The Return of Strict Liability: When a Supervisor Creates a Hostile Work Environment by Sexually Harassing a Subordinate

by
Jack A. Raisner
Assistant Professor of Business Law
St. John's University

Most employers, and many sexual harassment experts, would say that employers cannot be held absolutely liable for the sexually hostile work environments created by their supervisors. The Supreme Court of the United States, however, has never decided this issue. Rather, in 1986, it commenced a tug-of-war between employees and management that continues in federal courthouses to this day over what the standard of liability in such cases should be.

In Meritor v. Vinson, management and employees vied to get the better of a new area of the new rules governing sexual harassment liability, specifically, where a hostile work environment is created by a supervisor. The Meritor court acknowledged the existence of two forms of sexual harassment liability: (1) quid pro quo, which arises when the employer conditions tangible job benefits on the employee's submission to conduct of a sexual nature and adverse job consequences result from the employee's refusal to submit to the conduct, and (2) hostile work environment harassment, which arises when sexual conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment. Meritor involved a hostile work environment claim. It was brought by a subordinate against her supervisor with whom she had shared a sexual relationship. The litigants, and the EEOC, as amicus, suggested three standards of liability to the Meritor court for possible adoption. One was strict liability. Strict, or absolute, liability is based on the notion that a supervisor generally acts as an agent of the employer, for Title VII purposes, when making jobs decisions. The employer, delegating decision-making authority to the supervisor, becomes directly liable for quid pro quo harassment "whether employer had notice of, or approved, the unlawful conduct." Pointing out that supervisors can abuse the employer's power to coercively harass in hostile work environment cases, as well as in quid pro quo cases, employees argued that the Court apply the same strict liability standard in both cases where a supervisor engages in sexual harassment.

The second approach, favored by employers, had already been adopted by most courts in cases of hostile work environments that were created, not by supervisors, but by coworkers. In such cases, no expressly authorized power of the employer is used in the harassment. Therefore, instead of strict liability, a type of negligence liability was fashioned. Under that approach, an employer is held responsible for acts of sexual harassment where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action. Employers desired this approach because it allowed them to be relieved of liability, even after the fact, by taking appropriate corrective action.

While the EEOC, in its 1980 Guidelines, had argued for a stricter, absolute standard for supervisor hostile work environment harassment, by 1986, it had arrived at a more centrist position. It presented the Meritor court with a third option. This approach also allowed employers to take prophylactic and remedial measures to relieve themselves of liability for harassment occurring without their knowledge. The inquiry posed in the EEOC's amicus brief in Meritor focused on: (1) whether the employer adopted a policy against harassment and a set of procedures for handling sexual harassment grievances, (2) whether the victim had utilized these procedures, and (3) whether the procedures were reasonably responsive to the complaint. If so, the employer would be free of liability for supervisor-caused hostile environment harassment. Under this approach, employers cannot insulate themselves from liability simply by acting promptly; they must also have an effective grievance procedure system in place. Nevertheless, they can negate liability for harassment that has occurred, provided these conditions are met.

Given these choices, the Meritor court picked none of the above. It declined "the parties' invitation to issue a definitive rule on employer liability." Instead, it

Continued on Page 2
LIABILITY (continued from page 1)
effectively called for a tug-of-war, making subsequent litigants vie over the ultimate direction the liability standard would take.

The ground rules laid down by the Meritor plurality decision further blurred the battlelines. The Court rejected the view of the District of Columbia Court of Appeals below, that "employers are always automatically liable for sexual harassment by their supervisors." At the same time, the Court also appeared to reject the favored position of employers, that notice of the conduct is required before liability arises. Moreover, it seemed to repudiate a position suggested by the Equal Employment Opportunity Commission in its brief, that employers who maintain grievance procedures be insulated when the employee fails to use it.

Having rejected both polar extremes and the middle ground, the Court revealed the substantive law on which the parties would be concentrating their efforts in arguing the issue in future litigation. Agreeing with an assertion put forth by the EEOC, the Court stated that "Congress wanted courts to look to agency principles for guidance in this area." The somewhat arcane law of agency became the legal substance, or "rope," for litigants to grasp onto in the tug-of-war over harassment liability.

Perhaps anticipating that the unfamiliar particulars of agency law might lead to undesirable results if stretched too far, the Meritor court cautioned that agency principles "may not be transferable in all the particulars to Title VII." Faced with the Supreme Court's admonition that agency rules be applied, however, most courts have taken the instructions to heart, but the results have varied widely, as discussed below.

A. Respondeat Superior

The laws of agency are irrelevant, of course, where the employer personally engages in sexual harassment, whether it be quid pro quo or hostile environment harassment. Agency theory comes into play where the harassment comes about through the actions of an agent or employee of the employer. In such situations, the courts' touchstone for guidance in the laws of agency is the Restatement (Second) of Agency (1958)§219-237(1958). The Restatement sets forth concepts by which liability can be imputed to employers who do not directly participate in the sexual harassment. This most embracing theory is respondeat superior, or vicarious, or automatic liability. This form of liability only arises in the workplace and presupposes that the employee has acted within the scope of employment. Employers perennially contend that sexual harassment by a supervisor is never within the scope of employment of the supervisor. Supervisors, they argue, usually have not been given the authority to sexually harass, nor is sexual harassment "acted out by a purpose to serve the employer." Accordingly, they assert that sexual harassment always falls outside the scope of employment and never gives rise to strict liability under respondeat superior. Nevertheless, in quid pro quo harassment cases, the courts readily overcame this theoretical barrier to strict liability. As mentioned above, in quid pro quo cases, the supervisor explicitly uses his authority to make employment decisions in the course of the sexual harassment, by conditioning job benefits on submission to sexual advances. Since the supervisor's power to retaliate comes directly from the employer, direct, or strict liability is imputed back to the employer, under the respondeat superior theory, for the supervisors' abusive use of the employer's authority. Coupling this in the terms of the Restatement, it can be said that if harassment was caused by the exercise of supervisory power, or the supervisor was "aided in accomplishing" the harassment by having authority over decisions affecting the victim, the responsibility for the conduct can be imputed to the employer. Today, virtually all courts apply this reasoning to impose strict liability in quid pro quo cases.

The question then is: can this same, strict, respondeat superior analysis also apply in hostile work environment cases? In hostile work environment cases, liability does not turn on the supervisor's decision-making capacity. Indeed, hostile work environments can be created independent of supervisory power. As one court has stated: "In a hostile environment case, the harasser is not explicitly raising the mantle of authority to cloak the plaintiff in an unwelcome atmosphere." Since the factual basis for hostile work environment liability need not involve supervisory power, employers argued in Meritor, and the Supreme Court agreed, that respondeat superior liability is inappropriate in hostile environment cases, even when a supervisor is the harasser. Respondeat superior liability in hostile environment cases, accordingly, was repudiated by the lead opinion in the Meritor plurality, penned by then-Associate Justice Rehnquist. Although five justices pointed to agency principles, they specifically rejected respondeat superior as being one of them.

Since Meritor, only some state courts and codes have adopted respondeat superior liability for a supervisor who creates a hostile work environment. Plaintiffs in federal court who have sought to impose a strict liability standard in such cases have been forced to look deeper into the Restatement for exemptions, or more accurately, substitutes for respondeat superior, in order to find a strict liability theory to point at their employers.

Beyond pure respondeat superior, Section 219(2) of the Restatement does offer three alternative theories of agency by which employees can argue that courts should impute employer liability, even where the supervisor has acted outside of the scope of employment. Restatement §219 provides, as follows:

(1) A master is subject to liability for the torts of his servants committed while acting in the scope of their employment.
(2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:
   (a) the master intended the conduct or the consequences, or
   (b) the master was negligent or reckless, or
   (c) the conduct violated a non-delegable duty of the master, or
   (d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

The sections which have figured most prominently in imputing employer liability in sexual harassment cases are

Continued on page 7
Recent Developments in Employment and Labor Law

EMPLOYEE FREEDOM OF SPEECH
With its decision in Connick v. Myers, 75 L.Ed.2d 708 (1983), the Supreme Court enunciated a two-tiered test for determining when speech by a government employee will be afforded First Amendment protection. To be protected, the speech must first, be on a matter of public concern, and, second, the employee's interest in the speech cannot be outweighed by the State's interest in promoting efficiency in the provision of the public services for which it is responsible. (Connick, at 142) With its recent decision, in Waters v. Churchill, 128 L.Ed.2d (1994), the Court resolves a split among the Circuits as to "whether the Connick test should be applied to what the government employer thought was said, or to what the trier of fact ultimately determines to have been said." (Waters, at 692) (See Atcherson v. Siegenmann, 605 F.2d 1058 (8th Cir. 1979); Wulf v. Wichita, 883 F.2d 842 (10th Cir. 1989); and, Sims v. Metropolitan Dade County, 972 F.2d 1230 (11th Cir. 1992).

The plaintiff in Waters, Cheryl Churchill, sued her former employer, the McDonough District Hospital, under 42 U.S.C. § 1983, for firing her in violation of her First Amendment rights. The gravamen of her complaint appears to have been that the Connick test should only be applied to factual conclusions reasonably arrived at by the employer, but that the employer, in this case, did not arrive at its factual conclusions as to what had been said, and the manner in which it was said, in a reasonable manner. The Court agreed with her, that the employer need not determine the facts of a particular case with scientific certainty, or even with the certainty commensurate with a trial conducted pursuant to formal rules of evidence, but the Court disagreed with her as to whether or not adequate factfinding had been conducted by the employer in this case. In its disposition of the case, the Court enunciated the standards by which a government employer's factfinding and conclusions will be measured, for constitutional fitness. First, the court observed that "the propriety of a proposed procedure must turn on the particular context in which the question arises - on the cost of the procedure and the relative magnitude and constitutional significance of the risks it would decrease and increase." (Churchill, at 697) The Court went on to state that "[i]t is necessary that the [employer] reach its conclusion about what was said in good faith" and that "employer decision-making will not be unduly burdened by having courts look to the facts as the employer reasonably found them to be." (Id. at 700-701).

In sum, the propriety of a government employer's factfinding procedures will be judged by the cost and the magnitude of the constitutional risks inherent in a given situation, and the conclusions reached on the basis of facts gathered by such a procedure must be reasonable and have been reached in good faith. Thus, it is a very real possibility, and one that the Court recognized, that government employees could suffer adverse employment decisions on the basis of erroneous factual determinations, but that if the employer's fact finding procedures are adequate to the risks involved and the conclusions are reasonable and reached in good faith, the decision will be legally unassailable.

RETROACTIVITY OF CIVIL RIGHTS ACT OF 1991
The United States Supreme Court handed down decisions in two cases, in which the retroactivity of the Civil Rights Act of 1991 (P.L. 102-166) was at issue. In Landgraf v. USI Film Products, ___ U.S. (1994), the Court decided that neither § 102(a)(1) of the Act (creating the right to recover compensatory and punitive damages for certain violations of Title VII) nor § 102(c)(1) (permitting either party to demand a jury trial if compensatory or punitive damages are sought) is retroactive. Similarly, in Rivers v. Roadway Express, Inc., ___ U.S. (1994), the Court held that § 101 of the Act (defining the term "make and enforce contracts") as it appears in § 1 of the Civil Rights Act of 1866 to include "making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship") is not retroactive. In both cases, the refusal to order retroactive application of the Act was premised on the Court's inability to determine clear Congressional intent that the Act be applied retroactively.

While this is probably the end of the saga on the retroactivity issue for the Civil Rights Act of 1991, these two cases leave many questions unanswered. For instance, in Mozee v. American Commercial Marine Service, 963 F.2d 929 (7th Cir. 1992), the issue of whether §§ 104 and 105 of the Act (pertaining to the business necessity defense for disparate impact cases) will go unresolved, because the petition for certiorari in that case was denied. The same issue, with regard to § 105 was also raised in Johnson v. Uncle Ben's, Inc., 965 F.2d 1363 (5th Cir. 1992), and the petition for certiorari was denied there, as well. Also, the retroactivity of § 106 (prohibiting the discriminatory use of test scores), § 107(a) (clarifying the availability of the mixed motive defense), and § 116 (affirming the validity of certain affirmative action remedies) will remain an unanswered question since the petition for certiorari was denied in San Francisco Police Officers Association v. San Francisco, ___ F.2d ___ (9th Cir. 1992), where those issues were raised.

RECENT DEVELOPMENTS
(continued from page 3)


NEGLIGENT INFLECTION OF EMOTION DISTRESS

In a pair of cases, Consolidated Rail Corp. v. Gottshall and Consolidated Rail Corp. v. Carlisle, 512 U.S. __, 129 L.Ed.2d 427, 114 S.Ct. (1994), the Supreme Court held, for the first time, that claims for damages purely for negligent infliction of emotional distress can be brought under the Federal Employers Liability Act (FELA), and established the zone of danger test as the appropriate standard for "evaluating claims for negligent infliction of emotional distress that are brought under the Federal Employers' Liability Act (FELA), and established the zone of danger test as the appropriate standard for "evaluating claims for negligent infliction of emotional distress that are brought under the Federal Employers' Liability Act." (Gottshall, at 435) (The cases were consolidated for purposes of the Court's opinion, and will be referred to, herein, as Gottshall.) In so doing, the Court examined and rejected the physical impact test and the relative bystander test, as inconsistent with the purposes of FELA. With this opinion, the Court has resolved a split among the Courts on the issue of the appropriate standard for establishing a claim for negligent infliction of emotional distress, under FELA. (See Ray v. Consolidated Rail Corp., 938 F.2d 704 (7th Cir. 1991); Elliott v. Norfolk & Western R. Co., 910 F.2d 1224 (4th Cir. 1990); Adams v. CSX Transp., Inc., 899 F.2d 536 (6th Cir. 1990); and, Gaston v. Flowers Transp., 866 F. 2d 816 (5th Cir. 1989)).

James Gottshall sued Consolidated Rail Corp. (Conrail) for negligent infliction of emotional distress after having witnessed the death of a coworker, Richard Johns, who collapsed and died of heart failure on the jobsite, brought on by "the heat, humidity, and heavy exertion" of laying track. After Johns' death, but before the body was removed by the coroner, Gottshall and the other members of the crew were ordered back to work, where they labored for several hours within sight of the sheet covered body. Alan Carlisle sued Conrail for negligent infliction of emotional distress after he suffered a nervous breakdown in response to the added responsibilities and longer, more erratic work hours associated with his promotion from train dispatcher to trainmaster. Carlisle won at trial, and the judgment was affirmed on appeal to the Third Circuit. At trial, Conrail won its motion for summary judgment, but, after an appeal, the Third Circuit reversed the summary judgment and remanded for trial. Conrail sought, and was granted writs for both the affirmation of Carlisle's claim and the remand for trial of Gottshall's claim. The Supreme Court reversed the appellate affirmance of Carlisle's trial victory, ruling that "Carlisle's work-stress-related claim plainly does not fall within the common law's conception of the zone of danger[]" (Gottshall, at 449) With respect to Gottshall's claim, the Court remanded for trial with instructions to apply the zone of danger test in evaluating the claim.

PREEMPTION

In Hawaiian Airlines, Inc. v. Norris, 512 U.S. __, 129 L.Ed. 2d 203, 114 S.Ct. (1994), the U.S. Supreme Court, affirming the judgment of the Supreme Court of Hawaii, held that a state law claim of wrongful discharge is not preempted by the Railway Labor Act (45 U.S.C. § 153). In so doing, the Court applied the preemption standard developed in a line of cases under §301 of the Labor Management Relations Act (29 U.S.C. § 185), to the question of "whether an aircraft mechanic who claims that he was discharged for refusing to certify the safety of a plane that he considered unsafe and for reporting his safety concerns to the Federal Aviation Commission may pursue available state law remedies for wrongful discharge, or whether he may seek redress only through the [Railway Labor Act's] arbitral mechanism." (129 L.Ed.2d at 208) Applying the standard developed under §301, as articulated in Lingle v. Norge Division of Magic Chef, Inc., 486 U.S. 399, 100 L.Ed.2d 410, 108 S.Ct. 1877 (1988) preemption occurs only if resolution of the state law claim requires interpretation of a collective bargaining agreement (CBA). Or, stated differently, if the rights involved exist independently of the collective bargaining agreement, preemption does not occur. The rights involved will be considered independent, even if they are defined by the CBA, so long as there is another source for the rights, which is wholly external to the CBA. If there is an independent source for the rights at issue, the claim could be resolved by interpreting the independent source, and without interpreting the CBA.

In this case, the right involved was the right to not be wrongfully discharged. Norris, who was discharged for refusing to certify, as safe, a plane he believed to be unsafe, and for reporting his concerns to the FAA, sued his former employer in state court, claiming that his discharge was in retaliation for his refusal to certify the plane and for reporting the safety matter to the FAA. Norris claimed that this discharge was wrongful under, among other things, the Hawaii Whistleblower Protection Act (Haw. Rev. Stat. §§ 378-61 to 378-69). The airline contended that, since a determination of whether Norris was wrongfully discharged would require an interpretation of the CBA, and since the RLA required that all such matters be resolved under the arbitral mechanism set up by the RLA, Norris' state law claim was preempted. The airline's theory rested upon the assertion that since Norris' claim originated as a grievance, and since grievances are listed as a type of minor dispute subject to the RLA arbitral mechanism, the claim can only be settled by arbitration under the statute. The Court agreed with the airline that the term "grievance[]" as it appears in 45 U.S.C. § 151a, includes "disputes involving the application or interpretation of a [collective bargaining agreement]" (129 L.Ed.2d at 212), but the Court did not agree that every dispute involving a determination of whether a worker performed his or her duties, as set forth in a CBA, required an interpretation of the CBA. The Court observed that, under Lingle, "purely factual questions' about an employee's conduct or an employer's conduct and motives do not require a court to interpret any term of a collective bargaining agreement" (Norris at 217, citing Lingle, 486 U.S. at 407), and that Norris' state law retaliatory discharge claim was just such a purely factual question. Since the Court found that no interpretation of the CBA would be necessary, it held that the RLA's arbitration provisions did not preempt the state law claim, under the Hawaii Whistleblower's Protection Act.
Weighing Discrimination Against the Overweight

**Cook v. Rhode Island**

by

Dr. Sharlene A. McEvoy
Fairfield University

Consider the following incidents:

*A five-foot seven-inch, three hundred twenty-seven pound security guard was fired by the Los Angeles Times although he was an excellent employee who had won the praise of his supervisors.

*A five-foot four-inch, three hundred five pound woman applied for a job with a Santa Cruz, California health food store and when she survived the screening process, she was told she was next in line for a position. Later, when she saw the same job advertised again, she called the company to say she was still interested. She was told that the company believed that she could not handle the position because of her weight.

*An obese bank employee sued her employer for doing nothing when a co-worker joked, pinched, and ridiculed her in the presence of customers, saying that fat people lie and stink.

These experiences are typical of those endured by some of the thirty-eight million obese Americans. Anti-fat bias is the last preserve of bigotry as overweight people are routinely ridiculed by employers, peers, and the media. While prejudice against racial, ethnic, and religious minorities, is proscribed by federal and state civil rights acts, size discrimination still prevails.

A study of three hundred sixty-seven fat women and seventy-eight overweight men, by Esther Rothblum, a psychology professor at the University of Vermont, revealed a close correlation between weight and employment discrimination. Over 40% of the males and 60% of the females said that they had been denied promotions and raises. Significantly, the fatter the person, the more likely he or she was to be discriminated against.

What are the rights of an overweight person who has been dismissed from, or denied, employment? The answer is

Continued on page 6

---

**Proposed Editorial Policy and Information for Contributors**

The *Employment and Labor Law Quarterly* is the official publication of the Employment and Labor Law Section of the Academy of Legal Studies in Business. The editorial mission of the Quarterly is to provide accurate and authoritative information and commentary on statutory, regulatory, and jurisprudential developments in employment and labor law, in a form which is practical and readily usable by managers, teachers, and researchers, and to encourage and facilitate research and writing about issues at the developing edge of labor and employment law.

In addition to publishing scholarly articles that serve this editorial mission, the Quarterly will also provide, three regular features in each issue: 1) The Research Center, 2) Recent Developments in Employment and Labor Law, and 3) Case Studies in Employment and Labor Law. The Research Center provides a survey of federal legislative developments, a comprehensive guide to the papers on employment and labor law presented at the national and regional conferences of the Academy of Legal Studies in Business, and a selected listing of scholarly journal articles published in the field. The Recent Developments section provides commentary on selected developments in the field. The Case Studies section will present studies of liability-laden workplace situations for use in teaching employment and labor law. These case studies may be either actual workplace situations which have been sufficiently disguised to protect the interests of all parties involved, cases based on actual workplace situations, or completely fictitious situations. Since part of the mission of the Quarterly is to bridge the gap between research and practice, the intended audience is both management professionals and academicians in the field of employment and labor law.

The Quarterly actively solicits, for publication, articles dealing with issues of employment and labor law, but it is particularly interested in articles that discuss and analyze emerging developments, and that maintain a balance between theoretical considerations and practical application. Reviews of scholarly books in the field, case studies, and shorter works and abstracts are also actively solicited. Article length manuscripts will be reviewed by members of the Quarterly’s editorial board, and publication decisions will normally be made within two months. If you wish to have your submission reviewed, please so indicate, in your cover letter.

Manuscripts should be submitted to: Prof. Roger J. Johns, Editor in Chief, Employment and Labor Law Quarterly, College of Business, Eastern New Mexico University, Portales, New Mexico 88130.

For article length manuscripts, three copies, should be submitted. The title, author(s), and affiliation(s) should appear only on a detachable title page. The manuscripts must not contain any information indicative of the name(s) or affiliation(s) of the author(s). Footnotes should conform to the requirements set forth in *A Uniform System of Citation*, 15th Ed. Manuscripts should be typed (doubled-spaced) on 8¼" by 11" paper. Tables or charts should be appended, with a notation in the text indicating where it should be placed. The Quarterly is available, by subscription, to non-members of the Academy of Legal Studies in Business, at a cost of $ per year.
Disabilities Act (ADA) which became effective in 1992 and forbids other conditions under the Americans With

WEIGHING continued from page 5

tion against qualified individuals with disabilities. A "disability" is defined as a "physical or mental impairment that substantially limits one or more major life activities." Anyone with a record of such an impairment or anyone regarded as having such an impairment is disabled.

The EEOC conceded that while obesity is not what might be considered a "traditional" disability, since it is possible for an obese person to lose weight, it is, nevertheless, a chronic condition. Moreover, the EEOC declared that it is not necessary that a condition be involuntary or immutable to be covered. The agency's position was buttressed by the fact that in 1992, experts at a National Institute of Health conference stated that there is increasing physiological, biochemical, and genetic evidence that being overweight is not simply an issue of willpower, but a complex disorder of energy metabolism. Thus, in some cases, obesity is an immutable condition.

The Court rejected Rhode Island's argument that Cook was not protected by the law, because she could lose weight and rid herself of the disability whenever she chose. Rhode Island also claimed that her weight compromised her ability to evacuate patients in an emergency and put her at greater risk of developing heart disease, thus increasing the likelihood of a worker's compensation claim.

Cook proved that she was a victim of discrimination because of a handicap in violation of Section 504 of the Rehabilitation Act of 1973, by showing that she applied for a job in a federally funded program or activity, that she suffered from a cognizable disability, that she was qualified for the position and that she was not hired due to her disability.

The EEOC urged the Court of Appeals to consider obesity, just as it would many other conditions under the Americans With Disabilities Act (ADA) which became effective in 1992 and forbids discrimina-

Corporate Sponsorship for the Quarterly

The Richard D. Irwin Publishing Co. has made a commitment, to the Employment and Labor Law Section, to underwrite a significant part of the cost of publishing this Newsletter, for the next two years. This additional funding will play an important part in the continued growth and development of the Newsletter. On behalf of the members of the Section, the editors of the Newsletter thank both the Richard D. Irwin Publishing Co., for their vote of confidence in our endeavor, and Craig Beytien of Irwin, who was instrumental in arranging for this funding. The editors also thank Eastern New Mexico University, and its College of Business for providing the initial funding which has made the Newsletter, in its current form, a possibility.
LIABILITY continued from page 2
sections (2)(b) and (d), which set forth three alternative theories of employer liability. Two of them, "negligence" found in section (2)(b), and "apparent authority" found in section (2)(d), do not pose any threat of strict liability on the employer. The third, however, based on the clause "aided in accomplishing" in section (2)(d), does suggest direct liability, as was noted in the discussion of quid pro quo harassment, above.26

B. Negligence

The negligence prong, found in the Restatement §219(2)(b), poses little threat of liability for the careful employer. Even before the Supreme Court in Meritor directed attention to the Restatement, the concept of negligence had been introduced in sexual harassment jurisprudence. In the case of employer liability for the sexual harassment between co-workers, courts, by 1987, had recognized a hybrid negligence/constructive knowledge theory. Under it, liability would be imposed if the employer had actual or constructive knowledge of the sexual harassment, but failed to take remedial action.21 This theory imposes a duty on the employer to take notice of sexual harassment that is reasonably conspicuous. Employer liability in this context has been defined as "failing to remedy or prevent a hostile or offensive work environment of which management level employees knew, or in the exercise of reasonable care, should have known."22 Beyond taking notice, it imposes a duty to take remedial action once the employer has knowledge. Failure of the employer to take such notice or remedial action violates the duty. The employer, therefore, is negligent or reckless when it fails to uphold either duty. The theory of negligence is virtually identical to the theories of coworker liability and the EEOC's proposed "lack of grievance procedure" liability that the Meritor court had addressed. Courts that wish to follow the Supreme Court's directions to use agency law principles, can import the same remedial approaches that were presented to the Meritor court, by harmonizing them with the negligence theory of Restatement §219(2)(b). These courts can essentially employ the same comfortable analysis advocated by the EEOC and employers to the Meritor court. Courts that apply the Restatement no further than §219(2)(b) usually arrive at outcomes favorable to the employer, as illustrated by recent decisions in the Third and Sixth Circuits.

In Bouton v. BMW of North America,23 a bilingual secretary claimed hostile work environment against her supervisor. In casting for the appropriate standard of liability, the Third Circuit surveyed the various policies underlying the various Restatement sections. It felt most comfortable with the negligence theory, in which scrutiny would focus on the employer's policies against sexual harassment and on whether the victim adequately notified the employer of the harassment. Finding the employer's policy in place, and the notification by the victim inadequate, the Court held that the complaint mechanism was well known to the plaintiff and further harassment was prevented in response to her first complaint. "By definition," held the Court, "there is no negligence." The Court relieved BMW of whatever harassment may have occurred by sustaining the award of summary judgment against the plaintiff.

Similarly, the Sixth Circuit in Reed v. Delta Air Lines Inc.,24 was faced with an airline ticket agent who alleged that she was sexually assaulted by her supervisor, among other acts of a sexual nature. The Court relieved the employer of liability based on a finding that the employer did not have "real notice" of the supervisor's propensity for harassment, and on the fact that the employer took prompt remedial action after learning of the harassment. Under the guise of agency negligence theory, these courts, like most that essentially apply the coworker and grievance procedure tests, can easily reach a result favorable to the moderately vigilant employer.

The employee, therefore, is likely to lose the "tug-of-war" unless it can induce the court to apply the alternative liability standards found in the Restatement (Second) of Agency, specifically in the "apparent authority," and, more importantly, the "aided in accomplishing" clauses of section 219(2)(d).

C. Apparent Authority

Section 219(2)(d) of the Restatement (Second) of Agency ostensibly combines two grounds for liability into a single section. That section provides that a master may be liable for the acts of a servant acting outside the scope of delegated authority if the servant "purported to act on behalf of the principal and there was reliance on that apparent authority, or if the servant was aided in accomplishing the tort by the existence of the agency relationship."25

Some courts refuse to acknowledge this section at all. In Spencer v. General Electric,26 for example, the Fourth Circuit mentioned this section, but refused to apply it in a case involving the rape of the victim. In Reed v. Delta Airlines Inc., the Court, as mentioned above, balked at applying section 219(2)(d), and focused exclusively on the employer's complaint procedure.27

Other courts acknowledge section 219(2)(d) but only for the part of it that imputes employer liability based on apparent authority. These courts either ignore or dismiss the second part of the section. By training their sights on apparent authority, these courts obviate employer liability because it is unlikely that a harasser will "purport to act on behalf of the employer by his inappropriate actions toward the plaintiff," as illustrated in Hirschfield v. New Mexico Corrections Dept.28 There, a female typist in a prison alleged that she was actually harassed by the Captain of Security, who was not her direct supervisor. She invoked section 219(2)(d) by claiming that the harasser was "aided in accomplishing" the harassment by virtue of agency relationship. Instead of analyzing whether the conduct was facilitated by the harasser's powerful position, the court hastened to sweep the clause "aided in accomplishing" into the apparent authority part of the clause. Thus, it held that "[t]he second half of 219(2)(d) which reads 'or is aided in accomplishing the tort by the existence of the agency relations,' must be read in the context of what immediately precedes it." Since the Captain "did not purport to act on behalf of the institution by his inappropriate actions toward plaintiff," the court found section 219(2)(d) inapplicable and the employer not liable.

D. Does "aided in accomplishing" merely modify apparent authority?

As demonstrated in Hirschfield, many courts attempt to merge the "aided in accomplishing" clause of section 219(2)(d)
LIABILITY continued from page 7
into the concept of apparent authority, rather than recognizing it as a separate basis for liability. One court was apparently so concerned that the "aided in accomplishing" clause might be read on its own, it replaced the connective "or" in the Restatement with the word "and" in citing the section.9 Another court strained to read the "aided in accomplishing" clause out of the Restatement altogether by making a declaration that obliquely revealed its recognition that the "aided in accomplishing" clause open the door to automatic liability. In Doe v. NCR, an employee was raped on the job after-hours by her supervisor. There, the employee claimed that the supervisor was "aided in accomplishing" the harassment by the virtue of his job which allowed him entrance to the office and proximity to her. The district court, as in Hirschfield, interpreted the section as relating only to apparent authority. In support of this reading, it referred to Comment (e) on section 210(2) which speaks of section (d) as "includ[ing] primarily situations in which the principal's liability is based upon conduct which is within the apparent authority of a servant." Reading this respectively, the Court dismissed the plaintiff's claim that her supervisor bore liability for the employer by virtue of his proximity to her.

It may be surmised that courts narrow the focus of section (2)(d) to solely "apparent authority" because employers are more comfortable under that standard, and can more easily prevail. Plaintiffs rarely will be able to prove apparent authority. First, few harassers "purport" that they are acting on behalf of the employer when engaging in harassment. Victims will often have difficulty proving that they believed that the agent was authorized to engage in harassing conduct. Moreover, many courts have concluded that the same grievance procedures and remedial action that negate negligence liability also "divest" employers of apparent authority.31 Under the apparent authority theory, employers, once again, can be readily relieved of harassment liability if they have prevention and responsive mechanisms in place -- which divest apparent authority and destroy any imputed liability.32 In short, where the courts' focus is on the "apparent authority" clause in section 219(2)(d), the employee is likely to be unable to impute liability to the employer. E. "Aided in accomplishing" clause--on its own.

By contrast, several courts that have read the "aided in accomplishing" clause apart from apparent authority have opened a wide realm of direct employer liability in supervisor-created hostile environment cases. In Rauch v. Coyne, for example, a hotel employee alleged that her supervisor was able to harass her only because he had a key allowing him to enter the locked room where she worked. On this basis, the D.C. district court found that the harassment was, under section 219(2)(d) "aided by the agency relationship." Applying this "proximity" or "access" interpretation to another case involving a rape, the outcome is likely to be different than it was in Doe v. NCR. For example, in Huitt v. Market Street Hotel Corp., the plaintiff was a bartender who was raped on her first day of work by her supervisor when he drove her home. Her hostile work environment claim was essentially similar to that asserted in Doe v. NCR, only in Huitt, the plaintiff alleged that her supervisor has disallowed her use of the phone to find another ride home. Thus, the court found there was sufficient facts on which to sustain direct employer liability under section 219(2)(d): "accepting plaintiff's evidence, her superior was able to place himself in a position to drive plaintiff home by using his authority in order to make it more difficult for plaintiff to make other arrangements for a ride...[the supervisor] accomplished the alleged rape of plaintiff by using his authority to place plaintiff in the vulnerable position of having no ride home other than [the supervisor]."

Only a few courts have based "aided in accomplishing" liability on whether the supervisor had access to the subordinate to engage in the sexual harassment. Generally, the courts require something more than mere access. As the Huitt court noted, some invocation of supervisor authority to facilitate the harassment should be present, but the supervisor need not expressly threaten the subordinate by referring to the authority delegated.33 An increasing number of courts look for some presence of supervisory authority in the harassment before applying the "aided in accomplishing" clause as a basis of liability. When they do, their focus tends to land not on where the harassment takes place, or on the issue of access. Rather, these courts recognize that supervisors who have the inherent power of retaliation, may be facilitated by this inherent power when they harass the employee. While the supervisor may not be invoking this retaliatory power as explicitly as in quid pro quo harassment, due to its presence, the application of the "aided in accomplishing" clause may lead as naturally to strict liability in hostile environment cases as it does in quid pro quo cases.

The first major post-Meritor case to illustrate how hostile work environment strict liability can arise under the "aided in accomplishing" clause used an analysis that was nearly indistinguishable from a quid pro quo analysis. The Eleventh Circuit in Sparks v. Pilot Freight Carriers, Inc. was confronted with a billing clerk whose superior, a terminal manager made sexual advances combined with remarks such as "you'd better be nice to me," and "your fate is in my hands." She rebuffed these gestures, never notified her company official, and was eventually fired. She claimed quid pro quo harassment in that she was fired in retaliation for her refusal to give in to his sexual demands. She also claimed hostile work environment harassment. The court conceded that the supervisor was not acting within the scope of his employment when allegedly harassing Sparks. Applying the section 219(2)(d) exceptions to respondeat superior, however, the Court emphasized the "aided in accomplishing" clause as a distinct basis for liability from apparent authority. The court noted that where the supervisor exercises actual decision-making authority over the subordinate's job, direct liability flows to the employer in the quid pro quo case. Adopting the same principle for hostile work environment cases, the Court observed that the terminal manager had actual and apparent authority to alter Spark's employment statutes--including authority to fire her. Since he repeatedly reminded Sparks that he could fire her, should she fail to comply with his advances, the court concluded that the company may have been directly liable to

Continued on page 9
LIABILITY continued from page 8

her under the "aided in accomplishing" clause.

The question raised by Sparks is: what kinds of managerial conduct, apart from repeated reminders of being fired, will suffice to trigger section 219(2)(d) liability? Can strict liability be imputed from the acts of non-supervisors who are still powerful figures in the organization and who can affect an employee's destiny? Can direct liability be imputed from the acts of a low-level supervisor who has been delegated little authority but who can affect some aspects of the victim's job conditions? What if the manager does not intend to use his authority, but the victim nevertheless perceives a threat of reprisal? Can it not be argued that even if such a supervisor has not relied on apparent authority, he would still have been aided by the existence of the agency relationship.

Perhaps the most sensitive, and realistic, analysis of how high level officers can wield their power to "aid" or facilitate sexual harassment, without explicit threats, was set forth by Chief Judge Myron H. Thompson of the Middle District Court of Alabama in Sims v. Montgomery County Commission. In Sims, Butler, the county sheriff, asked a female dispatcher to join him in getting some coffee and cake. As they went into the coffee room, Butler approached the dispatcher, and in her words, "[h]e put his hands down my side and on my buttocks." She said nothing because she figured Butler had acted unintentionally. A few days later, however, Butler approached her again and asked her if the telephone number was in.

The court  found that Columbia provided a

Continued on page 10
endure sexual harassment, the employer will be liable regardless of the absence of notice or the reasonableness of the employer's complaint procedures. The fact that the person engaged in the harassment has the authority, real or apparent, to make decisions affecting the economic status of the employee, leads to direct liability to the employer under section 219(2)(d)—the identical analysis that leads to direct liability in *quid pro quo* cases. As the Second Circuit concluded liable: "[i]t would be a jarring anomaly to hold that conduct which always renders an employer liable under a *quid pro quo* theory does not result in liability to the employer when that same conduct becomes so severe and pervasive as to create a discriminatorily abusive work environment."

While the Second Circuit did not require explicit threats of job retaliation for direct section 219(2)(d) liability to be imputed, the Circuit was quick to point out that "where a low-level supervisor does not rely on his supervisor authority to carry out the harassment, the situation will generally be indistinguishable from cases in which the harassment is perpetrated by a co-worker—thus the employer will not be liable unless "the employer either provided no reasonable opinion for complaint or knew of the harassment but did nothing about it.""

The open question after *Karibian*, therefore, is, at what level of supervisory capacity will direct, or strict, liability be triggered under section 219(2)(d)? As the *Sims* court noted: "a supervisor need not necessarily be high in the business structure, nor does he have to have the authority to hire, fire, or promote in order to be considered an agent whose conduct is binding on an employer under Restatement §219(2)(d)." Must the supervisor explicitly condition job benefits on submission to the harassment, as in *quid pro quo* cases? Or, once the actual or apparent authority to affect job benefits is present, will the unspoken "hope" on the supervisor's part, that the victim will be reluctant to reject him, because of his authority, be enough as in *Sims*? For that matter, does the harasser even need to be the direct supervisor of the victim? Might not other high-powered individuals within the organization be "hopeful" that, by virtue of their positions, the victim will be reluctant to reject their abusive conduct. The plaintiff might argue that whenever there is an understandable fear that the harasser will use his or her authority to retaliate, no matter who the harasser is, direct liability applies under section 219(2)(d). We can expect to see imputed direct liability stretched further as the tug-of-war continues in hostile work environment litigation.

Conclusion
Judging by the Second Circuit and EEOC position staked out in *Karibian*, strict liability is now likely to be sought by plaintiffs in more cases of hostile work environment. Although the Supreme Court in *Meritor* rejected automatic liability in all supervisor-created hostile environment cases, it did not foreclose the possibility that such liability can obtain when agency principles are applied. By directing courts to these agency principles, the Court invited plaintiffs and courts to ask why strict liability should not be imputed whenever an ingredient of the harassment is a legitimate fear of retaliation based on the harasser's authorized power to affect job conditions—irrespective of whether the conduct fits neatly into the *quid pro quo* or hostile work environment categories.

Faced with possible automatic liability for their supervisors' actions, employers who wish to keep a safe distance from liability must redouble their efforts to prevent harassment. This has always been the prime policy argument in favor of holding employers strictly liable for supervisor-created harassment. This standard may, at first, seem onerous. Employers may be displeased when courts no longer view their grievance procedures as an impregnable shield against pre-grievance liability. Nevertheless, employers will probably find that their grievance and remedial mechanisms are effective in avoiding liability costs under a strict liability standard as under the negligence or coworker liability approaches. In reality, most sexual harassment victims are not interested in bringing a long, arduous, and expensive lawsuit simply in order to stick employers with the pre-grievance harassment causes by their supervisors—under any theory! Their interests lie in stopping the harassment without retaliation. Therefore, there will always be an incentive for both employees and employers to use effective preventive and remedial procedures to resolve their problems instead of costly litigation. Sharon Karibian, for example, undoubtedly would not have brought her lawsuit if Columbia's complaint system had been effective. While these mechanisms may not extinguish sexual harassment liability completely under a strict liability theory, will obviate liability, for all practical purposes, when they are working well. Making sure these mechanisms work better, by making liability standards stricter, may, in the end, be worthwhile.

References
1. Hostile work environment sexual harassment was declared a violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq. in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 65, 106, S.Ct. 2399, 2404, 91 L.Ed. 2s 49 (1986). There, the Court defined hostile work environment harassment as occurring, when "[s]exual conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." (quoting 29 C.F.R. § 1604.11(a)(3)). Moreover, "[f]or 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.'" 477 U.S. at 67, 106 S.Ct. at 2405 (quoting *Henson v. Dundee*, 682 F.2d 897, 902 (11th Cir. 1982)).


4. *Id. at 70.*

5. In *Meritor*, the D.C. Circuit, did not apply a strict liability standard in holding the employer liable for the harassment that took place when a voluntary affair went sour between the supervisor and subordinate.

Continued on page 11
LIABILITY continued from page 10

6 This approach was first outline in the EEOC 1980 Guidelines. 29 C.F.R. §1604.11(d) and received extensive judicial recognition. See, e.g., Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982).

7 Brief for US and EEOC as Amici Curiae 26 reprinted at 40 FEP. (BNA) §1828029 quoted in Larson, Employment Discrimination, §41A.64(c) n.25.


9 477 U.S. at 72, 106 S.Ct. at 2408.

10 Id. That view appears to be supported by the definition of an "employer" in Title VII of the Civil Rights Act of 1964, as "any agent or an employer, 42 U.S.C. §2000e(b). But raises the question of whether a supervisor, when engaging in sexual harassment, is acting as an agent.

11 The Court noted that "absence of notice to an employer does not necessarily insulate that employer from liability." Id.

12 The Court stated that the "mere existence of a grievance procedure and a policy against discrimination, coupled with [an employee's] failure to invoke that procedure must insulate [an employer] from liability." Id.

13 Id.

14 Id.

15 Restatement (Second) of Agency §219(1) (1958). Conduct is within scope of employment if it is "actuated, at least in part, by a purpose to serve the [employer]." Id. at §228. Conduct specifically forbidden by the employer may still be within the scope of employment based on such factors as: (1) whether it is common among employees; (2) the time, place, and purpose of the act; (3) whether the employer has "reason to expect" the act will be done; and (4) whether "the instrumentality by which the harm is done has been furnished" by the employer. Id. at §229.

16 Restatement (Second) of Agency §219(2)(d); see also, Horn v. Duke Homes Inc. Div. of Windsor Mobile Homes, 755 F.2d 599, 605 (7th Cir. 1985).


18 The opinion joined by Chief Justice Burger, and Justices White, Powell, and O'Connor stated that employer liability is not automatic in hostile environment cases. 477 U.S. at 72.

19 California is one state that imposes such automatic liability. Cal. Code §12940(h); see, e.g., Kelly-Zarian v. Wohl Shoe Co., 22 Cal. App.4th 397, 27 Cal. Rptr.2d 457 (Ct. App. 1994) (once jury found employee's supervisor had harassed her, the court granted JNOV against the employer under a strict liability theory).

20 Infra note 17.


22 Hirschfield, 916 F.2d at 577, quoting EEOC v. Hacienda Hotel, 881 F.2d 1504, 1516 (9th Cir. 1989).


26 894 F.2d 651 (4th Cir. 1989).

27 Infra note 24.

28 916 F.2d 572, 579 (10th Cir. 1990).

29 In Watts v. New York City Police Dept., 724 F. Supp. 99, 106 n.6 (S.D.N.Y. 1989) the court wrote: "[n]evertheless, if the conduct is accomplished be means furnished to the supervisor by his employer (such as the supervisor's influence or control over hiring, job performance evaluations, work assignments, or promotions), and the employer has not put in place strong policies and procedures that effectively belie the appearance of such authority, agency law will impute such conduct to notwithstanding the absence of notice." (emphasis added).


34 Infra note 30.


36 Citing Lipsett v. University of Puerto Rico, 864 F.2d 881 n.71 (1st Cir. 1988).

37 830 F.2d 1554 (11th Cir. 1987).


39 Id. at 1071.

40 Id. Id. at 1075.


42 Id. at 776, citing Henson, 682 F.2d at 910.

43 Id.

44 766 F. Supp. at 1069.
The Research Center

In an effort to develop a greater awareness of and access to legislative and scholarly developments in the field of employment and labor law, this section of the Newsletter provides listings and locations for the most recently published scholarly journal articles, conference papers and the most recently introduced federal legislation. It is the hope of the Editors of this Newsletter, that this information will inspire and facilitate research and writing in the area of employment and labor law.

CONFERENCE PAPERS

This Newsletter provides the only widely-distributed, comprehensive listing of the scholarly papers on employment and labor law presented at the meetings of the regional academies of legal studies in business.

The North East Academy of Legal Studies in Business held its annual meeting in Hempstead, New York, April 30 - May 1, 1994. The following papers dealing with employment and labor law issues were presented at the meeting:

The Legal Guidelines for Employer-Employee Committees after Electromation and Dupont, Bruce L. Haller, Dowling College

Whistleblowers Face Preemption: When the Purposes of Laws Conflict, John Houlihan, University of Southern Maine

Weight Discrimination: Is It a Barrier to Employment?, Diana D. Juettner, Mercy College and Anthony F. Libertella, Iona College

Harris v. Forklift Systems, Inc.: What Are the Standards in Hostile Environment Claims?, Eileen Kelly and Gwen Seaquist, Ithaca College

Violence in the Workplace: Are Employers Legally Responsible?, Susan Lynn Pollet, Mercy College

The following papers were presented at the annual meeting of the North Atlantic Regional Business Law Association at Stonehill College, April 23, 1994:

Constructive Discharge: Can the Employer Ever Win?, John Houlihan, University of Southern Maine

Using Data From Court Cases & Employee Surveys To Develop Sexual Harassment Policies, Toni Lester, Babson College

Weighty Matters: Cook v. State of Rhode Island Federal Protection for the Overweight, Dr. Shariene A. McEvoy, Fairfield University


Employer Liability For Torts of Employees: The Developing Law of Negligent Hiring and Retention, David Twomey, Boston College

The following papers were presented at the annual meeting of the Western Academy of Legal Studies in Business at Asilomar, California, April 8-10, 1994:

The Employer's Burden Under the Americans With Disabilities Act, Thomas Brierton, University of the Pacific

Sexual Harassment Laws Present a Plurality of Perplexing Problems, Elizabeth R. Koller, University of the Pacific

Employer Defense Strategies in Discrimination Cases Involving Workers With HIV: Judicial Interpretations and Future Expectations, Jeffrey A. Mello, Golden Gate University

Prevalent Employer Discriminatory Behaviors Toward Employees With HIV and the Likely Impact of the Americans With Disabilities Act, Jeffrey A. Mello, Golden Gate University

The following papers were presented at the annual meeting of the Mid Atlantic Academy of Legal Studies in Business at The College of William and Mary, April 14-15, 1994:

Employer Liability for Hostile Environment Sexual Harassment Based on a Single Occurrence: Seeking Guidance From the Courts, Francis Achampong, Norfolk State University

Virginia Expands Public Policy Exception to Employment at Will, Douglas Brinckman, Radford College

Labor Law: Total Quality Management Teams in Jeopardy, Randall K. Hanson and Rebecca Porterfield, University of North Carolina at Wilmington

Continued on page 13
Research Center

(continued from page 12)

The following paper was presented at the annual meeting of the Pacific Northwest Academy of Legal Studies in Business at Salem, Oregon, April 22-23, 1994:

Equal Opportunity Harassment, Dr. Mary-Kathryn Zachary, West Georgia College

The following paper was presented at the annual meeting of the Pacific Southwest Academy of Legal Studies in Business at Long Beach, California, February 4-5, 1994:

Recent Changes to Employment Law in Ontario, J. Douglas Clarke, Toronto-Ryerson Polytechnic University

Federal Legislation

The following list highlights the employment and labor related legislation introduced in the 103rd Congress, since January 1, 1994. If you wish to learn more about bills listed here, the Library of Congress maintains an electronic bulletin board with all legislation introduced in every Congress since 1973. The data for the current Congress (the 103rd) is updated daily. Information on bills in the current Congress includes number, title, digest of the bill, sponsors/cosponsors, committee action and floor action. The bulletin can be accessed, over Internet, at the Telnet address: locis.loc.gov.

House of Representatives

H.RES.446 For purposes of issuing final guidelines under Title VII of the Civil Rights Act of 1964 relating to unlawful harassment in employment, the EEOC should exclude religion based harassment.

H.CON.RES.203 Information regarding the conviction of child-related sex offenses should be available to employers.

H.CON.RES.227 No person shall be required to comply with, participate in, or endorse any employee sensitivity training or education relating to homosexuality or cultural diversity as conditions relating to employment in the Federal civil service.

H.R.3738 A bill to promote equitable pay practice and eliminate discrimination in the civil service.

H.R.3801 Makes applicable to congressional employees any provisions of Federal law relating to employment, discrimination, health and safety, and information availability to the public.

H.R.3949 Amends Fair Labor Standards Act of 1938 excluding firefighters or rescue squad members from coverage during period of volunteer service at a location they are not employed.

H.R.3966 Amends the Fair Labor Standards Act of 1938 providing individuals with impaired vision or blindness not be covered by special certificates for employment of handicapped workers at a lower than minimum wage.

H.R.4112 Prohibits reprisal against a member of the armed forces for making or preparing a communication alleging sexual harassment or unlawful discrimination against such a member.

H.R.4150 Amends Fair Labor Standards Act of 1938 to apply overtime exemption to employees whose regular rate of pay exceeds one and one-half times the minimum wage and more than half of whose compensation represents commissions on goods and services.

H.R.4161 Federal Employees Family Friendly Leave Act amending Federal law to allow Federal employee use of sick leave to attend the medical needs of a family member.

H.R.4444 Equity for Congress Act, making applicable to Congress stated Federal laws.

H.R.4547 Amends the Fair Labor Standards Act of 1938 to exempt from minimum wage and overtime compensation provisions employees of educational enterprises recognized as independent school districts who exhibit specified criteria.

H.R.4565 Employment Non-Discrimination Act of 1994-Prohibits employment discrimination on the basis of sexual orientation by covered entities, including employing authorities of Congress.

H.R.4803 A bill to amend the Fair Labor Standards Act of 1938 to prohibit discrimination in the payment of wages based on sex, race, or national origin.

H.R.4981 A bill to amend certain Federal civil rights statutes to prevent involuntary arbitration to claims arising from discrimination based on race, color, religion, sex, national origin, age, or disability.


HAMDT.832 An amendment to require the application to the Legislative Branch within 120 days of enactment of the bill the specified Acts.

Continued on page 14.
Research Center
(continued from page 13)

Senate
S.RES.219 For purposes of issuing final regulations regarding religious harassment under Title VII of the Civil Rights Act of 1964, the EEOC should exclude such categories.
S.1979 Sexual Harassment Prevention Act of 1994-Directs employers, including Federal and congressional, to post in conspicuous places a notice prepared or approved by the primary enforcement agency setting forth sexual harassment guidelines.
S.1864 Harassment-Free Workplace Act-Unlawful for a respondent to engage in sexual harassment against an employee or job applicant. Prohibits retaliation against persons involved with alleged harassment charges.
S.2051 A bill to amend the Fair Labor Standards Act of 1938 to exclude from the definition of employee firefighters and rescue squad workers who perform volunteer services and to allow an employer not to pay overtime compensation to the above mentioned performing volunteer services.
S.2071 Congressional Accountability Act-Makes specified Federal statutes applicable to the offices and employees of the legislative branch of the Federal government.
S.2327 A bill to amend the Civil Rights Act of 1964 to encourage mediation of charges filed under Title VII of such Act to decrease resort to the courts.
S.2328 Federal Acquisition Labor Law Improvement Act of 1994-Amends the Davis-Bacon Act to provide for wage determinations based on the locality where the work is performed.
S.2405 A bill to amend Federal civil rights statutes to prevent involuntary arbitration to claims involving employment discrimination.
S.AMDT:1804 Express the sense of the Congress regarding the issuance under Title VII of the Civil Rights Act of 1964 of administrative guidelines applicable to religious harassment in employment.

Public Laws
The following legislation has been passed into public law since the most recent issue of this Newsletter.

H.R.1 Public Law: 103-3 (2/5/93)

Law Review Articles
The following is a partial listing of scholarly articles dealing with employment and labor law issues which have been published between January 1, 1994 and September 12, 1994. Future editions of the Employment and Labor Law Quarterly will provide listings of articles published since the date upon which the following list was compiled.

Auray, Lori, A Cost-Shifting Amendment to the Family and Medical Leave Act of 1993: How to Improve Upon a Good Thing, 3 TEX. J.WOMEN&L. 403-416 (Spr 1994)
Barton, Peter C., Weatherwax, Roy C., Revenue Ruling 93-88 Expands Exclusion for Employee Discrimination Damages, 25 TAX ADVISER 281 (May 1994)
Bauer, Kristoff T., Congress Finds the Key to Extraterritoriality? 45 LAB.L.J. 417-432 (Jul 1994)
Beck, Melissa M., Fairness on the Field: Amending Title VII to Foster Greater Female Participation in Professional Sports, 12 CARDOZO A.E.L.J. 241-280 (Spr 1994)

Continued on page 15
Research Center

(continued from page 14)


*Employment Discrimination: Recent Developments in the Supreme Court*, 10 *Touro.L.Rev.* 525-540 (Wnr 1994)

*Employment Discrimination - Sexual Harassment - New Jersey Supreme Court Adopts a Gender-Specific Reasonableness Standard*, 107 *Harv.L.Rev.* 955-960 (Feb 1994)


Continued on page 16
Research Center
(continued from page 15)


Hervey, Tamara K., Structural Discrimination Unrecognised, 57 Mod.L.REV. 307-314 (Mar 1994)


Hofmeister, Edith M., Women Need Not Apply: Discrimination and the Supreme Court's Intimate Association Test, 28 U.S.F.L.REV. 1009-1077 (Sum 1994)


Jackson, Brian F., Flaxman, Howard R., Intermittent Leave and Reduced Leave Schedule: Traps for the Unwary Under the Family and Medical Leave Act, 20 EMP.REL.L.J. 29-46 (Sum 1994)


Ludwig, Steven K., Complying with the Family and Medical Leave Act, 10 CORP.COUNS.Q. 1-21 (Jan 1994)


Jacobs, Lesley A., Equal Opportunity and Gender Disadvantage, 7 CANADIAN.J.&JURIS. 61-71 (Jan 1994)


Johnson, Kathryn A., Constructive Discharge and "Reasonable Accommodation" Under the Americans with Disabilities Act, 65 U. COLO.LREV. 175-191 (Wntr 1994)

Khan, Anwar N.; Hohnen, Jacoba, Workplace Sexual Harassment in Britain and Western Australia, 23 J.COLL.NEG.PUB.SECTOR 137-150 (Spr 1994)

Kralik, Stephanie L., Civil Rights - The Scope of Title VII Protection for Employees Challenging English-Only Rules, 67 TEMP.L.REV. 393-416 (Spr 1994)


Lipschultz, Jeramy Harris, Craft v. Metromedia, Inc. and its Social-Legal Progeny, 16 COMM.&L. 45-74 (Mar 1994)

Long, B.L., Psychiatric Diagnoses in Sexual Harassment Cases, 22 BULL.AM.ACAD.PSYCHOL.L. 195-203 (Jun 1994)


Martell, Kathryn; Sullivan, George, Sexual Harassment: The Continuing Workplace Crisis, 45 LAB.L.J. 195-207 (Apr 1994)

Martinez, Theresa A., Embracing the Outlaws: Deviance at the Intersection of Race, Class, and Gender, 1994 UTAHL.REV. 193-207 (Wntr 1994)

Mello, Jeffrey A., Prevalent Employer Discriminatory Behaviors Toward Employees With HIV and the Likely Impact of the ADA, 45 LAB.L.J. 323-337 (Jun 1994)


Newbold, Lindsay A., Application of the ADEA to Indian Tribes, 46 WASH.U.J.URB.&CONTEMPL. 381-390 (Sum 1994)

Continued on page 17


Patterson, Kathryn Fruch, Discrimination in the Workplace: Are Men and Women Not Entitled to the Same Parental Leave Benefits Under Title VII? 47 SMU L. Rev. 425-448 (Jan-Feb 1994)


Brant, Joanne C., 'Our Shield Belongs to the Lord': Religious Employers and a Constitutional Right to Discriminate, 21 Hastings Const. L. Q. 275-321 (Wnt 1994)


Perea, Juan F., Ethnicity and Prejudice: Reevaluating 'National Origin' Discrimination Under Title VII, 35 Wm. & Mary L. Rev. 805-870 (Spr 1994)


Sneirson, Amy M., One of These Things is Not Like the Other: Proving Liability Under the Equal Pay Act and Title VII, 72 Wash. U. L. Q. 783-795 (Sum 1994)


Suffredini, Brian R., Racial Discrimination: Reductions-In-Force Do Not Absolve Employers from Title VII Liability, 35 B.C.L. Rev. 495-505 (Mar. 1994)


West, Martha S., Gender Bias in Academic Robes: The Law's Failure to Protect Women Faculty, 67 Temp. L. Rev. 67-178 (Spr 1994)


The Case Against Front Pay Damages

by

John McGee

Southwest Texas State University

Successful plaintiffs under the Age Discrimination in Employment Act of 1976 (ADEA) may recover lost pay from the date of termination until trial (back pay), plus the pay they would have received from the date of trial until retirement age (front pay). Front pay has been defined by one court as "a lump sum representing the discounted present value of the difference between the earnings an employee would have received in his old employment and the earnings he can be expected to receive in his present and future, and by hypothesis inferior, employment." Speculating on the amount an employee would have received in the future until some hypothetical retirement date has proven to be impractical and it is time to ask whether such damages are a legitimate compensatory component in age discrimination cases.

The concept of front pay does not appear in the Act itself. The remedies section simply says that civil actions may be brought "for such legal or equitable relief as will effectuate the purposes of this chapter," and "legal and equitable relief ... includes ... without limitation judgements compelling employment, reinstatement or promotion." Thus, Congress has stated its preference for reinstatement as the proper remedy in discrimination cases. The concept of allowing front pay, instead of reinstatement, first appeared in a 1984 law review article by Peter Janovsky, who made a persuasive argument for allowing recovery of front pay in order to make a plaintiff whole and carry out the intended purposes of the Act. As long as the "normal" retirement age was 65, as it was in 1984, the amount of front pay could be calculated with relative certainty. But in 1986 the ADEA was amended to prohibit mandatory retirement and to eliminate any reference to a "normal" retirement age. With the demise of a fixed retirement age, calculating the proper amount of front pay to award has become a game of chance with many, as yet, unanswered questions, such as, When should front pay be granted instead of reinstatement? How should front pay damages be calculated? Can the remaining work life of an employee be accurately proved? Does the victim have a duty to mitigate front pay damages?

Reinstatement or Front Pay?
The courts often state the "rule" that reinstatement should suffice unless there are special factors involved which dictate a resort to front pay, described as a "special" remedy, warranted only by "egregious circumstances." Therefore, it could be expected that front pay would be available only in cases where reinstatement is impracticable or impossible, such as situations involving discord or antagonism between the parties that would render reinstatement ineffective. The trial court found just such a situation in Walther v. Lone Star Gas Co. and ordered front pay but the Fifth Circuit reversed and ordered reinstatement because the employer had testified that it considered the employee a qualified and competent employee capable of resuming work and there was little evidence of ill will between employer and employee. The Fifth Circuit said it could find nothing in the record to indicate that reinstatement was infeasible, other than a statement that the litigation was "protracted and necessarily vexing," and therefore front pay was not the appropriate remedy. Despite such precedents, the use of front pay has become widespread. Ordering reinstatement forces judges to supervise a coerced employment relationship; perhaps that is why it has been judged to be impracticable or inadequate where 1) there is discord and antagonism between the parties, 2) it is "reasonable" for the claimant to refuse an offer of reinstatement, and 3) the claimant is "hearing" the normal retirement age anyway. Even plaintiffs who request reinstatement sometimes end up with front pay instead, the courts having found reinstatement "impracticable." The jury in Price v. Marshall Erdman & Associates, Inc. awarded Price $750,000 in front pay, but he wanted to be reinstated instead. The court refused to order reinstatement because of "mutual dislike and defendants' continued opinion that plaintiff is incompetent," reasoning that "if the employee dislikes the idea of working for the employer or the employer dislikes the idea of having the employee work for him, reinstatement should not be ordered." Price was a salesman who spent much of his working time away from the office and so was not constantly rubbing shoulders with his enemies; nevertheless, the judge noted that "It is one thing to order the reinstatement of low-level employees performing routine tasks, or higher-level employees after the supervisors involved in the unlawful employment action have left the company or been transferred to another division, but to order reinstatement of a high-level employee performing discretionary functions into the division from which he was fired and which remains under the management of the person who fired him is a formula for continuous judicial intervention in the employment relation. If Price is reinstated, every time he is denied credit for a sale, or denied a raise or a bonus, or has a squabble with [his supervisor], he will be tempted to run to the district court." In Lewis v. Federal Prison Industries, Inc., the court found it reasonable for Lewis to refuse reinstatement after a psychiatrist testified that Lewis experienced a "reactive depression" in response to the discriminatory acts that occurred at the company and that, although Lewis' health had improved since he left, his symptoms would return should he return there. There was also evidence that Lewis had only four years until the date of his mandatory retirement. In another case, the plaintiff was awarded front pay because he was within eight years of retirement.

Although the trial ordered reinstatement in EEOC v. Century Broadcasting Corp., it was reversed because the judge had not given a sufficient "rational" for withholding front pay. The case involved a radio station which had terminated all announcers over the age of forty. The trial court ordered that they be rehired but the

Continued on page 19
DAMAGES continued from page 18

Court of Appeals would not allow this because "reinstatement would disrupt the operation of the station and would displace announcers currently employed" and "station management does not have confidence [in these announcers]." 10

The case that best illustrates the willingness of the courts to substitute front pay for reinstatement is *Buckley v. Reynolds Metals Co.* 26 The judge ordered that Buckley be reinstated immediately to his old position or to a substantially equivalent position. However, after eight months of fruitless negotiations, the parties stipulated that Buckley would seek an award of front pay instead. The court agreed, concluding that reinstatement was impossible or impracticable because the parties said it was.

Calculating the Amount of Front Pay

Front pay awards are guided by consideration of factors such as the availability of employment opportunities, the period within which the employee by reasonable efforts could have been reemployed, the employee's work and life expectancy, discount tables to determine the present value of future damages, and other factors that are pertinent on all types of prospective damage awards. 21 Some of this evidence, like the discount tables, is objective; but how is a judge or jury to know how long the plaintiff actually would have remained working at the job, whether he soon would have left for a different, perhaps better-paying job, or whether the plaintiff soon would have been dismissed for legitimate reasons? 22 Often the source of such data, which is necessary to calculate a reasonably certain front pay award, is the plaintiff's testimony and that of his experts.

In *Forest Electric Corp. v. Murtha* 23 the employee testified that he was in excellent physical condition and enjoyed working with the people at Forest Electric so much that he would have worked until he was seventy-three to seventy-five years old. He also testified that he was earning $49,406 per year at the time he was terminated, at age sixty-six. Based on this evidence, and on evidence of earning history and fringe benefits, and based on reasonable assumptions about increases in earnings due to economic conditions, Murtha's expert economist declared that Murtha would have earned approximately $377,000 in the period from his termination until age seventy-three, if he worked to that age. The expert stated that work life was a fact which varied too much from person to person to use general tables to estimate it. 24 The company countered with the testimony of a statistician rather than an economist. He testified that Murtha would probably have worked until age seventy, based on what the typical man who was working at age sixty-six would do. Assuming he retired at age seventy, Murtha's economic loss until retirement would have been $69,713. 25 The jury accepted Murtha's expert and conclude that he would have worked to the age of seventy-one to seventy-three. The front pay award was $200,000.

In *Doyne v. Union Electric Co.* 26 the employee testified that he planned to work until age seventy and that he had so informed Union Electric. One of Union Electric's own witnesses testified that prior to Doyne's termination he told another employee that he intended to work until age seventy. The jury awarded $273,993 in front pay based on this testimony but the trial judge reduced the amount to $19,610.66 after declaring that there was insufficient evidence to support the jury's finding that Doyne would have remained employed with Union Electric until age seventy and that the front pay award should be based on retirement at the age of 65. 27 The Court of Appeals sided with the jury and reinstated the $273,993 award. 28

The longer the proposed front pay period the more speculative the damages become. 29 Awards have been allowed involving as much as four years between the trial date and the date when compulsory retirement could have been imposed, 30 but it is the total circumstances, not merely the length of time until retirement, that determines whether a particular award is too speculative. Mr. Buckley, for example, sought an award to cover a nine year period, which under other circumstances might exceed the limits of permissible speculation. However, Buckley had worked for Reynolds for more than twenty-five years when he was fired; he had nine years to work before retirement. There was no reason to reject his assertion that he intended to remain at Reynolds until he reached the regular retirement age of sixty-five. It was also reasonable to assume that absent the illegal discharge, he would have been able to remain at Reynolds until he planned to retire. In view of his age, it was unlikely that Buckley would voluntarily switch jobs again or embark on a new career path. Finally, the industry where Buckley was employed provided relatively steady and dependable employment. Under these circumstances nine years did not seem unduly speculative. 31

Awards that have been considered unduly speculative have arisen in situations where the discharged employee is only forty years old or so, or where the award might encompass ten years or more during which the employee, had not been unlawfully discharged but continued in his employment, might or might not get raises, reductions, fired or incapacitated. 32 For example, the employees in *Rengers v. WCLR Radio Station* 33 requested nine years of front pay but the evidence indicated that in a fickle industry like radio, job security for disk jockeys is quite tenuous and so the court refused to speculate that they would have remained employed at the station until retirement. In *Price*, 34 the employee's expert witness estimated damages ranging from $1.2 million if Price retired at the age of sixty-five to $2.1 million if he retired at seventy-five but failed to discount each year's projected earnings loss by the probability that Price would have lived long enough to obtain those earnings. The court thought that since the probability was not one hundred percent the estimate of lost earnings should have been scaled down accordingly. The court decided a bigger problem was the expert's failure to take into account the high volatility of earnings: "The figures the expert projected may be the best possible estimate of . . . mean expected earnings had [the employee] remained with [the employer], but the variance around that mean must be considerable. Risk-averse persons—and most people are assumed to be risk-averse in their serious financial affairs—will pay a premium, often a large one, to avoid risk . . . [A] person who did not mind risk would not be willing to pay a loading charge—he would prefer to take his chances on the loss's occurring or not . . . The award in effect enabled (the employee) to exchange his risky . . ."

Continued on page 20
DAMAGES continued from page 19

expectations... for a risk-free asset having
the same expected value but, assuming
the employee is risk averse, a substantially
higher utility. 735

Front pay awards will not be upheld if
there is no evidence in the record to support
the calculations. For example, in Hybert v.
Heast the court had assumed that 1) the
employee would continue to work at his
present rate of productivity until the age of
seventy-two (he was sixty-seven when the
trial ended); 2) the employer would have
decided to employ the employee in his
last-held position until he retired at the age
of seventy-two; and 3) that the employer
would have continued to employ the em-
ployee at his last-held salary level for five
more years until he retired at seventy-
two.37 Since there was no evidence to
support any of these assumptions, the front
pay award was reversed.

The Duty to Mitigate

To be entitled to an award of front pay
a plaintiff must make reasonable attempts
to mitigate. The employer can avoid
liability by showing that there were suit-
able positions available and that the
employee failed to use reasonable care in
seeking them. For example, in Leeds v. Sex-
son the employee was not entitled to
an award of front pay because he failed to
remain in the labor market and failed to
diligently search for alternative work. The
employee in Rodgers v. Western-Southern
Life Insurance Co. 39 was not entitled to a
front pay award because he declined an
offer of reinstatement and failed to show
that it would have been feasible or
inappropriate for him to return. The jury
instructions in Gries v. Zimmer, Inc.40 offer
a concise statement of the duty to mitigate.

In that case, the judge told the jury that if
the plaintiff "failed to make reasonable
efforts to find a new job, you should
subtract from his damages any amount that
he could have earned in a new job after his
discharge."41

The length of time an employee has to
find comparable employment depends on
the circumstances. In Fite v. First Ten-
nessee Production Credit Ass'n,42 the
employee postponed seeking other
employment for a year in the expectation
that he would be reinstated. When it
became apparent that this would not
happen, he vigorously sought other
employment. Given these circumstances,
the court gave him more than three years to
find comparable employment.43

Should Front Pay be Doubled?
The ADEA calls for the doubling of
damages in cases of a willful violation.
Should this doubling apply to front pay
awards? In Olitsky v. Spencer Gifts, Inc.44
the employee argued that the court should
double the jury's award of $400,000
front pay after finding that Spencer Gifts
acted willfully and the Fifth Circuit agreed,
stating that "to exclude front pay would
make no sense, for an award of double
damages might well fall short of compen-
sation and thus contain no punitive
component at all (in fact contain a negative
punitive component). In such a case the
plaintiff might be better off if the violation
were adjudged not willful."45

On the other hand, several courts have
held that the doubling provision of ADEA
does not apply to front pay awards.46 These
courts see front pay exclusively as an
equitable award and, therefore, not subject
to doubling. One court has even consid-
ered double back pay and front pay as
mutually exclusive.47 Clearly, the avail-
ability of double damages is one of the
circumstances that courts look at when
deciding whether to award front pay at all.
In Lee v. Rapid City Area Sch. Dist.48 the
court entered judgement for $22,140 for
back pay, $39,664.85 for front pay, and
$10,000 for double damages, citing its
"discretionary" authority regarding double
damages while noting that the plaintiff had
already received an award of front pay.49

Summary and Conclusion

The phrase "without limitation" in the
damages section of the ADEA invites
federal courts to be imaginative in devis-
ing equitable remedies and front pay has
been the result. Initially, front pay was said
to be appropriate only when the other
damages awarded did not fully compen-
sate the plaintiff for his injuries. Subsequently, it has become the remedy of
choice where reinstatement is not feasible
because the employee has found another
job, where it would require displacement
of another worker, or where hostility would
result if the employee returned. Front pay
is being used to compensate employees
until retirement even though the discrimi-
nation has ceased. This is a windfall, not
restitution, says the Lewis dissent,50 and it
creates an incentive for the discharged
employee to remain unemployed and for
the employer to settle the case without
addressing the possible age discrimination in
the workplace. If front pay was not
available, the employee would have little
incentive to prosecute a frivolous claim.51

Given the difficulty in calculating the proper
amount of front pay and the resulting
speculative nature of the award it is time to
consider the wisdom of the widespread use
of this remedy.

References

2. McKnight v. General Motors Corp., 908 F.2d 104, 116 (7th Cir. 1990) cert. denied 499 U.S. 919, 111 S.Ct. 1306, 113 L.Ed. 2d 241
7. 952 F.2d 119 (5th Cir. 1992).
8. Id. at 126.

Continued on page 21
Letter from the Editor

With this first issue of the second volume, we officially enter our second year of publication. For those of you who have been with us from the beginning, you know that the publication continues to grow in size and expand in coverage. To reflect the shifting emphasis toward longer articles, the name of the publication has been changed, starting with this issue, to the Employment and Labor Law Quarterly. And, in keeping with this shift toward more scholarly fare, beginning with the next issue, Vol.2, No.2, the Quarterly will begin publishing reviewed articles. An editorial board has been assembled, in order to accomplish this. Of course we will always need more help, so if you are inclined in this direction, and would like to contribute your efforts to the growth of the publication, please call me at (505)562-2332, or drop me a note at College of Business, Eastern New Mexico University. A proposed Editorial Policy and Instructions for Contributors is included in this issue, for your review and comment. Since this Quarterly is being produced to meet the needs of the Employment and Labor Law Section, as well as the teaching and legal professions in general, your input into the development of this policy and the instructions is essential, so please communicate with me in this regard.

Even though the Quarterly will be publishing longer, reviewed articles, we will also continue to publish shorter unreviewed pieces, as we have in the past, as well as announcements of events important to the Section. Let me emphasize, the Quarterly is still evolving, and the format and the nature of the materials published is not cut in stone. If you have ideas for new features, send them in, or call me. I would personally like to publish book reviews, and interviews with attorneys who have handled important cases for which appellate or U.S. Supreme Court opinions have been published. I welcome your reaction to this idea.

Developments on the Quarterly, in the Section, have been superb. Laura Pincus and Dawn Bennett-Alexander deserve our thanks and a great deal of applause for their foresight and energy in founding this Section. Thank you both. The size of the section and the volume of scholarly writings in this field are growing tremendously. Fully one fourth of the papers presented at the last two Annual Meetings were on employment or labor law topics, and the field continues to be well represented at the regional meetings as a quick perusal of the "Conference Papers" section of the Research Center will reveal. For all of you who contribute your time to the publication, or who have submitted materials for publication, thank you. We could not do this without you.

Roger Johns
Chair of the Section
Editor in Chief