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Case at a Glance

Kimberly Ellerth sued her former employer for sexual discrimination, claiming an executive had sexually harassed her for several years. The Supreme Court is asked to determine whether a victim in a *quid pro quo* sexual-harassment suit can recover damages from the harasser's employer even though the victim did not suffer any tangible detriment with respect to the compensation, terms, conditions, or privileges of employment as a result of her refusal to submit to the harasser's advances.

Can an Employer Be Held Strictly Liable for a Supervisor's Quid Pro Quo Sexual Harassment When There Has Been a Quid but No Quo?

by Jay E. Grenig

PREVIEW of United States Supreme Court Cases, pages 474-478. © 1998 American Bar Association.

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stared conspicuously at her breasts and legs throughout the interview.

About a week after the Slowik interview, Ellerth was offered and accepted the position of merchandising assistant in Burlington's office in Chicago, Illinois. In that position Ellerth reported to Burlington's national accounts manager who reported to Slowik. The national accounts manager and Ellerth were the only two employees in the Chicago office.

Slowik, though based in New York City, came to the Chicago office one or two days every month or two. When Slowik was in Chicago, Ellerth was required to see him on a regular basis. Ellerth also saw Slowik at Burlington's corporate offices in Greensboro, North Carolina, and on training trips to New York City and San Francisco, California.

ISSUE

Can a claim of a supervisor's *quid pro quo* sexual harassment be asserted against the employer when the victim neither submitted to the sexual advances of the harasser nor suffered any tangible adverse effects with respect to the compensation, terms, conditions, or privileges of employment as a consequence of refusing to submit to the harassment?

FACTS

Kimberly Ellerth interviewed in March 1993 for a marketing job with the mattress ticking division of Burlington Industries ("Burlington"). The interview went well and she was invited back for a second interview with Theodore Slowik, vice president of Sales and Marketing.

Ellerth alleges Slowik asked her a number of disturbing questions during the interview. As an example, Ellerth says Slowik asked her if she and her husband were planning on having a family and were "practicing" at it. Ellerth also claims Slowik

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KIMBERLY B. ELLERTH*
DOCKET NO. 97-569

ARGUMENT DATE:
APRIL 22, 1998
FROM: THE SEVENTH CIRCUIT

Ellerth also talked with Slowik by telephone about once a week. According to Ellerth, her encounters with Slowik were characterized by a constant barrage of sexual comments, innuendo, and occasionally more.

Ellerth claims Slowik telephoned her before she traveled to New York City for a week of training and spoke suggestively to her. While in New York City, Ellerth asserts Slowik had several conversations with her, two of which were prolonged. In the first conversation, Ellerth says Slowik told a number of off-color, offensive jokes.

A second conversation took place over a business lunch with Slowik and another Burlington executive. Ellerth contends Slowik again told a number of sexually offensive jokes and rubbed her knee under the table. On leaving the restaurant, Ellerth says Slowik and the other executive walked several feet behind her with Slowik commenting, "You have got great legs, Kim." When she returned to the office, Ellerth says she reported to two other employees that Slowik and the other executive had been loud, obnoxious, rude, and offensive during lunch.

Slowik, according to Ellerth, continued making sexually offensive comments when he and Ellerth were together. After a business dinner in Greensboro in the summer of 1993, Ellerth asserts Slowik invited her to join him in the lounge of the hotel where both were staying, and she felt obliged to accept. While in the lounge, Ellerth claims Slowik commented on the anatomy and skimpy outfits of the female band members.

Ellerth further alleges Slowik looked at her breasts and said, "You are a little lacking in that area, aren't you, Kim?" Ellerth says that when she did not respond, Slowik told her

that she "ought to loosen up" and continued to stare at her chest and legs.

Ellerth maintains that as she and Slowik left the lounge, his remarks became more threatening. She quotes him as saying, "You know, Kim, I could make your job very hard or very easy at Burlington." Ellerth alleges that she interpreted the comment to mean that she would have to have sex with Slowik to succeed at Burlington.

Ellerth says that after the summer 1993 Greensboro trip, Slowik began telephoning her more frequently. The calls, though brief, normally included sexually harassing comments. According to Ellerth, Slowik would talk about her body and ask about her "practice" to have a family. She claims that on several occasions Slowik refused to give her special permission to do something for a customer until she described her clothing to him.

Ellerth states Slowik suggested that her job would be much easier if she wore shorter skirts. She asserts that every time she was on the telephone with Slowik, she "ended up almost in tears."

Ellerth claims her resistance to Slowik's overtures did not deter him. Thus, when Ellerth interviewed in 1994 with Slowik for a promotion, he rubbed her knee with his hand while asking if the frequent travel associated with the new position would make her husband miss her.

Ellerth, however, was promoted in March 1994; apparently, Slowik recommended the promotion. Approximately two months after being promoted, Burlington asserts that Ellerth's direct supervisor received complaints about her work. After the supervisor discussed the

complaints with Ellerth, Ellerth left a message on her supervisor's answering machine in May 1994 telling the supervisor that she was quitting. She sent him a letter by facsimile to the same effect.

Ellerth's original letter of resignation included references to Slowik's alleged harassment of her, among them the following: "What I did not want to mention to you was the fact that Ted had harassed me in the past and I simply ignored him to save my job;" "needless to say these incidents could be seen as sexual harassment;" and "what a shame that one man can have such an influence."

Ellerth, on the advice of her husband, covered up the references to Slowik's comments with correction fluid, and the letter as transmitted showed the blank spaces from the redaction. Three weeks later, Ellerth sent her supervisor a more complete explanation in a letter that said in part: "Before I was hired, you and I spoke about the reasons why Ted didn't feel comfortable around me. I told you he had said and done some sexually inappropriate things to me in the past. What I didn't tell you was that he had on two occasions patted my rear and every time he saw me he looked me up and down like a piece of meat."

At all relevant times Burlington had a sexual-harassment policy in force. Burlington's policy provided that "the company will not tolerate any form of sexual harassment in the workplace. . . . If you have any questions or problems, or if you feel you have been discriminated against, you are encouraged to talk to your supervisor or human resources representative or use the grievance procedure promptly."

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Ellerth acknowledges knowing that Burlington had a policy against sexual harassment but says she was unaware of how vigorously it was enforced. Ellerth claims that both she and her husband feared her job would be jeopardized if she complained about Slowik more than she already had. Ellerth did not use the grievance procedure or complain to her direct supervisors.

Ellerth filed a sexual-harassment complaint against Burlington with the Illinois Department of Human Rights and the Equal Employment Opportunity Commission (the "EEOC") on October 12, 1994. Ellerth alleged that she felt "compelled to resign . . . due to continued the [sic] hostile offensive environment and abusive work environment created by Slowik's sexual harassment and my opposition to sexual harassment by Slowik."

The EEOC did not take on Ellerth's case but did issue her a right-to-sue letter on November 30, 1994. Ellerth then filed suit against Burlington in federal district court. (Under Title VII of the Civil Rights Act of 1964 ["Title VII"], an individual alleging employment discrimination cannot file suit without first filing a complaint with the EEOC. The EEOC, however, is not equipped to pursue all legitimate claims of employment discrimination it receives. With respect to most complaints, the EEOC briefly investigates and then issues the complainant a right-to-sue letter; the letter authorizes the complainant to proceed in court.)

Burlington moved for summary judgment (see Glossary). Viewing Ellerth's complaint as alleging hostile-environment sexual harassment, the district court granted Burlington's motion, concluding that Burlington had no knowledge of Slowik's misconduct and thus was

not responsible for it. Viewing Ellerth's complaint as alleging *quid pro quo* sexual harassment, the court held that Burlington could not be held liable when there was no evidence Slowik withheld tangible employment benefits because Ellerth refused his advances. 912 F. Supp. 1101 (N.D.Ill. 1996).

Ellerth appealed to the Seventh Circuit, arguing that her complaint was sufficiently broad to encompass *quid pro quo* sexual harassment as well as hostile-environment sexual harassment. She also argued that the district court erred in its analysis of the agency principles applicable to the case.

A three-judge panel held that Ellerth's allegations and the materials she presented in opposition to Burlington's motion for summary judgment raised a genuine issue of material fact on her claim of *quid pro quo* sexual harassment. 102 F.3d 848 (7th Cir. 1997).

Burlington's petition for rehearing *in banc* (see Glossary) was granted, and the decision of the panel was vacated. In a per curiam decision (see Glossary) containing eight separate opinions, the Seventh Circuit reversed the district court and held that employers may be strictly liable under Title VII for *quid pro quo* sexual harassment even if the harassed employee neither submitted to a supervisor's sexual advances nor suffered any adverse employment consequences as a result of refusing to submit. 123 F.3d 490 (7th Cir. 1997). The court did not address Ellerth's claim of hostile-environment sexual harassment, finding it waived.

The Supreme Court granted Burlington's petition for a writ of certiorari and now reviews the Seventh Circuit's *in banc* ruling. 118 S. Ct. 876 (1998).

CASE ANALYSIS

Title VII makes it unlawful "for an employer . . . to discriminate against any individual with respect to his . . . conditions . . . of employment, because of such individual's . . . sex . . ." 42 U.S.C. § 2000e-2(a)(1). It is well established that this prohibition encompasses sexual harassment in the workplace.

For analytical purposes, courts have created two categories of sexual harassment: *quid pro quo* harassment and hostile-environment harassment. *Quid pro quo* sexual harassment occurs when an employer conditions tangible employment benefits on an employee's submission to sexual demands. Hostile-environment sexual harassment occurs when the actions of a supervisor or coworker have the purpose or effect of unreasonably interfering with an employee's work performance or create an intimidating, hostile, or offensive work environment.

The distinction between *quid pro quo* sexual harassment (which is always perpetrated by a supervisor) and hostile-environment sexual harassment perpetrated by a supervisor often is blurred. However, courts typically treat the two categories of harassment differently in terms of imposing liability on the employer. In cases involving *quid pro quo* harassment, courts routinely hold the employer strictly liable — liable without fault — for the supervisor's misconduct.

Employer liability is treated differently in hostile-environment cases decided after the Supreme Court handed down its decision in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986). In *Meritor*, the Court confirmed that sexual harassment is a form of sex discrimination prohibited by Title VII. Holding that

actionable sexual harassment could exist if it were sufficiently severe or pervasive to alter the conditions of employment, the Court declined to determine when an employer could be held liable for a supervisor's hostile-environment sexual harassment.

The *Meritor* Court stated only that it agreed with the EEOC's position that Congress wanted courts to look to agency principles for guidance in this area. "While such . . . 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. . . . For the same reason, absence of notice to an employer does not necessarily insulate that employer from liability." 477 U.S. at 72. Indeed, the Court rejected the employer's argument that "the mere existence of a grievance procedure and a policy against discrimination, coupled with [the employee's] failure to invoke that procedure" insulated it from liability. 477 U.S. at 72.

Burlington argues that the strict-liability standard used by the Seventh Circuit in *Ellerth's* incomplete *quid pro quo* claim is inconsistent with the Court's holding in *Meritor*. Burlington says that a strict-liability standard is particularly inappropriate in *quid pro quo* sexual-harassment claims predicated on mere unfulfilled threats because employers have no effective means of monitoring the "noncompany acts" of their supervisors. According to Burlington, in the

absence of a showing of economic harm to the victim, strict liability places an impossible burden on employers while at the same time encroaching on employee privacy.

Burlington maintains that *Ellerth* must show she submitted to Slowik's inappropriate sexual advances or that adverse job consequences resulted from her failure to do so. Burlington reasons that when a supervisor threatens retaliation due to an employee's rejection of his or her sexual advances but fails to act on the threats, the supervisor has not actually misused any authority delegated by the employer; at most, the supervisor has only contemplated such misuse.

Ellerth responds that the federal appeals courts have uniformly imposed strict liability on employers for *quid pro quo* sexual harassment regardless of economic injury to the victim. She also contends that a majority of the appeals courts to have addressed the issue have held or acknowledged that Title VII does not require an additional showing of economic injury in *quid pro quo* sexual-harassment cases.

Ellerth contends an employer should be strictly liable for *quid pro quo* sexual harassment whenever a supervisor with actual or apparent authority over the employee proposes to provide employment benefits in return for the employee's acceptance of the supervisor's sexual advances or threatens to withhold benefits if the advances are refused. That, insists *Ellerth*, is exactly what she encountered with Slowik. Says *Ellerth*, Slowik had actual authority to threaten her with benefits or adverse consequences, and he certainly had the apparent authority to do so.

SIGNIFICANCE

There is a conflict among the federal appeals courts over the elements of a *quid pro quo* sexual-harassment claim. Some appeals courts require the plaintiff in such a case to prove the harassment was tied to tangible consequences in the terms and conditions of the plaintiff's employment; others hold the threat of tangible consequences is enough.

The Seventh Circuit falls into the second camp, holding in *Ellerth's* case that a supervisor's threat of retaliation linked to sexual advances is sufficient to state a *quid pro quo* sexual-harassment claim even if the employee did not submit to the advances and suffered no adverse job consequences. Also in this camp are the Third and Ninth Circuits. Both courts have intimated that *quid pro quo* sexual harassment occurs whenever a supervisor intertwines a request for the performance of sexual favors with a discussion of actual or potential job benefits or detriments. *Robinson v. City of Pittsburgh*, 120 F.3d 1286 (3d Cir. 1997) (whether employee submits to or rebuffs sexual advances, a *quid pro quo* violation occurs at the time an employee is told his or her compensation or other job benefit is dependent on submission to unwelcome sexual advances); *Heyne v. Caruso*, 69 F.3d 1475 (9th Cir. 1995) (same).

The First, Fourth, Fifth, Tenth, Eleventh, and District of Columbia Circuits have taken the opposite view and have held that *quid pro quo* sexual harassment requires proof of tangible, work-related detriment or economic injury. *Chamberlin v. 101 Realty, Inc.*, 915 F.2d 777, 783 (1st Cir. 1990)(plaintiff in a *quid pro quo* harassment case must show that his or her reaction to advances affected tangible aspects of compen-

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sation, terms, conditions, or privileges of employment); *Spencer v. General Electric Co.*, 894 F.2d 651, 658 (4th Cir. 1990) (same); *Ellert v. University of Texas, Dallas*, 52 F.3d 543 (5th Cir. 1995) (same); *Sauers v. Salt Lake County*, 1 F.3d 1122 (10th Cir. 1993) (same); *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554 (11th Cir. 1987) (same); *Gary v. Long*, 59 F.3d 1391 (D.C. Cir. 1995) (same). In these courts, if a plaintiff cannot show a supervisor's sexual harassment had tangible effects on the terms and conditions of employment, the misconduct is actionable only as hostile-environment sexual harassment.

Resolving the disagreement over the proper standard of liability in *quid pro quo* sexual-harassment suits is important to both employees and employers. If the Supreme Court affirms the Seventh Circuit's decision and holds that unfulfilled retaliatory threats can constitute *quid pro quo* sexual harassment, it will be expanding greatly the number of sexual-harassment claims brought under that theory. Many claims previously advanced under the negligence standard associated with hostile-environment sexual harassment will be transformed into strict liability *quid pro quo* cases because employer liability is easier to establish.

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AMICUS BRIEFS

In support of Burlington Industries, Inc.

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