

7.10: BURLINGTON INDUSTRIES, INC. v. ELLERTH

The following U.S. Supreme Court case provides some guidance on the Court's interpretation of the law regarding sexual harassment in the workplace.

SUPREME COURT OF THE UNITED STATES

BURLINGTON INDUSTRIES, INC. v. ELLERTH

524 US 742 (1998)

(Case Syllabus edited by the Author)

Respondent Kimberly Ellerth quit her job after 15 months as a salesperson in one of petitioner Burlington Industries' many divisions, allegedly because she had been subjected to constant sexual harassment by one of her supervisors, Ted Slowik. Slowik was a mid-level manager who had authority to hire and promote employees, subject to higher approval, but was not considered a policy-maker. Against a background of repeated boorish and offensive remarks and gestures allegedly made by Slowik, Ellerth places particular emphasis on three incidents where Slowik's comments could be construed as threats to deny her tangible job benefits. Ellerth refused all of Slowik's advances, yet suffered no tangible retaliation and was, in fact, promoted once. Moreover, she never informed anyone in authority about Slowik's conduct, despite knowing Burlington had a policy against sexual harassment. In filing this lawsuit, Ellerth alleged Burlington engaged in sexual harassment and forced her constructive discharge, in violation of Title VII of the Civil Rights Act of 1964, 42 U. S. C. §2000e et seq. The District Court granted Burlington summary judgment. The Seventh Circuit en banc reversed in a decision that produced eight separate opinions and no consensus for a controlling rationale. Among other things, those opinions focused on whether Ellerth's claim could be categorized as one of quid pro quo harassment, and on whether the standard for an employer's liability on such a claim should be vicarious liability or negligence.

Held:

Under Title VII, an employee who refuses the unwelcome and threatening sexual advances of a supervisor, yet suffers no adverse, tangible job consequences, may recover against the employer without showing the employer is negligent or otherwise at fault for the supervisor's actions, but the employer may interpose an affirmative defense.

(a) The Court assumes an important premise yet to be established: a trier of fact could find in Slowik's remarks numerous threats to retaliate against Ellerth if she denied some sexual liberties. The threats, however, were not carried out. Cases based on carried-out threats are referred to often as "quid pro quo" cases, as distinct from bothersome attentions or sexual remarks sufficient to create a "hostile work environment." Those two terms do not appear in Title VII, which forbids only "discriminat[ion] against any individual with respect to his ... terms [or] conditions ... of employment, because of ... sex." § 2000e—2(a)(1). In *Meritor Savings Bank, FSB v. Vinson*, 477 U. S. 57, this Court distinguished between the two concepts, saying both are cognizable under Title VII, though a hostile environment claim requires harassment that is severe or pervasive. *Meritor* did not discuss the distinction for its bearing upon an employer's liability for discrimination, but held, with no further specifics, that agency principles controlled on this point. *Id.*, at 72. Nevertheless, in *Meritor*'s wake, Courts of Appeals held that, if the plaintiff established a quid pro quo claim, the employer was subject to vicarious liability. This rule encouraged Title VII plaintiffs to state their claims in quid pro quo terms, which in turn put expansive pressure on the definition. For example, the question presented here is phrased as whether Ellerth can state a quid pro quo claim, but the issue of real concern to the parties is whether Burlington has vicarious liability, rather than liability limited to its own negligence. This Court nonetheless believes the two terms are of limited utility. To the extent they illustrate the distinction between cases involving a carried-out threat and offensive conduct in general, they are relevant when there is a threshold question whether a plaintiff can prove discrimination. Hence, Ellerth's claim involves only unfulfilled threats, so it is a hostile work environment claim requiring a showing of severe or pervasive conduct. This Court accepts the District Court's finding that Ellerth made such a showing. When discrimination is thus proved, the factors discussed below, not the categories quid pro quo and hostile work environment, control on the issue of vicarious liability.

(b) In deciding whether an employer has vicarious liability in a case such as this, the Court turns to agency law principles, for Title VII defines the term "employer" to include "agents." §2000e(b). Given this express direction, the Court concludes a uniform and predictable standard must be established as a matter of federal law. The Court relies on the general common law of agency, rather than on the law of any particular State. *Community for Creative Non-Violence v. Reid*, 490 U. S. 730. The Restatement (Second) of

Agency (hereinafter Restatement) is a useful beginning point, although common-law principles may not be wholly transferable to Title VII. See *Meritor*, *supra*, at 72.

(c) A master is subject to liability for the torts of his servants committed while acting in the scope of their employment. Restatement § 219(1). Although such torts generally may be either negligent or intentional, sexual harassment under Title VII presupposes intentional conduct. An intentional tort is within the scope of employment when actuated, at least in part, by a purpose to serve the employer. *Id.*, §§ 228(1)(c), 230. Courts of Appeals have held, however, a supervisor acting out of gender-based animus or a desire to fulfill sexual urges may be actuated by personal motives unrelated and even antithetical to the employer's objectives. Thus, the general rule is that sexual harassment by a supervisor is not conduct within the scope of employment.

(d) However, scope of employment is not the only basis for employer liability under agency principles. An employer is subject to liability for the torts of its employees acting outside the scope of their employment when, *inter alia*, the employer itself was negligent or reckless, Restatement § 219(2)(b), or the employee purported to act or to speak on behalf of the employer and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation, *id.*, § 219(2)(d). An employer is negligent, and therefore subject to liability under § 219(2)(b), if it knew or should have known about sexual harassment and failed to stop it. Negligence sets a minimum standard for Title VII liability; but Ellerth seeks to invoke the more stringent standard of vicarious liability. Section 219(2)(d) makes an employer vicariously liable for sexual harassment by an employee who uses apparent authority (the apparent authority standard), or who was "aided in accomplishing the tort by the existence of the agency relation" (the aided in the agency relation standard).

(e) As a general rule, apparent authority is relevant where the agent purports to exercise a power which he or she does not have, as distinct from threatening to misuse actual power. Compare Restatement §§ 6 and 8. Because supervisory harassment cases involve misuse of actual power, not the false impression of its existence, apparent authority analysis is inappropriate. When a party seeks to impose vicarious liability based on an agent's misuse of delegated authority, the Restatement's aided in the agency relation rule provides the appropriate analysis.

(f) That rule requires the existence of something more than the employment relation itself because, in a sense, most workplace tortfeasors, whether supervisors or co-workers, are aided in accomplishing their tortious objective by the employment relation: Proximity and regular contact afford a captive pool of potential victims. Such an additional aid exists when a supervisor subjects a subordinate to a significant, tangible employment action, *i.e.*, a significant change in employment status, such as discharge, demotion, or undesirable reassignment. Every Federal Court of Appeals to have considered the question has correctly found vicarious liability in that circumstance. This Court imports the significant, tangible employment action concept for resolution of the vicarious liability issue considered here. An employer is therefore subject to vicarious liability for such actions. However, where, as here, there is no tangible employment action, it is not obvious the agency relationship aids in commission of the tort. Moreover, *Meritor* holds that agency principles constrain the imposition of employer liability for supervisor harassment. Limiting employer liability is also consistent with Title VII's purpose to the extent it would encourage the creation and use of anti-harassment policies and grievance procedures. Thus, in order to accommodate the agency principle of vicarious liability for harm caused by misuse of supervisory authority, as well as Title VII's equally basic policies of encouraging forethought by employers and saving action by objecting employees, the Court adopts, in this case and in *Faragher v. Boca Raton*, *post*, p. ___, the following holding: An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence, see Fed. Rule. Civ. Proc. 8(c). The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. While proof that an employer had promulgated an antiharassment policy with a 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. No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action.

(g) Given the Court's explanation that the labels *quid pro quo* and hostile work environment are not controlling for employer-liability purposes, Ellerth should have an adequate opportunity on remand to prove she has a claim which would result in vicarious liability. Although she has not alleged she suffered a tangible employment action at Slowik's hands, which would deprive

Burlington of the affirmative defense, this is not dispositive. In light of the Court's decision, Burlington is still subject to vicarious liability for Slowik's activity but should have an opportunity to assert and prove the affirmative defense.

123 F. 3d 490, affirmed.

Kennedy, J., delivered the opinion of the Court, in which Rehnquist, C. J., and Stevens, O'Connor, Souter, and Breyer, JJ. joined. Ginsburg, J., filed an opinion concurring in the judgment. Thomas, J., filed a dissenting opinion, in which Scalia, J. joined.

NON-EMPLOYMENT DISCRIMINATION: In addition to the employment situations, anti-discrimination laws also apply to discrimination in credit, housing, and places of public accommodation.

CREDIT: It is unlawful for a lender to deny credit, because of age (other than to minors), or sex or marital status, in making personal or mortgage loans and/or in dealing with credit cards matters under both the federal Equal Credit Opportunity Act, 15 USC Sections 28-39, as well as NYS' HRL Section 296-a.

HOUSING: The federal Fair Housing Amendments Act of 1988, 11 USC Sections 357-358, makes it unlawful to discriminate in housing on the basis of race, color, religion, national origin, sex, disability and families with children. New York's HRL Section 296 subd 5 forbids housing discrimination on the basis of race, color, religion, national origin, sex, disability, families with children, age, and marital status.

It is unlawful to deny housing to a legally blind, severely handicapped, or mute person, or to evict such a person, because of a dog or other handicapped aiding pet, unless a public health hazard develops.

"Red lining," is also an unlawful practice. This occurs when banks and/or other financial institutions refuse to make loans to prospective home buyers in certain neighborhoods.

However, it is lawful in NYS to refuse to rent half of a two-family house, or even to rent a room in a house, where the landlord/owner lives in the house, based on age, sex, religion, disability, marital status, or the presence of children. Race is not included as a basis for such denial.

PUBLIC ACCOMMODATIONS: Theaters, restaurants, hotels, resorts, and public modes of transportation are considered public accommodations. It is unlawful to discriminate against patrons at such places, on the basis of ages, marital status, sex, race, color, national origin, disability, creed, and/or religion.

However, claims of religious liberty may override public accommodation laws as the following U.S. Supreme Court decision illustrates.

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