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## **Discrimination Cases in the Supreme Court's 1997 Term (The Supreme Court and State and Local Government Law: The 1997-1998 Term)**

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## DISCRIMINATION CASES IN THE SUPREME COURT'S 1997 TERM

*Eileen R. Kaufman\**

*Hon. Leon D. Lazer:*

Our next speaker is the Vice-Dean of Touro and an expert in the area of sexual harassment and discrimination in general. She has lectured on these subjects numerous times before various groups including the Supreme Court Justices Association. She is also a reporter for the Pattern Jury Instruction Committee, and she is a first class lawyer, and, as you are going to hear in a moment, she is a first class speaker. Dean Kaufman.

*Dean Eileen Kaufman:*

Thank you, Leon. The Supreme Court decided a record number of discrimination cases last term; four dealing with sexual harassment, two with disability discrimination, and the last with discrimination based on gender but within an immigration context. My focus today will be on the sexual harassment cases because, undoubtedly, they were among the most important decisions of the term.

The fact that the court decided four sexual harassment cases in one term is truly astounding given the fact that this has been an area of law not known for high court guidance. To the delight of all parties concerned with the enforcement of sexual harassment laws, and I include women's rights groups, chambers of commerce, the practicing bar, and the federal bench itself, these cases resolved a "bewildering array" of lower court opinions. The decisions eliminated considerable confusion on a number of issues, such as whether same sex sexual harassment is cognizable under Title VII,<sup>1</sup> and under what circumstances an employer can be liable

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for sexual harassment practiced by a supervisor, or a school district for harassment by a teacher.

In the first case, *Oncale v. Sundowner Offshore Services*,<sup>2</sup> the Court held that Title VII does indeed encompass same sex sexual harassment. The plaintiff, Joseph Oncale, worked for Sundowner as a roustabout on an oil platform.<sup>3</sup> He was a member of an eight-man crew, some of whom had supervisory authority over him.<sup>4</sup> Those supervisors forcibly subjected him to sex-related, humiliating actions, including physically assaulting him in a sexual way and threatening him with rape.<sup>5</sup> The Supreme Court opinion spares us the precise and rather gory details "in the interest of brevity and dignity," although the Court of Appeals opinion describes, among other things, a forcible sodomy incident involving a bar of soap.<sup>6</sup>

Plaintiff complained about this conduct to a supervisor who failed to respond.<sup>7</sup> Oncale then quit and requested that his pink slip note that he "voluntarily left due to sexual harassment and verbal abuse."<sup>8</sup> Both the district court and the Fifth Circuit concluded he had no cause of action because Title VII does not encompass same sex sexual harassment.<sup>9</sup> The Supreme Court reversed, in a short, unanimous decision, analogizing to racial discrimination, where the Court rejects any presumption that an

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for the New York Pattern Jury Instructions. She has published primarily in the area of civil rights law.

<sup>1</sup> Title VII of Civil Rights Act of 1964 (42 U.S.C. § 2000e-2(a)(1) provides, in relevant part, that "[I]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . . ."

<sup>2</sup> 118 S. Ct. 998 (1998) [hereinafter *Oncale I*].

<sup>3</sup> *Id.* at 1000.

<sup>4</sup> *Id.* at 1001.

<sup>5</sup> *Id.*

<sup>6</sup> *Oncale v. Sundowner Offshore Svcs., Inc.*, 83 F.3d 118, 118-19 (5th Cir. 1996) [hereinafter *Oncale II*].

<sup>7</sup> *Oncale I*, *supra* note 2, at 1001.

<sup>8</sup> *Id.*

<sup>9</sup> *Oncale v. Sundowner Offshore Svcs., Inc.*, 1995 U.S. Dist. LEXIS 4119; *Oncale v. Sundowner Offshore Svcs., Inc.*, 83 F.3d 118 (1996). The Fifth Circuit cited as binding *Garcia v. Elf Atochem North America*, 28 F.3d 446, 451-52 (5th Cir. 1994).

employer will not discriminate against members of his or her own race.<sup>10</sup> The Court said, "nothing in Title VII necessarily bars a claim of discrimination because of sex merely because the plaintiff and the defendant are of the same sex."<sup>11</sup>

Further, in a very important clarification, the Court stated that "harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex."<sup>12</sup> So, for example, conduct that signifies a general hostility to women in the workplace would be actionable harassment. The conduct does not have to be related to sexual desire.

In response to the concern that this decision will convert Title VII into a general civility code for the American workplace, the Court emphasized that the statute prohibits only that behavior that is so objectively offensive as to alter the conditions of the victim's employment.<sup>13</sup> Quoting from *Harris v. Forklift Systems, Inc.*,<sup>14</sup> and *Meritor Savings Bank, F.B. v. Vinson*,<sup>15</sup> the Court's previous two forays into the world of sexual harassment, the Court reiterated that conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment (environment that a reasonable person would find hostile or abusive), is beyond Title VII's purview.<sup>16</sup>

In *Harris*, which we discussed at this conference a few years ago,<sup>17</sup> the Court adopted a standard that has both a subjective and objective component: subjective in that the actual victim must perceive and experience the environment to be hostile and objective in that it has to be offensive to a reasonable person in the

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<sup>10</sup> Oncale I, *supra* note 1 (citing *Castaneda v. Partida*, 430 U.S. 482, 499 (1977)).

<sup>11</sup> *Id.* at 1002.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> 51 U.S. 17, 21 (1993) (holding that to be actionable as an "abusive work environment," harassing conduct need not affect the claimant's psychological well being or cause the claimant to suffer injury).

<sup>15</sup> 477 U.S. 57, 64 (1986) (noting that the correct inquiry on the issue of sexual harassment was whether sexual advances were unwelcome, not whether employee's participation in them was voluntary). The first sexual harassment case to reach the United States Supreme Court was *Meritor. Id.*

<sup>16</sup> Oncale I, *supra* note 2, at 1003.

<sup>17</sup> Eileen Kaufman, *Employment Discrimination: Recent Developments in the Supreme Court*, 11 *TOURO L. REV.* 465, 468-471 (1995).

plaintiff's position.<sup>18</sup> Thus, the statute does not reach what Justice Scalia refers to as "genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex,"<sup>19</sup> nor does it reach ordinary socializing in the workplace such as, male-on-male horseplay or intersexual flirtation, nor does it require asexuality or androgyny in the workplace.<sup>20</sup>

The Court reaffirmed in this decision that the objective severity of the harassment must be judged "from the perspective of a reasonable person in the plaintiff's position" and with common sense and an appropriate sensitivity to social context.<sup>21</sup> What does that mean? The Court uses the following illustration:

[a] professional football player's working environment is not severely or pervasively abusive if the coach smacks him on the buttocks as he heads onto the field, but the same behavior would reasonably be experienced as abusive by the coach's secretary, be that secretary male or female, back at the office.<sup>22</sup>

While this decision certainly clarifies the issue by rejecting not only those cases holding that same sex harassment is never cognizable under Title VII, but also those cases requiring the plaintiff to prove that the harasser is homosexual and motivated in his behavior by sexual desire, the decision, nevertheless, injects a new uncertainty into the area.

Let me explain what I mean. In his decision, Justice Scalia repeatedly emphasized that Title VII proscribes discrimination.<sup>23</sup> It is a difference in treatment, discrimination, that is at the heart of Title VII. Justice Scalia commented that the critical issue is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex

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<sup>18</sup> Harris, *supra* note 14, at 21.

<sup>19</sup> Oncale I, *supra* note 2, at 1003.

<sup>20</sup> Oncale I at 1003.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 1001,1002 (stating for example, "Title VII's prohibition of discrimination 'because of . . . sex,'" and "Title VII . . . is directed only at 'discrimination . . . because of . . . sex.'")

are not exposed.<sup>24</sup> The plaintiff must always prove that the conduct at issue was “not merely tinged with offensive sexual connotations but actually constituted sexual ‘discrimination’ . . . because of . . . sex.”<sup>25</sup>

The question raised by that language is what about the equal opportunity harasser, the employer who creates a hostile environment for both men and women, or the employer who offers job advancement to both males and females in exchange for sexual favors. Does this decision mean that such conduct would not be encompassed under Title VII? While that does not seem consistent with the statutory objectives, a literal reading of Justice Scalia’s opinion does raise the question.

The next pair of cases, which were decided on the last day of the term, were probably the two most important sexual harassment cases of the term. The Court resolved an issue that had generated considerable confusion in lower courts, the issue of employer liability. Under what circumstances will an employer be liable for sexual harassment practiced by a supervisor? In *Burlington Industries, Inc. v. Ellerth*<sup>26</sup> and *Faragher v. City of Boca Raton*,<sup>27</sup> the Court laid out a definitive and detailed rule for resolving these issues and, in doing so, brought some needed coherence to what had been a previously muddled area of law.

The plaintiff in *Burlington Industries*, Kimberly Ellerth, was a saleswoman who was subjected to constant sexual harassment by her supervisor, a middle-level manager.<sup>28</sup> The supervisor repeatedly made comments about her body, told her to loosen up, and said, “You know Kim, I could make your life very hard or very easy at Burlington.”<sup>29</sup> When she was being considered for promotion he again said to her she was not loose enough and he then rubbed her knee.<sup>30</sup> She received the promotion, but was told by her supervisor that “you’re going to be out there with men that work in factories and they certainly like women with pretty butts

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<sup>24</sup> *Id.* (citing Harris, *supra* at 25, 126 L.Ed.2d 295, 114 S. Ct. 367 (Ginsburg, J., concurring)).

<sup>25</sup> *Id.* at 1003.

<sup>26</sup> 118 S. Ct. 2257 (1998) (hereinafter Burlington).

<sup>27</sup> 118 S. Ct. 2275 (1998).

<sup>28</sup> *Burlington*, *supra*, note 26, at 2262.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

and legs.”<sup>31</sup> On one occasion, when she called him, he responded by saying, “I don’t have time for you now, Kim, unless you tell me what you’re wearing.”<sup>32</sup> A few days later, he said, “are you wearing shorter skirts yet, Kim, because it would make your job a heck of a lot easier.”<sup>33</sup> A short time later, plaintiff quit. Although her initial explanation of her resignation did not refer to sexual harassment or to the conduct of her supervisor, three weeks later she sent a letter in which she explained that she quit because of her supervisor’s conduct.<sup>34</sup>

Her Title VII claim was dismissed in the district court.<sup>35</sup> Although it found the conduct to be sufficiently pervasive and severe to constitute a hostile environment, the Court concluded that the employer, Burlington Industries, did not have actual or constructive knowledge of the supervisor’s behavior and, therefore, could not be found liable.<sup>36</sup> The Seventh Circuit en banc reversed, producing eight opinions with eight different views on what the governing standard should be when a supervisor threatens to alter a subordinate’s terms or conditions but does not follow through on the threat.<sup>37</sup> It is in that posture that the case reached the Supreme Court.

The Court looked at principles of agency law,<sup>38</sup> particularly the Restatement of Agency, Section 219(1), which imposes liability on employers for torts committed by employees while acting within

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<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Ellerth v. Burlington Industries, Inc.*, 912 F. Supp. 1101 (N.D. Ill. 1996) (hereinafter *Ellerth*).

<sup>36</sup> *Id.*

<sup>37</sup> 123 F.3d 490, 495 (7th Cir. 1997)(en banc). The court stated “. . . certain views commend a majority within our court: in particular, that the standard for employer liability in cases of hostile-environment sexual harassment by a supervisory employee, is negligence, not strict liability, and that liability for *quid pro quo* harassment is strict even if the supervisor’s threat does not result in a company act.” *Id.*

<sup>38</sup> *Id.* at 2266. The Court used the definition of “employer” under Title VII which includes “agents.” *Id.* (citing 42 U.S.C. § 2000e(b)).

the scope of employment.<sup>39</sup> This is basic respondeat superior liability. Since scope of employment analysis typically requires conduct that, at least partially, benefits the employer, it will rarely serve as a predicate for imposing liability in sexual harassment cases because that kind of conduct is more likely to be actuated by purely personal desires. In tort law, we talk about the difference between a frolic and a detour when we talk about vicarious liability. Sexual harassment would clearly be treated as a frolic and, therefore, not within the scope of employment.

Other subsections of Section 219(2) of the Restatement provide alternate bases for imposing employer liability.<sup>40</sup> The first is the negligence standard, Section 219(2)(b), which provides for employer liability when the employer has been negligent or reckless.<sup>41</sup> The "employer is negligent with respect to sexual harassment if it knew or should have known about the conduct and failed to stop it."<sup>42</sup> Second, Section 219(2)(d) provides for employer liability when the employee was aided in accomplishing the harassment by the agency relationship.<sup>43</sup> Most of the Court's analysis is directed at the "aided by the relationship" standard.<sup>44</sup>

The most obvious category of cases calling for vicarious liability is the category of cases involving a tangible, concrete, adverse employment action. There, it is clear that the "aided by the relationship" standard is easily satisfied, because there is no other way that the supervisor could have brought about that adverse employment action. Examples include a firing, the denial of a

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<sup>39</sup> RESTATEMENT (SECOND) OF AGENCY § 219(1) (1957). This section states in pertinent part: "A master is subject to liability for the torts of his servants committed while acting in the scope of their employment." *Id.*

<sup>40</sup> *Id.* at § 219(2). This section states in pertinent part:

(2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:

(a) the master intended the conduct or the consequences, or

(b) the master was negligent or reckless, or

(c) the conduct violated a non-delegable duty of the master, or

(d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

<sup>41</sup> *Id.* at § 219(2)(b).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at § 219(2)(d).

<sup>44</sup> *Id.*



promotion, the denial of a raise, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.<sup>45</sup> In that category of cases, the Court has little trouble imposing vicarious liability on the employer regardless of whether the employer knew or should have known about the supervisor's actions. In such cases, it is obvious that the supervisor could not have inflicted the harm absent the agency relationship. "The supervisor has been empowered by the company as a distinct class of agent to make economic decisions affecting other employees under his or her control"<sup>46</sup> and thus, "a tangible employment action taken by the supervisor becomes, for Title VII purposes, the act of the employer."<sup>47</sup> Thus, the Court is, in effect, reaffirming that in *quid pro quo* type cases (i.e., sexual favors in exchange for some advancement in the workplace),<sup>48</sup> the employer will be vicariously liable.<sup>49</sup>

The more problematic category of cases and the ones that have generated such confusion in the lower courts, are those not involving a tangible employment action, typically, the hostile environment cases. There, it is harder to determine whether the supervisor whose conduct created the hostile environment has really been aided by the agency relationship.

One could say that the supervisor always is aided by the agency relationship, because "a supervisor's power and authority invests his or her harassing conduct with a particularly threatening character."<sup>50</sup> However, there may be other instances when the supervisor's conduct differs little from what might be accomplished by a co-employee, one with no power and no

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<sup>45</sup> *Burlington*, *supra* note 26, at 2268-69.

<sup>46</sup> *Id.* at 2269.

<sup>47</sup> *Id.*

<sup>48</sup> See generally E. Scalia, *The Strange Career of Quid Pro Quo Sexual Harassment*, 21 HARV. J.L. & PUB. POLICY 307 (1998).

<sup>49</sup> *Burlington*, *supra* note 26, at 2266. (noting that the "law now imposes liability on employers where the employee's 'purpose, however misguided, is wholly or in part to further the master's business.'") (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 70, at 505 (5th ed. 1984).

<sup>50</sup> *Id.*

supervisory authority over the plaintiff.<sup>51</sup> In those cases, the supervisor's status may make no difference at all.<sup>52</sup>

Ultimately, the Court concludes that a consideration of agency principles must be tempered with a consideration of the objectives of Title VII, particularly Title VII's goal of encouraging employers to create anti-harassment policies and to develop effective grievance procedures.<sup>53</sup> The Court fashions a rule that accommodates agency principles of vicarious liability for harm caused by misuse of supervisory authority as well as Title VII's equally basic policy of encouraging forethought by employers and saving action by objecting employees.<sup>54</sup>

The rule the Court announces is that an employer is subject to vicarious liability for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. However, when no tangible employment action is taken, the employer may raise an affirmative defense consisting of two elements, first, "that the employer exercised reasonable care to prevent and to promptly correct any sexually harassing behavior," and, second, "that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to otherwise avoid harm."<sup>55</sup> The second part sounds like the avoidable consequences doctrine in tort law.<sup>56</sup>

In fashioning this rule, the Court reviewed the history of the two categories of sexual harassment, *quid pro quo* harassment<sup>57</sup> and

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<sup>51</sup> *Id.* at 2269.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 2270 (hereinafter referred to as the "Burlington rule.").

<sup>56</sup> For a discussion of the application of the avoidable consequences doctrine in this context, see *Ford Motor Co. v. EEOC*, 458 U.S. 219, 232, n.15.

<sup>57</sup> See *Karibian v. Columbia University*, 14 F.3d 773 (2d Cir.), *cert. denied*, 114 S.Ct. 2693 (1994) (stating that "liability for *quid pro quo* harassment is always imputed to the employer . . ."). See also *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 72 (1986) (noting that agency principles would provide sound guidance in sexual harassment cases); *Kauffman v. Allied Signal, Inc.*, 970 F.2d 178, 185-86 (6th Cir. 1992) (holding that "[u]nder a *quid pro quo* theory of sexual harassment, an employer is held strictly liable for the conduct of its supervisory employees . . . under a theory of respondeat superior"); *Carrero v. New York City Hous. Auth.*, 890 F.2d 569, 579 (2d Cir. 1989) (holding that "in

hostile environment harassment,<sup>58</sup> terms originally proposed by Catherine MacKinnon<sup>59</sup> and subsequently adopted by the courts.<sup>60</sup> The Court concludes that when it comes to determining employer liability, the two labels are not dispositive.<sup>61</sup> The labels do remain useful, however, in illustrating the difference between fulfilled threats and offensive conduct.<sup>62</sup> Therefore, they should still be used in evaluating the threshold question of whether discrimination within the meaning of Title VII has been established.<sup>63</sup>

Because Kimberly Ellerth had relied on preexisting case law that had established different rules of employer liability depending upon whether the claim is *quid pro quo* or hostile environment, the Court remanded the case for further development consistent with its newly announced rule.<sup>64</sup> Justice Thomas, joined by Justice Scalia, filed a dissenting opinion, arguing that in cases involving hostile environment created by a supervisor, employer liability should only be imposed when the employer was negligent in permitting the conduct to occur.<sup>65</sup>

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a *quid pro quo* sexual harassment case the employer is held strictly liable for its employee's unlawful acts"); *Steele v. Off Shore Shipbuilding Inc.*, 867 F.2d 1311, 1316 (11th Cir. 1989) (holding that "the corporate defendant is strictly liable for the supervisor's harassment"); *Chamberlin v. 101 Realty, Inc.*, 915 F.2d 777, 785 (1st Cir. 1970) (reiterating that "an employer is strictly liable for the actions of its supervisors that amount to sexual discrimination or sexual harassment resulting in tangible job detriment to the subordinate employee" (quoting *Henson v. City of Dundee*, 682 F.2d 897, 910 (11th Cir. 1982))).

<sup>58</sup> *Burlington*, *supra* note 26, at 2270.

<sup>59</sup> CATHERINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* (1979).

<sup>60</sup> *See Meritor Sav. Bank*, *supra* note 15.

<sup>61</sup> *Burlington*, *supra* note 26, at 2265. The Court clearly states that "[w]hen we assume discrimination can be proved . . . , the factors we discuss below, and not the categories *quid pro quo* and hostile work environment, will be controlling on the issue of vicarious liability." *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 2271.

<sup>65</sup> 118 S. Ct. 2257, 2271 (Thomas, J., dissenting). Justice Thomas argued that discrimination in the "terms, conditions, or privileges" of employment as defined under Title VII should be evaluated by the same standards, independent of the type of discrimination. *Id.* The dissent cites numerous race discrimination cases which have been determined under a negligence standard when the claim has been racially hostile work environment. *Id.* at 2271-72. As

In the second case dealing with employer liability, *Faragher v. Boca Raton*,<sup>66</sup> the Court applied the *Burlington* rule.<sup>67</sup> Like *Burlington*, *Faragher* involved what we would call a "hostile environment claim."<sup>68</sup> Beth Ann Faragher worked as a lifeguard for the Parks and Recreation Department of the City of Boca Raton.<sup>69</sup> She alleged that her immediate supervisors subjected her, as well as other female lifeguards to uninvited and offensive touching, citing as an example an instance when one supervisor, Terry, put his arm around her and put his hand on her buttocks.<sup>70</sup> Terry also made "crudely demeaning references to women generally" and once commented disparagingly about the plaintiff's shape.<sup>71</sup> When interviewing a woman for a job as lifeguard, Terry told her that "female lifeguards had sex with their male counterparts and asked her whether she would do the same."<sup>72</sup>

Another supervisor, Silverman, behaved similarly. He once tackled the plaintiff and said that, "but for a physical characteristic he found unattractive, he would readily have sexual relations with her."<sup>73</sup> He pantomimed an act of oral sex, he made repeated vulgar references to women and sexual matters, commented on the bodies of the female employees and told them he wanted to have sex with them.<sup>74</sup> The plaintiff did not complain to higher management about the conduct of either of these two supervisors, Terry or Silverman, although she did speak to one rather low level supervisor who responded by saying that the City just doesn't care

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Title VII is a broad employment discrimination statute, Justice Thomas argues against developing new standards or rules which are only applicable to one branch of claims under the statute. *Id.* at 2275.

<sup>66</sup> *Faragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998).

<sup>67</sup> *Burlington*, *supra* note 54, at 2270.

<sup>68</sup> *Faragher*, *supra* note 27, at 2279. As Justice Souter stated, the issue in this case was "identification of the circumstances under which an employer may be held liable under Title VII of the Civil Rights Act of 1964 (citations omitted) for the acts of a supervisory employee whose sexual harassment of subordinates has created a hostile work environment amounting to employment discrimination." *Id.*

<sup>69</sup> *Id.* at 2279.

<sup>70</sup> *Id.* at 2280.

<sup>71</sup> *Id.* at 2281.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

about this. He did not forward the complaint to any higher official.<sup>75</sup>

Eventually another female employee did complain about the conduct of Terry and Silverman to the personnel director, who investigated the complaint, found that the two men had acted improperly, reprimanded them, and gave them a choice of suspension without pay or the forfeiture of annual leave.<sup>76</sup> Interestingly, the City of Boca Raton had adopted a sexual harassment policy,<sup>77</sup> but had failed to distribute the policy to the marine safety section, so the two supervisors and most of the lifeguards were completely unaware that such a policy existed. As we will see, that proved important in the Court's decision.<sup>78</sup>

The District Court found that the behavior of Terry and Silverman created a hostile environment and the city was liable for their conduct.<sup>79</sup> The Eleventh Circuit agreed, but only to the extent this was a hostile environment.<sup>80</sup> It reversed with respect to imposing employer liability and the full Court of Appeals, sitting en banc, agreed.<sup>81</sup>

The Supreme Court, with Justice Souter writing for a seven-two majority, adopted the Burlington rule and reversed the Eleventh Circuit.<sup>82</sup> Applying that rule to these facts, the Court found in favor of Faragher, finding that a remand was not necessary. There is no question, the Court concluded, that the conduct of the two supervisors created an actionable hostile environment nor was

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<sup>75</sup> *Id.* at 2281. Faragher indicated that her conversations with this supervisor were tantamount to a discussion with a person she held in high esteem, and not intended as a conversation with her supervisor. *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 2280.

<sup>78</sup> *Id.* at 2292.

<sup>79</sup> 864 F. Supp. 1552 (S.D. Fla. 1994). The district court found three justifications for concluding that the supervisor's conduct was "discriminatory harassment sufficiently serious to alter the conditions of Faragher's employment." *Id.* at 1562-63. These were: (a) harassment sufficiently pervasive to allow an inference of the City's "knowledge, or constructive knowledge" of it; (b) liability under traditional agency principles; and, (c) imputation of liability to the city for an employee's failure to act. *Id.* at 1563-64.

<sup>80</sup> 76 F.3d 1155, 1167 (11th Cir.1996), *aff'd*, 111 F.3d 1530 (11th Cir. 1997) (en banc).

<sup>81</sup> *Id.*

<sup>82</sup> Faragher, *supra* note 27, at 2292-93.

there any question that the supervisors had “virtually unchecked authority” over the plaintiff.<sup>83</sup>

What about the affirmative defense that is offered to employers under the *Burlington* rule? The Court said the affirmative defense offered no protection to the City of Boca Raton, because, although the city had drafted a sexual harassment policy, it had failed to disseminate it effectively. Further, the policy itself failed to include a procedure for bypassing the harassing supervisors when registering complaints.<sup>84</sup> Thus, the Court found, as a matter of law, that the City of Boca Raton could not prove the affirmative defense because it had not exercised reasonable care to prevent the supervisor’s conduct.<sup>85</sup>

In essence, what the Court did in *Burlington* and *Faragher* is formulate a broad rule of vicarious liability in Title VII cases that effectively imposes vicarious liability on employers when supervisors engage in sexual harassment, regardless of whether the employer had actual or constructive knowledge of what was going on. When harassment results in a tangible employment action, it is strict liability, no affirmative defense is available. However, when no tangible employment action results, the employer may raise an affirmative defense consisting of two elements; that the employer exercised reasonable care to prevent and promptly correct the behavior and that the employee unreasonably failed to take advantage of any preventative or corrective opportunities or to otherwise avoid harm.<sup>86</sup> It seems clear, after reading these decisions, that the safest way for employers to protect themselves against liability in cases of supervisory harassment, at least in those cases that do not involve tangible employment actions, is to promulgate and to distribute effectively an anti-sexual harassment policy with an effective and clear grievance procedure. Not surprisingly, virtually every article that has appeared since these decisions were announced counsels employers to do just that.

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<sup>83</sup> *Id.* at 2293.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> See *Burlington*, *supra* note 26, at 2270 and *Faragher*, *supra* note 27 at 2293. This is a restatement of the *Burlington* rule.

The fourth sexual harassment case of the term, *Gebser v. Lago Vista Independent School District*,<sup>87</sup> goes the other way. It raised the same issue of employer liability for supervisory harassment, but this time, in the context of school districts under Title IX.<sup>88</sup> Interestingly, the Court did not utilize the *Burlington* rule and instead adopted a very restrictive rule pursuant to which a school district will only be liable for the harassment of a student by a teacher if a school district official who, at a minimum, has authority to institute corrective measures on the district's behalf, had actual notice of, and is deliberately indifferent to, the teacher's misconduct.<sup>89</sup>

This case involved an eighth grader, Ms. Gebser, who joined a book club led by a teacher, Frank Waldrop.<sup>90</sup> In the course of discussions in the book club, he repeatedly made sexually suggestive comments.<sup>91</sup> In the ninth grade, the plaintiff was assigned to classes taught by Mr. Waldrop in both the fall and the spring semesters.<sup>92</sup> In those classes, he began to address his sexually suggestive comments to Ms. Gebser directly.<sup>93</sup> In the spring semester, he visited her in her home "ostensibly to give her a book," and while there, kissed and fondled her. Not long after that, in the balance of that term and into the summer and the next term, they repeatedly had sexual intercourse, often during school hours but not on school property.<sup>94</sup> Plaintiff did not report the conduct to school officials because, she said, she wanted to continue to have him as her teacher.<sup>95</sup>

The parents of two other students did complain to the principal about Waldrop making sexually suggestive comments in class.<sup>96</sup> The principal spoke to Waldrop, who apologized and said it would

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<sup>87</sup> 118 S. Ct. 1989 (1998).

<sup>88</sup> Title IX of the Education Amendments of 1972, 86 Stat. 373, as amended, 20 U. S. C. § 1681 *et seq.* (hereinafter Title IX).

<sup>89</sup> Gebser, *supra* note 86, at 2000.

<sup>90</sup> *Id.* at 1993.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

not happen again.<sup>97</sup> The principal did not report the incident to the superintendent of schools, who was the district's Title IX coordinator.<sup>98</sup>

A few months later, Waldrop was arrested when a police officer discovered Waldrop and the plaintiff having sex.<sup>99</sup> He was fired immediately and his teaching license was revoked by the Texas Education Agency.<sup>100</sup> During the relevant period of time, from the time he began his comments in class through the sexual relationship that he had with the plaintiff, the school district did not have any official grievance procedure for lodging complaints of sexual harassment, nor had it promulgated any formal anti-harassment policy.<sup>101</sup>

Gebser brought suit against Waldrop raising state law claims and against the school district raising Title IX claims as well as claims under Section 1983 and state negligence law.<sup>102</sup> The District Court rejected her Title IX claim against the school district, finding that the school district lacked actual or constructive knowledge of the teacher's conduct.<sup>103</sup> The Fifth Circuit affirmed.<sup>104</sup>

With Justice O'Connor writing for a five to four majority, the Court distinguished Title IX from Title VII<sup>105</sup> and declined to

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<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> Gebser and her mother filed suit under Title IX, Rev. Stat. § 1979, 42 U.S.C. § 1983, and state negligence law against the school district and the teacher. Subsequent to lower court action, Gebser appealed only on the Title IX claim. *Id.* at 1993-94.

<sup>103</sup> *Id.*

<sup>104</sup> *Doe v. Lago Vista Independent School Dist.*, 106 F.3d 1223 (5th Cir. 1997). The Appeals Court only had before it the Title IX claim and relied on its decision in *Rosa H. V. San Elizario Independent School Dist.*, 106 F.3d 648 (5th Cir. 1997). There the Fifth Circuit held that "school districts are not liable in tort for teacher-student sexual harassment under Title IX unless an employee who has been invested by the school board with supervisory power over the offending employee actually knew of the abuse, had the power to end the abuse, and failed to do so." *Id.* at 1226.

<sup>105</sup> Gebser, *supra* note 86, at 1997. Justice O'Connor stated that the central aim of Title VII was to "compensate victims of discrimination" while Title IX was directed at "'protecting' individuals from discriminatory practices carried



impose liability on the school district for the harassment of a student by a teacher.<sup>106</sup> Her reasoning went something like this: Title IX, unlike Title VII, does not explicitly confer a private right of action.<sup>107</sup> But, in *Cannon v. University of Chicago*,<sup>108</sup> the Court had held that Title IX is enforceable through an implied right of action<sup>109</sup> and, in *Franklin v. Gwinnett County Public Schools*,<sup>110</sup> the Court held that monetary damages are available in the implied private action.<sup>111</sup> Without overruling either precedent, the Court concluded that, where a private right of action has been judicially implied, the Court, “has a measure of latitude to shape a sensible remedial scheme that best comports with the statute.”<sup>112</sup>

The remedial scheme that seemed sensible to the Court was to impose liability on the school district only when it actually knew of harassment. Constructive knowledge will not suffice, meaning that negligence is not good enough. Not only must the school district have actual knowledge, its response must amount to deliberate indifference to discrimination.<sup>113</sup> There can be little doubt that this standard renders it virtually impossible for a school district to be liable for a school teacher’s sexual harassment of a student.

The Court justifies the result by pointing to the fact that, unlike Title VII, Title IX is framed in terms of a condition on federal funding, not an outright prohibition of discrimination.<sup>114</sup> Title IX conditions federal funding on a promise not to discriminate.<sup>115</sup> Moreover, the Court concludes that Title IX itself “contains important clues that Congress did not intend to allow recovery in

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out by recipients of federal funds. *Id.* at 1997 (citing *Cannon*, *supra* note 111, at 704).

<sup>106</sup> *Id.* at 2000.

<sup>107</sup> *Id.*

<sup>108</sup> 41 U.S. 677 (1979).

<sup>109</sup> *Id.*

<sup>110</sup> 503 U.S. 60 (1992).

<sup>111</sup> *Id.*

<sup>112</sup> Gebser, *supra* note 96, at 1996.

<sup>113</sup> *Id.* at 1999.

<sup>114</sup> *Id.* at 1998.

<sup>115</sup> *Id.*

damages where liability rests solely on principles of vicarious liability or constructive notice.”<sup>116</sup> What is the clue?

The clue, Justice O'Connor said, is the administrative enforcement mechanism, found in the statute, that requires actual notice to the recipient of federal funds and an opportunity for voluntary compliance before a non-compliance proceeding can be brought.<sup>117</sup> The Court concludes that this administrative mechanism makes sense because it avoids “diverting education funding from beneficial uses where a recipient was unaware of discrimination in its programs and is willing to institute corrective measures.”<sup>118</sup> Imposing vicarious liability on a school district for sexual harassment of a student by a teacher would be fundamentally at odds with that objective.<sup>119</sup> Ultimately, the Court concludes that “where a statute’s express enforcement scheme hinges its most severe sanction, loss of federal funding, on notice and unsuccessful efforts to obtain compliance, we cannot attribute to Congress the intention to have an implied enforcement scheme that allows imposition of greater liability without comparable conditions.”<sup>120</sup>

Thus the Court holds that a school district is not liable for the discriminatory conduct of a teacher unless it had actual notice and in its response exhibited deliberate indifference to the discrimination.<sup>121</sup> Applying that standard to the facts, the Court concludes that the school district lacked actual notice. The fact it had failed to promulgate an anti-harassment policy and did not have any grievance procedure in place proves irrelevant under this standard.<sup>122</sup> That is a result very different from the rule announced in the two Title VII cases.

Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, wrote in dissent, pointing out the obvious, that “few Title IX plaintiffs who have been victims of intentional discrimination will be able to recover damages under this exceedingly high

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<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 1998.

<sup>118</sup> *Id.* at 1999.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 1999. The Court identifies its adoption in § 1983 cases of the deliberate indifference standard as a comparable analysis. *Id.*

<sup>122</sup> *Id.*

standard.”<sup>123</sup> The dissent relied in part on Department of Education regulations that provide for vicarious liability when the teacher was aided in accomplishing the harassment by virtue of the teacher’s position of authority within the institution.<sup>124</sup>

The dissent argued that imposing vicarious liability makes sense because it serves to induce the school district to adopt and enforce practices to prevent this kind of behavior, and that the rule adopted by the majority does exactly the opposite. By requiring actual notice, the majority rule creates a negative incentive for school boards that can claim immunity by insulating themselves from knowledge about the conduct.<sup>125</sup> If the person with the authority to correct the situation puts a wall around himself or herself and exhibits a demeanor of “I don’t want to know,” then the school will never have actual notice.<sup>126</sup> Even if every teacher in the district knew about the harassing behavior, the district would not be liable because teachers do not have the authority to institute corrective measures on the district’s behalf, and thus their actual knowledge would not count.

Justice Ginsburg wrote a short dissent indicating that she would offer the school district the opportunity to assert an affirmative defense similar to the one announced in *Burlington*.<sup>127</sup>

Interestingly, the Supreme Court announced that it would hear another Title IX case this term. The case is *Davis v. Monroe County Board of Education*,<sup>128</sup> which raises the question whether a school district can be liable when a teacher fails to intervene after being told that one student was sexually harassing another.<sup>129</sup> In *Davis*, the Eleventh Circuit dismissed the Title IX action against the school district, finding that Title IX does not encompass claims of sexual harassment of one student by another.<sup>130</sup> Given the decision of *Gebser*, where the Court declined to impose liability on

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<sup>123</sup> *Id.* at 2005 (Stevens, J., dissenting).

<sup>124</sup> *Id.* at 2004 (citing Dept. of Education, Office for Civil Rights, *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 62 FED. REG. 12034, 12039 (1997)).

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 2007 (Ginsburg, J., dissenting).

<sup>128</sup> 119 S. Ct. 29 (1998).

<sup>129</sup> *Id.*

<sup>130</sup> 120 F.3d 1390 (11th Cir. 1997).

a school district for a teacher's intentional misconduct, I think it unlikely that the Court will impose liability on the district for a teacher's negligence, at least absent actual notice and deliberate indifference.

There were two disability discrimination cases last term which I will address briefly. The first was *Pennsylvania Department of Corrections v. Yeskey*.<sup>131</sup> This case raised the question whether Title II of the Americans with Disabilities Act (ADA),<sup>132</sup> covers inmates in state prisons. The plaintiff was sentenced to serve 18-36 months in a state correctional facility, but the judge offered Yeskey an option of choosing instead to go to a "motivational boot camp" for first time offenders.<sup>133</sup> If he did and successfully completed that program, he would be eligible for parole in just six months, but Yeskey was refused admission to the boot camp because his medical history showed he suffered from hypertension.<sup>134</sup> He brought suit under the ADA claiming that his exclusion from the boot camp constituted unlawful discrimination on the basis of disability. The District Court dismissed the suit, finding that the ADA is not applicable to inmates in state prisons.<sup>135</sup> The Third Circuit reversed.<sup>136</sup>

In a short, unanimous and straightforward decision, Justice Scalia concluded that the statutory language is unambiguous and plainly covers state institutions, with no exception for state prisons.<sup>137</sup> The statute provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a

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<sup>131</sup> 118 S. Ct. 1952 (1998) (hereinafter *Yeskey*).

<sup>132</sup> 42 U.S.C. § 1213 *et seq.* Title II provides that:

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs or activities of a public entity, or be subjected to discrimination by any such entity. 42 U.S.C. § 12132.

<sup>133</sup> *Yeskey*, *supra* note 130, at 1954.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> 118 F.3d 168 (3rd Cir. 1997).

<sup>137</sup> *Yeskey*, *supra* note 130, at 1954 (finding that "state prisons fall squarely within the statutory definition of 'public entity', which includes 'any department, agency, special purpose district, or other instrumentality of a State or States or local government'" as cited in 42 U.S.C. § 12131(1)(B)).

public entity.”<sup>138</sup> Justice Scalia rejected the state’s somewhat unusual argument that state prisons do not provide prisoners with the benefits of programs, services or activities.<sup>139</sup> To the contrary, he said, “modern prisons provide inmates with many recreational activities, medical services, and educational and vocational programs, all of which, at least theoretically, benefit the prisoners.”<sup>140</sup> He also rejected the argument that the ADA requires voluntary participation in these services and programs, noting that the statute does not require voluntariness and, even if it did, participation in this boot camp is indeed voluntary.<sup>141</sup>

Significantly, the Court rejected as irrelevant the state’s argument that Congress never envisioned that the ADA would apply to prisoners.<sup>142</sup> Justice Scalia said “the fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.”<sup>143</sup> Similarly, there is no reason to apply the doctrine of constitutional doubt, which requires an interpretation that avoids grave and doubtful constitutional questions, because that doctrine only applies where a statute is capable of multiple meanings.

One question left unresolved by the Court is whether application of the ADA to state prisons is a constitutional exercise of Congress’ power under either the Commerce Clause or Section Five of the Fourteenth Amendment. Because that issue was not raised in the District Court or the Court of Appeals, the Supreme Court declined to consider it.<sup>144</sup>

The second disability case of the term is a far lengthier opinion with as much medicine in it as law. *Bragdon v. Abbott*<sup>145</sup> is a case brought by a woman with asymptomatic HIV whose dentist refused to fill a cavity of hers in his office, instead requiring that the procedure be done in a hospital.<sup>146</sup>

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<sup>138</sup> 42 U.S.C. § 12132. See note 131, *supra*.

<sup>139</sup> *Yeskey*, *supra* note 130, at 1955.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* (citing *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499 (1985)).

<sup>144</sup> *Id.* at 1956.

<sup>145</sup> 118 S. Ct. 2196 (1998) (hereinafter *Bragdon*).

<sup>146</sup> *Id.* at 2201.

Abbott brought suit under state law<sup>147</sup> and Section 302 of the ADA,<sup>148</sup> alleging discrimination on the basis of her disability.<sup>149</sup> Section 302 prohibits exclusion from a public accommodation on the basis of a disability, and it specifically defines “public accommodation” as including “the professional office of a health care provider.”<sup>150</sup> The statute, however, provides an exception where “the individual poses a direct threat to the health or safety of others.”<sup>151</sup> The two issues in the case are whether asymptomatic HIV is a disability within the meaning of the statute, and whether the treatment of the plaintiff in the dentist’s office would have posed a direct threat to the health or safety of the dentist or nurses on his staff. The District Court ruled in favor of the plaintiff and the First Circuit affirmed.<sup>152</sup> The Supreme Court agreed that asymptomatic HIV is a disability within the meaning of the statute because it is a physical impairment and it substantially limits a major life activity.<sup>153</sup> The Court was not troubled by the fact that in plaintiff’s case the disease had not progressed to the symptomatic phase. “In light of the immediacy with which the virus begins to damage the infected person’s white blood cells and the severity of the disease, we hold it is an impairment from the moment of infection.”<sup>154</sup> HIV causes abnormalities in a person’s blood and the infected person’s white cell count continues to drop. Thus, “HIV must be regarded as a physiological disorder, with a constant and detrimental effect on the infected person’s hemic and lymphatic systems from the moment of infection. HIV infection

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<sup>147</sup> *Id.* at 2201. The state law provisions were not before the Court.

<sup>148</sup> Americans with Disabilities Act § 302, 42 U.S.C. § 12182(a) provides “No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who . . . operates a place of public accommodation.”

<sup>149</sup> 912 F. Supp. 580, 585-87 (D. Me. 1996), *aff’d*, 107 F.3d 934 (1st Cir. 1997).

<sup>150</sup> The term “public accommodation” is defined to include the “professional office of a health care provider at 42 U.S.C. § 12181(7)(F).

<sup>151</sup> 42 U.S.C. § 12182(b)(3).

<sup>152</sup> 912 F. Supp. 580, 585-87 (D. Me. 1996), *aff’d*, 107 F.3d 934 (1st Cir. 1997).

<sup>153</sup> Bragdon, *supra* note 144, at 2207.

<sup>154</sup> *Id.* at 2204.

satisfies the statutory and regulatory definition of a physical impairment at every stage of the disease.”<sup>155</sup>

The Court then went on to consider whether the impairment affects a major life activity, as required by the statute. The opinion becomes quite interesting at this point. The major life activity that the plaintiff said was limited by her HIV status was reproduction.<sup>156</sup> The Court noted that other plaintiffs would have pointed to other major life activities as being affected and impaired or substantially limited by HIV, but since Abbott only identified reproduction, the Court limited itself to whether reproduction is indeed a major life activity.<sup>157</sup> The Court had little trouble concluding that reproduction “falls well within the phrase ‘major life activity’” because “reproduction and the sexual dynamics surrounding it are central to the life process itself.”<sup>158</sup> In so concluding, the Court rejected the argument that Congress intended the ADA only to cover life activities that have a public, economic, or daily dimension.<sup>159</sup>

Having found that reproduction is a major life activity, the Court addresses the question of whether Abbott’s HIV status substantially limits that activity.<sup>160</sup> Relying on medical literature, the Court concludes that it does in two different ways. First, a woman with HIV who attempts to conceive a child imposes a risk on the man with whom she is having sex of transmission of the HIV disease.<sup>161</sup> Second, a woman who conceives a child is imposing a threat of transmitting the disease to her own child during gestation and childbirth.<sup>162</sup> Although conception and childbirth are not impossible for an individual with HIV, the ADA does not require absolute impossibility to perform a major life activity, only a substantial limitation of that activity. Thus, the Court concludes that asymptomatic HIV does constitute a disability within the meaning of the statute because it is a physical

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<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 2205.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 2206.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

impairment that does substantially limit reproduction, a major life activity.

Having determined that plaintiff suffered from a disability, the Court still had to determine whether that impairment posed a direct threat to the health or safety of others, specifically the dentist.<sup>163</sup> The Court said that the assessment has to be determined objectively.<sup>164</sup> Thus, a good faith belief by the dentist that the impairment posed a risk would not relieve the doctor of liability if that belief were not objectively reasonable.<sup>165</sup> In determining the reasonableness of the defendant's action, the views of public health authorities such as the United States Public Health Service and National Institute of Health should be given special weight and authority, although if a health care professional disagrees with the prevailing medical consensus, he or she may refute it by citing a credible scientific basis for deviating from the accepted norm.<sup>166</sup> Ultimately, the Court concluded that on the record, it could not determine whether the First Circuit had sufficient evidence to conclude as a matter of law that plaintiff's impairment did not pose a risk, and the case was remanded for further consideration of that issue.<sup>167</sup>

In an interesting dissenting opinion, Justice Rehnquist, joined by Justices Scalia, Thomas, and O'Connor, takes issue with the conclusion that reproduction is a major life activity, equating it instead with decisions such as who to marry, where to live and how to earn one's living.<sup>168</sup> These are important decisions but not repetitively performed nor essential in the day to day existence of a normally functioning individual. The dissent also disagrees with the conclusion that asymptomatic HIV substantially limits reproduction, because a person infected with HIV still can engage in sexual intercourse and give birth to a child. The fact that an individual infected with HIV might not engage in those activities is treated by the dissent as a voluntary choice, not a substantial limitation imposed by the impairment. Further, because a claim of

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<sup>163</sup> *Id.* at 2209-10.

<sup>164</sup> *Id.* at 2210.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 2211.

<sup>167</sup> *Id.* at 2212.

<sup>168</sup> *Id.* at 2214-15 (Rehnquist, J., dissenting).



disability must be evaluated on a particularized basis, in terms of how the impairment is affecting this individual, the dissent would require the plaintiff to demonstrate that, were it not for her HIV status, she would have attempted reproduction. In other words, the dissent would require plaintiff to prove that her plan, before she was diagnosed, was to have children.<sup>169</sup>

The final case of the term presents a completely different genre of discrimination. *Miller v. Albright*<sup>170</sup> is not a statutory case, rather it raises an equal protection claim that challenges a distinction contained in Section 309 of the Immigration and Naturalization Act<sup>171</sup> that treats out of wedlock children of citizen mothers differently from out of wedlock children of citizen fathers. Pursuant to the statute, a child of a citizen mother is treated as a citizen at birth, whereas a child of a citizen father is not.<sup>172</sup>

The plaintiff in *Miller* was born in the Philippines.<sup>173</sup> Her mother was a Filipino national and her father was an American citizen, who served in the United States Air Force and was stationed in the Philippines at the time of the child's conception.<sup>174</sup> The mother and father were never married and indeed there is no evidence that the father had any contact with the child at all, returning after his tour of duty to the United States.<sup>175</sup> Many years after the child's birth, the father commenced a paternity proceeding, which resulted

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<sup>169</sup> *Id.* at 2216.

<sup>170</sup> 118 S. Ct. 1428 (1998).

<sup>171</sup> Immigration and Naturalization Act, § 309(a)(4), 66 Stat. 238, *amended by* 8 U.S.C. § 1409(a)(4) (1986). This section provides in pertinent part:

(a) The provisions . . . of section 1401 of this title, and of paragraph (2) of section 1408 of this title, shall apply as of the date of birth to a person born out of wedlock if--

(4) while the person is under the age of 18 years--

(A) the person is legitimated under the law of the person's residence or domicile,

(B) the father acknowledges paternity of the person in writing under oath, or

(C) the paternity of the person is established by adjudication of a competent court. *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Miller v. Albright*, 118 S. Ct. 1428, 1432 (1998). Miller was born on June 20, 1970. *Id.*

<sup>174</sup> *Id.* at 1432-33.

<sup>175</sup> *Id.*

in a decree declaring him to be the father.<sup>176</sup> When the child applied for citizenship, she was denied on the ground that the Immigration and Naturalization Act (hereinafter "INA") "requires that a child born out of wedlock be legitimized before age eighteen in order to acquire U.S. citizenship."<sup>177</sup> Since the paternity proceeding was brought after the plaintiff turned eighteen, the statutory requirements had not been satisfied.<sup>178</sup>

The father and child brought suit, claiming that the INA's different treatment of citizen mothers and citizen fathers violated the equal protection guarantee of the due process clause of the Fifth Amendment.<sup>179</sup> Pursuant to the statutory scheme, four requirements must be satisfied in order for a child of a citizen father and an alien mother to obtain citizenship—1) the blood relationship between the child and the father must be established by clear and convincing evidence, 2) the father had the nationality of the United States at the time of the child's birth, 3) the father has agreed in writing to provide financial support for the child until age eighteen and 4) while the child is under the age of eighteen, the child is legitimated, or the father acknowledges paternity in writing under oath, or the child's paternity is adjudicated by a court.<sup>180</sup> Because Immigration and Naturalization Services' (hereinafter INS) rejection of plaintiff's claim for citizenship was based solely on her failure to satisfy the fourth requirement, that became the only issue on appeal—whether the requirement that children born out of wedlock to citizen fathers, but not citizen mothers, must obtain formal proof of paternity before age eighteen violates the Fifth Amendment.<sup>181</sup>

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<sup>176</sup> *Id.* at 1433. In 1992, the father filed a petition in a Texas court to establish his paternity. *Id.* The court found him to be the "biological and legal father of Lorelyn Panero Miller." *Id.*

<sup>177</sup> *Id.* (citing § 309(a)(4) INA as applicable to § 301(g) INA in regard to the statutory basis for acquiring citizenship).

<sup>178</sup> *Id.* "Without such legitimization before age eighteen, there is no legally recognized relationship under the INA and the child acquires no rights of citizenship through an American citizen parent." *Id.* (further citation omitted).

<sup>179</sup> U.S. CONST., amend V. The Due Process Clause provides in pertinent part: "No person shall . . . be deprived of life, liberty, or property without due process of law . . ." *Id.*

<sup>180</sup> 8 U.S.C. § 1409(a).

<sup>181</sup> *Miller*, 118 S. Ct. at 1436.

This case produced five different opinions. In total, six judges rejected plaintiff's claim, although for very different reasons, and three justices found an equal protection violation. Since the topic for today is discrimination, I will leave for another day any discussion of the thorny jurisdictional issues raised in these opinions and focus exclusively on the equal protection analysis.

One issue that divided the justices is the standard that should be used in evaluating the equal protection claim. The answer to this question arguably depends on whose claim we are evaluating--the father's claim or the child's claim. Justices Stevens and Rehnquist applied mid-level scrutiny to both claims: the child's claim seeking to have her citizenship confirmed by the court, and her father's claim that citizen fathers should have the same right to transmit citizenship as citizen mothers.<sup>182</sup> Mid-level scrutiny, of course, requires that the statutory distinction be substantially related to an important government objective. Justices O'Connor and Kennedy, concurring in the judgment, rejected the father's claim on standing grounds and applied only rational basis review to the child's claim because, in their view, the challenged statute does not draw a distinction based on the gender of the child so the child has not suffered from gender based discrimination.<sup>183</sup> Under the rational basis test, they have no trouble upholding the statute although they indicate that it could not withstand mid-level review. The dissenting Justices, Ginsburg, Souter, and Breyer, applied mid-level scrutiny to both the father and child's claim and found that the statutory classification could not withstand this heightened review.<sup>184</sup>

The decision for the Court, I suppose, is represented in Justice Stevens' opinion, although it is only joined by the Chief Justice, which concludes that the classification survives mid level scrutiny.<sup>185</sup> Ensuring reliable proof of a biological relationship between the potential citizen and its citizen parent constitutes an important governmental objective and that objective is served by requiring proof of paternity where the citizen parent is the father.<sup>186</sup>

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<sup>182</sup> *Id.* at 1439-42.

<sup>183</sup> *Id.* at 1442 (O'Connor, J., concurring).

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 1442

<sup>186</sup> *Id.* at 1439.

Where the citizen parent is the mother, the blood relationship is immediately obvious, so additional steps are not necessary.<sup>187</sup>

In addition to establishing proof of a biological relationship, the statutory distinction effectively serves two other important objectives, according to the Court.<sup>188</sup> First is the interest in encouraging the development of a healthy relationship between the citizen parent and the child and the second is the related interest in fostering ties between the foreign born child and the United States.<sup>189</sup> Congress could well have been concerned about the phenomenon of American servicemen fathering children abroad, and then returning to this country, sometimes not even knowing that a child had been born. It was surely reasonable, the Court concludes, for Congress to “condition the award of citizenship to such children on an act that demonstrates, at a minimum, the possibility that those who become citizens will develop ties with this country—a requirement that performs a meaningful purpose for citizen fathers but normally would be superfluous for citizen mothers.”<sup>190</sup>

In addition to finding that important governmental objectives support the additional requirements imposed on children of citizen fathers, the Court further concluded that the means used in the statute are well tailored to serve these objectives.

Many of you may remember a 1983 New York immigration case involving a substantially similar classification, *Lehr v. Robinson*,<sup>191</sup> that the Court said fully supports its conclusion in *Miller*.<sup>192</sup> In *Lehr*, the Court upheld a New York law that also distinguished between unmarried fathers and unmarried mothers.<sup>193</sup> *Lehr* involved the rights of a parent to receive notification of an adoption and to veto the adoption. Like the statute at issue in this case, the New York law granted those rights to unmarried fathers only if a formal act establishing paternity had been taken. The

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<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> 463 U.S. 248 (1983)

<sup>192</sup> *Miller*, 118 S. Ct. at 1440.

<sup>193</sup> *Lehr*, 463 U.S. at 264.

Court concluded that the equal protection argument was even less persuasive in the current case than in *Lehr*.<sup>194</sup>

Justices Ginsburg, Souter, and Breyer dissented. I particularly recommend Justice Ginsburg's dissent to you because it contains a fascinating historical account of how our immigration laws have discriminated against women over centuries.<sup>195</sup> While the case at bar challenges a classification that seemingly burdens men, our immigration laws historically have done just the opposite—laws on the transmission of citizenship from parent to child starkly discriminated against citizen mothers, not citizen fathers. For example, statutes enacted in 1790, 1795, and 1802 all provided that a child born abroad could only gain citizenship when the father was a citizen. Thus, women were unable to transmit their citizenship to their children born abroad.

Justice Breyer's dissenting opinion argues forcefully that mid-level scrutiny is the appropriate standard and that the classification at issue fails the test because it relies on overbroad generalizations that mothers are significantly more likely than fathers to care for their children or to develop relationships with their children.<sup>196</sup> Justice Breyer illustrates that with a number of examples, including one where he hypothesizes a family consisting of an American mother and a foreign father. The child is conceived and born abroad and then the mother returns to the United States leaving the father to raise the child. Why should not this mother be required to fulfill the statutory requirements currently imposed only on citizen fathers? Justice Breyer notes that this example "suggests how arbitrary the statute's gender-based distinction is once one abandons the generalization that mothers, not fathers, will act as caretaker parents."<sup>197</sup>

Justice Breyer had no trouble agreeing with Justice Stevens that there are important objectives sought to be served by the classification—ensuring reliable proof of a biological relationship and encouraging ties between the parent and child, and between the child and the United States.<sup>198</sup> He disagrees, however, when it

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<sup>194</sup> *Miller*, 118 S. Ct. at 1440.

<sup>195</sup> *Id.* at 1450-52 (Ginsburg, J., dissenting).

<sup>196</sup> *Id.* at 1455-56 (Breyer, J., dissenting).

<sup>197</sup> *Id.* at 1461 (Breyer, J., dissenting).

<sup>198</sup> *Id.* at 1456 (Breyer, J., dissenting).

comes to determining whether or not the statutory classification substantially furthers those objectives.<sup>199</sup> He concludes that they do not and that in fact the relationship between the statutory requirements and the stated objectives is one of total misfit.<sup>200</sup>

Let me end, since we are in baseball playoff season, with a scorecard. From the plaintiff's point of view, it is five to two. Out of seven discrimination cases, it looks like a clear victory for discrimination plaintiffs in five cases, the three Title VII cases and the two disability discrimination cases, verses two wins for the defendant, the Title IX case and the immigration case. I hope the Yankees do as well. Thank you.

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<sup>199</sup> *Id.* at 1463 (Breyer, J., dissenting)

<sup>200</sup> *Id.*

