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## Significant Employment Law Decisions in the 1997-98 Term: A Clarification of Sexual Harassment Law and a Broad Definition of Disability

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# SIGNIFICANT EMPLOYMENT LAW DECISIONS IN THE 1997-98 TERM: A CLARIFICATION OF SEXUAL HARASSMENT LAW AND A BROAD DEFINITION OF DISABILITY\*

Vicki J. Limas<sup>†</sup>

## I. INTRODUCTION: AN OVERVIEW OF THE LABOR AND EMPLOYMENT CASES

More than ten percent of the Supreme Court's 1997-98 docket involved labor and employment law issues, requiring interpretation of a number of federal statutes. In the labor arena, the Court primarily considered procedural issues arising under statutes governing the labor/management relationship. While the Court determined that the Labor Management Relations Act<sup>1</sup> does not confer federal subject matter jurisdiction in suits alleging invalidity of collective bargaining agreements,<sup>2</sup> it held that nonunion employees challenging a union's agency fees<sup>3</sup> may sue in federal court, despite a collective bargaining agreement provision for arbitration of such challenges, because those employees are not parties to the agreement.<sup>4</sup>

The Court, interpreting the Multiemployer Pension Plan Amendments Act of 1980,<sup>5</sup> found that Act's six-year statute of limitations on suits to collect unpaid withdrawal liability payments<sup>6</sup> to begin anew for each missed installment.<sup>7</sup> The Court

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\* Based on remarks delivered at the Conference, *Practitioners' Guide to the October 1997 Term of the United States Supreme Court*, at the University of Tulsa College of Law, December 11, 1998.

† Associate Professor of Law, The University of Tulsa College of Law. I wish to thank one of my mentors, J. Patrick Cremin of Hall, Estill, Hardwick, Gable, Golden & Nelson, for participating in this program with me and for discussing these cases from the perspective of one who must work with their rules every day.

1. 29 U.S.C. §§ 141-187 (1994).

2. *See* *Textron Lycoming Reciprocating Engine Div., AVCO Corp. v. United Auto. Implement Workers of Am.*, 118 S. Ct. 1626, 1631 (1998). Section 301(a) of the LMRA provides:

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a)(1947).

3. Under an "agency shop" arrangement, a union may charge nonunion employees of a bargaining unit "agency fees" as a fair share of the costs of its representation of the unit, as the union is obligated to represent all employees within that unit whether or not they belong to the union. *See* 48 Am. Jur. 2d *Labor and Labor Relations* § 100 (1994).

4. *See* *Airline Pilots Ass'n v. Miller*, 118 S. Ct. 1761, 1769 (1998). Although this case arose under the Railway Labor Act, 45 U.S.C. §§ 1-188 (1926), its holding presumably applies to public-sector bargaining relationships, as well as private-sector bargaining relationships governed by the National Labor Relations Act, 29 U.S.C. §§ 151-169 (1935). *See* *Airline Pilots Ass'n*, 118 S. Ct. at 1766.

5. 29 U.S.C. §§ 1381-1461 (1980). The statute of limitations appears at § 1451(f).

also determined that the National Labor Relations Board's "good faith reasonable doubt" test is proper under the National Labor Relations Act<sup>8</sup> when determining whether an employer has committed an unfair labor practice<sup>9</sup> by polling union members regarding their continued support of a union.<sup>10</sup>

The Court contributed most significantly to the area of nondiscrimination in employment. Substantive issues arising under almost all of the commonly litigated anti-discrimination statutes were addressed, including: employer liability for sexual harassment by supervisors under Title VII of the Civil Rights Act of 1964 (Title VII);<sup>11</sup> whether same-sex harassment is actionable under Title VII;<sup>12</sup> the meaning of "disability" under the Americans with Disabilities Act (ADA);<sup>13</sup> and whether a former employee must tender back funds received under the terms of a release before she can sue the employer under the Age Discrimination in Employment Act of 1967<sup>14</sup> (ADEA).

Most memorable, however, will be the Court's clarification of sexual harassment law with respect to hostile environment cases and employer liability for harassment by supervisors, along with its expansive definition of "disability" under the ADA. All of these employment cases, as well as the Court's interpretation of the ADA, send a strong signal to lower courts that they should be interpreting these statutes more expansively, which should result in fewer summary judgments for employers as more claims are recognized and more factual determinations reach juries.

## II. THE ADEA: ENFORCEMENT OF THE OWBPA'S WAIVER PROVISIONS IN *OUBRE V. ENTERGY OPERATIONS*

The Court's plain-language interpretation of the ADEA issue in *Oubre v.*

6. When most employers withdraw from an underfunded multiemployer pension plan, they must pay an adjusted proportionate share of the plan's unfunded vested benefits upon withdrawal. *See id.* § 1381(a).

7. *See Bay Area Laundry and Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Calif.*, 188 S. Ct. 542, 551 (1997).

8. 29 U.S.C. §§ 151-69 (1935).

9. It is an unfair labor practice for an employer, *inter alia*, "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 157." *Id.* § 158(a)(1). These include rights "to self-organization, to form, join, or assist labor organizations, [and] to bargain collectively through representatives of their own choosing." *Id.* § 157. It is also an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." *Id.* § 158(a)(5).

10. *See Allentown Mack Sales and Service v. National Labor Relations Board*, 118 S. Ct. 818, 829 (1998).

11. 42 U.S.C. § 2000(e) (1994); *see Burlington Indus. v. Ellerth*, 118 S. Ct. 2257 (1998); *Faragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998), discussed *infra* Part III. The Court also decided the issue of a school district's liability for damages under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a), to a student who had been sexually harassed by a teacher in *Gebser v. Lago Vista Indep. Sch. Dist.*, 118 S. Ct. 1989 (1998).

12. *See Oncale v. Sundowner Offshore Serv.*, 118 S. Ct. 998 (1998), discussed *infra* Part III.

13. 42 U.S.C. §§ 12101-213 (1990); *see Bragdon v. Abbott*, 118 S. Ct. 2196 (1998), discussed *infra* Part IV. In another case decided under the ADA, the Court held that a state prison is covered by Title II of the ADA, 42 U.S.C. §§ 12131-50, which prohibits discrimination against a qualified individual with a disability by a public entity. *See Pennsylvania Dept. of Corrections v. Yeskey* 188 S. Ct. 1952 (1998). This case is discussed briefly *infra* Part IV.

14. 29 U.S.C. §§ 621-34 (1994); *see Oubre v. Entergy Operations*, 118 S. Ct. 838 (1998), discussed *infra* Part II.

*Entergy Operations*<sup>15</sup> seems unremarkable, although it garnered three dissenters. The plaintiff therein had been offered a severance package in exchange for a general release of claims against her employer.<sup>16</sup> That release failed, however, to mention ADEA claims, as required by the Older Workers Benefit Protection Act<sup>17</sup> (OWBPA), and was also deficient under the OWBPA with respect to the time allotted the employee to consider her options or change her mind.<sup>18</sup> After accepting the package and receiving all severance payments, totaling \$6,258, the plaintiff sued her employer under the ADEA.<sup>19</sup> The district court granted summary judgment to the employer, and the Fifth Circuit affirmed,<sup>20</sup> based on alternative common law contract theories: first, that the plaintiff had ratified the release by failing to tender back the payments before filing suit; second, that she was estopped from avoiding her promise not to sue by retaining the consideration for the promise.<sup>21</sup>

The Supreme Court rejected the applicability of these common law principles, citing both the statutory mandate of the OWBPA regarding waivers of ADEA claims, and the overall policy behind its strictures on such waivers: protecting older workers.<sup>22</sup> The Court found the OWBPA's language<sup>23</sup> clear and unqualified with respect to waiver of ADEA claims: if a release does not comport with the statutory requirements of the OWBPA, there simply is no waiver.<sup>24</sup> Because the employer had

15. 118 S. Ct. 838 (1998).

16. *See id.* at 838.

17. 29 U.S.C. § 626(f) (1990).

18. *See Oubre*, 118 S. Ct. at 840.

19. *See id.*

20. *See Oubre v. Entergy Operations*, 112 F.3d 787 (5th Cir. 1996) (per curiam).

21. *See Oubre*, 118 S. Ct. at 840-41.

22. *See id.*

23. The OWBPA states in relevant part:

An individual may not waive any right or claim under this [Act (the ADEA)] unless the waiver is knowing and voluntary. . . . [A] waiver may not be considered knowing and voluntary unless at a minimum—

(A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;

(B) the waiver specifically refers to rights or claims arising under this [Act];

(C) the individual does not waive rights or claims that may arise after the date the waiver is executed;

(D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;

(E) the individual is advised in writing to consult with an attorney prior to executing the agreement;

(F)(i) the individual is given a period of at least 21 days within which to consider the agreement; . . .

(G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired;

29 U.S.C. § 626(f)(1) (1990). The parties in *Oubre* agreed that the release did not advise the plaintiff of the requirements of (B), (F)(i), and (G) above. *See Oubre*, 118 S. Ct. at 842.

24. *See Oubre*, 118 S. Ct. at 841. The Court's language is direct:

The statutory command is clear: An employee "may not waive" an ADEA claim unless the waiver or release satisfies the OWBPA's requirements. The policy of the Older Workers Benefit Protection Act is likewise clear from its title: It is designed to protect the rights and benefits of older workers. The OWBPA implements Congress' policy via a strict, unqualified statutory stricture on waivers, and we are bound to take Congress at its word. Congress imposed specific

not drafted the release in compliance with the OWBPA, the Court concluded, the release was unenforceable as to the plaintiff's ADEA claim;<sup>25</sup> the plaintiff could not ratify the release by retaining the payments, because "the retention did not comply with the OWBPA any more than the original release did."<sup>26</sup> Furthermore, to recognize ratification under the statute would, practically speaking, enable employers to flout the OWBPA's waiver provisions and still evade suit because most employees would be financially unable to tender back the monies paid.<sup>27</sup> The Court left open the possibility, however, of restitution, recoupment, or setoff of the payments by the employer.<sup>28</sup>

The dissent saw nothing in the statute to prevent the application of common law principles to the OWBPA.<sup>29</sup> The majority's ruling, though, merely enforces the Act's explicit language, which is aimed precisely at the obligations of employers seeking to avoid liability for ADEA claims.<sup>30</sup> The OWBPA's requirements for release of ADEA claims must be carefully followed, in order for employers to take advantage of the benefits of the release.<sup>31</sup>

### III. TITLE VII: CLARIFICATION OF SEXUAL HARASSMENT LAW

This term brought some much needed clarification to the area of sexual harassment law. First, the Court recognized a cause of action against employers for same-sex harassment under Title VII in *Oncale v. Sundowner Offshore Services*<sup>32</sup> This decision provided further guidance on how to determine the existence of a claim of hostile environment in the workplace. The Court also settled the question of employer liability for harassment of employees by supervisors. It held in *Burlington Industries v. Ellerth*<sup>33</sup> and *Faragher v. City of Boca Raton*<sup>34</sup> that employers are vicariously liable for sexual harassment of employees by supervisors under Title VII—regardless of whether quid pro quo or hostile environment harassment is shown—but afforded an affirmative defense when no tangible employment benefits were affected by the harassment.

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duties on employers who seek releases of certain claims created by statute. Congress delineated these duties with precision and without qualification: An employee "may not waive" an ADEA claim unless the employer complies with the statute. Courts cannot with ease presume ratification of that which Congress forbids.

*Id.*

25. *See id.*

26. *Id.* at 842.

27. *See id.*

28. *See id.*; *see also id.* at 844 (Breyer, J. concurring).

29. *See id.* at 845-46 (Thomas, J., dissenting).

30. *See* 29 U.S.C. §626(f)(1) (1990); *see also Oubre*, 118 S. Ct. at 841-42.

31. *Oubre*, 118 S. Ct. at 842.

32. 118 S. Ct. 998, 1003 (1998).

33. 118 S. Ct. 2257, 2271 (1998).

34. 118 S. Ct. 2275, 2292-93 (1998).

### A. Judicial Recognition of the Hostile Environment Sexual Harassment Theory

The Court first defined the contours of a Title VII sexual harassment claim over a decade ago, in *Meritor Savings Bank, FSB v. Vinson*.<sup>35</sup> The *Meritor* Court recognized that sexual harassment not only occurs when receipt of tangible (*i.e.*, economic) employment benefits depends on acquiescence to sexual demands—the quid pro quo theory—but also when a hostile environment is created by sexual conduct in the workplace.<sup>36</sup> Prior to *Meritor*, the lower courts had agreed only on the quid pro quo theory, even though the Equal Employment Opportunity Commission had, six years earlier in 1980, issued guidelines recognizing “hostile environment sexual harassment” as a form of discrimination under Title VII.<sup>37</sup> Chief Justice Rehnquist, writing for a unanimous Court in *Meritor*, cited these guidelines favorably, along with the cases following them, in holding that Title VII’s language prohibiting discrimination in “terms, conditions, or privileges of employment”<sup>38</sup> encompasses more than “‘economic’ or ‘tangible’ discrimination”<sup>39</sup> and reaches sexual conduct creating hostile or abusive working conditions.<sup>40</sup>

The Court thus modified the elements of the quid pro quo claim of sexual harassment to accommodate a hostile environment claim. A claim of quid pro quo harassment requires the plaintiff to prove that: (1) plaintiff is a member of a class protected by Title VII’s prohibition of discrimination because of sex;<sup>41</sup> (2) plaintiff is subject to unwelcome conduct in the form of sexual advances or requests for sexual favors; (3) these requests are made because of plaintiff’s sex; and (4) receipt or denial of tangible terms, conditions or privileges of employment are conditioned on plaintiff’s reaction to such requests.<sup>42</sup>

In a hostile environment sexual harassment claim, the second and fourth elements are slightly altered. As to the second element, the objectionable conduct can go beyond sexual advances or requests for sexual favors to “other verbal or physical conduct of a sexual nature.”<sup>43</sup> Drawing from racial harassment cases, the Court explained that “Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult.”<sup>44</sup> However, for such conduct to be actionable, “it must be sufficiently severe or pervasive ‘to alter the conditions

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35. 477 U.S. 57 (1986).

36. *See id.* at 73.

37. 29 C.F.R. § 1604.11 (1985).

38. Title VII provides, in pertinent part:

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s . . . sex . . .

42 U.S.C. § 2000e-2(a)(1) (1994).

39. *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986).

40. *See id.*

41. Both men and women are protected from discrimination on the basis of sex. *See Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 682 (1983).

42. *See, e.g., Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1414 (10th Cir. 1987).

43. *Meritor*, 477 U.S. at 65 (quoting EEOC guidelines at 29 C.F.R. § 1604.11(a) (1985)).

44. *Id.*

of [the victim's] employment and create an abusive working environment."<sup>45</sup> The fourth element of a hostile environment claim, then, looks to the severity or pervasiveness of the conduct to determine whether abusive working conditions have been created.<sup>46</sup>

The Court also clarified the "unwelcomeness" aspect of the second element of a sexual harassment claim. It rejected the district court's conclusion that, because Ms. Vinson had engaged voluntarily in intercourse with her supervisor, the conduct was not "unwelcome."<sup>47</sup> A sexual harassment victim need not be "forced to participate against her will,"<sup>48</sup> the Court stated, in order for the conduct to be "unwelcome." Rather, one must look at the victim's own perception of the conduct: "The 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."<sup>49</sup> With respect to this factual inquiry, however, the Court determined that the district court had correctly admitted evidence of the plaintiff's sexually provocative speech and dress.<sup>50</sup>

Thus, *Meritor* established the elements necessary to state a claim of hostile environment sexual harassment: (1) the plaintiff is a member of a class protected by Title VII; (2) the plaintiff was subject to unwelcome conduct of a sexual nature; (3) the conduct occurred because of the plaintiff's sex; and (4) the conduct was sufficiently severe or pervasive as to alter the conditions of plaintiff's employment and create an abusive working environment.<sup>51</sup> In order to hold an employer liable for harassing conduct by its employees, however, a fifth element must connect the employer to the harassing conduct.<sup>52</sup>

*Meritor* also discussed the issue of employer liability, but "declin[e]d the parties' invitation to issue a definitive rule."<sup>53</sup> It did, however, reject a strict liability theory of employer liability for acts of supervisors and, in accordance with Title VII's definition of "employer" to include an "agent of [an employer],"<sup>54</sup> offered some

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45. *Id.* at 67 (quoting *Henson v. Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)).

46. *See id.*

47. *Id.* at 68. Although Ms. Vinson did allege she participated in intercourse with her supervisor, she also alleged that he raped her on a number of occasions. *See id.* at 60.

48. *Id.* at 68.

49. *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 68 (1986).

50. *See id.* at 73.

51. *See Meritor*, 477 U.S. 57.

52. *See generally*, HAROLD S. LEWIS JR., CIVIL RIGHTS AND EMPLOYMENT DISCRIMINATION LAW 186 (1997) (citing *Meritor*, 477 U.S. 57; *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991); *Carrero v. New York City Housing Authority*, 890 F.2d 569 (2d Cir. 1989); *Hall v. Gus Construction Co.*, 842 F.2d 1010 (8th Cir. 1988); *Hicks v. Gates Rubber Company*, 833 F.2d 1406 (10th Cir. 1987); *Rabidue v. Osceola Refining Co.*, 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987); *Scott v. Sears, Roebuck & Co.*, 798 F.2d 210 (7th Cir. 1986); *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982)).

53. *Id.* at 72.

54. Title VII defines "employer" as follows:

The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person. . . .

42 U.S.C. § 2000e(b).

guidelines based on agency principles:

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, surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible. For this reason, we hold that the Court of Appeals erred in concluding that employers are always automatically liable for sexual harassment by their supervisors. For the same reason, absence of notice to an employer does not necessarily insulate that employer from liability.<sup>55</sup>

With respect to its comment regarding notice to the employer, the Court provided some guidance based on the facts of the case. The Court rejected the employer's proffered defense that its written grievance procedure and general anti-discrimination policy protected the employer from liability.<sup>56</sup> The policy did not specifically address sexual harassment, and it required the employee to report to an immediate supervisor, who, in this case, was the alleged harasser. Such a policy, the Court reasoned, would discourage employees from reporting harassment under these circumstances:

Since Taylor was the alleged perpetrator, it is not altogether surprising that respondent failed to invoke the procedure and report her grievance to him. Petitioner's contention that respondent's failure should insulate it from liability might be substantially stronger if its procedures were better calculated to encourage victims of harassment to come forward.<sup>57</sup>

### *B. Defining a Hostile Environment*

The next time the Court addressed sexual harassment, seven years later in *Harris v. Forklift Systems, Inc.*,<sup>58</sup> it determined what effect the conduct in a hostile environment case must have on the victim in order for the conduct to be actionable.<sup>59</sup>

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55. *Meritor*, 477 U.S. at 72 (citations omitted).

56. *See id.* at 63.

57. *Id.* at 73.

58. 510 U.S. 17 (1993).

59. The Court summarized the acts by Ms. Harris' supervisor, Charles Hardy, which she alleged created a hostile working environment:

[T]hroughout Harris' time at Forklift, Hardy often insulted her because of her gender and often made her the target of unwanted sexual innuendos. Hardy told Harris on several occasions, in the presence of other employees, "You're a woman, what do you know" and "We need a man as the rental manager"; at least once, he told her she was "a dumb ass woman." Again in front of others, he suggested that the two of them "go to the Holiday Inn to negotiate [Harris'] raise." Hardy occasionally asked Harris and other female employees to get coins from his front pants pocket. He threw objects on the ground in front of Harris and other women, and asked them to pick the objects up. He made sexual innuendos about Harris' and other women's clothing . . . While Harris was arranging a deal with one of Forklift's customers, he asked her, again in front of other



Justice O'Connor, writing for the unanimous Court, rejected the position that the conduct "must 'seriously affect [an employee's] psychological well-being' or lead the plaintiff 'to suffe[r] injury.'"<sup>60</sup>

Rather, the Court held, the appropriate standard "takes a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury."<sup>61</sup> This standard, furthermore, must be applied by using a test of objective and subjective "reasonableness," looking at the totality of the circumstances:

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. This is not, and by its nature cannot be, a mathematically precise test. . . . But we can say that whether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances. These may include 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. . . . [W]hile psychological harm, like any other relevant factor, may be taken into account, no single factor is required.<sup>62</sup>

Justice Scalia, concurring, criticized the imprecision of this standard. Yet he acknowledged that the test fashioned in *Harris* best reflected Title VII's "terms, privileges and conditions of employment" language:

"Abusive" (or "hostile," which in this context I take to mean the same thing) does not seem to me a very clear standard—and I do not think clarity is at all increased by adding the adverb "objectively" or by appealing to a "reasonable person[']s]" notion of what the vague word means . . . . Be that as it may, I know of no alternative to the course the Court today has taken. One of the factors mentioned in the Court's nonexhaustive list—whether the conduct unreasonably interferes with an employee's work performance—would, if it were made an absolute test, provide greater guidance to juries and employers. But I see no basis for such a limitation in the language of the statute . . . . I know of no test more faithful to the inherently vague statutory language than the one the Court today adopts.<sup>63</sup>

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employees, "What did you do, promise the guy . . . some [sex] Saturday night?" *Id.* at 19 (citations omitted). The district court found, and the Sixth Circuit affirmed in an unpublished opinion, that although Hardy's conduct may have offended Harris, it was not "so severe as to be expected to seriously affect [Harris'] psychological well-being" and therefore did not create "a working environment so poisoned as to be intimidating or abusive to [Harris]." *Id.* at 20 (quoting from the appellate record) (alteration in original).

60. *Id.* at 20 (alteration in original).

61. *Id.* at 21.

62. *Id.* at 22-23 (citation omitted).

63. *Id.* at 24-25 (Scalia, J., concurring) (alteration in original).

C. *Same-sex Harassment and Refinement of the Hostile Environment Theory in Oncale v. Sundowner Offshore Services*

Justice Scalia embraced *Harris'* test this term in *Oncale v. Sundowner Offshore Services*,<sup>64</sup> which recognized a cause of action for same-sex sexual harassment. Mr. Oncale worked as a roustabout on an eight-man offshore drilling platform.<sup>65</sup> In his complaint, he alleged that he was sexually harassed on several occasions by supervisors John Lyons and Danny Pippen and a co-worker, Brandon Johnson.<sup>66</sup> The conduct consisted of Lyons placing his penis on Oncale's neck and arm on different occasions while Pippen and Johnson restrained him, threats of homosexual rape by Lyons and Pippen, and Lyons forcing a bar of soap into Oncale's anus in the shower while Pippen restrained him.<sup>67</sup> Oncale had complained to management but was told by the employer's Safety Compliance Clerk that he too had been harassed and called homosexual names by Lyons and Pippen; nothing was done about Oncale's complaint and Oncale quit.<sup>68</sup> He said in his deposition, "'I felt that if I didn't leave my job, that I would be raped or forced to have sex.'"<sup>69</sup>

The district court dismissed Oncale's claim, and the Fifth Circuit affirmed, ruling that a man has no cause of action against another man for sexual harassment under Title VII.<sup>70</sup> The Supreme Court reversed, unanimously holding "that nothing in Title VII necessarily bars a claim of discrimination 'because of . . . sex' merely because the plaintiff and the defendant (or the person charged with acting on behalf of the defendant) are of the same sex."<sup>71</sup>

Writing for the Court, Justice Scalia noted that the courts of appeal, in ruling on same-sex harassment, distinguished between "quid pro quo" and "hostile environment" cases.<sup>72</sup> While they generally recognized a cause of action for same-sex harassment when a tangible employment benefit was affected, they "took a bewildering variety of stances" in hostile environment cases.<sup>73</sup> Some, like the Fifth Circuit, refused to recognize a cause of action altogether, some recognized such a cause of action regardless of the sex of the harasser or victim, and others required the plaintiff to prove that the harasser was motivated by homosexual desire.<sup>74</sup>

The Court's discussion of hostile environment sexual harassment focused on the elements requiring that the conduct arises "because of the plaintiff's sex" and is "severe and pervasive."<sup>75</sup> As to the first requirement, the Court stressed, "the plaintiff . . . must always prove that the conduct at issue . . . actually constituted

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64. 118 S. Ct. 998 (1998).

65. *See id.* at 1000-01.

66. *See Oncale v. Sundowner Offshore Services*, 83 F.3d 118, 119-120 (5th Cir. 1996).

67. *See id.*

68. *See Oncale*, 118 S. Ct. at 1001.

69. *Id.*

70. *See id.*

71. *Id.* at 1001-02.

72. *See id.* at 1002.

73. *Id.*

74. *See Oncale*, 118 S. Ct. at 1002.

75. *Id.*

'discriminat[ion] . . . because of . . . sex.'"<sup>76</sup> Justice Scalia used *Harris*' language to clarify: "whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."<sup>77</sup> The Court acknowledged that the element requiring the conduct arise "because of sex" might be easier to prove if the harasser and victim were of the opposite sex, as in *Meritor* and *Harris*, or if there were evidence that a same-sex harasser was homosexual;<sup>78</sup> however, it stressed that sexual harassment "need not be motivated by sexual desire."<sup>79</sup> As examples, the Court suggested that the element could be satisfied if a woman used derogatory, sex-specific terms toward another woman out of "general hostility to the presence of women in the workplace,"<sup>80</sup> or if a same-sex harassment victim used "direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace."<sup>81</sup>

These examples, furthermore, cast light on the nature of the conduct to be examined. They illustrate the fact that "conduct of a sexual nature" violative of Title VII need not be conduct defined in terms of *sexual activity*; conduct that pertains to the sex of the victim is sufficient. Thus, conduct that indicates derogation of one sex over another (which, by definition, would be "unwelcome" to the victim) could give rise to a sexual harassment claim, as could unwelcome conduct that explicitly or implicitly pertains to some sort of sexual activity.

In response to the employer's argument that recognition of same-sex harassment would amount to "a general civility code for the American workplace,"<sup>82</sup> the Court explained that the presence of sexual conduct alone does not give rise to a cause of action.<sup>83</sup> Rather, the conduct must be "so objectively offensive as to alter the 'conditions' of the victim's employment";<sup>84</sup> that is—here Scalia used the very terminology of *Harris* he had before criticized—the conduct must be "severe or pervasive enough to create . . . an environment that a reasonable person would find hostile or abusive."<sup>85</sup> The Court offered further instruction on how to make this determination, explaining that *Harris*' totality of the circumstances test must include the social context of the behavior:

[T]hat inquiry requires careful consideration of the social context in which particular behavior occurs and is experienced by its target. . . . 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

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76. *Id.* (emphasis added) (alteration in original).

77. *Id.* (quoting *Harris*, 510 U.S. at 25 (Ginsburg, J., concurring)).

78. *See id.*

79. *Id.*

80. *Oncule*, 118 S. Ct. at 1002.

81. *Id.*

82. *Id.*

83. *See id.* at 1002-03.

84. *Id.* at 1003.

85. *Id.*

simple recitation of the words used or the physical acts performed.<sup>86</sup>

As an example, the Court distinguished the conduct of a coach slapping a football player on the buttocks as he entered the playing field from that of a coach slapping his secretary on the buttocks in the office.<sup>87</sup> In contrast to the worried tone of his concurrence in *Harris*, Justice Scalia placed great faith in a jury's ability to use "[c]ommon sense, and an appropriate sensitivity to social context, . . . 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."<sup>88</sup>

The above direction to the jury deciding a sexual harassment case also adds an important dimension that had, at least before *Harris*, received different treatment from lower courts: the perspective from which to assess the reasonableness of the plaintiff's perception of the hostility or abusiveness of the conduct. *Harris* referred to a "reasonable person" in its articulation of the test,<sup>89</sup> but declined to "answer . . . all the potential questions [the test] raises."<sup>90</sup> *Harris* thus did not indicate whether "reasonable person" meant that the conduct should be viewed from a reasonable victim's perspective, taking into account men's and women's different social perspectives,<sup>91</sup> or whether it should be viewed from the perspective of a generic "reasonable person." *Oncale* appears to endorse the "reasonable victim" perspective, by emphasizing the social context of the conduct and by expanding *Harris*' "reasonable person" language to "reasonable person in the plaintiff's position."<sup>92</sup> Requiring a fact finder to consider the victim's perspective, allowing victim testimony about personal experiences and expectations in the social context of the workplace, and allowing expert testimony about socialization of men and women, will ensure a more realistic verdict than if the fact finder were required to assess "reasonableness" from the point of view of the average person who may not have had an experience similar to that of the plaintiff.

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86. *Oncale*, 118 S. Ct. at 1003.

87. *See id.*

88. *Id.*

89. *Harris*, 510 U.S. at 22 (emphasis added).

90. *Id.* at 22-23.

91. *See, e.g.,* *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991). That court explained:

We realize that there is a broad range of viewpoints among women as a group, but we believe that many women share common concerns which men do not necessarily share. For example, because women are disproportionately victims of rape and sexual assault, women have a stronger incentive to be concerned with sexual behavior. Women who are victims of mild forms of sexual harassment may understandably worry whether a harasser's conduct is merely a prelude to violent sexual assault. Men, who are rarely victims of sexual assault, may view sexual conduct in a vacuum without a full appreciation of the social setting or the underlying threat of violence that a woman may perceive.

*Id.* (citations omitted).

92. *Oncale*, 118 S. Ct. at 1003.

*D. Employer Liability for Sexual Harassment by Supervisors: Burlington Industries v. Ellerth and Faragher v. City of Boca Raton*

The Court squarely faced the issue of employer liability in the context of harassment by a supervisor in *Burlington Industries v. Ellerth*<sup>93</sup> and *Faragher v. City of Boca Raton*.<sup>94</sup> Neither plaintiff had complained to management about her supervisor's conduct.<sup>95</sup> In these cases, Justice Scalia abandoned his faith in a jury's ability to determine the reasonableness of a plaintiff's actions and joined Justice Thomas' dissents.

An interesting twist on the accepted sexual harassment theories occurred in *Burlington*: Ms. Ellerth's supervisor, Ted Slowik, had threatened her with loss of tangible benefits if she did not acquiesce to his sexual demands, but he never carried through on the threats.<sup>96</sup> Conduct cited by the Court included the following: After Ellerth failed to react to a comment he made about her breasts, Slowik "told her to 'loosen up' and warned, 'You know, Kim, I could make your life very hard or very easy at Burlington.'"<sup>97</sup> When considering Ellerth for a promotion, Slowik "expressed reservations . . . because she was not 'loose enough'" and then "reach[ed] over and rubb[ed] her knee"; nevertheless she was promoted.<sup>98</sup> On another occasion, Slowik denied a business-related request from Ellerth and said, "are you wearing shorter skirts yet, Kim, because it would make your job a whole heck of a lot easier."<sup>99</sup> The district court found Slowik's conduct to create a hostile environment, but also found a quid pro quo "component" to the harassment.<sup>100</sup>

The appropriate analysis to determine Burlington's liability would, the lower courts reasoned, depend on whether the above facts amounted to quid pro quo or hostile environment harassment. If a plaintiff stated a claim for quid pro quo harassment, this reasoning continued, the employer would be vicariously liable for the supervisor's actions.<sup>101</sup> If, on the other hand, the plaintiff stated a hostile environment claim, the employer must be found negligent in order to be liable, *i.e.*, that it either knew or should have known about the conduct and failed to take any action.<sup>102</sup> The district court determined that Slowik's quid pro quo conduct "merely . . . contribut[ed] to Ellerth's hostile environment."<sup>103</sup> Applying the negligence standard, it found that Burlington neither knew nor should have known about the conduct, as

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93. 118 S. Ct. 2257 (1998).

94. 118 S. Ct. 2275 (1998).

95. See *Burlington*, 118 S. Ct. at 2262; *Faragher*, 118 S. Ct. at 2281.

96. See *Burlington*, 118 S. Ct. at 2264.

97. *Id.* at 2262 (alteration in original).

98. *Id.*

99. *Id.*

100. *Ellerth v. Burlington Indus.*, 912 F. Supp. 1101, 1121 (N.D. Ill. 1996).

101. See *Burlington*, 118 S. Ct. at 2264-65 (citing *Davis v. Sioux City*, 115 F.3d 1365, 1367 (8th Cir. 1997); *Nichols v. Frank*, 42 F.3d 503, 513-14 (9th Cir. 1994); *Bouton v. BMW of North America*, 29 F.3d 103, 106-07 (3rd Cir. 1994); *Sauers v. Salt Lake County*, 1 F.3d 1122, 1127 (10th Cir. 1993); *Kauffman v. Allied Signal, Inc.*, 970 F.2d 178, 185-86 (6th Cir.), *cert. denied*, 506 U.S. 1041 (1992); *Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311, 1316 (11th Cir. 1989)).

102. See *id.* at 2263.

103. *Ellerth v. Burlington Indus.*, 912 F. Supp. 1101, 1123 (N.D. Ill. 1996).

Ellerth had not used the company's internal procedures to report the conduct.<sup>104</sup> Burlington was granted summary judgment.<sup>105</sup>

The Seventh Circuit reversed *en banc*, but, as the Supreme Court noted, "produced eight separate opinions and no consensus for a controlling rationale."<sup>106</sup> Six of the judges thought Ellerth had stated a quid pro quo claim, but none agreed on the applicable standard for employer liability when quid pro quo threats fail to affect tangible job benefits.<sup>107</sup>

Writing for the seven-person majority in *Burlington*, Justice Kennedy observed that the terms "quid pro quo" and "hostile environment" are useful primarily to analyze how the alleged harassing conduct discriminates with respect to terms or conditions of employment:

We assumed, and with adequate reason, that if an employer demanded sexual favors from an employee in return for a job benefit, discrimination with respect to terms or conditions of employment was explicit. Less obvious was whether an employer's sexually demeaning behavior altered terms or conditions of employment in violation of Title VII. We distinguished between quid pro quo claims and hostile environment claims, and said both were cognizable under Title VII, though the latter requires harassment that is severe or pervasive. The principal significance of the distinction is to instruct that Title VII is violated by either explicit or constructive alterations in the terms or conditions of employment and to explain the latter must be severe or pervasive.<sup>108</sup>

The Court added that the terms also "illustrate the distinction," for purposes of stating a claim under Title VII, "between cases involving a threat which is carried out and offensive conduct in general":<sup>109</sup>

When a plaintiff proves that a tangible employment action resulted from a refusal to submit to a supervisor's sexual demands, he or she establishes that the employment decision itself constitutes a change in the terms and conditions of employment that is actionable under Title VII. For any sexual harassment preceding the employment decision to be actionable, however, the conduct must be severe or pervasive.<sup>110</sup>

Under the above characterizations, the Court found that Ellerth's allegations amounted to a "hostile environment" claim because no employment decision had yet been affected by her supervisor's threats.<sup>111</sup> However, the Court pointed out that it

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104. See *Burlington*, 118 S. Ct. at 2263.

105. See *id.*

106. *Id.*

107. See *id.*

108. *Id.* at 2264 (citations omitted).

109. *Id.*

110. *Burlington Indus. v. Ellerth*, 118 S. Ct. 2257, 2265 (1998).

111. See *id.*

had never used the terms “quid pro quo” or “hostile environment” in connection with a determination of employer liability for conduct causing discrimination.<sup>112</sup> Without the question of how to designate Ellerth’s claim of harassment, the issue in *Burlington* merged with that presented in *Faragher*.

There was no question that the conduct alleged in *Faragher* amounted to hostile environment sexual harassment by Faragher’s supervisors.<sup>113</sup> Like Ellerth, Faragher did not report the harassment.<sup>114</sup> The district court found in Faragher’s case, however, that her employer, the City of Boca Raton, had not thoroughly disseminated its sexual harassment policy, and neither Faragher nor her supervisors were aware of it.<sup>115</sup> It held the City liable, imputing constructive knowledge and finding that Faragher’s supervisors were acting as its agents.<sup>116</sup> The Eleventh Circuit reversed on the issue of the City’s liability, holding that the supervisors’ harassment was not within the scope of their employment, they were not aided in the harassment by the agency relationship, and the City did not have constructive knowledge of the harassment.<sup>117</sup>

Recognizing both the plain language of Title VII and the fact that Congress’s 1991 amendments to Title VII<sup>118</sup> had not affected any aspect of *Meritor*, the Court set out in *Burlington* and *Faragher* to complete the task it broached in *Meritor*: to establish “a uniform and predictable standard . . . as a matter of federal law” for employer liability.<sup>119</sup> Moreover, the Court would “rely ‘on the general common law of agency, rather than on the law of any particular State, to give meaning to’” the terms “employer” and “agent” of an employer in Title VII.<sup>120</sup> The starting point, as

112. *See id.*

113. The Supreme Court described the conduct found by the district court to be hostile environment sexual harassment in *Faragher v. City of Boca Raton*, 864 F. Supp. 1552, 1564 (S.D. Fla. 1994), *aff’d in pertinent part*, 76 F.3d 1155, 1162 (11th Cir. 1996), *aff’d en banc* 111 F.3d 1530 (11th Cir. 1997), which was perpetrated by Ms. Faragher’s supervisors, Bill Terry and David Silverman:

From time to time over the course of Faragher’s tenure at the Marine Safety Section, between 4 and 6 of the 40 to 50 lifeguards were women. During that 5-year period, Terry repeatedly touched the bodies of female employees without invitation, would put his arm around Faragher, with his hand on her buttocks, and once made contact with another female lifeguard in a motion of sexual stimulation. He made crudely demeaning references to women generally, and once commented disparagingly on Faragher’s shape. During a job interview with a woman he hired as a lifeguard, Terry said that the female lifeguards had sex with their male counterparts and asked whether she would do the same.

Silverman behaved in similar ways. He once tackled Faragher and remarked that, but for a physical characteristic he found unattractive, he would readily have had sexual relations with her. Another time, he pantomimed an act of oral sex. Within earshot of the female lifeguards, Silverman made frequent, vulgar references to women and sexual matters, commented on the bodies of female lifeguards and beach goers, and at least twice told female lifeguards that he would like to engage in sex with them.

*Faragher*, 118 S. Ct. at 2281 (citations omitted).

114. *See Faragher*, 118 S. Ct. at 2281.

115. *See id.* at 2280-81.

116. *See Faragher*, 864 F. Supp. at 1563-1564.

117. *See Faragher v. City of Boca Raton*, 76 F.3d 1155, 1166-1167 (11th Cir. 1996), *aff’d en banc*, 111 F.3d 1530 (1997).

118. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.

119. *Burlington*, 118 S. Ct. at 2265. *See also Faragher*, 118 S. Ct. at 2286, 2291 n.4.

120. *Burlington*, 118 S. Ct. at 2265 (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 740 (1989)).

*Meritor* instructed, would be the *Restatement (Second) of Agency (Restatement)*.<sup>121</sup>

Justice Kennedy, writing in *Burlington*, and Justice Souter in *Faragher*, began their analyses with principles set out in the *Restatement* regarding liability of a master for tortious acts of his servant. Each carefully reviewed the various circuit courts' opinions applying these principles. Both rejected the applicability of *Restatement* § 219(1), which states that "[a] master is liable for the torts of his servants committed while acting in the scope of their employment,"<sup>122</sup> concluding that harassment is beyond the scope of employment.<sup>123</sup> They then turned to § 219(2):<sup>124</sup>

(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>125</sup>

Both focused their analyses on subsections (a), (b) and (d), finding subsection (c) inapplicable.<sup>126</sup>

Justice Kennedy explained in *Burlington* that § 219(2)(a) pertains to the situation in which an employer is directly liable by his own actions or indirectly liable "where the agent's high rank in the company makes him or her the employer's alter ego."<sup>127</sup> Justice Souter noted that *Harris* had presented the latter situation because the alleged harasser was the employer's president "who was indisputably within that class of an employer organization's officials who may be treated as the organization's proxy";<sup>128</sup> under such circumstances, the employer would be liable for harassment.

Employer liability for negligence under § 219(2)(b), Justice Kennedy further explained, applies "with respect to sexual harassment if [the employer] knew or should have known about the conduct and failed to stop it."<sup>129</sup> This is "a minimum standard for employer liability under Title VII."<sup>130</sup>

Justice Souter added, "In such circumstances, the combined knowledge and inaction may be seen as demonstrable negligence, or as the employer's adoption of the offending conduct, quite as if they had been authorized affirmatively as the employer's policy."<sup>131</sup> Both opinions implied that negligence is the correct standard

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121. RESTATEMENT (SECOND) OF AGENCY (1957); see *Meritor*, 477 U.S. at 72.

122. RESTATEMENT at § 219(1).

123. See *Burlington*, 118 S. Ct. at 2267; *Faragher*, 118 S. Ct. at 2288-2289.

124. See *Burlington*, 118 S. Ct. at 2267; *Faragher*, 118 S. Ct. at 2290.

125. RESTATEMENT (SECOND) OF AGENCY § 219(2) (1957).

126. See, e.g., *Burlington*, 118 S. Ct. at 2267.

127. *Id.*

128. *Faragher*, 118 S. Ct. at 2284.

129. *Burlington*, 118 S. Ct. at 2267.

130. *Id.*

131. *Faragher*, 118 S. Ct. at 2284.



to apply when the harassment is perpetrated by a nonsupervisory co-worker who is not purporting to act on behalf of the employer.<sup>132</sup>

This left Restatement § 219(2)(d), which imposes employer liability if an employee reasonably relies on the apparent authority of the tortfeasor or if the tortfeasor was aided in accomplishing the tort by the agency relationship.<sup>133</sup> Justice Kennedy observed that the “apparent authority” clause is generally inapplicable in situations involving harassment by supervisors, who are usually misusing actual power as opposed to power they do not have.<sup>134</sup> Therefore, the appropriate standard to apply to supervisor harassment is the “aided in the agency relationship standard,” which, he explained, requires “something more” than just “the proximity and regular contact” provided by the employment relation.<sup>135</sup> That “something more” can be the power to “[take] a tangible employment action against the subordinate.”<sup>136</sup> Justice Souter described this power as follows:

When a person with 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. When a fellow employee harasses, the victim can walk away or tell the offender where to go, but it may be difficult to offer such responses to a supervisor, whose “power to supervise—[which may be] to hire and fire, and to set work schedules and pay rates—does not disappear . . . when he chooses to harass through insults and offensive gestures rather than directly with threats of firing or promises of promotion.”<sup>137</sup>

He added that employer liability for acts of supervisors is also appropriate because “the employer has a greater opportunity to guard against misconduct by supervisors than by common workers; employers have greater opportunity and incentive to screen them, train them, and monitor their performance.”<sup>138</sup>

Both opinions concluded that an employer is vicariously liable when a supervisor takes tangible employment action against an employee, as a result of the employee’s reaction to harassing conduct. As Justice Kennedy reasoned, “In that instance, it would be implausible to interpret agency principles to allow an employer to escape liability.”<sup>139</sup> This conclusion affirmed the circuits’ virtual unanimity in imposing vicarious liability on an employer for quid pro quo sexual harassment.

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132. See *Burlington*, 118 S. Ct. at 2268 (citing EEOC regulation 29 C.F.R. § 1604.11(d) with approval); *Faragher*, 118 S. Ct. at 2289 (citing cases applying negligence standard to co-worker harassment situations).

133. See RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (1957).

134. See *Burlington*, 118 S. Ct. at 2267-68.

135. *Id.* at 2268.

136. *Id.*

137. *Faragher*, 118 S. Ct. at 2291 (citation omitted).

138. *Id.*

139. *Burlington*, 118 S. Ct. at 2269; *Faragher*, 118 S. Ct. at 2291.

Where no tangible employment action is taken by a harassing supervisor, however, both justices recognized the difficulty in determining whether the supervisor was aided by the agency relationship or was simply acting like a harassing co-worker.<sup>140</sup> They were also mindful of *Meritor's* holding that employers cannot always be found liable for harassment by supervisors.<sup>141</sup> The justices reconciled their reasoning in adopting a vicarious liability standard for supervisor harassment by recognizing a two-part affirmative defense, comprising both the employer's actions in attempting to prevent and correct the harassing conduct, and the (in)actions of the employee/victim in failing to use opportunities provided by the employer to prevent or correct the harassing conduct. The resulting rule is stated in identical language in *Burlington* and *Faragher*:

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 preventive or corrective opportunities provided by the employer or to avoid harm otherwise.<sup>142</sup>

Both cases add the following explanatory language regarding proof of the defenses:

While proof that an employer had promulgated an anti-harassment 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 any 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. No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment.<sup>143</sup>

The Court justified the affirmative defense to vicarious liability by invoking the various policies underlying Title VII. Specifically, both justices cited Title VII's policies favoring conciliation through internal grievance mechanisms, deterrence of unlawful conduct, and mitigation of damages.<sup>144</sup> The employer's obligation, under

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140. See *Burlington*, 118 S. Ct. at 2269; *Faragher*, 118 S. Ct. at 2291-92.

141. See *Meritor*, 477 U.S. at 72.

142. *Burlington*, 118 S. Ct. at 2270; *Faragher*, 118 S. Ct. at 2292-93.

143. *Burlington*, 118 S. Ct. at 2270; *Faragher*, 118 S. Ct. at 2293.

144. See *Burlington*, 118 S. Ct. at 2270; *Faragher*, 118 S. Ct. at 2292.

the first element of the defense, to exercise reasonable care to prevent and promptly correct harassment, promotes the conciliation and deterrence policies, while the obligation placed on the employee in the second element to reasonably avoid harm promotes all three policies.<sup>145</sup>

Justices Thomas and Scalia dissented in both cases. Justice Thomas, the author of the dissents, maintained that the same standard of employer liability should apply in sexual harassment cases as has been applied by the circuits in racial harassment cases: vicarious liability for tangible employment actions taken on the basis of race, and liability based on a negligence standard for hostile environment cases.<sup>146</sup> Justice Thomas' distinction, however, underplays the fact that the Court's rule pertains to harassment by *supervisors*. This rule will undoubtedly be applied to racial and other forms of prohibited harassment by supervisors as well. As discussed above,<sup>147</sup> conduct amounting to hostile environment sexual harassment can indicate derogation of one sex without implicating any kind of sexual activity, as when the harasser refers to members of one sex using derogatory adjectives or epithets; such conduct would indeed be analogous to racial harassment. On the other hand, conduct amounting to "hostile environment" sexual harassment can implicate sexual activity and carry with it an implied threat that the victim's reaction to the conduct will affect terms of the victim's employment. Conduct of a supervisor in derogation of one's sex, race or religion, however, certainly carries with it an implied threat that the supervisor could exercise authority to take an adverse employment action against the victim of the harassment. The Court's rule thus fits hostile environment harassment perpetrated by a supervisor for any reason prohibited by Title VII.<sup>148</sup>

#### IV. THE ADA: A BROAD DEFINITION OF "DISABILITY" IN *BRAGDON V. ABBOTT*

The Court took a giant step into the area of disability law in *Bragdon v. Abbott*.<sup>149</sup> On the Court's first occasion to construe the Americans with Disabilities Act,<sup>150</sup> the Court had to interpret that statute's threshold requirement of

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145. See *Burlington*, 118 S. Ct. at 2270; *Faragher*, 118 S. Ct. at 2292-93.

146. See *Burlington*, 118 S. Ct. at 2272 (Thomas, J., dissenting).

147. See *supra* notes 80-82 and accompanying text.

148. The Court reached a different result in *Gebser v. Lago Vista Independent School District*, 118 S. Ct. 1989 (1998), on the standard for liability of a school district to a student who has been harassed by a teacher in violation of the nondiscrimination provision of Title IX of the Education Act Amendments, 20 U.S.C. § 1681-88. There it held, in a 5-4 opinion, that the district would not be liable to the student for damages for the teacher's harassing conduct "unless an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of discrimination in the recipient's programs and fails adequately to respond." *Id.* at 1999. Furthermore, such failure to respond "must amount to deliberate indifference to discrimination." *Id.*

This holding was based on the Court's analysis of the differences in the purposes and language of Title IX as compared with Title VII. A complete analysis of *Gebser*, a Title IX case, is beyond the scope of analysis of this discussion, which focuses on Title VII and other statutes bearing on nondiscrimination in employment.

149. 118 S. Ct. 2196 (1998).

150. 42 U.S.C. §§ 12101-213.

“disability,”<sup>151</sup> which applies to all titles under the ADA.<sup>152</sup> In *Bragdon*, written by Justice Kennedy for a five-person majority, the Court held that someone infected with the human immunodeficiency virus (“HIV”), but asymptomatic, is “an individual with a disability” within the meaning of the ADA.<sup>153</sup> This holding may not seem remarkable, if one is aware of the climate in which the ADA emerged;<sup>154</sup> however, the Court’s holding that a physical impairment of the reproductive system constitutes a substantial limitation on a major life activity indicates the Court’s willingness to define “disability” broadly to encompass a number of potential *prima facie* disability claims.

The case arose after Ms. Abbott went to the office of Dr. Bragdon, a dentist, to have her teeth checked.<sup>155</sup> On the medical history form she revealed that she was HIV-positive; however, at that time she suffered no serious symptoms of the infection.<sup>156</sup> Dr. Bragdon determined that Ms. Abbott had a cavity that needed to be filled and told her that, according to his infectious disease policy, he would have to fill the tooth in a hospital.<sup>157</sup> Ms. Abbott then sued Dr. Bragdon for violation of Title III of the ADA, which prohibits disability-based discrimination by private entities that operate public accommodations.<sup>158</sup> Both the District of Maine<sup>159</sup> and the First Circuit<sup>160</sup> held that Ms. Abbott was “an individual with a disability” within the meaning of the ADA and that Dr. Bragdon had violated her Title III rights.<sup>161</sup>

The ADA defines “disability” in three distinct ways, to include individuals who: have a disability, have had a disability in the past, or are regarded by others as having a disability, whether they have a disability or not.<sup>162</sup> Ms. Abbott claimed that her condition of being HIV-positive was an actual disability, which the statute defines as “a physical or mental impairment that substantially limits one or more . . . major life activities.”<sup>163</sup> However, the ADA does not define key terms within this definition; rather, the terms “physical or mental impairment,” “substantially limits,” and “major life activities” are defined in the *Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act*<sup>164</sup> (“the regulations”) promulgated by the EEOC.

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151. *Id.* § 12102. One may also be covered if he has a record of a disability or is regarded as having a disability. *See id.*

152. The nondiscrimination in employment provisions of the ADA are contained in Title I, 42 U.S.C. §§ 12111-17. The Findings and Purpose and Definitions sections, §§ 12101-02, and Title V—Miscellaneous Provisions, §§ 12201-13, apply to Title I as well as all other titles of the ADA.

153. *Bragdon*, 118 S. Ct. at 2209.

154. Much of the legislative history of the ADA refers to employers’ treatment of individuals who are HIV-positive or who have full-blown AIDS.

155. *See Bragdon*, 118 S. Ct. at 2201.

156. *See id.*

157. *See id.*

158. *See* 42 U.S.C. §§ 12161-12207. The nondiscrimination provision of Title III appears at § 12182. As explained at the outset of this article, the same definition of “disability” applies to all titles of the ADA. *See id.* § 12102.

159. *See* *Abbott v. Bragdon*, 912 F. Supp. 580 (D. Me. 1995).

160. *See* *Abbott v. Bragdon*, 107 F.3d 934 (1st Cir. 1997).

161. The First Circuit affirmed the district court’s summary judgment in favor of Ms. Abbott. *See id.* at 949.

162. 42 U.S.C. § 12102(2) (1994).

163. *Id.* §12102(2)(A) (1994).

164. *Id.*

The regulations define “physical or mental impairment” as:

(1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or

(2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.<sup>165</sup>

“Major life activities” are defined in the regulations as “functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.”<sup>166</sup> None of the above listings, however, is intended to be exhaustive.<sup>167</sup>

The regulations state that an impairment “substantially limits” an individual in a major life activity if he or she is:

(i) Unable to perform a major life activity that the average person in the general population can perform; or

(ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.<sup>168</sup>

With regard to determining whether a physical or mental impairment “substantially limits a major life activity,” the regulations further state that the following factors should be considered: “(i) The nature and severity of the impairment; (ii) The duration or expected duration of the impairment; and (iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.”<sup>169</sup>

Thus, a determination of the threshold question of whether an individual is disabled under the ADA proceeds in three steps: first, whether the individual has a *physical or mental impairment*; second, whether the impairment affects some identified *major life activity*; and third, whether the impairment *substantially limits* that major life activity.<sup>170</sup>

After setting out a detailed scientific description of the course of the HIV virus

165. 29 C.F.R. § 1630.2(h) (1998).

166. *Id.* § 1630.2(i).

167. *See, e.g., Bragdon*, 118 S. Ct. at 2202-03.

168. 29 C.F.R. § 1630.2(j) (1998).

169. *Id.* § 1630.2(j)(2).

170. *See Bragdon*, 118 S. Ct. at 2202.

in the human body, the Court held, with regard to the first step, that “HIV infection 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 . . . [which therefore] satisfies the statutory and regulatory definition of a physical impairment during every stage of the disease.”<sup>171</sup> As to the second step of the disability analysis, the Court limited its analysis to the question posed by the plaintiff throughout the litigation: whether reproduction is a major life activity.<sup>172</sup> The Court adopted the First Circuit’s reasoning that “[t]he plain meaning of the word ‘major’ denotes comparative importance’ and ‘suggest[s] that the touchstone for determining the activity’s inclusion under the statutory rubric is its significance.’”<sup>173</sup> It rejected Bragdon’s argument that the adjective “major” is limited to activities of a “public, economic or daily character.”<sup>174</sup> Rather, the Court reasoned, “[r]eproduction and the sexual dynamics surrounding it are central to the life process itself” and therefore constitute major life activity.<sup>175</sup>

The Court then easily concluded, for the third step of the analysis, that HIV infection substantially limits the major life activity of reproduction due to the risk of transmission to a male partner or to a child.<sup>176</sup> Addressing the uncertainty of this risk, the Court pointed out that the impairment does not have to make the major life activity impossible in order to substantially limit it.<sup>177</sup> Instead, the Court focused on the gravity of the outcome: “It cannot be said as a matter of law that an 8% risk of transmitting a dread and fatal disease to one’s child does not represent a substantial limitation on reproduction.”<sup>178</sup>

The Court bolstered its interpretation of the ADA’s definition of “disability” to include asymptomatic HIV infection by citing consistent interpretations of the Rehabilitation Act of 1973<sup>179</sup> by the various agencies administering that act and by circuit courts interpreting it.<sup>180</sup> It noted that Congress had been aware of these interpretations when it enacted the ADA, and that a number of provisions contained in the ADA, including its definition of “disability,” were derived from interpretations of the Rehabilitation Act.<sup>181</sup> Furthermore, after the ADA was passed, agencies continued to interpret “disability” as including HIV-positive status.<sup>182</sup>

The dissent took issue on two points with regard to the definition of “disability.” The first was that reproduction is not a “major life activity”; three members of the dissent would have held that “major life activities” are those “repetitively performed

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171. *Id.* at 2204.

172. *See id.* at 2205. The Court indicated, however, that “[g]iven the pervasive, and invariably fatal, course of the disease, its effect on major life activities of many sorts might have been relevant to our inquiry.” *Id.* at 2204-05.

173. *Id.* at 2205 (citing 107 F.3d at 939, 940).

174. *Id.*

175. *Id.*

176. *See Bragdon*, 118 S. Ct. at 2206.

177. *See id.*

178. *Id.*

179. 29 U.S.C. §§ 706, 791, 793, 794, 794(a) (1994).

180. *See Bragdon*, 118 S. Ct. at 2207-08.

181. *See id.* at 2208.

182. *See id.*

and essential in the day-to-day existence of a normally functioning individual."<sup>183</sup> The second point, on which four dissenters agreed, was that, assuming reproduction to be a major life activity, Ms. Abbott had not proven that her asymptomatic HIV infection "substantially limited" that major life activity for her.<sup>184</sup> These dissenters disagreed with the majority's reasoning that whether a major life activity is substantially limited by an impairment can be determined generally; they would have held that this determination must be made on an individualized basis.<sup>185</sup> This reasoning was based on the ADA's language providing that "disability determination must be made 'with respect to an individual'"<sup>186</sup> and that "'major life activities' allegedly limited by an impairment must be those 'of such individual.'"<sup>187</sup>

The majority's broad interpretation of "disability" under the ADA should result in lower courts allowing more claims to pass the *prima facie* threshold. The Court's broad construction of the ADA is evident also in *Pennsylvania Dep't of Corrections v. Yeskey*,<sup>188</sup> in which the Court interpreted Title II of the ADA.<sup>189</sup> Title II prohibits discrimination against a qualified individual with a disability by a "public entity," which is defined to include "any . . . instrumentality of a State . . . or local government."<sup>190</sup> The Court unanimously found no implied exemption for state prisons and upheld an ADA claim against the prison by a first-time offender who was denied admission into a boot camp program because of his hypertension.<sup>191</sup>

## V. CONCLUSION: ENCOURAGEMENT FOR PLAINTIFFS

Employment discrimination cases decided this term indicate a much broader interpretation of the nondiscrimination statutes, which will result in more claims being recognized at the *prima facie* stage, and more claims getting to juries. The sexual harassment cases, in particular, anticipate the role of the jury in resolving those disputes and provide explicit instruction. While this is not good news for defendants' lawyers, the Court's broad readings should better achieve the fundamental purpose, recognized by the Court, of Title VII and other nondiscrimination statutes: to "eradicat[e] discrimination throughout the economy."<sup>192</sup>

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183. *Id.* at 2215 (Rehnquist, J., dissenting).

184. *See id.* at 2215-2216, 2217. (Rehnquist, J. dissenting; O'Connor, J. concurring in part and dissenting in part).

185. *See id.* at 2214, 2217 (Rehnquist, J., dissenting; O'Connor, J., concurring in part and dissenting in part).

186. *Bragdon*, 118 S. Ct. at 2214 (citing 42 U.S.C. § 12102(2) (1994)).

187. *Id.* (citing 42 U.S.C. § 12102(3)(A) (1994)).

188. 118 S. Ct. 1952 (1998).

189. 42 U.S.C. §§ 12131-12150 (1994).

190. *Id.* § 12131(1)(B) (1994).

191. *See Yeskey*, 118 S. Ct. at 1956.

192. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 254 (1994); *see also* 42 U.S.C. § 12101(b)(1) (1994) ("It is the purpose of this chapter . . . to provide a clear and comprehensive national mandate for elimination of discrimination against individuals with disabilities.").