BURLINGTON, FARAGHER, ONCALE, & BEYOND: RECENT DEVELOPMENTS IN TITLE VII/TITLE IX JURISPRUDENCE

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I. INTRODUCTION

During 1998, the United States Supreme Court issued three important Title VII decisions. These decisions not only clarified the plaintiff's and the employer's burdens but also refueled discussion about addressing and, more importantly, preventing illegal harassment and discrimination in the workplace. This outline explains the import of the Supreme Court's 1998 decisions, discusses post-Burlington-Faragher-Oncale cases in the educational context, and concludes by recommending measures that colleges and universities can take to safeguard themselves from discrimination and harassment complaints.

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** The presenters wish to thank Catherine S. Ryan, Esquire, of Reed Smith Shaw & McClay LLP (Pittsburgh) for her work in preparing this outline.

1 The Supreme Court's decision in Gebser v. Lago Vista Indep. School Dist., 118 S.Ct. 1989 (1998), under Title IX will not be addressed in this outline, because it is being covered in another session at this Conference.
II. THE BURLINGTON-FARAGHER DECISIONS

On June 26, 1998, the United States Supreme Court ruled in two landmark sexual harassment cases (Burlington Indus., Inc. v. Ellerth, 118 S.Ct. 2257 (June 26, 1998) and Faragher v. City of Boca Raton, 118 S.Ct. 2275 (June 26, 1998)) that employers may be "vicariously liable" for unlawful harassment committed by their supervisors, subject to an affirmative defense based on the reasonableness of the employer's and the victim's conduct.

What is "Vicarious Liability"?

"Vicarious liability" means that an employer may be liable not only for its own negligence, but for the negligence of one of its employees. Specifically, under vicarious liability, an employer is subject to liability for the torts of its servants or employees committed while acting in the scope of their employment. Restatement (Second) of Agency § 219(1). An employer may also be liable for employee actions committed outside the scope of employment when, for example, the employer itself was reckless or negligent, Restatement, § 219(2)(b), or when the employee purported to act or speak on behalf of the employer and there was reliance on the employee's apparent authority, or when the employee was aided in accomplishing the tort by the existence of the agency relationship. Restatement, § 219(2)(d).

A. Burlington Indus., Inc. v. Ellerth

1. The Facts: The plaintiff, who worked as a salesperson, quit her job after 15 months claiming that her supervisor's constant sexual harassment made her job intolerable. The plaintiff then brought sexual harassment and constructive discharge claims under Title VII
alleging that her supervisor had made unwelcome sexual advances and had threatened to influence her employment negatively if she did not submit to his advances. The plaintiff admitted that her supervisor never carried out any of his threats and that she was actually promoted. The plaintiff also admitted that she never had complained to anyone in authority about the supervisor's behavior.

2. **The Decision:** The Court's 7-2 decision (by Justice Kennedy with Justices Thomas and Scalia dissenting) is important for its discussion of supervisor liability and its articulation of an employer's affirmative defense to such liability. In reversing the lower court's judgment in the employer's favor, the Supreme Court remanded the case to give the employer a chance to prove the affirmative defense.

3. **Supervisor Liability:** The Court held that an employer may be liable for a supervisor's actions even if the threats of a supervisor are unfulfilled if the supervisor had created a sexually hostile work environment. Specifically, the Court explained:

   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.

118 S.Ct. at 2270.

4. **Affirmative Defense:** When, however, the victim has suffered no negative tangible employment action, e.g., discharge, demotion, or undesirable reassignment, the employer may receive the benefit of an -affirmative defense if the employer can prove by a preponderance of the evidence two necessary elements:
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.

Id.

B. *Faragher v. City of Boca Raton*

1. **The Facts:** The plaintiff alleged that, during her five years of employment as a lifeguard with the city of Boca Raton, she had been subjected to a sexually hostile work environment by two of her supervisors who repeatedly subjected her to “uninvited and offensive touching,” lewd remarks, and discussions of women in offensive terms. The plaintiff never officially reported any of these incidents. Although the city had a sexual harassment policy, it was not widely disseminated and the harassing supervisors and the victim were unaware of the policy.

2. **The Decision:** In a 7-2 decision (by Justice Souter with Justices Thomas and Scalia dissenting), the Supreme Court held the city vicariously liable for the sexual harassment of its supervisors. In doing so, the Court employed the same test and affirmative defense it announced in *Burlington*, concluding that the city could not assert the affirmative defense to liability because there was evidence that the city had acted unreasonably. For example, the evidence showed that, although the city may have had a sexual harassment policy, it was not widely disseminated and, consequently, most of the lifeguards were
unaware of its existence. Thus, the Supreme Court reinstated the
district court's award of $1 to the plaintiff on her Title VII claim
against the City, $10,000 in compensatory damages against the
supervisors, jointly and severally, and $500 in punitive damages
against one of the supervisors. In assessing damages, the Court noted
that "the reversal necessary on the theory of supervisory harassment
renders any remand for consideration of imputed knowledge entirely
unjustifiable."

C. What Burlington and Faragher Mean

1. Both Burlington and Faragher make clear that employers may be held
liable for unlawful harassment committed by their supervisors. The
claim that a supervisor is acting outside the scope of his or her
employment when committing such acts will not provide protection from
liability. Thus, employers must now more than ever take affirmative
steps to prevent harassment and to limit their potential liability.

2. Taking affirmative steps will help prevent negative employment
consequences related to harassment. Moreover, in cases like Burlington
where the victim suffered no negative employment consequences, an
employer may be able to establish an affirmative defense to charges
that a supervisor harassed a subordinate employee. For example, the
more reasonable an employer's conduct, the more likely it is that an
employer will be able to assert successfully the affirmative defense to
harassment. Based upon the Faragher-Burlington affirmative defense,
an employer can avoid liability in cases where no adverse employment
action was taken by showing that it exercised reasonable care to
prevent and to correct promptly any sexually harassing behavior and
that the plaintiff unreasonably failed to take advantage of any
preventive or corrective opportunities given by the employer or to
otherwise avoid the harm.

3. Moreover, Faragher and Burlington apply not only to sexual
harassment cases, but also to race harassment cases. In Deffenbaugh-
Williams v. Wal-Mart Stores, Inc., No. 97-10685 (5th Cir. Sept. 24,
1998), the Fifth Circuit employed vicarious liability principles to
reinstate a $75,000 punitive damage award against Wal-Mart following
a jury's finding that the plaintiff's immediate supervisor acted with
malice or reckless indifference when he allegedly discharged her for
engaging in an interracial relationship. Citing Burlington, the Fifth
Circuit wrote that the Supreme Court's intent in adopting a vicarious
liability standard:

apparently was not to state a standard solely for sexual
harassment claims, but rather "to accommodate the
agency principles of vicarious liability for harm caused by
misuse of supervisory authority, as well as Title VII's
equally basic policies of encouraging forethought by
employers and saving action by objecting employees."

D. Higher Education Case Law In The Wake Of The
Burlington-Faragher Decisions

1. In Gunnell v. Utah Valley State College, 152 F.3d 1253 (10th Cir. Aug.
19, 1998), a college secretary brought claims for sexual harassment
and retaliation under Title VII and for denial of medical leave under
the Family and Medical Leave Act.² Specifically, Gunnell claimed that her direct supervisor and the Chief of Campus Police (for whom she also worked) subjected her to comments, jokes and pictures of a sexual nature and unwelcome physical contact such as hugs. Gunnell complained to the College's Personnel Director who investigated the allegations, reviewed the sexual harassment policy with the alleged harassers' departments, and instructed that there could be no retaliation against Gunnell for her complaints.

Immediately after Gunnell complained, the sexual harassment ceased. Gunnell, however, complained that she was given inferior job duties and that other employees were "setting her up" by shifting blame to her for errors she did not commit.³ The situation came to a head when

² Although the plaintiff in this case clearly was an "employee," colleges and universities should also consider the question of: Who is an "employee" for Title VII purposes? In O'Connor v. Davis, 126 F.3d 112 (2d Cir. 1997), the Court of Appeals for the Second Circuit held that a college student who was working as an unpaid intern at a state hospital had no claim under Title VII because she was not an "employee" under the Act. Specifically, the Court held that "[w]here no financial benefit is obtained by the purported employee from the employer, no 'plausible' employment relationship of any sort can be said to exist." See also Graves v. Women's Professional Rodeo Assoc., 907 F.2d 71 (8th Cir. 1990) ("compensation by the putative employer to the putative employee in exchange for [her] services . . . is an essential condition to the existence of an employer-employee relationship." But see Haavistola v. Community Fire Co., 6 F.3d 311 (4th Cir. 1993) (volunteer firefighter is an employee because she received state-funded disability pension, group life insurance and survivors' benefits for dependents).

³ See Mora v. University of Miami, 15 F. Supp.2d 1324, 1335 (S.D. Fla. 1998) (internal citations omitted) (citing Faragher and Oncale and noting that "although Title VII mentions specific employment decisions with immediate consequences, the scope of the prohibition is not limited to 'economic' or 'tangible' discrimination and that Title VII covers more than 'terms' and 'conditions' in the narrow contractual sense so that court rejected employer's argument that plaintiff's failure to respond to its repeated requests to provide documentation for his absences converted his termination into a resignation.

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Gunnell's supervisor put her on probation for refusing to cooperate with co-workers. Gunnell left the office declaring "I'm through. This is it." Later, however, she called in and said she was taking a medical leave. Shortly thereafter, Gunnell was discharged for insubordination.

The college raised several arguments on summary judgment, including that the harassment stopped as soon as Gunnell complained. The district court granted summary judgment on Gunnell's sexual harassment claim. On appeal, the Tenth Circuit relied on the Faragher and Burlington cases and remanded to the trial court for it to re-evaluate the case based upon the Supreme Court's decisions in Faragher and Burlington. The Tenth Circuit explained:

_Under Faragher and Burlington Industries, an employer whose supervisory personnel has harassed subordinates will be liable for the harassment that occurred even though the employer ultimately stopped further harassment. If the employee has not been subjected to any tangible employment action, however, the employer may assert an affirmative defense to any liability by showing both that it had reasonable mechanisms in place to prevent and to cure any discriminatory practices and that the plaintiff employee unreasonably failed to take advantage of such opportunities._ Before the district court, [the college] argued generally that it acted promptly to correct any inappropriate behavior. However, given that Faragher and Burlington Industries have now set forth a specific defense to employer liability for sexual harassment by a supervisor, we reverse summary judgment on this claim and remand to allow the district court to evaluate Gunnell's claim in light of these recent Supreme Court cases. For example, under Faragher and Burlington Industries, the district court should consider whether there was a hostile work environment based on sexual harassment of Gunnell that existed within the limitations period; whether [her direct supervisor] or others who caused such hostile work environment were [actually] Gunnell's supervisors; whether [the college] had a reasonable policy in place to prevent and correct promptly such sexually harassing behavior; and whether Gunnell unreasonably failed to take advantage of such policies or to avoid harm or otherwise.
152 F.3d at 1261 (emphasis added).

Thus, the court's language implies that having a policy in place which is ineffective to stop reported harassment may cause an employer to fail the first prong of the affirmative defense.

2. In *Fall v. Indiana Univ.*, 12 F. Supp.2d 870 (N.D. Ind. July 23, 1998), the United States District Court for the Northern District of Indiana denied a motion to dismiss the plaintiff's hostile work environment claim against the University and its chancellor. The Court's decision explained that plaintiff Lynn Fall had met with Indiana University at South Bend ("IUSB") officials about generating student interest in Plymouth, Indiana and eventually had accepted a job as a liaison with the Plymouth community. Through her position, she became familiar with Daniel Cohen, then-Chancellor of IUSB.

The Court recited the allegations of the complaint, upon which its ruling was based. During a meeting in Cohen's office, Fall claimed that Cohen closed the door, admitted that his e-mail scheduling the meeting had been a ruse, put his arms around her, groped her breasts, and forced his tongue into her mouth. Fall alleged she vomited after the encounter and claimed she felt "paralyzed." Fall did not complain, but avoided Cohen after the incident. At a Christmas party later that year, Cohen told Fall that some "cuts" would have to be made and she took this to mean that her job would be eliminated. Fall then reported the incident in Cohen's office to her immediate supervisor (three months after it allegedly had occurred). As a result of the ensuing investigation, Cohen resigned.
In reviewing the motion to dismiss, the court acknowledged that the *Faragher/Burlington Industries* framework applied but that "we need not address this new pronouncement of employer liability if the sexually objectionable environment created by a supervisor does not rise to a level actionable under Title VII." 12 F. Supp.2d at 876. Thus, the court began by interpreting Faragher's admonition that the standard for judging hostility be "sufficiently demanding to ensure that Title VII does not become a 'general civility code' to mean that 'only extreme conduct can be said to discriminatorily alter the terms and conditions of employment'" and held that the employee must meet a two-prong test: (1) that the conduct was subjectively hostile to him or her; and (2) that the conduct would have been objectively hostile to a reasonable person. Faragher, 118 S. Ct. at 2283; 12 F. Supp.2d at 877. Using these standards, the Court held that the subjective prong was met because Fall alleged that she vomited and felt "paralyzed" after the incident. The objective prong was met because Cohen planned the meeting which took place in the confines of his office and because the physical contact was severe.

After concluding that both prongs of the subjective/objective test had been met, the Court next considered the University's affirmative defense because Fall did not suffer any adverse employment act. The affirmative defense requires an employer to show both that it exercised reasonable care to prevent and to correct the harassing behavior and that the plaintiff unreasonably failed to take advantage of that corrective action. The court held that the University met the corrective part of the affirmative defense -- that is, exercised reasonable care to
promptly correct sexually harassing behavior by a supervisor -- by having an anti-sexual harassment policy in place and immediately investigating Fall's complaint. The Court held, however, that the University did not act reasonably to prevent the harassment. Specifically, in response to Fall's complaint against Cohen, the Vice-Chancellor for Academic Affairs responded "Oh, no, not again," referring to his knowledge of a previous sexual harassment complaint against the chancellor in which a female employee alleged that she went into Cohen's office and then he closed the door and tried to kiss her. Because of this knowledge by the University, albeit actual or constructive, the court denied summary judgment because "Burlington and Faragher place the burden of showing reasonable care in preventing sexual harassment on the University." 12 F. Supp.2d at 883. Although this in no way implies that employers must discharge employees who are the focus of sexual harassment complaints, it stresses the importance of investigating and responding adequately to all complaints.⁴

Although it did not need to, the court also held that the University did not meet the second part of the affirmative defense, i.e., showing that the plaintiff unreasonably failed to take advantage of the University's

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⁴ See Johns v. Harborage I Ltd., No. C8-98-301 (Minn. Ct. App. Nov. 17, 1998) (affirming trial court's finding that restaurant should have taken steps to prevent a male employee from harassing a female co-worker where the male employee had a history of exposing himself and groping female waitresses. Even though the restaurant conducted a prompt investigation of the employee's complaint, the court held that Title VII liability can be imputed when the employer should have known that an employee may become a victim of sexual harassment but took no steps to prevent it).
corrective action to remedy the harassment. The court held that Fall's three-month delay in reporting the incident was not unreasonable and, therefore, the University was not eligible to assert the affirmative defense created by the Supreme Court in Faragher and Burlington.5

3. In Perdue v. City Univ. of N.Y., 13 F.Supp.2d 326 (E.D.N.Y. 1998), the District Court for the Eastern District of New York awarded more than $800,000 in compensatory damages, back pay and attorneys' fees to the school's former women's basketball coach and sports administrator Molly Perdue in a Title VII and Equal Pay Act ("EPA") case. The case was decided before the Supreme Court's decisions in Faragher and Burlington. Perdue alleged that she had been paid less than the combined salaries of the two men who held the positions of men's basketball coach and men's sports administrator. Based on evidence that Perdue coached the same number of games and bore the same number of administrative duties, the jury found that the University had committed a willful violation of the EPA by paying Perdue less than the combined salaries of the two men performing comparable jobs. To show a willful violation, Perdue had to demonstrate that the University knew of discrepancies between her and her male counterparts. She did so by testifying that a member of the school's Presidential Advisory Committee, in response to a report on the

5 But see Coates v. Sundor Brands Inc., No. 97-9102 (11th Cir. Nov. 13, 1998) (holding that employer satisfied affirmative defense where plaintiff's initial complaint of sexual harassment was immediately investigated and plaintiff confirmed through subsequent conversations that the situation was resolved even though she would allege in later proceedings that the harassment continued).
school's violations of Title IX, said "Let the women sue." The woman sued and won over $800,000.

III. THE ONCALE DECISION

On March 4, 1998, the United States Supreme Court unanimously ruled that Title VII's prohibition against sexual harassment applies to harassment by a member of one sex against a member of the same sex, thereby resolving what the Court termed a "bewildering variety of stances" taken by federal circuit and district courts on the issue. Sometimes overlooked, however, the Court also gave important direction on the sufficiency and type of evidence needed to support a hostile work environment claim under Title VII.


1. The Facts: The plaintiff, Joseph Oncale, brought a sexual harassment suit under Title VII alleging (among other things) acts of sexual battery and threats of homosexual rape by two male supervisors and a male co-worker. The United States Court of Appeals for the Fifth Circuit affirmed summary judgment against Oncale under its earlier holding that "[h]arassment by a male supervisor against a male subordinate does not state a claim under Title VII even though the harassment has sexual overtones. Title VII addresses gender discrimination."

2. The Decision: In an opinion authored by Justice Souter, the Supreme Court reversed, holding that same-sex harassment claims are cognizable under law if they meet the standards of proof applicable to sexual harassment claims generally. Justice Thomas filed a dissenting opinion in which Justice Scalia concurred.
3. "Because . . . of sex": In ruling, the Court relied on a literal reading of Title VII's prohibition that:

   It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . . .

118 S.Ct. at 1001 (emphasis added). Building on its earlier holding that discrimination by people of one race against people of the same race could be actionable under Title VII, Castaneda v. Partida, 430 U.S. 482, 499 (1977), the Court ruled that same-sex discrimination falls within Title VII's purview and explicitly rejected the requirement that, to be unlawful, the alleged harasser must be a homosexual or be motivated by sexual desire.

4. What Is A Hostile Work Environment?: The Court also clarified that hostile work environment claims are not about the gender of the alleged harasser, but rather are about behavior – because of sex – that is so severe or pervasive that it would alter the conditions not only of the alleged victim's employment, but also of a reasonable person's employment. 118 S.Ct. at 1002-03.

5. Finally, the Court also rejected the argument that recognition of same-sex harassment claims would impose an unworkable burden on employers and would "transform Title VII into a general civility code for the American workplace." The Court observed that "[c]ommon sense, and an appropriate sensitivity to social context, will enable courts and jurists 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 pervasive." 118 S.Ct. at 1003.

6. The Supreme Court remanded the case to the district court for a jury trial of Oncale's claims. A week before the scheduled trial date, the parties settled the suit for an undisclosed amount.

B. **What Oncale Means**

1. *Oncale* was a foreseeable clarification of Title VII jurisprudence that confirms that unlawful discrimination is *any* discrimination *because of sex*. To employers which currently have effective policies against discrimination and harassment in place, *Oncale* simply means – keep doing what you are doing. *Oncale* does require employers to recognize the viability of same-sex discrimination and harassment claims. The Court's decision, however, should have no effect on the policies and internal mechanisms that have been and continue to be advisable to prevent workplace discrimination and harassment and to address potential problems when they arise. To those who do not have policies and procedures in place, they must seize this opportunity to implement a policy that articulates a "zero tolerance" approach to all discrimination and harassment in the workplace.

C. **Educational Case Law In The Wake Of The Oncale Decision**

1. **What Constitutes Hostile Work Environment?**

   a. In *Oncale*, the Supreme Court explained that Title VII does not prohibit all verbal or physical harassment in the workplace; it is directed only at "discriminat[ion] . . . because of . . . sex."
Furthermore, the Court explained that it has "never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations." 118 S.Ct. at 1002.

b. In *Oncale*, the Court also discussed the sufficiency and type of evidence needed in sex discrimination cases. A same-sex discrimination plaintiff may raise an inference of discrimination when, *e.g.*, "a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace." 118 S.Ct. at 1002. A same-sex harassment plaintiff may also "offer direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace." *Id.*

c. In *Lapsley v. Columbia Univ.-College of Physicians and Surgeons*, 999 F. Supp. 506, 521-22 (S.D.N.Y. Mar. 26, 1998), the Court cited *Oncale* and held that the employee failed to establish racial discrimination where the evidence showed that she was berated in front of fellow workers because "[o]pen criticism of [the plaintiff] . . . does not suffice to establish a racially hostile work environment."

brought by an assistant professor. Specifically, Assistant Professor Kelley Chrouser alleged that her department chair and another colleague, both lesbians, sexually harassed her by staring at her breasts, backing her up against a wall, making sexually explicit comments to her, and telling her that she was "all tarterd up."

Based on Oncale, the court stated that "Chrouser's burden is to demonstrate that her workplace was 'hellish,' not merely tinged with offensive sexual connotations and vulgarity." 1998 WL 299426 at *3. Thus, although the court found that some of the "more graphic and vulgar remarks were certainly offensive utterances, [ ] the law of sexual harassment is 'not designed to purge the workplace of vulgarity." Id. (internal citations omitted). The court granted summary judgment on the sexual harassment claims noting that "[t]he circumstances of Chrouser's employment are too far removed from the hellish and intolerable end of the spectrum, and too close to the merely unpleasant workplace." Id.

3. In Gallant v. Board of Trustees of Cal. State Univ., 997 F. Supp. 1231 (N.D. Cal. Mar. 27, 1998), the District Court for the Northern District of California granted summary judgment in the university's favor in a student's Title IX suit. David Gallant, a 49-year-old gay woman and a student at another college, testified about a conversation with Dr. May, the then-Dean of the Center for Science, Technology and Information Resources at California State University, Monterey Bay ("CSUMB"). During the conversation, Gallant alleged that Dr. May asked Gallant whether she was gay, made an explicit comment about his sex life with his wife and stated he was "in love" with a male colleague who had "a
nice tight ass." Gallant claimed that she repeatedly expressed her discomfort and steered the conversation to professional subjects, including school.

Following this conversation, May allegedly promised Gallant various computer equipment to use in her academic pursuits if she transferred schools and Gallant subsequently became a student at CSUMB. May also found Gallant housing in a male colleague's home which he visited on five occasions and again made explicit comments about his extramarital affairs and his sex life with his wife. Gallant asked May to make good on his promises regarding computer equipment; May allegedly refused and accused her of lying. Gallant subsequently filed a sexual harassment claim.

In granting summary judgment, the court noted that Gallant produced:

no evidence that Dr. May's conduct, although arguably objectionable and unprofessional, was in any way connected with plaintiff's sex. Plaintiff has introduced no evidence, nor does the record suggest, that Dr. May would not have acted in exactly the same way to a student or prospective student who happened to be male. Dr. May spoke to her of his sexual desires and liaisons with both men and women. Despite the sexual nature of the speech, it did not expose plaintiff to the "disadvantageous terms or conditions ... to which members of the other sex are not exposed" that the Supreme Court requires a plaintiff to prove."

997 F. Supp. at 1235.

4. **Does Same Sex Apply To Same Race, Same Age?**

a. In *Oncale*, the Supreme Court noted that:
in the related context of racial discrimination in the workplace we have rejected any conclusive presumption that an employer will not discriminate against members of his own race. "Because of the many facets of human motivation, it would be unwise to presume as a matter of law that human beings as one definable group will not discriminate against other members of that group."


b. In Curley v. St. John's Univ., 19 F. Supp. 2d 181 (S.D.N.Y. 1998), the court cited Oncale and permitted the plaintiff's age discrimination denial of tenure claim to proceed even though the majority of decision-makers were over 40. The court held that, through Oncale, the Supreme Court has "emphasized the plausibility of various forms of intra-group discrimination."

5. In H.M. and M.M. v. Jefferson County Bd. of Educ., 1961607, 1998 WL 397430 (Ala. July 17, 1998) (not yet released for publication), the Alabama Supreme Court held that sexual harassment of a student by a teacher of the same sex could support a Title IX claim but that the school board was not liable under Title IX.

The plaintiff-parents filed a complaint on behalf of their minor son claiming that Jerry Dale Talbot, his teacher and coach, had sexually harassed and abused him for four years. The school board did not deny that Talbot engaged in sexual misconduct towards the boy but argued that it should not be liable because, as soon as the board learned of the complaint, it immediately investigated the claims and ultimately discharged Talbot. Moreover, the Board argued that Title IX prohibits only discrimination on the basis of sex and "because this case involves
a male teacher and a male student, the plaintiffs have no claim under Title IX." 1998 WL 397430 at *2.

The Court rejected the Board’s argument and stated "that the Supreme Court’s *Oncale* definition of "discrimination on the basis of sex" demonstrates that same-sex harassment may constitute discrimination on the basis of sex and that such discrimination is, therefore, actionable under Title IX, provided, of course, a plaintiff proves the remaining statutory factors." *Id.* After deciding that such a claim is viable under Title IX, the Court was quick to note that damages may not be recovered from a school board "unless an official of the school district who at a minimum has authority to institute corrective measures on the district's behalf has actual notice of, and is deliberately indifferent to, the teacher's misconduct." 1998 WL 397430 at *3, quoting *Gebser*, 118 S.Ct. at 1993.

6. In *Doe v. Dallas Indep. School Dist.*, 153 F.3d 211 (5th Cir. 1998), the Fifth Circuit Court of Appeals reversed dismissal of a Title IX action brought on behalf of minor students against the principal and the school district. The students, all boys, claimed that a third-grade teacher and Boy Scout Troop leader sexually molested them. The district court originally dismissed the Title IX claim "[b]ecause the only basis of discrimination alleged by the plaintiffs is same-sex harassment, [therefore], the plaintiffs have failed to state a claim under Title IX."

On appeal, the school district acknowledged that *Oncale* permitted the claim but argued that it was still not liable because it acted
appropriately. The Fifth Circuit held, however, that the plaintiffs would be given the opportunity to show that a school district official who had the authority to address alleged discrimination and to institute corrective action had actual knowledge and failed to respond.

IV. WHAT CAN HAPPEN: THE DANGERS & BENEFITS OF RESPONSE

A. In Vanderhurst v. Colorado Mountain College, No. 97-B-563, 1998 WL 515942 (D. Colo. Aug. 18, 1998), a court found that Professor Randy Vanderhurst, who was discharged for sexual harassment and violation of the college's code of ethics, had presented enough evidence to go to trial on his claim that Colorado Mountain College violated his free speech rights. Specifically, Vanderhurst made two comments during a clinical pathology course about which students complained. First, in demonstrating that sewage treatment plants do not completely purify water, Vanderhurst told students he had once seen a tampon floating in the treated water at a sewage plant. Later, Vanderhurst explained that a certain parasite could be transmitted by male homosexual contact through anal and oral sex. Vanderhurst also allegedly stated, *inter alia*, that he would not make any "blonde jokes" in response to a question posed by a female student, used the terms "big dog" and "floaters and sinkers" when referring to human feces, discussed in class, without permission, that a student had been bitten by a pig, requested that students not make comments regarding his classroom comments on their evaluations and made statements about how "dumb" his students were.

After the decision, the College issued a statement explaining that, if it had not taken action, it could have been found in violation of federal statutes barring
sex discrimination and that "[t]he outcome of this case will not deter us from continuing to act in the best interest of our students, and we will continue to expect our employees to provide a supportive and healthy learning environment for our students." "Federal Jury Rules For Professor Fired Over Classroom Comments", The Chronicle of Higher Education, Oct. 23, 1998.

Balanced Against...

B. In Grudzinski v. University of Cal. at Irvine, Case No. 764501 (Cal. Super. Ct. Oct. 9, 1998), Christina Grudzinski, a former surgical resident, alleged sexual harassment against the University and 11 of her supervisors after she was dismissed from the residency program following complaint of sexual harassment. Although the case proceeded to trial, the judge concluded that her claims were "without foundation, frivolous and unreasonably brought and without substance" and ordered Grudzinski to pay $1.1 million to the defendants for their legal fees. See Fred Woodhams, U. of Cal. at Irvine Cleared In Harassment; Woman Ordered to Pay $1.1 Million in Legal Fees, The Chronicle of Higher Education, Nov. 17, 1998.

V. WHAT SHOULD LEARNING INSTITUTIONS DO DIFFERENTLY IN LIGHT OF THE BURLINGTON-FARAGHER-ONCALE DECISIONS?

A. The 1997 Report Card On Gender Equity, prepared by the National Coalition for Women and Girls in Education, gave learning institutions a D+ in the progress of eliminating sexual harassment. Even if this is an extreme perspective, the problem clearly exists and the question remains: what's to be done?

B. Learning institutions can combat sexual harassment in the workplace while protecting themselves from liability by doing the following:
1. Establish a written policy against all forms of unlawful discrimination and harassment that identifies prohibited conduct, that sets up a confidential and accessible complaint procedure which assures appropriate corrective action in the event of a policy violation, up to and including discharge, expulsion or suspension and that prohibits retaliation.

2. Establish a system to prove the dissemination of the policy. For example, have faculty, students and employees sign an acknowledgment that they have received the policy. When training occurs, keep records, again by signature of attendees, so you can prove both who was trained and what the training was which they received.

3. Set up an effective complaint/investigatory process. Ensure that the complaint procedure allows a victim to report the unlawful conduct to someone other than their supervisor or professor (such as an affirmative action/EEO officer).

4. Disseminate the policy widely and discuss it with faculty, students and employees.

5. Educate department chairs, professors, and supervisors thoroughly on all aspects of the policy, emphasizing their special obligation not to engage in discrimination or harassment and to deal with, rather than to ignore, potential discrimination and harassment. Document attendance at and the contents of such training meetings.

6. Respond to claims of harassment or discrimination promptly by following clear procedures such as interviewing the accuser, the
accused, and witnesses, gathering any documentary or other evidence, and documenting the investigatory process. One good resource is a pamphlet published by the National Association of College and University Attorneys: "How To Conduct A Sexual Harassment Investigation" (May, 1997).

7. Resolve all complaints with a written report that thoroughly and fairly summarizes the factual findings and the bases for them in a way that avoids making unnecessary “admissions” that can later be mischaracterized in the course of any litigation, and attach supporting documents.

8. If a policy violation is found, based on the seriousness of the offense, the perpetrator’s past record, take (and document) appropriate corrective action that is reasonably calculated to prevent any further harassment or discrimination. What is reasonable will vary depending on factors such as the action taken against others for similar offenses, the victim’s input, the actor's prior pertinent history, and any other relevant circumstances.

9. Communicate results on a “need to know” basis in confidence, and give closure to the matter with those involved, keeping in mind that unnecessary or improper disclosure may create a claim for defamation.

10. Follow-up by checking with the victim to make sure that the problem has been resolved and that no retaliation has occurred and with the perpetrator to make sure that all mandatory steps are followed and that the conduct has not been repeated, and document the follow-up.
C. E-mail and other electronic communications are increasingly prevalent means of harassment and discrimination. In formulating a zero-tolerance policy for sexual harassment, a separate e-mail usage policy should be written or referenced. At a minimum, this policy should:

1. prohibit use of university e-mail to send fraudulent, unlawful or abusive messages;

2. identify a source to report threatening, intimidating or harassing messages;

3. caution that sending fraudulent, unlawful or abusive messages is a violation of school of university policy as well as state and federal laws (if applicable);

4. articulate possible disciplinary action that will result for violations of the e-mail policy.

VI. Cases Decided Since The Supreme Court's Faragher and Burlington Decisions

A. Caro v. City of Dallas, 17 F. Supp.2d 618 (N.D. Tex. 1998) (holding that criticism, insults and assignment of menial tasks did not constitute a tangible job detriment so no quid pro quo claim existed and granting summary judgment on hostile work environment claim because it held that the supervisor's conduct did not, per se, rise to the level of hostile work environment).

plaintiff's failure to report allegedly harassing events until eight months after they happened was not unreasonable where she reported them as soon as they became impossible to ignore).

C.  *Cully v. Milliman and Robertson*, No. 97 Civ. 4346, 1998 WL 651057 (S.D.N.Y. Sept. 22, 1998) (denying summary judgment on hostile work environment claim because facts demonstrated that management simply moved plaintiff to another work station and never spoke with the alleged harassers about the conduct and, thus, a jury could reasonably find that it failed the first prong of the affirmative defense).

D.  *DiLenno v. Goodwill Indus. of Mid-Eastern Pa., et al.*, No. 98-1024 (3rd Cir. Nov. 27, 1998) (reversing summary judgment for employer where employee was transferred from her job "tagging" donated merchandise to a job sorting donated clothing which triggered her phobia of the "critters" found in donation bags. The court held that "transfer to a job that an employer knows an employee cannot do may constitute [an] adverse employment action . . . base[d] on the principle that what constitutes retaliation depends on what a person in the plaintiff's position would reasonably understand.").

E.  *Distasio v. Perkin Elmer Corp.*, 157 F.3d 55 (2d Cir. 1998) (reversing summary judgment in co-worker harassment case under the negligence standard and holding that employer did not take reasonable care to prevent harassment even though it had a no-harassment policy because the plaintiff's supervisor never forwarded her complaints to human resources).

F.  *Fierro v. Saks Fifth Avenue*, 13 F. Supp.2d 481 (S.D.N.Y. 1998) (granting summary judgment to employer and finding that first prong was satisfied because employer had a no-harassment policy with readily available
complaint procedures and second prong was met because plaintiff's
generalized fears about complaining can never constitute reasonable grounds
for failing to utilize the complaint mechanism).

G.  *Harrison v. Eddy Potash, Inc.*, Nos. 96-2045, 92-2065, 1998 WL 758401 (10th
Cir. Oct. 30, 1998) (denying judgment as a matter of law for employer
because there was evidence that, although employer had a no-harassment
policy, plaintiff was not aware of the policy).

(allowing hostile work environment claim to proceed to trial where plaintiff
who suffered no tangible job detriment raised an issue of fact as to first prong
of affirmative defense because the company's designated investigator was one
of the alleged harassers and to the second prong because the plaintiff's
complaint may not have been specific enough to apprise the investigator of
the nature of the problem.

12465 (S.D.N.Y. Aug. 1998) (denying summary judgment in hostile work
environment case because there was an issue of fact as to the first prong of
the affirmative defense where, *inter alia*, the employer did not take remedial
action for a week despite plaintiff's daily complaints).

**For More on Faragher, Burlington & Oncale...**

_Student-To-Student Sexual Harassment Under Title IX: The Legal And Practical

_The University's Liability For Professor-Student Sexual Harassment Under Title

U. of Cal. at Irvine Cleared in Harassment; Woman Ordered to Pay $1.1 Million in Legal Fees, The Chronicle of Higher Education, Nov. 17, 1998

How to Conduct a Sexual Harassment Investigation, National Association of College and University Attorneys (May 1997)


Cornell Computer Policy & Law Homepage located on the World Wide Web at www.cornell.edu/CPL

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Doe v. Dallas Indep. School Dist., 153 F.3d 211 (5th Cir. 1998)


Faragher v. City of Boca Raton, 118 S.Ct. 2275 (June 26, 1998)


Graves v. Women's Professional Rodeo Assoc., 907 F.2d 71 (8th Cir. 1990)

Gunnell v. Utah Valley State College, 152 F.3d 1253 (10th Cir. Aug. 19, 1998)


Haavistola v. Community Fire Co., 6 F.3d 311 (4th Cir. 1993)


O'Connor v. Davis, 126 F.3d 112 (2d Cir. Sept. 19, 1997)

