SUPREME COURT OF THE UNITED STATES

No. 97–569

BURLINGTON INDUSTRIES, INC., PETITIONER *v.* KIMBERLY B. ELLERTH

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

[June 26, 1998]

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, dissenting.

The Court today manufactures a rule that employers are vicariously liable if supervisors create a sexually hostile work environment, subject to an affirmative defense that the Court barely attempts to define. This rule applies even if the employer has a policy against sexual harassment, the employee knows about that policy, and the employee never informs anyone in a position of authority about the supervisor's conduct. As a result, employer liability under Title VII is judged by different standards depending upon whether a sexually or racially hostile work environment is alleged. The standard of employer liability should be the same in both instances: An employer should be liable if, and only if, the plaintiff proves that the employer was negligent in permitting the supervisor's conduct to occur.

I

Years before sexual harassment was recognized as "discriminat[ion] . . . because of . . . sex," 42 U. S. C. §2000e–2(a)(1), the Courts of Appeals considered whether, and

when, a racially hostile work environment could violate Title VII.[1] In the landmark case *Rogers* v. *EEOC*, 454 F. 2d 234 (1971), cert. denied, 406 U. S. 957 (1972), the Court of Appeals for the Fifth Circuit held that the practice of racially segregating patients in a doctor's office could amount to discrimination in "'the terms, conditions, or privileges'" of employment, thereby violating Title VII. *Id.*, at 238 (quoting 42 U. S. C. §2000e–2(a)(1)). The principal opinion in the case concluded that employment discrimination was not limited to the "isolated and distinguishable events" of "hiring, firing, and promoting." *Id.*, at 238 (opinion of Goldberg, J.). Rather, Title VII could also be violated by a work environment "heavily polluted with discrimination," because of the deleterious effects of such an atmosphere on an employee's well-being. *Ibid.*

Accordingly, after *Rogers*, a plaintiff claiming employment discrimination based upon race could assert a claim for a racially hostile work environment, in addition to the classic claim of so-called "disparate treatment." A disparate treatment claim required a plaintiff to prove an adverse employment consequence and discriminatory intent by his employer. See 1 B. Lindemann & P. Grossman, Employment Discrimination Law 10–11 (3d ed. 1996). A hostile environment claim required the plaintiff to show that his work environment was so pervaded by racial harassment as to alter the terms and conditions of his employment. See, *e.g.*, *Snell* v. *Suffolk Cty.*, 782 F. 2d 1094, 1103 (CA2 1986) ("To establish a hostile atmosphere, . . . plaintiffs must prove more than a few isolated incidents of racial enmity"); *Johnson* v. *Bunny Bread Co.*, 646 F. 2d

---

[1] This sequence of events is not surprising, given that the primary goal of the Civil Rights Act of 1964 was to eradicate race discrimination and that the statute's ban on sex discrimination was added as an eleventh-hour amendment in an effort to kill the bill. See *Barnes* v. *Costle*, 561 F. 2d 983, 987 (CADC 1977).

1250, 1257 (CA8 1981) (no violation of Title VII from infrequent use of racial slurs). This is the same standard now used when determining whether sexual harassment renders a work environment hostile. See *Harris* v. *Forklift Systems, Inc.*, 510 U. S. 17, 21 (1993) (actionable sexual harassment occurs when the workplace is "*permeated* with discriminatory intimidation, ridicule, and insult") (emphasis added) (internal quotation marks and citation omitted).

In race discrimination cases, employer liability has turned on whether the plaintiff has alleged an adverse employment consequence, such as firing or demotion, or a hostile work environment. If a supervisor takes an adverse employment action because of race, causing the employee a tangible job detriment, the employer is vicariously liable for resulting damages. See *ante,* at 15. This is because such actions are company acts that can be performed only by the exercise of specific authority granted by the employer, and thus the supervisor acts as the employer. If, on the other hand, the employee alleges a racially hostile work environment, the employer is liable only for negligence: that is, only if the employer knew, or in the exercise of reasonable care should have known, about the harassment and failed to take remedial action. See, *e.g., Dennis* v. *Cty. of Fairfax,* 55 F. 3d 151, 153 (CA4 1995); *Davis* v. *Monsanto Chemical Co.,* 858 F. 2d 345, 349 (CA6 1988), cert. denied, 490 U. S. 1110 (1989). Liability has thus been imposed only if the employer is blameworthy in some way. See, *e.g., Davis* v. *Monsanto Chemical Co., supra,* at 349; *Snell* v. *Suffolk Cty., supra,* at 1104; *DeGrace* v. *Rumsfeld,* 614 F. 2d 796, 805 (CA1 1980).

This distinction applies with equal force in cases of sexual harassment.[2] When a supervisor inflicts an adverse

---

[2] The Courts of Appeals relied on racial harassment cases when analyzing early claims of discrimination based upon a supervisor's sexual harassment. For example, when the Court of Appeals for the

employment consequence upon an employee who has rebuffed his advances, the supervisor exercises the specific authority granted to him by his company. His acts, therefore, are the company's acts and are properly chargeable to it. See 123 F. 3d 490, 514 (1997) (Posner, C. J., dissenting); *ante,* at 17 ("Tangible employment actions fall within the special province of the supervisor. The supervisor has been empowered by the company as a distinct class of agent to make economic decisions affecting other employees under his or her control").

If a supervisor creates a hostile work environment, however, he does not act for the employer. As the Court concedes, a supervisor's creation of a hostile work environment is neither within the scope of his employment, nor part of his apparent authority. See *ante,* at 10–14. Indeed, a hostile work environment is antithetical to the interest of the employer. In such circumstances, an employer should be liable only if it has been negligent. That is, liability should attach only if the employer either knew, or in the exercise of reasonable care should have known, about the hostile work environment and failed to take remedial action.[3]

District Columbia Circuit held that a work environment poisoned by a supervisor's "sexually stereotyped insults and demeaning propositions" could itself violate Title VII, its principal authority was Judge Goldberg's opinion in *Rogers*. See *Bundy* v. *Jackson*, 641 F. 2d 934, 944 (CADC 1981); see also *Henson* v. *Dundee*, 682 F. 2d 897, 901 (CA11 1982). So too, this Court relied on *Rogers* when in *Meritor Savings Bank, FSB* v. *Vinson*, 477 U. S. 57 (1986), it recognized a cause of action under Title VII for sexual harassment. See *id.*, at 65–66.

[3] I agree with the Court that the doctrine of *quid pro quo* sexual harassment is irrelevant to the issue of an employer's vicarious liability. I do not, however, agree that the distinction between hostile work environment and *quid pro quo* sexual harassment is relevant "when there is a threshold question whether a plaintiff can prove discrimination in violation of Title VII." *Ante,* at 8. A supervisor's threat to take adverse action against an employee who refuses his sexual demands, if never

Sexual harassment is simply not something that employers can wholly prevent without taking extraordinary measures––constant video and audio surveillance, for example––that would revolutionize the workplace in a manner incompatible with a free society. See 123 F. 3d 490, 513 (Posner, C.J., dissenting). Indeed, such measures could not even detect incidents of harassment such as the comments Slowick allegedly made to respondent in a hotel bar. The most that employers can be charged with, therefore, is a duty to act reasonably under the circumstances. As one court recognized in addressing an early racial harassment claim:

> "It may not always be within an employer's power to guarantee an environment free from all bigotry. . . . [H]e can let it be known, however, that racial harassment will not be tolerated, and he can take all reasonable measures to enforce this policy. . . . But once an employer has in good faith taken those measures which are both feasible and reasonable under the circumstances to combat the offensive conduct we do not think he can be charged with discriminating on the basis of race." *De Grace* v. *Rumsfeld,* 614 F. 2d 796, 805 (1980).

Under a negligence standard, Burlington cannot be held liable for Slowick's conduct. Although respondent alleged a hostile work environment, she never contended that Burlington had been negligent in permitting the harassment to occur, and there is no question that Burlington

---

carried out, may create a hostile work environment, but that is all. Cases involving such threats, without more, should therefore be analyzed as hostile work environment cases only. If, on the other hand, the supervisor carries out his threat and causes the plaintiff a job detriment, the plaintiff may have a disparate treatment claim under Title VII. See E. Scalia, The Strange Career of *Quid Pro Quo* Sexual Harassment, 21 Harv. J. L. & Pub. Policy 307, 309–314 (1998).

acted reasonably under the circumstances. The company had a policy against sexual harassment, and respondent admitted that she was aware of the policy but nonetheless failed to tell anyone with authority over Slowick about his behavior. See, *ante,* at 3. Burlington therefore cannot be charged with knowledge of Slowick's alleged harassment or with a failure to exercise reasonable care in not knowing about it.

II

Rejecting a negligence standard, the Court instead imposes a rule of vicarious employer liability, subject to a vague affirmative defense, for the acts of supervisors who wield no delegated authority in creating a hostile work environment. This rule is a whole-cloth creation that draws no support from the legal principles on which the Court claims it is based. Compounding its error, the Court fails to explain how employers can rely upon the affirmative defense, thus ensuring a continuing reign of confusion in this important area of the law.

In justifying its holding, the Court refers to our comment in *Meritor Savings Bank, FSB* v. *Vinson,* 477 U. S. 57 (1986), that the lower courts should look to "agency principles" for guidance in determining the scope of employer liability, *id.*, at 72. The Court then interprets the term "agency principles" to mean the Restatement (Second) of Agency (1957). The Court finds two portions of the Restatement to be relevant: §219(2)(b), which provides that a master is liable for his servant's torts if the master is reckless or negligent, and §219(2)(d), which states that a master is liable for his servant's torts when the servant is "aided in accomplishing the tort by the existence of the agency relation." The Court appears to reason that a supervisor is "aided . . . by . . . the agency relation" in creating a hostile work environment because the supervisor's "power and authority invests his or her harassing conduct

with a particular threatening character." *Ante,* at 18.

Section 219(2)(d) of the Restatement provides no basis whatsoever for imposing vicarious liability for a supervisor's creation of a hostile work environment. Contrary to the Court's suggestions, the principle embodied in §219(2)(d) has nothing to do with a servant's "power and authority," nor with whether his actions appear "threatening." Rather, as demonstrated by the Restatement's illustrations, liability under §219(2)(d) depends upon the plaintiff's belief that the agent acted in the ordinary course of business or within the scope of his apparent authority.[4] In this day and age, no sexually harassed employee can reasonably believe that a harassing supervisor is conducting the official business of the company or acting on its behalf. Indeed, the Court admits as much in demonstrating why sexual harassment is not committed within the scope of a supervisor's employment and is not part of his apparent authority. See *ante,* at 10–14.

Thus although the Court implies that it has found guidance in both precedent and statute––see *ante,* at 9 ("The resulting federal rule, based on a body of case law developed over time, is statutory interpretation pursuant to congressional direction")––its holding is a product of willful policymaking, pure and simple. The only agency principle that justifies imposing employer liability in this context is the principle that a master will be liable for a servant's torts if the master was negligent or reckless in permitting them to occur; and as noted, under a negligence standard, Burlington cannot be held liable. See

---

[4] See Restatement §219, Comment *e*; §261, Comment *a* (principal liable for an agent's fraud if "the agent's position facilitates the consummation of the fraud, in that from the point of view of the third person the transaction seems regular on its face and the agent appears to be acting in the ordinary course of business confided to him"); §247, Illustrations (newspaper liable for a defamatory editorial published by editor for his own purposes).

supra, at 5–6.

The Court's decision is also in considerable tension with our holding in *Meritor* that employers are not strictly liable for a supervisor's sexual harassment. See *Meritor Savings Bank, FSB* v. *Vinson*, *supra*, at 72. Although the Court recognizes an affirmative defense––based solely on its divination of Title VII's *gestalt*, see *ante*, at 19––it provides shockingly little guidance about how employers can actually avoid vicarious liability. Instead, it issues only Delphic pronouncements and leaves the dirty work to the lower courts:

> "While proof that an employer had promulgated an anti-harassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing any unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense." *Ante*, at 20.

What these statements mean for district courts ruling on motions for summary judgment––the critical question for employers now subject to the vicarious liability rule––remains a mystery. Moreover, employers will be liable notwithstanding the affirmative defense, *even though they acted reasonably*, so long as the plaintiff in question fulfilled *her* duty of reasonable care to avoid harm. See *ibid.* In practice, therefore, employer liability very well may be the rule. But as the Court acknowledges, this is the one result that it is clear Congress did *not* intend. See *ante*, at 18; *Meritor Savings Bank, FSB* v. *Vinson*, 477 U. S., at 72.

The Court's holding does guarantee one result: There

will be more and more litigation to clarify applicable legal rules in an area in which both practitioners and the courts have long been begging for guidance. It thus truly boggles the mind that the Court can claim that its holding will effect "Congress' intention to promote conciliation rather than litigation in the Title VII context." *Ante,* at 19. All in all, today's decision is an ironic result for a case that generated eight separate opinions in the Court of Appeals on a fundamental question, and in which we granted certiorari "to assist in defining the relevant standards of employer liability." *Ante,* at 5.

* * *

Popular misconceptions notwithstanding, sexual harassment is not a freestanding federal tort, but a form of employment discrimination. As such, it should be treated no differently (and certainly no better) than the other forms of harassment that are illegal under Title VII. I would restore parallel treatment of employer liability for racial and sexual harassment and hold an employer liable for a hostile work environment only if the employer is truly at fault. I therefore respectfully dissent.