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Venters v. City of Delphi, 123 F.3d 956 (7th Cir. 1997)

Since the federal courts began to recognize harassment claims under Title VII,¹ they have largely agreed that sex-based harassment differed fundamentally from other varieties of harassment. Only in the context of sex-based harassment could an employer condition job benefits on sexual favors. Thus, courts fashioned a special doctrine called “quid pro quo” harassment to account for the apparent uniqueness of this kind of discrimination. The Seventh Circuit recently broke ground in Venters v. City of Delphi² by demonstrating that a religious demand fit the job-benefits-for-sex model. In so doing, it has invited other courts to overcome the formalistic barriers between sexual harassment and other forms of harassment, as well as those between Title VII harassment and disparate treatment doctrines.

I

Jennifer Venters had served as a dispatcher in the Delphi, Indiana, police department for nearly six years when a new police chief, Larry Ives, took office. Right away, Ives made it clear that the police department was “God’s house,” and employees would have to play by God’s rules. At first, Ives urged Venters to cleanse her soul by attending his church and viewing religious videotapes. At times, however, he criticized her personal life—she shared a house with another unmarried woman—and accused her of entertaining male police officers in her home with pornographic videos. Ives then accused her of incest and bestiality, and he even suggested that she would be better off killing herself than leading such a sinful life. Finally, he told Venters that she could choose God’s way or Satan’s—and if

². 123 F.3d 956 (7th Cir. 1997).
she chose Satan’s, she could no longer work for the city. Six months after Venters complained about Ives’s abuse, he had ginned up enough evidence against her to fire her for inadequate performance.3

Venters sued the City of Delphi for religious harassment and discriminatory discharge under Title VII, as well as First Amendment violations.4 The district court granted the city’s motion for summary judgment on all of Venters’s claims. On appeal, the Seventh Circuit reversed, holding that Ives’s abuse of Venters constituted quid pro quo harassment.5 For the first time, a court had found quid pro quo harassment in a case that was not about a sexual proposition.6

At the time of the court’s decision, there were two strains of harassment doctrine under Title VII: quid pro quo and hostile work environment. Quid pro quo doctrine applied to cases of sex-based harassment that included sexual propositions; hostile work environment doctrine applied to all other sex-based harassment claims. “Quid pro quo” denoted the bargain: sexual favors in exchange for job benefits. The doctrine offered plaintiff-friendly standards for proving causation and imputing liability to the employer.7 Importantly, the plaintiff who proved the sexual bargain needed to show nothing more to prove that she had suffered discrimination on the basis of sex.8 Hostile work environment plaintiffs, in contrast, had to prove more to merit a finding of discrimination.9

3. See id. at 963-65.
4. See id. at 965. This Case Note addresses only the Title VII religious harassment claim.
5. The Seventh Circuit also reversed the district court’s grant of summary judgment on Venters’s First Amendment claims. See id. at 977. On remand, the case was settled. Telephone interview with Laura Bowker, Attorney, Stuart & Branigin (Dec. 7, 1997).
6. See, e.g., 1 LEX LARSON, EMPLOYMENT DISCRIMINATION § 15.06 (1996) ("[S]exual harassment may take the form of either a hostile work environment or of ‘quid pro quo’ harassment . . . . In race, religion, and national origin cases there does not seem to be any counterpart to ‘quid pro quo’ sexual harassment."); see also infra notes 17-18 and accompanying text (collecting race and religion cases where courts have refused to consider quid pro quo theories). In the other leading treatise on the subject, Lindemann and Grossman contend that religious harassment may take the form of quid pro quo. See 1 BARBARA LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 755 (3d ed. 1996). The case they rely on for this proposition, Young v. Southwestern Savings & Loan Ass’n, fits the quid pro quo model, but it predates the emergence of the quid pro quo doctrine. 509 F.2d 140 (5th Cir. 1975). The case involved an atheist’s refusal to attend mandatory staff meetings that began with prayer. The court held for the plaintiff on her constructive discharge claim. See id. at 144.
7. See, e.g., Henson v. City of Dundee, 682 F.2d 897, 908-10 (11th Cir. 1982):

An employer may not require sexual consideration from an employee as a quid pro quo for job benefits. . . . As in the typical disparate treatment case, the employee must prove that she was deprived of a job benefit which she was otherwise qualified to receive because of the employer’s use of a prohibited criterion in making the employment decision. . . . In the classic quid pro quo case an employer is strictly liable for the conduct of its supervisors . . . .
8. See Burlington Indus. v. Ellerth, 118 S. Ct. 2257, 2264 (1998) ("[In Meritor we assumed . . . that if an employer demanded sexual favors from an employee in return for a job benefit, discrimination . . . was implicit.") (referring to Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986)). Some of the earliest courts to consider quid pro quo claims rejected this proposition, holding that victims had been singled out not because they were women, but because their bosses found them
Some months after Venters, the Supreme Court decided Burlington Industries v. Ellerth, restructuring harassment doctrine. Although the decision is probably most significant for clarifying the employer liability question in hostile work environment cases, it also shifted the focus in all cases of sex-based harassment from overtly sexual conduct to the victim's economic injuries. Justice Kennedy wrote for the Court that the categories "quid pro quo" and "hostile work environment" are relevant only for the purposes of determining whether discrimination had taken place and have no bearing on liability. Liability now hinges on whether the victim has suffered a "tangible employment action," such as termination or the loss of a promotion; if so, then the employer is automatically liable. In effect, Ellerth recasts the old quid pro quo doctrine as tangible employment action doctrine. Any case a plaintiff could have won under the old quid pro quo regime would now be brought as a tangible employment action claim.

Under the new tangible employment action doctrine, the lower courts are still applying the substantive (non-liability) elements of the old quid pro quo and hostile work environment doctrines in order to determine whether discrimination has taken place. Plaintiffs who can show sexual propositions will likely still benefit from a presumption of causation.

sexually attractive as individuals. See Vicki Schultz, Reconceptualizing Sexual Harassment, 107 YALE L.J. 1683, 1701-02 (1998) (citing cases). Scholars have criticized the presumption of causation on other grounds. Schultz argues that it obscures other kinds of sex-based harassment that lack an overtly sexual component. See id. at 1686-87. Franke argues that the "sex-is-sexism" paradigm has dangerous implications for women's sexual agency and that it conflates sexism with heterosexism because of the inevitable focus on the harasser's sexuality. See Katherine M. Franke, What's Wrong with Sexual Harassment?, 49 STAN. L. REV. 691, 730, 733-35 (1997).

Even in the hostile work environment context, however, the lower courts tend to rely on overtly sexual conduct as an "indeterminate proxy for whether harassing conduct is based on sex." Schultz, supra note 8, at 1747.


11. Under Ellerth, hostile work environment defendants have an affirmative defense to otherwise automatic liability. The defense consists of two components: (1) the employer must show that it exercised reasonable care to prevent and correct any harassment; and (2) the employer must show that the plaintiff unreasonably failed to take advantage of any preventive and corrective opportunities. See id. at 2270.

12. Although the Supreme Court has never required that sex-based harassment take overtly sexual forms to be actionable, the lower courts have hesitated to find hostile work environment harassment in the absence of overtly sexual behavior. See Schultz, supra note 8, at 1739, 1744-55. Schultz has argued for the lower courts to focus not on whether the "harassing conduct is sexual in nature," but on "whether such conduct makes it more difficult for women to develop and express their capability as workers." Id. at 1773-74.

13. See id. at 2265, 2270.

14. Id. at 2270.

Ellerth does not require, however, that such presumptions be limited to cases about sexual propositions. The Ellerth Court wrote that the term “quid pro quo” was relevant merely to distinguish “cases involving a threat which is carried out [from those involving] offensive conduct in general.” This distinction should be relevant whether the harassment is based on sex or on any other protected status. Venters anticipated this doctrinal development, arguing for a broader understanding of quid pro quo. As such it complements Ellerth and demonstrates Ellerth’s potential for addressing different kinds of discrimination.

II

Prior to Venters, the quid pro quo model seemed so inextricable from sexuality that its relevance to other cases was almost entirely overlooked. One district court had speculated that quid pro quo analysis might apply to some cases of religious harassment, but it proceeded to apply a hostile work environment theory to the case before it. The First Circuit even held that there could be no such thing as race-based quid pro quo harassment.

Despite this context, the Venters court easily saw the case as quid pro quo harassment. The court held that conditioning Venters’s continued employment on her adoption of a set of religious beliefs “fit neatly into the quid pro quo framework.” Judge Rovner reduced the analysis to its essentials: “Ives did not . . . simply share his religious beliefs with [Vanters], but instead he . . . made adherence to his set of religious values a requirement of continued employment in the police department.” Thus, the easiest analogy to quid pro quo doctrine’s “sleep with me, or you’re fired” was “adopt my religious views, or you’re fired.” Because they are not job-related, these demands are, on their face, inappropriate for the workplace. Because these demands are based on membership in a protected group, making them a condition of employment violates Title VII.

16. Ellerth, 118 S. Ct. at 2265.
17. See Weiss v. United States, 595 F. Supp. 1050, 1056 (E.D. Va. 1984) (“Religious harassment, like sexual harassment, can take many forms . . . : harassment that creates an intimidating, offensive environment . . . and “quid pro quo” harassment, in which a supervisor demands that an employee alter or renounce some religious belief in exchange for job benefits.”).
18. See Lattimore v. Polaroid Corp., 99 F.3d 456, 463 (1st Cir. 1996). The plaintiff in Lattimore did not advance a quid pro quo theory but only a hostile work environment theory. See also Wright-Simmons v. City of Okla. City, 155 F.3d 1264, 1270 (10th Cir. 1998) (characterizing quid pro quo doctrine as “unique to sexual harassment cases” and therefore inapplicable to the case of race-based harassment before it).
19. Venters, 123 F.3d at 971-72. This
20. Id. at 976-77.
22. Venters successfully argued that she was discriminated against for being of a different religion than Ives, not for being of any particular religion. See Venters, 123 F.3d at 971-72. This
Under this type of theory, analogues emerge in other Title VII contexts. For example, a white woman whose supervisor harassed her for dating an African-American man, and who was subsequently fired, might have a quid pro quo claim. Suppose that the supervisor urged her to "go back to white men, where she belongs" and even threatened to fire her unless she dumped her boyfriend. The Venter analysis would apply to this situation, as it would to a national origin plaintiff whose supervisor required her to move from a predominantly ethnic neighborhood to a white neighborhood in order to retain her job. In each case, the supervisor discriminates by requiring the victim to choose between accession to a non-work-related demand that is based on her protected status, and punishment.

Although the Seventh Circuit based its holding on a simple analogy, the holding is also supported on a deeper level. An underlying premise of quid pro quo doctrine is that some non-work-related demands are inherently discriminatory. A demand that an employee alter her religious belief is like a demand that an employee submit to sexual advances: Both attack the victim's personhood. Because these demands are so invasive and are based on membership in a protected group, simply proving that they occurred should be sufficient to demonstrate discrimination under Title VII. Other claims that sound in traditional disparate treatment analysis, such as refusal to hire because of a "foreign" accent, reflect similar debasement of the victim's personhood. Focusing on the nature of the harms rather than the conduct that causes them underscores that harassment claims are simply factual variations on disparate treatment.

Religious belief, or even the lack of religious belief, is central to personhood. As the Venter court noted in holding for the plaintiff on her
First Amendment claims, Ives's proselytizing "invade[d] the realm that the First Amendment reserves to one's own conscience and interfere[d] with the individual's ability to believe or not, to practice or not, as she wishes."\(^{27}\) That Venters had not placed her own religious beliefs at issue did not affect the court's view. The demand that she adopt religious beliefs not of her choosing remained deeply intrusive.

The purpose of proselytizing is to induce another person's religious conversion.\(^{28}\) If religion "shap[es] an individual's concept of . . . personhood,"\(^{29}\) then renouncing one's religion or adopting a new faith cannot be undertaken lightly. The proselytizer attempts to influence another person to alter her very identity—in a fundamental way, to become a different person. Moreover, by demanding that she alter her religious belief, the proselytizer may communicate profound disrespect for the other person's autonomy.\(^{30}\) Although demands to change one's religious beliefs might be innocuous or merely annoying when coming from a neighbor, a stranger, or even a co-worker, they acquire a strongly coercive quality when coming from a supervisor with the power to hire and fire.\(^{31}\)

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that is essential to the self-definition of the believer."). The note writer derives this view from the work of the Protestant theologian Paul Tillich. See id. at 1477.

27. Venters, 123 F.3d at 971. The Supreme Court has recognized that even belief systems that are not traditionally recognized religions merit comparable judicial deference. See, e.g., United States v. Seeger, 380 U.S. 163, 166 (1965) (equating any "given belief that is sincere and meaningful [and] occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God" with traditional religions for the purpose of interpreting the conscientious objector exception to the selective service statute).

28. Webster's defines "proselytize" as "to induce someone to convert to one's faith." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 937 (10th ed. 1993); cf. MARK TUSHNET, RED, WHITE AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 261 (1988) (describing proselytizing as an invitation to "outsiders" to join the religious community). Proselytizing is certainly protected by the First Amendment. See Widmar v. Vincent, 454 U.S. 263, 269-70 n.6 (1981) (finding no reason to treat "religious speech designed to win religious converts" any differently from worship); Murdock v. Pennsylvania, 319 U.S. 105, 109 (1943) ("This form of religious activity occupies the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits.").


30. See David L. Gregory, Religious Harassment in the Workplace: An Analysis of the EEOC's Proposed Guidelines, 56 MONT. L. REV. 119, 141-42 (1995) (analogizing religious and sexual harassment as acts that threaten the victim's autonomy). It is of course possible, however, that the proselytizer believes she is communicating sincere concern about the other person.

31. See, e.g., David L. Gregory, Religion in the Secular Workplace, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 749, 757 (1990) (noting that "involuntary submission to prayer certainly could quickly become fully as unwelcome as sexual harassment"). Like proselytizing, however, not every sexual advance is coercive; some are innocuous, some are welcome.

The degree of protection due to proselytizing in the workplace is the subject of much debate. Some religious people deeply believe both that proselytizing is a duty and that limiting their right to proselytize, even to unwilling coworkers, infringes on their religious liberty. See, e.g., Spoor, supra note 22, at 1005. Title VII claims involving proselytizing are on the rise. See Josh Schopf, Note, Religious Activity and Proselytization in the Workplace: The Murky Line Between Healthy Expression and Unlawful Harrasment [sic], 31 COLUM. J.L. & SOC. PROBS. 39, 49 (1997).
Because religion has external as well as internal components, proselytizing also enforces behavioral norms. Adopting a religion—the proselytizer’s objective—usually requires not only a subjective change of heart, but also changes in behavior, practice of rituals, and participation in a community of fellow believers.22 Ives demanded not only that Venters embrace his beliefs, but also that she attend his church and conform her lifestyle to its teachings. These changes of behavior constitute the performance of religious, or at least moral, norms of behavior. Religious norms may also perpetuate a social hierarchy.33

Membership in one’s cultural group has similar implications for selfhood as religious belief.34 It “provides a person with a system of values, customs, and ways of thinking that give one’s life, activities, and choices meaning and significance.”35 Cultural identity—usually rendered as “national origin” in Title VII’s terminology—may imbue the individual with traits, such as accent, that are profoundly difficult to change. Moreover, divesting such traits may be extremely undesirable. Refusing to

When the Equal Employment Opportunity Commission attempted in 1993 to issue religious harassment guidelines that would have limited employees’ freedom to proselytize at work, religious communities responded with an uproar. The Senate forced the EEOC to drop its guidelines altogether in the wake of protest from conservative lawmakers, religious groups, and civil liberties groups. See Spoor, supra note 22, at 976-77.

32. See Tushnet, supra note 28, at 273 (noting that rituals help a religious community define itself “v”is-à-vis the wider society”). Courts often rely on such objective indicators to determine what constitutes a religion for First Amendment purposes. See, e.g., Employment Div. v. Smith, 494 U.S. 872, 877 (1990) (“[T]he ‘exercise of religion’ often involves not only belief and profession but the performance of (or abstinence from) physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation.”).

33. See J.M. Balkin, The Constitution of Status, 106 YALE L.J. 2313, 2324 (1997) (noting that religious identity, even though it can be changed, “can be endowed with sufficient cultural meaning to support a system of social stratification”).

34. The analogies to proselytizing also give new vitality to the traditional justifications for the quid pro quo doctrine. Coerced sexuality in the workplace debases the victim’s autonomy, compels the victim to enact gender roles involuntarily, and reinforces gender hierarchy in the workplace. Some feminist scholars contend that the overtly sexual conduct of much sex-based harassment is inherently dehumanizing. See, e.g., Susan Estrich, Sex at Work, 43 STAN. L. REV. 813, 820 (1991) (“What makes sexual harassment more offensive, more debilitating, and more dehumanizing to its victims than other forms of discrimination is precisely the fact that it is sexual.”). In the paradigm case, a subordinate is coerced into sexual submission and punished if she refuses. If she submits, she performs one of her most subordinate gender roles, that of sexual conquest. See Franke, supra note 8, at 766 (discussing Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986)) (“What made the complained of conduct sex discrimination was . . . that he both regarded Vinson as a sex object, and forced her into that role by coercing her to have sex with him.”). Quid pro quo harassment can thus be viewed as a means of policing the performance of gender norms. A supervisor’s enforcement of gender roles has little to do with a subordinate’s ability to perform her job, but much to do with maintaining a workplace hierarchy; therefore, it is discrimination based on sex. See id. at 772 (“To understand sexual harassment as a regulatory practice that constitutes gendered subjects by inscribing, enforcing, and policing hetero-patriarchal gender norms is to provide a better account of what sexual harassment is . . . . [T]his approach better explains why sexual harassment is a kind of sex discrimination.”).

35. Yang, supra note 26, at 129.
promote an employee with a “foreign” accent, however, coerces her assimilation to the dominant Anglo culture; if she cannot eradicate her accent, she forfeits job opportunities. Although such an employee may not have suffered “harassment,” denying her employment for this reason assaults her personhood. Forced assimilation is to the cultural sphere what proselytizing is to the religious one: the means of inducing conformity to a dominant norm of behavior, belief, or ideology. Doctrinally, however, this case would be analyzed simply as disparate treatment.

This analysis illuminates the region where harassment doctrine circles back to its origins in disparate treatment doctrine. There is little substantive distinction among sexual favors, adoption of religious belief, or even eradicating the accent of one’s native language when any of these are made a condition of employment. All are simply species of disparate treatment. By stretching the once-narrow boundaries of quid pro quo doctrine, Venters shows that quid pro quo cases are, and always have been, merely disparate treatment cases. Applying Venters’s analysis to other kinds of harassment exposes them as merely disparate treatment as well. Such a retreat from needless formalism would simplify the analysis not only of religion, race, and national origin claims, but of sexual harassment claims as well.

—Eileen B. Goldsmith

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36. See, e.g., Kahakua v. Friday, No. 88-1668, 1989 WL 61762 (9th Cir. June 2, 1989) (concerning the failure to hire an individual with a Hawaiian accent). Employers who impose grooming policies that bar distinctively African-American hairstyles are also enforcing assimilation to a dominant white norm. See, e.g., Rogers v. American Airlines, 527 F. Supp. 229, 232 (S.D.N.Y. 1981) (rejecting the plaintiff’s argument that her hairstyle reflected the “cultural, historical, essence of the Black woman in American society”). Although it may be objectively easier to conform with a grooming policy than to change one’s speech, the grooming rule is not a lesser form of discrimination. See notes 23-24 and accompanying text. For an argument that grooming codes and other employer policies that implicate gender-, race-, or ethnicity-related mutable characteristics are as illegal under Title VII as policies that implicate immutable characteristics, see Peter Brandon Brayer, Mutable Characteristics and the Definition of Discrimination Under Title VII, 20 U.C. DAVIS L. REV. 769, 839 (1987) (“If we recognize that individual dignity, personal freedom, and sense of self are often intimately tied to mutable characteristics, then we must criticize the cavalier fashion with which courts dismiss individuals’ claims that employers’ racially, sexually, or ethnically premised rules unjustly restrict personal integrity and expression.”).


38. See id. at 1387 (“The demand for speech uniformity suggests preference for conformity, distrust of difference, and attachment to a large, looming notion of ‘we.’ The demand for speech uniformity is scary, in the scary sense of statism, nationalism, territorial acquisitiveness, and purist conceptions of race.”).

39. Similarly, had the police chief in Venters refused to hire a job applicant because of her religious beliefs, the rejected applicant would present a relatively uncontroversial disparate treatment claim. I am grateful to Professor Vicki Schultz for helping me see this point.

For the paradigmatic statement of disparate treatment doctrine, see McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). To make a prima facie case of disparate treatment, a plaintiff must show that she is a member of a protected group, that she has suffered an adverse job action not suffered by others similarly situated, and that the employer’s proffered reason for the adverse action is a pretext.