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# Sexual Harassment and Violence Against Women: Developments in Federal Law

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## ABSTRACT

Gender-based discrimination, harassment, and violence against women in the workplace and society generally have assumed new legal and political significance as a consequence of recent high profile proceedings involving alleged misdeeds by elected government officials, members of the military, public school teachers and students, and the private corporate sector. This report reviews the judicial evolution of sexual harassment law, including a discussion of four recent U.S. Supreme Court rulings that dealt with the issue of same-sex harassment and determined the liability of employers and school districts for harassment by supervisory employees and acts directed against public school students. This report will be periodically updated.

# Sexual Harassment and Violence Against Women: Developments in Federal Law


## Summary

Gender-based discrimination, harassment, and violence against women in the home, workplace, and society at large are continuing topics of legislative and judicial concern. Legal doctrines condemning the extortion of sexual favors as a condition of employment or job advancement, and other sexually offensive workplace behaviors resulting in a "hostile environment," have evolved from judicial decisions under Title VII of the 1964 Civil Rights Act and related federal laws. The earlier judicial focus on economic detriment or *quid pro quo* harassment—making submission to sexual demands a condition to job benefits—has largely given way to Title VII claims alleging harassment that creates an "intimidating, hostile, or offensive environment." In 1994, Congress broke new legal ground by creating a civil rights cause of action for victims of "crimes of violence motivated by gender." The new law also made it a federal offense to travel interstate with the intent to "injure, harass, or intimidate" a spouse, causing bodily harm to the spouse by a crime of violence.

During its 1997-98 term, the U.S. Supreme Court decided four cases involving a range of issues from the legality of same-sex harassment to the vicarious liability of employers and a local school district for monetary damages as the result of harassment by supervisors and teachers. In *Oncale v. Sundowner Offshore Services Inc.*, the U.S. Supreme Court resolved a conflict among the federal circuit courts by ruling that sex discrimination consisting of same-sex harassment is actionable under Title VII.. *Faragher v. City of Boca Raton* and *Burlington Industries v. Ellerth,* held employers vicariously liable for sexual harassment of an employee by a supervisor with immediate or successively higher authority of that employee. Where the harassment results in a "tangible employment action"—such as demotion or discharge—against the victim, Title VII liability is automatic and no defense is available to the employer. In cases not involving tangible reprisals or loss of job benefits, however, the failure of a complaining employee to take advantage of any anti-harassment policy and procedures made available by the employer may be asserted as an affirmative defense. *Doe v. Lago Vista Independent School District,* by contrast, ruled 5 to 4 that Title IX of the Education Amendments of 1972 imposes no liability on local school districts for teacher harassment of students unless a school official with authority to institute corrective measures has actual knowledge of the alleged misconduct and is deliberately indifferent to it.

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# Sexual Harassment and Violence Against Women: Developments in Federal Law

## Introduction

Gender-based discrimination, harassment, and violence against women in the home, workplace, and society at large have been the focus of considerable legislative and judicial attention in recent years. Legal doctrines condemning the extortion of sexual favors as a condition of employment or job advancement, and other sexually offensive workplace behaviors resulting in a "hostile environment," continue to evolve from judicial decisions under Title VII of the 1964 Civil Rights Act and other federal equal employment opportunity laws. In 1994, Congress broke new legal ground by creating a civil rights cause of action for victims of "crimes of violence motivated by gender." The new law also made it a federal offense to travel interstate with the intent to "injure, harass, or intimidate" a spouse, causing bodily harm to the spouse by a crime of violence.[1] On May 16, 2000, however, the Supreme Court decided in *U.S. v. Morrison*[2] that Congress had overstepped its constitutional bounds when it passed the VAWA civil remedy provision and invalidated the statute.

Sexual harassment issues have recently assumed new legal and political importance. The military conviction of a drill sergeant at the Army's Aberdeen training facility for rape and sexual harassment of female recruits, and recent allegations by the Army's highest ranking female general that she was harassed by a male colleague, have focused the public's attention once more upon sexual harassment in the military. Similarly, proceedings leading to the dismissal of sexual harassment charges against the President by a former Arkansas state employee spawned a host of legal and constitutional issues that may reverberate for years to come. Questions as to the legal responsibility of school districts or other educational authorities for sexual harassment within the schools are highlighted by judicial decisions and numerous alleged incidents of sexual abuse or unwanted displays of affection involving public school students and their teachers.

During its 1997-98 term, the U.S. Supreme Court decided four cases involving a range of issues from the legality of same-sex harassment to the vicarious liability of employers and a local school district for monetary damages as the result of harassment by supervisors and teachers. On March 4, 1998, the U.S. Supreme Court resolved a conflict among the federal circuit courts by ruling, in *Oncale v. Sundowner*

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[1] 18 U.S.C. § 2261(a)(1).

[2] 120 S.Ct. 1740 (2000).

*Offshore Services Inc.*,[3] that sex discrimination consisting of same-sex harassment is actionable under Title VII. *Faragher v. City of Boca Raton*[4] and *Burlington Industries v. Ellerth*[5] dramatically altered the standards that had been applied by federal appeals courts to determine employer liability in sexual harassment cases. Where harassment by a supervisor results in a "tangible employment action"—such as demotion or discharge—against an employee, Title VII liability is automatic and no defense is available to the employer. In cases not involving tangible reprisals or loss of job benefits, however, the fact that a complaining employee "unreasonably" failed to avail herself of any anti-harassment policy and procedures established by the employer may be asserted as an affirmative defense. *Gebser v. Lago Vista Independent School District,*[6] by contrast, ruled 5 to 4 that Title IX of the Education Amendments of 1972 imposes no liability on local school districts for teacher harassment of students unless a school official with authority to institute corrective measures has actual knowledge of the alleged misconduct and is deliberately indifferent to it. Relying on *Gebser*, the Court in *Davis v. Monroe County Board of Education*[7] recognized that school districts may also be liable for student-on-student harassment, but only where responsible officials "are deliberately indifferent to sexual harassment, of which they have actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school."

## Federal Equal Employment Opportunity Law

Title VII of the 1964 Civil Rights Act does not mention sexual harassment but makes it unlawful for employers with 15 or more employees to discriminate against any applicant or employee "because of. . .sex."[8] Federal law on the subject is, therefore, largely a judicial creation, having evolved over nearly a three decade period from federal court decisions and guidelines of the Equal Employment Opportunity Commission (EEOC) interpreting Title VII's sex discrimination prohibition.[9] Two forms of sexual harassment have been recognized by the courts and EEOC

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[3] 523 U.S. 75 (1998).

[4] 524 U.S. 775 (1998).

[5] 524 U.S. 742 ( 1998).

[6] 524 U.S. 274 (1998).

[7] 526 U.S. 629 (1999).

[8] 42 U.S.C. § 2000e-2(a)(1).

[9] 42 U.S.C. 2000e et seq. Sexual harassment in federally assisted education programs is also prohibited by Title IX of the 1972 Education Amendments, 20 U.S.C. §§ 1681 et seq. (Franklin v. Gwinnet County Public Schools, 503 U.S. 60 (1992)). While Title VII and Title IX are the primary sources of federal sexual harassment law, relief from such conduct has also been sought, albeit less frequently, pursuant to § 1983 of Title 42, the Federal Employees Liability Act, and the Equal Protection and Due Process Clauses of the U.S. Constitution. E.g. Doe v. Taylor Independent School District, 975 F.2d 137 (5th Cir. 1992)(holding that a student has a firmly established equal protection and due process right to be free from sexual molestation by a state-employed school teacher).

administrative guidelines. The first, or "*quid pro quo*" harassment, occurs when submission to "unwelcome" sexual advances, propositions, or other conduct of a sexual nature is made an express or implied condition of employment, or where it is used as the basis of employment decisions affecting job status or tangible employment benefits. As its name suggests, this form of harassment involves actual or potential economic loss—*e.g.* termination, transfer, or adverse performance ratings, *etc.*— as a consequence of the employee's refusal to exchange sexual favors demanded by a supervisor or employer for employment benefits. The second form of actionable harassment consists of unwelcome sexual conduct that is of such severity as to alter a condition of employment by creating an "intimidating, hostile or offensive working environment." The essence of a "hostile environment" claim is a "pattern or practice" of offensive behavior by the employer, a supervisor, co-workers, or non-employees so "severe or pervasive" as to interfere with the employee's job performance or create an abusive work environment.

In 1980, the federal agency responsible for enforcing Title VII issued interpretative guidelines prohibiting both *quid pro quo* and hostile environment sexual harassment. The EEOC guidelines focus on sexuality rather than gender—in terms of job detriments resulting from "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical behavior of a sexual nature"—and require that a "totality of the circumstances" be considered to determine whether particular conduct constitutes sexual harassment.[10] In addition, judicial developments in hostile environment law were anticipated by elimination of tangible economic loss as a factor and by providing that unwelcome sexual conduct violates Title VII whenever it "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." According to the EEOC guidelines, an employer is liable for both forms of sexual harassment when perpetrated by supervisors.[11] The employer, however, is liable for harassment perpetrated by co-worker or nonemployees only if the employer knew or should have known of the harassment and failed to "take immediate and appropriate corrective action."[12] They also recommend that employers take preventive measures to eliminate sexual harassment[13] and state that employers may be liable to those denied employment opportunities or benefits given to another employee because of submission to sexual advances.[14]

On March 19, 1990, the EEOC issued "Policy Guidance on Sexual Harassment" to elaborate on certain legal principles set forth in its interpretative guidelines from a decade before.[15] First, the later document reasserts the basic distinction between "quid pro quo" and "hostile environment" and states that an employer "will always be held responsible for acts of '*quid pro quo*' harassment" by a supervisor while hostile

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[10] 29 C.F.R. §1604.11(a)(1995).

[11] Id. at § 1604.11(c).

[12] Id. at § 1604.11(d)-(e) (1995).

[13] Id. at § 1604.11(f).

[14] Id. at § 1604.11(g).

[15] BNA, FEP Manual 405:6681 et seq.

environment cases require "careful examination" of whether the harassing supervisor was acting in an 'agency capacity'".[16] On the "welcomeness" issue, the policy guide states that "a contemporaneous complaint or protest" by the victim is an "important" but "not a necessary element of the claim." Instead, the Commission will look to all "objective evidence, rather than subjective, uncommunicated feelings" to "determine whether the victim's conduct is consistent, or inconsistent, with her assertion that the sexual conduct is unwelcome."[17] In determining whether a work environment is hostile, several factors are emphasized:

> (1) whether the conduct was verbal or physical or both; (2) how frequently it was repeated; (3) whether the conduct was hostile or patently offensive; (4) whether the alleged harasser was a co-worker or supervisor; (5) whether others joined in perpetrating the harassment; and (6) whether the harassment was directed at more than one individual.

However, because the alleged misconduct must "substantially interfere" with the victim's job performance, "sexual flirtation or innuendo, even vulgar language that is trivial or merely annoying, would probably not establish a hostile environment."[18] In addition, "the harasser's conduct should be evaluated from the objective standard of a 'reasonable person.'"[19]

## *Quid Pro Quo* Harassment

The earliest judicial challenges involving tangible benefit or *quid pro quo* harassment claims—filed by women who were allegedly fired for resisting sexual advances by their supervisors—were largely unsuccessful. The discriminatory conduct in such cases was deemed to arise from "personal proclivity" of the supervisor rather than "company directed policy which deprived women of employment opportunities." Until the mid-1970's, federal district courts were reluctant either to find a Title VII cause of action or to impose liability on employers who were neither in complicity with, nor had actual knowledge of, *quid pro quo* harassment by their supervisory employees. An historic turning point came when the federal district court in *Williams v. Saxbe*[20] held for the first time that sexual harassment was discriminatory treatment within the meaning of Title VII because "it created an artificial barrier to employment which was placed before one gender and not the other, despite the fact that both genders were similarly situated."[21] Echoing earlier opinions that an employer is not liable for "interpersonal disputes between employees," the court nonetheless refused to dismiss the complaint since "if [the

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[16] Id. at 405:6695.

[17] Id. at 405:6686.

[18] Id.

[19] Id.

[20] 413 F. Supp. 654 (D.D.C. 1976).

[21] Id. at 657-58.

alleged harassment] was a policy or practice of plaintiff's supervisor, then it was the agency's policy or practice, which is prohibited by Title VII."[22]

Appellate tribunals in several federal circuits soon began to affirm that *quid pro quo* harassment violates Title VII where "gender is a substantial factor in the discrimination," reversing contrary lower court holdings. For example, Judge Spotswood Robinson, writing for the D.C. Circuit in *Barnes v. Costle*[23] disagreed with "the notion that employment conditions summoning sexual relations are somehow exempted from the coverage of Title VII" as implied by the decision below. Finding that it was "enough that gender is a factor contributing to the discrimination in a substantial way," Judge Robinson ruled that differential treatment based upon an employee's rejection of her supervisor's sexual advances violated the statute. Similarly, in *Tomkins v. Public Service Electric & Gas Co.*, the Third Circuit reversed the trial court's denial of Title VII protection to all "sexual harassment and sexually motivated assault," finding that where an employee's "status as a female was a motivating factor in the supervisor's conditioning her continued employment on compliance with his sexual demands," actionable *quid pro quo* harassment had occurred. "[T]o establish a *prima facie* case of *quid pro quo* harassment, a plaintiff must present evidence that she was subject to unwelcome sexual conduct, and that her reaction to that conduct was then used as the basis for decisions affecting the compensation, terms, conditions, or privileges of her employment."[24] And while the loss of a "tangible employment benefit" has most often meant dismissal or demotion, *quid pro quo* claims may also arise from denial of career advantages—job title, duties or assignments—of less immediate economic impact upon the employee. The Seventh Circuit, for example, has ruled that a tenured professor who was allegedly stripped of her job title and removed from academic committees because she rebuffed the sexual advances of the university provost may have a claim for *quid pro quo* sexual harassment under Title VII.[25]

The dismissal by Judge Susan Weber Wright of Paula Jones' sexual harassment lawsuit against President Clinton squarely addressed the workplace consequences that must flow from the refusal to submit to an unwelcome sexual advance for the court to find actionable harassment.[26] Plaintiff Jones claimed that her career advancement had repeatedly been thwarted by her state employer as retribution for rebuffing the former Arkansas Governor. As evidence of "tangible job detriments," Jones alleged that she had been discouraged by supervisors from seeking job promotions or pay increases; that following return from maternity leave, she was transferred to a new position with fewer responsibilities; that she was effectively denied access to grievance procedures available to other sexual harassment victims; and that by physically isolating her directly outside her supervisor's office with little work to do,

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[22] Id. at 660-61.

[23] 561 F.2d 983 (D.C.Cir. 1977).

[24] Karibian v. Columbia University, 14 F.3d 773, 777 (2d Cir.), cert. denied, 114 S.Ct. 2693 (1994).

[25] Bryson v. Chicago State University, 96 F.3d 912 (7th Cir. 1996).

[26] Jones v. Clinton, 16 F. Supp. 2d 1054 (E.D.Ark. 1998).

she was "subjected to hostile treatment having tangible effects." Judge Wright was unconvinced by the record, however, that any threat perceived by Jones during her alleged hotel meeting with the former Governor was so "clear and unambiguous" as to be a *quid pro quo* conditioning of "concrete job benefits or detriments on compliance with sexual demands." "Refusal" cases like *Jones*, calling for proof "tangible job detriment" by plaintiffs who resist unwelcome sexual demands, "[27] were distinguished from so-called "submission" cases, where "in the nature of things, economic harm will not be available to support the claim of the employee who submits to the supervisor's demands."[28]

It was widely anticipated that some further guidance on the essential character of *quid pro quo* harassment, particularly in relation to Jones' claims against President Clinton, would be forthcoming when the Supreme Court decided *Burlington Industries, Inc. v. Ellerth.*[29] That case involved a former merchandising assistant at Burlington Industries who alleged that she was the subject of repeated boorish and offensive comments and gestures by a division vice-president who implied that her response to his advances would affect her career. Ellerth detailed three incidents in which her supervisor's comments could be construed as threats to deny her tangible job benefits. A short time later, she quit her job without informing anyone in authority about the harassment, even though she was aware of Burlington's anti-harassment policy.

The trial court granted the company's motion to dismiss on the grounds that no adverse consequences flowed from the plaintiff's refusal to submit to the alleged advances. The action was reinstated by a *per curiam* decision of the entire Seventh Circuit holding the employer strictly liable for *quid pro quo* harassment "even if the supervisor's threat does not result in a company act"[30] or actual economic loss. Appellate court rulings from the Eighth[31] and Eleventh[32] Circuits, on the other hand, had during the same period reaffirmed the necessity of proving actual loss of job benefits or a "tangible job detriment" as an element of a *quid pro quo* claim. Squarely presented by *Ellerth*, therefore, was the question of whether sexual advances by a supervisor accompanied by the threatened but not actualized loss of employment or job benefits may render an employer liable for *quid pro quo* harassment.

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[27] E.g., Cram v. Lamson & Sessions Co., 49 F.3d 466 (8th Cir. 1995); Sanders v. Casa View Baptist Church, 134 F.3d 331, 339 (5th Cir. 1998)(noting that to withstand summary judgment on quid pro quo claims, plaintiffs were required to produce evidence showing that the harassment complained of affected tangible aspects of their compensation, terms, conditions, or privileges of employment); Gary v. Long, 59 F.3d 1391, 1396 (D.C. Cir. 1995)("[A] supervisor's mere threat or promise of job-related harm or benefits in exchange for sexual favors does not constitute quid pro quo harassment. . . .").

[28] Karibian v. Columbia Univ., supra n. 23. See also Jansen v. Packaging Corp of American, 123 F.3d 490 (7th Cir. 1997).

[29] 118 S.Ct 2257 (1998).

[30] 123 F.3d 490, 494 (7th Cir. 1997)(per curiam).

[31] Davis v. City of Sioux City, 115 F.3d 1365 (8th Cir. 1997).

[32] Farley v. American Cast Iron Pipe Co., 115 F.3d 1548 (11th Cir. 1997).

In fashioning an employer liability rule in *Ellerth*, and the *Faragher* case decided the same day, the Court considered the judicial distinction between *quid pro quo* and environmental harassment to be less important than whether the claim involved a threat that had been "carried out" in fact. Claims based on unfulfilled threats of retaliation were equated by the Court to hostile environment harassment, requiring plaintiff to prove "severe and pervasive" conduct. Under common law agency principles, as applied by the majority, an employer is generally immune from liability for the tortious conduct of its agent (the harassing supervisor in *Ellerth*), which is deemed to be "outside the scope of employment," unless the wrongdoer is "aided" in the harassment by "the existence of the agency relation." The "aided in the agency relation standard" differentiates supervisory harassment for which an employer may be automatically liable from similar acts committed by mere co-workers. And it is most clearly satisfied in those cases where the harassment culminates in a "tangible employment action." Such actions, according to Justice Kennedy, include instances where the subordinate employee is subjected to "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits" for failing to permit sexual liberties. Since Ellerth had not demonstrated that she was the victim of retaliation by her supervisor – in fact, she had been promoted during the period in question – there was no tangible detriment for which the employer could be held strictly liable.

*Ellerth* was remanded, however, for application of an alternative standard of vicarious employer liability formulated by the Court jointly in *Ellerth* and *Farragher* for supervisory harassment cases not involving a "tangible employment action." Under that rule, after the plaintiff proves that the supervisory misconduct is both "severe and pervasive," the employer may assert as an "affirmative defense" that its actions to prevent and remedy workplace harassment were "reasonable," while the plaintiff "unreasonably" failed to take advantage of any anti-harassment policies and procedures of the employer. Ellerth's failure to avail herself of the employer's grievance procedure likely defeats any Title VII recovery against Burlington under the second prong of this defense. The judicial task for lower courts after *Ellerth* is to construe this duty of reasonable care governing the employer's affirmative defense to liability. Other than rewarding employers for prophylactic measures aimed at workplace harassment and compelling victim participation in those efforts, *Ellerth* provides little specific guidance. Note also that Justice Kennedy's opinion for the majority in *Ellerth* included a passing elliptical reference to *Jones v. Clinton* when it "express[ed] no opinion as to whether a single unfulfilled threat is sufficient to constitute discrimination in the terms or conditions of employment." This *dictum* largely begs the district court's conclusion that harassing circumstances alleged by Jones did not create a hostile environment, and since no "tangible employment action" was proven, any finding of actionable harassment under federal law was unwarranted.

## Hostile Environment Harassment

The earlier judicial focus on economic detriment or *quid pro quo* harassment—making submission to sexual demands a condition to job benefits—largely gave way to Title VII claims for harassment that creates an "intimidating, hostile, or offensive environment." The first federal appellate court to jettison the tangible economic loss requirement and recognize a hostile environment claim of

sexual harassment was the D.C. Circuit in *Bundy v. Jackson.*[33] The plaintiff there charged that several supervisors made continual sexual advances and propositions, questioned her about her sexual proclivities, ignored her complaints, criticized her work performance, and attempted to block her bid for promotion. The appeals court ruled that actionable sex discrimination is not limited to gender-based conditions resulting in a tangible job consequence, but occurs whenever sex is a motivating factor in treating an employee in an adverse manner. Despite the plaintiff's failure to prove *quid pro quo* harassment—she was not fired, demoted, or denied a promotion—the court was unwilling to adopt a rule that would permit an employer to lawfully harass an employee "by carefully stopping short of firing the employee or taking any other tangible actions against her in response to her resistance."[34] Another decision important to the judicial development of sexually hostile environment law was *Henson v. Dundee* where the Eleventh Circuit rejected a claim of *quid pro quo* harassment but found that the employee had a right to a trial on the merits to determine whether the misconduct alleged made her job environment hostile.[35]

*Meritor Savings Bank v. Vinson*[36] ratified the consensus then emerging among the federal circuits by recognizing a Title VII cause of action for sexual harassment. Writing for the Supreme Court in 1986, then-Justice Rehnquist affirmed that a "hostile environment," predicated on "purely psychological aspects of the workplace environment," could give rise to legal liability and that "tangible loss" of "an economic character" was not an essential element. This holding was qualified by the Court with important reservations drawn from earlier administrative and judicial precedent. First, "not all workplace conduct that can be described as 'harassment' affects a term, condition, or privilege of employment within the meaning of Title VII." For example, the "mere utterance" of an "epithet" engendering "offensive feelings in an employee" would not ordinarily be *per se* actionable, the opinion suggests. Rather, the misconduct "must be sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment."[37]

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[33] 641 F.2d 934 (1981).

[34] Id. at 945.

[35] 682 F.2d 897 (11th Cir. 1982). In an oft-quoted passage from its opinion, the court stated:

> Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets. A pattern of sexual harassment inflicted upon an employee because of her sex is a pattern of behavior that inflicts disparate treatment upon a member of one sex with respect to terms, conditions, or privileges of employment. There is no requirement that an employee subjected to such disparate treatment prove in addition that she suffered tangible job detriment. Id. at 902.

[36] 477 U.S. 57 (1986).

[37] Id. at 62 (quoting Henson v. Dundee), supra n. 21 at 904. In Vinson the complainant alleged that her supervisor demanded sexual relations over a three-year period, fondled her in

(continued...)

Second, while "voluntariness" in the sense of consent is not a defense to a sexual harassment charge,

> [t]he gravamen of any sexual harassment claim is that the alleged sexual advances were `unwelcome.' . . .The correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary.[38]

Accordingly, "it does not follow that a complainant's sexually provocative speech or dress is irrelevant as a matter of law in determining whether he or she found particular sexual advances unwelcome. To the contrary, such evidence is obviously relevant."[39]

Finally, turning to the issue of employer liability, the *Vinson* majority held that the court below had "erred in concluding that employers are always automatically liable for sexual harassment by their supervisors."[40] The usual rule in Title VII cases is strict liability, and four Justices, concurring in the judgment, argued that the same rule should apply in the sexual harassment context as well. The majority disagreed, impliedly suggesting that in hostile environment cases no employer, at least none with a formal policy against harassment, should be made liable in the absence of actual or constructive knowledge.[41]

The Supreme Court's failure to clearly define what constitutes a hostile environment in *Meritor Savings* led to frequent conflict in the lower courts. For example, three federal Circuit Courts of Appeals—the Sixth, the Seventh, and the Eleventh—concluded that in a sexual harassment case, a plaintiff must not only prove that the conduct complained of would have offended a reasonable victim and that he or she was actually offended, but also that the plaintiff suffered serious psychological

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[37] (...continued)
front of other employees, followed her into the women's restroom and exposed himself to her, and forcibly raped her several times. She claimed she submitted for fear of jeopardizing her employment. During the period she received several promotions which, it was undisputed, were based on merit alone so that no exchange of job advancement for sexual favors (quid pro quo harassment) was alleged or found.

[38] Id. at 68 (citing 29 C.F.R. § 1604.11(a)(1985)).

[39] Id. at 69.

[40] Id. at 72.

[41] On the issue of employer liability, Meritor states:

> [While] declin[ing] the parties' invitation to issue a definitive rule on employer liability. . .we do agree with the EEOC that Congress wanted courts to look to agency principles for guidance in this area. While such common-law principles may not be transferable in all their particulars to Title VII, Congress' decision to define `employer' to include any `agent' of an employer, 42 U.S.C. § 2000e(b), surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible. Id. at 72-73.

injury as a result of the conduct.[42] On the other hand, three other Circuits, the Third, the Eighth, and the Ninth, held that the Title VII plaintiff need demonstrate only that he or she was actually offended by conduct that would be deemed offensive by a reasonable victim.[43]

*Harris v. Forklift Systems, Inc.,*[44] revisited and offered some clarification of *Meritor Savings*. The Supreme Court granted certiorari in *Harris* to resolve the conflict among the circuits over whether harassing conduct must produce severe psychological harm to create an actionable hostile environment under Title VII. A company president had subjected a female manager to sexual innuendo, unwanted physical touching, and insults because of her gender. After two years, she left the job. Despite its determination that demeaning sexual comments by the employer had "offended the plaintiff, and would offend the reasonable woman," the trial court ruled against the plaintiff since the conduct alleged was not "so severe as to be expected to seriously affect plaintiff's psychological well-being" or create an "intimidating or abusive" environment. The Sixth Circuit upheld the trial court ruling in a three-paragraph unpublished opinion.

The Supreme Court reversed, deciding in 1993 that hostile environment sexual harassment need not "seriously affect psychological well-being" of the victim before Title VII is violated. *Meritor Savings*, wrote Justice O'Connor, had adopted a "middle path" between condemning conduct that was "merely offensive" and requiring proof of "tangible psychological injury." Thus, a hostile environment is not created by the "'mere utterance of an . . . epithet which engenders offensive feelings in an employee.'" On the other hand, a victim of sexual harassment need not experience a "nervous breakdown" for the law to come into play. "So long as the environment would reasonably be perceived, and is perceived, as hostile or abusive, there is no need for it also to be psychologically injurious."

*Harris* also addressed the standard of reasonableness to be applied in judging sexual harassment claims, an issue dividing the lower federal courts then and now. Justice O'Connor opted for a two-part analysis, both components of which must be met for a violation to be found. First, the conduct must create an objectively hostile work environment—"an environment that a reasonable person would find hostile and abusive." Second, the victim must subjectively perceive the environment to be abusive. The "totality of circumstances" surrounding the alleged harassment are to guide judicial inquiry, including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." Significantly, however, *Harris* did not explicitly resolve a fundamental issue raised by

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[42] Rabidue v. Osceola Refining Co., 805 F.2d 611 (6th Cir. 1986); Scott v. Sears Roebuck, 798 F.2d 210 (7th Cir. 1986); and Brooms v. Regal Tube, 830 F.2d 1554 (11th Cir. 1987).

[43] Andrews v. City of Philadelphia, 895 F.2d 1469 (3d Cir 1990); Burns v. McGregor Electronic Industries, Inc., 955 F.2d 559 (8th Cir. 1992); and Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991).

[44] 510 U.S. 17 (1993).

several lower courts regarding the appropriate "gender perspective" to consider in assessing sexual harassment claims.[45]

An increasingly broad range of hostile environment harms—frequently as concerned with lewd comments, inquiries, jokes or displays of pornographic materials in the workplace as with overt sexual aggression—have been brought before the federal courts. *Robinson v. Jackson Shipyards, Inc.*[46] was among the first reported decisions to impose liability for sexual harassment based on the pervasive presence of sexually oriented materials—magazine foldouts or other pictorial depictions—and "sexually demeaning remarks and jokes" by male co-workers without allegations of physical assaults or sexual propositions directed at the plaintiff. Most courts, however, have limited recovery to cases involving repeated sexual demands or other offensive conduct.[47] Except for cases involving touching or extreme verbal behavior, courts are often reluctant to find that sexual derision—or claims against pornography in the workplace—when unaccompanied by sexual demands, is sufficient to create a hostile environment.[48] This tendency may be reinforced by the Court's admonition in *Oncale*

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[45] Compare, e.g. Rabidue v. Osceola Refining Co., 805 F.2d 611, 622 (6th Cir. 1986)(holding that barrage of "nudie" pictures and litany of degrading comments were "annoying," but would not be sufficiently offensive to a reasonable person so as to interfere with the person's work performance), cert. denied, 481 U.S. 1041 (1987) with Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1524 (M.D. Fla. 1991)(applying reasonable woman standard to determine that pervasive pornographic pictures, sexual comments, verbal harassment, abusive graffiti, and unwelcome touching of some of plaintiff's female co-workers created a hostile working environment) and Spenser v. General Electric Co., 697 F. Supp. 204, 218 (E.D. Va.1988)(finding that sexual comments and suggestive behavior of plaintiff's superior, such as sitting on female workers' laps and talking about private parts, would have seriously affected the psychological well-being of reasonable female employee), aff'd, 894 F.2d 651 (4th Cir. 1990). See also Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991)(adopting reasonable woman standard).

[46] 760 F. Supp. 1486 (M.D.Fla. 1991).

[47] E.g. Highlander v. K.F.C. Nat'l Management Co., 805 F. 2d 644 (6th Cir. 1986)(holding that one instance of fondling and one verbal proposition were not sufficient to establish "hostile environment");E.g. Waltman v. Int'l Paper Co., 875 F.2d 468, 475 (5th Cir. 1989)("focus is whether [plaintiff] was subjected to recurring acts of discrimination, not whether a given individual harassed [plaintiff] recurrently."); King v. Board of Regents, 898 F.2d 533, 537 (7th Cir. 1990)("although a single act can be enough. . .generally repeated incidents create a stronger claim of hostile environment, with the strength of the claim depending on the number of incidents and the intensity of each incident"). But cf. Vance v. Southern Tel. & Tel. Co., 863 F.2d 1503, 1510 (llth Cir. 1989)("the determination of whether the defendant's conduct is sufficiently `severe or pervasive' to constitute racial harassment does not turn solely on the number of incidents alleged by plaintiff.").

[48] For example, in Hall v. Gus Construction Co., 842 F.2d 1010, 1017 (8th Cir. 1988), having found that defendants' conduct had gone "far beyond that which even the least sensitive of persons is expected to tolerate," the Eighth Circuit nonetheless felt compelled to add that "Title VII does not mandate an employment environment worthy of a Victorian salon. Nor do we expect that our holding today will displace all ribaldry on the roadway." See also Cowan v. Prudential Ins. Co. of America, 141 F.3d 751, 758 (7th Cir. 1998)(no hostile environment where offensive comments were "fairly sporadic . . . [and] unrelated incidents

(continued...)

that Congress never intended Title VII to become a general "code of civility." But conduct need not be overtly sexual; other hostile conduct directed against the victim because of the victim's sex is also prohibited.[49] And, in line with *Vinson*, evidence of a sexual harassment claimant's own provocative behavior or prior workplace conduct is generally relevant to a judicial determination of whether the defendant's conduct was unwelcome.[50]

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[48] (...continued)
which occurred over two years of [plaintiff's] employment, were not physically threatening, most of the incidents were not severe, and only two of the incidents were directed at plaintiff"); Jones v. Flagship Int'l, 793 F.2d 714 (5th Cir. 1986)(holding that two requests for sexual contact plus one incident of bare-breasted mermaids as table decorations for a company party were insufficiently pervasive to create hostile environment), cert. denied, 479 U.S. 1065 (1987).

[49] See Williams v. General Motors Corp., F.3d (6th Cir, 1999); Andrews v. City of Philadelphia, 898 F.2d 1469, 1485 (3d Cir. 1990)("The Supreme Court [in Vinson] in no way limited this concept to intimidation or ridicule of an explicitly sexual nature."); Bell v. Crackin Good Bakers, Inc., 777 F.2d 1497, 1503 (11th Cir. 1985)(holding that valid claim could be based on "threatening, bellicose, demeaning, hostile, or offensive conduct by a supervisor in the workplace because of the sex of the victim"); McKinney v. Dole, 765 F.2d 1129, 1140 (D.C.Cir. 1985)(district court erred in assuming that incident of physical force could not constitute sexual harassment unless "explicitly sexual").

[50] See, e.g., Jones v. Wesco Investments Inc., 846 F.2d 1154 n.5 (8th Cir. 1988)("A court must consider any provocative speech or dress of the plaintiff in a sexual harassment case."); Swentek v. USAIR, Inc., 830 F.2d 552, 556 (4th Cir. 1987)(affirming trial judge's determination to permit testimony that the plaintiff was "a foul-mouthed individual who often talked about sex," that the plaintiff had placed a "dildo in her supervisor's mailbox" and once grabbed the genitals of a male co-worker and sexually propositioned him).

Claims involving isolated or intermittent incidents have frequently been dismissed as insufficiently pervasive.[51] In *Jones v. Clinton*[52], for example, Judge Wright ruled that considering the "totality of circumstances," an alleged hotel incident and other encounters between Paula Jones and former Governor Clinton were not "the kind of sustained and nontrivial conduct necessary for a claim of hostile work environment." In particular, the court noted that plaintiff Jones "never missed a day of work" because of the incident nor did she complain to her supervisors; never did she seek medical or psychological treatment as a consequence of alleged harassment; and that her allegations generally failed to demonstrate any adverse workplace effects. The Seventh Circuit, in another case, concluded that while an Illinois state employee "subjectively perceived her work environment to be hostile and abusive" the paucity of sexually oriented comments complained of—three suggestive comments by a co-worker over a three-month period—"were not sufficiently severe that a reasonable person would feel subjected to a hostile working environment."[53] Of course, a single incident may be actionable if it is linked to a granting or denial of an employment benefit (*quid pro*

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[51] Scusa v. Nestle USA Company, 181 F.3d 958 (8th Cir. 1999)(pattern of co-worker harassment not actionable because it was not so severe or pervasive as to prevent plaintiff from performing all her duties on a full-time basis); Lam v. Curators of the Univ. of Mo., 122 F.3d 654, 656-57 (8th Cir. 1997)(noting that single exposure to offensive videotape was not severe or pervasive enough to create hostile environment); Sprague v. Thorn Americas, Inc, 129 F.3d 1355, 1366 (7th Cir. 1997)(five sexually-oriented incidents spread out over the course of 16 months not sufficiently severe or pervasive to create hostile environment); Saxton v. American Tel. & Tel. Co., 10 F.3d 526, 534 (7th Cir. 1993)("relatively limited" instances of unwanted sexual advances, which included the supervisor placing his hand on plaintiff's leg above the knee several times, rubbing his hand along her upper thigh; kissing her several seconds, and "lurching at her from behind some bushes," did not create an objectively hostile work environment); Chamberlin v. 101 Realty, 915 F.2d 777 (lst Cir. 1990)(five mild sexual advances by a supervisor, without more, were insufficient); Drinkwater v. Union Carbide Corp., 904 F.2d 853 (3d Cir. 1990)(a claim must demonstrate a "continuous period of harassment and two comments do not create an atmosphere."); Ebert v. Lamar Truck Plaza, 878 F.2d 338 (10th Cir. 1989)(use of foul language and infrequent touching of employees at 24-hour restaurant was not pervasive or severe and management promptly took corrective action whenever complaints were made).

[52] Supra n. 25.

[53] McKensie v. Illinois Department of Transportation, 92 F.3d 473 (7th Cir. 1996). See also Butler v. Ysleta Independent School District, 161 F.3d 263 (5th Cir. 1998)(sexually offensive messages anonymously sent by elementary school principal to two female teachers not actionable since they were infrequent and non-threatening and were received at home while it is the "workplace itself [that] is central to the wrong of sexual harassment." Penry v. Federal Home Loan Bank of Topeka, 155 F.3d 1257 (10th Cir. 1998)(gender-based inappropriate behavior of supervisor over a three-year period– including needless touching, grabbing, and offensive comments–evinced "poor taste and lack of professionalism," but incidents "were too few and far between to be considered" harassment). But cf., Abeita v. TransAmerica Mailings, 159 F.3d 246 (6th Cir. 1998)(though not directed at plaintiff, supervisor's sexually provocative statements to her about other women for an ongoing and continual basis for seven years, were sufficiently severe and pervasive to send case to the jury).

*quo* harassment),[54] or if the incident involves physical assault[55] or touching of the employee in an offensive manner under circumstances that preclude her escape.[56] The EEOC policy statement also states that the agency "will presume that the unwelcome, intentional touching of a charging party's intimate body areas is sufficiently offensive to alter the conditions of her working environment and constitute a violation of Title VII."[57]

## Same-Sex Harassment

Title VII was interpreted early on by the courts and the EEOC to protect both men and women against workplace sexual harassment by the opposite sex. In *Meritor,* the Court found that Congress intended "to strike at the entire spectrum of disparate treatment of men and women" in employment and read Title VII to prohibit discriminatory harassment by a supervisor "because of the subordinate's sex." Until the Supreme Court decision in *Oncale v. Sundowner Offshore Services, Inc.*, however, federal courts were sharply divided over whether the Act applied when the harasser and the victim are of the same sex. Although Title VII does not prohibit direct discrimination by an employer based on an employee's sexual orientation[58]—whether homosexual, bisexual, or heterosexual—the EEOC[59] and the District of Columbia,[60]

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[54] Neville v. Taft Broadcasting Co., 857 F. Supp. 1461 (W.D.N.Y. 1987).

[55] Crisonino v. New York City Housing Auth., 985 F. Supp. 385 (S.D.N.Y. 1997)(supervisor called plaintiff a "dumb bitch" and "shoved her so hard that she fell backward and hit the floor, sustaining injuries from which she has yet to fully recover").

[56] Davis v. U.S. Postal Service, 142 F.3d 1334 (10th Cir. 1998)("[a] rational jury could find that a work environment in which a plaintiff is subjected to regular unwelcome hugging and kissing combined with other specific incidents . . . [including] an assault, is objectively hostile.").

[57] BNA, FEP Manual at 405:6681.

[58] Ulane v. Eastern Airlines, Inc., 742 F.2d 1081 (7th Cir. 1984), cert. denied, 471 U.S. 1017 (1985).

[59] The EEOC Compliance Manual states that the respective sexes of the harasser and the victim are irrelevant in determining whether Title VII has been violated:

> The victim does not have to be of the opposite sex from the harasser. Since sexual harassment is a form of sex discrimination, the crucial inquiry is whether the harasser treats a member or members of one sex differently from members of the other sex. The victim and the harasser may be of the same sex where, for instance, the sexual harassment is based on the victim's sex (not on the victim's sexual preference) and the harasser does not treat the employees of the sex the same way.

EEOC Compliance Manual, § 615.2(b)(3). While EEOC interpretations of Title VII are not binding on the courts, they are frequently accorded judicial deference. See Meritor, 477 U.S. at 65.

[60] Barnes v. Costle, 561 F.2d 983, 990 n. 55 (D.C.Cir. 1977)(acknowledging the possibility of actionable Title VII claim where "a subordinate of either gender" is harassed "by a homosexual superior of the same gender.").

Sixth,[61] Seventh,[62] Eighth,[63] Ninth Circuit,[64] and Eleventh Circuits[65] all indicated that same-sex harassment was actionable in some circumstances. An apparent majority of federal district courts to consider the issue also allowed such claims where the alleged harassment is "because of" the victim's sex;[66] the rationale being that Title VII bars disparate treatment based on the sex or gender of the employee, without regard to whether the harasser is male or female. Nonetheless, the Fifth Circuit concluded with minimal analysis that same sex harassment was never actionable,[67] while other courts had limited Title VII liability to same sex cases based on homosexual conduct since only then was the harassment deemed to be "because of sex."[68]

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[61] Yeary v. Goodwill Industries—Knoxville, Inc., 107 F.3d 443 (6th Cir. 1997)("It is not necessary for this court to decide today whether same-sex harassment can be actionable only when the harasser is homosexual; all that is necessary for us to observe is that when a male sexually propositions another male because of sexual attraction, there can be little question that the behavior is a form of harassment that occurs because the propositioned male is male—that is `because of'. . .sex.")

[62] Baskerville v. Culligan Int'l Co., 50 F.3d 428, 430 (7th Cir. 1995)(In a heterosexual harassment action, the court noted parenthetically that "sexual harassment of women by men is the most common kind, but we do not mean to exclude the possibility that sexual harassment of men by women, or men by other men, or women by other women would not be actionable in appropriate cases."). See also J. Doe & H. Doe v. City of Belleville, 119 F.3d 563 (7th Cir. 1997).

[63] Quick v. Donaldson Co., 90 F.3d 1372 (8th Cir. 1996)(evidence that male employees were the sole targets of other heterosexuals who practiced "bagging" co-worker testicles could lead to finding that such treatment was based on sex).

[64] Steiner v. Showboat Operating Co., 25 F.3d 1459, 1464 (9th Cir. 1994)(commenting that "we do not rule out the possibility that both men and women. . .have viable claims against [a male supervisor] for sexual harassment"), cert. denied 115 S. Ct. 733 (1995).

[65] Fredette v. BVP Management Associates, 112 F.3d 1503 (11th Cir. 1997)("when homosexual male supervisor solicits sexual favors from a male subordinate and conditions work benefits or detriment on receiving such favors, the male subordinate can state a viable Title VII claim for gender discrimination").

[66] See Gerd v. United Parcel Service, Inc., 934 F. Supp. 357 (D.Colo. 1996) and cases cited therein.

[67] Garcia v. Elf Atochem North America, 28 F.3d 449 (5th Cir. 1994) denied that "harassment by a male supervisor against a male subordinate [states] a claim under Title VII even though the harassment has sexual overtones" based on the earlier Fifth Circuit ruling in Goluszek v. Smith. The Goluszek court refused "a wooden application" of Title VII to salvage same-sex claims in favor of an interpretation that focused on "imbalance" and "abuse" of power in the workplace directed at "discrete and vulnerable groups." Title VII claims were limited, said the court, to the "exploitation of a powerful position to impose sexual demands or pressures on an unwilling but less powerful person." Since a male in a"male dominated" work environment was not "inferior"– or a victim of a "gender-biased atmosphere; an atmosphere of oppression by a `dominant gender'"–same sex harassment was not actionable. See also Vandevanter v.Wabash Nat'l Corp., 867 F. Supp. 790 (N.D.Ind. 1994).

[68] McWilliams v. Board of Supervisors, 72 F.3d 1191 (4th Cir. 1996). See also Wrightson v. Pizza Hut of America, Inc. 99 F.3d 138 (4th Cir. 1996)("a claim may lie under Title VII for

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On March 4, 1998, the U.S. Supreme Court entered the fray and while providing a modicum of specific guidance, agreed with the majority view of the federal courts that "nothing in Title VII necessarily bars a claim of discrimination 'because of . . . sex' merely because the plaintiff and defendant (or the person charged with acting on behalf of the defendant) are of the same sex." *Oncale v. Sundowner Offshore Services, Inc.*[69] involved *quid pro quo* and hostile environment claims of a male offshore oil rig worker who alleged that he was sexually assaulted and abused by his supervisor and two male co-workers for three months in 1991, forcing him to quit his job. Relying on the Fifth Circuit's earlier *Garcia* ruling, a federal judge in Louisiana dismissed the action. On appeal, the Fifth Circuit observed that Title VII's prohibition against sex discrimination is "gender-neutral" and seemed persuaded by *Meritor* and *Harris* that "so long as the plaintiff proves that harassment is because of the victim's sex, the sex of the harasser and victim is irrelevant." Nonetheless, the appeals court viewed itself bound by the panel decision in *Garcia* which could not be overruled absent a contrary *en banc* ruling by the Fifth Circuit or superceding decision by the Supreme Court.

In a remarkably brief opinion, the Supreme Court revived Oncale's federal lawsuit, voting unanimously to defeat "a categorical rule excluding same-sex harassment claims from the coverage of Title VII." Long on implication, but short on detail, Justice Scalia's opinion for the court is notable for its emphasis on general sexual harassment principles—transcending the limits of the same-sex issue before the Court—and possibly paving the way for stricter scrutiny of sexual harassment claims in general. First, the opinion observes that federal discrimination laws do not prohibit "all verbal or physical harassment in the workplace," only conduct that is discriminatory and based on sex. Moreover, harassing or offensive conduct "is not automatically discrimination because of sex, merely because the words used have a sexual content or connotation." Instead, Justice Scalia emphasized, those alleging harassment must prove that the conduct was not just offensive, but "actually constituted" discrimination. Secondly, reiterating *Meritor* and *Harris*, only conduct so "severe or pervasive" and objectively offensive as to alter the conditions of the victim's employment is actionable so that "courts and juries do not mistake ordinary socializing in the workplace–such as male-on-male horseplay or intersexual flirtation–for discriminatory 'conditions of employment.'" Another modulating aspect of the *Oncale* ruling is the Court's obvious concern for "social context" and workplace realities when appraising all sexual harassment claims–same-sex or otherwise.

> The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed. Common sense and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive.

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[68] (...continued)
same-sex hostile work environment sexual harassment where, as here, the individual charged with the discrimination is homosexual").

[69] 118 S.Ct 998 (1998).

The net effect of *Oncale* for same sex harassment and hostile environment cases generally is difficult to predict. The Court clearly reinjected the element of discrimination – "because of sex" – back into harassment law, perhaps tempering a tendency on the part of some lower courts to equate offensive behavior with a hostile environment without more. Indeed, Justice Scalia goes so far as to state that "Title VII does not prohibit all verbal or physical harassment" and "requires neither asexuality or androgyny in the workplace." Because little guidance is offered, however, for determining when untoward conduct crosses the line to sex-based discrimination, formidable obstacles may remain for Joseph Oncale, the victor before the Supreme Court, and others like him. Justice Scalia's opinion suggests two possible approaches to demonstrating a nexus between sexually offensive conduct and gender discrimination.

> A trier of fact might reasonably find such discrimination, for example, if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace. A same-sex harassment plaintiff may also, of course, offer direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace.

But it is difficult to discern how either approach would aid male same-sex plaintiffs like Oncale in proving discrimination "because of sex" when they are victims of harassment by other males on an oil rig or in other male-dominated workplaces.

The *Oncale* ruling may also mark a general tempering of earlier decisions driving current trends in sexual harassment litigation. The numerous examples of "innocuous differences" in the way men and women interact cited by the Court might serve as the basis for future judicial acceptance of a wider latitude of behavior in the workplace than might otherwise have been considered permissible. The lengths to which Justice Scalia seems to go in articulating the bounds of permissible heterosexual behavior in a same-sex harassment case reinforces this conclusion. Thus, the express approval of "intersexual flirtation" and "teasing or roughhousing" implies that a certain level of fraternization in the workplace is permissible and the consequent range of actionable conduct correspondingly reduced. In this regard, the decision's emphasis upon "social context" may complicate the already difficult judicial task of identifying a sexually hostile work environment. Does this mean, for example, that conduct permitted in a blue-collar workplace may be actionable in a white-collar, professional environment? Thus, the decision might lead to the dismissal of cases the courts have entertained in the past. At the very least, beyond its threshold endorsement of a same-sex cause of action under Title VII, the *Oncale* decision appears to raise as many questions as it answers.

## Remedies

One major aspect of the 1991 Civil Rights Act[70] of particular importance to sexual harassment claimants was the extension of jury trials and compensatory and punitive damages as remedies for Title VII violations. Previously, Title VII plaintiffs had no

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[70] Pub. L. 102-166, 105 Stat. 1071.

right to a jury trial and were entitled only to equitable relief in the form of injunctions against future employer misconduct, reinstatement, and limited backpay for any loss of income resulting from any discharge, denial of promotion, or other adverse employment decision. Consequently, victims of alleged sexual harassment were often compelled to rely on state fair employment practices laws,[71] or traditional common law causes of action for assault, intentional infliction of emotional distress, unlawful interference with contract, invasion of privacy, and the like, to obtain complete monetary relief.[72] Section 102 of the 1991 Act[73] altered the focus of federal EEO enforcement from reliance on judicial injunctions, where voluntary conciliation efforts fail, to jury trials, and compensatory and punitive damages, in Title VII actions involving intentional discrimination.

Compensatory damages under the 1991 Act include "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses."[74] The compensatory and punitive damages provided by §102 are "in addition to any relief authorized by Section 706(g)" of the 1964 Civil Rights Act.[75] Therefore, plaintiffs may recover damages in addition to equitable relief, including backpay. Punitive damages may also be recovered against private employers where the plaintiff can demonstrate that the employer acted "with malice or reckless indifference" to the individual's federally protected rights. Punitive damages are not recoverable, however, against a governmental entity.[76] In cases where a plaintiff seeks compensatory or punitive damages, any party may demand a jury trial.[77]

The damages remedy under the Act is limited by dollar amount, however, according to the size of the defendant employer during the twenty or more calendar weeks in the current or preceding calendar year. The sum of compensatory and punitive damages awarded may not exceed: $50,000 in the case of an employer with more than 14 and fewer than 101 employees; $100,000 in the case of an employer with more than 100 and fewer 201 employees; $200,000 in the case of an employer with more than 200 and fewer than 501 employees; and $300,000 in the case of an employer with more than 500 employees.[78] In jury trial cases, the court may not inform the jury of the damage caps set forth in the statute.

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[71] E.g., Wirig v. Kinney Shoe Corp., 448 N.W. 2d 526, 51 FEP Cases 885 (Minn. Ct.App. 1989), aff'd in part and rev'd in part on other grounds, 461 N.W.2d 374 (Minn. Sup.Ct. 1990).

[72] See e.g. Rojo v. Kliger, 52 Cal.3d 65, 901 P.2d 373 (Cal. Sup.Ct. 1990); Baker v. Weyerhauser Co., 903 F.2d 1342 (10th Cir. 1990); Syndex Corp. V. Dean, 820 S.W.2d 869 (Tex. App. 1991).

[73] 105 Stat. 1072, 42 U.S.C. § 1981a.

[74] 42 U.S.C. § 1981a(b)(3).

[75] Id. at § 1981a(a)(1).

[76] Id. at § 1981a(b)(1).

[77] Id. at § 1981a(c).

[78] Id. at § 1981a(b)(3).

A recent ruling by the Ninth Circuit Court of Appeals significantly increases the amount of damages that may be awarded a former employee who proves harassment or other intentional discrimination based on race, color, religion, sex, or national origin under Title VII, or disability under the Americans with Disability Act. The trial judge and jury in *Gotthardt v. National Railroad*[79] awarded $350,000 in compensatory damages and $124,010.46 back pay for lost wages to a 59-year-old woman who was forced to quit her job due to posttraumatic stress syndrome caused by workplace harassment. Because she claimed that her age, stress, and background would foreclose a future job or career, the trial court also awarded the employee more than $600,000 in "front pay" to cover wages lost from the date of jury verdict forward for eleven years. Amtrak argued that this front pay award must be included in the $300,000 statutory cap on damages as "future pecuniary losses" specifically covered by the statute. Unfortunately for employers, however, the Ninth Circuit determined that front pay is an equitable remedy, rather than legal damages, and therefore not subject to the cap. There is currently a division in the federal circuits on this issue, but until the Supreme Court finally resolves the dispute, the stakes for employers may be considerable. The estimated monetary values of pending cases may be multiplied several times if juries or judges can be persuaded by plaintiffs' attorneys to award front pay for years, or even decades, into the future.

The expansion of Title VII remedies dramatically affects the level of relief available in cases of intentional sex discrimination, where for the first time employees in the private sector have the prospect of federal compensatory and punitive damage recoveries and the right to a jury trial. The Act now provides a monetary remedy for victims of sexual harassment in employment in addition to lost wages. Since harassment of the hostile environment type often occurs without economic loss to the employee, in terms of pay or otherwise, critics of the prior law charged that the sexual harassment victim was frequently without any effective federal relief. Title VII plaintiffs may now seek monetary compensation for emotional pain and suffering, and other pecuniary and nonpecuniary losses, caused by sexual harassment. Moreover, federal claims may be joined with pendent state-law claims for damages unlimited by the caps in the federal law or an election made between pursuing state and federal remedies.

## Liability of Employers and Supervisors for Monetary Damages

The addition of monetary damages to the arsenal of Title VII remedies rekindled inquiry into an employer's liability for harassment perpetrated by its supervisors and nonsupervisory employees, and of the personal liability of individual harassers. The *Ellerth* decision ratified the federal circuit courts, which had generally declared employers vicariously liable for *quid pro quo* sexual harassment committed by supervisors[80] culminating in tangible job detriment. Only those with actual authority

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[79] 191 F.3d 1148 (9th Cir. 1999).

[80] See Horn v. Duke Homes, 755 F.2d 599, 604 (7th Cir. 1985)(noting that all circuits (continued...)

to hire, promote, discharge or affect the terms and conditions of employment can engage in *quid pro quo* harassment and are held to act as agents of the employer, regardless of their motivations. *Quid pro quo* harassment is viewed no differently than other forms of discrimination prohibited by Title VII, for which employers have routinely been held vicariously liable. Because Title VII defines employer to include "any agent" of the employer, the statute is understood to have incorporated the principle of *respondeat superior*, in effect holding "employers liable for the discriminatory [acts of] . . . supervisory employees whether or not the employer knew, should have known, or approved of the supervisor's actions."[81] However, the suggestion in *Meritor Savings Bank* that courts look to agency law in developing liability rules for hostile work environment led most lower federal courts to reject vicarious liability for employers lacking actual or constructive knowledge of environmental harassment perpetrated by a supervisor.

Prior to *Ellerth* and *Faragher*, most courts made an employer liable for a hostile environment only if it knew or should have known about the harassment and failed to take prompt remedial action to end it. They reasoned that, unlike *quid pro quo* cases, in which a supervisor exerts actual authority to affect the terms, conditions, or privileges of a subordinate's employment, the supervisor is cloaked with no actual or apparent authority to create a hostile environment. In other words, the employer was directly liable for its own wrongdoing in not stopping harassment of which it was or should have been aware but was not automatically or "strictly" liable for supervisory misconduct.[82] A minority view, however, recognized vicarious liability when the harasser was a supervisor[83] and created a hostile environment through threats and intimidation.[84] Similarly, an employer without actual or constructive knowledge was generally not liable for co-worker harassment since the discriminatory conduct was not within the scope of employment and the employer usually had conferred no authority,

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[80] (...continued)
reaching the issue have held employers strictly liable for quid pro quo harassment).

[81] Meritor Savings, 477 U.S. at 70-71.

[82] See, e.g. Zimmerman v. Cook County Sheriff's Dep't, 96 F.3d 1017 (7th Cir. 1996)(employer not liable to plaintiff who complained of "personality conflict" with supervisor since absent "an Orwellian program of continuous surveillance, not yet required by law," the plaintiff must provide enough information to make a reasonable employer think there was a possibility of sexual harassment); Lipsett v. University of Puerto Rico, 864 F.2d 881, 901 (lst Cir. 1988); Bouton v. BMW of North America, Inc., 29 F.3d 103 (3d Cir. 1994); Waltman v. International Paper Co., 875 F.2d 468 (5th Cir. 1989); Juarez v. Ameritech Mobile Communications, Inc., 957 F.2d 317 (7th Cir. 1992); Burns v. McGregor Elec. Indus., 995 F.2d 559 (8th Cir. 1992); Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991).

[83] Kaufman v. Allied Signal, Inc., 970 F.2d 178 (6th Cir.), cert. denied, 113 S.Ct. 831 (1992).

[84] E.g.Karibian v. Columbia University, 14 F.3d 773, 780 (2d Cir. 1994)(actions of a "supervisor at a sufficiently high level in the hierarchy would necessarily be imputed to the company").

real or apparent, to facilitate the harassment.[85] This negligence theory of employer liability continues to govern cases alleging harassment by co-workers and customers.[86]

## Vicarious Employer Liability and the *Ellerth/Faragher* Affirmative Defense

A different set of liability principles was adopted by the Supreme Court for supervisory harassment in *Ellerth (supra)* and *Faragher v. City of Boca Raton.*[87] While working as a lifeguard for the Parks and Recreation Department of the City of Boca Raton, Faragher and a female colleague were subjected to offensive touching, comments, and gestures from two supervisors. Neither lifeguard complained to department management at the time of their employment or when they resigned. In addition, lifeguards had almost no contact with City officials because they were employed at locations far removed from City Hall. However, after resigning from their positions for reasons unrelated to the alleged harassment, Faragher sued the City under Title VII.

Applying agency principles, the district court held the city directly liable based on the supervisory authority of the harassing employees and overall workplace structure, and indirectly liable because the harassment alleged was severe and pervasive enough to support an inference of knowledge, or constructive knowledge by the City. The Eleventh Circuit *en banc* rejected both theories and reversed. "An employer will rarely be directly liable for hostile environment harassment," the appeals court observed, because ongoing physical and verbal harassment falls outside the scope of the supervisor's employment and is unaided by the agency relationship. Nor was the court persuaded that city officials knew, or should have known, of the harassment.

As in *Ellerth*, the *Faragher* Supreme Court largely abandoned the legal distinction between *quid pro quo* and hostile environment harassment, looking instead to agency principles as guides to employer liability for supervisory misconduct. Justice Souter's majority opinion reiterated *Ellerth's* determination that sexual harassment by a supervisor is not within the scope of employment. But because a supervisor is "aided" in his actions by the agency relationship, a more stringent vicarious liability standard was warranted than pertains to similar misconduct by mere co-workers, where the employer is liable for negligence only if he fails to abate conditions of which he "knew or should have known." "When a person with

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[85] See e.g. Torres v. Pisano 116 F.3d 625 (2d Cir. 1997)(university not liable for hostile environment where plaintiff complained to university official but told him to "keep it confidential."); Baker v. Weyerhauser Co., 903 F.2d 1342 (10th Cir. 1990); Steele v. Offshore Shipbuilding, Inc., 867 F.2d 1311 (11th Cir. 1989); Swentek v. USAir, Inc., 830 F.2d 552 (4th Cir. 1987).

[86] See, e.g., Coates v. Sundor Brands, Inc., 164 F.3d 1361 (11th Cir. 1999)(employer not liable for co-worker harassment where plaintiff never directly discussed matter with supervisor); Lockard v. Pizza Hut, Inc., 162 F.3d 1062 (10th Cir. 1998)("an employer may be held liable for the harassing conduct of its customers"only on the basis of negligence, i.e. if it "fails to remedy or prevent a hostile or offensive work environment of which management-level employee's knew, or in the exercise of reasonable care should have known.").

[87] 524 U.S. 775 (1998).

supervisory authority discriminates in the terms and conditions of subordinates' employment, his actions necessarily draw upon his superior position over the people who report to him, or those under them, whereas an employee generally cannot check a supervisor's abusive conduct the same way that she might deal with abuse from a co-worker."

The Court also determined, however, that public policy considerations were important in crafting employer liability rules. The congressional design behind Title VII favored both the creation of anti-harassment policies and effective grievance mechanisms by employers, and a coordinate duty on the part of employees to avoid or mitigate harm. To accommodate these Title VII policies and agency principles of employers' vicarious liability, the Court in *Ellerth* and *Faragher* adopted a composite standard which for the first time explicitly allows employers an affirmative defense to liability for environmental harassment caused by supervisory misconduct. According to the seven Justice majorities in both cases:

> An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence . . . . The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise. While proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense.

The affirmative defense is unavailable, however, and employers are strictly liable for harassment of subordinate employees by their supervisors perpetrated by means of a "tangible employment action," such as discharge, demotion, or undesirable reassignment.

The affirmative defense adopted by the Court in *Ellerth* and *Faragher* imposes a duty of care on both the employer and the employees to prevent workplace harassment and to mitigate it effects. The first line of defense for the employer is to adopt and communicate to its staff and management an effective sexual harassment policy and complaint procedure. In most cases, the failure to do so — at least in the case of large employers, like the city government in *Faragher* — will result in strict liability for any harassing conduct by supervisory employees, whether or not the alleged victim suffers any adverse employment action. Questions remain, however, as to scope of that legal obligation, particularly in relation to smaller employers, since the Court's formulation appears to leave open the possibility that corrective actions short of a formalized anti-harassment policy may be reasonable, at least in some

circumstances. Thus, considerations of employer size and resources, and the structure of the workplace — e.g., whether a single location or on scattered sites — may be relevant factors.

Similarly, the latest High Court decisions place the burden on aggrieved employees to avail themselves of corrective procedures provided by the employer—thereby mitigating damages caused by the alleged harassment — or risk having their claim legally barred. However, whether an employee's failure to take such saving action would be deemed "unreasonable" if the complainant is able to demonstrate the inadequacy of the employer's grievance procedure, that employees had suffered retaliation for invoking the procedure in the past, or that harassing supervisors previously had not been disciplined for their action, is not addressed by the Court. Nor do the decisions specifically address the fate of employers denied the benefit of the affirmative defense because an employee followed the complaint procedure set forth in the employer's anti-harassment policy. Is strict employer liability the rule in such cases, or is the issue to be decided in light of the overall appropriateness of the employer's remedial response? Thus, many questions remain for lower courts to decide in regard to the employer's assertion of an affirmative defense. Consequently, while clarifying the law to some extent, it may take the courts years to flesh out the concept of "reasonable care," "correct promptly," "unreasonably failed," and "tangible employment action," all key elements in the Court's definition of the employer's affirmative defense.

## Judicial Developments After *Ellerth* and *Faragher*

Some guidance may be gleaned from later federal appeals court decisions that have grappled with issues left unresolved by *Ellerth* and *Faragher*. Much judicial attention has focused on whether conduct alleged by the plaintiff amounts to a tangible employment action, nullifying the employer's affirmative defense, and to the adequacy of any corrective action taken by the employer in response to alleged harassment. Aside from hiring, discharge, promotion or demotion, and benefits decisions having direct economic consequences, an employment action may be "tangible" if it results in a significant change in employment status. In *Durham Life Ins. Co v. Evans*,[88] a tangible employment action was found when the employer took away the plaintiff's private office and secretary, denied her of files and control of funds provided by clients in order to pay premiums, and assigned her a large number of lapsed accounts. The Third Circuit reasoned, "[i]f an employer's act substantially decreased an employee's earning potential and caused significant disruption in his or her working conditions, a tangible adverse employment action may be found." *Reinhold v. Commonwealth of Virginia*,[89] on the other hand, found no such action where the harassing supervisor "dramatically increased" the plaintiff's workload, denied her the opportunity to attend a professional conference, and generally gave her undesirable assignments. The Fourth Circuit ruled against the plaintiff because she had not "experienced a change in her employment status akin to a demotion or a reassignment entailing significantly different

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[88] 166 F.3d 139, 153 (3d Cir. 1999).

[89] 151 F.3d 172 (4th Cir. 1998).

job responsibilities."[90] Similarly, in *Watts v. Kroger Co.*,[91] the affirmative defense was permitted to an employer who had altered the plaintiff's work schedule – such that she was required to give up her second job which had previously been accommodated – one week after complaining of sexual harassment by her supervisor. According to the Fifth Circuit: "Simply changing one's work schedule is not a change in [plaintiff's] employment status. Neither is expanding the duties of one's job as a member of the produce department to include mopping the floor, cleaning the chrome in the produce department, and requiring her to check with her supervisor before taking breaks." And an employee alleging sexual harassment who ultimately quit her job could point to no "tangible" detriment where there was no showing of change in salary, benefits, duties, or prestige, but only "rude and uncivil behavior" by the employer.[92] But where a significant change of status resulted in the plaintiff being given a new, less prestigious position – amounting, in effect, to a demotion – a tangible employment action was found by another Fifth Circuit panel.[93]

The first prong of the affirmative defense requires the employer to show that it took reasonable care to prevent and promptly correct harassment. Most courts have read *Ellerth* to require, at a minimum, that the employer establish, disseminate, and enforce an anti-harassment policy and complaint procedure. Thus, in *Durham Life Ins. Co.*, the defendant was denied the *Ellerth* affirmative defense because plaintiff "was never given any literature or provided any information about the procedure to report sexual harassment and had no idea where such information could be obtained."[94] The court held that the employer's policy must be disseminated to all employees and provide an assurance that the harassing supervisor can be bypassed in registering a complaint. The defendant's complaint system in *Wilson v. Tulsa Junior College*[95] was found to be inadequate because it did not contain a provision for complaints to be filed after normal office hours. Plaintiff was a custodian and the harassment occurred during the evening shift. As a result, the employer was not entitled to the affirmative defense. And if the plaintiff's failure to invoke the employer's formal complaint procedures is not "unreasonable," the employee may still prevail. In *Sharp v. City of Houston*, the employee presented evidence that lodging a complaint was forbidden the "code of silence" which operated within the police department where she worked. Anyone using the reporting procedure would "suffer such a pattern of social ostracism and professional disapprobation that he or she would likely sacrifice a career in [the department]."[96] She also demonstrated that procedures for bypassing the harassing supervisors were ineffective. Judgment against the city was affirmed.

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[90] Id. at 175.

[91] 170 F.3d 505, 510 (5th Cir. 1999).

[92] Webb v. Cardiothoracic Surgery Associates, 139 F.3d 532 (5th Cir. 1998).

[93] Sharp v. City of Houston, 164 F.3d 923 (5th Cir. 1999)(plaintiff's transfer from prestigious Mounted Patrol to less prestigious Police Academy, although voluntary, was compelled by sexual harassment and retaliation and supported judgment against city).

[94] Supra n. 87, at p. 162.

[95] 164 F.3d 534 (10th Cir. 1998)

[96] 164 F.3d at 931-32.

Beyond adopting an anti-harassment policy and procedures for its employees, the employer must undertake immediate and appropriate corrective action – including discipline proportionate to the seriousness of the offense – when it learns of a violation.[97] Whether the employer has responded in a prompt and reasonable manner depends on all the underlying facts and circumstances, and the harassment victim's own conduct may be a relevant factor. Thus, in *Coates v. Sundor Brands, Inc.*,[98] the Eleventh Circuit found that the employer's reaction to a complaint was adequate, even though delayed for a period of twenty months, because the employee's initial allegations were not sufficiently specific to warrant an earlier response by the employer. The plaintiff originally requested that no work assignment be changed, forcing her continued regular contact with the harasser, and repeatedly assured the human resources manager that the circumstances were fine. The employer took immediate action to suspend the harasser when the plaintiff was finally candid about her problems.[99] In some cases, alleged harassers who were discharged but later exonerated have sued their employers. The employer has usually prevailed, however, as long as the decision to fire or otherwise discipline the suspected perpetrator was based on a good faith belief of misconduct after an adequate investigation was performed. "The real issue is whether the employer reasonably believed the employee's allegation [of harassment] and acted on it in good faith, or to the contrary, the employer did not actually believe the co-employee's allegation but instead used it as a pretext for an otherwise discriminatory dismissal."[100]

Even before the High Court's latest decisions, lower court rulings suggested that the most effective defensive strategy for employers to avoid liability for a hostile work environment was a proactive approach. Thus, in *McKenzie v. Illinois Department of Transportation*,[101] the "prompt and remedial action" taken by the state employer in barring further workplace contacts between the allegedly harassing co-worker and the complainant was held to prevent recovery on a hostile environment claim. In addition,

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[97] See Skidmore v. Precision Printing and Packaging, Inc., 188 F.3d 606 (5th Cir. 1999)(employer not liable because it took "prompt remedial action" when it instructed alleged harasser to leave plaintiff alone and moved her to a new shift even though no investigation was conducted until complaint was filed with EEOC six months later); Mockler v. Multnomah County, 140 F.3d 808 813 (9th Cir. 1998).

[98] 164 F.3d 1361 (llth Cir. 1999).

[99] See also Indest v. Freeman Decorating, Inc., 164 F.3d 258 (5th Cir. 1999)(employer not liable for a vice president's sexual harassment when it took prompt and effective action upon learning of the situation); Van Zant v. KLM Royal Dutch Airlines, 80 F.3d 708, 715 (2d Cir. 1996)(employer's response prompt where it began investigation on the day that complaint was made, conducted interviews within two days, and fired harasser within ten days); Steiner v. Showboat Operating Co., 25 F.3d 1459 (9th Cir. 1994), cert. denied, 513 U.S. 1082 (1995)(employer's response to complaints inadequate despite eventual discharge of harasser where it did not seriously investigate or strongly reprimand supervisor until after plaintiff filed charge with state FEP agency).

[100] Waggoner v. City of Garland Tex., 987 F.2d 1160, 1165 (5th Cir. 1993). See also Cotran v. Rollins Hudig Hall International, Inc., 17 Cal. 4th 93 (1998); Morrow v. Wal-MartStores, Inc., 152 F.3d 559 (7th Cir. 1998).

[101] 92 F.3d 473 (7th Cir. 1996).

the courts have generally been reluctant to impose Title VII liability on employers who act "prophylactically" to stem harassing conditions before they begin. This is illustrated by *Gary v. Long*[102] where the D.C. Circuit dismissed a hostile environment lawsuit against the Washington Metropolitan Area Transit Authority (WMATA) as the result of repeated verbal and physical harassment, and eventual rape, of a female employee by a supervisor. Claims of *quid pro quo* harassment were rejected due to lack of economic detriment. Moreover, WMATA escaped liability on the hostile environment claim because it had an "active and firm" policy against the sexual harassment which it publicized through staff notices, seminars, and EEO counselors, and because it maintained detailed grievance procedures for reporting acts of discrimination.

The practical lesson for employers is to formulate and communicate to employees a specific policy forbidding workplace harassment; to establish procedures for reporting incidents of harassment that bypass the immediate supervisor of the victim if he or she is the alleged harasser; to immediately investigate all alleged incidents and order prompt corrective action (including make-whole relief for the victim) when warranted; and to appropriately discipline the harasser.

## Personal Liability of Harassing Supervisors and Co-workers

Some division of judicial opinion persists, again because "agent[s]" are included within the Title VII definition of "employer," as to the personal liability of individual supervisors and co-workers for hostile environment harassment or other discriminatory conduct. A majority of federal circuit courts to address the question—the Second,[103] Fifth,[104] Seventh,[105] Ninth,[106] Tenth[107] and Eleventh[108] and District of Columbia[109]—have interpreted agents in the statutory definition as merely incorporating *respondeat superior* and refused to impose personal liability on agents. These courts also note the incongruity of imposing personal liability on individuals while capping compensatory and punitive damages based on employer size, as the statute does, and exempting small businesses that employ less than 15 persons from Title VII altogether. Of the Courts of Appeals, only the Fourth Circuit[110] has extended Title VII liability to supervisors in both their personal capacity where the supervisor

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[102] 59 F. 3d 1391 (D.C. Cir 1995). See also, Farley v. American Cast Iron Pipe Company, 115 F.3d 1548 (11th Cir. 1997).

[103] Tomka v. Seiler Corp., 66 F.3d 1295 (2d Cir. 1995).

[104] Grant v. Loan Star Co., 21 F.3d 649 (5th Cir.), cert. denied, 115 S. Ct. 574 (1994).

[105] EEOC v. AIC Sec. Investigations, Ltd., 55 F.3d 1276 (7th Cir. 1995).

[106] Miller v. Maxwell's Int'l Inc., 991 F.2d 583 (9th Cir. 1993), cert. denied, 114 S. Ct. 1049 (1994).

[107] Haynes v. Williams, 88 F.3d 989 (10th Cir. 1996).

[108] Busby v. City of Orlando, 931 F.2d 764 (11th Cir. 1991).

[109] Gary v. Long, 59 F.3d 1391 (D.C. Cir. 1995), cert. denied, 116 S.Ct. 569 (1995).

[110] See Paroline v. Unisys Corp., 879 F.2d 100 (4th Cir. 1989), rev'd in part, aff'd in relevant part, 900 F.2d 27 (4th Cir. 1990) (en banc).

exercised significant control over the plaintiff's hiring, firing, or conditions of employment. The First Circuit, the Third Circuit, the Sixth Circuit, and the Eight Circuit have yet to decide the issue, leading to contradictory results among the district courts in those jurisdictions.[111]

## Sexual Harassment in the Schools

Issues surrounding the legal responsibility of school districts or other educational authorities for sexual harassment within the schools are highlighted by recent media reports of harassment of students by teachers and of disciplinary proceedings against students for alleged sexual abuse or unwanted displays of affection directed at their peers. Title IX of the 1972 Education Amendments provides that "[no] person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[112] Under the statute, student victims of any form of sex discrimination, including sexual harassment, may file a written complaint with the Office of Civil Rights (OCR)[113] for administrative determination and possible imposition of sanctions—including termination of federal funding—upon the offending educational institution. In addition, school personnel who harass students may be sued individually for monetary damages and other civil remedies under 42 U.S.C. § 1983 prohibiting the deprivation of federally protected rights under "color of law."

Title IX also provides student victims with an avenue of judicial relief. In *Cannon v. University of Chicago,*[114] the Supreme Court ruled that an implied right of action exists under Title IX for student victims of sex discrimination who need not exhaust their administrative remedies before filing suit. However, the availability of monetary damages under Title IX remained uncertain until *Franklin v. Gwinnett County Public Schools.*[115] In *Franklin*, a female high school student brought an action for damages under Title IX against her school district alleging that she had been subjected to sexual harassment and abuse by a teacher. The Supreme Court held that damages were available to the sexual harassment victim if she could prove that the school district had intentionally violated Title IX. After *Franklin*, Title IX had been held to prohibit both *quid pro quo* and hostile environment teacher-student harassment. There was less judicial consensus, however, regarding legal standards for holding an educational institution liable for a sexually hostile educational environment created by student or teacher misconduct.

The appropriate standard for measuring a school district's liability for sexual abuse of a student by a teacher remained unsettled until the Supreme Court ruling in

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[111] See Hernandez v. Wangen, 938 F. Supp. 1052 (D.P.R. 1996) and cases listed therein.

[112] 20 U.S.C. § 1681 (a).

[113] 34 C.F.R. § 100.7(d)(1)(1995).

[114] 441 U.S. 677 (1979).

[115] 503 U.S. 60 (1992).

*Gebser v. Lago Vista Independent School District.*[116] The federal courts of appeals and district courts had adopted a variety of standards, including strict liability;[117] a "knew or should have known" negligence standard;[118] a theory of intentional discrimination;[119] or imputed liability based on principles of agency law.[120] In a series of three rulings, the Fifth Circuit has rejected each of these approaches in favor of a more stringent standard requiring "actual knowledge" by responsible school officials.[121]

On June 22, 1998, in *Gebser,* the Supreme Court answered the question of what standard of liability to apply to school districts under Title IX where a teacher harasses a student without the knowledge of school administrators. Jane Doe, a thirteen year old student, had been sexually abused by a teacher, but there was no evidence that any school official was aware of the situation until after it ended. Instead of strict liability or theory of constructive notice, Doe relied on the familiar common law principle later applied by the Court in *Ellerth* and *Faragher* that an employer is vicariously liable for an employee's injurious actions, even if committed outside the scope of employment, if the employee "was aided in accomplishing the tort by the existence of the agency relationship."[122] According to this theory, the harasser's status as a teacher made his abuse possible by placing him in an authoritative position to take advantage of his adolescent student. Because teachers are almost always "aided" by the agency relationship, however, and application of the common law rule "would generate vicarious liability in virtually every case of teacher-student harassment," the Fifth Circuit rejected the approach in favor of its actual knowledge standard.

In a 5 to 4 opinion by Justice O'Connor, the Supreme Court affirmed, avoided any comparison to the strict liability and affirmative defense framework promulgated for Title VII employment law. It held that a student who has been sexually harassed by a teacher may not recover damages against the school district "unless an official of the school district who at a minimum has authority to institute corrective measures on the district's behalf has actual knowledge of, and is deliberately indifferent to, the teacher's misconduct." The differing legislative constructs of Title VII and Title IX,

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[116] 118 S.Ct 1989 (1998).

[117] See Bolon v. Rolla Public Schools, 917 F. Supp. 1423 (E.D.Mo. 1996).

[118] Deborah O. v. Lake Central School Corp. 61 F.3d 905 (7th Cir. 1995)(school liable if it "knew or should have known about the harassment and yet failed to take appropriate remedial action").

[119] RLR v. Prague Public School District I-103, 838 F. Supp. 1526 (W.D.Okla. 1993)(school district not liable for sexual abuse by basketball coach because parents of student victim "failed to come forward with any facts showing the custom or policy, acquiescence in, conscious disregard of, or failure to investigate or discipline on the part of the school district").

[120] Doe v. Claiborne County, Tennessee, 103 F.3d 495 (6th Cir. 1996)(institution not liable unless teacher is aided in the harassment by an agency relationship with the institution).

[121] Canutillo Independent School District v. Leija, 101 F3d 393 (5th Cir. 1996); Rosa H. v. San Elizario Independent School District, 106 F.3d 648 (5th Cir. 1997); Doe v. Lago Vista Independent School District, 106 F.3d 1223 (5th Cir. 1997).

[122] Id. at 1225 (citing Restatement (Second) of Agency § 219(2)(d)(1958).

and an apparent reluctance to impose excessive financial liability on schools, appeared to drive the Court's decision.

Unlike Title VII, Title IX has been judicially determined to provide only an "implied" private right of action and rather than a statute of general application, it imposes legal obligations only as a condition to the receipt of federal financial assistance. These distinctions persuaded the Court to "shape a sensible remedial scheme that best comports with the statute" and its legislative history. In analyzing congressional intent, the Court examined the statutory provisions for Title IX enforcement by means of federal agency termination of federal funds to noncomplying school districts following notice and opportunity to be heard. Given the express notice requirement of the statute, the majority felt it unfair to impose a vicarious or constructive notice standard on school districts in private lawsuits. Moreover, there was concern that the award of damages in any given case might unfairly exceed the amount of federal funding actually received by the school. Consequently, there was no actionable Title IX claim since responsible school administrators were without notice or "actual knowledge" of the alleged sexual relationship. The Court summarily noted that Lago Vista's failure to promulgate and publicize an anti-harassment policy and grievance procedure, as mandated by U.S. Department of Education regulations, established neither actual notice, deliberate indifference, or even discrimination under Title IX.

The dissenters argued that the rationale for Title VII respondeat superior or vicarious liability — to induce the employer to take corrective action and limit damages — also applied to Title IX sexual harassment. Justice Stevens contended that the majority's rule creates the opposite incentive, encouraging schools to insulate themselves from knowledge, and predicted that few Title IX plaintiffs who have been sexually harassed will be able to recover damages under "this exceedingly high standard." In addition to urging vicarious liability, Justice Ginsburg proposed to permit schools, akin to the standard in *Faragher*, to assert internal procedures as an affirmative defense.

*Davis v. Monroe County Board of Education*, decided in 1999, addressed the standard of liability that should be imposed on school districts to remedy student-on-student harassment.[123] The plaintiff in *Davis* alleged that her fifth-grade daughter had

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[123] Prior to Davis, the federal appeals courts were divided between those which refused to award Title IX damages or injunctive relief against a school district for student-on-student or "peer" sexual harassment, Rowinsky v. Bryan Independent School District, 80 F.3d 1006 (5th Cir.), cert. denied 519 U.S. 861 (1996), Davis v. Monroe, 120 F.3d 1390 (11th Cir. 1997), and others, which had applied agency principles and Title VII legal standards to hold school officials liable for failure to take reasonable steps to prevent known hostile environment harassment by students or other third parties. Murray v. New York Univ. College of Dentistry, 57 F.3d 243, 248-50 (2d Cir. 1995)(discussing Title VII standards in analyzing Title IX sexual harassment claim); Brown v. Hot, Sexy and Safer Products, Inc., 68 F.3d 525, 540 (lst Cir. 1995)(applying Title VII principles to Title IX hostile environment sexual harassment claim), cert. denied 516 U.S. 1159 (1996); and Clyde K. v. Puyallup School Dist., 35 F.3d 1396, 1402 (9th Cir. 1994)("school officials might reasonably be concerned about liability for failing to remedy peer sexual harassment that exposes female students to a hostile

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been harassed by another student over a prolonged period – a fact reported to teachers on several occasions – but that school officials had failed to take corrective action. Justice O'Connor, writing for a sharply divided court, determined that the plaintiff had stated a Title IX claim. Because the statute restricts the actions of federal grant recipients, however, and not the conduct of third parties, the Court again refused to impose vicarious liability on the school district. Instead, "a recipient of federal funds may be liable in damages under Title IX only for its own misconduct." School authorities' own "deliberate indifference" to student-on-student harassment could violate Title IX in certain cases. Thus, the Court held, where officials have "actual knowledge" of the harassment, where the "harasser is under the school's disciplinary authority," and where the harassment is so severe "that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school," the district may be held liable for damages under Title IX.

In qualifying the *Davis* standard, the Court suggests that student harassment may be far more difficult to prove than sexual harassment in employment. Beyond requiring "actual knowledge," Justice O'Connor cautioned that "schools are unlike adult workplaces" and disciplinary decisions of school administrators are not to be "second guess[ed]" by lower courts unless "clearly unreasonable" under the circumstances. Additionally, the majority emphasized that "damages are not available for simple acts of teasing and name-calling among school children, even where these comment target differences in gender." In effect, *Davis* left to school administrators the task of drawing the line between innocent teasing and actionable sexual harassment – a difficult and legally perilous task at best.

On March 13, 1997, before the Supreme Court ruling in *Gebser,* OCR issued a policy guidance addressing the institutional liability of school districts for harassment of students by teachers or other students. That policy states that a school district or other funded educational agency may be liable under Title IX if the institution knew, or should have known, that a student was being subjected to hostile environment sexual harassment by other students and fails to take appropriate corrective action. For quid pro quo harassment of a student by a teacher or other employee—involving, for example, use of grading authority to extort sexual favors—a district "will always be liable for even one instance" of abuse, regardless of its actual or constructive knowledge. Liability for a "hostile or abusive educational environment" attaches, according to OCR, if the harassing teacher or employee "reasonably" appeared to act on the school's behalf, i.e. with "apparent authority" or was "aided" in the harassment by reason of "position of authority" with the institution. A school district is also liable under the guidance if it fails to take immediate and appropriate steps to remedy known harassment.[124] These standards appear to conflict with *Gebser* and *Davis* insofar as they would permit finding an institution liable for student harassment based on "constructive knowledge"– that is, what school administrators reasonably should have known – or the "apparent authority" of the alleged harasser, regardless of what they actually knew.

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[123] (...continued)
educational environment").

[124] Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12034, 12039-40 (1997).

## Violence Against Women Act

The Violence Against Women Act (VAWA) was enacted by Congress in 1994 "to protect the civil rights of victims of gender-motivated violence." It imposed new criminal penalties for certain specified offences and created a private cause of action for civil damages against persons who perpetrate "crime[s] of violence motivated by gender."[125] Specific "crimes of violence" triggering statutory coverage include "State or Federal offenses" that would constitute "a felony against the person. . .or a felony against the property," as recognized by federal law,[126] and which pose "a serious risk of physical injury to another," whether or not the misconduct alleged ever resulted in actual charges or a prior criminal action. To be actionable under VAWA, however, the complainant has to show that the offense was "motivated by gender," i.e., that the predicate crime was committed "because of gender or on the basis of gender,"[127] and was at least partially due to "an animus based on the victim's gender."

According to the legislative history, "proof of 'gender motivation' under Title III" of VAWA is to "proceed in the same ways proof of race or sex discrimination proceeds under other civil rights laws. Judges and juries will determine 'motivation' from the 'totality of the circumstances' surrounding the event."[128] In this regard, legal standards for proof of "hate crimes" may be "useful," such as "language used by the perpetrator; the severity of the attack (including mutilation); the lack of provocation; previous history of similar incidents; absence of any other apparent motive (battery without robbery, for example); common sense."[129] In other words, no cause of action will lie for injury resulting from mere "random" acts of violence, regardless of the gender of the victim, where it is not proven that the perpetrator was gender-motivated.[130]

The enforcement mechanism provided for this new right to be free of gender-motivated violent crime is a private civil action in federal (or state) court. The prevailing plaintiff in a judicial action may obtain compensatory and punitive damages, injunctive relief, and "such other relief as the court deems appropriate." While predicated upon conduct that is made criminal by other federal and state law provisions, the statute does not require a prior criminal complaint, prosecution, or conviction to establish the elements of a cause of action. No federal administrative

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[125] 42 U.S.C. § 13981.

[126] 18 U.S.C. § 16. In effect, the bill incorporates the existing federal criminal code definition of "crime of violence" as predicate for a civil rights violation under VAWA.

[127] Id. at § 13981(e)(1).

[128] S. Rep. No. 103-138, at 52 (1992).

[129] Id. at 52 n. 61.

[130] Under evidentiary standards prescribed by § 13981(e)(1), the complainant must prove gender motivation "by a preponderance of the evidence."

scheme is authorized for VAWA enforcement.[131] But parallel civil and criminal proceedings for conduct which constitutes a VAWA offense are not precluded.

To some extent, VAWA overlapped and supplemented the protection of Title VII for women victimized by gender-motivated violence and harassment in the workplace. Title VII applies only to employment, but even there excludes a large segment of the national workforce employed by companies and firms with fewer than 15 employees. A condition precedent to a Title VII judicial action is that the complaining employee or applicant first resort to the EEOC administrative process for voluntary negotiation and conciliation of the matter between the parties. Moreover, while the 1991 amendments added provisions for jury trials and compensatory and punitive damage awards in Title VII actions, such relief is limited by monetary "caps" that find no parallel in later law. The element of "violence," however, is not a requisite of the offense under either the Title VII or Title IX.

The 1994 law's statement of purpose anchored the civil rights remedy for gender-motivated violence to the "affirmative" power of Congress under the Commerce Clause of the U.S. Constitution and § 5 of the Fourteenth Amendment. Congressional power to prohibit or remedy equal protection or due process violations has historically been limited by judicial construction of the Fourteenth Amendment to "state action" or private conduct actively supported by the state or its agents. As discussed below, the power of Congress to regulate purely private conduct pursuant to its §5 power, always problematic, may now be a dead letter. Similarly, recent Supreme Court rulings have largely eviscerated congressional authority to regulate non-economic activities "affecting commerce" by application of civil or criminal sanctions.

In *United States v. Lopez,*[132] the Supreme Court invalidated, as exceeding Congress' commerce powers, the Gun-Free School Zones Act of 1990[133], which made a federal offense of possessing a firearm within 1,000 feet of a school. As traditionally applied, the Commerce Clause permits Congress to regulate "use of the channels" and "instrumentalities" of interstate commerce, as well as activities within a state that "substantially affect" its flow. Despite the absence of congressional findings, the Government in *Lopez* claimed that the statute regulated an activity which substantially impacted interstate commerce because possession of firearms in a school zone may result in an increase in violent crime. Criminal violence, in turn, affects the national economy by increasing insurance costs, reducing the willingness of persons to travel to areas of the country perceived as unsafe, and by diminishing productivity due to impaired student learning environments. The Supreme Court concluded, however, that the regulated activity—firearm possession within a school zone—was beyond Congress' constitutional reach since it had "nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." The Court

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[131] This is in contrast to the voluntary negotiation and conciliation procedures of the Equal Employment Opportunity Commission which must be pursued before filing a federal lawsuit seeking relief from sexual harassment in the workplace under Title VII of the 1964 Civil Rights Act. 42 U.S.C. §§ 2000e et seq.

[132] 514 U.S. 549 (1995).

[133] 18 U.S.C. § 922(a)(1)(A).

rejected the Government's "cost of crime" argument as an overly expansive theory which would permit Congress to "regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce." Were this argument successful, the Court reasoned, "it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign."

The first criminal prosecution under VAWA involved a husband who was convicted of interstate domestic violence for severely beating his wife in their home and subsequently driving her in and out of West Virginia for a period of five days before taking her to a hospital in Kentucky. On appeal, in *United States v. Bailey*,[134] the defendant challenged his conviction on the grounds that the interstate domestic violence statute, 18 U.S.C. § 2261(a), exceeded Congress' powers under *Lopez* since it concerned neither "channels" nor "instrumentalities" of commerce, and was not related in any "substantial" way to commercial activity. The Fourth Circuit disagreed, upholding both the VAWA provision and the conviction. *Lopez* was distinguished as not applicable to the domestic violence statute which required the crossing of a state line, "thus placing the transaction squarely in interstate commerce." Constitutional support for VAWA was drawn from earlier decisions approving the White Slave Traffic Act of 1910[135] and the Mann Act[136] which condemned transportation in interstate commerce for various "immoral" purposes. In other words, the *Lopez* analysis was not relevant to the VAWA criminal provision, which incorporates an interstate component similar to these earlier statutes and "requires the commission of a crime of violence causing bodily injury, which certainly is not different from the immoral purpose forbade in *Cleveland* and the debauchery forbade in *Caminetti*."

Likewise, the Eighth Circuit U.S. Court of Appeals in *United States v. Wright*[137] sustained a VAWA provision making it a federal crime to cross a state line with the intent to violate a state protective order and then to violate it.[138] A federal district court had voided the statute on the grounds that crossing state lines to violate a protective order was not a commercial activity and "does not substantially affect interstate commerce." The appeals court agreed that the "affecting commerce" test of *Lopez* was not germane but rejected the conclusion that crossing state lines for noncommercial purposes is not interstate commerce. Judicial rulings upholding a variety of federal offenses, from Mann Act to the crime of traveling in interstate commerce to avoid prosecution, had consistently affirmed that "crossing state lines, without more, is interstate commerce." Also relevant was the fact that the statute required not only the crossing of a state line with prohibited intent, but that the perpetrator actually act on that intent. The defendant's Tenth Amendment challenge to the statute was also rejected.

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[134] 112 F.3d 758 (4th Cir. 1997).

[135] Caminetti v. United States, 242 U.S. 470 (1917).

[136] Cleveland v. United States, 329 U.S. 14 (1946).

[137] 128 F.3d 1274 (1997).

[138] 18 U.S.C. § 2262(a)(1).

Early judicial challenges to VAWA's civil remedy provision had also affirmed a relatively expansive interpretation of congressional power. In *Doe v. Doe*,[139] the plaintiff alleged a pattern of "systematic and continuous" physical and emotional abuse at the hands of her spouse over a seventeen year period resulting in severe emotional distress, trauma, and depression. The defendant spouse moved to dismiss, claiming that Congress lacked authority under either the Commerce Clause or the Fourteenth Amendment to enact the VAWA remedy for gender-based violence. The federal district court rejected the motion, however, finding support for Congress' judgment that violence against women was a "national problem with substantial impact on interstate commerce." A "rational basis" for the legislation was found in "statistical, medical, and economic data before the Congress" that was lacking in *Lopez*. The Senate Report, for example, indicated that 50% of rape victims leave the work force involuntarily and that "fear of gender-based crimes restricts movement, reduces employment opportunities, increases health expenditures, and reduces consumer spending, all of which affect interstate commerce and the national economy."[140] Moreover, VAWA was found to "complement" rather than encroach upon state procedures because it remedied "deficiencies" in existing state and federal legal protections against gender-based violence while preserving traditional state tort remedies. The federal safeguards were further justified, said the *Doe* Court, given the special harm, community unrest, and likelihood of retaliation, provoked by bias-inspired crime.

The constitutionality of VAWA's civil damages remedy for gender-based violence[141] had been sustained by eleven federal district courts when the Fourth Circuit *en banc* reversed an earlier panel decision and invalidated the statute.[142] In *U.S. v. Morrison*,[143] the Supreme Court affirmed the appeals court's conclusion that the civil remedy provision of VAWA exceeded Congress' constitutional authority. The case involved a civil action by a female Virginia Tech student against two male student athletes who verbally berated and raped her three times within minutes of their first meeting. Administrative proceedings against the perpetrators under the university's "Sexual Assault Policy" were dismissed or set-aside on two separate occasions, and the sexual violence had gone unpunished by state officials, when the female victim turned for relief to the federal courts. The district judge was convinced by the "totality of circumstances" – including vulgar statements made by the defendants concerning the assaults and the "gang rape" aspect of the case – that "gender animus" was the underlying motivation for the crime. But he voided the statute, since to equate the impact of gender-motivated crime with interstate commerce would "extend Congress' power. . . and unreasonably tip the balance away from the states."

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[139] 929 F. Supp. 608 (D.Conn. 1996).

[140] S.Rep. 138, 103d Cong., lst Sess. 54 (1993).

[141] 42 U.S.C. § 13981(c).

[142] Brzonkala v. Virginia Polytechnic and State University, 169 F.3d 820 (4th Cir. 1999)(en banc).

[143] 120 S.Ct. 1740 (2000).

That decision was reviewed initially by a three-judge appellate panel, which applied a "rational basis" standard in concluding that the "regulated activity" substantially affected interstate commerce. In contrast to the congressional silence in *Lopez*, the *Brzonkala* panel cited "voluminous findings" from the committee reports on the social and economic costs of gender-motivated crimes which warranted judicial deference and a "strong presumption of validity and constitutionality." In a an *en banc* rehearing, the full Fourth Circuit reversed, finding it "impossible to link such violence with a particular interstate market or with any specific obstruction of interstate commerce." Rather, the relationship between gender violence and commerce was too "attenuated" and indistinguishable from that existing "between any significant activity and interstate commerce." Invoking federalism concerns, the court declined to "rely[ ] on arguments that lack any principled limitations and [that] would, if accepted, convert the power to regulate interstate commerce into a general police power."

These proceedings set the stage for the Supreme Court's long awaited decision on May 16, 2000 in *U.S. v. Morrison*, holding that Congress had overstepped its constitutional bounds when it passed the VAWA civil remedy. Declaring that "the Constitution requires a distinction between what is truly national and which is truly local," a five- Justice majority led by the Chief Justice rejected each of the two sources of constitutional authority asserted by Congress to support the legislation. The law was neither a valid regulation of interstate commerce nor a proper means of enforcing the equal protection guarantee of the Fourteenth Amendment. The commerce clause provided no basis for the Act, the Court said, despite the extensive record compiled and the findings enacted that the problem of violence against women had a substantial and deleterious effect on commerce. Just as the "noneconomic, criminal nature of the conduct at issue" was crucial to the demise of the Gun-Free School Zone Act in *Lopez,* gender-motivated crimes of violence were, for the majority, "not in any sense of the phrase economic activity." Thus, congressional findings to the effect that gender-based violence deterred travel or employment of victims, diminished national productivity or added to national medical costs did not rationally support the legislation or require deference by the Court. In addition, the findings were "substantially weakened" by a "but-for causal chain," allowing "Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption." Such reasoning was faulty under *Lopez*, the majority argued, because it would permit federal regulation of family law and other traditional areas of state concern, "completely obliterat[ing] the Constitution's distinction between national and local authority."

Section 5 of the Fourteenth Amendment likewise provided no basis for the civil remedy provision because the constitutional guarantee of equal protection is directed at the states and its officials, not at private "individuals who have committed criminal acts motivated by gender bias," who are the sole targets of the statute. Since the VAWA civil remedy did nothing to the states or state officers, it was not a valid exercise of the § 5 enforcement power. The Court also noted that the statute applies uniformly throughout the states, while the legislative record failed to demonstrate that gender-motivated crimes occur equally in all states, or even most states. Therefore, the VAWA remedy did not meet the judicial requirements of "congruence" and "proportionality" with the problem it seeks to address. The Court did not explain why

Congress could not, if it decided the states were failing because of prejudice or animus to protect women, provide a federal remedy against private individuals.

Joining Chief Justice Rehnquist in the majority were Justices O'Connor, Scalia, Kennedy, and Thomas. Justice Souter dissented, along with Justices Stevens, Ginsburg, and Breyer, who charged that the majority with revision of the substantial effects test under the commerce clause by discounting its "cumulative effects and rational basis features." This "defect" in the majority's reasoning was its "rejection of the Founders' considered judgment that politics, not judicial review, should mediate between state and national interests as the strength and legislative jurisdiction of the National Government inevitably increased through the expected growth of the national economy."

## United States v. Lanier

On March 31, 1997, the U.S. Supreme Court vacated a ruling by the Sixth Circuit U.S. Court of Appeals which had reversed the conviction of David Lanier, a Tennessee Chancery Court judge, for willful deprivation of federal constitutional "rights, privileges, or immunities" under color of law in violation of 18 U.S.C. § 242. The charges against Lanier stem from allegations that he raped, assaulted, or harassed eight women in his chambers who either worked for the judge, worked with him, or had cases pending before his court. The "right, privilege or immunity" allegedly violated was identified as a Fourteenth Amendment due process guarantee of "bodily integrity"—specifically, the right to be free of sexual assault by a state official. After a trial, Lanier was convicted on two felony and five misdemeanor counts of violating § 242 and was sentenced to a total of twenty-five years in prison. A panel of the Court of Appeals for the Sixth Circuit affirmed the conviction and sentence, but the full court overturned the decision and granted rehearing *en banc*.[144]

Invoking established rules of construction for criminal statutes, and the Supreme Court ruling in *Screws v. United States*,[145] the *en banc* majority set-aside the conviction on the grounds that existing § 242 precedents failed to adequately notify the public that simple or sexual assault crimes invaded a constitutional right or liberty protected by the statute. To avoid unconstitutional vagueness, a plurality of the *Screws* Court had construed the statute to require proof of "specific intent" to deprive the victim of a right "made specific either by the express terms of the Constitution. . .or by decisions interpreting them." The Federal Government had argued that a due process right to be free of unwarranted assault recognized by lower court decisions in other contexts provided adequate notice of criminal conduct to be punished. But due to the statute's "abstract" nature, and discrepancies among the circuits and federal district courts in their recognition of "new" constitutional rights, Chief Judge Merritt felt that "[o]nly a Supreme Court decision with nationwide application can make specific a right that can result in § 242 liability" and only when the right had been made to apply in "a factual situation fundamentally similar to the one at bar." The *en banc* court conceded the "outrageous" nature of Judge Lanier's conduct, but found that since the Supreme

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[144] 43 F.3d 1033 (6th Cir. 1995).

[145] 325 U.S. 91 (1945).

Court had not so ruled in a "fundamentally similar" situation, the supposed right to be free of sexual assault could not form the basis for a federal prosecution.

Writing for a unanimous Supreme Court, Justice Souter faulted the Sixth Circuit for applying too restrictive a standard and for concluding that § 242 could never incorporate "newly-created constitutional rights." The "fair warning" requirement in *Screws* was not a "categorical rule" excluding from the universe of §242 safeguards any right not specifically identified by prior Supreme Court decisional law. To interpret the statute so restrictively, said the Court, was "unsound," contradicting both the legislative and judicial history of the criminal civil rights provisions and decisional law governing the corollary "clearly established" qualified immunity standard applied by the courts to determine civil liability of state officials under 42 U.S.C. 1983. The "touchstone" for imposing § 242 criminal liability is whether the statute, either standing alone or as construed by the courts at all levels, "made it reasonably clear at the relevant time that the defendant's conduct was criminal." According to Justice Souter, "general statements of the law" could provide "fair and clear warning" and may apply "with obvious clarity," in at least some situations, even though the particular conduct in question had not previously been held unlawful in precisely the same circumstances.

The Supreme Court's disposition of *Lanier* avoided decision of the main substantive issue in the case—that is, the constitutional status of the right to be free from sexual harassment and abuse at the hands of state officials. Other aspects of the ruling, however, and its contemporary legal background suggested the probable legal outcome of the case on remand. First, in a concluding footnote the Court rejected "as plainly without merit" several arguments—including the unavailability of § 242 to enforce due process rights—made by Judge Lanier and relied upon by the Sixth Circuit to reach its earlier decision. This complicated the task of defending Judge Lanier's position on remand. In his background discussion of the case, Justice Souter also quotes with seeming approval from the trial judge's instruction to the jury that the Fourteenth Amendment protection of bodily integrity includes "the right to be free from certain sexually motivated physical assaults and coerced sexual battery." This instruction appears to conform to the weight of existing lower federal court precedent, including a Sixth Circuit decision since *Lanier*,[146] making it difficult for the appeals court to reiterate its earlier finding that Judge Lanier did not have "fair warning" that his conduct violated constitutional rights.[147] In addition, Congress has enacted legislation based on the assumption that § 242 punishes sexual assaults. [148] Finally, the

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[146] Doe v. Claiborne County, 103 F.3d 495 (6th Cir. 1996)..

[147] See, e.g. Doe v. Taylor Independent School District, 15 F.3d 443, 451 (5th Cir.), cert. denied, 115 S. Ct. 70 (1994)(teacher's sexual abuse of a student "deprived [the student] of a liberty interest recognized under the substantive due process component of the Fourteenth Amendment"); Dang Vang v. Vang Xiong X. Toyed, 944 F.2d 476, 479 (9th Cir. 1991)(plaintiff's constitutional right were violated in a § 1983 case when she was raped by a state welfare official); and Stoneking v. Bradford Area School District, 882 F.2d 720, 727 (3d Cir. 1989), cert. denied, 493 U.S. 1044 (1990)("the constitutional right. . .to freedom from invasion of. . .personal security through sexual abuse, was well established" by the early 1980's).

[148] In the Violent Crime Control and Law Enforcement Act of 1994, Congress required

(continued...)

U.S. Justice Department brief in *Lanier* noted that it prosecutes thirty cases per year under § 242, many based on a due process right to bodily integrity. Since 1981, the Civil Rights Division of DOJ had prosecuted at least twenty-nine §242 cases involving sexual assault by public officials, most involving a woman who was sexually assaulted by a jailor, police officer, or border patrol agent. However, three other cases besides *Lanier* involved sexual assault by state judges—two resulting in guilty pleas, the third in acquittal.

In sum, *Lanier* questioned the fundamental nature of "constitutional crimes" prohibited by § 242, a statute notable for its definitional vagueness and described by the court of appeals as "perhaps the most abstractly worded statute among the more than 700 crimes in the federal criminal code." Since the federal "rights, privileges, or immunities" whose official invasion may be the predicate for a § 242 prosecution are not plainly spelled out by statute, its scope has traditionally been determined by the courts according to contemporary constitutional understanding of those terms. Justice Souter, in his opinion, appears largely unmoved by respondent's argument that to permit a § 242 prosecution of Judge Lanier would encroach upon the traditional police powers of the state and impermissibly "federalize," by judicial decree, state offenses like rape and sexual assault into a federal "common law" of crime. Nonetheless, as noted earlier, solicitude for federalism and our dual system of government was a factor limiting Congress' commerce power to enact the Gun-Free School Zones Act in *Lopez* and could inform judicial review of the corollary issue posed by *Lanier*. To what extent, if any, such objections may influence renewed judicial consideration of the case can only be speculated. At this point, however, *Lanier* appears to expand the general availability of § 242 as a safeguard against official deprivation of federal constitutional rights and, in addition, may constitutionally buttress the civil remedy for gender-motivated violence in VAWA, at least as applied to acts of violence by governmental agents or others acting under color of law.

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[148] (...continued)
enhanced punishment for several crimes in aggravated circumstances, including sexual violence. That enhancement provision applied to violations of § 242. See P.L. 103-322 § 320103(b)(3), 108 Stat. 2109.