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## Emroch Lecture: Uncertainties in the Law of Sexual Harassment

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## EMROCH LECTURE

*The Emroch Lecture Series was established through the generosity of the late Mr. Emmanuel Emroch, his wife Bertha, and their many friends and associates. The endowment is currently supported by Mr. Emroch's son and daughter-in-law, Mr. & Mrs. Walter Emroch. Mr. Emroch received a B.A. degree from the University of Richmond in 1928 and a J.D. degree from the University of Richmond School of Law in 1931. The Honorable Susan Webber Wright presented this address as the Thirteenth Annual Emroch Lecture on November 12, 1998, at the University of Richmond School of Law.*

### UNCERTAINTIES IN THE LAW OF SEXUAL HARASSMENT

*The Honorable Susan Webber Wright\**

#### I. INTRODUCTION

The topic, "Uncertainties in the Law of Sexual Harassment," derived from my need to come up with a title for this talk before I had really decided what I would say. Of course, I believe that I was invited here to talk about sexual harassment because of the famous case, *Jones v. Clinton*,<sup>1</sup> that was before me and might be remanded, and about which I am ethically bound to remain silent.

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\* Chief Judge, U.S. District Court for the Eastern District of Arkansas. B.A., 1970, Randolph-Macon Woman's College; J.D., 1975, University of Arkansas; M.P.A., 1978, University of Arkansas.

1. 990 F. Supp. 657 (E.D. Ark. 1998).

Nevertheless, the topic itself is of current interest for other reasons, including the 1998 decisions of the United States Supreme Court in *Burlington Industries, Inc. v. Ellerth*,<sup>2</sup> and *Faragher v. City of Boca Raton*.<sup>3</sup> These companion cases defined standards for employer liability when supervisors sexually harass employees. Also this year, the Court decided *Gebser v. Lago Vista Independent School District*,<sup>4</sup> which defined standards for school district liability when teachers sexually harass students. Because *Jones v. Clinton* does not involve any issues of vicarious liability, and because this issue is an extremely important one in the real world of employment, I have chosen to concentrate my remarks on vicarious liability issues.

Unlike law professors who speak and write on policy, I do not intend in this presentation to draw any significant policy conclusions about the state of the law. In other words, I am not intending to suggest what the law should be. Instead, my goal is to present some issues that are yet to be resolved and, thus, present uncertainties. Some of these uncertainties are legal, but most are purely practical. This is not intended as another scholarly tome from the feminist perspective or a contribution to a colloquy among law professors. Instead, it is a snapshot-in-time from the perspective of one whose experience with the topic has frankly been limited to only a few cases.

I hope to show that the *Ellerth* and *Faragher* decisions leave uncertainties concerning the new affirmative defense now available to employers. I will mention some possible job-site ramifications of this new standard, including the possible impact upon employee privacy. In addition, I briefly explore whether these decisions will have any impact upon other types of harassment cases filed under Title VII.

Next, I will describe the standards set forth in *Gebser* for the liability of a school district for a teacher's sexual harassment of a student. In *Gebser*, a majority of the Supreme Court ruled that the district would be liable only if an official with authori-

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2. 118 S. Ct. 2257 (1998).

3. 118 S. Ct. 2275 (1998).

4. 118 S. Ct. 1989 (1998).

ty to take corrective action had actual knowledge of the harassment.<sup>5</sup> This decision presents an interesting and perhaps confusing contrast to the rules set forth in *Ellerth* and *Faragher*, decided only one week later.

Another area of uncertainty that I will briefly describe was created by Congress when it amended the Federal Rules of Evidence in 1994. This action raises questions concerning employer liability because the new rules directly address admissibility of prior sexual activity on the part of both the alleged victim and the alleged perpetrator. These controversial rules add uncertainty to issues of employer liability.

I conclude that the legal uncertainties will not be resolved until either Congress or the Supreme Court, or both, firmly grasp and clearly enunciate the goals of anti-harassment law.

## II. BACKGROUND: CIVIL RIGHTS ACT OF 1964 AND TITLE IX TO THE EDUCATION AMENDMENTS OF 1972

The development of the law of sexual harassment began with the passage of Title VII of the Civil Rights Act of 1964.<sup>6</sup> In pertinent part, Title VII provides that it is "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 race, color, religion, sex, or national origin."<sup>7</sup> Anyone reading the brief legislative history of this law would hardly conclude that it would encompass the principles of sexual harassment law as it exists today.

The amendment adding sex to the list of protected categories was offered by a congressman from Virginia who joked that females outnumbered males in this country and read a letter from a constituent who complained that this population imbalance created spinsters who were deprived of a "right" to a husband and family.<sup>8</sup> The debate on the House floor indicated that

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5. *See id.* at 1993.

6. 42 U.S.C. § 2000e to 2000e-17 (1994 & Supp. 1996).

7. *Id.* at § 2000e-2(a)(1).

8. *See* 110 CONG. REC. 2577 (1964) (letter to Rep. Smith of Virginia).

some representatives voted for it because they believed that without the amendment adding sex as a protected category, white women would suffer an employment disadvantage to black employees, including black women.<sup>9</sup> In fact, it is widely believed that sex was added by those in Congress who actually opposed the legislation and guessed that if sex was included, Congress would defeat the entire anti-discrimination measure.<sup>10</sup>

In 1986, in *Meritor Savings Bank, F.S.B. v. Vinson*,<sup>11</sup> the United States Supreme Court acknowledged for the first time that sexual harassment is discrimination on the basis of sex.<sup>12</sup> In the 1992 decision in *Franklin v. Gwinnett County Public Schools*,<sup>13</sup> the Supreme Court recognized that sexual harassment of a student by a teacher violates Title IX of the Education Amendments of 1972.<sup>14</sup> Title IX prohibits discrimination in educational programs in schools that receive federal financial assistance.<sup>15</sup> The Supreme Court looked to Title VII to define sexual harassment. Neither *Meritor* nor *Franklin*, however, decided the issues of vicarious liability that confronted the United States Supreme Court this past term.

### III. UNCERTAINTIES FOLLOWING *ELLERTH* AND *FARAGHER*

*Ellerth* and *Faragher* represent an attempt by the Supreme Court to settle the issue of employer liability for an actionable sexually hostile environment in the absence of a "tangible employment" decision.<sup>16</sup> Because of *Jones v. Clinton*, I will not

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9. See *id.* at 2583 (remarks of Rep. Andrews of Alabama); *id.* at 2584 (remarks of Rep. Gathings of Arkansas).

10. See SUSAN M. OMILIAN & JEAN P. KAMP, SEX-BASED EMPLOYMENT DISCRIMINATION § 1.01, at 3. During the debate, Representative Edith Green of Oregon noted that many of "those gentlemen of the House who are most strong in their support of women's rights this afternoon probably gave us the most opposition when we considered a bill which would grant equal pay for equal work just a very few months ago." 110 CONG. REC. 2581 (1964).

11. 477 U.S. 57 (1986).

12. See *id.* at 66-67.

13. 503 U.S. 60 (1992).

14. See *id.* at 76.

15. See 20 U.S.C. §§ 1681-1688 (1994 & Supp. 1997).

16. The plain language of Title VII prohibits employers from making "economic" or "tangible" employment decisions on the basis of race, color, religion, sex, or nation-

say anything substantive about what constitutes an actionable hostile environment, but I note that the Supreme Court dealt with the issue in *Harris v. Forklift Systems, Inc.*<sup>17</sup> It will be sufficient for this discussion to say that the Supreme Court assumed that both Ms. Ellerth and Ms. Faragher were victims of an actionable hostile environment.<sup>18</sup>

In *Ellerth*, the plaintiff, Kimberly Ellerth, alleged that she suffered sexual harassment from a supervisor (not her immediate supervisor), mostly in the form of suggestive comments. She never reported the harassment to Burlington, her employer, even though Burlington had an anti-harassment policy and a complaint procedure for reporting incidents of harassment. Despite the supervisor's statements, including that he could "make her life very hard or very easy" at work, she was promoted and suffered no job detriment or retaliation.<sup>19</sup> She quit her job, stating reasons other than the harassment but later wrote the employer complaining about the harassment. The Seventh Circuit Court of Appeals, en banc, reversed the district court's summary judgment for the defendant employer, but did so in eight separate opinions that reflect the lack of judicial consensus in this area.<sup>20</sup>

In *Faragher*, the plaintiff, Beth Ann Faragher, worked for the defendant Boca Raton as a lifeguard. She was the victim of sexual harassment by two male supervisors who made lewd remarks and offensively touched her and other female employees. Faragher, like Ellerth, suffered no tangible job detriment. Even though the city had an anti-harassment policy, the policy was not posted or otherwise published at the work site. The Eleventh Circuit Court of Appeals found that the city could not be liable for the supervisors' harassment and reversed the dis-

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al origin. See 42 U.S.C. § 2000e-2(a)(1) (1994 & Supp. 1997). However, the Supreme Court extended Title VII liability to "environmental claims" for sexual harassment so "severe or pervasive" that they create "an abusive working environment." *Faragher v. City of Boca Raton*, 118 S. Ct. 2275, 2293 (1998) (citations omitted).

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

18. See *Burlington Indus., Inc. v. Ellerth*, 118 S. Ct. 2257, 2265 (1998); *Faragher*, 118 S. Ct. at 2293.

19. *Ellerth*, 118 S. Ct. at 2262.

20. See generally *Ellerth v. Burlington Indus., Inc.*, 123 F.3d 490 (7th Cir. 1997) (en banc).

strict court's judgment awarding the plaintiff nominal damages against the city.<sup>21</sup>

These twin appellate decisions epitomized the divergent approaches used by courts of appeals in determining employer liability, and the United States Supreme Court granted certiorari for both. The Court decided both cases the same day and set forth standards designed to clarify employer liability in sexual harassment cases. For those who are not familiar with the decisions, a little background would be helpful to understand the traditional rules governing employer liability for wrongful acts of employees.

As required by the decision in *Meritor*,<sup>22</sup> courts rely upon common law rules of agency, outlined in the Restatement of Agency, to determine the extent of employer liability for a supervisor's sexually harassing conduct. Keep in mind that agency law recognizes direct liability and indirect liability. Direct liability applies for the employer's own fault, while indirect liability results from the wrongful conduct of an employee.

Agency law imposes direct liability when the employer intended the harassing conduct, when the employer was negligent or reckless, or when the perpetrator is such a high-ranking officer of the employer that the perpetrator is deemed to be the "alter ego" of the employer.<sup>23</sup> Indirect liability for an employee's harassment follows when the employee was aided in his wrongful act by the existence of the agency relationship.<sup>24</sup>

The Restatement of Agency also recognizes that an employer shoulders liability for the wrongful act of an employee when the employee acted "at least in part" to serve the employer.<sup>25</sup> An example given in *Ellerth* portrays a salesperson who lies in

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21. See *Faragher*, 111 F.3d at 1530 (11th Cir. 1998).

22. 477 U.S. 57 (1986).

23. See *Ellerth*, 118 S. Ct. at 2267; *Faragher*, 118 S. Ct. at 2284. For a discussion of a master's (employer's) direct liability, see RESTATEMENT (SECOND) OF AGENCY, § 219(a)-(b) (1957).

24. See RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (containing another clause on liability resulting from apparent authority); see *id.* § 219(2)(c) (providing another basis for liability—non-delegable duty). The Court in *Ellerth* discusses these sections at some length. See *Ellerth*, 118 S. Ct. at 2265-68.

25. RESTATEMENT (SECOND) OF AGENCY § 228(1)(c). See also *Ellerth*, 118 S. Ct. at 2266; *Faragher*, 118 S. Ct. at 2286 (applying § 228(1)(c)).

making a sale. Such an act, even if prohibited by the employer, benefits the employer and is therefore within the scope of employment.<sup>26</sup> Another basis of employer liability is to impute an employee's knowledge of wrongful conduct to the employer, which is appropriate if the employee's duties would include reporting misconduct.

In discrimination cases, courts have uniformly found an employer liable when the supervisor's discriminatory actions result in a "tangible employment action," which "in most cases inflicts direct economic harm."<sup>27</sup> A typical situation is one in which the supervisor conditions promotion or salary raises upon the employee's yielding to the supervisor's sexual advances. This is traditional "quid pro quo" harassment, as the supervisor withholds a job benefit or inflicts a job-related harm because the employee rejected the supervisor's unwelcome sexual advances. According to the majority opinion in *Ellerth*, "[a] tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."<sup>28</sup> Because the tangible employment action is ultimately an employer action, the employer liability flows from the agency relationship between the supervisor and the employer.<sup>29</sup>

In *Ellerth* and *Faragher*, proper application of these rules would absolve both Ellerth's and Faragher's employers of any liability—direct or indirect—for the supervisors' harassment. The employers did not intend the conduct and were not negligent or reckless. They were not liable on the basis that the supervisors were aided by the agency relationship, as the Supreme Court has ruled that this liability "requires the existence of something more than the employment relationship itself."<sup>30</sup> Neither employer would be liable under a theory that it benefited from the supervisors' wrongful conduct. As pointed out in

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26. See *Ellerth*, 118 S. Ct. at 2266.

27. *Id.* at 2269.

28. *Id.* at 2268.

29. See *id.* at 2269; *Faragher*, 118 S. Ct. at 2285 (discussing the various reasons courts have enunciated as the basis for finding employer liability for harassment resulting in tangible employment action, or *quid pro quo* harassment).

30. *Ellerth*, 118 S. Ct. at 2268.



*Ellerth*, the supervisor was not acting in any way to serve the employer but was instead acting "out of gender-based animus or a desire to fulfill sexual urges."<sup>31</sup> The *Faragher* decision, on its facts, rejected imputed knowledge as a basis for liability. Perhaps most important, in neither case was there a "tangible employment action" which would render the employer liable.<sup>32</sup>

Of course, no one can read the minds of Supreme Court Justices. But it is rather clear that a majority of the Justices believed that the intent of Title VII would be frustrated by limiting employer liability to common law rules of agency and found that "Title VII is designed to encourage the creation of anti-harassment policies and effective grievance mechanisms."<sup>33</sup>

The Court established a new standard for employer liability for sexual harassment if there is "an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee."<sup>34</sup> In this situation, the employer will be liable, but there is available an affirmative defense which is unavailable in cases involving a tangible employment action;<sup>35</sup> and the affirmative defense is focused on avoiding harm (i.e., preventing and correcting harassment).<sup>36</sup>

The affirmative defense, well known today among lawyers and employers alike, consists of two 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>37</sup>

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31. *Id.* at 2266. The Eleventh Circuit Court of Appeals held that the supervisors who harassed the plaintiff were acting for their own personal ends and were not aided in their actions by the employment relationship. *See Faragher v. City of Boca Raton*, 111 F.3d 1530, 1536-37 (11th Cir. 1997).

32. *See Faragher*, 118 S. Ct. at 2294.

33. *Ellerth*, 118 S. Ct. at 2270.

34. *Id.*

35. *See id.*

36. "Title VII borrows from tort law the avoidable consequences doctrine." *Id.* at 2270 (citation omitted).

37. *Faragher*, 118 S. Ct. at 2293.

This new standard, I suggest, opens up a number of issues, including the requirement of reasonableness on the part of both the employer and the alleged victim, the possible impact upon employee privacy, and the effect upon legal standards for other types of harassment proscribed by Title VII.

#### A. *Reasonableness*

It does not take a lawyer or a law student to imagine that there are innumerable situations that will give rise to the following questions of fact: what constitutes “reasonable care” by the employer to prevent and correct sexual harassment by supervisors? And, what is “unreasonable failure” by the employee to take advantage of the preventive or corrective opportunities that the employer has taken reasonable care to provide? The Court does not give us much help. We know, however, that in *Faragher*, the city of Boca Raton lost because it did not publicize its anti-harassment policy at the plaintiff’s workplace, and the policy did not include a complaint procedure that ensured that the harassing supervisors would be bypassed.<sup>38</sup>

Reasonableness is ordinarily a jury question, and therefore it is possible that courts will be granting motions for summary judgment less often in cases in which the employer is asserting the *Ellerth* and *Faragher* affirmative defense. One judge has written: “If *Faragher* and *Ellerth* signal anything, it is that fewer sexual harassment cases will be resolved on summary judgment.”<sup>39</sup>

#### B. *Employee Privacy*

Justice Thomas, in his dissent in *Ellerth*, reasons that “[s]exual harassment is simply not something that employers can wholly prevent without taking extraordinary measures—constant video and audio surveillance, for example—that

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38. *See id.*

39. *Lissau v. Southern Food Service, Inc.*, 159 F.3d 177, 184 (4th Cir. 1998) (Michael, J., concurring in part and dissenting in part).

would revolutionize the workplace in a manner incompatible with a free society."<sup>40</sup> Will employers, in their efforts to exercise "reasonable care" in preventing and correcting sexual harassment, invade the privacy of workers? Will they inflict harm on a "right to privacy" as they protect a right to be free from sexual harassment? The answers to these questions are uncertain.

Sexually harassing e-mail, dubbed "e-harassment" by one court,<sup>41</sup> has provided many litigants with the evidence they need to establish the existence of a sexually-hostile work environment.<sup>42</sup> In a 1996 case,<sup>43</sup> the United States District Court for the Eastern District of Pennsylvania denied a defendant/employer's motion for summary judgment, in part because of evidence of offensive e-mail.<sup>44</sup> Even though the employer took remedial action and withdrew e-mail privileges from offending employees and had a grievance procedure in place, the court found that whether the employer took "prompt" and "effective" remedial action remained a "reasonable ground for dispute."<sup>45</sup>

Given the powerful evidentiary value of "e-harassment," it comes as no surprise that a recent survey reported that two-thirds of employers monitor their employees, including storing and reviewing e-mail.<sup>46</sup> Furthermore, one quarter of employers who responded that they monitor employees confessed that they do so surreptitiously.<sup>47</sup>

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40. *Ellerth*, 118 S. Ct. at 2273 (Thomas, J., dissenting).

41. See *Rudas v. Nationwide Mutual Ins. Co.*, No. 96-5987, 1997 WL 11302, at \*1 (E.D. Pa. Jan. 10, 1997).

42. In 1995, a group of Chevron employees filed a sexual harassment suit, alleging that Chevron allowed employees to transmit sexually harassing messages over the company's e-mail system. See Marc Peyser & Steve Rhodes, *When E-mail is Oops-mail*, NEWSWEEK, Oct. 16, 1995, at 82. One of the offending e-mails presented a list of "25 reasons beer is better than women." *Id.* Chevron settled for \$2.2 million. See *id.*

43. *Harley v. McCoach*, 928 F. Supp. 533 (E.D. Pa. 1996).

44. See *id.* at 537.

45. *Id.* at 537, 540.

46. See Maggie Jackson, *Boss Probably Spies on You, Survey Shows*, LOS ANGELES DAILY NEWS, May 26, 1997, at B1 (discussing a 1997 American Management Association survey).

47. See *id.* Because most employees work at the will of their employers and most courts review invasion of privacy claims under the "reasonable person" standard, employees usually leave their right to privacy at home when they leave for work in

Some employers go beyond monitoring in the workplace and prohibit co-worker fraternization outside of work.<sup>48</sup> While anti-fraternization policies may offend our ideals of freedom and privacy, they are legally valid under the employment-at-will doctrine that governs most employment relationships.<sup>49</sup> Even before the Court's decisions in *Faragher* and *Ellerth*, workplace privacy had become one of the leading labor issues of this decade<sup>50</sup> and with the steady growth of Title VII lawsuits,<sup>51</sup> the issue will likely intensify in years to come.

### C. Title VII Standards for Other Types of Harassment

In Title VII, sex is listed along with race, color, religion, and national origin as a protected class.<sup>52</sup> There is nothing in the language of the statute to suggest that sex discrimination merits legal treatment distinct from other types of discrimination. Justice Thomas, in his dissent in *Ellerth*, reasons that the standard for employer liability for a sexually hostile environment should be the same as for a racially hostile environment: "An employer should be liable if, and only if, the plaintiff proves that the employer was negligent in permitting the supervisor's conduct to occur."<sup>53</sup> Since this new affirmative defense exists for sexual harassment cases, perhaps it will apply as well to other types of harassment under Title VII.

Courts have, on occasion, followed racial harassment decisions as precedent in sexual harassment cases.<sup>54</sup> Surely no

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the morning. See *Smyth v. Pillsbury Co.*, 914 F. Supp. 97 (E.D. Pa. 1996) (holding that when Pillsbury told its employee that his e-mail would remain private, the employee still had no reasonable expectation of privacy).

48. See, e.g., *Watkins v. United Parcel Serv., Inc.*, 797 F. Supp. 1349 (S.D. Miss. 1992).

49. See *id.* at 1359.

50. See PAUL M. SCHWARTZ & JOEL R. REIDENBERG, DATA PRIVACY LAW 351 (1996); David F. Linowes & Ray C. Spencer, *Privacy: The Workplace Issue of the '90s*, 23 J. MARSHALL L. REV. 591 (1990).

51. EEOC reports show the number of Title VII sexual harassment claims grew from 10,532 in 1992 to 15,889 in 1997. See Kimberly Mills, *Suiting up After Major Rulings on Sexual Harassment by the U.S. Supreme Court, There's Little Doubt Where the Trend is Headed*, SEATTLE POST-INTELLIGENCER, July 12, 1998, at E1.

52. See 42 U.S.C. § 2000e-2(m) (1994 & Supp. 1997).

53. *Burlington Indus., Inc. v. Ellerth*, 118 S. Ct. 2257, 2271 (1998) (Thomas, J., dissenting).

54. See, e.g., *Bolden v. PRC, Inc.*, 43 F.3d 545, 551, n.1 (10th Cir. 1994).

court would ever rule that our public policy places a greater value on eliminating sexual harassment than it places on eliminating racial harassment; and surely Justice Souter, who wrote that Title VII's purpose is to prevent harm, would agree that the purpose is to prevent harm from all types of harassment proscribed by Title VII, with no preference for one type over the other.<sup>55</sup> Recently, both the Fifth and Tenth Circuits have applied *Ellerth* and *Faragher* to race discrimination cases, although the Fifth Circuit case did not address the new affirmative defense.<sup>56</sup> The Ninth Circuit recently declined to decide whether to apply these decisions in a Title VII retaliation case.<sup>57</sup>

#### IV. STUDENTS AND SEXUAL HARASSMENT

Juxtaposed against the *Ellerth* and *Faragher* decisions is another Supreme Court decision from the 1998 term, *Gebser v. Lago Vista Independent School District*,<sup>58</sup> which held that under Title IX of the Education Amendments of 1972,<sup>59</sup> a school district cannot be held liable for sexual harassment of a student by a teacher unless a school district official with authority "to institute corrective measures" had actual notice of the wrongful conduct and was deliberately indifferent to it.<sup>60</sup>

In this case a high school teacher and one of his students had sexual intercourse a number of times during the student's sophomore and junior years. The student did not report this to

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55. See *Ellerth*, 118 S. Ct. at 2292.

56. See *Deffenbaugh-Williams v. Wal-Mart Stores*, 156 F.3d 581 (5th Cir. 1998) (holding that the new liability rules set forth in *Ellerth* and *Faragher* rendered the employer liable for punitive damages); see also *Wright-Simmons v. Oklahoma City*, 155 F.3d 1264 (10th Cir. 1998).

57. See *Gregory v. Widnall*, 153 F.3d 1071 (9th Cir. 1998).

58. 118 S. Ct. 1989 (1998).

59. Title IX reads in pertinent part as follows: "No person . . . shall, on the basis of sex, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a) (1994). This statute apparently tracks the language of Title VI of the Civil Rights Act of 1964, which prohibits race discrimination in all programs that receive federal funds. See *Gebser*, 118 S. Ct. at 1997 (citing *Grove City College v. Bell*, 465 U.S. 555, 566 (1984)).

60. See *Gebser*, 118 S. Ct. at 1999.

the school district, which learned about the sexual relationship only after the teacher and student were "caught in the act."<sup>61</sup> Earlier, however, the principal of the school had counseled the offending teacher concerning sexual remarks he had allegedly made in class and about which some parents had complained. The principal had not reported any problems about the offending teacher to the superintendent of the district, who served as the Title IX compliance officer.<sup>62</sup> During this time the district had no formal anti-harassment policy and no grievance procedure for reporting sexual harassment complaints as required by Title IX regulations. The student and her parents sued the teacher and the school district, and the only issue before the Court was the liability of the school district.<sup>63</sup>

In a five-to-four decision, the Court rejected the argument that it should apply the same rules as are applied in Title VII cases involving supervisor/employee harassment.<sup>64</sup> Justice O'Connor, writing for the majority, pointed out that Title VII specifically allows a cause of action for discrimination, while Title IX's cause of action is implied.<sup>65</sup> Following precedent that "a private remedy should not be implied if it would frustrate the underlying purpose of the legislative scheme," the majority found that it would "frustrate the purposes" of Title IX to follow rules of agency or constructive notice in a Title IX sexual harassment case involving a teacher and student.<sup>66</sup> Included in the majority's reasoning was the fact Title VII, at the time Title IX was passed, did not allow compensatory damages as a remedy.<sup>67</sup> Additionally, the Court explained that regulations enforcing Title VII's non-discrimination policies give administrative agencies "the power of the purse," allowing them to withdraw funds from offending school districts.<sup>68</sup> The majority

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61. *Id.* at 1993.

62. *See id.*

63. *See id.*

64. *See id.* at 1996. In *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 75 (1992), in recognizing an implied right of action for teacher/student harassment under Title IX, the Court invoked Title VII precedent in finding that sexual harassment is sex discrimination.

65. *See Gebser*, 118 S. Ct. at 1991-92.

66. *Id.* at 1996-97.

67. *See id.* at 1997.

68. *Id.* at 1998.

found that the regulations envisioned no damage remedies but favored continued funding for educational purposes when the school district is “unaware of discrimination . . . and is willing to institute prompt corrective measures.”<sup>69</sup>

In finding that the plaintiff must show that a district official had actual notice of the offending conduct and was deliberately indifferent to it, the majority followed Title IX procedure that must precede administrative withdrawal of funding as punishment for discrimination. That procedure requires notice to an “appropriate person” and an opportunity to institute corrective measures.<sup>70</sup> Even though Title IX regulations require the institution and publication of grievance procedures, the majority found that failure to do so was not deliberate indifference.<sup>71</sup>

This case illustrates that the liability of the employer (here, a school district) might be narrowing under Title IX since the majority held that actual notice to someone with authority is required. At the same time, the liability of an employer under Title VII is arguably enhanced after the decisions in *Ellerth* and *Faragher* unless the employer takes steps to insure that the new affirmative defense is available to it. The Supreme Court has, in effect, scuttled traditional agency rules for Title IX and retained them, while adding additional duties of preventive and corrective measures for Title VII.

In his dissent in *Gebser*,<sup>72</sup> Justice Stevens makes many observations, among them the argument that the district should be liable under traditional agency principles because the offending teacher “was aided in accomplishing the tort by the existence of the agency relation.”<sup>73</sup> He further points out that the

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69. *Id.* at 1999.

70. *Id.*

71. *See id.* at 2000.

72. *See id.* (Stevens, J., dissenting). Justices Souter, Ginsburg, and Breyer joined in this dissent. Justice Ginsburg wrote a separate dissent, which Justice Souter and Breyer joined, in which she favored recognition of an affirmative defense very similar to the one adopted by the majority of the Court one week later in *Ellerth* and *Faragher*. *See id.* at 2007 (Ginsburg, J., dissenting).

73. *Id.* at 2003 (Stevens, J., dissenting) (quoting RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (1957)).

teacher "exercised even greater authority and control over his students than employers and supervisors exercise over their employees."<sup>74</sup>

Perhaps the strongest policy statement in Justice Stevens's dissent is that school districts will be liable only when their officials have *actual* knowledge of the wrongful conduct.<sup>75</sup> This, says Justice Stevens, is inconsistent with the statutory incentive to minimize "the danger that vulnerable students will be exposed to such odious behavior."<sup>76</sup> Without expressing any personal opinion about what the law should be, I anticipate that critics might say that the rule adopted by the majority encourages the school district to take the stance of an ostrich with its head in the sand. The only problem with the analogy is that the ostrich that has its head in the sand is not placing itself out of harm's way, while the school district that is deliberately ignorant of a teacher's sexual abuse of a student is doing just that, and can avoid liability.

#### V. UNCERTAINTIES ON THE EFFECT OF RULES 412 AND 415 OF THE FEDERAL RULES OF EVIDENCE

As noted, the language of Title VII does not support the notion that sex discrimination should be singled out for special legal rules. The same cannot be said of the Federal Rules of Evidence when wrongful sexual activity is at issue in a case. The Violent Crime Control and Law Enforcement Act of 1994<sup>77</sup> amended Rule 412 and adopted Rules 413, 414, and 415, all of which concern evidence of sexual conduct.<sup>78</sup> Rule 412, a federal "rape shield" rule which was extended to civil cases, restricts evidence of an alleged victim's past sexual behavior.<sup>79</sup> Rule 413

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74. *Id.* at 2004 (Stevens, J., dissenting).

75. *See id.*

76. *Id.*

77. Pub. L. No. 102-322, 108 Stat. 1796.

78. *See id.*

79. *See* FED. R. EVID. 412. The rule reads: "The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct . . . (1) Evidence offered to prove that any alleged victim engaged in other sexual behavior. (2) Evidence offered to prove any alleged victim's sexual predisposition." FED. R. EVID. 412(a). However, in civil cases,



allows evidence of past sexual offenses in criminal sexual assault cases, and Rule 414 applies a similar rule for criminal cases involving child molestation.<sup>80</sup> Both of these rules provide that the evidence of past offenses "is admissible, and may be considered for its bearing on any matter to which it is relevant."<sup>81</sup> Rule 415 makes Rules 413 and 414 applicable in civil cases involving sexual assault or child molestation.<sup>82</sup>

The least controversial change is the amendment to Rule 412.<sup>83</sup> One area of uncertainty with respect to Rule 412 is the extent to which it applies in cases in which the plaintiff who alleges sexual harassment has had consensual sexual relations with the alleged perpetrator or with others from the workplace. Clearly the rule prohibits evidence offered to prove the alleged victim's "sexual predisposition," but the rule contains an exception if the evidence is "otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party."<sup>84</sup>

Some cases decided before extension of the rule to civil cases permitted evidence of the victim's prior sexual behavior, when that behavior was known by the perpetrator, to determine whether the perpetrator thought his advances were welcomed by the plaintiff.<sup>85</sup> These cases followed the Supreme Court's

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evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim.

FED. R. EVID. 412(b)(2).

80. See FED. R. EVID. 413, 414.

81. FED. R. EVID. 413(a), 414(a).

82. See FED. R. EVID. 415. The rule reads, in pertinent part:

In a civil case in which a claim for damages or other relief is predicated on a party's alleged commission of conduct constituting an offense of sexual assault or child molestation, evidence of that party's commission of another offense or offenses of sexual assault or child molestation is admissible and may be considered as provided in Rule 413 and Rule 414 of these rules.

FED. R. EVID. 415(a).

83. FED. R. EVID. 412.

84. FED. R. EVID. 412(b)(2).

85. See, e.g., *Weiss v. Amoco Oil Co.*, 142 F.R.D. 311, 316 (S.D. Iowa 1992).

lead in *Meritor*.<sup>86</sup> In *Meritor*, the plaintiff had prior consensual sexual relations with her supervisor and the Court noted that the plaintiff's sexually provocative speech, dress, and testimony about her personal fantasies were "obviously relevant" to whether "her conduct indicated that the alleged sexual advances were unwelcome."<sup>87</sup> The Court concluded that there was no per se rule against admitting evidence of a plaintiff's sexual predilections and that trial courts should weigh the usual considerations in deciding whether to admit such evidence.<sup>88</sup>

The "usual considerations" to which the Court referred include the basic tenets set out in Federal Rules of Evidence 404, 404(b), and 403.<sup>89</sup> Rule 404 guards against admitting character evidence to prove conduct in conformity with that character during a particular occasion.<sup>90</sup> However, Rule 404(b) permits admitting evidence of "other crimes, wrongs, or acts" for other purposes.<sup>91</sup> Finally, Rule 403 requires trial courts to insure that the probative value of evidence is not substantially outweighed by danger of unfair prejudice.<sup>92</sup>

The legislative history of Rules 413, 414, and 415 reflects that Congress probably did not intend to strike an imbalance in the evidence in civil sexual harassment cases, but was instead more concerned about clarifying evidentiary rules in rape and child molestation cases.<sup>93</sup> Evidently Congresswoman Susan Molinari and others were determined to hold up President Clinton's crime bill unless these new evidentiary rules were adopted.<sup>94</sup>

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86. 477 U.S. 57 (1986).

87. *Id.* at 68-69.

88. *See id.*

89. Before the advent of Rule 412, two United States District Courts had held that evidence regarding a plaintiff's sexual history was generally inadmissible character evidence and that the discovery of such evidence could not possibly lead to the admissible evidence. *See Mitchell v. Hutchings*, 116 F.R.D. 481, 485 (D. Utah 1987); *Priest v. Rotary* 98 F.R.D. 755, 758-59 (N.D. Cal 1983).

90. *See* FED. R. EVID. 404(a).

91. FED. R. EVID. 404(b).

92. *See* FED. R. EVID. 403.

93. *See* 140 CONG. REC. H8968-01, H8991-92 (Aug. 21, 1994) (statement of Rep. Molinari).

94. *See* James J. Duane, *The New Federal Rules of Evidence on Prior Act of Accused Sex Offenders: A Poorly Drafted Version of a Very Bad Idea*, 157 F.R.D. 95, 96 (1994).

A matter of considerable concern is that the Rules of Evidence have heretofore been uniformly applicable to all civil cases in federal court. These rules have withstood the test of time and have gained a high degree of acceptance. The aforementioned Rules 403 and 404, which are applicable to nearly all evidence,<sup>95</sup> have long been available to judges in determining the admissibility of past sexual misconduct. Many commentators have been sharply critical of the new Rules 413-415, which, unlike Rule 412, make no reference to the balancing analysis of Rule 403.<sup>96</sup> Some scholars anticipated that the courts would find Rules 413, 414, and 415 unconstitutional.<sup>97</sup> This has not happened. Courts instead have been finding that these rules are to be applied along with Rule 403.<sup>98</sup> It is possible that in some cases, the existence of these rules will not matter because the courts will continue to do what they have always done. However, it is clear that at least in the Second and Tenth Circuits, courts will consider admission of propensity evidence as probative in the balancing required of the court under Rule 403.<sup>99</sup>

Therefore, Rules 412 and 415 have arguably weighed evidence in favor of alleged victims and against alleged perpetrators. This has the potential for increasing employer liability for sexual harassment by supervisors.<sup>100</sup> It therefore also has implications regarding screening of job applicants and employer scrutiny of on-the-job activities of employees. I have seen no statistics, if any can be produced, concerning whether these rules have resulted in more sexual harassment lawsuits or

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95. Rule 609 is an exception.

96. See James S. Liebman, *Proposed Evidence Rules 413 to 415—Some Problems and Recommendations*, 20 U. DAYTON L. REV. 753 (1995); Duane, *supra* note 94, at 96.

97. See generally Louis M. Natali, Jr. & R. Stephen Stigall, "Are You Going to Arraign His Whole Life?": *How Sexual Propensity Evidence Violates the Due Process Clause*, 28 LOY. U. CHI. L.J. 1 (1996).

98. See, e.g., *United States v. Guardia*, 135 F.3d 1326 (10th Cir. 1998); *United States v. Sumner*, 119 F.3d 658, 661 (8th Cir. 1998).

99. See *United States v. Meacham*, 115 F.3d 1488, 1491 (10th Cir. 1997); *United States v. Larson*, 112 F.3d 600, 604 (2d Cir. 1997).

100. See *Cleveland v. KFC National Management Co.*, 948 F. Supp. 62, 64 (N.D. Ga. 1996) (applying Rule 415 against an employer to admit, in a Title VII case, past sexual misconduct of a perpetrator, a former manager who was not a defendant).

whether they have had any impact upon discovery practices and settlement negotiations in such suits.<sup>101</sup>

## VI. CONCLUSION

Despite the aforesaid uncertainties, one fact is certain: women have had substantial success in entering the workplace in so-called "men's jobs." Since the 1960's, substantial numbers of women have entered many areas of American life that had been previously reserved for men, either because of our laws or our culture. Examples of this are the many women who are now in professions such as law and medicine or who work in other employment traditionally dominated by men. Our military academies are now admitting women. In part because of Title IX, girls are now able to participate in athletics, sometimes on teams that include boys. All of these advances have placed females in positions where they are more likely to face sexual harassment.

The discussion of sexual harassment issues spread from law schools and courtrooms to become a national debate when the United States Senate Committee on the Judiciary held hearings on the nomination of Clarence Thomas to the United States Supreme Court. Since then, the EEOC has received increased numbers of complaints alleging sexual harassment. In 1990, the EEOC received 6,800 such complaints, and in 1997, nearly 16,000.<sup>102</sup> The *Jones v. Clinton* case continues to be the topic of talk shows and news broadcasts, and the debate will rage on—and at times it is a very emotional debate—concerning what constitutes sexual harassment, and whether and how to remedy it. Employers might even confront more and more lawsuits.

Yet another certainty is that sexual harassment is different from other types of harassment. Justice Thomas was correct when he wrote that Title VII does not treat sex discrimination

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101. See generally REPORT OF THE EIGHTH CIRCUIT GENDER BIAS TASK FORCE 43-44 (Sept. 1997) (discussing survey results of attorneys' and judges' opinions concerning the effects of these rules) [hereinafter EIGHTH CIRCUIT REPORT].

102. See 144 CONG. REC. E1081-03 (daily ed. June 10, 1998) (statement of Rep. Hamilton).

differently from other types of discrimination. However, the potential for misunderstandings between men and women (frequently the subject of pop-psychology books), not to mention the enormous power of sexual attraction, in fact place sex in its own category.

There is considerable evidence that men and women simply do not have the same views concerning what constitutes sexual harassment.<sup>103</sup> The potential for ambiguities is nearly unlimited. For example, if a man calls a woman "honey," he can either be expressing endearment or condescension. The intention of the speaker may be different from the listener's interpretation of the speaker's intent.<sup>104</sup> This type of ambiguity or misunderstanding is not very likely in a situation of racial harassment, when, for example, the speaker uses a racial epithet.

I believe the law has realized that sexual harassment is in a class of its own. Congress, through the adoption of the 1994 amendments to the Rules of Evidence, and the Supreme Court, in *Ellerth* and *Faragher*, have singled out sexual misconduct for special rules that will have an impact upon employer liability. But the Court itself has not stated clearly just what Title VII and Title IX have as their principal purpose when it comes to sexual harassment. In *Faragher*, Justice Souter wrote that the "primary objective" of Title VII "is not to provide redress but to avoid harm."<sup>105</sup> But in *Gebser*, Justice O'Connor reasoned that the central aim of Title VII is to compensate victims of discrimination.<sup>106</sup> And, more significantly, the law now extends considerably more protection to workers who are harassed by their supervisors than to students harassed by their teachers.

The legislative histories surrounding Title VII and the 1994 amendments to the Federal Rules of Evidence establish that

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103. See OMLIAN & KAMP, *supra* note 10, § 22.14.50, at 66-76.

104. A study conducted by the Eighth Circuit Court of Appeals Gender Fairness Task Force found that women employees "saw their workplace as significantly more tolerant of sexually harassing behavior than men." EIGHTH CIRCUIT REPORT at 120. Also, "[m]en were . . . more likely than women to deny, tolerate, or rationalize sexual harassment." *Id.* at 118.

105. *Faragher v. City of Boca Raton*, 118 S. Ct. 2275, 2292 (1998) (citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975)).

106. *Gebser*, 118 S. Ct. at 1997 ("Thus, whereas Title VII aims centrally to compensate victims of discrimination, Title IX focuses more on 'protecting' individuals from discriminatory practices carried out by recipients of federal funds.").

Congress never imagined that the law of sexual harassment would be what it is today, much less the effect it might have upon employer liability. The Supreme Court will continue to look at employer liability: in this term the Court will decide cases involving student-to-student harassment,<sup>107</sup> and employer liability for punitive damages under Title VII.<sup>108</sup> Until we have more guidance, the debate—and the uncertainties—will continue.

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107. See *Davis v. Monroe County Bd. of Educ.*, 120 F.3d 1390 (11th Cir. 1997), *cert. granted*, 66 U.S.L.W. 3387 (Sept. 29, 1998) (No. 97-843).

108. See *Kolstad v. American Dental Ass'n*, 139 F.3d 958 (D.C. Cir. 1998), *cert. granted*, 67 U.S.L.W. 3106 (Nov. 2, 1998) (No. 98-208).

