If the plaintiff and Taylor did engage in an intimate or sexual relationship during the time of plaintiff's employment with Capital, that relationship was a voluntary one by plaintiff having nothing to do with her continued employment at Capital or her advancement or promotions at that institution.

As pointed out by amici AFL-CIO, et al. this latter finding is somewhat remarkable in that it simply avoids a central credibility issue of the case, which is whether such a relationship took place, and the finding comports with neither the story of Taylor--who claimed that no relationship took place, nor that of respondent who claimed that only an unwelcome one took place.[1]

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[1]AFL-CIO point out that the CA was possibly unable to review this fact as clearly erroneous because it did not have a total transcript, due apparently to the fact that the DC denied respondent's IFP request for a transcript.

What made the Court of Appeals' even job more difficult, of course, is that the DC never bothered to give its understanding of what the applicable law is in a sexual harassment case. These "findings of fact" are merely followed by the conclusory statement that no Title VII violation occurred here.

The Court of Appeals reversed. It noted that Title VII claims come in two varieties: there is the garden variety "quid quo pro" claim in which a plaintiff asserts that sexual favors were required in order for the plaintiff to retain a job, achieve a promotion, etc. This is not such a case. Rather, the CA explained that respondent's claim was one for for sexual harassment. In a sexual harassment case, the issue is whether Taylor "created or condoned a substantially discriminatory work environment, regardless of whether the complaining employees lost any tangible job benefits as a result of the discrimination." App. 7a, citing Bundy v. Jackson, 641 F.2d 934, 943-944 (CADC 1981). The CA noted that the DC did not undertake a determination on whether a Title VII violation of this nature occurred, and that a remand was proper on this issue.[2] The CA added, however, that the voluntariness of respondent's behavior in a sexual harassment case was immaterial. It further mentioned in a footnote, that evidence of respondent's dress and personal fantasies "had no place in this litigation." In addition, it concluded that the DC

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[2]Of course, this is also understandable in that Bundy had not been decided when the DC ruled, and this case was so long on appeal (3 years from argument to panel decision) that the law clarified significantly.

had erred in not permitting respondent to elicit evidence from other women of how Taylor had treated them.

The CA also reversed with respect to employer liability on the notice issue. The CA held that employers must answer for sexual harassment of any subordinate by any supervising superior. First, Title VII expressly defines an employer as including the employer's agents. Second, it relied very slightly on some legislative history. Third, The EEO Guidelines support such a view. Finally, it noted that neither the statutory language nor its legislative history suggested that sex discrimination should be treated any differently from racial or religious discrimination, and "the case law in these latter areas establishes beyond cavil that an employer is chargeable with Title VII violations occasioned by discriminatory practices of supervisory personnel" App. 16a (quotation omitted). In addition, supervisors are not limited to those who can hire, promote, or fire; rather, "the ability to direct employees in their work, to evaluate their performances and to recommend personnel actions carries attendant power to coerce, intimidate and harass."

## II. DISCUSSION

I am frankly somewhat surprised that the SG found this a case worth participating in. Judge Bork was clearly correct that the evidentiary rulings of the CADC were wrong, but I think any subsequent court would have figured that out. The "strict liability" issue is a bit of a tempest in a teapot given that in cases where there has been no firing, demotion, etc, the most a victorious plaintiff can receive is an injunction against the

employer telling it to correct the offensive environment. This is not a case that leaves employers open to large compensatory or punitive damage claims, as they are forbidden by Title VII. Finally, whether Ms. Vinson loses or wins here or on remand with respect to the facts hardly seems worth the SG's--or this Court's--time.

A. The existence of a cause of action for harassment.

You indicated in your memo to file that you have no trouble concluding, as the SG does, that a cause of action exists where actions of supervisors create an "offensive work environment." I agree with this, and believe it is supported by the plain language of Title VII, and the purpose behind it. I will add simply that petitioner's argument that Title VII was meant to remedy merely tangible "economic" harms such as loss of job, etc, does not support its view that the creation of an offensive work environment should not state a Title VII violation. Clearly, were a significant number of employers to permit their workplaces to become sexually, racially, or religiously offensive, there is no doubt that, as a practical matter, jobs would be foreclosed to the offended who would be unwilling to submit themselves to such terms of employment--and Title VII expressly prohibits, inter alia, discrimination in terms or conditions of employment. Acceptance of petitioner's view would mean that all sorts of sexual harassment could be carried on with impunity as long as the subject is never fired, demoted, etc. That is silly. Finally, there is absolutely no reason for distinguishing sexual harassment from racial or religious harassment on this basis. See Henson v. City

of Dundee, 682 F.2d 897, 901 (CA11 1982); Bundy v. Jackson, 641 F.2d 934, 943-44 (CADC 1981).

In the event the Court agrees that sexual harassment states a claim under Title VII, I believe that the EEO Guidelines state an acceptable definition: "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when", inter alia, "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," 29 U.S.C. §1604.11.

B. Employer Liability

The important issue in this case, I think, is whether an employer can be held liable for sexual harassment by a supervisor absent notice to the employer of such harassment. Certain briefs argue that this issue need not be reached until there is a finding of liability. I disagree because a decision that there can be no liability imputed to the bank would preclude the necessity of a remand on the factual issues in the case.

The petr's main argument is that without notice to the employer there can be no finding of intent. That begs the question because the issue here is which representative of the company needs to have the intent in order to find the company liable. The SG takes petr's side on this issue beginning with the idea that the Act uses the term "agent," but noting that an "agent" is deemed one only insofar as he acts within the scope of his authority. The SG, however, makes two critical admissions. First,

he admits that agency principles are not carried wholesale into Title VII analysis. Second, he admits that where a supervisor fires a worker for sexual reasons, the employer is liable regardless of its awareness of the behavior, even though a strong argument can be made that firings for sexual reasons are beyond the scope of the agent's authority and therefore the employer should not be liable. Therefore, I find the SG's argument resting on the term agency to be weak. Just as a supervisor is the employer's agent when he is empowered to hire, fire, etc., he would seem to be no less the employer's agent when it comes to dealing with subordinates or creating a working atmosphere. See Henson v. City of Dundee, 682 F.2d 897, 913 (CA11 1982) (Clark, J., dissenting). The SG proposes the following rule that asks whether procedures were available to an employee and whether they were utilized, and the company was "reasonably responsive to the complaint." Only if this procedure was followed or there is actual knowledge could the employer be found liable.

I recommend that you reject the SG's view on notice. First, it is inconsistent with Title VII law in any other area. The SG admits that if this were a quid pro quo case the bank would be liable for the supervisor's activity here. If it were a race or religious atmosphere case liability would apparently be imputed to the employer.[3] Second, the SG makes no attempt to justify

why?

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[3]I do not rely too heavily on this argument. Several cases from the race area involve firings, thus they are not analogous to a case in which there the offense is limited to creating an offensive working environment. In addition, those cases that do exist, of course, are not dispositive because this Court has not

(Footnote continued)

special treatment for sex discrimination cases except to say that enforcement is difficult because a lot of sexual relationships are not abusive. That does not justify a policy that leads to excusing a hostile working environment in cases in which the victims are truly offended or abused. In addition, even if it is a good policy, the SG should address those concerns to Congress, because the statute this Court is asked to interpret indicates in no way that sexual harassment claims are to be treated different from other Title VII claims. Indeed Congress, indicated that "discrimination against women is no less serious than other prohibited forms of discrimination." S. Rep. No. 415, 92d Cong., 1st Sess. 7 (1971), quoted in Horn v. Duke Homes, 755 F.2d 599, 606 (CA7 1985). Third, the SG's fear that the CADC's rule will lead to interference in private matters on the part of employers seems misplaced. Courts can separate abusive situations from non-abusive ones, which would have been evident here if the District Court had explained itself properly. Fourth, the CADC's rule does not open up employers to endless financial liability. In cases in which there has been no firing, failure to promote, or demotion, the remedy is simply injunctive. Fifth, the SG's rule is, in effect, an exhaustion requirement nowhere suggested in the statute, and one which, I think, has the potential for creating

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(Footnote 3 continued from previous page)
yet ruled on liability for the acts of a supervisor in the areas of race and religion in harassment cases. I would simply suggest that there is no reason to distinguish sex cases from race or religion cases with respect to liability for the acts of a supervisor.

endless confusion on the meaning of liability. By separating the employer from its supervisors, it would be unclear whose acts could constitute a Title VII violation.[4] Sixth, a rule requiring notice in such situations causes needless confusion in another respect. A "constructive discharge" case is a hybrid of sorts. Such a claim is that harassment got so bad that the claimant was forced to quit--not that she was fired due to failure to acquiesce. I can see no reason for imputing liability to the employer in a case where a worker is wrongfully fired--an imposition of liability on the employer with which the SG agrees-- and not imputing it where harassment is so bad one has no choice but to quit. Once such a distinction is rejected, it requires little to say that there is no reason to wait until a situation gets so bad that an employee has to quit before an injunction can issue against the employer. Seventh, the SG's statement that the approach in the brief is simply an elaboration of the approach taken by the EEOC seems flatly wrong. Those regulations provide, as pointed out by the CADC:

> "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

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[4]For example, the SG's brief argues that "the gravamen of a 'hostile environment' claim is that the employer has improperly tolerated a sexually discriminatory atmosphere." SG's Brief at 29. Accepting that as true would mean that after notice to the Bank here, the focus of a lawsuit would be on how the bank acted, rather than on how Mr. Taylor acted prior to and subsequent to the notice. There is no reason to complicate a determination of liability to this degree.

should have known of their occurrence." 29 C.F.R. §1604.11(c) (emphasis added).

Finally, as respondent points out, if the Bank is not liable, and if the individual's liability is unclear because he is not, as an individual, the employer for purposes of Title VII, then some acts of discrimination go unremedied.

C. The "voluntariness" finding of the DC and Evidentiary Issues

Recall that the CA stated that the issue in a sexual harassment case is whether Taylor "created or condoned a substantially discriminatory work environment, regardless of whether the complaining employees lost any tangible job benefits ...." The CA clearly was correct in faulting the DC for failing to determine whether a Title VII violation of this sort occurred here, and the proper course was to remand on this issue. I do not think that the stark, unexplained, ambiguous finding of the DC that if respondent and Taylor engaged in sexual relations, they were voluntary, can possibly stand as dispositive of the sexual harassment claim. The CA stated that under Bundy, the DC was to determine whether respondent was subjected to "sexually stereotyped insults,""demeaning propositions" or "unwelcomed sexual advances" that poisoned the work environment. The EEOC guidelines consider in addition "other verbal or physical conduct of a sexual nature." The focus of a harassment suit, then, is far broader than the issue whether two people had a "voluntary" relationship, and without analysis of these issues a DC has simply not evaluated a claim of harassment. Further, it simply is not clear to me what

"voluntary" means here, and in light of the fact that the legal nature of a sexual harassment claim was not clear when the DC ruled, and in light of the fact that the CA had only a partial transcript and may have felt constrained in overturning this as clearly erroneous, I see no reason to interfere with its remand determination. Upholding the remand changes nothing with respect to Title VII law, but does ensure that DC's do their job right, and that this case is evaluated properly. The Government's brief here goes to some lengths to argue that if this Court examines the record as a whole there is no way that a claim of discrimination was stated; if that is so, the DC on remand will be able to determine that quickly enough, and I cannot begin to understand why this Court should examine the record on this issue. I note, in passing, that the Court did not grant cert on the issue of whether the voluntariness finding precludes a finding of liability here. On a question that is presented, I disagree with the CA that "voluntariness had no materiality whatsoever." Simply, as an evidentiary matter such a statement is silly. The Court can save for another day, the precise way that "voluntariness" might fit into a harassment claim, but surely such evidence must be admissible to explain who might have had a greater part in "causing" the discriminatory atmosphere. Similarly, I think the CA was wrong that evidence of respondent's dress and discussions with other workers "had no place in this litigation." Again, it seems an elementary point that admitting evidence in no way implies that such evidence will be accorded great weight or will determine the outcome. Such evidence is surely relevant to de-

ciding the nature of the work environment and how it got created.[5]

D. Mootness and Respondent's Suggestion to DIG

I am not persuaded by respondent's argument, as well as the argument of some amici, that the writ of certiorari should be dismissed as improvidently granted. The case presents legal questions, and whatever factual problems exist can be cleared up on remand. A greater concern is whether the case is moot. Since the DC twice did not allow respondent to amend her complaint to make a constructive discharge claim, and respondent no longer works for the bank, it is not clear to me what relief she could get if she wins. Although the DC opinion is again not crystal clear, it is clear enough that it found that the firing was not sexually motivated; therefore there could be no back pay, reinstatement, etc. Amicus AFL-CIO suggests that on remand the DC could still allow an amendment to the complaint so it is at least uncertain at this time what remedy could follow. In addition, several cases have made the curious remark that someone could get "nominal damages" and "attorneys' fees." For reasons flowing from this Court's circulated decisions in Bender and Diamond rel-

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[5] I think, however, that the CA was clearly correct in ruling that evidence tending to show harassment of other women working alongside respondent is plainly relevant in a harassment suit. As the CA stated "Even a woman who was never herself the object of harassment might have a Title VII claim is she were forced to work in an atmosphere in which such harassment was pervasive. This, then, of course, was another way in which the DC failed to properly assess the environmental issue. This issue is not before the Court, and the DC on remand could, of course, taken new evidence on it.

ative to attorneys' fees and standing, I do not believe that attorneys' fees prevent the case from becoming moot. With respect to "nominal damages," I have examined the several cases that seem to suggest that they would be possible, e.g., Katz v. Dole, 709 F.2d 251, 253 n. 1 (CA4 1983), and I agree with amicus AFL-CIO that "the question of whether such relief should be permitted is at least a substantial legal question in its own right, never decided by the Court and not yet addressed in this case by the lower courts." AFL-CIO Amicus, at 24. My own view is that such a remedy is probably not available because courts are not empowered to grant remedies not provided for in the statute in question. I think you may want to ask about mootness at oral argument. I probably come down agreeing with the AFL-CIO that "it will not be evident until after the remand whether there is any relief available to Vinson if she prevails on the merits." It is conceivable, though not likely, that the DC will now let Vinson add her constructive discharge claim.

III. CONCLUSION

As pointed out in the brief of the Women's Bar Associations, sexual harassment at the work place has been shown by various reliable studies to be a serious problem in this country. That is apparently why Congress acted. I recommend that the decision of the CADC be affirmed insofar as it holds that sexual harassment states a claim under Title VII, and that the supervisor's acts

can be imputed to the employer. I recommend reversal on the two evidentiary points.

84-1979 MERITOR SAVINGS BANK v. VINSON Argued 3/25/86

environment

Tall (PetH)

Witness of a co-worker of Vinson was relied on by DC.

Bank had no notice — no complaint.

CADC held ev. that Resp voluntarily engaged

Responding to SOC, Tall agreed DC did not try case on theory of "hostile environment". ~~But~~ This theory had not then been established by cases, but facts here would not have established such an environment.

(See 56 Br)

Employee has remained in employment for 4 yrs w/o complaining, & w/o ~~soo~~ suffering any loss of benefits.

Barry (Resp)(able lawyer)

No mention of "environment" in Complaint

Conceded CADC did not find that any of the DC's findings ~~of~~ fact was clearly erroneous.

BRW said that under VII, it does not suffice to give notice to one employee (Taylor) re the "agent" or employer of another employee. The Bank

Also conceded Resp. introduced the testimony of no other women re to sexual harassment even tho DC said this would be admissible in rebuttal.

(See 32a, n.1)

Urges we remand for full evidentiary hearing on "environment".

No. 84-1979, Meritor Savings Bank v. Vinson Conf. 3/28/86

The Chief Justice Reverse (CJ switched to aff'm, Remand)

Emphasized "voluntary" finding.

Case is factual & DC's findings control.

DC found "hostile environment" not shown.

Most imp. quest in "strict liability" - i.e. whether Bk is liable. No notice to it.

Taylor not sued - only bank.

~~Bk~~ Bank not liable. No complaints made to ct. Its policy OK.

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Justice Brennan Remand (Aff'm CADC's decision to remand for retrial)

Title VII ~~II~~ doesn't have to establish specific sexual acts to prove hostile environment.

Case not tried on "atmospheric" issue.

Should remand to afford opportunity to Resp. to prove hostile atmosphere.

As Taylor was a supervisor, the Bk is liable for his conduct.

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Justice White Aff - CADC remand~~ed~~ for new trial.

Environment action is may be appropriate

But CADC was wrong as to ~~Evidence~~ of ~~Petitioner's voluntary~~ to irrelevance of all of DC's holding

EEOC in here (amicus) saying strict ~~liability~~ liability does not necessarily apply under VII.

Leave issue for remand.

Justice Marshall Affirm or Remand

Agree with WJB

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Justice Blackmun Affirm

(Did not understand HAB's position)

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Justice Powell Reverse

See my notes

6 CA DCs

Justice Rehnquist ~~OK to Reverse~~ Affirm, but disagree with Op.

Agrees with EEOC that this employer should be held liable.

Opinion – the reasoning – is wrong but could go with remand.

??

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Justice Stevens Affirm & Remand.

D.C. did not make a finding on the conflict of ev.

D.C. erred in not admitting ev. on "direct" of testimony of other employees

Favors strict liability on employer

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Justice O'Connor Affirm & Remand on hostile environment.

Agrees with B.R.W.

D.C. did not recognize the "hostile" sexual ~~ha~~ harassment claim.

~~claim~~

D.C. failed to find whether conduct was "welcome" – not whether it was "voluntary"

Analogous to racial cases – slurs, etc

Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

From: **Justice Rehnquist**

Circulated: APR 22 1986

Recirculated: _____

1st DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 84-1979

MERITOR SAVINGS BANK, FSB, PETITIONER *v.*
MECHELLE VINSON ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[April ——, 1986]

JUSTICE REHNQUIST delivered the opinion of the Court.

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

I

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

Respondent brought this action against Taylor and the bank, claiming that during her four years at the bank she had "constantly been subjected to sexual harassment" by Taylor

Renewed 4/23-24

Included to Josie, but want to consider case further.

4/26 Josie

in violation of Title VII. She sought injunctive relief, compensatory and punitive damages against Taylor and the bank, and attorney's fees.

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

Respondent also testified that Taylor touched and fondled other women employees of the bank, and she attempted to call witnesses to support this charge. But while some supporting testimony apparently was admitted without objection, the District Court did not allow her "to present wholesale evidence of a pattern and practice relating to sexual advances to other female employees in her case in chief, but advised her that she might well be able to present such evidence in rebuttal to the defendants' cases." *Vinson* v. *Taylor*, 23 Fair Empl. Prac. Cases (BNA) 37, 38–39, n. 1 (D DC 1980). Respondent did not offer such evidence in rebuttal.

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*Like the Court of Appeals, this Court was not provided a compete transcript of the trial. We therefore rely largely on the District Court's opinion for the summary of the relevant testimony.

Finally, Respondent testified that because she was afraid of Taylor she never reported his harassment to any of his supervisors and never attempted to use the bank's complaint procedure.

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

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

> "If [respondent] and Taylor did engage in an intimate or sexual relationship during the time of [respondent's] employment with [the bank], that relationship was a voluntary one having nothing to do with her continued employment at [the bank] or her advancement or promotions at that institution." *Id.*, at 42 (footnote omitted).

The court ultimately found that respondent "was not the victim of sexual harassment and was not the victim of sexual discrimination" while employed at the bank. *Id.*, 43.

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

The Court of Appeals for the District of Columbia Circuit reversed. 753 F. 2d 141 (1985). Relying on its earlier hold-

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

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

As to the bank's liability, the Court of Appeals held that an employer is absolutely liable for sexual harassment practiced by supervisory personnel, whether or not the employer knew or should have known about the misconduct. The court relied chiefly on Title VII's definition of "employer" to include "any agent of such a person," 42 U. S. C. § 2000e(b), as well as on the EEOC guidelines. The court held that a supervisor is an "agent" of his employer for Title VII purposes, even

if he lacks authority to hire, fire, or promote, since "the mere existence—or even the appearance—of a significant degree of influence in vital job decisions gives any supervisor the opportunity to impose on employees." 753 F. 2d, at 150.

In accordance with the foregoing, the Court of Appeals reversed the judgment of the District Court and remanded the case for further proceedings. A subsequent suggestion for rehearing en banc was denied, with three judges dissenting. 760 F. 2d 1330 (1985). We granted certiorari, 474 U. S. —— (1985), and now affirm but for different reasons.

## II

Title VII of the Civil Rights Act of 1964 makes it "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U. S. C. §2000e–2(a)(1). The prohibition against discrimination based on sex was added to Title VII at the last minute on the floor of the House of Representatives. 110 Cong. Rec. 2,577–2,584 (1964). The principal argument in opposition to the amendment was that "sex discrimination" was sufficiently different from other types of discrimination that it ought to receive separate legislative treatment. See 110 Cong. Rec. 2,577 (1964) (Statement of Rep. Celler quoting letter from United States Department of Labor); *id.*, at 2,584 (statement of Rep. Green). This argument was defeated, the bill quickly passed as amended, and we are left with little legislative history to guide us in interpreting the the Act's prohibition against discrimination based on "sex."

Respondent argues, and the Court of Appeals held, that unwelcome sexual advances that create an offensive or hostile working environment violate Title VII. Without question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor "discriminate[s]" on the basis of sex. Petitioner apparently

does not challenge this proposition. It contends instead that in prohibiting discrimination with respect to "compensation, terms, conditions, or privileges" of employment, Congress was concerned with what petitioner describes as "tangible loss" of "an economic character," not "purely psychological aspects of the workplace environment." Brief for the Petitioner 30–31. In support of this claim petitioner observes that in both the legislative history of Title VII and this Court's Title VII decisions, the focus has been on tangible, economic barriers erected by discrimination.

We reject petitioner's view. First, the language of Title VII is not limited to "economic" or "tangible" discrimination. The phrase "terms, conditions, or privileges of employment" evinces a Congressional intent "'to strike at the entire spectrum of disparate treatment of men and women'" in employment. *City of Los Angeles Department of Water and Power* v. *Manhart*, 435 U. S. 702, 707, n. 13 (1977), quoting *Sprogis* v. *United Air Lines, Inc.*, 444 F. 2d 1194, 1198 (CA7 1971). Petitioner has pointed to nothing in the Act to suggest that Congress contemplated the limitation urged here.

Second, in 1980 the EEOC issued guidelines specifying that "sexual harassment," as there defined, is a form of sex discrimination prohibited by Title VII. As an "administrative interpretation of the Act by the enforcing agency," *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 433–434 (1971), these guidelines, "'while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance,'" *General Electric Co.* v. *Gilbert*, 429 U. S. 125, 141–142 (1976), quoting *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140 (1944). The EEOC guidelines fully support the view that harassment leading to noneconomic injury can violate Title VII.

In defining "sexual harassment," the guidelines first describe the kinds of workplace conduct that may be actionable under Title VII. These include "[u]nwelcome sexual ad-

vances, requests for sexual favors, and other verbal or physical conduct of a sexual nature." 29 CFR § 1604.11(a). Relevant to the charges at issue in this case, the guidelines provide that such sexual misconduct constitutes prohibited "sexual harassment," whether or not it is directly linked to the grant or denial of an economic *quid pro quo*, where "such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment." § 1604.11(a)(3).

In concluding that so-called "hostile environment" *(i. e.*, non *quid pro quo)* harassment violates Title VII, the EEOC drew upon a substantial body of judicial decisions and EEOC precedent holding that Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult. See generally 45 Fed. Reg. 74,676 (1980). *Rogers* v. *EEOC*, 454 F. 2d 234 (CA5 1971), cert. denied, 406 U. S. 957 (1972), was apparently the first case to recognize a cause of action based upon a discriminatory work environment. In *Rogers*, the Court of Appeals for the Fifth Circuit held that a Hispanic complainant could establish a Title VII violation by demonstrating that her employer created an offensive work environment for employees by giving discriminatory service to its Hispanic clientele. The court explained that an employee's protections under Title VII extend beyond the economic aspects of employment:

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

Courts applied this principle to harassment based on race, *e. g.*, *Firefighters Institute for Racial Equality* v. *City of St. Louis*, 549 F. 2d 506, 514–515 (CA8), cert. denied, 434 U. S. 819 (1977); *Gray* v. *Greyhound Lines*, 545 F. 2d 169, 176 (CADC 1976), religion, *e. g.*, *Compston* v. *Borden, Inc.*, 424 F. Supp. 157 (SD Ohio 1976), and national origin, *e. g.*, *Cariddi* v. *Kansas City Chiefs Football Club*, 568 F. 2d 87, 88 (CA8 1977). Nothing in Title VII suggests that a hostile environment based on discriminatory *sexual* harassment should not be likewise prohibited. The guidelines thus appropriately drew from, and were fully consistent with, the existing caselaw.

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

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

Accord, *Katz* v. *Dole*, 709 F. 2d 251, 254–255 (CA4 1983); *Bundy* v. *Jackson*, 641 F. 2d, at 943–944; *Zabkowicz* v. *West Bend Co.*, 589 F. Supp. 780 (ED Wisc. 1984).

Of course, as the courts in both *Rogers* and *Henson* recognized, not all workplace conduct that may be described as "harassment" affects a "term, condition, or privilege" of employment within the meaning of Title VII. See *Rogers*, *supra*, at 238 ("mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee" would not affect the conditions of employment to sufficiently significant

degree to violate Title VII); *Henson*, *supra*, at 904 (quoting same). For sexual harassment to be actionable, it must be sufficiently severe or pervasive "to alter the conditions of [the victim's] employment and create an abusive working environment." *Ibid.* Respondent's allegations in this case—which include not only pervasive harassment but also criminal conduct of the most serious nature—are plainly sufficient to state a claim for "hostile environment" sexual harassment.

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

Second, the District Court's conclusion that no actionable harassment occurred might have rested on its earlier "finding" that "[i]f [resp] and Taylor did engage in an intimate or sexual relationship . . . , that relationship was a voluntary one." *Id.*, at 42. But the fact that sex-related conduct was "voluntary," in the sense that the complainant was not forced to participate against her will, is not a defense to a sexual harassment suit brought under Title VII. The gravamen of any sexual harassment claim is that the alleged sexual advances were "unwelcome." 29 CFR § 1604.11(a). While the

question whether particular conduct was indeed unwelcome presents difficult problems of proof and turns largely on credibility determinations committed to the trier of fact, the District Court in this case erroneously focused on the "voluntariness" of respondent's participation in the claimed sexual episodes. The correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary.

Petitioner contends that even if this case must be remanded to the District Court, the Court of Appeals erred in one of the terms of its remand. Specifically, the Court of Appeals stated that testimony about respondent's "dress and personal fantasies," 753 F. 2d, at 146, n. 36, which the District Court apparently admitted into evidence, "had no place in this litigation." *Ibid.* The apparent ground for this conclusion was that respondent's voluntariness *vel non* in submitting to Taylor's advances was immaterial to her sexual harassment claim. While "voluntariness" in the sense of consent is not a defense to such a claim, it does not follow that a complainant's sexually provocative speech or dress is irrelevant as a matter of law in determining whether he or she found particular sexual advances unwelcome. To the contrary, such evidence is obviously relevant. The EEOC guidelines emphasize that the trier of fact must determine the existence of sexual harassment in light of "the record as a whole" and "the totality of circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred." 29 CFR § 1604.11(b). Respondent's claim that any marginal relevance of the evidence in question was outweighed by the potential for unfair prejudice is the sort of argument properly addressed to the District Court. In this case the District Court concluded that the evidence should be admitted, and the Court of Appeals' contrary conclusion was based upon the erroneous, categorical view that testimony about provocative dress and publicly expressed

sexual fantasies "had no place in this litigation." 753 F. 2d, at 146, n. 36. While the District Court must carefully weigh the applicable considerations in deciding whether to admit evidence of this kind, there is no *per se* rule against its admissibility.

III

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

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

Petitioner argues that respondent's failure to use its established grievance procedure, or to otherwise put it on notice of the alleged misconduct, insulates petitioner from liability for Taylor's wrongdoing. A contrary rule would be unfair, petitioner argues, since in a hostile environment harassment case

the employer often will have no reason to know about, or opportunity to cure, the alleged wrongdoing.

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

The EEOC suggests that when a sexual harassment claim rests exclusively on a "hostile environment" theory, however, the usual basis for a finding of agency will often disappear. In that case, the EEOC believes, agency principles lead to

> "a rule that asks whether a victim of sexual harassment had reasonably available an avenue of complaint regarding such harassment, and, if available and utilized, whether that procedure was reasonably responsive to the employee's complaint. If the employer has an expressed policy against sexual harassment and has implemented a procedure specifically designed to resolve sexual harassment claims, and if the victim does not take advantage of that procedure, the employer should be shielded from liability absent actual knowledge of the sexually hostile environment (obtained, *e. g.*, by the filing of a charge with the EEOC or a comparable state agency). In all other cases, the employer will be liable if

> it has actual knowledge of the harassment or if, considering all the facts of the case, the victim in question had no reasonably available avenue for making his or her complaint known to appropriate management officials." *Id.*, at 26.

As respondent points out, this suggested rule is in some tension with the EEOC guidelines, which hold an employer liable for the acts of its agents without regard to notice. 29 CFR §1604.11(c). The guidelines do require, however, an "examin[ation] of the circumstances of the particular employment relationship and the job functions performed by the individual in determining whether an individual acts in either a supervisory or agency capacity." *Ibid.*

This debate over the appropriate standard for employer liability has a rather abstract quality about it given the state of the record in this case. We do not know at this stage whether Taylor made any sexual advances toward respondent at all, let alone whether those advances were unwelcome, whether they were sufficiently pervasive to constitute a condition of employment, or whether they were "so pervasive and so long continuing . . . that the employer must have become conscious of [them]," *Taylor* v. *Jones*, 653 F. 2d 1193, 1197–1199 (CA8 1981) (holding employer liable for racially hostile working environment based on constructive knowledge).

We therefore decline the parties' invitation to issue a definitive rule on employer liability, but we do agree with the EEOC that Congress wanted courts to look to agency principles for guidance in this area. While such common-law principles may not be transferable in all their particulars to Title VII, Congress' decision to define "employer" to include any "agent" of an employer, 42 U. S. C. §2000e(b), surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible. For this reason, we hold that the Court of Appeals erred in concluding that employers are always

automatically liable for sexual harassment by their supervisors. See generally Restatement (Second) of Agency §§ 219–237 (1958). For the same reason, absence of notice to an employer does not necessarily insulate that employer from liability. *Ibid.*

Finally, we reject petitioner's view that the mere existence of a grievance procedure and a policy against discrimination, coupled with respondent's failure to invoke that procedure, must insulate petitioner from liability. While those facts are plainly relevant, the situation before us demonstrates why they are not necessarily dispositive. Petitioner's general nondiscrimination policy did not address sexual harassment in particular, and thus does not alert employees to their employer's interest in correcting that form of discrimination. J. A. 25. Moreover, the bank's grievance procedure apparently required an employee to complain first to her supervisor, in this case Taylor. Since Taylor was the alleged perpetrator, it is not altogether surprising that respondent failed to invoke the procedure and report her grievance to him. Petitioner's contention that respondent's failure should insulate it from liability might be substantially stronger if its procedures were better calculated to encourage victims of harassment to come forward.

## IV

In sum, we hold that a claim of "hostile environment" sex discrimination is actionable under Title VII, that the District Court's findings were insufficient to dispose of respondent's hostile environment claim, and that the District Court did not err in admitting testimony about respondent's sexually provocative speech and dress. As to employer liability, we conclude that the Court of Appeals was wrong to disregard agency principles and impose absolute liability on employers for the acts of their supervisors, regardless of the circumstances of a particular case.

Accordingly, the judgment of the Court of Appeals reversing the judgment of the District Court is affirmed, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

Supreme Court of the United States
Washington, D. C. 20543

April 24, 1986

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

Re: Meritor Savings Bank v. Vinson
No. 84-1979

Dear Bill:

I share John's reservation with respect to part III of your draft opinion regarding the employer's liability for the conduct of a supervisor. I hope you will consider accomodating this concern.

Sincerely,

Bill

Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

April 24, 1986

Re: 84-1979 - Meritor Savings Bank v. Vinson

Dear Bill:

Although I agree with most of your draft opinion, I have serious reservations about the conclusion of Part III with respect to the employer's liability for the conduct of a supervisor.

As I understand the cases, the Courts of Appeals are unanimous in holding that there is strict liability in the "quid pro quo" type of case, as in other Title VII cases, but the rule is less certain in a "hostile environment" type of case. It would seem to me to make a good deal of sense to have the same rule apply to both kinds of cases because as a matter of statutory construction, it seems doubtful that Congress would have intended different rules to apply to the two Title VII claims. I assume that there will be a good many situations in which the plaintiff's claims will involve a mixture of both. Moreover, in the hostile environment type of case, it would seem to me that normal principles of agency law would impose liability on the employer for conditions that fell squarely within the responsiblity of the supervisor. Accordingly, instead of leaving the issue in some doubt, I would favor giving our approval to the rule that Courts of Appeals have pretty well already developed, namely that the employer is strictly liable for the conduct of the supervisor concerning the environment and the employees that are directly under his or her supervision. See e.g., Horn v. Duke Homes, 755 F.2d 599, 603-606 (CA7 1985).

Apart from this concern, I am prepared to join your opinion.

Respectfully,

JPS

Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 24, 1986

Re: 84-1979 - Meritor Savings Bank v. Vinson

Dear John:

I am willing to make a sixth vote, but not a fifth one, for the position on employer's absolute liability for hostile environment which you expound in your letter of April 24th.

If, as you say, "in the hostile environment type of case, it would seem to me that normal principles of agency law would impose liability on the employer for conditions that fell squarely within the responsibility of the supervisor," I would think the draft would already satisfy you, since that is the position taken there. The draft also reflects the EEOC position taken in this Court, and I have seen nothing in the Act or legislative history that would persuade me that Congress intended to apply some doctrine other than the normal law of agency in this situation.

Sincerely,

WHR

Justice Stevens

cc: The Conference

FLP

I'll join WHR

DC found my employee (not just Resp.) had complained on the Bk procedures permitted. But apart from facts of this case, a principle of agency so broad that the employer is liable for every tort of low-level supervisors, seems unreasonable.

MEMORANDUM

WHR's draft reflects the EEOC position, & I voted this way at Conference

To: Mr. Justice Powell April 26, 1986

From: Bob

No.84-1979 Meritor Savings Bank v. Vinson, 84-1979

I have read Justice Rehnquist's draft, and think you could join it, although I share the reservations expressed in Justice Stevens' memo. I know that you were skeptical about the hostile environment claim here, but the circulating draft does no more than remand on that issue.

I also agree, however, with the point made by Justice Stevens with respect to the liability issue. It is almost meaningless to say that the decision should be made according to agency principles. Note that there is no dispute in the area of quid pro quo discrimination that the employer is liable for the

acts of the supervisor. Thus, we do not permit the employer to escape liability in this context by saying that firing for failure to submit to a sexual relationship was beyond the scope of the authority of the supervisor, and therefore the employer is not liable for the act. The employer is liable. I cannot understand why there would be a different rule in the "hostile environment" context. In addition, to deny liability in some cases of hostile environment means that certain charges would go without any effective remedy, since if the supervisor is found not to be acting as an "agent" he is not covered by Title VII. This would be a bad result because such logic would necessarily apply in the race context as well. Finally, there is another very good reason not to hopelessly complicate the scope of liability here, and that is that we are not talking about open-ended, large monetary penalties for violations of Title VII; rather, we are simply talking about giving an employee who has been subjected to a hostile environment a meaningful remedy in the form of an injunction against the employer.

Justice Rehnquist has indicated that he will make a sixth vote but not a fifth for the position on absolute employer liability. That must mean, at least, that he too sees the merit in it, but simply is not willing to make a Court on the issue. Thus, I think your position on the issue will be an important one. Were you to indicate agreement with the position taken by Justice Stevens, my guess is there would be a Court for employer liability for supervisors' conduct. That would be my preference. On the other hand you may simply want to join what Justice

Reghnquist has circulated as you hinted was your preliminary inclination in our telephone discussion of 4/25.

I do not recall specifically discussing this particular aspect of the case, thus your views may be very well set.

April 28, 1986

84-1979 Meritor Savings Bank v. Vinson

Dear Bill:

Please join me.

Sincerely,

Justice Rehnquist

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 1, 1986

Re: No. 84-1979-Meritor Savings Bank v. Vinson

Dear Bill:

I agree with John and Bill Brennan on the question of employer liability, and therefore cannot join your opinion as it is now written.

Sincerely,

T.M.

T.M.

Justice Rehnquist

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

May 8, 1986

No. 84-1979 Meritor Savings Bank v. Vinson

Dear Bill,

Please join me.

Sincerely,

Sandra

Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 19, 1986

84-1979 - Meritor Savings Bank, FSB v. Vinson

Dear Bill,

Please join me.

Sincerely yours,

Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

May 27, 1986

84-1979 - Meritor Savings Bank v. Vinson

Dear Bill:

I join.

Regards,

Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 28, 1986

Re: No. 84-1979 - Meritor Savings Bank, FSB v. Mechelle Vinson

Dear Bill:

In due course, I shall circulate a dissent in this one.

Sincerely,

T.M.

Justice Rehnquist

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 9, 1986

Re: 84-1979 - Meritor Savings Bank v. Vinson

Dear Thurgood:

Please join me.

Respectfully,

ch

Justice Marshall

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 11, 1986

No. 84-1979

Meritor Savings Bank v. Vinson

Dear Thurgood,

Please join me.

Sincerely,

Bill

Justice Marshall

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 13, 1986

Re: No. 84-1979, Meritor Savings Bank v. Vinson

Dear Thurgood:

Please join me.

Sincerely,

Justice Marshall

cc: The Conference

84-1979 Meritor Savings Bank v. Vinson (Bob)

WHR for the Court 4/7/86
1st draft 4/22/86
2nd draft 5/5/86
3rd draft 6/16/86
Joined by LFP 4/28/86
SOC 5/8/86
BRW 5/19/86
CJ 5/26/86

TM concurring
1st draft 6/6/86
2nd draft 6/12/86
Joined by JPS 6/9/86
WJB 6/11/86
HAB 6/13/86

JPS concurring
1st draft 6/13/86

TM will circulate a dissent 5/28/86