

ARTICLES

THE STRANGE CAREER OF *QUID PRO QUO* SEXUAL HARASSMENT

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Title VII issues a simple command—don’t treat employees differently because of race or sex—that courts have obscured with an array of terms, tests, and categories.¹ The United States Supreme Court confronts an example this spring: “*quid pro quo* sexual harassment,” which it is asked to define in *Burlington Industries, Inc. v. Ellerth*.²

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1. See Stephen E. Tallent and Kathleen G. Vagt, *The Mix-Up Over “Mixed Motives,” in EQUAL OPPORTUNITY LAW 30 YEARS LATER E-1* (1995). The Supreme Court’s “recipes” for discrimination cases “have brought the purpose of the 1964 [Civil Rights] Act a long way. At this point, however, they do little more than confuse and provide fodder for commentators’ gratuitous manipulation.” *Id.* at E-4. See also, e.g., *O’Connor v. Consolidated Coin Catering Corp.*, 56 F.3d 542 (4th Cir. 1995), *rev’d*, 517 U.S. 308 (1996) (holding that a 56-year-old could not state a *prima facie* case of age discrimination under the test of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), when his replacement was 16 years younger, because both men were within the “protected class” of the age discrimination statute).

2. No. 97-569. *Burlington Industries* is one of three cases before the Court that should make the 1997 Term the defining year in the law of sexual harassment. In *Faragher v. City of Boca Raton*, No. 97-282, the Court addresses the standard of employer liability for “environmental” sexual harassment, an issue that is regarded as closely tied to *quid pro quo* for reasons explained in Part V, *infra*. Earlier this Term, in *Oncale v. Sundowner Offshore Services, Inc.*, 118 S. Ct. 998 (1998), the Court held that harassment may be

I argue here that the Court should demur—it should abandon *quid pro quo* rather than shoulder the pointless task of clarifying it. This Article will show that *quid pro quo* is so meaningful it is functionally meaningless. It is analytically useless and cumbersome, confounding the analysis of cases to which it is applied and the law of sexual harassment generally. It should be eliminated as a functional category of discrimination.

In explaining why this is so, and in recounting *quid pro quo*'s adventures in the federal courts, this Article also aims to tell a cautionary tale about Title VII's promiscuous terms, tests, and categories.

I. INTRODUCTION

There are two forms of sex discrimination in employment: "adverse job action" and harassment. Adverse job action is termination, demotion, refusal to hire or promote, and the like. Sexual harassment is said to consist of

[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature . . . when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.³

Courts also recognize two forms of sexual harassment: *quid pro quo* and "hostile work environment."⁴ *Quid pro quo* harassment conditions employment (or promotion) on sexual favors.⁵ Hostile work environment or "environmental" harassment comprises discriminatory comments, advances, touching, and the like that make the workplace "hostile" or "abusive."⁶

discrimination "because of" sex under Title VII even when the harasser and victim are the same sex.

3. 29 C.F.R. § 1604.11(a) (1997) (interpretative regulations of the Equal Employment Opportunity Commission ("EEOC") defining "Sexual harassment"). The courts have adopted a variety of definitions, and the EEOC's is not definitive. *See, e.g.*, *General Electric Co. v. Gilbert*, 429 U.S. 125, 141-42 (1976). The EEOC definition is, however, representative, and is quoted for that purpose here.

4. *See* BARBARA LINDEMANN & PAUL GROSSMAN, 1 EMPLOYMENT DISCRIMINATION LAW 746 (1996).

5. *See, e.g.*, *Bryson v. Chicago State University*, 96 F.3d 912, 915 (7th Cir. 1996).

6. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993).

Courts and commentators universally accept *quid pro quo* as a discrete form and “category” of discrimination. It receives a 21-page sub-chapter in the leading treatise on the law of employment discrimination, Barbara Lindemann and Paul Grossman’s *Employment Discrimination Law*.⁷ Every federal appellate court recognizes *quid pro quo* as a category of harassment, and the Supreme Court mentioned it in both of its sexual harassment decisions prior to this Term.⁸ In *Burlington Industries* the Court addresses *quid pro quo* head-on.

Catharine MacKinnon is credited with introducing *quid pro quo* to the analysis of sex discrimination in her influential 1979 book, *Sexual Harassment of Working Women*. Professor MacKinnon identified *quid pro quo* as taking three forms. In the first, there is a proposition, rejection, and retaliation. In the second, the woman complies and does not receive a job benefit. In the third, the woman complies and does benefit. MacKinnon identified a “fourth logical possibility” that, in her words, “does not require further discussion”: “the woman refuses to comply, receives completely fair treatment on the job, and is never harassed again In this one turn of events, there truly is ‘no harm in asking.’”⁹

The scenarios identified by Professor MacKinnon provide a loose framework for the discussion that follows.

II. QUID PRO QUO AS ADVERSE JOB ACTION

Today no one disputes that the first *quid pro quo* pattern identified by MacKinnon—proposition, rejection, retaliation—is employment discrimination for which the employer is strictly liable.¹⁰ In the 1982 decision *Henson v. City of Dundee*,¹¹ the Eleventh Circuit cited MacKinnon’s book and held that *quid pro quo* discrimination occurs when a woman refuses sexual advances and consequently is “deprived of a job benefit which

7. LINDEMANN AND GROSSMAN, *supra* note 4, at 759-80.

8. See *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 68 (1986); *Harris*, 510 U.S. at 20.

9. CATHARINE MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 33 (1979).

10. *But see* *Jansen v. Packaging Corporation of America*, 123 F.3d 490, 517-18, 532 (7th Cir. 1997) (Coffey, J., concurring in part and dissenting in part), *cert. granted sub nom. Burlington Industries, Inc. v. Ellerth*, No. 97-569 (urging that *quid pro quo* be judged by a negligence standard and restricted to cases of adverse job action).

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

she was otherwise qualified to receive."¹² *Henson* was the first published federal decision to use *quid pro quo* to describe sex discrimination, and continues to be cited as the seminal *quid pro quo* case and as black letter law.¹³

The result in *Henson* is clearly correct, but curious. Why did retaliatory job action require its own Latin name and "category" to be recognized as illegal sex discrimination? A woman was terminated (or refused employment) because she rejected sexual advances.¹⁴ A jury could quickly infer that the advances—and hence the adverse employment action—were on account of her sex and therefore constituted sex discrimination in violation of Title VII. Why does it help *analytically* to call this *quid pro quo*? And why call it harassment?

The answer seems to be that in the 1970s some employers argued—and some courts agreed—that sexually-motivated conduct was "personal" and therefore not attributable to the company even when it resulted in adverse job action. In *Tomkins v. Public Service Electric & Gas Co.*,¹⁵ the plaintiff alleged that when she became eligible for promotion her supervisor took her to lunch to "discuss her prospects with the firm"; he made sexual advances, she resisted, and rather than being promoted she was transferred, demoted, and eventually terminated. "The abuse of authority . . . for personal purposes is an unhappy and recurrent feature of our social experience," the court intoned, but it "is not . . . sex discrimination within the meaning of Title VII."¹⁶ In *Barnes v. Train*,¹⁷ the plaintiff claimed to have been terminated

12. *Id.* at 909.

13. See, e.g., LINDEMANN & GROSSMAN, *supra* note 4, at 760.

14. I exclude from this discussion another possibility: that the woman was not qualified and the *quid pro quo* proposition gave her a chance at employment she otherwise would not have had. MacKinnon described such offers as widely rumored and rarely made, see MACKINNON, *supra* note 9, at 36-38, but she does not address whether Title VII is violated when, in this manner, a woman is effectively offered and denied a job because of sex. Under the *Henson* test the case would fail because the woman could not prove an element of her *prima facie* case—that she was "otherwise qualified." *Henson*, 682 F.2d at 909. The same result could be reached by positing that, when the qualified and unqualified woman refuse the proposition, both are insisting that they be treated as a man would be: the unqualified woman is so treated (the unqualified man would not get the job either) and the qualified woman is not. Under current law, however, the unqualified woman might have a partial remedy without a special *quid pro quo* category of discrimination. See 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2)(B) (1994).

15. 422 F. Supp. 553, 555 (D.N.J.), *rev'd*, 568 F.2d 1044 (3d Cir. 1977).

16. *Id.* at 556.

17. 13 FEP Cases (BNA) 123 (D.D.C. 1974), *rev'd sum nom.* Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977).

for refusing sexual advances; the case was dismissed with the terse judgment that it concerned “an inharmonious personal relationship.”¹⁸ And in *Williams v. Saxbe*,¹⁹ the plaintiff alleged that she was terminated for refusing sexual advances. The defendant argued that “plaintiff has not made out a case of sex discrimination under the Act because the instant case was not the result of a policy of the office, but rather, was an isolated personal incident”; the court denied defendant’s motion to dismiss, while agreeing that plaintiff would have to prove the retaliation was part of “policy or practice” and not “a non-employment related personal encounter.”²⁰

In other words, sexual motivation once was used *as a defense*; it was defendants who distinguished what I will call *quid pro quo* “retaliation” cases from other adverse-job-action cases, characterized them as sexual harassment, and said that as such they were not actionable.²¹ When Professor MacKinnon argued at about this time that sexually-motivated mistreatment—fondling, verbal abuse—was actionable sex discrimination under Title VII, she naturally included *quid pro quo* retaliation cases within her claim. The snappy Latin name given these cases in an influential book about sexual harassment probably helped ensure that *quid pro quo* retaliation cases remained classified, as defendants had sought, as a kind of sexual harassment, rather than being trotted back to the adverse-job-action barn where they belonged. Thus was born a “class” of cases that was redundant virtually from its inception.²²

18. *Id.* at 124.

19. 413 F. Supp. 654 (D.D.C. 1976).

20. *Id.* at 660-61. See generally MACKINNON, *supra* note 9, at 83-90 (discussing these and other cases).

21. It reflects how far the law of sexual harassment has come that today some courts would maintain that sexual motive is *necessary* to certain Title VII claims. See *Wrightson v. Pizza Hut of America, Inc.*, 99 F.3d 138, 143 (4th Cir. 1996) (harassment by person of the same sex is not actionable under Title VII unless the aggressor is a homosexual acting out of prurient interest). The Supreme Court rejected this approach in *Oncale v. Sundowner Offshore Services, Inc.*, 118 S. Ct. 998, 1002 (1998).

22. For a decision pre-dating MacKinnon’s book that holds for the plaintiff on the ground that sexually-motivated termination is discrimination “because of” sex, see *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977).

A slightly different historical account is offered in BARBARA LINDEMANN & DAVID D. KADUE, *SEXUAL HARASSMENT IN EMPLOYMENT LAW* 145-46 (1992), but the same critique applies. The authors explain that courts “initially were reluctant” to find *quid pro quo* retaliation actionable because “the proximate cause of the adverse employment action was the female complainant’s *activity* (her rejection of sexual advances) rather than her *gender*.” *Id.* at 145. However, “[c]ourts now uniformly find *quid pro quo* harassment

Of course, *quid pro quo* retaliation is the other side of the coin from a scenario that plainly is sexual harassment and that is *not* actionable as adverse job action—the circumstance where the woman submits to the *quid pro quo* threat and her boss sexually abuses her. This other side of the coin is what *quid pro quo* means to be—the *quid pro quo* harasser means to extort sex, and in this sense the adverse-job-action case is the “unsuccessful” *quid pro quo* case. Moreover, what I will call the *quid pro quo* “submission” case is a potent illustration of the use of the employment relationship to harass sexually. For these reasons it would be understandable—which is not to say analytically sensible—that the *quid pro quo* submission case dominated the conception of *quid pro quo* and dragged the “unsuccessful” retaliation case with it to the “harassment” rubric.²³

But this raises a second and still more curious aspect of *Henson* and the adoption of *quid pro quo*: *quid pro quo* harassment was first recognized and long limited to its retaliatory form. “As in the typical disparate treatment case,” the court noted in *Henson*, “the employee must prove that she was *deprived of a job benefit . . .*”²⁴ The court fashioned from the Supreme Court’s notorious *McDonnell Douglas* test the elements of a “prima facie” case of “a *quid pro quo* sexual harassment claim”:

unlawful . . . simply by reasoning that when an employer conditions an individual’s employment opportunities upon services as a sexual partner, it is discriminating on the basis of gender.” *Id.* at 146. Precisely. And because the woman lost employment “on the basis of gender,” *quid pro quo* retaliation cases should be treated with adverse-job-action cases generally.

23. MacKinnon and her allies might have *wanted* retaliation cases to be perceived as harassment for another reason: The courts were bound to find it illegal under Title VII to terminate a woman for refusing sexual favors (as illustrated by the reversal on appeal of cases discussed in text accompanying notes 15-18, *supra*). Portraying that form of discrimination as the “other side of the coin” from the submission case could be expected to facilitate recognition of the submission case too. From there it was but a short step to recognizing that taking sex without asking in the environmental harassment case could also be illegal.

But this is not how the law developed: *quid pro quo* did not leverage the actionability of environmental harassment. Rather, the two “forms” were recognized virtually simultaneously. Indeed, *Henson* is both the first sex discrimination case to use the term *quid pro quo* and a seminal “environmental” harassment case, quoted at length in the Supreme Court decision that recognized environmental harassment as actionable. *See Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 66-67 (1986). And, *Henson* discussed and recognized the actionability of environmental harassment *before* taking up *quid pro quo*. *See Henson v. City of Dundee*, 682 F.2d 897, 901-06 (11th Cir. 1982). More to the point, and as discussed immediately below, submission cases only recently have proceeded under the name *quid pro quo*.

24. *Henson*, 682 F.2d at 909 (emphases added).

- (1) The employee is a member of the protected class;
- (2) She was subjected to unwelcome sexual harassment to which members of the opposite sex had not been subjected;
- (3) She applied and was qualified for a position for which the employer was accepting applications;
- (4) *That despite her qualification she was rejected;*
- (5) That after her rejection, the position remained open and the employer continued to accept applicants who possessed complainant's qualifications.²⁵

The rule has been widely repeated.²⁶

Whatever the origin of the *quid pro quo* test for women who suffer adverse job action because they refuse to trade sex for work, today no reason exists to treat *quid pro quo* retaliation cases as a category of discrimination separate and apart from adverse job action *simple*. To be sure, the *quid pro quo* proposition supplies powerful direct evidence of discriminatory motive. *Quid pro quo* retaliation is an especially contemptible sort of adverse job action and may have great emotional effect on the plaintiff

25. *Id.* at 911 n.22 (emphasis added). The redundancy of the *Henson* test is obvious when that test is compared to *McDonnell Douglas*'s. The woman could state a prima facie case under *McDonnell Douglas* with steps 1, 3, 4, and 5 of *Henson*: she was a (1) woman who was (3) qualified but (4) rejected, and (5) the position was still held out. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 & n.13 (1973). Why—because she was also subjected to the indignity of sexual advances—should she have to prove those advances as an element to her claim? The liberal conspiracy theorist will be forgiven spying in this rule the machinations of the white male hegemony. As an employment lawyer—and not a *liberal* conspiracy theorist—I see different forces: the history discussed above, and the weakness of courts and practitioners for encumbering Title VII with ponderous, unwieldy, and occasionally unjust multi-factored tests.

26. *See* LINDEMANN & GROSSMAN, *supra* note 4, at 760 (relying on *Henson* for the elements of a *quid pro quo* claim and requiring “adverse employment action” as well as an effect on a “tangible aspect of the complainant’s term, condition, or privilege of employment”); Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV. L. REV. 1449, 1455 (1984) (“[I]n a *quid pro quo* case of sexual harassment . . . [t]he plaintiff must establish . . . that she was denied an employment benefit because she refused to provide sexual favors.”); *see also* Gary v. Long, 59 F.3d 1391, 1396 (D.C. Cir. 1995) (“[T]he supervisor must have wielded the authority entrusted to him to subject the victim to adverse job consequences.”); *Sauers v. Salt Lake County*, 1 F.3d 1122, 1127 (10th Cir. 1993) (describing a *quid pro quo* case as one where the plaintiff “suffered an economic injury”) (citation omitted); *Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 619 (6th Cir. 1986) (observing that courts “have recognized that an offensive work environment could . . . constitute Title VII harassment without the necessity of asserting a tangible job detriment . . . , which proof underlies the *quid pro quo* variant of sexual harassment”) (emphasis added).

and jury; for these reasons, it will likely bear on damages. But in retaliation cases the term *quid pro quo* does not distinguish illegal conduct from legal conduct. It is analytically superfluous and burdensome and should be abandoned.

III. QUID PRO QUO AS HARASSMENT

To the foregoing critique one may add that in retaliation cases *quid pro quo* harassment is none of the above: the *quid* (sex) is withheld, so is the *quo* (work), and there is no harassment.²⁷ By contrast, in cases where the woman submits and is hired (or promoted) all three are present: *quid* is exchanged for *quo* and there is harassment. Perhaps, then, while abandoning the term *quid pro quo* in retaliation cases as just suggested, we should retain it for submission cases.

Treating the submission case as actionable *quid pro quo* harassment is consistent with the term's original definition. In two of the three *quid pro quo* scenarios identified by Professor MacKinnon, the woman submits.²⁸ The restrictive *quid pro quo* definition traces to *Henson*, but even there it may have been unintended; the court observed at one point: "On a practical level, of course, there are many cases that could be characterized interchangeably as [hostile work environment harassment] or *quid pro quo* cases."²⁹ This statement makes little sense if the court is excluding the submission case from *quid pro quo*.³⁰ The *Henson* opinion exudes a certain excitement at being first—the court had a chance to add a Latin term to the Title VII lexicon and show off a new five-part riff on the *McDonnell Douglas* test—and perhaps, in its enthusiasm to define *quid pro quo*, the court lost sight of what it meant.

Today, the ascendant view is that *quid pro quo* harassment is actionable when the woman submits. The leading case is the Second Circuit's *Karibian v. Columbia University*,³¹ which recognizes that *quid pro quo* comprises both "'refusal' cases" and

27. I discuss in Part V, *infra*, whether the proposition itself is actionable harassment.

28. See text accompanying note 9, *supra*.

29. *Henson*, 682 F.2d at 909 n.18 (11th Cir. 1982).

30. See LINDEMANN & GROSSMAN, *supra* note 4, at 770 (defining *quid pro quo* as requiring adverse job action yet observing that "in certain cases, the line between [*quid pro quo* harassment and hostile environment harassment] may be fuzzy").

31. 14 F.3d 773, 777 (2d Cir. 1994).

“submission’ cases.”³² Chief Judge Posner recently advocated limiting *quid pro quo* liability to “company acts” such as hiring and firing—the rule of *Henson*. It is a sign of the times (if not of thorough research) that he described his position as un-“orthodox,” indeed “novel[].”³³

To the extent the ascendant view prevails and *quid pro quo* is defined to include both retaliation and submission cases, it will become something more than the functionally useless “category” of discrimination examined in the preceding section. It will become affirmatively confusing. Consider the treatment in the 1996 edition of the leading discrimination law treatise. *Lindemann and Grossman* begins by citing *Henson* and identifying “adverse employment action” as an element of a *quid pro quo* claim.³⁴ But in discussing the adverse-job-action element, the treatise stumbles against *Karibian* and its holding that the woman who submits has a *quid pro quo* claim. The editors rally by suggesting that for submission cases “threatened” economic harm is enough.³⁵ This is a valiant effort to shore up a doctrine in collapse, but it fails for several reasons. First, a threat is not “actual economic harm”; saying that it is fundamentally alters the requirement. Second, this variant of the *Henson* test not only eliminates an element (“actual economic harm”), it adds one—submission. And third, when push comes to shove, those who favor a *quid pro quo* action for submission cases are unlikely to stand by the requirement of a threat, since in one classic submission scenario no threat occurs: the woman is *promised* a job or promotion in exchange for sex, and submits.³⁶ The *Henson*

32. *Karibian*, 14 F.3d at 778. See also *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1297 (3d Cir. 1997) (“Like the Second Circuit, we ‘do not read Title VII to punish the victims of sexual harassment who surrender to unwelcome sexual encounters.’” “The supervisor’s conduct is equally unlawful under Title VII whether the employee submits or not.”) (quoting *Karibian*, 14 F.3d at 778); *Nichols v. Frank*, 42 F.3d 503 (9th Cir. 1994) (finding *quid pro quo* harassment where plaintiff submitted and suffered no adverse job action).

33. *Jansen v. Packaging Corporation of America*, 123 F.3d 490, 514 (7th Cir. 1997) (Posner, C.J., concurring and dissenting), *cert. granted sub. nom. Burlington Industries, Inc. v. Ellerth*, No. 97-569. *Jansen* was the companion case to *Burlington Industries*, which the Supreme Court reviews this spring.

34. LINDEMANN & GROSSMAN, *supra* note 4, at 760.

35. See *id.* at 768.

36. The retaliation case includes a threat or promise to the same degree as the submission case; in this respect, *Lindemann and Grossman* is mistaken in suggesting that in the submission case economic threat merely stands in for economic injury. The submission test eliminates something (adverse job action), and adds something (submission).

test has just cracked from trying to do two jobs at once: define adverse job action *and* sexual harassment.

The problem with using *quid pro quo* to refer both to retaliation and submission cases extends beyond the difficulty of formulating a single *McDonnell Douglas* test to accommodate both; it reaches the term's very serviceability as a definition. *Quid pro quo* harassment is where actual economic harm occurs, or does not. It is where a threat is made—or a promise. It is where a woman submits, or does not. State that a case involves *quid pro quo* harassment, and you will have left unsaid whether the plaintiff gained a job or lost one, and whether the alleged damages are emotional or economic. You will have said little more than that the suit involves sex discrimination. This is a definition so broad that it fails its assigned task—defining.

Of course, this confusion is avoided if *quid pro quo* no longer includes the retaliation case, as argued in the previous section, and comprises submission cases only. Perhaps, in other words, *quid pro quo* should not mean what it did and should mean what it did not? Before reincarnating *quid pro quo* in this form, however, we must ask of the submission case what we asked of the retaliation case—what gap does it fill in existing doctrine? Environmental harassment exists when “[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct . . . has the . . . effect of . . . creating an intimidating, hostile, or offensive working environment.”³⁷ The woman who is forced to engage in unwanted sex with her boss to keep her job has satisfied these elements. She can state a claim for environmental harassment.³⁸

37. 29 C.F.R. § 1604.11(a) (1997). See also *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64-67 (1986); *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993).

38. See, e.g., *Meritor*, 477 U.S. 57 (recognizing environmental harassment when plaintiff has unwanted sex with a supervisor to remain employed); see also LINDEMANN & KADUE, *supra* note 22, at 158, which identifies the following differences between *quid pro quo* and environmental harassment: (1) environmental harassment need not be the act of a supervisor; (2) it is not limited to sexual advances; and (3) it does not require proof of economic injury. In other words, the plaintiff who can prove *quid pro quo* submission can prove environmental harassment—with less. A fourth and final difference the treatise identifies is that liability generally is automatic in *quid pro quo* cases. *Id.* This is discussed in Part V, *infra*.

Environmental discrimination requires a certain quantum of harassing conduct—it must be “severe” or “pervasive.” See *Harris*, 510 U.S. at 21. No such requirement has been stated in cases allowing *quid pro quo* submission claims. *Quid pro quo* submission cases can be expected to meet that requirement virtually by definition, however. Compare *Karibian v. Columbia University*, 14 F.3d 773, 776 (2d Cir. 1994) (concerning a “violent sexual

To be sure, the *quid pro quo* proposition is important evidence. Just as the *quid pro quo* retaliation case is a strong adverse-job-action case, so the *quid pro quo* submission case often will be stronger than the environmental harassment claim that lacks an express threat of retaliation. The supervisor's overt threat and extortion will likely cause a jury to regard the experience as especially "intimidating," "offensive," and "hostile." The *quid pro quo* element is not necessary, however, to distinguish the impermissible from the permissible. Rather, just as the *Henson* test adds a superfluous element (sexual advances) to the test for adverse-job-action discrimination *simple*, so the *quid pro quo* submission test adds an element (threatened or promised job action) that one can omit and still state a claim under Title VII.

We now have eliminated the second of the two scenarios thought to warrant *quid pro quo*'s treatment as a discrete form and category of discrimination: in "submission" cases, as in "retaliation" cases, the concept is redundant of existing doctrine and therefore analytically unnecessary and cumbersome. We also have an affirmative reason to jettison the term: it covers the entire waterfront of discrimination—adverse job action and harassment—and doctrinal confusion results.

IV. QUID WITHOUT QUO—NO HARASSMENT IN CASE OF BREACH OF CONTRACT?

The preceding discussion of "submission" cases conflated Professor MacKinnon's second and third scenarios: under both scenarios the woman submits, but under the second the job is denied. One could argue that technically MacKinnon is wrong and there is no *quid pro quo* harassment in this situation: The essence of *quid pro quo* is conditioning a job benefit on sex. In the retaliation case, the condition is enforced. In the submission case, it is satisfied. In the *quid* without *quo* scenario, however, the conditioning never occurs.

relationship" over several years), and *Nichols v. Frank*, 42 F.3d 503, 506 (9th Cir. 1994) (concerning a plaintiff who "repeatedly but unwillingly performed oral sex"), with *LINDEMANN & GROSSMAN*, *supra* note 4, at 795 ("[A] physical incident may constitute unlawful [environmental] harassment, on the basis of its severity, even if it occurs only once."), and *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1305 (2d Cir. 1995) ("[E]ven a single incident of sexual assault sufficiently alters the conditions of the victim's employment and clearly creates an abusive work environment for purposes of Title VII liability."), and *King v. Board of Regents*, 898 F.2d 533, 537 (7th Cir. 1990) ("[A] single act [of harassment] can be enough."). In a *quid pro quo* submission case, moreover, the single "physical incident" is preceded by at least one sexually-offensive threat or solicitation.

This absurd result—barring *quid pro quo* claims when the plaintiff was coerced to have sex but obtained no job benefit—is dictated by the *Henson* test as it has come to be stated. For instance, *Lindemann and Grossman's* adaptation of the *Henson* test provides that “the complainant’s *reaction* to the sexual advance [must have] affected a tangible aspect of the complainant’s term, condition, or privilege of employment.”³⁹ The treatise’s use of the word “reaction” (rather than “refusal”) artfully accommodates the submission case (although the test’s requirement of adverse job action remains an obstacle to the submission case, as shown *supra*). But in the *quid* without *quo* scenario, the “reaction” has no “effect”; therefore, if we take the *Henson* test seriously, there can be no claim of *quid pro quo*. In *Lipsett v. University of Puerto Rico*,⁴⁰ the First Circuit dutifully cited *Henson* for the proposition that a *quid pro quo* plaintiff must show (1) unwelcome sexual advances and (2) “that his or her reaction to these advances affected tangible aspects” of employment.⁴¹ “In rebuttal,” the court continued, “the defendant may show that the behavior complained of either did not take place or that it did not affect a tangible aspect of the plaintiff’s employment.”⁴² Elsewhere the court wrote:

The gist of a *quid pro quo* claim is that the plaintiff is threatened by the harasser with demands for a sexual encounter. If the plaintiff rejects those demands, then the threats may become real—that is, he or she may lose a job Conversely, the plaintiff may accede to those demands out of fear He or she may then be rewarded for this compliance. If the plaintiff is threatened, and if the plaintiff is rewarded or punished, then there is *quid pro quo* harassment.⁴³

39. LINDEMANN & GROSSMAN, *supra* note 4, at 760 (emphasis added).

40. 864 F.2d 881 (1st Cir. 1988).

41. *Id.* at 898.

42. *Id.* (emphasis added).

43. *Id.* at 913 (emphasis added). See also *Chamberlin v. 101 Realty, Inc.*, 915 F.2d 777, 784 (1st Cir. 1990) (repeating the *Lipsett* test); *Showalter v. Allison Reed Group, Inc.*, 767 F. Supp. 1205, 1212 (D.R.I. 1991) (searching for “tangible job benefit” to determine whether *quid pro quo* case submission case was proved).

The EEOC definition of sexual harassment contains the same notion: sexual harassment occurs, *inter alia*, when “submission to or rejection of [unwelcome sexual advances] by an individual is used as the basis for employment decisions affecting such individual.” 29 C.F.R. § 1604.11(a)(2) (1997) (“Sexual harassment”). The EEOC definition captures the *quid* without *quo* scenario elsewhere, however, allowing that harassment also occurs when “submission to [unwelcome sexual advances] is made either

I have not found a case where the employer defended a *quid pro quo* claim with evidence that although the proposition was made and the woman submitted to unwanted sex, a white male got the job. Confronted with that argument, the First Circuit surely would manage to distinguish its statements in *Lipsett*. That would be the right result—discrimination requires discrimination, not a fully-executed contract. It is the realness of the offensive sexual contact or adverse job action that determines legality, not the realness of the conditioning. But that this “element” of *quid pro quo* would not be given effect reveals another respect in which *quid pro quo* is a flawed and misleading “category” of discrimination: it is an analytic construct requiring a formal conditioning of employment on sex that the law itself does not demand, as the hostile environment cases show. *Quid pro quo* is a powerful concept that, when applied, injects needless formalism and complexity to the analysis of employment discrimination.

V. “NO HARM IN ASKING” AND THE STANDARD OF EMPLOYER LIABILITY

Two reasons might still be given for retaining *quid pro quo* as a discrete category of discrimination. One is Professor MacKinnon’s “fourth logical possibility”: “the woman refuses to comply, receives completely fair treatment on the job, and is never harassed again.”⁴⁴ MacKinnon concluded that this fourth scenario “does not require further discussion” because “[i]n this one turn of events, there truly is ‘no harm in asking.’”⁴⁵ Some today disagree. In the Seventh Circuit’s *Jansen* decision, Judge Flaum was joined by five colleagues in advocating that a single *quid pro quo* threat be actionable.⁴⁶

explicitly or implicitly a term or condition of an individual’s employment.” *Id.* at §1604.11(a)(1). Of course, this broader language also includes the environmental harassment case where sexual conduct effectively is made a “condition” of employment, demonstrating again that *quid pro quo* does not constitute a meaningfully distinct “category” of harassment.

44. MACKINNON, *supra* note 9, at 33.

45. *Id.*

46. *Jansen v. Packaging Corporation of America*, 123 F.3d 490, 499 (7th Cir. 1997), *cert. granted sub. nom. Burlington Industries, Inc. v. Ellerth*, No. 97-569. Judge Flaum claimed only a “toehold in the case law” for this view, consisting of dictum by Judge Reinhardt and other cases that “describe a valid *quid pro quo* claim in terms that could encompass a situation based on threats only.” *Id.* at 499 n.6 (emphasis added). It has been one of the points of this Article that with *quid pro quo* little reliance should be placed on what courts’ prior statements “could encompass” (or exclude).

On this score it seems safe to agree with MacKinnon that the *quid pro quo* threat is insufficiently harmful to warrant suit under Title VII. Saying "You're an incompetent stupid female bitch" a single time is not actionable environmental harassment. Why should suit lie for saying "I don't have time for you right now, Kim, unless you tell me what you're wearing," a statement that Judge Flaum found to be a *quid pro quo* proposition in his *Jansen* opinion?⁴⁷ More to the point, if the retaliation case is treated as adverse job action, and the submission case is handled as environmental discrimination, it is difficult to see how the *quid pro quo* threat alone is substantial enough, or different enough, to constitute a separate "form" or "category" of discrimination. And no one has contended it is. MacKinnon's "fourth logical possibility" is not a reason to retain the category of *quid pro quo* discrimination.⁴⁸

This leaves one argument for retaining *quid pro quo* as a discrete category of harassment: the standard of employer liability. Liability for adverse job action is strict. The consensus is that liability for environmental harassment is not (although the exact standard is another issue that has divided the courts and that the Supreme Court takes up this Term in *Faragher v. City of Boca Raton*⁴⁹). Liability for *quid pro quo* in retaliation and

In addition to the authorities cited by Judge Flaum, see *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1297 (3d Cir. 1997) (dictum that, under § 1604.11(a)(1) of the EEOC's guidelines, "a *quid pro quo* violation occurs at the time when an employee is told that his or her compensation, etc. is dependent upon submission to unwelcome sexual advances"); *Chamberlin v. 101 Realty, Inc.*, 915 F.2d 777, 783 (1st Cir. 1990) (dictum that "a supervisor's demand that an employee submit to an unwelcome sexual advance or face discharge could well constitute" *quid pro quo* harassment); *Karibian v. Columbia University*, 14 F.3d 773, 779 (2d Cir. 1994) ("[O]nce an employer conditions any terms of employment upon the employee's submitting to unwelcome sexual advances, a *quid pro quo* harassment claim is made out, regardless of whether the employee (a) rejects the advances and suffers the consequences or (b) submits to the advances in order to avoid those consequences. . . . The focus should be on the prohibited conduct, not the victim's reaction."). The *Karibian* statement is ambiguous.

47. See *Jansen*, 123 F.3d at 503. The *Henson* test requires only a "sexual advance," not a threat. See LINDEMANN & GROSSMAN, *supra* note 4, at 760. Judge Flaum would reserve his single-threat *quid pro quo* claim for the "clear and unambiguous threat of an adverse job consequence." *Jansen*, 123 F.3d at 499. But as discussed immediately below, this sub-class, of an element, of a type, of *quid pro quo* discrimination hardly warrants retaining a functional "category" otherwise meriting elimination.

48. Put another way, retaining the *quid pro quo* "category" of discrimination for the sake of the actionability of the *quid pro quo* proposition reflects the normative judgment that the proposition has so serious an effect on the employment relationship that it should not go unremedied. By this argument the proposition should rise or fall as environmental harassment, a category of discrimination devoted to conduct so "severe" as to alter the conditions of employment.

49. No. 97-282.

submission cases, however, has widely though not uniformly been thought to be strict. (The Court declined to grant certiorari on this issue in the *Burlington Industries* case.) Thus, *Lindemann and Grossman* instructs that “in certain cases the line between [*quid pro quo* and environmental harassment] may be fuzzy” but that “it is crucial to determine which theory (or theories) apply . . . [because] [i]n *quid pro quo* cases employer liability is automatic . . . [whereas] employer liability in hostile environment cases depends on agency principles.”⁵⁰

The rule of strict liability in *quid pro quo* submission cases illustrates to a degree the doctrinal confusion caused by the term’s ambiguity. Liability is strict in adverse-job-action cases, and should be no less strict when the adverse job action is retaliation for refusing sexual advances. This was the reasoning of *Henson*, which began its discussion of employer liability by stating that an employer is strictly liable in the “typical” adverse-job-action case:

Sexual harassment *resulting in a tangible job detriment* is a form of sex discrimination every bit as deleterious . . . as other unlawful employment practices. We hold that an employer is strictly liable for the actions of its supervisors that amount to sexual discrimination or sexual harassment *resulting in tangible job detriment*⁵¹

The Second Circuit’s *Karibian* decision is a striking illustration of adopting strict liability for submission cases because that is the *quid pro quo* rule, without considering that the “*quid pro quo* rule” results from the adverse-job-action element of the retaliation case, which the submission case lacks. In *Karibian* the Second Circuit recognized the *quid pro quo* submission case for the first time, and had to distinguish *Kotcher v. Rosa & Sullivan Appliance Center, Inc.*⁵² and *Carrero v. New York City Housing Authority*,⁵³ where it had stated that *quid pro quo* required adverse job action. *Kotcher* was a hostile work environment case, *Karibian* explained; its statement on *quid pro quo* was dictum.⁵⁴ As for *Carrero*, it was a retaliation case; its statement was merely “descriptive of the facts

50. LINDEMANN & GROSSMAN, *supra* note 4, at 770.

51. *Henson v. City of Dundee*, 682 F.2d 897, 909-910 (11th Cir. 1982) (emphases added).

52. 957 F.2d 59, 62 (2d Cir. 1992).

53. 890 F.2d 569, 577 (2d Cir. 1989).

54. *Karibian v. Columbia University*, 14 F.3d 773, 778 (2d Cir. 1994).

before the Court.”⁵⁵ One page earlier, however, *Karibian* had relied on exactly two cases for the proposition that *quid pro quo* liability is strict: *Kotcher* and *Carrero*. The court even quoted a sentence from *Kotcher* that explicitly tied the rule of strict liability in *quid pro quo* to the presence of adverse job action: “The supervisor is deemed to act on behalf of the employer when making decisions *that affect the economic status* of the employee.”⁵⁶

But strict liability in *quid pro quo* submission cases is not entirely an accident. *Henson* noted that co-workers as well as supervisors can make a work environment hostile. At least in co-worker environmental harassment cases, therefore, it must be asked whether the employer should be responsible. *Quid pro quo* harassment, by contrast, is uniquely a supervisor’s act.⁵⁷ Today, the leading reason given for strict liability is that *quid pro quo* necessarily entails authority conferred by the employer.⁵⁸ The supervisor is acting with “actual” or “apparent” authority, it is said, and the employer therefore is bound.⁵⁹

The proper standard of employer liability for harassment is beyond the scope of this Article. My concern is not *what* standard should apply, but whether *different* standards should apply in *quid pro quo* and environmental cases, for only in that event is there reason to retain *quid pro quo* as a discrete category of discrimination. My view is that strict liability is inappropriate for *quid pro quo* submission cases because the *quid pro quo* harasser seldom acts within his actual or apparent authority. He has actual and not merely apparent authority to terminate. But that is not what he is doing. He is demanding sexual favors. And he has no authority to do that, as should be “apparent” to

55. *Id.* at 778. This is a phrase to be filed away for future use: Troublesome statements in prior cases may be disregarded when (1) they did not concern the facts before the court and therefore are dictum, or (2) they did concern the facts before the court.

56. *Karibian*, 14 F.3d at 777 (quoting *Kotcher*, 957 F.2d at 62) (emphasis added).

57. See *Henson v. City of Dundee*, 682 F.2d 897, 910 (11th Cir. 1982); see also *Jansen v. Packaging Corporation of America*, 123 F.3d 490, 505 (7th Cir. 1997) (Cudahey, J., concurring), *cert. granted sub nom. Burlington Industries, Inc. v. Ellerth*, No. 97-569 (“*Quid pro quo* is always a creature of power.”).

58. See *Jansen*, 123 F.3d at 496 (majority opinion) (“When a supervisor wields the authority actually delegated to him to dole out job benefits and detriments in order to condition such employment consequences upon receipt of sexual favors, ‘the supervisor, by definition, is the company.’”) (citation omitted); *Nichols v. Frank*, 42 F.3d 503, 514 (9th Cir. 1994) (noting that a harasser “is able to grant such job benefits or detriments only because he has actual or apparent authority to do so ‘delegated to him by his employer’”) (citation omitted).

59. See also *Pfau v. Reed*, 125 F.3d 927, 936 n.5 (5th Cir. 1997); *Nichols*, 42 F.3d at 514.

co-workers familiar with company policy and the discrimination laws. Apparent authority is boundless if it includes whatever agents unlawfully use actual authority to extort.

What is important for purposes of this Article, however, is that it is a fiction that the *quid pro quo* harasser acts with more authority—actual or apparent—than the boss who takes without asking in the environmental discrimination case. That is, the company is no more complicit in *quid pro quo* harassment than in environmental harassment; in both instances the supervisor uses power and opportunity supplied by the company for a purpose that, in most workplaces, company policy expressly prohibits. One supervisor orders his assistant to accompany him on a business trip and gropes her on the plane, at dinner, and in the hotel. A second supervisor does the same and tells her that's what he did with her predecessors. A third supervisor adds that if she doesn't submit she's fired. The first scenario is environmental harassment only, not *quid pro quo*. The third is both. The second is ambiguous. I believe the employer should not be liable in any of these scenarios unless it endorsed the conduct. Others will argue that the employer should be liable without more in each. Either answer has more to recommend it than yoking to the tired formalism of *quid pro quo* yet another legal fiction: that the supervisor who goes the extra measure and violates the company non-discrimination policy in *word* as well as deed, thereupon acts with the authority of, and on behalf of, the company.

In the words of Judge Diane Wood of the Seventh Circuit:

When [a] supervisor bombards an unwilling subordinate with unwanted sexual images, touching, vulgar words, or denigrating comments, only the most committed formalist would feel confident in saying when those actions cross the imaginary line from 'hostile environment' harassment to '*quid pro quo*' harassment. By the same token, when the supervisor makes constant demands for sex in exchange for job benefits (maybe in jest, maybe not), the victim surely suffers from a 'hostile environment' at the same time that she endures the '*quid pro quo*' harassment.⁶⁰

"In the real world," Judge Wood wrote, "sexual harassment does not sort itself into tidy categories"; those who would retain

60. *Jansen*, 123 F.3d at 567 (Wood, J., concurring and dissenting, joined by Judges Easterbrook and Rovner).

separate standards of liability for *quid pro quo* and environmental harassment have failed to “question[] the legal basis of the distinction between “*quid pro quo*’ and ‘hostile environment’ claims,” a distinction “now some eighteen years old”⁶¹

This critique of the distinction between *quid pro quo* and environmental harassment is correct,⁶² with this amendment: not even in the theoretical world inhabited by Title VII terms, tests, and categories is *quid pro quo* “tidy.” Instead, *quid pro quo* is redundant and ambiguous in theory, and cumbersome and confusing in practice. It should be abandoned.

VI. CONCLUSION

Quid pro quo owes its longevity to the triumph of form over substance in the application of discrimination law. Substantively *quid pro quo* was redundant of existing law literally from the day it was recognized in *Henson*. In obeisance to *McDonnell Douglas*, however, it was reduced to a five-part test that not only endured but, after *Karibian*, mutated to another multi-part test. That second test is fundamentally different from the first but is supposed to be the same; it is redundant of an entirely different doctrine; and, in slavish devotion to a principle irrelevant to the occurrence of discrimination, it has been stated as embodying the startling concept that the taint of discrimination can be removed if, after the woman submits, she is denied the job she was promised. Quite a track record for a doctrine that owed its adoption to the failed argument that sexually-motivated discrimination is not sex discrimination, and perhaps also to the mistaken conjecture that sexual advances not made “terms” of employment might be outside of Title VII.

61. *Id.* at 567, 569 (Wood, J., concurring and dissenting, joined by Judges Easterbrook and Rovner).

62. The same cannot be said for the common standard that Judge Wood then adopted for harassment claims, a standard that approaches strict liability. *See id.* at 574-75 (Wood, J., concurring and dissenting, joined by Judges Easterbrook and Rovner). For reasons stated above, the better rule presumes harassment to be, in Chief Judge Posner’s words, non-company acts, but allows the plaintiff to prove company acquiescence.

Half of the Seventh Circuit judges who sat in *Jansen* should be counted as votes for eliminating *quid pro quo* as a category of discrimination: Judge Wood and Judges Easterbrook and Rovner who joined her; and Chief Judge Posner and Judges Coffey and Manion, who would confine *quid pro quo* to adverse-job-action cases where it is unnecessary. *See* argument in Part II, *supra*.

Quid pro quo should be excised, with Occam's razor. And the manner in which it gained a life of its own stands warning against mechanical reliance on complex tests to determine whether someone was treated differently because of sex.

