

January 1987

Meritor Savings Bank v. Vinson: Title VII Liability for Sexual Harassment

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Recommended Citation

Suzanne Egan, *Meritor Savings Bank v. Vinson: Title VII Liability for Sexual Harassment*, 17 Golden Gate U. L. Rev. (1987).
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NOTE

**MERITOR SAVINGS BANK V. VINSON:
TITLE VII LIABILITY FOR SEXUAL
HARASSMENT**

I. INTRODUCTION

In *Meritor Savings Bank v. Vinson*,¹ the United States Supreme Court addressed the issue of sexual harassment for the first time.² The Court held that when sexual harassment creates a hostile or offensive working environment, it is actionable under Title VII of the Civil Rights Act of 1964.³ The Court interpreted Title VII as demonstrating a congressional intent to preserve the economic, psychological and emotional benefits of employment.⁴ This interpretation has been advanced by the Equal Employment Opportunity Commission (EEOC)⁵ and in lower court opinions.⁶ The Supreme Court rejected the District of Columbia Circuit Court of Appeals ruling that an employer is strictly liable for hostile environment sex discrimination regardless of the circumstances of the case.⁷ Instead, the Court stated that courts

1. _____, U.S. _____, 106 S.Ct. 2399 (1986).

2. *Id.* at 2409.

3. 42 U.S.C. § 2000e-2(a)(1)(1976). Title VII states (in relevant part): "It is an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, *terms, conditions or privileges* of employment because of sex . . ." (emphasis added), *Id.*

4. *Vinson*, 106 S.Ct. at 2405.

5. Congress established the EEOC to interpret and enforce Title VII in 1964; *See generally* EEOC Guidelines on Sexual Harassment, 29 C.F.R. § 1604.11 (1985).

6. *See, e.g.*, *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981); *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982); *Katz v. Dole*, 709 F.2d 251 (4th Cir. 1983); *Horn v. Duke Homes*, 755 F.2d 599 (7th Cir. 1985); *Jones v. Flagship Intern.*, 793 F.2d 714 (5th Cir. 1986); *Moylan v. Maries County*, 792 F.2d 746 (8th Cir. 1986); *Tomkins v. Public Service Electric & Gas Co.*, 568 F.2d 1044 (3rd Cir. 1977); *Jeppsen v. Wunnicke*, 611 F.Supp. 78 (D. Alaska 1985).

7. *Vinson v. Taylor*, 753 F.2d 141 (D.C. Cir. 1985).

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must look to agency principles for guidance in determining employer liability,⁸ and must examine the totality of the circumstances.⁹ Notice or absence of notice to the employer of the harassment will not be dispositive of the liability issue.¹⁰

II. BACKGROUND

A. TITLE VII

In 1971, in *Griggs v. Duke Power Company*,¹¹ the Supreme Court stated that, in enacting Title VII of the Civil Rights Act of 1964, Congress intended “[to remove all] artificial, arbitrary, and unnecessary barriers to employment specifically, when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification(sic).”¹² The Court has subsequently construed the statute to prohibit discrimination which acts to deny an individual employment or creates an offensive work environment.¹³

The legislative history accompanying the 1972 amendment to Title VII reveals a heightened awareness of the problem of sex discrimination.¹⁴ The Report of the House of Representatives states: “[d]iscrimination against women is no less serious

8. *Vinson*, 106 S.Ct. at 2408. Title VII defines “employer” as any employer or agent of an employer, 42 U.S.C. § 2000e(b) (1976). See generally Vermuluen, *Employer Liability Under Title VII for Sexual Harassment by Supervisory Employees*, 10 CAP. U. L. REV. 499 (1981); Comment, *New EEOC Guidelines on Discrimination Because of Sex: Employer Liability For Sexual Harassment Under Title VII*, 61 B. U. L. REV. 535 (1981); Comment, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV. L. R. 1449 (1984).

9. *Vinson*, ___ U.S. ___, 106 S.Ct. at 2404.

10. *Id.*

11. 401 U.S. 424 (1971).

12. *Id.* at 431. An impermissible classification is when race, national origin or sex is used as a criteria for employment decisions.

13. See generally, *McDonnell Douglass Corp. v. Green*, 411 U.S. 792,801 (1973) (“In the implementation of [employment decisions], it is abundantly clear that Title VII tolerates no racial discrimination, subtle or otherwise.”); *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1971) (“In forbidding employer’s to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sexual stereotypes. [Title VII] subjects to scrutiny and eliminates such irrational impediments to job opportunities and enjoyment which have plagued women in the past.”).

14. Congress included sex in Title VII in an attempt to defeat the bill; See generally Kanowitz, *Sex Based Discrimination in American Law III: Title VII of the 1964 Civil Rights Act and the Equal Pay Act of 1963*, 20 HASTINGS L. J. 305, 310-13 (1968-69).

than other forms of prohibited employment practices and is to be accorded the same degree of social concern given to any type of unlawful discrimination."¹⁵ However, as late as 1975, courts dismissed sexual harassment claims brought under Title VII as isolated employment practices undeserving of judicial recognition.¹⁶

In response to the judicial reluctance to recognize sexual harassment claims under Title VII, in 1980, the EEOC issued guidelines to aid courts confronted with sexual harassment complaints.¹⁷ Pursuant to the guidelines, unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature that occur in the workplace constitute sexual harassment.¹⁸ The EEOC recognize two types of sexual harassment claims: 1) a quid pro quo claim, where submission to or rejection of sexual advances is made a condition of employment or is used as a basis for employment decisions;¹⁹ and 2) a hostile environment claim, in which sexual harassment unreasonably interferes with an individual's work performance or creates an intimidating, hostile or offensive work environment.²⁰

The guidelines also set standards for employer liability.²¹ Under the guidelines, an employer is responsible for the acts of its supervisory employees or agents regardless of whether the

15. H.R. Rep. No. 92-238, 92d Cong., (1971), 1st Sess.2, *reprinted in* 1972 U.S. Code, Cong. & Ad. News 2137, 2141.

16. *See, e.g.,* Corne v. Bausch & Lomb, Inc., 390 F.Supp. 161 (D. Ariz. 1975)(Supervisor's sexual harassment of subordinate employee viewed by court as merely satisfying a personal urge); Tomkins v. Public Service Electric & Gas Co., 422 F.Supp. 553 (D. N.J. 1976) (*Sexual harassment not sex discrimination under Title VII*), *rev'd* 568 F.2d 1044 (3d Cir. 1977).

17. The preamble to the EEOC's intermin guidelines states: "[s]exual harassment continues to be especially widespread. Because of the continued prevalence of this unlawful practice, the Commission has determined that there is a need for guidelines in this area of Title VII law." 45 Fed. Reg. 25,024 (1980) (to be codified at 29 C.F.R. § 1604) A Redbook magazine survey on sexual harassment found that 88% of the 9,000 female respondents reported they experience sexual harassment at the workplace. *See* SUBCOMM. ON INVESTIGATIONS OF THE HOUSE OF REP. COMM. ON POST OFFICE AND CIVIL SERVICE, 96TH CONG.2D SESS., REPORT ON SEXUAL HARASSMENT IN THE FEDERAL GOVERNMENT 153 (Comm. Print 1980).

18. 29 C.F.R. § 1604.11(a) (1985).

19. *Id.* at (a)(1), (a)(2).

20. *Id.* at (a)(3).

21. *Id.* at (c).

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acts were authorized or whether the employer knew or should have known of the activity.²² The EEOC guidelines also encompass sexual harassment perpetrated by co-employees and non-employees. In these instances, employers are liable only if they were aware of the harassment and took no prompt remedial action.²³

B. CASE LAW

1. *The Development of Discriminatory Work Environment Claim Under Title VII*

In 1971, the Fifth Circuit Court of Appeals in *Rogers v. EEOC*²⁴ was the first court to recognize that Title VII protects an individual from an emotionally or psychologically offensive work environment.²⁵ The court held that an hispanic worker established a Title VII violation by alleging that her employer's segregation of his ethnic clients created a working environment in which she was discriminated against.²⁶ The *Rogers* court explained that employment discrimination was developing into a subtle and sophisticated practice, affecting not only the economic benefits of work but also an employee's relationship with her work environment and other intangible benefits.²⁷ The *Rogers* court concluded that "[the] psychological as well as economic fringes are statutorily entitled to protection"²⁸ Therefore, employees must be protected against an employer's ability to create working environments "[s]o heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers"²⁹ Courts developed the principle of hostile or offensive environment discrimination in the context of race, religion and national origin discrimination.³⁰ Several cases have held that repeated deroga-

22. *Id.*

23. *Id.* at (d).

24. 454 F.2d 234 (5th Cir. 1971).

25. *Id.*

26. *Id.* at 238.

27. *Id.*

28. *Id.*

29. *Id.*

30. *See, e.g.,* *Young v. Southwestern Savings and Loan Assoc.*, 509 F.2d 140 (5th Cir. 1975)(Compulsory attendance at religious meeting constitutes a discriminatory work environment); *Gary v. Greyhound Lines, East*, 545 F.2d 169 (D.C. Cir. 1976)(Title VII grants an employee the right to work in an environment free of racial intimidation);

tory comments, racial slurs and religious coercion constitutes a hostile environment violative of Title VII.³¹ However, isolated racial slurs or epithets do not violate Title VII because they are not sufficiently pervasive so as to affect a term or condition of employment.³²

2. *Sexual Harrassment Hostile Environment*

The District of Columbia Circuit Court of Appeals in 1981, was the first court to hold that pervasive sexual harassment in the workplace may constitute a claim of hostile environment sex discrimination under Title VII.³³ In *Bundy v. Jackson*,³⁴ the District of Columbia Court of Appeal found that the plaintiff was entitled to relief under Title VII because she had worked in an environment where unsolicited sexual propositions and sexually demeaning comments were the standard operating procedure.³⁵ The court stated:

The relevance of these 'discriminatory environment' cases to sexual harassment is beyond serious dispute . . . Racial slurs, though intentional and directed at individuals, may still be just verbal insults, yet they too may create Title VII liability. How then can sexual harassment, which injects the most demeaning sexual stereotypes into the general work environment and which always represents an intentional assault on an individual's innermost privacy not be illegal?³⁶

The court held that sexual harassment constitutes illegal sex discrimination regardless of whether it results in a loss of job

Carridi v. Kansas City Chief's Football Club Inc., 568 F.2d 87 (8th Cir. 1977).

31. *Erebia v. Chrysler Plastics Prod. Corp.*, 772 F.2d 1250 (6th Cir. 1985)(Subordinates repeatedly subjected supervisor to racial epithets; managements failure to take action violated Title VII); *Snell v. Suffolk County*, 611 F.Supp. 521 (E.D. N.Y. 1985)(repeated episodes of offensive and humiliating conduct violates Title VII); *Bailey v. Binyon*, 583 F.Supp. 923 (N.D. Ill. 1984) (frequent use of derogatory racial names violates Title VII); *Weiss v. United States*, 595 F.Supp. 1050 (E.D. Va. 1984)(Repeated use of religious slurs in front of peers constitutes a hostile environment).

32. See *Rogers*, 454 F.2d at 238; *Carridi*, 568 F.2d at 87; *Gary*, 545 F.2d at 196; See generally *Larson & Larson*, I Employment Discrimination § 84.10 (1986).

33. *Bundy v. Jackson*, 641 F.2d 934 at 944 (D.C. Cir. 1981).

34. *Id.*

35. *Id.* at 939.

36. *Id.* at 935.

benefits.³⁷

The Eleventh Circuit further defined discriminatory work environment sexual harassment claims in *Henson v. City of Dundee*³⁸ in 1982. The plaintiff in *Henson* complained of three types of sexual harassment.³⁹ First, she claimed her supervisor had created a discriminatory work environment by repeatedly subjecting her and a co-worker to demeaning sexual inquiries, vulgarities and unwelcome sexual advances.⁴⁰ Second, Henson claimed she was constructively discharged due to the sexual harassment.⁴¹ Finally, she complained she was denied a promotion because she rejected her supervisor's sexual advances.⁴² In essence, Henson alleged a hostile environment claim and a quid pro quo claim.⁴³

The court distinguished the quid pro quo harassment claim from the hostile environment claim.⁴⁴ The court noted that in making promotion decisions the supervisor is acting within the scope of his actual or apparent authority.⁴⁵ Therefore, when a supervisor demands sexual favors as a quid pro quo to a promotion, the supervisor's conduct can be imputed to the employer.⁴⁶ The court held that "[a]n employer is strictly liable for the actions of its supervisors, that amount to sexual discrimination or sexual harassment resulting in a tangible job detriment to the subordinate employee."⁴⁷ The court rejected the notion that an

37. *Id.* at 948. The court added that there is no need for a plaintiff alleging sexual harassment to prove that she resisted the harassment. The court explained that if a woman is required to show that she resisted the harassment, she would be faced with:

[a] cruel trilemma, she can endure the harassment. She can attempt to oppose it with little hope of success, either legally or practically but with every prospect of making the job even less tolerable for her. Or she can leave her job, with little hope of legal relief and the likely prospect of another job where she will face harassment anew.

Id. at 946.

38. 682 F.2d 897 (11th Cir. 1982).

39. *Id.* at 899.

40. *Id.*

41. *Id.* at 900-01

42. *Id.* at 900.

43. *Id.*

44. *Id.* at 910.

45. *Id.*

46. *Id.*

47. *Id.* at 910. The court set forth plaintiff's prima facie case for a quid pro quo claim:

employer can escape liability by taking remedial action to stop the harassment.⁴⁸

In distinguishing a hostile environment claim from a quid pro quo claim, the court stated that when a supervisor creates a hostile or offensive work environment he is acting outside the scope of his actual or apparent authority.⁴⁹ The court explained that a supervisor's ability to create a discriminatory work environment is not enhanced by his supervisory position.⁵⁰ On the contrary, the supervisor harasses and insults a subordinate employee for his own reasons.⁵¹ The harassment can not be imputed to the employer unless the plaintiff demonstrates that the employer knew or should have known of the harassment and failed to take prompt remedial action.⁵² Notice to the employer can be demonstrated by showing that the plaintiff complained to higher management of the harassment or by showing that the harassment was so pervasive that constructive knowledge of it can be imputed to the employer.⁵³

1) *the employee belongs to a protected group.* 2) *the employee was subjected to unwelcome sexual harassment.* 3) *The harassment complained of was based upon sex.* 4) *The employee's reaction to harassment complained of affected tangible aspects of the employee's compensation, terms, conditions or privileges of employment.* The acceptance or rejection of the harassment by an employee must be an express or implied condition to the receipt of a job benefit or the cause of a tangible job detriment in order to create liability. 5) *Respondeat superior:* The employer is strictly liable for sexual harassment by supervisors that cause a tangible job detriment.

Id. at 908 (emphasis added).

48. *Id.* at 910 n.19.

49. *Id.* at 910.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* The court also set forth a prima facie case for a hostile environment claim:

1) *the employee belongs to a protected group . . .* 2) *the employee is subjected to unwelcome sexual harassment: . . .* [The] conduct must be unwelcome in the sense that the employee did not solicit or incite it, and in the sense that the employee regarded the conduct as undesirable or offensive . . . 3) *The harassment complained of was based upon sex . . .* [T]he plaintiff must show that but for the fact of her sex, she would not have been subjected to the harassment . . . 4) *The harassment complained of affected a 'term, condition or privilege' of employment: . . .* [the harassment] must be sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment.

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In 1983, the Fourth Circuit Court of Appeals in *Katz v. Dole*⁵⁴ created another standard for determining employer liability.⁵⁵ That court distinguished a hostile environment claim from a disparate treatment claim, in which the ultimate issue is whether the plaintiff can prove intent to discriminate on the part of the employer.⁵⁶ The disparate treatment theory is used in Title VII litigation to prove that an employer intended to discriminate against an individual on the basis of race, national origin or sex.⁵⁷ The *Katz* court stated that in a hostile environment case, there is no need to prove intent "[because] the sexual advance or insult almost always will represent 'an intentional assault on an individual's innermost privacy.'"⁵⁸

The court set forth a two step analysis for discriminatory work environment claims.⁵⁹ Plaintiff must first show that the harassment took place, then she must demonstrate that the employer knew or should have known of the abuse and failed to take effective action to put it to an end.⁶⁰ The plaintiff must show that the employer acquiesced in or approved of the harassment so that knowledge of the harassment can be imputed to the employer.⁶¹ It is then incumbent upon the employer to refute such evidence.⁶²

In order to rebut the plaintiff's prima facie case the employer must establish that he took action reasonably calculated to end the harassment.⁶³ The proof must be more than a mere showing that the employer had a blanket policy against sexual

Whether the sexual harassment at the work place is sufficiently severe and persistent to affect seriously the psychological well being of the employee is a question to be determined in light of the totality of the circumstances. 5) *Respondent Superior* . . . [s]he must show that the employer knew or should have known of the harassment and failed to take prompt remedial action.

Id. at 902-05.

54. 709 F.2d 251 (4th Cir. 1983).

55. *Id.* at 253.

56. *Id.* at 255.

57. See generally *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

58. *Katz*, 709 F.2d at 255, (quoting *Bundy v. Jackson*, 641 F.2d at 945).

59. *Katz*, 709 F.2d at 255-56.

60. *Id.* at 256.

61. *Id.*

62. *Id.*

63. *Id.*

harassment.⁶⁴ The *Katz* court held that the plaintiff had satisfied her burden of proof by establishing that nontrivial sexual harassment took place.⁶⁵ Not only had she proven that sexual harassment was pervasive enough to impute knowledge to the employer, but she had also specifically complained to her supervisor.⁶⁶

Some jurisdictions have held that the employer is automatically liable when its supervisory employees sexually harass subordinate employees.⁶⁷ In 1979, the Ninth Circuit in *Miller v. Bank of America*,⁶⁸ held that an employer is absolutely liable regardless of the form of harassment.⁶⁹ The court analogized an employer's liability under Title VII to other torts committed by employees, whether intentional or negligent.⁷⁰ It stated that the doctrine of respondeat superior is routinely applied to the law of torts and Title VII violations.⁷¹ In the Ninth Circuit, Title VII violations are essentially torts for which an employer will be held liable if perpetrated by a supervisor of the wronged employee.⁷² Other courts rely upon the EEOC guidelines to reach the same result.⁷³

Consistently, courts agree that in order to state a cognizable claim for hostile environment sexual harassment, the plaintiff must show plaintiff must show by examining circumstances, that the harassment by examining the totality of the circumstances, the harassment was sufficiently pervasive to effect a term or condition of employment,⁷⁴ this differs from a quid pro quo claim in that the plaintiff does not have to show

64. *Id.*

65. *Id.* Nontrivial harassment is harassment which is so pervasive that it effects a term or condition of work, *See supra*, note 30, and accompanying text.

66. *Katz*, 709 F.2d at 256.

67. *See, e.g.*, *Horn v. Duke Homes*, 755 F.2d 599 (7th Cir. 1982)(EEOC guidelines establish liability regardless of notice to the employer); *Jeppsen v. Wunnicke*, 611 F.Supp. 78 (D. Alaska 1985)(relying on the EEOC guidelines and *Vinson v. Taylor*, 753 F.2d 141) (D.C. Cir. 1985); *Mitchell v. OsAir, Inc.*, 629 F.Supp. 636 (N.D. Ohio 1986).

68. 600 F.2d 211 (9th Cir. 1979).

69. *Id.* at 214.

70. *Id.* at 213.

71. *Id.*

72. *Id.*

73. *See supra* note 67, and note 16, and accompanying text.

74. *See, e.g.*, *Katz*, 709 F.2d at 251; *Bundy*, 641 F.2d at 934; *Henson*, 682 F.2d at 847. *See generally*, 78 A.L.R. Fed. 252 (1986); 46 A.L.R. Fed 198 (1980).

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that submission to sexual advances was a condition to a tangible job benefit.⁷⁵ Among the thirteen circuits, there were three different standards of employer liability. Some Circuits had established that knowledge would be imputed to the employer if the plaintiff could show that she either complained to higher management or that the harassment was sufficiently pervasive.⁷⁶ The Fourth and Third Circuit held that an employer would be liable if the plaintiff could show that the employer manifested an approval or acquiesced to the harassment.⁷⁷ Finally, the Ninth Circuit and the Seventh Circuit have held that strict liability would be imposed regardless of the employer's knowledge of the harassment.⁷⁸

III. FACTS OF THE CASE

Meritor Savings Bank employed Mechelle Vinson from 1974 to 1978.⁷⁹ She was hired as a teller trainee.⁸⁰ During the course of her employment, the Branch Manager and Vice President, Sidney Taylor, made sexual advances toward her.⁸¹ Taylor fondled her in front of customers and other employees, exposed himself to her and followed her into the restroom.⁸² Vinson agreed to have sexual relations with Taylor out of fear of losing her job.⁸³ They engaged in sexual intercourse 40-50 times and on several occasions Taylor violently raped Vinson.⁸⁴ It was not until Vinson became involved in a steady relationship that she

75. See *supra*, note 47 an accompanying text.

76. See, e.g., *Henson*, 682 F.2d at 897; *Jones v. Flagship*, 793 F.2d 714 (5th Cir. 1986)(a hostile environment claim requires a higher burden of proof than a quid pro quo claim); *Moylan v. Maries County*, 792 F.2d 746 (8th Cir. 1986)(Plaintiff must show that the employer knew or should have known of the harassment but failed to take remedial action); *Joyner v. AAA Cooper Transportation*, 597 F.Supp. 637 (M.D. Alabama 1983)(the court relies on *Henson's* prima facie case).

77. See, e.g., *Katz*, 709 F.2d 251 (4th Cir. 1983); *Tomkins v. Public Service Electric & Gas Co.*, 568 F.2d 1044 (3rd Cir. 1977); *Craig v. Y & Y Snacks, Inc.*, 721 F.2d 77 (3rd Cir. 1983); *Robson v. Eva's Supermarket*, 538 F.Supp. 857 (D.C. Ohio 1982); *Stringer v. Pennsylvania Dep't. of Community Affairs*, 446 F.Supp 704 (M.D. Pa. 1978); *Harrison v. Reed Rubber Co.*, 603 F.Supp. 145 (E.D. Mo. 1985).

78. See *supra*, note 67 and accompanying text.

79. *Vinson v. Taylor*, 22 Empl. Prac. Dec. ¶ 30708 (CCH 1980).

80. *Id.* at 14690.

81. *Id.*

82. *Id.*

83. *Id.* at 14687.

84. *Id.*

ceased submitting to Taylor's advances.⁸⁵ Ultimately, the Bank fired Vinson for excessive use of sick leave.⁸⁶

Vinson filed an action against the Bank and Taylor in 1979, alleging sexual harassment sex discrimination.⁸⁷ The District of Columbia district court found that Vinson's promotions from teller-trainee to assistant branch manager were based solely on merit.⁸⁸ The court held that because Vinson had not been required to grant Taylor or any other Bank employees sexual favors as a condition of employment,⁸⁹ or to obtain her promotions,⁹⁰ she had not stated a cognizable sexual harassment claim.⁹¹ The court concluded that if Vinson and Taylor were involved in a relationship, it was voluntary.⁹²

The District of Columbia Court of Appeals reversed and remanded on the basis that the district court did not afford Vinson the full scope of protection she was entitled.⁹³ It stated that the district court erred in not considering whether Vinson was entitled to Title VII relief under a hostile environment claim rather than focusing on whether Vinson was denied or awarded a tangible job benefit as a result of submitting to Taylor's sexual advances.⁹⁴ The court of appeals stated that Vinson's grievance clearly warranted an inquiry into whether or not she was "[s]ubjected to 'sexually stereotyped insults' or 'demeaning propositions' that illegally poisoned the 'psychological and emotional work environment'".⁹⁵

The court of appeals further stated that voluntariness was not an issue because the statute refers to whether the advances

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*, See generally, Catherine MacKinnon, SEXUAL HARASSMENT OF WORKING WOMEN at 46-47 (1979), (MacKinnon argues that one can not actually determine if promotions are based upon merit or whether they are based upon submission to the advances. Since the woman submitted to the advances, the court can not determine what would have happened if she had not submitted.); See also Brief for Respondent, Meritor Savings Bank, FSB v. Vinson, at 29.

90. *Vinson*, 22 Empl. Prac. Dec. ¶ 30708 at 14687.

91. *Id.* at 14,686.

92. *Id.*

93. *Id.* at 14,687

94. *Vinson v. Taylor*, 753 F.2d 141, 145 (D.C. Cir. 1985).

95. *Id.*

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were *unwelcome*.⁹⁶ It also found that the district court erred in not allowing Vinson to present evidence that Taylor harassed other female employees.⁹⁷ The court added that evidence of Vinson's dress and sexual fantasies had no place in the litigation.⁹⁸ The court concluded that:

We have no difficulty in concluding that an employer may be held accountable for discrimination accomplished through sexual harassment by any supervisory employee with authority to hire, promote or to fire . . . The mere existence -or even the appearance -of a significant degree of influence in vital job decisions gives any supervisor the opportunity to impose upon employees. That opportunity is not dependent solely upon the supervisor's authority to make personnel decisions; the ability to direct employers in their work, to evaluate their performances and to recommend personnel actions carries attendant power to coerce, intimidate and harass. For this reason, we think employers must answer for sexual harassment of any subordinate by any supervising superior.⁹⁹

The United States Supreme Court granted certiorari.¹⁰⁰

IV. THE SUPREME COURT'S REASONING

The Supreme Court first addressed the issue of whether sexual harassment hostile environment claims are actionable under Title VII.¹⁰¹ The Bank argued that in enacting Title VII, Congress intended only to protect the tangible or economic benefits of the workplace, not the psychological and emotional aspects.¹⁰² The Court rejected this argument, finding nothing in the language of Title VII limiting it to economic

96. *Id.* at 144.

97. *Id.* at 146(emphasis added).

98. *Id.*

99. *Id.* at 146n.36.

100. *Id.* at 149-50.

101. 474 U.S. ____, 106 S.Ct. 57, 88 L.Ed.2d 46 (1985). The D.C. Circuit denied the Bank's petition for a rehearing *en banc*. 760 F.2d 1330 (D.C. Cir. 1985)(Bork, J., Scalia, J., Starr, J., dissenting).

102. Meritor Savings Bank, FSB v. Vinson, __ U.S. ____, 106 S.Ct. 2399, 2405 (1986).

discrimination.¹⁰³

In holding that sexual harassment may violate Title VII, the Supreme Court relied on both the EEOC guidelines and *Rogers v. EEOC*.¹⁰⁴ The Court noted that although the guidelines are not controlling, they are entitled to great deference because they represent the administrative interpretation of Title VII.¹⁰⁵ The Court explained that the guidelines define sexual harassment to include “[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature.”¹⁰⁶ The Court found that the EEOC had included hostile environment sexual harassment in its guidelines and in doing so relied upon the developing body of Title VII law.¹⁰⁷

The Court also discussed the Fifth Circuit’s holding in *Rogers v. EEOC*,¹⁰⁸ that a plaintiff could state a cognizable Title VII claim by alleging that her employer created a discriminatory work environment by treating his clients in a discriminatory manner, and therefore violated Title VII.¹⁰⁹ The Supreme Court held that there is no legitimate reason not to apply the principle of hostile environment discrimination to sexual harassment cases, provided that the plaintiff establish a violation of Title VII by showing that discrimination based on sex created a hostile or offensive work environment.¹¹⁰

The Supreme Court added that in order for sexual harassment to be actionable, it must be sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment.¹¹¹ The Court next addressed the issue of whether, under the circumstances, Vinson had been a victim of sexual harassment. It found that the district court

103. *Id.* at 2404. The Bank argued that the EEOC guidelines went a step further than Congress intended and therefore the guidelines should be ignored. *Id.* at 2405, Brief for Petitioner at 37.

104. *Id.* (Courts rely on the broad language of Title VII to encompass all forms of discrimination); *See supra*, note 13, and accompanying text.

105. *Id.* at 2405.

106. *Id.*

107. *Id.* (citing 29 C.F.R. § 1604.11(a)(1985)).

108. *Id.*

109. 454 F.2d 234 (5th Cir. 1971).

110. *Vinson*, 106 S.Ct. at 2405 (citing *Rogers*, 454 F.2d at 238).

111. *Id.* at 2405-06. Further, the harassment must affect a “term, condition, or privilege” of employment. *Id.* at 2406.

erred in holding that she was not.¹¹² The Court stated that the district court erred by making its determination without considering the hostile environment sexual harassment theory.¹¹³

The Court then discussed the district court's finding that Vinson's and Taylor's relationship was voluntary.¹¹⁴ The Court explained that the key issue in a hostile environment case is not whether the sexual advances were voluntary but whether the advances were *unwelcome*.¹¹⁵ The Court stated

[t]he fact that sex-related conduct was "voluntary," in the sense that the complainant was forced to participate against her will, is not a defense to a sexual harassment suit brought under Title VII The correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary.¹¹⁶

In remanding the case for rehearing, the Court issued several evidentiary rulings. The Court observed that the EEOC guidelines require courts to examine the "totality of the circumstances" and to "look at the record as a whole"¹¹⁷ to determine whether a valid claim of sexual harassment exists.¹¹⁸ Evidence of Vinson's dress and sexual fantasies is admissible on the issue of whether the sexual advances were welcome or unwelcome.¹¹⁹ The trial court always has discretion to exclude such evidence if its probative value is outweighed by its prejudicial effect.¹²⁰ However, the court stated "[w]hile the district court must carefully

112. *Id.* at 2405.

113. *Id.*, See e.g., *Rogers*, 454 F.2d at 238.

114. *Vinson*, 106 S.Ct. at 2405.

115. *Id.*

116. *Id.* at 2407(emphasis added). This is in accordance with the EEOC guidelines which define sexual harassment as *unwelcome* sexual advances. See 29 C.F.R. § 1604.11(a)(1985).

117. *Id.* at 2406.

118. *Id.* (The EEOC guidelines state: "In determining whether the alleged conduct constitutes sexual harassment, it is necessary to look at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case by case basis.") 29 C.F.R. § 1604.11(b).

119. *Id.*

120. *Id.* at 2407.

weigh the applicable considerations in deciding whether to admit evidence of this kind, there is no per se rule against its admissibility."¹²¹

The final issue addressed by the Court was employer liability.¹²² The plaintiff advocated that the Court affirm the Court of Appeals' holding imposing strict liability on an employer.¹²³ The EEOC filed an amicus brief urging that employers should only be held liable in three situations: 1) when the employer has actual knowledge of the harassment; 2) when the employee files a complaint with an appropriate agency; or 3) when there are no available means for the employee to complain to management officials.¹²⁴ The Court rejected the EEOC's proposed rule.¹²⁵ Instead, it agreed with the plaintiff that the proposed rule conflicted with the EEOC's own guidelines which hold employers liable regardless of notice and by examining the circumstances as a whole.¹²⁶

The Court refused to issue a definitive rule on employer liability, but stated that agency principles should be applied in aiding the determination of employer liability.¹²⁷ It stated that although "[c]ommon law principles may not be transferrable in all their particulars to Title VII, Congress' decision to define

121. *Id.*; See also FED. R. EVID. 403; Cleary, *McCORMICK ON EVIDENCE*, 544-48 (3d ed. 1984).

122. *Id.*; But see, Krieger & Fox, *Evidentiary Issues in Sexual Harassment Litigation*, *BERKELEY WOMEN'S L.J.* 115 (1986)(arguing that evidence of plaintiff's past sexual behavior should be inadmissible).

123. *Id.* at 2408.

124. *Id.*; Vinson argued that notice to Taylor, as Vinson's direct supervisor, was notice to the bank. The Bank argued that a hostile environment sexual harassment claim should not be actionable under Title VII, and in the alternative, if it is actionable under Title VII the plaintiff should be required to prove notice to the employer, and that notice to the perpetrating supervisor should not be considered notice to the employer. Brief of Petitioner, *Meritor Savings Bank, FSB V. Vinson*, at 34-35.

125. *Id.*; The Attorney General and the EEOC argued that a sexual harassment hostile environment claim is different from a hostile environment based on race, national origin or religion because racial slurs are presumptively unwelcome and sexual advances can be denigrating or complimentary. Therefore to hold an employer strictly liable for sexual harassment would require employers to intrude upon their employees privacy. Brief for the United States and the Equal Employment Opportunity Commission at 12, 30. Vinson effectively countered this argument by pointing out that sexual relations between employees are not at issue, but sexual abuse, which is always inherently offensive, is at issue. Brief for the Respondent at 18.

126. *Vinson* 106 S.Ct. at 2408.

127. *Id.*

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'employer' to include any 'agent' of an employer . . . surely . . ."¹²⁸ demonstrates an intent to limit employer liability under Title VII.¹²⁹ Notwithstanding these apparent limitations on employer liability, notice or absence of notice does not necessarily determine liability.¹³⁰ The Court concluded that the court of appeals erred in holding that an employer is always automatically liable for sexual harassment regardless of the circumstances of the case.¹³¹

Finally, the Court rejected the Bank's argument that an employer should be shielded from liability when a victim of sexual harassment fails to use the company's grievance procedure.¹³² The Court explained that in the majority of companies, the grievance procedures require a victim of sexual harassment to first complain to her supervisor, who is often the harasser.¹³³ Additionally, a policy which does not specifically address sexual harassment fails to notify employees that there is a company policy against such harassment.¹³⁴ The Court noted that the Bank's grievance procedure required Vinson to inform Taylor of the harassment. In situations such as Vinson's, failure to use the grievance procedure will not insulate an employer from liability.¹³⁵

To summarize, the Court held that a sexual harassment hostile environment claim is actionable under Title VII.¹³⁶ However the Court refused to issue a definitive rule for employer liability.¹³⁷ The Court also held that the totality of the circumstances must be examined and that courts should look to agency principles to determine liability.¹³⁸ The Court further held that the court of appeals erred in entirely disregarding common law agency principles and imposing liability on an employer regard-

128. *Id.*

129. *Id.*, See 42 U.S.C. § 2000e(b)(1976).

130. *Id.* at 2408-09.

131. *Id.* at 2409.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.* The Bank's grievance procedure required Vinson to complain to Taylor about the harassment. Vinson's protests while she was forcibly raped should have been held to be notice to the Bank.

137. See *supra*, note 102, and accompanying text.

138. See *supra*, note 128, and accompanying text.

less of the circumstances of the case.¹³⁹

V. CONCURRING OPINION

Justice Marshall, in a concurring opinion,¹⁴⁰ criticized the Court's decision not to hold the employer strictly liable.¹⁴¹ He argued that most circuit courts have held an employer strictly liable for sexual harassment claims of the *quid pro quo* type, hence there was no reason to develop a separate notice requirement for hostile environment cases.¹⁴² Justice Marshall stated that a supervisor is clothed in authority when he hires and fires employees and he does not step outside this role when creating a hostile environment.¹⁴³ He stated, further, that the very reason a sexually offensive environment can be created is the fact that the supervisor is acting within the authority of the employer.¹⁴⁴ He also indicated that an employer can only act through its employees, and there is no difference between hiring and firing decisions and other decisions related to the work environment.¹⁴⁵ Therefore, an employer should be held strictly liable if the supervisor has in any way discriminated against a subordinate employee.¹⁴⁶

VI. CRITIQUE

The significance of the Supreme Court's recognition that sexual harassment falls within the rubric of Title VII is aptly shown in one commentator's statement: "[T]he Supreme Court's recognition of sexual harassment would represent a significant step forward in the relative credibility of women in our society. Until women's experiences are recognized and understood and not trivialized women will remain exiled in a separate caste and

139. See *supra*, note 129, and accompanying text.

140. See *supra*, note 140, and accompanying text.

141. *Vinson*, 106 S.Ct. at 2409; (Brennan, J., Blackum, J., and Stevens, J., joined the concurring opinion. Stevens, J., wrote separately stating that he did not find anything inconsistent with the Court's opinion and Marshall's opinion and therefore could join them both, *Id.* at 2411.

142. *Id.* at 2410.

143. *Id.* See *supra*, note 33 and accompanying text.

144. *Id.* at 2410-11.

145. *Id.* at 2411.

146. *Id.*

culture of their own."¹⁴⁷ As true as that may be, the Court would have further advanced the rights of women if it had affirmed the court of appeals' holding that an employer is automatically liable for sexual harassment perpetrated by its supervisory employees.¹⁴⁸ By placing a heavier burden of proof on a plaintiff alleging a hostile environment claim as opposed to a quid pro quo claim, the Court has failed to give full credence to women's experience in the workplace.¹⁴⁹

The Court applied agency principles incorrectly when it established a separate notice requirement for hostile environment claimants. As Justice Marshall in his concurring opinion indicated, employers act only through their employees, therefore decision-making authority is necessarily delegated to supervisory employees.¹⁵⁰ The supervisor is essentially acting as the employer when he or she makes employment decisions.¹⁵¹ Creating an efficient and productive work environment is as important as making hiring and firing decisions. The employer should be held liable for *all* acts performed by supervisors.¹⁵²

In *Henson v. City of Dundee*,¹⁵³ Judge Clark, in his dissent, addressed the distinction made by the majority that, on the one hand, when a supervisor creates a discriminatory work environment, the employer will be held liable only if the plaintiff can prove that the employer knew or should have known of the harassment, but on the other hand held that an employer is strictly liable for quid pro quo harassment.¹⁵⁴ Judge Clark stated, it is

147. *Id.*, See also *Horn v. Duke Homes*, 755 F.2d 599 (7th Cir. 1985)(employee held strictly for sexual harassment).

148. Leventer, *Sexual Harassment and Title VII: EEOC Guidelines, Conditions Litigation, And The United States Supreme Court*, 10 CAP. U. L. REV. 481, 497 (1981).

149. The D.C. Circuit's holding of strict liability was followed by at least two district courts: *Jeppsen v. Wunnicke*, 611 F.Supp. 78 (D. Alaska 1985); *Mitchell v. OsAir, Inc.*, 629 F.Supp. 636 (D.C. Ohio 1986). The Supreme Court's holding, in the context of these lower courts, can be seen as a step backward for women's rights.

150. As one commentator argues: "[T]he lack of effective recognition of hostile environment harassment might be explained as stemming from a reluctance in legal circles to recognize fully that it is the sexual harassment itself which constitutes the aggrieved injury and not the job related reprisal.", Goundry, *Sexual Harassment in the Employment Context: Legal Management of A Working Woman's Experience*, 45 U. TORONTO FACULTY L. REV., 1, 10 (Spr. 1985).

151. *Vinson* 106 S.Ct. at 2410.

152. *Id.*

153. *Id.*(emphasis added).

154. 682 F.2d 897 (11th Cir. 1982).

an incorrect assumption:

[t]hat the capacity of any person to create a hostile or offensive work environment is not necessarily enhanced or diminished by the degree of, authority which the employer confers upon that individual. . . . [A] supervisor by virtue of his position is enhanced in his ability to create an offensive environment when compared to the janitor, for example, when a supervisor creates such an environment women employees are not apt to complain for fear of retaliation.¹⁵⁵

Although traditional agency principles cannot be applied to Title VII across the board, they do support holding an employer strictly liable for the acts of its supervisory employees regardless or whether the employer knew or should have known of the activity.¹⁵⁶ Under the Second Restatement of Agency, an employer would be held liable for its supervisory employees conduct as long as serving their employer played some role in the behavior.¹⁵⁷ Supervisor's usually perform hiring and firing duties and have general authority over the workplace.¹⁵⁸ A subordinate employee relies on the apparent authority of a supervisor when her supervisor touches her as much as when he tells her to attend a meeting.

Victim's of sexual harassment rarely have the economic power in the workplace to effectively stop this interaction.¹⁵⁹ They fear that the supervisor will retaliate by making their work situation more difficult if they do complain, or that they will get the response "[i]f you can't take working in a man's

155. *Id.* at 913.

156. *Id.* at 913-14.

157. *See Horn*, 755 F.2d at 605; *See generally Vermuluen, supra*, note 8 at 256; Comment, *New EEOC Guidelines on Discrimination Because of Sex*, 535 B.U.L.R. 538-43 (1981).

158. Vermuluen, *supra*, note 8, at 526. The second restatement of agency, § 219, comment C, subsection (d), states that an employer will be held liable for the acts of its employee's if the employee purported to act on behalf of the employer and there was reliance on the apparent authority of the employee. This includes situations in which the employer's liability is based upon conduct which is within the apparent authority of the employee, as when the employee defames or interferes with another's business and in other situations where the agent can cause harm because of the agent's position. Restatement (Second) of Agency § 219, Comment C (1958).

159. *See generally Lyn Farley, SEXUAL SHAKEDOWN*, 1 (1978).

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world . . ."¹⁶⁰ Some fear they will get an even more outrageous response like the plaintiff in *Bundy v. Jackson*¹⁶¹ received when she complained to her supervisor's supervisor of his harassment: "[a]ny man in his right mind would want to rape you."¹⁶² In these situations where the Vice President of the Bank is the harasser, the Supreme Court should have gone a step further and held the Bank strictly liable.

Another potentially dangerous aspect of the opinion is the Court's holding regarding evidence of the plaintiff's dress and sexual fantasies. The Court stated that such evidence is "[o]bviously relevant to the issue"¹⁶³ of whether the sexual advances were welcome or unwelcome and that there is no per se rule against its admissibility.¹⁶⁴ This evidence is irrelevant to the issue and under the Federal Rules of Evidence it is inadmissible.

Evidence of a women's dress is not relevant to the issue of whether she welcomed the sexual demands of her supervisor. Under Rule 401 of the Federal Rules of Evidence, relevant evidence is evidence which has a tendency to make the existence of a fact of consequence more or less probable than it would be without the evidence.¹⁶⁵ What a woman wears to work does not make it more or less probable that she welcomed sexual demands and demeaning sexual comments from her supervisor. The woman in tight fitting pants, as opposed to a women who wears a business suit, does not welcome sexual advances, yet both women are subject to sexual harassment in the workplace. A woman's dress is no more relevant to the issue of whether she welcomed the *harassment* than the alleged harasser's wardrobe is to whether he actually harassed the plaintiff.¹⁶⁶ The fact that a man wears tight fitting t-shirts to work or baggy suits will not make it more probable than not that he sexually harassed a co-worker. A woman's wardrobe does not evidence her desire to be

160. See generally C. MacKinnon, *supra*, note 89; Cohen & Vincelle, *Notice, Remedy and Employer Liability for Sexual Harassment*, 35 LAB. L. J. 301, 304-05 (1985); Goundry, *supra*, note 150, at 12.

161. Goundry, *supra*, note 150, at 12.

162. 641 F.2d 934 (D.C. Cir. 1981).

163. *Id.* at 940.

164. *Vinson* 106 S.Ct. at 2407.

165. *Id.*

166. Fed. R. Evid. 401, See generally Cleary, *McCORMICK ON EVIDENCE* 540-49 (3d ed. 1985).

subjected to degrading sexual comments or demands for sexual favors.

The Court's reasoning is reminiscent of the way the law has treated rape victims. It was frequently asserted that women who wore revealing clothes were "asking" to be raped.¹⁶⁷ Implicitly, the Court has suggested that a victim of sexual harassment has welcomed the sexual advances of her supervisor when she has dressed in a certain way. The Court is perpetuating the sexual stereotype that the woman is at fault when she is harassed or raped.¹⁶⁸

Evidence of the plaintiff's sexual fantasies is not relevant to the issue of whether she indicated to the supervisor that the sexual advances were welcome or unwelcome. Vinson had shared her personal fantasies with a co-worker.¹⁶⁹ There was no evidence that Taylor knew of these conversations. Yet, the District Court admitted Vinson's co-worker's testimony of Vinson's fantasies.¹⁷⁰ The Bank argued that because Vinson shared her fantasies with her friend, Vinson welcomed the sexual relationship with Taylor.¹⁷¹

An individual's personal life and intimate sexual secrets do not tend to prove that the individual welcomed sexual harassment from another person.¹⁷² A woman does not give up her right to work in an environment free from discrimination because she chooses to share aspects of her sexuality with a friend.¹⁷³ The issue of whether the plaintiff indicated that she welcomed the sexual advances can not be resolved by delving into the plaintiff's relationship with others. Evidence of other relationships and the intimate secrets communicated within that relationship are not relevant to the plaintiff's relationship with

167. Brief for Respondent in Opposition to the Petition for Writ of Certiorari, *Meritor Savings Bank, FSB v. Vinson*, at 29 n. 1.

168. See *Priest v. Rotary*, 32 Empl. Prac. Dec. ¶ 33,864 (N.D. Cal.1983); *Fair Employment & Housing v. Fresno Hilton Hotel*, California Fair Employment Housing Case No. FEP 80-81L7-0514se, FEHC Decision No. 84-03 (1984)(relying heavily on *Priest v. Rotary*).

169. See Brief for Respondent, *Meritor Savings Bank, FSB v. Vinson*, at 40; *Priest*, 35 Empl. Prac. Dec. paragraph 33,864.

170. *Vinson v. Taylor*, 753 F.2d at 146 n.36.

171. *Id.*

172. Brief for Petitioner, *Meritor Savings Bank*, at 27.

173. See e.g., *Katz v. Dole*, 709 F.2d at 254 n.3; *Kreiger*, *supra*, note 122, at 116-22.

the alleged harasser.¹⁷⁴

The Supreme Court stated that arguments concerning whether the evidence's probative value is outweighed by the prejudicial effect should be made to the district court.¹⁷⁵ However, the district court of the northern district of California explained, in *Priest v. Rotary*¹⁷⁶ while granting a protective order against a defendant's attempt to discover information about the plaintiff's past sexual history, to admit such evidence "[m]ight intimidate, inhibit or discourage Title VII plaintiffs . . . from pursuing their claims [and] would clearly contravene the remedial effect intended by Congress in enacting Title VII and should not be tolerated by the federal courts."¹⁷⁷ The court also stated:

It is often said that those who do not learn from history are condemned to repeat it. By carefully examining our experience with rape prosecutions, however, the courts and the bar can avoid repeating in this new field of civil sexual harassment suits the same mistakes that are now being corrected in the rape context. The courts and Congress have concluded that even in the criminal context, the use of evidence of the complainant's past sexual behavior is more often harassing and intimidating than genuinely probative, and the potential for prejudice outweighs whatever probative value such evidence may have. Certainly, then, in the context of civil suits for sexual harassment, absent extraordinary circumstances, inquiry into such areas should not be permitted either in discovery or trial.¹⁷⁸

The policy considerations influencing the *Priest* court are also applicable to evidence relating to the plaintiff's dress and sexual fantasies. Admitting such evidence will only serve to confuse the trier of fact with irrelevant and collateral issues.¹⁷⁹ The Department of Fair Employment and Housing in *Department of*

174. *Katz* at 254 n.3.

175. *Vinson*, 106 S.Ct. at 2407.

176. 35 Empl. Prac. Dec. ¶ 33,864.

177. *Id.* at 31,159.

178. *Id.*

179. *Id.*

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*Fair Employment and Housing v. Fresno Hilton Hotel*¹⁸⁰ stated, that regarding evidence of the plaintiff's past sexual history, "[I]n sexual harassment cases, care must be taken not to put the victim on trial."¹⁸¹

*Suzanne Egan**

180. FEHC Decision no. 84-03.

181. *Id.*

* Golden Gate University, Class of 1988.