

2-1-1995

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Recommended Citation

David L. Gregory, *CIVIL RIGHTS: Sex Discrimination: Continuing Clarifications by the Second Circuit*, 61 Brook. L. Rev. 363 (1995).
Available at: <https://brooklynworks.brooklaw.edu/blr/vol61/iss2/3>

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SEX DISCRIMINATION: CONTINUING CLARIFICATIONS BY THE SECOND CIRCUIT*

David L. Gregory[†]

INTRODUCTION

During the 1993-1994 term, the United States Court of Appeals for the Second Circuit provided helpful clarifications of the law prohibiting sex discrimination and sexual harassment in employment.¹ Sex discrimination, and especially sexual harassment, continue to be among the most highly charged and visible areas of employment discrimination law.² Indeed,

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¹ Sexual harassment is a prohibited category of unlawful sex discrimination. The United States Equal Employment Opportunity Commission ("EEOC") Guidelines state:

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

29 C.F.R. § 1604.11 (1994).

The EEOC Guidelines have been cited with approval by the United States Supreme Court. See *Harris v. Forklift Sys., Inc.*, 114 S. Ct. 367, 371 (1993); *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 66 (1986).

² The single highest award thus far in an individual case of unlawful sexual harassment is the \$7.1 million awarded in *Weeks v. Baker & McKenzie*, No. 943043, 1994 WL 636488 (Cal. Super. Sept. 30, 1994). See Jane Gross, *Jury Awards \$7.1 Million in Sex Case*, N.Y. TIMES, Sept. 2, 1994, at A16. Ms. Weeks, employed as a legal secretary for less than two months by Baker & McKenzie, the largest law firm in the world, was repeatedly subjected to unwelcome physical sexual harassment by Martin R. Greenstein, then an intellectual property partner in the law firm. Mark Boennighausen, *\$7.2 Million Secretary*, THE AMERICAN LAWYER,

President Clinton has been sued in federal district court for sexual harassment allegedly committed while he was the governor of Arkansas.³ The academic and popular literature on

October 1994, at 76. Ms. Weeks sued both Greenstein and Baker & McKenzie, accusing the latter of not taking reasonable steps to stop the harassment. *Id.* At her trial "Weeks accused Greenstein of touching her breast while reaching over her shoulder from behind and putting M&M candies in the pocket of her blouse. Then, she claimed, Greenstein pulled her arms back and stated: 'let's see which [breast] is bigger.'" *Id.* Furthermore, Ms. Weeks established that "the firm's failure to do anything other than scold Greenstein after the last complaint before Ms. Weeks brought suit," resulted in liability because "the firm failed 'to take reasonable steps' to prevent the sexual harassment of plaintiff from occurring." *Id.* Six other female employees of the firm came forward at trial to testify that, prior to Ms. Weeks's experience, they suffered from similar inappropriate conduct by Greenstein. *Id.* At trial, the jury awarded Weeks \$6,900,000 in punitive damages against the law firm, for failing to investigate and to stop the reported incidents of sexual harassment, with an additional \$225,000 in punitive damages against Greenstein. *Weeks*, 1994 WL 636488 at *1. The judge subsequently reduced the punitive damages of Baker & McKenzie from \$6,900,000 to \$3,500,000. *Sex-Harassment Award Reduced*, N.Y. TIMES, Nov. 29, 1994, at A22. In doing so, the judge stated that "[a]lthough the firm failed to take reasonable steps to protect Ms. Weeks and other women, its conduct 'was not the product of a deliberate and purposeful policy aimed at violating the rights of anyone.'" *Id.* The \$225,000 punitive damage award against the former partner was left intact. *Id.* Weeks has accepted the reduced award. Mark Boennighausen, *Baker Plaintiff Accepts \$3.5 Million in Damages*, THE AMERICAN LAWYER, Dec. 13, 1994, at 3. Baker & McKenzie has indicated that it will, nevertheless, appeal the entire award. *Law Firm Appeals 3.8-Million Sex-Harassment Award*, L.A. TIMES, Dec. 24, 1994, at 24.

This case has been the subject of numerous articles. See, e.g. Boennighausen, *supra*, at 76. (discussing, through an investigative report interviewing the six woman and six man jury, the manner, intensity and seriousness with which they approached the resolution of this case); Gross, *supra* at A16 (Reporting that "Baker & McKenzie . . . said the firm had made great strides in the treatment of sexual harassment complaints since Ms. Weeks' lawsuit The firm brought in a consultant who worked with the Navy after the Tailhook sexual harassment case and developed a videotape about the correct way to handle such situations."); Victoria Slind-Flor, *Mega-firm Socked in Punitives*, N.Y.L.J. Sept. 12, 1994, at A4 (indicating that the size of the punitive damage award is indicative of a disgust for these types of practices by a law firm but that the outstanding size of the award may "bring punitive damages back to the attention of the U.S. Supreme Court"); see also, Tom Lewin, *Chevron Settles Sexual Harassment Charges*, N.Y. TIMES, Feb. 22, 1995, at A16. (Reporting that "Chevron Corporation agreed yesterday to pay \$2.2 million to settle sexual harassment charges that were brought by four female employees who said they had been the targets of a barrage of offensive jokes, e-mail messages and comments about their clothes and body parts, and, in one case, sadistic pornography sent through the company mail. Lawyers for the women, only one of whom still works for Chevron, said they believed that the settlement was probably the largest ever in a harassment case.")

³ Paula Jones filed her complaint on May 6, 1994 against President Clinton and Danny Ferguson, a state trooper assigned to security for then-Governor Clinton. *Jones v. Clinton*, 858 F. Supp. 902, 904 (E.D. Ark. 1994). Her complaint

alleged that the defendants' actions constituted hostile work environment sexual harassment under 42 U.S.C. § 1983. *Id.* at 904. Section 1983 mandates that:

Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1988 & Supp. 1994).

Jones made the following three additional claims: (1) that President Clinton deprived her of her constitutional rights to equal protection and due process under the Fifth and Fourteenth Amendments of the United States Constitution; (2) that defendants were guilty of intentional infliction of emotional distress; and (3) that the President defamed her. *Jones*, 858 F. Supp. at 904.

Jones's complaint revolved around incidents occurring while President Clinton was the Governor of Arkansas. Complaint, *Jones v. Ferguson*, No. LR-C-94-290, 1994 U.S. Dist. LEXIS 5739 (E.D. Ark. May 6, 1994). Jones worked as an employee of the Arkansas Industrial Developmental Commission. *Id.* at *2. She claimed that while working at the registration desk during a governors' conference on May 8, 1991, she was approached by Danny Ferguson. *Id.* Ferguson allegedly gave her a piece of paper with a four digit number on it and a note that said "the Governor would like to meet with you." *Id.* at *3. She claimed that after some speculation about the Governor's intention, and after deciding it was in her best interest to follow the instructions on the note because it might lead to advancement, she went to Governor Clinton's hotel room. *Id.* at *4. She alleged that Governor Clinton then made sexual advances to her. *Id.* at *5. The most egregious of these claimed advances was that Governor Clinton "lowered his trousers and underwear exposing his erect penis and asked Jones to 'kiss it.'" *Id.* at *5. Jones claimed that she rejected Governor Clinton's advances, at which time he pulled up his trousers and told her that if she were to get into any trouble he would take care of it. *Id.* at *6. He then allegedly said that "you're smart. Let's keep this between ourselves." *Id.* While she did not report the incident, in the next few days she allegedly told a friend, her sisters and her mother of the incident. *Id.* at *7. She alleged that Ferguson continued to make certain comments to her regarding Governor Clinton's continued desire to see her. *Id.* at *9.

Ms. Jones contended that her career was adversely affected by these encounters. She claimed that certain superiors began treating her "rudely" and that she was transferred to a position that required no responsible duties for which she could be adequately evaluated to earn advancement. *Id.* at *10. She also contended that she was not given the appropriate pay increase that accompanied her new position. *Id.* Furthermore, she contended that a certain article in *The American Spectator* was defamatory. *Id.* at *11. This article stated that a woman named "Paula" was "available to be Clinton's regular girlfriend if he so desired." *Id.*

On July 21, 1994, President Clinton moved to dismiss the complaint on grounds of presidential immunity and to defer the filing of any other motions or pleadings until the issue of immunity was resolved. *Jones*, 858 F. Supp. at 903. The Eastern District of Arkansas granted this motion. *Id.* at 906-07.

That court, in an opinion filed on December 28, 1994, held that "a President [does not have] absolute immunity from civil causes of action arising prior to assuming the office," and denied the President's motion to dismiss on grounds of

sexual harassment is voluminous.⁴ Despite the heightened national consciousness of sexual harassment in the wake of the October 1991 confirmation hearings of now-Associate Justice Clarence Thomas, there is no evidence that the incidence of sexual harassment has abated.⁵ In fact, perhaps because of

presidential immunity. *Jones v. Clinton*, 869 F. Supp. 690, 698 (E.D. Ark. 1994). It did hold, however, that President Clinton had limited, temporary immunity. *Id.* The case for both President Clinton and Ferguson was put on hold only for trial purposes, not for purposes of discovery and depositions. *Id.* at 699-700.

For a discussion of President Clinton's immunity claim, see Akhil Reed Amar & Neal Kumar Katyal, *Executive Privileges and Immunities: the Nixon and Clinton Cases*, 108 HARV. L. REV. 701 (1995).

⁴ The term "sexual harassment" was first made popular by Catharine MacKinnon's landmark book, *THE SEXUAL HARASSMENT OF WORKING WOMEN* (1979). Since that time, sexual harassment, conceptualized as a legal theory within the meaning of the already cognizable cause of action for unlawful sex discrimination, has received extensive written commentary. On March 21, 1995, a Westlaw search for all law review articles containing the phrase "sexual harassment" found hundreds of such articles.

The popular film, *Disclosure*, based upon the novel by Michael Crichton, achieved a box office gross of \$70 million in its first seven weeks in U.S. theaters. Ted Bunker, *Leaders and Success*, INVESTORS BUS. DAILY, Feb. 7, 1995, at A1. As of June 13, 1995, the film grossed \$83 million in domestic theaters and \$129 million in foreign theaters. Claudia Eller, *The Biz/Claudia Eller: Company Town; At the Box Office, Literary Prestige Is One for the Books*, L.A. TIMES, June 13, 1995, available in, LEXIS, NEWS Library, LAT File, at *4. The book and the film depict "reverse" sexual harassment of a male subordinate employee by a female corporate executive in the computer industry.

⁵ Several prominent books have discussed extensively the Justice Clarence Thomas-Professor Anita Hill hearings before the United States Senate Judiciary Committee in October of 1991. See, e.g., DAVID BROCK, *THE REAL ANITA HILL: THE UNTOLD STORY* (1993); JANE MAYER & JILL ABRAMSON, *STRANGE JUSTICE: THE SELLING OF CLARENCE THOMAS* (1994); RACE-ING JUSTICE, EN-GENDERING POWER: ESSAYS ON ANITA HILL, CLARENCE THOMAS, AND THE CONSTRUCTION OF SOCIAL REALITY (Toni Morrison ed., 1992). In addition, there has been significant discussion in law review literature. See, e.g., Mary I. Coombs, *Telling The Victim's Story*, 2 TEX. J. WOMEN & L. 277 (1993) (discussing the difficult road women take when reporting sexual harassment); David R. Dow and Richard A. Westin, *What We Should Learn From the Hill v. Thomas Fiasco*, 7 ST. JOHN'S J. LEGAL COMMENT. 81, 87 (1991-92) (arguing that the real problem with the Senate hearings is that "[a]ttention to judicial qualities has been supplanted by a searching inquiry into how he or she is likely to develop (or impede) areas of constitutional law that touch upon politically contentious topics. The consequence is that the hearing process now has as its primary activity the spectacle of senators and the nominee playing artful cat and mouse games over how the nominee can be expected to rule on not-so-hypothetical cases."); Karen Lebacqz, *Justice and Sexual Harassment*, 22 CAP. U. L. REV. 605 (1993) (discussing how deeply rooted and internalized societal and cultural perceptions of black women affected the view of Anita Hill's testimony and deprived her of justice); Shirley L. Mays, *Sexual Harassment and the Law: Justice or "Just Us"?*, 22 CAP. U. L. REV. 623 (1993) (criticizing views that declare

the new national awareness, allegations of sexual harassment increased dramatically in the wake of the Thomas-Hill hearings.⁶

The Second Circuit discharged its duty to guide discrimination and harassment litigants in the district courts within the contours of several recent pertinent decisions by the United States Supreme Court.⁷ This Article will focus on two sex-discrimination-in-employment decisions by the Second Circuit this term,⁸ *Cosgrove v. Sears, Roebuck & Co.*⁹ and *Karibian v.*

that Thomas's actions were acceptable in the African American culture because it is insulting to all women, feeds stereotypes and fails to recognize power differentials).

The Hill-Thomas hearing was also the subject of an entire issue of the *Southern California Law Review* in 1992, covering 394 pages and containing twenty six authors' essays and articles. See, e.g., Kimberle Crenshaw, *Gender, Race and the Politics of Supreme Court Appointments: The Import of the Anita Hill/Clarence Thomas Hearings*, 65 S. CAL. L. REV. 1467 (1992) (discussing the unique problems of African American women who accuse men of sexual harassment, in that they must overcome both racism and sexism); Louise F. Fitzgerald, *Science v. Myth: the Failure Of Reason In the Clarence Thomas Hearings*, 65 S. CAL. L. REV. 1399 (1992) (discussing how the hearings were infested with sexual stereotyping and reminding the reader that sexual harassment is not about love, romance or intimacy but about power); Anita F. Hill, *Sexual Harassment: The Nature of the Beast*, 65 S. CAL. L. REV. 1445 (1992).

⁶ See, e.g., Bonnie Miller Rubin, *Ouster of Top Execs Raises Sexual Harassment Issue to New Level*, CHI. TRIB., Apr. 9, 1995, available in LEXIS, News Library, CHTRFB file (noting that year after Thomas-Hill hearings, number of sexual harassment charges received by the EEOC rose by 53%, the largest increase in the agency's history); *Suing a Corporation Is No Easy Matter*, L.A. TIMES, Oct. 12, 1994, available in LEXIS, News Library, LAT file (5,623 sexual harassment charges filed in 1989, while 14,000 charges expected to be filed in 1994).

⁷ *Harris v. Forklift Sys., Inc.*, 114 S. Ct. 367 (1993) (prohibiting unlawful sexual harassment without reference to its emotional impact on the plaintiff, and reaffirming "abusive work environment" theory of *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986)); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

⁸ Several interesting, but peripheral, decisions of the Second Circuit during the term are beyond the immediate scope of this Article. The court has repeatedly determined that Title VII of the Civil Rights Act of 1964 is not the exclusive remedy for unlawful sex discrimination in employment and does not preclude a lawsuit brought pursuant to 42 U.S.C. § 1983. See *Annis v. County of Westchester*, 36 F.3d 251 (2d Cir. 1994); *Gierlinger v. New York State Police*, 15 F.3d 32 (2d Cir. 1994); *Saulpaugh v. Monroe Community Hosp.*, 4 F.3d 134 (2d Cir. 1993), cert. denied, 114 S. Ct. 1189 (1994). The Second Circuit has also discussed retaliatory discharge in the context of pregnancy, *Kelber v. Joint Indus. Bd. of the Elec. Indus.*, 27 F.3d 42 (2d Cir. 1994), and gender harassment in higher education, *Yusuf v. Vassar College*, 35 F.3d 709 (2d Cir. 1994).

⁹ 9 F.3d 1033 (2d Cir. 1993).

Columbia University,¹⁰ both of which interpret and extend recent Supreme Court precedents. While *Cosgrove* seems to favor employers' interests, limiting the damages assessed for a recognized retaliatory discharge, *Karibian* greatly broadens employers' potential liability for sexual harassment.

I. *COSGROVE V. SEARS, ROEBUCK & CO.*¹¹

The Second Circuit's decision in *Cosgrove v. Sears Roebuck & Co.* illustrates how the court will apply the analysis and rules from the Supreme Court's decision in *Price Waterhouse v. Hopkins*¹² to Title VII cases. In *Price Waterhouse*, the Court explained that Title VII does not require a showing by the plaintiff that a discriminatory motive was the sole cause of an employment decision.¹³ According to the Court, "Title VII meant to condemn even those decisions based on a mixture of

¹⁰ 14 F.3d 773 (2d Cir.), cert. denied, 114 S. Ct. 2693 (1994).

¹¹ 9 F.3d 1033 (2d Cir. 1993).

¹² 490 U.S. 228 (1989). The case involved the failure of Price Waterhouse, a nationwide accounting firm, to promote Ann Hopkins, a productive senior manager, to partner. *Id.* at 233-34. Hopkins sued in the District Court for the District of Columbia, alleging sex discrimination in the decisionmaking process. Although Hopkins had substantial professional qualifications, *id.*, the partners at Price Waterhouse cited her poor interpersonal skills as fatal to her bid for partnership. *Id.* at 234. Nevertheless, many of the partners' comments indicated that their negative reactions to Hopkins's personality were the results of sex stereotyping. For example, one partner explained to Hopkins that her subsequent bids for partnership would be strengthened if she walked, talked and dressed "more femininely." *Id.* at 235. A social-psychologist testified at trial that the evidence indicated that the partnership selection process at Price Waterhouse was infected with sex stereotyping. *Id.* at 235-36.

The district court found that Price Waterhouse had legitimately emphasized interpersonal skills in rejecting Hopkins. *Hopkins v. Price Waterhouse*, 618 F. Supp. 1109, 1120 (D.D.C. 1985), but it also concluded that the partners relied on sex stereotyping to come to that decision. *Id.* According to the district court, such reliance constituted discrimination on the basis of sex. *Id.* Therefore, Price Waterhouse could only avoid equitable relief by proving by clear and convincing evidence that it would have rejected Hopkins absent this discrimination. *Id.* The court of appeals approved the district court's conclusions by holding that if a plaintiff proves that discrimination played a role in an employment decision, the defendant will not be liable if it proves by clear and convincing evidence that it would have made the decision in the absence of discrimination. *Price Waterhouse v. Hopkins*, 825 F.2d 458, 471-72 (D.C. Cir. 1987). The Supreme Court generally endorsed the view of the court of appeals, but concluded that a clear and convincing standard of proof was too demanding. *Id.* at 252-53.

¹³ *Price Waterhouse*, 490 U.S. at 240.

legitimate and illegitimate considerations."¹⁴ The plaintiff retains the burden of persuasion at all times, as provided by *Texas Department of Community Affairs v. Burdine*,¹⁵ but once prima facie discrimination is proven, the employer can offer the mixed motives explanation as an affirmative defense.¹⁶ The Court held that once a plaintiff shows that gender played a motivating part in an employment decision, an employer may avoid liability if it proves by a preponderance of the evidence that it would have made the same decision if it had not allowed gender to play such a role.¹⁷

In *Cosgrove*, the Second Circuit held that even if an employer cannot prove that it would have made the challenged decision without considering gender, evidence of a legitimate reason for the employer's decision can greatly reduce the employer's exposure to compensatory and punitive damages. Patricia Cosgrove brought a Title VII sex discrimination action against her employer, Sears, Roebuck & Company. She alleged that Sears discriminated against her in both compensation and promotion because of her sex,¹⁸ and ultimately fired her in retaliation for a sex discrimination complaint she had filed with the United States Equal Employment Opportunity Commission ("EEOC").¹⁹

Five years after being hired by Sears as a sportswear buyer's assistant, Cosgrove was promoted to the position of assistant merchandise controller on November 1, 1974.²⁰

¹⁴ *Id.* at 241.

¹⁵ 450 U.S. 248 (1981).

¹⁶ *Price Waterhouse*, 490 U.S. at 246.

¹⁷ *Id.* at 253. The Civil Rights Act of 1991 modifies the holding of *Price Waterhouse* so that a plaintiff's proof of an illegitimate motivating factor suffices to establish a violation. 42 U.S.C. § 2000e-2(m) (1988 & Supp. III 1991). This proof alone, however, will trigger only declaratory and some injunctive relief. The employer can still escape the consequences of the challenged employment action and payment of damages by proving that it would have taken the same action for an existing non-discriminatory reason. See MICHAEL J. ZIMMER, ET AL., CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 176-77 (3d ed. 1994). This change was not applicable in *Cosgrove* because the Civil Rights Act has been ruled to have only prospective effect. See, e.g., *Landgraf v. U.S.I. Film Prods.*, 114 S. Ct. 1483 (1994); *Rivers v. Roadway Express, Inc.*, 114 S. Ct. 1510 (1994).

¹⁸ *Cosgrove*, 9 F.3d at 1035.

¹⁹ She also alleged unlawful sexual harassment in the workplace and that, following her termination from employment, Sears had impeded her efforts to obtain new employment. *Id.*

²⁰ *Id.* at 1036.

Cosgrove received an overall rating of "adequate" in August 1976.²¹ She expressed frustration with her performance rating in comparison to similarly-situated co-workers and with her salary.²² Sears contended at trial that Cosgrove's poor interpersonal skills were responsible for her job performance rating. Her immediate supervisor testified that after Cosgrove met with him and the head of the department, her performance deteriorated.²³ In October 1977 she received an even worse performance evaluation. On October 31, 1977, she filed her first charge of sex discrimination with the EEOC, alleging unequal compensation, failure to promote, denial of training, discriminatory job evaluations, and refusal to let her view her personnel file.²⁴

On December 2, 1977, the department head met with Cosgrove and outlined the job-performance areas in which she had received poor ratings. She was given sixty days, or until January 31, 1978, to improve her performance.²⁵ According to the Sears management procedure manual, following the December 2 meeting, at least one subsequent meeting should have been scheduled between Cosgrove and the department head to discuss her situation. No such meeting ever took place.²⁶ At the December 2 meeting, Cosgrove complained of offensive remarks allegedly made to her by male co-workers.²⁷ She claimed Sears never investigated her complaints, although Sears contended it investigated all of her harassment allegations.²⁸

On January 5, 1978, Cosgrove filed a second charge against Sears with the EEOC, alleging that her poor performance evaluation on December 2, 1977 was in retaliation for her complaint with the EEOC.²⁹ Although Sears denied it had any knowledge of the first charge until January 1978, there was evidence that Cosgrove's department head knew of the

²¹ *Id.* at 1036.

²² *Id.*

²³ *Id.* at 1036-37.

²⁴ *Cosgrove*, 9 F.3d at 1037.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

original EEOC charge as early as mid-December 1977.²⁹ Cosgrove was terminated from Sears on February 6, 1978. Her termination papers were prepared on January 24, 1978, one week before the sixty-day period to demonstrate improved job performance would have lapsed.³¹

Following her termination, Cosgrove conducted an extensive job search.³² She later claimed that Sears was uncooperative by not responding to a call for a reference and by returning an incomplete job reference form.³³ On April 22, 1980, Cosgrove filed an amended charge with the EEOC of post-termination retaliation against Sears.³⁴ On June 5, 1981, after the EEOC issued a right-to-sue letter to Cosgrove, she filed a discrimination and retaliation suit against Sears in the United States District Court for the Southern District of New York.³⁵

A. *The District Court's Decision*

The district court found that Cosgrove demonstrated by a preponderance of the evidence that Sears had knowledge of her sex discrimination claim, and that such knowledge played a motivating role in its decision to terminate Cosgrove.³⁶ However, the court also accepted the testimony of several Sears witnesses who testified that Cosgrove communicated poorly, maintained a messy office, was abrasive and disorganized, and, in her last months, was increasingly uncommunicative with her supervisors.³⁷ The court concluded that Sears was not liable for retaliatory discrimination because it had shown "that its legitimate reason, standing alone, would have induced it to make the same decision."³⁸

The court also found that there was no evidence of post-termination retaliation against Cosgrove. The court explained that the volume of Cosgrove's unsuccessful job applications

²⁹ *Cosgrove*, 9 F.3d at 1037.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 1038.

³⁶ *Cosgrove v. Sears, Roebuck & Co.*, No. 81 Civ. 3482, 1992 WL 8718, at *17 (S.D.N.Y. Jan. 10, 1992).

³⁷ *Id.*

³⁸ *Id.* at *18, (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252 (1989)).

alone was not sufficient to prove that Sears was obstructing her job search.³⁹

As for Cosgrove's claim of unlawful sex discrimination in both compensation and promotion, the court stated that a plaintiff must either prove that an employer had a discriminatory intent⁴⁰ or that "some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination."⁴¹ The evidence in Cosgrove's case focused on statistical disparities and on the competing explanations for those disparities.⁴² The court found, based on comparative statistics of similarly situated male and female Sears employees provided by the company, that there was no gender discrimination in respect to promotion or pay.⁴³ Moreover, the court inferred, from all the evidence presented, that promotions and compensation increases were attributable to differences between the performance of individual employees, and not to unlawful employer distinctions between the sexes.⁴⁴ Thus, the court concluded that Cosgrove failed to show either unlawful disparate treatment or disparate impact in employment due to her sex.⁴⁵

Finally, as for Cosgrove's sexual harassment claim, the court found that, based on an offensive anonymous note and remarks made by two co-workers, she did not show that the harassment was so severe or pervasive as to alter the conditions of her employment to create an actionable abusive working environment.⁴⁶ The district court dismissed Cosgrove's complaint with prejudice.

³⁹ The court stated that Cosgrove showed commendable energy in seeking to find employment elsewhere and her suspicion that Sears must have been blacklisting her could not be dismissed as unreasonable. However, the court went on to explain that "suspicion does not rise to the level of proof, particularly in a case where the two written responses by Sears which are in evidence are more consistent with letting Cosgrove down easily than with blacklisting her." *Id.* at *20.

⁴⁰ *Id.* at *20, (quoting *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 986 (1988)).

⁴¹ *Id.* (quoting *Watson*, 487 U.S. at 987).

⁴² *Cosgrove*, 1992 WL 8718 at *23.

⁴³ *Id.* at *23.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* (citing *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 67 (1986)).

B. *The Second Circuit's Decision*

The Second Circuit affirmed the district court's judgment dismissing Cosgrove's claims of gender discrimination, sexual harassment and post-termination retaliation.⁴⁷ The court of appeals held, however, that Cosgrove had successfully made out a claim of retaliatory discharge and remanded the case for a determination of damages.

The Second Circuit noted that a plaintiff alleging retaliatory discrimination under section 704(a) must make a prima facie showing of discrimination by a preponderance of the evidence.⁴⁸ In order to make a prima facie case, the plaintiff must show that: "(1) she was engaged in an activity protected under Title VII; (2) the employer was aware of the plaintiff's

⁴⁷ The court of appeals also affirmed the district court decision that Cosgrove failed to prove her sex discrimination claims. Since all but one of the employees similarly situated to Cosgrove, both male and female, were promoted faster than Cosgrove and received correspondingly higher salaries, the court found that Cosgrove failed to demonstrate gender discrimination with regard to pay increases and promotions. *Cosgrove*, 9 F.3d at 1041.

The court stated that in order for a plaintiff to establish a prima facie showing of sexual harassment, the plaintiff must demonstrate that she is a member of a protected group; she was the subject of unwelcome advances; the harassment was based upon her sex; and, the harassment adversely affected a term, condition or privilege of employment. *Id.* at 1042 (citation omitted). The plaintiff must also demonstrate that a supervisor's or coworker's actions should be imputed to the employer. *Id.* (citing *Kotcher v. Rosa and Sullivan Appliance Ctr., Inc.*, 957 F.2d 59, 62 (2d Cir. 1992)). The court found that Cosgrove failed to establish this requisite prima facie case because, while she was a member of a protected group and was the subject of unwelcome remarks and advances because of her gender, she failed to demonstrate that the alleged harassment adversely affected a term, condition or privilege of her employment, or that the actions of her coworkers should be imputed to Sears. *Id.* The court thus affirmed the district court decision denying Cosgrove's sexual harassment claim. The court also affirmed the district court's judgment dismissing Cosgrove's post-termination retaliation claim because Cosgrove offered no substantive evidence that Sears misrepresented her poor job performance at Sears. *Id.*

⁴⁸ *Id.* at 1038. Title VII of the Civil Rights Act of 1964 prohibits employers from firing workers in retaliation for opposing alleged discriminatory practices. Section 704(a) provides in relevant part that:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3 (1964).

participation in the protected activity; (3) the employer took adverse action against plaintiff based upon that activity; and (4) a causal connection existed between the plaintiff's protected activity and the adverse action by the employer."⁴⁹

The court held that the facts established at trial demonstrated that Cosgrove's claim satisfied all the elements of a prima facie case: she filed an EEOC complaint against Sears and Sears was aware of this, but did not follow its own procedures for addressing employee performance deficiencies in terminating Cosgrove.⁵⁰ Thus, the court concluded that a prima facie case was made that Sears retaliated against Cosgrove because she filed an EEOC complaint against Sears.⁵¹

Once a prima facie case is established by the plaintiff, the burden of production shifts to the employer to demonstrate a "legitimate non-discriminatory reason" for its action.⁵² Where a mixed motive exists, the employer will not prevail simply by offering a legitimate reason for its decision, if that reason did not motivate it at the time of the decision.⁵³ The employer must show that it would have made the same decision based on the legitimate factor alone.⁵⁴ The court found that Sears's failure to comply with its own manual regarding follow-up counselling and evaluation, its premature preparation of Cosgrove's termination papers, and its knowledge of Cosgrove's charge filed with the EEOC required the conclusion that, as a matter of law, Sears's decision to terminate Cosgrove was motivated, at least in part, by illegitimate reasons.⁵⁵ The Second Circuit reversed the decision of the district court on Cosgrove's retaliation claim, and remanded for a calculation of damages.⁵⁶ The court stated, however, that Cosgrove was only entitled to relief "for the period between when she was discharged based upon the discriminatory factor, and when she would have been discharged based upon her performance

⁴⁹ *Cosgrove*, 9 F.3d at 1039 (citing *Sumner v. United States Postal Service*, 899 F.2d 203, 208-09 (1990)).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* at 1039 (quoting *Sumner*, 899 F.2d at 209, quoting *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981)).

⁵³ *Id.* at 1040 (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252 (1989)).

⁵⁴ *Id.* at 1040 (citing *Price Waterhouse*, 490 U.S. at 244-45).

⁵⁵ *Cosgrove*, 9 F.3d at 1040.

⁵⁶ *Id.* at 1041.

alone."⁵⁷

The remedy afforded Cosgrove does not seem consistent with the logic underlying *Price Waterhouse*. The district court found that despite the fact that Cosgrove had proven prima facie retaliatory discharge, her supervisors had other legitimate concerns that, standing alone, warranted her termination.⁵⁸ The district court cited Cosgrove's poor performance and lack of interpersonal skills as sufficient reasons for discharge.⁵⁹

The Second Circuit disagreed with the trial court's application of the *Price Waterhouse* "mixed-motives" component of Cosgrove's retaliation claim. The court of appeals first explained that an employer cannot prevail in a mixed-motives case if the independent legitimate reason for its adverse decision was not, in fact, a motivating factor when the decision was made.⁶⁰ The court noted that Cosgrove was denied an opportunity to improve her employment performance when she was deprived of standard follow-up counselling and the benefit of the full probationary term to demonstrate improved job

⁵⁷ *Id.* at 1041.

⁵⁸ *Id.* at 1040. For further discussion of the *Price Waterhouse* decision, see Robert Belton, Symposium, *The United States Supreme Court's 1988 Term Civil Rights Cases, Causation and Burden-Shifting Doctrines in Employment Discrimination Law Revisited: Some Thoughts on Hopkins and Wards Cove*, 64 TUL. L. REV. 1359 (1990); Alfred W. Blumrosen, *Society in Transition II: Price Waterhouse and the Individual Employment Discrimination Case*, 42 RUTGERS L. REV. 1023 (1990); Roy L. Brooks, *The Structure of Individual Disparate Treatment Litigation After Hopkins*, 6 LAB. L. 215 (1990); Martha Chamallas, Symposium, *A Fair Hearing, Listening to Dr. Fiske: The Easy Case of Price Waterhouse v. Hopkins*, 15 VT. L. REV. 89 (1990); ; Paul J. Gudel, *Beyond Causation: The Interpretation of Action and the Mixed Motives Problem in Employment Discrimination Law*, 70 TEX. L. REV. 17 (1991); Candace S. Kovacic-Fleishcher, *Proving Discrimination After Price Waterhouse and Wards Cove: Semantics as Substance*, 39 AM. U. L. REV. 615 (1990); Charles A. Sullivan, *Accounting for Price Waterhouse: Proving Disparate Treatment Under Title VII*, 56 BROOK. L. REV. 1107 (1991); Kelly R. Dahl, Note, *Price Waterhouse, Wright Line, and Proving a "Mixed Motive" Case Under Title VII*, 69 NEB. L. REV. 869 (1990); Margaret E. Johnson, Comment, *A Unified Approach to Causation in Disparate Treatment Cases: Using Sexual Harassment by Supervisors as the Causal Nexus for the Discriminatory Motivating Factor in Mixed Motives Cases*, 1993 WIS. L. REV. 231 (1993); Michael A. Zubrensky, Note, *Despite the Smoke, There is No Gun: Direct Evidence Requirements in Mixed-Motives Employment Law After Price Waterhouse v. Hopkins*, 46 STAN. L. REV. 959 (1994).

⁵⁹ *Cosgrove*, 1992 WL 8718 at *18.

⁶⁰ *Cosgrove*, 9 F.3d at 1040 (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252 (1989)).

performance.⁶¹ Therefore, because the employer truncated its processes prematurely, the court concluded that there was no way to determine whether the company's stated procedures would have improved Cosgrove's job performance and attitude.⁶² The court then reasoned that Sears could not state with certainty that it would have terminated Cosgrove for the legitimate reasons subsequently proffered if it did not know whether those reasons would have existed at the time of the termination, assuming proper procedures had been followed.⁶³ Accordingly, "Sears must bear the cost of its lost opportunity."⁶⁴

The fact that Sears could no longer assert independent legitimate reasons for termination would seem to return the case to a simple retaliatory discharge claim. In fact, the Supreme Court is clear on this scenario:

We hold that when a plaintiff in a Title VII case proves that her gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account.⁶⁵

Cosgrove prevailed on her retaliatory discharge claim, but rather than treating the case as though she had proven retaliation outright, the Second Circuit suggested an inadequate, and decidedly pro-employer, compromise. The court directed Sears to pay Cosgrove only for the period between her actual discharge and the date "she would have been discharged based on her performance alone."⁶⁶ Thus, although the Second Circuit ostensibly rejected Sears's mixed-motives argument, the court's damage theory effectively decided that Sears's reasons for Cosgrove's termination were legitimate and would have eventually led to her discharge. Ultimately, Sears was held liable technically but was allowed to escape the consequences of its unlawful discharge of Cosgrove. In so doing, the *Cosgrove* court undercut the meaning of *Price Waterhouse*. The de minimis sanction for retaliation applied by the court fails to sufficiently

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 1041.

⁶⁵ *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989).

⁶⁶ *Cosgrove*, 9 F.3d at 1041.

deter future instances of unlawful retaliation.

II. *KARIBIAN V. COLUMBIA UNIVERSITY*⁶⁷

The Second Circuit decision in *Karibian v. Columbia University* confronts two ostensibly narrow technical questions regarding the proper analysis of sexual harassment claims. The court considered whether a quid pro quo plaintiff must have suffered actual economic loss and, more specifically, defined the agency principles underlying employer liability for a hostile work environment. The ruling reveals much about how the Second Circuit will employ the overarching quid pro quo and hostile work environment paradigms in future cases, especially in light of the virtually absolute liability standard it has imposed on corporate employers.

A. *The Facts of Karibian*

Sharon Karibian, a former Columbia University employee, brought a Title VII suit against Columbia University and her former supervisors, alleging sexual harassment. In 1987, while a student at Columbia University, Karibian worked in the University's "Telefund" fundraising office, sponsored by Columbia's Office of University Development and Alumni Relations ("UDAR").⁶⁸ Telefund was administered by Philanthropy Management Company ("PMI"), an independent contractor staffed by both PMI and Columbia employees.⁶⁹ Karibian, a university employee, was supervised by defendant Mark Urban, Development Officer for Annual Giving at UDAR.⁷⁰ Urban had the authority to alter Karibian's work schedule and assignments and to give her promotions and raises, subject to approval. He also had apparent authority to fire Karibian.⁷¹

According to Karibian, Urban repeatedly invited her out to bars, ostensibly to discuss work-related issues.⁷² On those oc-

⁶⁷ 14 F.3d 773 (2d Cir.), *cert. denied*, 114 S. Ct. 2693 (1994).

⁶⁸ *Id.* at 776.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

casions, Urban often asked Karibian back to his apartment.⁷³ At first Karibian rebuffed Urban's advances; ultimately, however, Urban succeeded in coercing her into a physically violent sexual relationship.⁷⁴ Karibian claimed that the conditions of her employment—including her raises and working hours—varied depending on her sexual acquiescence to Urban.⁷⁵ She also claimed that she believed she would be fired if she did not acquiesce to Urban's demands.⁷⁶

In September 1988, Karibian met with a member of Columbia University's Panel on Sexual Harassment. She reported that she was afraid her supervisor would retaliate against her if she ceased complying with his demands for sex.⁷⁷ Shortly thereafter, Karibian met with Columbia University's Equal Opportunity Coordinator.⁷⁸ According to Karibian, on both occasions she was discouraged from actively pursuing a formal complaint against Urban.⁷⁹ At Karibian's request, both meetings remained confidential and neither complaint resulted in any investigation of Urban.⁸⁰

In April 1989, Karibian told her immediate supervisor, Loren Spivak, of an especially violent sexual encounter with Urban.⁸¹ Spivak, a PMI employee, notified PMI's president, Ron Erdos, but neither reported the incident to Columbia University.⁸² In July 1989, Karibian was promoted to Project Director, the highest position within Telefund. In this position she reported directly to Urban at UDAR.⁸³ In January 1990, Karibian complained to the Director of Development Services at UDAR that she was afraid of being terminated by Urban and that Urban was "sabotaging" her work at Telefund.⁸⁴ Her complaint was brought to the attention of John Borden, UDAR's Deputy Vice President. At approximately the same

⁷³ *Karibian*, 14 F.3d at 776.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Karibian*, 14 F.3d at 776.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

time, Karibian met once again with Columbia University's Equal Opportunity Coordinator, this time dropping her request for confidentiality, and thereby granting permission for the Coordinator to speak to others at Columbia University about her difficulties with Urban.⁸⁵

After an investigation by Columbia University, Urban was forced to resign.⁸⁶ In August 1990, Columbia University closed the Telefund office and Karibian was laid off. She then brought her suit against Columbia University, Borden and Urban, claiming that the sexual harassment to which she was subjected violated Title VII.⁸⁷

B. *The District Court's Opinion*

The district court granted Columbia's motion for summary judgment and dismissed Karibian's complaint. The court began its analysis by recognizing that Title VII encompasses two forms of sexual harassment: quid pro quo and hostile work environment.⁸⁸ In rejecting Karibian's quid pro quo claim, the

⁸⁵ *Karibian*, 14 F.3d at 776.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Karibian v. Columbia University*, 812 F. Supp. 413, 416 (S.D.N.Y. 1993). One of the most difficult and important questions in all of employment discrimination law is what constitutes a hostile work environment.

In *Cortes v. Maxus Exploration Co.*, 977 F.2d 195 (5th Cir. 1992), the court stated that a hostile work environment claim required proof of:

(1) membership in a protected group; (2) subjection to unprovoked sexual advances, or request for sexual favors or other verbal or physical conduct of a sexual nature; (3) but for her sex, the plaintiff would not have been the object of the harassment; (4) the harassment was sufficiently pervasive to alter the conditions of employment and create an abusive or hostile working environment; and (5) the employer knew or should have known of the harassment and failed to take prompt remedial action.

Id. at 198-99.

Cf., *Carr v. Allison Gas Turbine Div.*, 32 F.3d 1007, 1008 (7th Cir. 1994) ("[T]he principal questions to be answered are whether the plaintiff was in fact sexually harassed to a degree that [adversely influenced] the conditions under which she worked, whether it was unwelcome harassment, whether management knew or should have known about the harassment yet failed to take appropriate remedial action."). *Carr*, however, is flawed. "Welcome sexual harassment" is an oxymoron; if . . . the employee demonstrates by word or deed that the 'harassment' is welcome . . . it is not harassment" and, therefore, unwelcome harassment is not an element of a hostile work environment cause of action. *Id.* at 1008-09.

But see, *Fuller v. City of Oakland*, 47 F.3d 1522 (9th Cir. 1995). The *Fuller*

court held that this theory requires proof of "an actual—rather than threatened—economic loss because of gender, or because a sexual advance was made and rejected."⁸⁹ Because Karibian produced no evidence demonstrating a denial of an economic benefit, and had in fact been promoted and received salary increases during her time at Telefund, the district court found

court held that in order to succeed on a hostile work environment claim the plaintiff must prove that: "(1) she was subjected to verbal or physical conduct of a sexual nature; (2) this conduct was unwelcome; and (3) the conduct was 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'" *Id.* at 1527 (citing *Ellison v. Brady*, 924 F.2d 872, 875-76 (9th Cir. 1991)).

The circuits have developed differing objective standards for hostile work environment sexual harassment. *See e.g.*, *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 898 (1st Cir. 1988) (factfinder must keep in mind both the woman's and the man's perspective when determining whether the behavior constitutes sexual harassment); *Andrews v. Philadelphia*, 895 F.3d 1469, 1482 (3d Cir. 1990) (factfinder must consider whether the harassment would detrimentally affect a reasonable person of the same sex in that position); *Paroline v. UNISYS Corp.*, 879 F.2d 100, 105 (4th Cir. 1989) (determination made from the point of view of the victim), *vacated in part*, 900 F.2d 27 (4th Cir. 1990); *Gebers v. Commercial Data Ctr. Inc.*, No. 93-4011, 1995 WL 9262 (6th Cir. Jan. 10, 1995) (objective component measured by a reasonable person standard); *Dey v. Colt*, 28 F.3d 1446, 1454 (7th Cir. 1994) (effect the conduct would have on a reasonable person in the plaintiff's position); *Saxton v. American Tel. & Tel. Co.*, 10 F.3d 526, 534 (7th Cir. 1993) (consider the impact the alleged harassment would have on a reasonable employee in the same position); *Fuller*, 47 F.3d at 1527 (reasonable person with the same fundamental characteristics, including sex, race, age, disability and sexual orientation).

The circuits have also developed differing gradations for determining when conduct reaches a level sufficiently severe or pervasive. *See e.g.*, *Spain v. Gallegos*, 26 F.3d 439 (3rd Cir.1994) (since intent to discriminate on the basis of sex can be demonstrated through actions not sexual by their very nature, rumors of an employee's sexual relationship with a fellow employee may constitute sexual harassment; however, this situation requires a more intensive factual inquiry); *Harris v. Clyburn*, No. 94-1009, 1995 WL 56634 at *3 (4th Cir. Feb. 3, 1995) (occasional tickling in the hallway is insufficient to prove severe or pervasive conduct when that was the only evidence of sexual harassment); *Beardsley v. Webb*, 30 F.3d 524 (4th Cir. 1994) (the conduct of a police lieutenant's supervisor which constituted, among other things, calling plaintiff "honey" and "dear," showing up at plaintiff's scheduled meetings when he was not involved, accusing her of having an extra-marital affair, and asking her what kind of underwear she wore clearly constituted behavior that was sufficiently severe and pervasive); *Koelsch v. Beltone Elecs. Corp.*, 46 F.3d 705, 708 (7th Cir. 1995) (isolated and innocuous incidents do not support a finding of sexual harassment, because they do not "poison . . . the workplace"; therefore, plaintiff failed to prove hostile work environment sexual harassment when she introduced evidence that on one occasion, her employer removed his shoe and rubbed her leg under a table and on another occasion, he grabbed plaintiff's buttocks).

⁸⁹ *Karibian*, 812 F. Supp. at 416.

that Karibian stated no valid claim under the quid pro quo theory.⁹⁰

The court also rejected Karibian's hostile work environment claim. The court ruled that a plaintiff suing under this theory must prove that "the employer either provided no reasonable avenue for complaint or knew of the harassment but did nothing about it."⁹¹ The court found there was no reasonable basis for her contention that Columbia University failed to provide a reasonable avenue for making complaints.⁹² As for the knowledge requirement, the court held that Columbia University could not be expected to act against Urban as a result of the confidential consultations of September 1988.⁹³ In response to Karibian's contention that Columbia University should have taken action in April 1989 when she notified her PMI supervisor of Urban's conduct, the court ruled that notice to PMI was not notice to Columbia University, and that PMI's knowledge was not knowledge by Columbia University.⁹⁴ As a result, "[t]he events of April 1989 did not impose on Columbia any duty to take remedial action against Urban."⁹⁵

C. *The Second Circuit Opinion*

1. Karibian's Quid Pro Quo Claim

The first question regarding Karibian's quid pro quo claim on appeal was whether an employee had to suffer actual economic loss to sustain a charge of quid pro quo harassment.⁹⁶ Karibian's failure to show evidence of actual, rather than threatened, economic loss proved fatal to her claim in the district court.⁹⁷ The Second Circuit pointed out that such a requirement contradicts Title VII and the EEOC guidelines as elucidated in *Meritor Savings Bank v. Vinson*.⁹⁸

⁹⁰ *Id.*

⁹¹ *Id.* (quoting *Kotcher v. Rosa & Sullivan Appliance Ctr., Inc.* 957 F.2d 59, 63 (2d Cir. 1992)).

⁹² *Id.*

⁹³ *Id.* at 417.

⁹⁴ *Id.*

⁹⁵ *Karibian*, 812 F. Supp. at 417.

⁹⁶ *Karibian*, 14 F.3d at 776.

⁹⁷ *Id.* at 776.

⁹⁸ *Id.* at 778 (citing *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 64 (1986)).

Meritor was the Supreme Court's first decision unanimously condemning unlawful sexual harassment.⁹⁹ In *Meritor*, the Court contrasted quid pro quo harassment with "conduct . . . creating an intimidating, hostile, or offensive working environment."¹⁰⁰ There is no mention in *Meritor* of whether a viable quid pro quo claim of unlawful harassment could be stated without some economic loss or benefit tied to the rejection of, or submission to, sexual advances.

The Second Circuit began its analysis by referring to the EEOC Guidelines prohibiting sexual harassment. The court ruled that quid pro quo harassment occurs when "submission to or rejection of [unwelcome sexual] conduct by an individual is used as a basis for employment decisions affecting such individual."¹⁰¹ To establish a prima facie case of quid pro quo harassment, the court held that a plaintiff must present evidence that she was subject to unwelcome sexual conduct, and that her reaction to such conduct was then used as grounds for decisions adversely affecting the compensation, terms, conditions or privileges of her employment.¹⁰² Because the quid pro quo harasser, by definition, wields the employer's authority to alter the terms and conditions of employment, the employer is strictly liable for quid pro quo harassment.¹⁰³

The court of appeals rejected the district court's ruling that actual economic loss is required in order for a plaintiff to prevail under the quid pro quo theory.¹⁰⁴ The court reasoned that in cases where the employee refuses her supervisor's advances, evidence of some job-related economic penalty will often be available; such evidence, however, is not always essential to a quid pro quo claim.¹⁰⁵ The court focused, instead, on the behavior of the supervisor, observing that:

In the nature of things, evidence of economic harm will not be available to support the claim of the employee who submits to the supervisor's demands. The supervisor's conduct is equally unlawful under Title VII whether the employee submits or not. Under the dis-

⁹⁹ See *supra* note 124.

¹⁰⁰ *Meritor*, 477 U.S. at 65 (quoting EEOC Guidelines, 29 CFR § 1604.11 (a)(3)).

¹⁰¹ *Karibian*, 14 F.3d at 778 (citing 29 C.F.R. § 1604.11(a)(2) (1993)).

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 778.

¹⁰⁵ *Id.*

strict court's rationale, only the employee who successfully resisted the threat of sexual blackmail could state a quid pro quo claim. We do not read Title VII to punish victims of sexual harassment who surrender to unwelcome sexual encounters. Such a rule would only encourage harassers to increase their persistence.¹⁰⁵

The court held that the key inquiry in a quid pro quo case is "whether the supervisor has linked tangible job benefits to the acceptance or rejection of sexual advances."¹⁰⁷ Quid pro quo harassment occurs when a supervisor conditions any terms of employment upon an employee's submitting to unwelcome sexual advances, regardless of whether the employee rejects the advances and suffers the consequences or submits in order to avoid those consequences.¹⁰⁸

Karibian stated that her work assignments, raises and promotions depended on her sexual acquiescence to Urban. Moreover, she claimed that Urban implicitly threatened to fire her if she did not submit to his demands. If Karibian's contentions were true, "Urban's conduct would constitute quid pro quo harassment because he made and threatened to make decisions affecting the terms and conditions of Karibian's employment based upon her submission to his sexual advances."¹⁰⁹ In granting summary judgment, the district court improperly removed this question from the factfinder.¹¹⁰ The Second Circuit admonished the district court for tying quid pro quo analysis to the retention or loss of "tangible" job benefits.¹¹¹ The problem is that without evidence of such a loss, it is harder to find the workable demarcation between the quid pro quo and hostile work environment theories of harassment.

The court explicated its understanding of the quid pro quo standard by distinguishing between "rejection" and "submission" quid pro quo harassment.¹¹² When the employee submits to sexual advances to avoid adverse employment consequences, it is no less actionable than when the employee spurns the overtures and suffers adverse treatment as a re-

¹⁰⁶ *Id.*

¹⁰⁷ *Karibian*, 14 F.3d at 778.

¹⁰⁸ *Id.* at 778-79.

¹⁰⁹ *Id.* at 778.

¹¹⁰ *Id.* at 779.

¹¹¹ *Id.* at 778.

¹¹² *Id.* at 778-779.

sult.¹¹³ Furthermore, the focus should remain "on the prohibited conduct, not the victim's reaction."¹¹⁴

Whether a tangible benefit or loss actually occurs, the court held that the supervisor's linking of a tangible job benefit to an unwelcome sexual advance indicates quid pro quo sexual harassment. Thus, in the Second Circuit, it appears that a claim of quid pro quo harassment, which is automatically imputed to the employer, may properly proceed to trial without any evidence of a tangible gain or loss by the plaintiff. In a submission case, the factfinder will determine whether the plaintiff submitted to advances out of a "reasonable fear" of some job-related reprisal.¹¹⁵ The flexibility of the Second Circuit interpretation seems to expand significantly upon the theory of harassment that the *Meritor* Court termed "economic quid pro quo."¹¹⁶

2. Karibian's Hostile Work Environment Claim

Unlike the quid pro quo unlawful sexual harassment case, a plaintiff suing under the hostile work environment theory must demonstrate some specific basis to hold the employer liable for its employees' misconduct.¹¹⁷ In *Karibian*, the Second Circuit limited its previous holding in *Kotcher v. Rosa & Sullivan Appliance Center, Inc.*, cited by the district court, that to prove a hostile work environment claim, the plaintiff must prove that the employer "either provided no reasonable avenue for complaint or knew of the harassment but did nothing about it."¹¹⁸ The court ruled that this standard is not applicable to all hostile work environment claims,¹¹⁹ although a plaintiff "must demonstrate some specific basis to hold the employer liable for the misconduct of its employees."¹²⁰ The court went on to say, however, that this basis of employer liability unfor-

¹¹³ *Karibian*, 14 F.3d at 779.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ 477 U.S. 57, 65 (1986).

¹¹⁷ *Karibian*, 14 F.3d at 779.

¹¹⁸ *Id.* (quoting *Kotcher v. Rosa & Sullivan Appliance Ctr., Inc.*, 957 F.2d 59, 63 (2d Cir. 1992)).

¹¹⁹ *Id.*

¹²⁰ *Id.* (citing *Kotcher*, 957 F.2d at 62).

tunately "remains elusive."¹²¹ Quoting the 1993 decision of the United States Supreme Court in *Harris v. Forklift Systems, Inc.*, the court simply stated that a work environment is hostile "[w]hen the workplace is permeated with 'discriminatory intimidation, ridicule, and insult,' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment.'"¹²²

¹²¹ *Id.*

¹²² *Id.* at 779; see also *Harris v. Forklift Sys. Inc.*, 114 S. Ct. 367, 370 (1993) (quoting *Meritor Savings Bank v. Vinson*, 477 U.S. at 57, 65, 67 (1986)). In *Meritor Savings Bank*, the Supreme Court held that hostile work environment sexual harassment is actionable under Title VII of the Civil Rights Act of 1964. *Meritor*, 477 U.S. at 66. In order to be actionable within the meaning of Title VII, the conduct must be "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Id.* (internal quotations and citation omitted). Whether sexual harassment actually occurred is not based upon whether the plaintiff "voluntarily" partook in the activity, but rather on whether the advances were "unwelcome." *Id.* at 68. In *Harris*, the Court attempted to further define the type of conduct that will be actionable as an abusive work environment sexual harassment claim under Title VII. The Court rejected the district court's determination that psychological damage is a necessary element of the cause of action. *Harris*, 114 S. Ct. at 371. Instead, the Court defined the limits of what constitutes a hostile work environment according to an objective assessment of the alleged behavior and the perception of the victim:

Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is not a Title VII violation.

Id. at 370. While the Court did not define when conduct reaches this level, it did list a number of factors that provide guidance: (1) the frequency of the conduct; (2) its severity; (3) whether it is physically threatening; and (4) whether it "unreasonably interferes with an employee's work performance." *Id.* at 371.

While this decision does rule out the need to show psychological harm, it provides relatively little substantive guidance as to how the lower courts should determine when there is a hostile work environment. See David Schultz, *From Reasonable Man to Unreasonable Victim?; Assessing Harris v. Forklift Systems and Shifting Standards of Proof and Perspective in Title VII Sexual Harassment Law*, 27 SUFFOLK U. L. REV. 717 (1993) (discussing various legal standards used by courts in sexual harassment law, arguing that "reasonable" standards be abandoned because of inherent problems and advocating a "balancing of interests" test in their stead); Kathleen A. Gleeson, Comment, *Constitutional Law—Civil Rights Act—Title VII—Sex Discrimination—Hostile Work Environment Sexual Harassment—The United States Supreme Court Held that an Employer's Conduct Need Not Seriously Affect an Employee's Psychological Well-Being or Cause the Employee to Suffer Tangible Injury to Be Actionable as Hostile Work Environment Harassment in Violation of Title VII of the Civil Rights Act of 1964: Harris Forklift Systems, Inc.*, 33 DUQ. L. REV. 173 (1994) (arguing that the lack of clear standards as to when conduct becomes actionable will lead to "a rash of inconsistent verdicts and damage awards"); Bradley Golden, Note, *Harris v. Forklift: The Supreme*

Most significantly, the court held that lack of notice to the employer and the existence of complaint procedures do not automatically insulate an employer from liability.¹²³ Following Supreme Court precedent, the court employed principles of agency, and held that an employer is liable for an abusive work environment created by a supervisor if the supervisor uses actual or apparent authority to further the harassment, or if the supervisor is otherwise aided in accomplishing the harassment by the existence of the agency relationship.¹²⁴

Court Takes One Step Forward and Two Steps Back on the Issue of Hostile Work Environment Sexual Harassment, 1994 DET. C.L. REV. 1151 (1994) (criticizing the Court's use of an objective standard and advocating a reasonable victim standard, because men can also be victims of sexual harassment); Mary C. Gomez, Note, *Sexual Harassment After Harris v. Forklift Systems, Inc.—Is it Really Easier to Prove?*, 18 Nova L. Rev. 1889 (1994) (arguing for the application of the reasonable woman standard in sexual harassment); Leah R. McCaslin, Note, *Harris v. Forklift Systems, Inc.: Defining the Plaintiff's Burden in Hostile Environment Sexual Harassment Claims*, 29 TULSA L.J. 761 (1994) (arguing that both the elimination of the need to prove psychological harm and the use of a reasonable person standard were proper); Marren Roy, Comment, *Employer Liability for Sexual Harassment: A Search for New Standards in the Wake Of Harris v. Forklift Systems, Inc.*, 48 SMU L. REV. 263 (1994) (criticizing *Harris* for failing to address employer liability standard and for failing to give guidance in applying the applicable standards).

¹²³ *Karibian*, 14 F.3d at 779; see also *Meritor*, 477 U.S. at 72-73.

¹²⁴ *Karibian*, 14 F.3d at 779-80. The Court in *Meritor* did not make a clear determination regarding the appropriate standard for holding employers liable for supervisors' conduct in hostile work environment cases, but it did reject a strict liability standard and endorsed a standard that looks to agency principles for guidance. *Meritor*, 477 U.S. at 72. Furthermore, the Court rejected the argument that an employer's "grievance procedure and policy against discrimination, coupled with [the plaintiff's] failure to invoke that procedure, must insulate [the employer] from liability." *Id.*

Meritor is the Court's definitive ruling that hostile work environment sexual harassment is actionable, but its holding caused confusion, especially in terms of its mandate that the corporate employer liability standard be formulated by general agency principles. For discussion of this case, see Sheryl A. Greene, *Reevaluation of Title VII Abusive Environment Claims Based on Sexual Harassment after Meritor Savings Bank v. Vinson*, 13 T. MARSHALL L. REV. 29 (1988) (arguing for a reevaluation of remedies available under Title VII in light of hostile work environment cases); David Holtzman & Eric Trelz, *Recent Developments in the Law of Sexual Harassment; Abusive Environment Claims after Meritor Savings Bank v. Vinson*, 31 ST. LOUIS U. L. J. 239 (1988) (sexual harassment allegations should be evaluated using the reasonable victim's viewpoint, and plaintiffs alleging harassment by a supervisor should be able to hold an employer liable absent a showing of negligence); Anne C. Levy, *The Change in Employer Liability for Supervisor Sexual Harassment after Meritor: Much Ado About Nothing*, 42 ARK. L. REV. 795 (1989) (arguing that cases and commentators have misinterpreted the *Meritor* Court's mandate on employer liability because of a misunderstanding of agency principles and reevaluating the problem with a clearer description of those princi-

The court reasoned that when a supervisor makes employment decisions based on an employee's response to sexual advances, it is fair to hold the employer liable because "the supervisor is acting within at least the apparent scope of the authority entrusted to him by the employer."¹²⁵

Applying these principles, the court found that Columbia University could be held liable for Urban's alleged harassment regardless of the absence of effective notice to Columbia or the reasonableness and efficacy of the university's internal complaint procedures.¹²⁶ The court rejected Columbia's contention that holding it liable for Urban's harassment was contrary to the standard of employer liability previously announced in *Kotcher*.¹²⁷ The court reasoned that where a low-level supervisor does not rely on supervisory authority to carry out the harassment, the *Kotcher* standard of employer liability generally will apply.¹²⁸ Such a standard is inapplicable in this case, the court held, because Karibian's claim alleged Urban utilized his supervisory authority over her employment to force her to submit to his sexual advances.¹²⁹ If the factfinder accepts Karibian's allegations, Columbia University should be held liable.¹³⁰ The district court's grant of summary judgment for Columbia University was reversed, and the case was remanded for further proceedings.

In its analysis of Karibian's hostile work environment

ples); Joseph M. Pellicciotti, *Sexual Harassment in the Workplace: A Consideration of Post-Vinson Approaches Designed to Determine whether Sexual Harassment Is Sufficiently Severe or Pervasive*, 5 DEPAUL BUS. L.J. 215 (1993) (arguing that lower courts still lack clear guidelines for evaluating alleged sexual harassment); Janet Seldon, *Employer Liability for 'Hostile Environment' Sexual Harassment*: Meritor Savings Bank, FSB v. Vinson, 31 HOW. L. REV. 51 (1988) (questioning whether the Court's leaving open the question of employer liability will prompt EEOC to alter its guidelines); Ronald Turner, *Employer Liability under Title VII for Hostile Environment Sexual Harassment by Supervisory Personnel: The Impact and Aftermath of Meritor Savings Bank*, 33 HOW. L. J. 1, 47 (1990) (arguing that agency principles are helpful, but should not be determinative and that courts "should take into account the nature of the prohibited conduct and an employer's effort to protect its work force from harassment").

¹²⁵ *Karibian*, 14 F.3d at 780 (quoting *Henson v. City of Dundee*, 682 F.2d 897, 910 (11th Cir. 1982)).

¹²⁶ *Id.*

¹²⁷ *Id.* at 781.

¹²⁸ *Id.* at 780.

¹²⁹ *Id.*

¹³⁰ *Id.*

claim, the Second Circuit addressed an area explicitly left open by the Court in *Meritor*.¹³¹ *Meritor's* indication that common law agency principles should control the question of employer liability for a hostile work environment was not only summarily endorsed; it was dramatically tightened to approach near-absolute corporate principal liability.¹³² The court's earlier decision in *Kotcher*, however, seemed to preclude employer liability without notice to the employer and absent the employer's failure to provide a reasonable internal avenue for complaint.¹³³ The court explained that it had indicated in its earlier ruling that notice and lack of complaint procedures were not "absolute" requirements and that the acts of a supervisor could rise to a level high enough that they would "necessarily be imputed to the company."¹³⁴ The court concluded that "an employer is liable for the discriminatorily abusive work environment created by a supervisor if the supervisor uses his actual or apparent authority to further the harassment, or if he was otherwise aided . . . by the existence of the agency relationship."¹³⁵

¹³¹ *Karibian*, 14 F.3d. at 779.

¹³² *Id.* at 779-80.

¹³³ *Id.* at 780 (citing *Kotcher*, 957 F.2d at 63).

¹³⁴ *Id.*

¹³⁵ *Id.* Agency law analysis can be very intricate and the circuits vary widely on the range of corporate employer liability for acts of supervisory personnel. See *Klessens v. United States Postal Serv.*, No. 93-1823, 1994 WL 718952 (1st Cir. Dec. 28, 1994) (holding that court must determine whether the employer knew or should have known of the alleged sexual harassment and failed to take prompt action). *Accord Spain v. Gallegos*, 26 F.3d 439 (3rd Cir. 1994) (finding that law requires the employer take to some affirmative remedial action concerning sexual harassment by coworkers); *Bouton v. BMW*, 29 F.3d 103 (3rd Cir. 1994) (applying negligence standard to determine whether the employer was liable in a hostile work environment case; thus failure to investigate and remediate will result in liability; this standard mandates an effective grievance policy, defined as one that is known to the victim and one that timely stops the harassment). *Spicer v. Virginia Dep't. of Corrections*, 44 F.3d 218 (4th Cir. 1995) (holding that remedial response is not sufficient solely because plaintiff does not complain after remedial steps are taken; response must still be prompt and adequate); *Paroline v. Unisys Corp.* 879 F.2d 100 (4th Cir. 1989) (holding that an employer is liable if it had actual or constructive knowledge of the harassment and took no prompt and adequate remedial action); cf. *Saxton v. American Tel. & Tel. Co.*, 10 F.3d 526 (7th Cir. 1993) (asserting that standard is not one of respondeat superior, but is instead a negligence standard closely resembling the "fellow servant rule;" thus, employer, provided that it has used due care in hiring the offended employee, is liable for its employees' torts against coworkers only if it knew, or had reason to know, of the misconduct and failed to take appropriate remedial action); *Fuller v.*

3. Agency Principles and the Distinction Between Quid Pro Quo and Hostile Work Environment

The agency law discussion in *Karibian* was very abbreviated. This cursory consideration of agency law issues is quite problematic. The distinctions between a supervisor linking job-related decisions to unwelcome sexual conduct (quid pro quo harassment) and one wielding delegated authority to create a hostile work environment are complex and were not sufficiently elucidated by the court. It is certainly arguable that the supervisor's actual or apparent authority is indeed the authority to control compensation, terms and conditions of employment. The Second Circuit, for whatever reason, did not provide a thorough analysis of the complex agency law principles that would distinguish employer liability for the two different types of claims. The highly charged political consequence is that corporate employers will bear virtually absolute liability for all of the sexual harassment perpetrated by supervisory personnel. The court held that an employer is strictly liable when a high-level supervisor creates a discriminatorily abusive work environment if the supervisor "uses his actual or apparent authority to further the harassment, or if he was otherwise

Oakland, Nos. 92-16081 & 92-16402, 1995 U.S. App. LEXIS 9148 (9th Cir. Feb. 14, 1995) (holding that employer is liable for failing to remedy harassment of which it knows or should have known and that remedies must be reasonably calculated to end the harassment; thus employer's obligation is not discharged until prompt, effective action has been taken to end current harassment and deter future harassment).

Furthermore, inaction cannot fairly be said to qualify as a remedy reasonably calculated to end the harassment. *Bouton*, 29 F.3d at 106-07 (Holding that prior conduct towards women should alert an employer to the likelihood that the employee would, despite warnings, try to harass the present plaintiff, therefore, there is a duty to act to prevent the harassment as well as to act after the fact.). *But see Andrews v. Philadelphia*, 895 F.2d 1469 (3d Cir. 1990) (using respondeat superior standard and asserting that if there was actual or constructive knowledge and the employer failed to take adequate remedial measures, then the employer will be liable); *Gebers v. Commercial Data Ctr., Inc.*, No. 93-4011, 1995 WL 9262 (6th Cir. Jan. 10, 1995) (applying respondeat superior to impose liability). For an excellent review of the pertinent decisions of the federal courts of appeal regarding the scope of corporate employer liability for sexual harassment committed by supervisors, see Frederick J. Lewis & Thomas L. Henderson, *Employer Liability for "Hostile Work Environment" Sexual Harassment Created by Supervisors: The Search for an Appropriate Standard*, 25 U. MEMPHIS L. REV. 667 (1995).

aided in accomplishing the harassment by the existence of the agency relationship."¹³⁶ By contrast, where a low-level supervisor does not rely on his supervisory authority to carry out the harassment, the situation purportedly is more akin to harassment carried out by the plaintiffs co-worker. In such a situation the employer will not be liable unless "the employer either provided no reasonable avenue for complaint or knew of the harassment but did nothing about it."¹³⁷

The standard of strict liability for an employer for the actions of a supervisor "at a sufficiently high level in the hierarchy"¹³⁸ is based on the court's application of section 219 (2)(d) of the Restatement (Second) of Agency.¹³⁹ Although the court's application of agency principles arguably resulted in a proper decision based on the facts before the court in *Karibian*, as a general rule imposing near-absolute liability on employers for hostile environment harassment carried out by high-level supervisors is a simplistic and problematic approach to an exceedingly complex issue.

In quid pro quo harassment, which occurs when an employee's response to a supervisor's unwelcome sexual advances is used as a basis for employment decisions affecting that employee, an employer is held strictly liable.¹⁴⁰ Strict liability is imposed because the supervisor's power to retaliate comes directly from improper exercise of the actual or apparent authority granted by the employer.¹⁴¹ This is a proper result, because without such authority the supervisor could not condition job benefits on the employee's submission to his sexual advances.

The court in *Karibian* used an analysis similar to that employed in quid pro quo cases to find that Columbia University could be held liable for the hostile work environment created by *Karibian*'s supervisor. Because the supervisor abused his delegated authority to create a discriminatorily abusive work

¹³⁶ *Karibian*, 14 F.3d at 780.

¹³⁷ *Id.* (quoting *Kotcher v. Rosa & Sullivan Appliance Ctr., Inc.*, 957 F.2d 59, 63 (2d Cir. 1992)).

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

environment,¹⁴² the employer was strictly liable. Under the particular set of facts presented in *Karibian*, where the supervisor allegedly told Karibian that she "owed him" and where he allegedly intimidated her by threatening to make decisions affecting her employment based on her responsiveness to his sexual advances,¹⁴³ strict liability is appropriate, even for a hostile work environment action, because, like the quid pro quo harasser, the supervisor here used his actual or apparent authority to create an intimidating and abusive environment.

More troublesome, however, is the second prong of the court's broad holding. Under that rule, an employer will be strictly liable for a hostile work environment when a supervisor is "otherwise aided in accomplishing the harassment by the existence of the agency relationship."¹⁴⁴ The liability link between the supervisor and the employer is more direct and concrete when the supervisor uses his delegated authority to further the harassment. That link can become tenuous, however, when the supervisor is merely "aided in accomplishing" the harassment by the agency relationship.¹⁴⁵

The capacity of a person to create a hostile work environment is not necessarily enhanced or diminished by that individual's authority. A hostile work environment can be created independent of supervisory power, such as when a co-worker engages in harassment.¹⁴⁶ This means, of course, that a person can create a hostile work environment without an agency relationship. Thus it is possible, theoretically and in fact, for even a high-level supervisor to create an abusive environment without abusing any authority delegated by the employer. In such a case the liability link is nonexistent; rather than relying on strict liability, a plaintiff in this situation must "demonstrate some specific basis" to hold the employer liable.¹⁴⁷

In practice, however, under the court's broad holding, a

¹⁴² *Karibian*, 14 F.3d at 780.

¹⁴³ *Id.* at 776.

¹⁴⁴ *Id.* at 780.

¹⁴⁵ *Id.*

¹⁴⁶ Jack A. Raisner, *The Return of Strict Liability: When a Supervisor Creates a Hostile Work Environment by Sexually Harassing a Subordinate*, EMPLOYMENT & LAB. L. Q., Oct. 1994, at 2.

¹⁴⁷ *Karibian*, 14 F.3d at 779.

high-level supervisor charged with creating a hostile work environment invariably will be viewed by the employee as able to harass primarily because of his position in the company. The employee naturally will be fearful that the supervisor will use the authority delegated by the employer to retaliate. Thus a plaintiff will always be able to show that—at least from her perspective—the supervisor was “aided in accomplishing” the harassment because of the agency relationship, i.e., because he was a supervisor. Whether that supervisor in fact used his supervisory authority to create the abusive environment becomes irrelevant. An employer is thus held strictly liable for misconduct by supervisors, even though the supervisor did not utilize the power granted by the employer to further his illicit actions.

This strict liability standard transcends the *quid pro quo* standard, where the basis for holding the employer liable is that the agent used the employer's authority to alter the employee's terms and conditions of employment. Under the *quid pro quo* theory the liability link is the supervisor's active exercise of his delegated powers. In contrast, holding an employer responsible under the theory that a supervisor was “aided” in misconduct by the existence of the agency relationship, could, in some instances, render the employer liable for an abusive atmosphere created without any employer authority. In such a situation, the supervisor's actions are similar to those of a harassing co-worker who also has no employer authority. In order for a plaintiff to prevail in this situation, the proper approach is to require her to show that the employer either provided no reasonable avenue for complaint or knew of the harassment but did nothing about it.

The employer should not be held strictly liable for a hostile work environment created by a high-level supervisor unless that supervisor exercised authority granted by the employer to carry out the harassment. The “aided in accomplishing” language used by the *Karibian* court, however, could lead to situations where the employer is strictly liable merely because the supervisor was in a position to use delegated authority to retaliate against a subordinate. Even under the *quid pro quo* avenue, the liability link is not passive; rather it is an active exercise of the supervisor's authority. It should not be enough that the supervisor was in a position to use his authority to

further illicit actions, but that he did, in fact, use his authority for an improper purpose.

Victims of sexual harassment should be compensated for their injuries, and, where appropriate, the employer should be liable. This puts a premium, however, on the proper application of agency principles. In the absence of a liability link, there is no legal basis for holding an employer strictly liable for a hostile work environment. Absolute liability should not be imposed on the employer in such situations. Corporate defenses, however, such as effective internal reporting mechanisms, will almost always be unavailing. As a result of the *Karibian* decision, the conceptual distinctions between quid pro quo and hostile work environment sexual harassment may no longer need to be as sharply drawn. *Karibian's* clarifications of corporate defendant liability standards for supervisory sexual harassment further plaintiffs' interests in deep-pocket recovery. This practical result was achieved at the expense of theoretical consistency in agency law.

CONCLUSION

In its *Karibian* and *Cosgrove* decisions, the Second Circuit has further elucidated several critically important issues in sex discrimination law. The court's analyses, however, have also prompted new questions that will continue to challenge the district courts in terms to come.

The *Cosgrove* decision indicates strict adherence to the letter of *Price Waterhouse*. The existence of a legitimate reason for adverse treatment of a Title VII plaintiff will only insulate an employer from liability if the employer was in fact motivated by the legitimate reason at the time of the employer's decision. Defendants in the Second Circuit now also have the responsibility of demonstrating proper internal procedures in the firing (or other adverse treatment) of a Title VII plaintiff, notwithstanding the assertion of a mixed motive at trial. *Cosgrove* also implies that if the employer puts forth some evidence of a legitimate rationale for the adverse treatment of an employee, that evidence will mitigate damages substantially. It is unclear whether this is logically consistent with the mixed-motives construct.

The Second Circuit's sexual harassment analysis in

Karibian represents a clarification of how the court will apply the quid pro quo and hostile work environment paradigms delineated by the Supreme Court in *Meritor*. The Second Circuit position reinforces near-absolute employer liability for the actions of a supervisor in either situation.

The significance of the Second Circuit's interpretation of the quid pro quo paradigm reflects the realistic assessment that the victim of harassment may submit without overt resistance to unwelcome sexual advances. The court properly refused to limit quid pro quo harassment to so-called "rejection" cases and instead placed the factual focus on whether the sexual advances were unwelcome. It is apparent, however, that even a consensual sexual relationship between supervisor and subordinate can quickly become very problematic for the Title VII defendant if the continuation of the affair becomes linked to the retention of tangible job benefits.

The Second Circuit's cursory consideration of the very intricate agency questions raised by *Meritor* is the most significant (non) development this term. In de facto repudiation of its earlier *Kotcher* decision, the court held that the existence of a reasonable avenue for complaint and a swift employer response to the complaint will not necessarily immunize an employer against liability for a hostile work environment. When a supervisor uses actual or apparent authority to create a hostile work environment, the employer will be held responsible for that supervisor's actions whether or not the employer had notice of the supervisor's behavior.

The court, unfortunately, suggested no circumstances in which a supervisor would not be viewed as wielding actual or apparent authority. Therefore, under *Karibian*, liability for both quid pro quo harassment and a hostile work environment involving a supervisor will be almost automatically imputed to the employer. The court's avowed adherence to *Meritor* in this instance seems inconsistent and represents a partial and unclear merging of the quid pro quo and hostile work environment paradigms.

The realistic result for employer defendants is ominous. An employer in the Second Circuit is charged with knowledge of all its supervisors' actions with respect to subordinate employees. Furthermore, if any supervisor participates in the creation of a hostile work environment, no corporate policy or

punishment of individual perpetration will relieve the employer's liability as the principal. The Second Circuit has made a fundamental policy choice, decidedly favoring plaintiffs in sexual harassment cases, and making it virtually impossible for corporate employers to disavow any harassing behavior by supervisors.

The court, unfortunately, suggested no circumstances in which a supervisor would not be viewed as wielding actual or apparent authority. Therefore, under *Karibian*, liability for both quid pro quo harassment and a hostile work environment involving a supervisor will be imputed to the employer almost automatically. The court's avowed adherence to *Meritor* in this instance seems inconsistent and represents a partial and unclear merging of the quid pro quo and hostile work environment paradigms.

