

ORIGINAL

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PROCEEDINGS BEFORE

**THE SUPREME COURT**

**OF THE**

**UNITED STATES**

CAPTION: BURLINGTON INDUSTRIES, INC. Petitioner v.

KIMBERLY B. ELLERTH

CASE NO: No. 97-569 *e-1*

PLACE: Washington, D.C.

DATE: Wednesday, April 22, 1998

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IN THE SUPREME COURT OF THE UNITED STATES

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BURLINGTON INDUSTRIES, INC., :  
Petitioner :  
v. : No. 97-569  
KIMBERLY B. ELLERTH :  
- - - - -X

Washington, D.C.  
Wednesday, April 22, 1998

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States at  
10:22 a.m.

APPEARANCES:

JAMES J. CASEY, ESQ., Chicago, Illinois; on behalf of the  
Petitioner.  
ERNEST T. ROSSIELLO, ESQ., Chicago, Illinois; on behalf of  
the Respondent.  
BARBARA D. UNDERWOOD, ESQ., Deputy Solicitor General,  
Department of Justice, Washington, D.C.; as amicus curiae,  
supporting Respondent.

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1 PROCEEDINGS

2 (10:22 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 now in No. 97-569, Burlington Industries v. Kimberly  
5 Ellerth.

6 Mr. Casey.

7 ORAL ARGUMENT OF JAMES J. CASEY

8 ON BEHALF OF THE PETITIONER

9 MR. CASEY: Mr. Chief Justice, and may it please  
10 the Court:

11 Is an employer strictly or automatically liable  
12 for job-related threats made in conjunction with sexual  
13 advances when the employee has suffered no tangible job  
14 detriment for the rejection of those advances -- in other  
15 words, the unfulfilled threat?

16 We submit that the answer to that question is  
17 no.

18 Strict or automatic liability should not be  
19 applied in a situation of unfulfilled threats, but rather  
20 should be analyzed --

21 QUESTION: Mr. Casey.

22 MR. CASEY: Yes.

23 QUESTION: It sounds to me like you're asking  
24 question 2 of the questions presented on petition for  
25 certiorari, which is whether strict liability is the

1 proper standard. Now, I thought the Court didn't grant  
2 certiorari on question 2. I thought we granted certiorari  
3 on question 1.

4 MR. CASEY: That is correct.

5 QUESTION: Most of your brief addresses question  
6 2. I mean, are we going to talk about question 1, on  
7 which cert was granted?

8 MR. CASEY: Justice, the -- the -- the  
9 question -- question 1 is the un -- is whether or not the  
10 strict liability standard ought to apply in the  
11 unfulfilled threat situation, where -- where there is no  
12 adverse job consequence.

13 QUESTION: Well, it doesn't address strict  
14 liability actually. It says whether a claim of quid pro  
15 quo sexual harassment may be stated under Title VII, when  
16 the plaintiff has neither submitted to the sexual advances  
17 nor suffered any tangible effects. That's the question.

18 MR. CASEY: Yes, Justice. Under --

19 QUESTION: It -- it doesn't refer to strict  
20 liability.

21 MR. CASEY: Under -- under the assumption,  
22 Justice, that in -- that most courts, who have addressed  
23 the issue, have addressed quid pro quo as a strict  
24 liability issue. And that's why I referred to the strict  
25 liability for the unfulfilled threat. And -- and that's

1 why I believe it is -- it is cognizable under question 1,  
2 which is the question that the Court did accept. You are  
3 quite correct about that.

4 But almost all of the courts who have addressed  
5 quid pro quo sexual harassment have addressed it under the  
6 theory of strict liability for the employer, where there  
7 has been a adverse job action, such as a termination of  
8 employment, a demotion, a transfer to a less fulfilling  
9 job, a loss of benefits. These are all tangible job  
10 detriments, where the company has acted, through --  
11 through a supervisor.

12 QUESTION: Well, there -- there's really no  
13 other reason to have the quid pro quo category, is there?

14 MR. CASEY: Absolutely not, Your Honor.

15 QUESTION: Except to establish a different  
16 standard of liability.

17 MR. CASEY: That's correct, Your Honor. And --  
18 and --

19 QUESTION: The statute doesn't -- doesn't  
20 establish different kinds of sexual harassment -- quid pro  
21 quo and -- and environmental harassment.

22 MR. CASEY: No, it does not. It --

23 QUESTION: That's not in the statute, is it?

24 MR. CASEY: It does not, Your Honor. But the  
25 courts who have addressed the other violations of Title

1 VII, for example, in race cases, have attached strict  
2 liability to the employer when the -- the supervisor has  
3 taken an adverse job action, such as a termination of  
4 someone because of their race, a refusal to hire someone  
5 because of their race, a termination of someone because of  
6 their national -- their national origins, because of their  
7 religion. Courts have viewed that as employer strict  
8 liability.

9 On the other hand, when -- when in a race case,  
10 for example, a -- a person is living in -- in a hostile  
11 racial work environment, or a hostile environment to one's  
12 religion, or a hostile environment because one happens to  
13 be Korean or Indian or -- or English, that has been viewed  
14 as whether or not the company has been negligent in  
15 permitting that hostile work environment to exist.

16 QUESTION: When you say "that has been viewed,"  
17 you mean by some courts; and other courts say that --  
18 well, first of all, you don't -- you don't challenge that  
19 the claim here falls within Title VII, you are just  
20 asserting that there is a different standard for the  
21 employer?

22 MR. CASEY: Oh, absolutely, Your Honor.

23 QUESTION: So everybody agrees that this kind of  
24 claim is stated under Title VII?

25 MR. CASEY: This is a -- this is a claim for



1 discrimination by reason of one's gender.

2 QUESTION: And then how did we come to this  
3 distinction, then? Because the statute doesn't say a word  
4 about quid pro quo and it doesn't say a word about hostile  
5 environment. It says: same terms and conditions of  
6 employment, period.

7 MR. CASEY: It -- it does, indeed. This Court,  
8 in Meritor, acknowledged at least a distinction between  
9 the hostile work environment and quid pro quo. This  
10 Court, in the Harris Forklift opinion, by noting that the  
11 Harris case was not a quid pro quo case, implicitly  
12 recognized the distinction.

13 I think the same distinction, Your Honor, has  
14 been made in the other -- in the other type violations of  
15 Title VII, in terms of -- of race and national origin,  
16 where there has been an act.

17 QUESTION: Do we have a race or national origin  
18 case where there's a negligence, as opposed to vicarious  
19 liability?

20 MR. CASEY: Not from this Court. There have  
21 been -- there are many circuits who have -- who have  
22 recognized that -- that the hostile environment -- the  
23 racially hostile environment is -- is a negligence issue.  
24 And -- and the standard the company or the employer is  
25 held to is whether the -- whether the employer knew or

1 should have known of the -- of the racially hostile  
2 environment. And -- and the same distinction is -- is  
3 what we are urging the Court to adopt in the sexual  
4 harassment case.

5 QUESTION: So suppose this supervisor -- let's  
6 use race as an example -- suppose a supervisor says, I'm  
7 not going to promote you because you're Asian, Hispanic,  
8 whatever, and a week later does promote the person. And  
9 the person is no longer even working for that  
10 supervisor -- promoted out of the department. Is there a  
11 violation there?

12 MR. CASEY: In that one instance, I would say  
13 there is not.

14 QUESTION: There is?

15 MR. CASEY: There is not a violation.

16 QUESTION: There is not.

17 MR. CASEY: If -- if there was repeated --  
18 repeated and -- and repeatedly hostile comments made by  
19 the supervisor to the employee because of his national --  
20 I think there then would be a violation. But here --

21 QUESTION: And do you analogize what happened  
22 here to the hypothetical that I -- I gave you?

23 MR. CASEY: I do. I do exactly. Here there was  
24 an implicit threat: I could make your job easier or  
25 harder for you. That was -- that's the kind of threat we

1 talked about. And it was at -- at a job promotion  
2 instance. And in this case --

3 QUESTION: Well, suppose in the case that I --  
4 that I put the promotion -- the case where I put it was --  
5 that she was promoted the next week.

6 MR. CASEY: Yes.

7 QUESTION: Suppose in the race hypothetical the  
8 promotion isn't going to come up for a year, but the  
9 supervisor has said that. Could the employee bring a  
10 cause of action injunction? Or is there just no -- it's  
11 just kind of a violation in the air, with no damage?

12 MR. CASEY: I think -- I think there is no harm.  
13 I think there is no harm. Although --

14 QUESTION: Despite -- despite the insult and the  
15 personal hurt, et cetera, et cetera?

16 MR. CASEY: Well, I don't think, Your Honor,  
17 that one insult is sufficiently severe to rise to -- to a  
18 hostile environment, as -- as bad as it may --

19 QUESTION: Well, what if -- what if you have a  
20 situation of a supervisor for a large corporate employer  
21 who routinely orders a female employee under his  
22 supervision to go to a certain isolated place, where the  
23 supervisor can be alone with this employee and repeatedly  
24 then tries to use that opportunity for sexual  
25 gratification -- repeatedly? No -- no change in promotion

1 status or discharge. Is -- is there vicarious liability  
2 there for the employer or only if the employer is, as you  
3 put it, negligent?

4 MR. CASEY: Your Honor, in -- in the example you  
5 just gave, I believe that there -- there is very likely a  
6 quid pro quo. She has been ordered off --

7 QUESTION: No. No. I -- I left that out of the  
8 assumption.

9 MR. CASEY: All right. The assumption is  
10 that -- that she's ordered to an isolated --

11 QUESTION: That the supervisor uses his  
12 supervisor -- supervisory authority to place the employee  
13 in -- in this situation, where he can then take advantage  
14 of her.

15 MR. CASEY: Okay.

16 QUESTION: And does so repeatedly.

17 MR. CASEY: Okay. He has acted. He has -- he  
18 has used the authority vested in him by -- by his  
19 employer. He has then acted on behalf of the employer,  
20 and I believe there may well then be --

21 QUESTION: But the employer is not negligent,  
22 the employer tells all their supervisors to be careful,  
23 don't do this.

24 MR. CASEY: By -- by issuing orders to isolate  
25 an employee, I believe he is using the authority vested



1 in -- in -- in -- vested in him by the -- by the employer.

2 QUESTION: All right. Then why not, in -- in  
3 one instance alone -- let -- let's take Justice O'Connor's  
4 example, but change it in this respect. Let's assume the  
5 supervisor orders the -- the employee into his office.  
6 And instead of being subtle about it or comparatively so,  
7 he is very explicit about it. He said: You are going  
8 nowhere with this company. You are not going to get your  
9 promotion 12 months hence unless in the meantime you grant  
10 sexual favors to me. Isn't that sufficient to create at  
11 least the hostile environment?

12 MR. CASEY: No, Your Honor.

13 QUESTION: Why not?

14 MR. CASEY: Because it --

15 QUESTION: What could be more hostile than that?

16 MR. CASEY: Because he -- he -- he has one --  
17 well, in terms of the hostile environment, Your Honor,  
18 the -- the courts have routinely -- the circuit courts of  
19 appeal have routinely held that a single incident --

20 QUESTION: Oh, quite. But -- but the -- the  
21 point of the single incident cases, as I understand them,  
22 is that there's a certain amount of -- of necessary rough  
23 give and take in life. And the fact that there may be one  
24 or two employees in a company who occasionally make a  
25 remark -- the one-incident case to be literal about it --

1 does not suffice to modify the entire environment to the  
2 point where a discrimination can be inferred.

3 But when one is talking about a supervisor, with  
4 the undoubted authority, in effect, to -- to change the  
5 entire future of a given employee in that company, and  
6 that supervisor is explicit about it, nothing is left to  
7 chance, it seems to me that the -- that the -- the very  
8 power of the employer, the explicitness of what he does in  
9 -- in this hypothetical should -- should be enough,  
10 whereas one remark from a fellow employee wouldn't be  
11 enough.

12 MR. CASEY: For liability -- Your Honor, for  
13 liability, for an employer to attach in an hostile work  
14 environment, there has to be some -- some indication to  
15 the employer that he knew -- the employer knew or should  
16 have known.

17 QUESTION: But why -- why not? Why, if -- if in  
18 a series of cases the employer is going to be liable  
19 because the supervisor has been authorized, has been given  
20 a particular power and repeatedly abuses it, so that the  
21 abuse is clear, why shouldn't the employer, by a parity of  
22 reasoning, be liable when the abuse is equally clear when  
23 it is made very explicitly clear in -- in one instance?

24 MR. CASEY: Because, Your Honor, in -- in the --  
25 in the example -- or the hypothetical that Your Honor

1 posits, the supervisor has done nothing but speak words.  
2 He has not exer --

3 QUESTION: Well, but he has done nothing in  
4 Justice O'Connor's hypo except speak words, except that he  
5 has done so somewhat less explicitly than he does in my  
6 case. So it may take a while to make it very clear that  
7 he means what he says. But in -- in my case, the -- the  
8 same inference can be drawn after the first instance.

9 MR. CASEY: On the contrary, Your Honor, in  
10 Justice O'Connor's hypothetical, as I understood it,  
11 the -- the supervisor repeatedly ordered the employee off  
12 to a isolated place where -- where he could then take  
13 advantage of the employee. And -- and it's the acting --

14 QUESTION: But she resisted. She resisted every  
15 time. It was awful for her, but she resisted. What --  
16 where do you put that case? I assume that if she succumbs  
17 in order to get the promotion, then you would say we don't  
18 have to prove negligence; is that correct?

19 MR. CASEY: Your Honor, in a -- in a submission  
20 case, I would -- I would argue that, in a submission case,  
21 that if the employee reasonably believed that submission  
22 was a term and condition of employment, I believe then  
23 there would be strict liability -- if she reasonably  
24 believed --

25 QUESTION: Okay. Now she reasonably -- she

1 reasonably believes that it's going to be very hard to put  
2 up resistance, but she's going to do it. She reasonably  
3 believes that she's got to resist this. And she does.  
4 And in those two cases, as far as the employer is  
5 concerned, there's no more likelihood that the employer  
6 will know about one situation than the other, is there?  
7 But you told me that if she succumbs, then there's  
8 liability. And if she doesn't, then what?

9 MR. CASEY: In -- if I can modify my -- not  
10 modify my answer, but if I can clarify my answer on -- on  
11 the submission. I do not believe in a case such as we  
12 have here, where there is a clear policy against sexual  
13 harassment, where there are avenues of redress which --  
14 which -- in which you can avoid the complaint --  
15 complaining through the offending supervisor, as is this  
16 case here, where -- that no employee then could reasonably  
17 believe what --

18 QUESTION: Well, that's -- that would all be for  
19 a trial if there were a trial. But this -- that's -- this  
20 was decided only on summary judgment.

21 MR. CASEY: On summary judgment. That's  
22 correct.

23 QUESTION: So we don't know anything about what  
24 employees -- we know that there was a policy. We don't  
25 know anything about how effective it was, how other



1 employees reacted to it. So all we know at this stage in  
2 the game is that there was a policy.

3 MR. CASEY: We -- we know -- we know something  
4 in addition to that, Your Honor. We know, one, there was  
5 a policy. We know, two, in -- in -- in following this  
6 Court's guidance in Meritor, that there were avenues of  
7 redress in which one could avoid the -- the -- the  
8 offending supervisor. And, three, we know that -- that  
9 the Respondent in this case was aware of the policy,  
10 understood the policy, and intentionally -- intentionally  
11 did not follow the policy. And in fact stated the reason  
12 she didn't tell her --

13 QUESTION: We -- we know -- we know two things:  
14 That there was a policy and she didn't use it. We don't  
15 know any -- anything about why. It may be that she  
16 thought it would -- was a totally ineffective policy. But  
17 we really can't go beyond the summary judgment record.  
18 And we don't know any of these things, other than the fact  
19 that there was a policy and the fact that she didn't use  
20 it.

21 MR. CASEY: Your -- Your Honor, and -- and I'm  
22 not going beyond the summary judgment record. What she --  
23 what she testified to -- and it -- and it is part of the  
24 summary judgment record -- what she testified to is that  
25 she intentionally did not report it to her supervisor

1 because, and I quote, it would be his duty to report it.  
2 And we do know that. And we do --

3 QUESTION: Where is that? What are you  
4 referring to? What testimony?

5 MR. CASEY: That's in the record, Your Honor,  
6 at -- I will find it, Your Honor. But it is -- it is  
7 clearly in the record, and it's quoted directly in our  
8 brief.

9 QUESTION: What -- what is the relationship  
10 between your reasonably believe standard and the standard  
11 either of employer negligence or, for that matter,  
12 employer strict liability?

13 MR. CASEY: I -- I don't understand.

14 QUESTION: Well, I understood you to say a  
15 moment ago, in response to Justice Ginsburg's variant on  
16 the question, that if the employee reasonably believed  
17 that he could carry out -- that the employer could carry  
18 out threats, even though those threats had not at that  
19 point been carried out, that there would be a hostile  
20 environment. And I -- I was going to say, what is the  
21 relationship between that standard and the standard of  
22 employer negligence?

23 MR. CASEY: Your Honor, I -- I -- perhaps I  
24 misspoke. What I said was if -- what I meant was -- if an  
25 employee reasonably believed that -- that submission was a

1 term and condition of employment and she did submit, and  
2 the relief was reasonable, then I believe there is --  
3 there would be a -- an adverse tangible job consequence.

4 QUESTION: But -- but if she reasonably believed  
5 it and did not submit, even on a claim of hostile work  
6 environment, there would be no liability, period? There  
7 could be no liability; is that your position?

8 MR. CASEY: In the hostile work environment,  
9 unless there -- there is some evidence that the employer  
10 knew or should have known.

11 QUESTION: May I ask a question on that point?  
12 Supposing in the Chicago office you had conditions that  
13 clearly amounted to a hostile work environment, much --  
14 much worse facts than you have here. Everybody is being  
15 very, very rude to the female employees. And the only  
16 person outside of that office who knows about it is the  
17 vice president in charge of sales in New York -- this  
18 particular individual. Would that be notice to the  
19 company of the hostile work environment?

20 MR. CASEY: Your Honor, I think in this -- in  
21 the -- in the situation you describe --

22 QUESTION: Yes.

23 MR. CASEY: -- there would be -- there would be  
24 the standard of the company should have known. If it is  
25 as open and notorious as Your Honor describes.

1 QUESTION: Well, but it's open only in Chicago.  
2 And the only higher executive who knows about it is this  
3 particular individual, Mr. Slowik. Would that be  
4 sufficient notice to the company?

5 MR. CASEY: And he was responsible for this  
6 office?

7 QUESTION: Well, he had exactly the duties he  
8 has in this case. He's the vice president in charge of  
9 the sales in a large part of the country. Is that --

10 MR. CASEY: I believe -- I believe, Your Honor,  
11 if he was aware of open --

12 QUESTION: Yes, he's aware of it. That's my --

13 MR. CASEY: -- and -- open and notorious  
14 conduct, of -- of a hostile environment for female  
15 employees, it would be notice to the company. I think so.  
16 Just --

17 QUESTION: Well, then why isn't it notice to the  
18 company when he does it himself?

19 MR. CASEY: Because, Your Honor, he did not  
20 fulfill the threat. He -- he simply implied a threat,  
21 never carried it out. She in fact got promoted.

22 QUESTION: What if he told the president  
23 about -- about the case, the president of the company.  
24 Would she then have -- have a case? He told the president  
25 everything that she's put in the record here.



1 MR. CASEY: I'm missing the --

2 QUESTION: The question -- part of the question  
3 is, A, is there a violation? And, B, if so, is the  
4 company responsible for it? And I'm trying to assume  
5 that -- that what he said would be a violation. Maybe  
6 that's where we -- we part company. I don't know. But if  
7 the things that happened here were not only known by  
8 Mr. Slowik, but by the board of directors of the company,  
9 would there be liability?

10 MR. CASEY: I do not believe so. I do not  
11 believe this is a hos -- I do not be --

12 QUESTION: So -- so it isn't a question of  
13 whether we hold the company responsible. The question, in  
14 your view, is whether there was a violation at all?

15 MR. CASEY: Well, if there's no liability,  
16 there's no -- there's no violation.

17 QUESTION: Right.

18 QUESTION: I thought you said earlier that --  
19 that, in your view, the acts were not repeated enough to  
20 constitute a hostile work environment. Was I wrong about  
21 that?

22 MR. CASEY: No, that's correct.

23 QUESTION: Yes.

24 MR. CASEY: And -- and -- and I don't --

25 QUESTION: So that's the reason, if there were

1 notice to the company --

2 MR. CASEY: -- and I don't think it rises to a  
3 hostile work environment.

4 QUESTION: Can -- can I ask you something about  
5 Justice O'Connor's hypothetical?

6 MR. CASEY: Yes, certainly.

7 QUESTION: You said that where -- where the  
8 company officer takes the woman aside to an isolated place  
9 where he can make his sexual advances, that that would --  
10 that would be automatic liability on the part of the  
11 employer?

12 MR. CASEY: Your Honor --

13 QUESTION: That would be a quid pro quo case?  
14 Is that why -- why -- because he's using his power as an  
15 officer to take her aside to the --

16 MR. CASEY: To order her to isolated parts of  
17 the -- of the factory.

18 QUESTION: What would you call that? Would you  
19 call that quid pro quo?

20 MR. CASEY: I would -- in -- in that  
21 circumstance, Your Honor, I would say that is quid pro  
22 quo, because -- because he is exercising the -- precisely  
23 the authority --

24 QUESTION: Well, what if he tells her to come  
25 over to the water cooler? I mean, boy, you've expanded

1 quid pro quo an enormous amount if you accept that. What  
2 if he tells her, you know, Come on over to the water  
3 cooler, I want to tell you something, and she goes over to  
4 the water cooler?

5 MR. CASEY: I don't -- I'm making the  
6 distinction, Your Honor. I interpreted Justice O'Connor's  
7 question --

8 QUESTION: I had thought the quid pro quo was  
9 just those -- those company actions which, in themselves,  
10 amount to an alteration of the terms and conditions of  
11 employment, like firing, promotion and so forth.

12 MR. CASEY: I think --

13 QUESTION: But you're willing to say quid pro  
14 quo is -- is what, any -- any action that -- that an  
15 officer of the company has authority to tell somebody to  
16 do?

17 MR. CASEY: No. I think, Your -- I think, Your  
18 Honor, that isolation and constant isolation on orders of  
19 a supervisor is -- is an adverse tangible job consequence.

20 QUESTION: Well, it isn't constant isolation, as  
21 I understood her hypothetical. He just took her aside to  
22 an isolated place to make his proposition. I mean if he  
23 assigned her to a -- you know, to Timbuktu or something,  
24 yes, then --

25 MR. CASEY: Justice --

1 QUESTION: -- then I could see a quid pro quo.

2 MR. CASEY: Justice --

3 QUESTION: But he just pulled her aside to make  
4 his proposition.

5 MR. CASEY: Justice O'Connor's question was  
6 repeatedly -- repeatedly ordered her to an isolated part  
7 of the factory so he could do that.

8 QUESTION: Oh, I see. So she's working --  
9 you -- you understood her question to mean that she's  
10 working in an isolated part of the factory?

11 MR. CASEY: That's correct.

12 QUESTION: All by herself there?

13 MR. CASEY: That's correct. That's how --  
14 exactly how I interpreted it.

15 QUESTION: Mr. Casey --

16 QUESTION: Well, that wasn't the question.

17 (Laughter.)

18 QUESTION: But you're altering it to suit your  
19 needs now.

20 QUESTION: Mr. Casey, would you explain this to  
21 me? In the -- I take it it's common ground here with you  
22 and everybody else that in a hostile environment claim  
23 there does not have to be any change in conditions beyond  
24 those conditions which are constituted by the hostility of  
25 the environment?



1 MR. CASEY: That is correct.

2 QUESTION: Okay. Now --

3 MR. CASEY: Environmental hostility, correct.

4 QUESTION: Right. If the environmental  
5 hostility is created by threats of personnel action,  
6 threats of a quid pro quo nature in other words, which are  
7 not carried out, why isn't the hostility of the  
8 environment just as clear, even though there are no other  
9 changes in condition, as -- as may be the case in a  
10 non-unfulfilled quid pro quo hostile environment case?

11 MR. CASEY: It -- Justice Souter, it may well be  
12 a hostile environment. And if it is a hostile  
13 environment, then -- then we look at it as a -- as a  
14 standard of negligence. Did the employer know or should  
15 the employer have known?

16 QUESTION: Well, but I'm leaving aside the --  
17 and maybe -- maybe I'm isolating the question too much  
18 for -- for -- for your tastes -- but I'm -- I'm suggesting  
19 for a minute let's leave aside the standard for imputing  
20 liability to the employer. Let's just look at whether  
21 there's been a violation. And -- and forget whether it's  
22 negligence or whether it's strict liability for the  
23 moment. And I take it your answer is yes, there can be a  
24 hostile environment by unfulfilled quid pro quo kinds of  
25 threats?

1 MR. CASEY: That's correct.

2 QUESTION: And your -- your only point of  
3 difference then, I guess, with your opponents on that  
4 isolated point is that you say there's got to be more than  
5 one threat, just as there has got to be more than one  
6 hostile remark, if you will, in order to create the  
7 environment?

8 MR. CASEY: Correct.

9 QUESTION: One -- one instance --

10 MR. CASEY: One instance does not create a  
11 hostile environment.

12 QUESTION: And you're saying that the fact that  
13 the hostile environment and the unfulfilled quid pro quo  
14 situation is created by a supervisor, with more authority  
15 than let's say just a fellow employee, that doesn't make  
16 any difference in the calculus of how many instances there  
17 have got to be before we can conclude that the environment  
18 has in fact become hostile; you're saying that really is  
19 not relevant?

20 MR. CASEY: I -- I don't -- I do not believe  
21 that to be relevant.

22 QUESTION: Okay.

23 QUESTION: Mr. Casey, you -- you formulated this  
24 question, a claim of quid pro quo sexual harassment. Now,  
25 what -- what is your understanding of the term "quid pro

1 quo sexual harassment"?

2 MR. CASEY: My understanding, Your Honor, is --  
3 is this for that. You give me something, and I will do  
4 something either negatively or positively to you. There's  
5 a quid and a quo. And -- and I believe --

6 QUESTION: Simply where it's proposed or where  
7 it happens?

8 MR. CASEY: Where it happens.

9 QUESTION: Where it happens?

10 MR. CASEY: Correct.

11 QUESTION: You mean --

12 QUESTION: Where it happens?

13 MR. CASEY: -- where -- where -- where something  
14 is proposed by -- by the -- by the supervisor, but not  
15 necessarily acquiesced in by the employee, I take it?

16 MR. CASEY: Sleep with me or I won't promote  
17 you, I mean, is the classic example that we all use.

18 QUESTION: Yes. But -- and --

19 MR. CASEY: And I don't promote you.

20 QUESTION: Yes. But it's curious, because you  
21 say that where -- where the woman says, Okay, I will sleep  
22 with you, and he does promote her, so that there is a quid  
23 and there is quo for the quid, that is not quid pro quo.  
24 But where she refuses, she does not give the quid, and  
25 therefore does not get the quo, that is quid pro quo?

1 (Laughter.)

2 MR. CASEY: Your Honor, if -- if he gets --

3 QUESTION: It's an interesting theory.

4 MR. CASEY: No -- no, it's -- but that's -- but  
5 that's not precisely the theory. The theory is if -- if  
6 she gets the promotion for having slept with him, she --  
7 she got something she's not otherwise entitled to. And I  
8 think that is -- that is discrimination. And I think that  
9 is a violation if she actually didn't get the promotion.

10 QUESTION: And in the case where it is -- in the  
11 case where it is the violation, he makes the proposition,  
12 it's refused, and she is not promoted, and the person who  
13 did it is the vice president of the company, why doesn't  
14 the company know about it? He knows about it. He's the  
15 vice president. He is the company. So why isn't the  
16 company the actor? Why does he --

17 MR. CASEY: Because he -- he -- excuse me, I  
18 didn't mean to interrupt you -- because he didn't act with  
19 the authority given him by the employer.

20 QUESTION: All right. So then you're just using  
21 the same arguments that were in this other case. There's  
22 nothing new here?

23 QUESTION: I guess it puzzles me that --

24 QUESTION: Is that right?

25 QUESTION: -- if she does acquiesce, the law



1 gives her a remedy. If she doesn't, it doesn't give her a  
2 remedy. So the law favors submission, as I understand it.

3 MR. CASEY: No, I don't -- I don't think that's  
4 actually the case, Your Honor. I don't think it's safer  
5 for submission in -- in any event. I don't think there's  
6 a --

7 QUESTION: But if we're talking --

8 QUESTION: I'm assuming he's bluffing in both  
9 cases. In both cases he's bluffing.

10 MR. CASEY: If he's bluffing in both cases and  
11 she had no reasonable belief, I think there's no  
12 violation.

13 QUESTION: But in your view, there -- in your  
14 view -- this is what I was trying to get at -- there is  
15 nothing in this case in respect to authority, apparent  
16 authority, agency -- all the things that we discussed in  
17 previous cases that were recently argue -- in that area,  
18 there is nothing different here; the only thing that is  
19 different in this case is whether or not the quid pro quo  
20 is in fact substantively irrespective, is that right?

21 MR. CASEY: In the face -- in the face of a  
22 clear policy in the company, she could not reasonably  
23 believe that he had the authority to do -- there is no  
24 apparent authority --

25 QUESTION: I mean, but I know that you -- I'm

1 trying to figure out, is there anything in the question  
2 that we are being asked to decide that is different from  
3 the question in the two cases that were recently argued  
4 here?

5 MR. CASEY: Absolutely.

6 QUESTION: And there is one thing that seemed  
7 different. We're asked -- which is what I thought the  
8 question meant -- whether there is a substantive violation  
9 of the statute, nothing to do with vicarious liability.

10 MR. CASEY: The --

11 QUESTION: And now, other than that, is there  
12 anything different?

13 MR. CASEY: Yes, Your Honor, the difference --

14 QUESTION: And what is that?

15 MR. CASEY: The difference in this case is the  
16 standard of liability to be applied. Is it strict  
17 liability or is it a negligence issue?

18 QUESTION: So if I believe it's strict  
19 liability, there's nothing different? If I --

20 MR. CASEY: Other than standard liability,  
21 that's correct.

22 QUESTION: But that -- that's what we didn't  
23 grant certiorari on. That's the second question.

24 MR. CASEY: Your Honor, I'm -- I'm tying the  
25 strict liability to the quid pro quo. If it is a quid pro

1 quo case, this for that, I believe the -- the cases are --  
2 are quite uniform that there is strict liability. And  
3 in --

4 QUESTION: Mr. Casey, how did all this come up?  
5 It really is mystifying, with a statute that doesn't use  
6 any of these terms. It just says no -- thou shall not  
7 discriminate in hiring, firing or terms and conditions of  
8 employment.

9 MR. CASEY: Justice, it came up in the context,  
10 really, of the other violations of Title VII, in the race  
11 cases. For example, the company is automatically liable  
12 if -- if the person is fired or demoted or not promoted  
13 because of his race. And --

14 QUESTION: Why -- why should that be? Why --  
15 why should that be? Why should there be a distinction  
16 between quid pro quo and hostile work environment? What  
17 is the law trying to achieve by adopting that category --  
18 by adopting that dichotomy?

19 MR. CASEY: Well, this Court has -- has  
20 instructed us, in Meritor, that we should look to agency  
21 principles. And -- and when one is acting on behalf of  
22 the employer and using his authority, that is in effect  
23 the employer acting. When -- when there is simply a  
24 hostile environment, there -- the standard for agency  
25 should be "known" or "should have known."

1 QUESTION: Thank you, Mr. Casey.

2 Mr. Rossiello, we'll hear from you.

3 ORAL ARGUMENT OF ERNEST T. ROSSIELLO

4 ON BEHALF OF THE RESPONDENT

5 MR. ROSSIELLO: Mr. Chief Justice, and may it  
6 please the Court:

7 The express language of Title VII of the Civil  
8 Rights Act of 1964 specifies that three elements, and  
9 three elements only, must be demonstrated to establish a  
10 violation of that statute. There must first be employer  
11 action; secondly, posited upon a discriminatory basis;  
12 and, third, the discriminatory conduct must alter the  
13 terms and conditions of employment.

14 The only issue for this Court to decide is  
15 whether or not Mr. Slowik's conduct in this case was  
16 employer action within the meaning of 42 U.S.C.  
17 2000e-2(a)(1).

18 QUESTION: Mr. Rossiello --

19 QUESTION: Well, why does quid -- I'm sorry, go  
20 ahead.

21 QUESTION: I'd like to ask you, in -- in a  
22 situation like this, where we take it that the supervisor  
23 doesn't follow through on any threat, actual or implied,  
24 of failure to promote or something, some employment  
25 action, where the employer does not follow through on



1 that, the harm to the employee seems to be very much the  
2 same as that under hostile environment claims.

3 MR. ROSSIELLO: That's correct.

4 QUESTION: I mean, I -- I don't see a lot of  
5 difference here than there would be to simply a hostile  
6 environment situation, where -- where the threat is -- is  
7 not carried out.

8 MR. ROSSIELLO: Well, the harm could or might be  
9 the same. For purposes of damage -- for purposes of  
10 damages or the harm inflicted, it could be the same for  
11 hostile work environment.

12 QUESTION: Well, I -- I just don't see much  
13 difference now. And in that regard, what role does the  
14 existence of an employer policy and method for handling  
15 complaints of this type play? Does it go to the  
16 reasonableness of the employee's belief or does it go to  
17 the amount of damages if there's liability? What role  
18 does that play?

19 MR. ROSSIELLO: It goes to the amount of  
20 damages. The existence of a policy has little or no  
21 effect on the liability issue. In this particular case,  
22 the policy we're talking about is a single, flimsy  
23 sentence, buried amid two very brief paragraphs --

24 QUESTION: Well, let's suppose it's a fabulous  
25 policy and very effective.

1 MR. ROSSIELLO: If we can find --

2 QUESTION: Now, what role does it play?

3 MR. ROSSIELLO: Excuse me?

4 QUESTION: What role should it play, if it's a  
5 perfect policy?

6 MR. ROSSIELLO: Little to none on the liability  
7 issue. Because the express language of Title VII does not  
8 require that the plaintiff follow a policy or complain to  
9 the employer before it goes to the EEOC --

10 QUESTION: Well, but might it go to the  
11 reasonableness of the employee's understanding when some  
12 comment is made? I mean if she knows perfectly well,  
13 look, this company has a -- a good policy, and if I say  
14 something higher up the ladder, it's going to be taken  
15 care of. Then is it reasonable to -- for her to believe  
16 that there is some serious threat out there?

17 MR. ROSSIELLO: The short answer to that is yes.  
18 The existence of a policy does affect the reasonableness  
19 of the plaintiff's conduct. Most often that would be in a  
20 hostile work environment-type case. In a quid pro  
21 quo-type case --

22 QUESTION: Well, but we've already explored the  
23 possibility that this is very much like hostile  
24 environment if the threat isn't carried out. You're --  
25 you're back to hostile environment.

1 QUESTION: Well, it's sort of a hybrid. If --

2 QUESTION: Well, Mr. Rossiello, a hybrid of  
3 what?

4 MR. ROSSIELLO: Well, some case -- if you look  
5 at Judge Wood's opinion, the first one, that was vacated  
6 in the Seventh Circuit, she seems to believe that quid pro  
7 quo sexual harassment also is a hostile work environment.

8 QUESTION: Well, what's wrong with that belief?

9 MR. ROSSIELLO: Nothing. I think it's -- not --  
10 nothing at all.

11 QUESTION: Could I follow up on that?

12 MR. ROSSIELLO: Sure.

13 QUESTION: You -- you agree that where -- where  
14 either she complies and -- and the job action --  
15 threatened job action isn't taken or she doesn't comply  
16 and the job action still isn't taken, it's like hostile  
17 work environment. Isn't it also true that where she  
18 doesn't comply and the job action is taken -- she's not  
19 given the promotion or she's fired -- is anything added to  
20 the Title VII analysis by saying it was quid pro quo?

21 That is to say, suppose the -- the officer of  
22 the company, without making a quid pro quo proposition,  
23 you know, didn't say, you know, Unless you sleep with me,  
24 you won't get the promotion, but simply asked the woman to  
25 sleep with him, she didn't, and he fired her for that

1 reason. Without having made any quid pro quo proposal,  
2 would -- would the case come out any differently if that  
3 could be established than it would if he had made the  
4 proposal?

5 In other words, isn't the -- isn't the proposal  
6 simply evidence of the fact that the reason she was fired  
7 or the reason she didn't get the promotion was sexual  
8 discrimination?

9 MR. ROSSIELLO: Yes.

10 QUESTION: Okay.

11 MR. ROSSIELLO: Because -- right. The -- if the  
12 threat is discriminatory in nature and if it affects --

13 QUESTION: You don't even need a threat. I mean  
14 if -- if --

15 MR. ROSSIELLO: You don't need much necessarily.

16 QUESTION: -- if he just makes a sexual  
17 advancement, she doesn't comply, she is fired thereafter,  
18 and if you can show that the reason for the firing was  
19 that she was not compliant, you -- you've established a  
20 case, haven't you?

21 MR. ROSSIELLO: Yes, you have.

22 QUESTION: Whether there's been the threat or  
23 not. The threat only serves as evidence of the reason for  
24 the job action.

25 MR. ROSSIELLO: Yes.



1 QUESTION: Okay. But in a -- in a situation  
2 in -- in which the threat is not carried out, then I take  
3 it quid pro quo -- the quid pro quo distinction makes a  
4 difference in this sense -- and tell me whether you think  
5 I'm right. As I understand the way we've been using the  
6 term, a quid pro quo threat is, by definition, a threat  
7 that only a supervisor can make, because only the  
8 supervisor has got the power to do whatever is threatened.

9 MR. ROSSIELLO: Right.

10 QUESTION: I suppose that a supervisor's threat,  
11 simply because it is that of a supervisor, may have more  
12 force, may be more powerful in creating a hostile work  
13 environment, even if it's only made once, than would one  
14 off-color remark or one proposition by a fellow employee  
15 without such power. Do you agree that in the unfulfilled  
16 quid pro quo situation there might be that difference?

17 MR. ROSSIELLO: Well --

18 QUESTION: Which is essentially an evidentiary  
19 difference.

20 MR. ROSSIELLO: There is. It's a question of  
21 proof. Right.

22 QUESTION: Okay.

23 MR. ROSSIELLO: We're only on summary judgment  
24 here. The District Court has --

25 QUESTION: With respect to that, if you've got a

1 supervisor who just loves to -- never makes kind of a  
2 thing, "If you don't, then I will," but just likes to make  
3 the atmosphere fun for the guys and dreadful for the --  
4 for the women, doesn't ask for any favors, there's just  
5 all of these remarks, light touching, just makes it -- do  
6 you remember way back in the beginning of the world, there  
7 was a case called Bundy, and there were secretaries who  
8 said, We don't want a promotion, and nobody is threatening  
9 to fire us, but this is awful to live under these  
10 conditions. So, Court, don't give us money, just tell  
11 them to stop.

12 Now, where does that kind of case fit in this  
13 picture?

14 MR. ROSSIELLO: Well, that is discriminatory  
15 conduct within the meaning of Title VII. As both -- both  
16 cases, Harris and Meritor, stated when the work  
17 environment is permeated with intimidation --

18 QUESTION: But nobody ever suggested in those  
19 days that there was something different between quid pro  
20 quo and a hostile environment and -- and vicarious  
21 liability on the one hand versus knew or should have known  
22 on the other. It seemed to be all one -- it was under  
23 Title VII and there was one standard.

24 MR. ROSSIELLO: Well, we believe there should be  
25 one standard. I mean, with all due respect, I think

1 Meritor is a wonderful opinion, but I don't think the  
2 Court or the author of the opinion intended to wreak the  
3 havoc that it did when it used those words, "quid pro  
4 quo," and "hostile work environment," in that opinion.  
5 The circuit courts of appeals and the district courts have  
6 had a field day with those two expressions.

7 QUESTION: Well, let me ask you this. Suppose  
8 it were a given -- suppose we would hold that in a hostile  
9 work environment case there is liability only if the  
10 employer is negligent. Suppose that were our holding.  
11 Would the quid pro quo distinction then be important to  
12 you?

13 (Laughter.)

14 MR. ROSSIELLO: Yes, it would be.

15 (Laughter.)

16 QUESTION: And in fact, I noticed that in  
17 answering Justice O'Connor's question you said, but in a  
18 quid pro quo case. And now, see, you attack this  
19 distinction and yet you use it.

20 MR. ROSSIELLO: Well, it's so hard to --

21 QUESTION: Or at least you want to hold it in  
22 reserve.

23 MR. ROSSIELLO: You see, it's so hard to avoid  
24 it. There is just such a large body of case law throwing  
25 these two terms around.

1 QUESTION: And we didn't start it,  
2 Mr. Rossiello, lest -- lest silence indicate consent.

3 (Laughter.)

4 QUESTION: When we used the -- the expression  
5 in -- in Meritor, we were referring to by -- what was by  
6 then a well-established body of -- of court of appeals  
7 law. I mean don't -- don't put it on us. We were just --

8 (Laughter.)

9 MR. ROSSIELLO: All right. I promise not to.

10 QUESTION: I don't see why it's a problem. Why  
11 is it a problem, but for the circumstance that you have  
12 here, where there is a proposition that is refused and no  
13 punishment? In any other situation, isn't it perfectly  
14 useful, or is it?

15 MR. ROSSIELLO: Well, it is -- it is  
16 instructive.

17 QUESTION: Instructive. But I mean more,  
18 doesn't it happen, propositions, every day of the week?

19 MR. ROSSIELLO: Yes.

20 QUESTION: And they're sometimes are followed by  
21 punishment. And they're also sometimes accepted and  
22 followed by the lack thereof.

23 MR. ROSSIELLO: In many cases, yes.

24 QUESTION: So there is actually -- but if there  
25 is -- if -- to go back to our case, where -- where there's



1 a proposition turned down and no punishment, if it were  
2 true in that subset, in that subset of quid pro quo, that  
3 it is not a violation unless it is a hostile work  
4 environment, which depends upon circumstance and a lot  
5 more than just the bare facts I stated, how can you win?  
6 Because what I'm interested in your answering is, in the  
7 opinions below, I have some kind of impression that you  
8 either waive that or they said that that isn't in the case  
9 or -- what -- can you explain to me what I'm -- what -- it  
10 may be a hostile work environment, but it requires further  
11 factual exploration, and there is a Seventh Circuit  
12 opinion that suggests this whole matter was waived or  
13 something.

14 MR. ROSSIELLO: Right.

15 QUESTION: Could you respond to my -- what I'm  
16 worried about?

17 MR. ROSSIELLO: Yes -- yes, I can. And that  
18 inquiry of Your Honor is treated at great length in our  
19 cross-petition for certiorari. By the time the Seventh  
20 Circuit got through its 203-page decision below, I think  
21 that hostile work environment claim got lost in the  
22 shuffle. We think there's enough in the record that we --  
23 it hasn't been waived. And if the Court --

24 QUESTION: What are we supposed to do if --  
25 if -- or what am I supposed to do if I thought that might

1 still be there, in light of what the Seventh Circuit did  
2 hold, not what they should have hold -- held? And -- and  
3 in light of the fact that your cross-petition, I take it,  
4 is not before us?

5 MR. ROSSIELLO: No.

6 QUESTION: All right. So what are -- what would  
7 I do in this case if I -- on the assumption -- I'm not  
8 saying I really think that -- but on the assumptions that  
9 I gave you?

10 MR. ROSSIELLO: Well, I would remand this case  
11 for reconsideration of the whole claim.

12 (Laughter.)

13 QUESTION: He should regret that we did not  
14 accept your cross-petition, I suppose.

15 MR. ROSSIELLO: Well --

16 QUESTION: We didn't accept it. I mean that's  
17 the fact.

18 MR. ROSSIELLO: Well, it's still pending. We  
19 have our foot in the door.

20 QUESTION: Mr. Rossiello, as I understood  
21 what -- what happened, was that you didn't surrender a  
22 hostile environment case, but you did surrender a simple  
23 negligence. So, in other words, what you said is hostile  
24 environment, quid pro -- whatever you want to call it,  
25 there's vicarious liability here. So I think what the

1 majority of the Seventh Circuit judges said you gave up  
2 was hostile environment, simple negligence, not that you  
3 gave up hostile environment and the standard is vicarious  
4 liability. Is that correct?

5 MR. ROSSIELLO: Yes, I believe that's an  
6 accurate characterization.

7 QUESTION: So that in the next round of this --  
8 let's assume you win this round -- in the next round, if  
9 it is determined that in fact when a supervisor is  
10 involved and the action involves a threat of using the  
11 authority that the supervisor has been given by the  
12 company, negligence is not required. A stricter standard  
13 of vicarious liability applies. Then you're home free?

14 MR. ROSSIELLO: Yes. Just as Justice Breyer  
15 said a few minutes ago, you know, when this -- this type  
16 of conduct is engaged in by a vice president, he is the  
17 company and the company is him.

18 QUESTION: Right. But the -- the point that I  
19 was making is the only thing that you have conceded out is  
20 company liability on a negligence theory?

21 MR. ROSSIELLO: For sure.

22 QUESTION: Yes, okay.

23 MR. ROSSIELLO: If there are no more  
24 questions --

25 QUESTION: Well, I don't -- I just don't

1 understand your response about his using authority that  
2 the company has given him. The company hasn't given him  
3 authority to -- to make a sexual proposition to any of the  
4 employees, has it?

5 MR. ROSSIELLO: That's true, the company has  
6 not.

7 QUESTION: And I assume the company also hasn't  
8 given him authority to fire a woman for her failure to  
9 comply with his sexual proposition.

10 MR. ROSSIELLO: No, absolutely not. That's why  
11 the cases in our brief, which are other types of Title VII  
12 cases, where --

13 QUESTION: I mean --

14 MR. ROSSIELLO: -- where a firing or discharge  
15 or a demotion or a pay -- a pay differential is --

16 QUESTION: -- where it occurs, you can say the  
17 employer has acted. I don't care whether this officer was  
18 involved or not, the employer has acted, where the firing  
19 has occurred. But where the firing hasn't occurred, where  
20 there's been no employer action, I -- I find it -- I find  
21 it much more difficult to leap to employer responsibility  
22 on a theory that the supervisor was using authority  
23 employment -- the employer gave him. The employer didn't  
24 give him any authority to fire somebody for failure to  
25 comply with his sexual advances.



1 MR. ROSSIELLO: Well, there's where you -- we  
2 get into the hair splitting. That's very true. The  
3 employer did not give the authority to sexual harass. No  
4 employer does that as far as I know. In fact, in the face  
5 of an explicit policy against sexual harassment, this type  
6 of conduct still occurs. But where a supervisor, like in  
7 this case, Mr. Slowik -- should I just finish?

8 QUESTION: You can finish your answer briefly to  
9 Justice Scalia's question.

10 MR. ROSSIELLO: All right. But where a  
11 supervisor uses the authority delegated in him in general  
12 to accomplish the sexual harassment, Title VII has been  
13 violated.

14 Thank you very much.

15 QUESTION: Thank you, Mr. Rossiello.  
16 Ms. Underwood, we'll hear from you.

17 ORAL ARGUMENT OF BARBARA D. UNDERWOOD

18 FOR THE UNITED STATES,

19 AS AMICUS CURIAE, SUPPORTING RESPONDENT

20 MS. UNDERWOOD: Mr. Chief Justice, and may it  
21 please the Court:

22 When a supervisor tells an employee she has to  
23 provide sexual favors in order to get a promotion, he is,  
24 at that moment, imposing a term or condition on her  
25 employment because of her sex, in violation of Title VII.

1 That's true whether she complies or refuses. And if she  
2 refuses, whether she's punished immediately or has to  
3 suffer anxiety about the result. No matter how she  
4 responds, this supervisor has used the power of the  
5 employer --

6 QUESTION: Even when the employer's policy,  
7 which the woman knew about, specifically prohibits this,  
8 how -- how could you possibly say that the employer was --  
9 was changing her terms and conditions of employment?  
10 The -- the supervisor was violating an employer policy  
11 that she knew about.

12 MS. UNDERWOOD: Just as when a supervisor fires  
13 someone or demotes someone --

14 QUESTION: Yes, but in -- but in -- but in that  
15 instance, the -- the company is acting -- the company has  
16 acted. So it is within the scope of employment. But if  
17 it's just a threat, there's no action within the scope of  
18 employment for agency principles.

19 MS. UNDERWOOD: Justice Kennedy, there is. The  
20 power to --

21 QUESTION: And we'll -- we'll leave aside  
22 hostile environment and repeated acts and pervasive  
23 discrimination and so forth.

24 MS. UNDERWOOD: The power to fire or to hire, to  
25 promote or demote, includes the power to state what the

1 conditions are for doing that, to hold out threats and  
2 promises. In fact, that's the way that power is most  
3 commonly and effectively and predictably used in the  
4 management of a company.

5 QUESTION: Well, you could say that, but it's  
6 not true. In fact, that power does not reside in that  
7 officer. It has explicitly been taken away from him by  
8 the company. What more can the company do than to -- you  
9 know, than to make that the company policy?

10 MS. UNDERWOOD: No, the company has given him  
11 the power to hire and fire, but not to do it for wrongful  
12 reasons. And just so, the company has given him the power  
13 to hold out the prospect of hiring and firing, promoting  
14 and demoting --

15 QUESTION: Well, but that's -- that's --

16 MS. UNDERWOOD: -- but not to do it --

17 QUESTION: But that's the difference. Suppose  
18 you have a model employer, with -- with policies, with  
19 grievance procedures and so forth. Then you have a threat  
20 that is not carried out. Under agency principles,  
21 there's -- the scope of employment doesn't come into play,  
22 because nothing has happened other than an environment,  
23 which we can take care of under a different analysis.

24 MS. UNDERWOOD: Well, a great deal has happened.  
25 The employee has now been told that her work assignment

1 and the conditions of her work are different and the terms  
2 on which she can get a promotion are different. Just --

3 QUESTION: But -- but that's never -- that's  
4 never -- never carried out.

5 QUESTION: And she knows that's not true.

6 QUESTION: Yes.

7 MS. UNDERWOOD: Well, she doesn't know it's not  
8 true. She knows that the company has stated that it's  
9 against company policy. That's not quite --

10 QUESTION: Well, then she also learns that it's  
11 not carried out because she doesn't acquiesce and nothing  
12 happens.

13 MS. UNDERWOOD: If there are no damages, then  
14 that would be a matter for damages. In this case --

15 QUESTION: Well, but there -- there -- my sense  
16 of the thing, if -- if that is true, is that there simply  
17 isn't any liability.

18 MS. UNDERWOOD: Well, suppose the company fires  
19 somebody and she complains and she immediately is  
20 reinstated. There will still be a violation.

21 QUESTION: Sure.

22 MS. UNDERWOOD: There will be minor damages.

23 QUESTION: And suppose they don't discharge the  
24 person. He says, I'll discharge you; are you discharged?

25 MS. UNDERWOOD: No.



1 QUESTION: He's wanting you to go collect  
2 unemployment insurance. I don't think they'll give it to  
3 you.

4 MS. UNDERWOOD: No, you're not discharged.

5 QUESTION: All right. And this doesn't penalize  
6 an attempt to discharge.

7 MS. UNDERWOOD: No, it doesn't.

8 QUESTION: All right. So it -- it -- if it's  
9 say you can't discharge, you can't hire, you can't  
10 discriminate on terms of employment. So why, if in fact  
11 you don't discharge the person but say you're going to but  
12 you don't, if that doesn't violate the statute, why would  
13 it violate it to say, I'm not going to give you a  
14 promotion, and then you do?

15 MS. UNDERWOOD: Well, this -- this isn't just,  
16 I'm not going to give you a promotion. If it were just,  
17 I'm not going to give you a promotion --

18 QUESTION: But suppose it is, I'm going to make  
19 you work in Timbuktu, or, I'm going to make you do some  
20 other thing terrible, but you don't.

21 MS. UNDERWOOD: No, what -- what distinguishes  
22 this is the -- the coercive effect it has right now. I'm  
23 not going to give you a promotion because you're a woman,  
24 I would say, is -- is not a -- is not now changing the  
25 condition --

1 QUESTION: But if it has -- if it has -- if it  
2 has the bad effect, if they do something bad, she's hurt.

3 MS. UNDERWOOD: Right.

4 QUESTION: But you're saying the simple  
5 statement of saying it -- so if you say something that  
6 never happens, because the person is a woman and it  
7 doesn't create a hostile environment, it still is  
8 actionable?

9 MS. UNDERWOOD: No, not if they say because  
10 she's a woman, because that isn't attempting to coerce her  
11 to do anything. There's nothing really she can do to stop  
12 being a woman. It's when the statement is, I won't  
13 promote you unless you do something.

14 QUESTION: Ms. Underwood, supposing this  
15 supervisor had two employees, one a man and one a woman.  
16 And he says to the man, I can make your life a lot easier  
17 here if you let me -- you let me use your beach place  
18 every weekend, and he says to the woman what was said  
19 here. Now, is a case of discrimination on the basis of  
20 sex made out there?

21 MS. UNDERWOOD: Well, if it's on the basis of  
22 using your beach place, then it's not on the basis of sex.

23 QUESTION: Well, but he's -- he's asking favors  
24 from both males and females.

25 MS. UNDERWOOD: Oh, I see. Well, I think that

1 if he's asking female -- favors from females on the basis  
2 of sex, then he is discriminating on the basis of sex  
3 against them. And he may also be engaging in other  
4 improper conduct with respect to other people. But I  
5 think the -- the point --

6 QUESTION: I see. So -- so your answer might be  
7 different if he hadn't asked the male employee to lend him  
8 his beach place, but rather made a sexual overture to the  
9 male employee. Then he would have been making sexual  
10 overtures indiscriminately, and there would have been no  
11 sexual discrimination towards either party; is that  
12 your --

13 MS. UNDERWOOD: Well, that -- that's the hardest  
14 case for the sex discrimination proposition. But --

15 QUESTION: Yes, it is.

16 QUESTION: It's an impossible case, isn't it?

17 MS. UNDERWOOD: Yes.

18 (Laughter.)

19 QUESTION: Ms. Underwood --

20 MS. UNDERWOOD: But -- but -- yes.

21 QUESTION: No, finish -- I thought you were  
22 finished. Go ahead.

23 MS. UNDERWOOD: No, I want -- I wanted, in  
24 response to some of those questions, to suggest that, for  
25 instance, if an employer said to the women employees or to

1 the black employees that you have to work twice as hard as  
2 the men do in order to keep your job or to get a promotion  
3 or you have to do twice as much work or you have to work  
4 twice as fast or you have to do the -- the -- you have to,  
5 in addition to doing all the other aspects of your job --

6 QUESTION: And -- and then the next -- and the  
7 next day, a new supervisor comes in and says, We're sorry  
8 about that; that's wrong. Was there a violation? They  
9 worked for 1 hour under the -- under the employee who  
10 behaved wrongfully.

11 MS. UNDERWOOD: There's a violation with de  
12 minimus consequences. You can always produce a trivial  
13 version of a violation. There was a violation. There  
14 have been cases in the lower courts where there was a  
15 remand to the district court for a factual inquiry to  
16 determine whether what happened was so trivial, so  
17 de minimus as not to --

18 QUESTION: Is there any case in any area of the  
19 law -- I'll focus on the word "discharge," because it  
20 clarifies it conceptually. I want to take out of your  
21 thought the problem of the bad environment. So we're not  
22 talking about a bad environment at all. Is there any case  
23 in labor law, law of contract? You know, there -- there  
24 is lots and lots of law where it's unlawful civilly to  
25 discharge someone. And is there any instance where a



1 person could recover where he wasn't discharged? It's  
2 somebody who said, I will discharge you, but he didn't.  
3 I -- I can't --

4 MS. UNDERWOOD: Not -- not if the only --

5 QUESTION: All right. Then --

6 MS. UNDERWOOD: -- there is not the case that  
7 to -- that a discharge is equivalent to a promise to  
8 discharge. But Title VII prohibits more than discharges.

9 QUESTION: Is there any case, then, under Title  
10 VII -- well, but it's -- you see, it's in -- it's lined up  
11 certain things: hiring, discharge and discriminating in  
12 terms of conditions of employment. So the question would  
13 be the same for each. That is, where there was no  
14 discharge, where there was no hiring, where there was no  
15 discrimination in terms or conditions of employment, but  
16 simply a threat to make -- to do those things that was not  
17 carried out.

18 Now, is there any precedent that would make the  
19 threat in any of those areas equivalent to the reality?

20 MS. UNDERWOOD: Well, I would describe the  
21 threat -- if -- if you describe the threat as altering her  
22 job responsibilities, altering what she has been told she  
23 must do to get a promotion, then the answer is yes.

24 But --

25 QUESTION: And can we tell from just the first

1 threat -- and this is the problem, Ms. Underwood, that I  
2 had understanding the government's position -- there could  
3 be a threat and the company could have a very strong  
4 policy. So you really, looking at it as an observer, you  
5 can't tell whether it would be reasonable for the worker  
6 to believe that the threat is anything more than a -- a  
7 slight of the kind that is -- we -- we all have to accept.

8 So I can understand a series of threats as  
9 making for a hostile environment. But I don't understand  
10 just a single threat. And you seem to say that a single  
11 threat, whether carried out or not, it -- it qualifies for  
12 liability.

13 MS. UNDERWOOD: A genuine, credible threat,  
14 which could be communicated, depending on the  
15 circumstances of the particular case, by one, serious,  
16 credible statement by somebody who is known, for instance,  
17 to have carried out such threats in the past,  
18 notwithstanding the wonderful policy --

19 QUESTION: But suppose all you have is this --  
20 you have this vice president, who is a pest. And you have  
21 a strong policy. And you have only those two things. How  
22 do you -- how do you know, when he makes his first threat?

23 MS. UNDERWOOD: Well, I think you have an issue  
24 of fact about whether a genuine, credible threat,  
25 sufficient to support liability, has been made. I think

1 that on this record, more was alleged than one statement.  
2 And sum -- enough was alleged to resist summary judgment.  
3 What we have in this case, after all, is the initial  
4 statement, I can make life difficult for you; then, I'm  
5 reluctant to promote you; then, after she's promoted, I  
6 won't give you permission to do the -- the job that you  
7 need to do for your customer unless you comply with my  
8 sexual demands.

9 In each case, a coercive statement is made.

10 QUESTION: Why does the threat -- why does the  
11 threat make a difference? In the example you gave  
12 earlier, about racial -- racial discrimination in  
13 employment, why -- why is it any worse -- why does it  
14 affect the working conditions any more if the -- if the  
15 officer of the company says, Because you're black, I'm  
16 going to make your work -- unless you work twice as hard,  
17 unless you black employees work twice as hard, you're  
18 going to be fired -- why is that any worse than -- than  
19 the officer who says, Because you're black employees, I'm  
20 going to give you twice as much work?

21 Now, there -- there's --

22 MS. UNDERWOOD: I -- I -- I --

23 QUESTION: -- there is no quid pro quo in the  
24 latter case.

25 MS. UNDERWOOD: No, I think they're the same.

1 QUESTION: They're not saying, Unless you do  
2 this, I'll do that. They're saying --

3 MS. UNDERWOOD: They are, in each case, imposing  
4 a new term or condition on employment by reason of race,  
5 in -- in the hypotheticals that you've posed.

6 QUESTION: Right. But the problem --

7 QUESTION: So the threat makes no difference?

8 MS. UNDERWOOD: No, the threat -- the threat can  
9 be the mechanism by which the new condition is imposed.  
10 And in this case, and in other sexual harassment cases, it  
11 sometimes is. But no, it's not the only way a new term or  
12 condition can be imposed on someone's employment.

13 QUESTION: What you're saying is --

14 QUESTION: But you're saying it's a term or  
15 condition even if the person is bluffing all the way  
16 through? You're saying it's still a term or condition?

17 MS. UNDERWOOD: I'm saying it's a term or  
18 condition if it is --

19 QUESTION: Even -- even -- even if the -- if the  
20 supervisor says, You're going to have to work twice as  
21 hard because you're a woman, and she doesn't work twice as  
22 hard and nothing happens, he was bluffing all along,  
23 that's still a violation as soon as he said it?

24 MS. UNDERWOOD: Well, if he says it in a -- in a  
25 sufficiently credible manner, so that she now -- and



1 everyone -- and other people in the work place to whom  
2 it's said -- anybody to whom it's said understands that to  
3 be a new term of employment under which --

4 QUESTION: But how do you judge that just on the  
5 basis of the threat alone? I mean, we -- and let me ask  
6 you how you factor in the existence of a policy that this  
7 kind of thing shouldn't happen and this is how you  
8 complain when it does?

9 MS. UNDERWOOD: Well, in general, it seems to me  
10 a good complaint procedure will serve many functions. One  
11 is that it will prevent some violations. Another is that  
12 prompt reporting will tend to corroborate the plaintiff,  
13 and failure to use it will tend to raise questions about  
14 her credibility.

15 QUESTION: But -- but strict liability, which is  
16 what you're arguing for, will not encourage that. Strict  
17 liability for a hostile work environment, say, or for a  
18 quid pro quo, say, if we were going to make a distinction,  
19 does -- does not encourage use of grievance procedures.  
20 It encourages laying back and filing a lawsuit.

21 MS. UNDERWOOD: Well, I don't -- it's not so  
22 clear that that's so. Because one consequence of laying  
23 back and filing a lawsuit is to minimize, to reduce the  
24 credibility of the plaintiff who says that something  
25 happened but never complained to anybody about it.



1 QUESTION: It certainly will go to damages,  
2 won't it?

3 MS. UNDERWOOD: It would go absolutely to --

4 QUESTION: All right. Let me -- let me -- let  
5 me ask you this question, which -- which I think is behind  
6 some of the things that are bothering us. Take an easy  
7 case in which there's a company policy, but there have  
8 been 25 threats from the -- from the particular  
9 supervisor. And he had done everything that -- that he  
10 could reasonably do to make it clear that he's going to  
11 follow through on the threat, but the moment for doing so  
12 has not yet occurred. The -- the next job evaluation has  
13 not come up yet.

14 The reason, if I understand your argument, that  
15 those threats -- repeatedly, et cetera -- changed the  
16 terms and conditions of employment is the same reason that  
17 we say other actions, perhaps even of co-employees, create  
18 hostile environments. It does create a hostile  
19 environment, and the hostility is in fact a change of  
20 condition. Is that your argument?

21 MS. UNDERWOOD: Well, it is similar to the  
22 hostile environment created by coworkers in the way that  
23 you suggest. The difference is that when hostile  
24 environment is created by coworkers, there is an issue  
25 about whether the company is properly responsible,

1 because --

2 QUESTION: Okay. But leave -- leave aside the  
3 question of what the standard of imputed liability is  
4 going to be. Just go the question of violation. And I  
5 take it on the question of violation, the two -- the two  
6 instances are identical in your analysis? There are  
7 evidentiary differences, but conceptually they're  
8 identical; is that correct?

9 MS. UNDERWOOD: The harm -- yes, the harm that's  
10 caused is caused in the same way.

11 I see the light.

12 CHIEF JUSTICE REHNQUIST: Thank you,  
13 Mr. Underwood. The case -- the case is submitted.

14 (Whereupon, at 11:22 a.m., the case in the  
15 above-entitled matter was submitted.)

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# CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of

The United States in the Matter of:

BURLINGTON INDUSTRIES, Petitioner v. KIMBERLY B. ELLERTH  
CASE NO: 97-569

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Donna Marie Fedele

(REPORTER)