**RE: DISCRIMINATION**
**A LOOK BACK AT TWENTY-FIVE YEARS OF SUPREME COURT DECISIONS IMPACTING HIGHER EDUCATION**

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## I. Laws and statutes

### A. Amendments to United States Constitution

First Amendment (Ratified December 15, 1791)

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment (Ratified Dec. 6, 1865)

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

### B. Statutes

Title VII of the Civil Rights Act of 1965

Title VII prohibits discrimination on the basis of race, color, religion, sex (including pregnancy), or national origin by private and public employers and by labor organizations and employment agencies, as to hiring, classifying, promoting, demotion, firing, pay or employment conditions. In general, Title VII applies to employers with 15 or more employees hired for 20 calendar weeks.

Executive Order No. 11246

Executive Order No. 11246 prohibits discrimination on the basis of race, color, religion or national origin for federal contractors. It also incorporates affirmative action requirements.

Equal Pay Act of 1963

The Equal Pay Act requires equal pay for equal work regardless of the sex of the employee. It applies to all private or public employers subject to the Fair Labor Standards Act of 1938.

Age Discrimination in Employment Act of 1967 (ADEA)

ADEA prohibits discrimination based on age against those 40 years of age or more. Employers of 20 or more employees hired for 20 calendar weeks are subject to the Act.

Older Workers Benefit Protection Act (OWBPA)

Amended the ADEA in 1990 by setting forth conditions for an employee waiving his/her litigation rights under the ADEA. Some of the conditions included are that the settlement agreement and release be written in layman's terms; notice and agreement that the individual is specifically waiving rights or claims arising under ADEA; notice also provides that the individual does not waive any rights or claims which may arise after the date of the

waiver; the consideration must be something of value to the individual; the individual must be advised in writing to consult with an attorney prior to executing the agreement; and the individual must be given at least 21 days within which to consider the agreement before execution and at least a 7 day revocation period after they sign the agreement.

Americans with Disabilities Act of 1990 (ADA)
The ADA requires all public and private employers with 15 or more employees to reasonably accommodate a disability of an applicant or an employee. A disability is defined as a "physical or mental impairment that substantially limits one or more of major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment. Reasonable accommodation may include making an existing facility accessible to applicants and employees, job restructuring, modified work scheduled, acquisition or modification of equipment etc.

Employee Retirement Income Security Act (ERISA)
ERISA protects the rights of employees to pension and other employer-provided benefits. Among its various provisions is the right to notice and information about vested benefits, minimum vesting requirements, and nondiscrimination requirements in the administration of the employer-sponsored benefit plan.

Title VI of the Civil Rights Act of 1964
Title VI prohibits discrimination based on race, color and national origin. It does not apply to sex or religion. Title VI is applicable to programs or activities at colleges and universities receiving federal financial assistance.

Title IX of Education Amendments of 1972
Title IX prohibits discrimination based on sex (gender). Title IX is applicable to programs or activities at colleges and universities receiving federal financial assistance

Section 1981 of the Civil Rights Act of 1866
Section 1981 prohibits discrimination on the basis of race, color or citizenship in the making and enforcement of contracts. It applies where state action is involved, but has been applied to private employment as well.

Section 1983 of the Civil Rights Act of 1871
Section 1983 prohibits discrimination on the basis of race, national origin or alienage. It applies where state action is involved.

Rehabilitation Act of 1973 (Sections 503 and 504)
Section 503, contained at 29 U.S.C. § 793, requires government contractors with any contract in excess of $10,000 to take affirmative action to employ and advance in employment qualified individuals with disabilities.
Section 504, at 29 U.S.C. § 794, provides that no person, by reason of disability, shall be excluded from participation in, denied the benefits of, or subjected to discrimination under any program or activity receiving federal financial assistance. This includes nondiscrimination in employment by these programs.

## II. Cases

### A. Race

*Regents of the University of California v Bakke*, 438 US 265, 98 S.Ct 2733, 57 L.Ed. 2d 750 (1978)

The University of California at Davis Medical School admitted only 100 students each year. Sixteen of the one hundred admits were set aside for "disadvantaged" applicants. The Medical School had two admissions programs, a regular program and a special program. Under the regular program, an applicant whose grade point average (GPA) was below 2.5 out of 4.0 was rejected. Under the special program, if an applicant was from a minority group and was found to be "disadvantaged" then they were exempted from the 2.5 GPA minimum and their applications were sent to a special committee composed of members of the minority community. The special admits were given one of the sixteen set aside slots. No disadvantaged white students were admitted under the special program.

Allan Bakke, a white male, applied for admission to the Medical School in both 1973 and 1974. Both times his application was rejected. Bakke brought suit in a California Superior Court to force his admission stating that the special admission's program excluded him from being admitted to the medical school on the basis of his race in violation of the Equal Protection Clause of the Fourteenth Amendment, the California Constitution and Title Vi of the 1964 Civil Rights Act.

The trial court found that the special program operated as a racial quota because minority applicants in the special program were rated only against on another. The Court found the University in violation of the 14th Amendment, the California State Constitution and Title VI. However, the Court did not order Bakke to be admitted.

Bakke then appealed to the California Supreme Court only that portion of the decision which denied him admission. This court ruled that since Bakke had met the burden of proof establishing that he had been discriminated against, then the University had to demonstrate that Bakke would not have been admitted even if there were no special program. To do this the California Supreme Court moved to have this matter remanded to the trial court. The University, however, in its petition for a rehearing conceded that it was unable to carry that burden. They then appealed to the U.S. Supreme Court.

Below is an excerpt from the U.S. Supreme Court Opinion*, Regents of the University of California v Bakke*:

> Justice Powell announced the judgement of the court and delivered an opinion expressing the view that (1) it was not necessary to determine whether a private right of action existed under Title Vi of the Civil Rights Act, since the question had not been considered in the courts below; (2) Title VI proscribed only those racial classifications that would violate the equal protection clause or the Fifth Amendment; (3) for purposes of the equal protection clause, racial and ethnic distinctions of any sort were inherently suspect and thus called for the most exacting judicial examination, racial and ethnic classifications being subject to stringent examination without regard to whether the group discriminated against was a discrete and insular minority; (4) when a burdensome classification (including a preferential classification to remedy past discrimination ) touched upon an individual's race or ethnic background, he was entitled to a judicial determination that the burden he was asked to bear on that basis was precisely tailored to serve a compelling governmental interest; (5) since in the case at bar there was no determination by the legislature or a responsible administrative agency that the University had engaged in a discriminatory practice requiring remedial efforts, and since the special admissions program totally foreclosed some individuals from enjoying the state-provided benefit of admission to the medical school solely because of their race, the classification must e regarded as suspect, and thus was permissible only if supported by a substantial state purpose or interest, and only if the classification was necessary to the accomplishment of such purpose or the safeguarding of such interest; (6) the special admissions program could not be justified as serving the purposed of (a) assuring within the student body a specified percentage of a particular racial

> group, since such racial preference was facially invalid as discrimination for its own sake, (b) countering the effects of "societal discrimination," since the government has a substantial interest in correcting the effects of specific, identified discrimination only, (c) increasing the number of physicians who would practice in communities currently underserved, there being virtually no evidence that the special admissions program was either needed or geared to promote such goal, or (d) obtaining the educational benefits that flowed from an ethnically diverse student body, since even though such a diversity was a constitutionally permissible goal in view of the First Amendment's special concern for academic freedom, nevertheless the defendant's program--reserving a fixed number of seats in each class solely on the basis of race, whereas the admissions programs of other universities properly took race into account as only one of the factors for consideration in achieving educational diversity through programs involving individual, competitive comparison of all applicants--was not necessary to promote the interest of diversity; and (7) thus, the defendant's special admissions program violated the Fourteenth Amendment, the California Supreme Court's judgment being proper as to its invalidation of the program and its ordering the admission of the plaintiff, but being improper insofar as it enjoined the defendant from ever giving any consideration to race in its admissions process.

Justice Powell also cited the Harvard College program. He quoted from the Brief submitted by Columbia University, Harvard University, Stanford University and the University of Pennsylvania as Amici Curiae as follows:

> In recent years Harvard College has expanded the concept of diversity to include students from disadvantaged economic, racial and ethnic groups. Harvard College now recruits not only Californians or Louisianans but also blacks and Chicanos and other minority students…
>
> In practice, this new definition of diversity has meant that race has been a factor in some admission decisions. When the Committee on Admissions reviews the large middle group of applicants who are 'admissible' and deemed capable of doing good work in their courses, the race of an applicant may tip the balance in his favor just as geographic origin or a life spent on a farm may tip the balance in other candidates' cases. A farm boy from Idaho can bring something to Harvard College that a Bostonian cannot offer. Similarly, a black student can usually bring something that a white person cannot offer…
>
> In Harvard College admissions the Committee has not set target-quotas for the number of blacks, or of musicians, football players, physicists or Californians to be admitted in a given year…But that awareness [of the necessity of including more than a token number of black students] does not mean that the Committee sets a minimum number of blacks or of people from west of the Mississippi who are to be admitted. It means only that in choosing among thousands of applicants who are not only 'admissible' academically but have other strong qualities, the Committee, with a number of criteria in mind, pays some attention to distribution among many types and categories of students.

*Bakke*, 438 US at 316-17

The Harvard Admission Program that Justice Powell quotes states that

> The number of applicants who are deemed to be not qualified is comparatively small. The vast majority of applicants demonstrate through test scores, high school records and teachers' recommendations that they have the academic ability to do adequate work at Harvard, and perhaps to do it with distinction.

*Bakke*, Appendix to Justice Powell's opinion 38 US at 321.

*Gratz et al v Bollinger et al*., 123 S.Ct. 2411, 156 L.Ed 2d 257 (2003)

The United States Supreme Court ruled on two affirmative Action cases: Gratz et al. v. Bollinger et al. and Grutter et al. v. Bollinger et al. The Court ruled against the University of Michigan in the undergraduate admissions case and for the University of Michigan in a law school admissions case.

Jennifer Gratz is a white female. Patrick Hamacher is a white male. Both applied to the University of Michigan's College of Literature, Science and the Arts (LSA). Gratz applied in 1995 and Hamacher in 1997. Both applicants were rejected. Gratz and Hamacher filed a class action lawsuit, in October 1997, against the University of Michigan's Literature, Science and Arts Program in the U.S. District Court for the Eastern District of Michigan. In their complaint they allege that the LSA program was in violation of Title VI of the Civil Rights Act of 1964 as well as the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution in that the school considered race as a factor in their admitting process. This was certified as a class action case.

All applications were reviewed and given points based on the following: high school grade point average; standardized test scores; academic quality of the applicant's high school; strength or weakness of the applicant's high school curriculum; in-state residency; alumni relationship; personal essay; and personal achievement or leadership.

Prospective students were admitted based on the following scores their applications received:

1. 100-150 admit
2. 95-99 admit or postpone
3. 90-94 postpone or admit
4. 75-89 delay or postpone
5. Less then 74 delay or reject

In 1997 the University made changes to its admissions procedures by making it possible for underrepresented minority applicants to receive additional points. Applicants also received additional points if they were socioeconomically disadvantaged, attended a high school with a predominantly underrepresented minority population or the field in which the person was applying was underrepresented. The example used by the Supreme Court in its opinion was for men who wished to have a career in nursing.

The University argued that it had a compelling interest in the educational benefit from a diverse student body. The University relied heavily on Justice Powell's opinion *Bakke* characterizing diversity as "constitutionally permissible objective" in the context of higher education.

The District Court issued a split decision. It found for the University on its admissions programs for 1999-2000 but granted summary judgment to the plaintiffs for the admissions program that was used from 1995-1998. The District Court also differentiated between this case and *Bakke*. The Court noted that Michigan's admissions policy was narrowly tailored to achieve a compelling interest in having a diverse student body. In *Bakke*, non-minority medical school applicants did not compete against favored minority applicants for a pre-determined number of openings. Michigan did not have a pre-determined set-aside. The University also did not have a separate minority review committee.

This matter was appealed to the 6th Circuit Court of Appeals. Prior to rendering a decision in this case, the Appeals Court issued a decision in the matter of *Grutter v Bollinger* in which that Court

affirmed the Law School's admission's policy. The plaintiffs requested of the Supreme Court that it grant certiorari to hear this case as well as the *Grutter* case at the same time and without awaiting a decision from the 6th Circuit. The Supreme Court agreed.

On appeal, Gratz argued that the use of race by the University violated the 14th Amendment to the U.S. Constitution. They argued that using "diversity as a basis for employing racial preferences is simply too open-ended, ill defined and indefinite to constitute a compelling interest capable of supporting narrowly-tailored means." Their second argument was that while the University believed their admission policy was narrowly tailored to achieve diversity, it did not meet the standards set by the *Bakke* decision. The Supreme Court rejected the first argument but accepted the second. The Supreme Court held that the undergraduate admissions' policy was unconstitutional, as it was not "narrowly tailored to achieve respondents' asserted compelling interest in diversity, the admission policy violates the Equal Protection Clause of the Fourteenth Amendment."

The undergraduate policy was considered inflexible. Since minority applicants were automatically given a twenty-point bonus the court determined that the process which provided them with an advantage over non-minority candidates was in violation of the Equal Protection Clause and thus unconstitutional.

*Grutter v Bollinger*, 123 S.Ct 2325, 156 L.Ed 2d 304 (2003)

Barbara Grutter, a white female, applied for admission to the University of Michigan's Law School in 1996. She was initially put on the waiting list but in June of 1997, her application was rejected. She filed a class action lawsuit in the U.S. District Court for the Eastern District (Southern Division). Grutter alleged in her complaint that the law school discriminated against her and other similarly situated on the basis of her race in violation of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, 42 USC §1981 and §1983, and Title VI of the Civil Rights Act of 1964 §2000d. The Law School responded to the complaint as follows:

> Defendants admit that the University of Michigan Law School has a current intention to continue to use race as a factor in admissions, as part of a broad array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.

Plaintiffs argued that race was a "super factor in the admissions process."

The District Court found that the use of race in the Law School's admission's process was in violation of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, and Title VI of the Civil Rights Act of 1964 and the Law School was enjoined from using race as a factor in its admissions process. The district court relied on five factors to determine that the admissions policy was not "narrowly tailored." The factors are:

(a) the Law School did not define "critical mass: with sufficient clarity;
(b) the apparent lack of a time limit on the Law School's consideration of race and ethnicity;
(c) the admissions policy was "practically indistinguishable" from a quota system;
(d) the Law School did not have a logical basis for considering the race and ethnicity of African-Americans, Native Americans and Puerto Ricans; and
(e) the Law School did not "investigate alternative means for increasing minority enrollment.

(*Grutter*, 137 F.Supp2d at 850-852)

The Sixth Circuit Court of Appeals, sitting en banc, heard oral arguments on December 6, 2001 and they issued their opinion on May 14, 2002. The Court reversed the District Court's ruling that the admissions policy was unconstitutional. The Court held that the Law School's diversity goal was a compelling state interest. The Court ruled that the Law School admission's policy was "narrowly tailored" to achieve that goal. Unlike the District Court, the Sixth Circuit found that the Law School used many factors in its admitting process and did not rely mainly on race and ethnicity. The Court did not consider the Law School's admissions process as a quota system. In that vein, the Appeals Court dismissed the court's reliance on *Adarand Constructors, Inc. v. Pena*, 515 US 200 (1995) as controlling. In *Adarand*, the Supreme Court held that "racial classifications are illegal except to remedy past discrimination." Here the Appeals Court held that *Bakke* was controlling and that *Adarand* did not over-rule *Bakke* as *Bakke* is the only case that deals directly with admissions process.

In June of 2003, the US Supreme Court affirmed the decision of the 6th Circuit Court of Appeals declaring the Law school's admission policy constitutional. In the majority opinion, authorized by Justice O'Connor, the Court agreed that the goal of the admission's policy was to assemble "a class that is both exceptionally academically qualified and broadly diverse." The Court also deferred to the Law School's "educational judgement that such diversity is essential." The Court quoted the brief filed by the Law School that the Law School sought to "enroll a critical mass of minority students." Critical mass was defied as the "educational benefits that diversity is designed to produce."

The Court found the Law Schools' admission policy to be a "narrowly tailored plan." The purpose of the narrow tailoring requirement is to ensure that "the means chosen 'fit' . . . the compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." *Richmond v. J.A. Croson Co.,* 488 U.S., at 493 (plurality opinion). The court noted that, since *Bakke*, it had not had the opportunity to define the contours of the narrow tailoring inquiry with respect to race-conscious university admissions programs. The court said "the inquiry must be calibrated to fit the distinct issues raised by the use of race to achieve student body diversity in public higher education." The court further said that to be narrowly tailored, "a race-conscious program cannot insulate categories of applicants with certain desired qualifications from competition with other applicants." "An admissions program must be flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight." They found that the Law School admission program bore the hallmarks of a narrowly tailored plan.

The Court found that the Law School's policy of considering race or ethnicity as only a "plus" as opposed to the undergraduate policy of awarding a "bonus" for race and ethnicity. No quotas were imposed upon the selection process. The Court considered this a flexible plan that allowed each application to be considered on an individual basis.

The Court did not believe that "race conscious admission policies" should run perpetually. To this end, the Court believed that "25 years from now, the use of racial preferences will no longer be necessary to further the intent approved today."

*Bob Jones University v. United States*, 461 US 574, 103 S.Ct. 2017, 76 L.Ed.2d 157 (1983)

This case was actually two cases, *Bob Jones University v. United States* and *Goldsboro Christian Schools, Inc v. United States*. The focus here is on the *Bob Jones* opinion.

Bob Jones University was founded in 1927 in Florida but moved to South Carolina in 1940. The University is not affiliated with any particular religious institution. All of their students are screened as to their religious beliefs as the school is dedicated to teaching its fundamentalist Christian religious beliefs. Bob Jones University was granted tax-exempt status under 501(c)(3) of the United State Internal Revenue Code.

The University sponsors followed the teachings of the Bible. As such, they interpreted the Bible as forbidding interracial dating and for this reason excluded Blacks from consideration for admission. From 1971 though 1975 the University moderated its position by allowing applications from Blacks who had married within their race. After 1975 the University allowed unmarried Blacks to enroll but they were still prohibited from interracial dating. Nearly all of the students and faculty lived on campus and were to eat meals together. Those that did not live on campus were provided with funds for lodging and certain meals if they were not taken on campus.

In 1970 the IRS notified the University that its tax-exempt status was being challenged due to his discriminatory practices. The University sought to have the IRS enjoined from this action by filing suit in US District Court. This matter went to the US Supreme Court which ruled that no judicial review could be made until any "assessment or collection of any tax." *Bob Jones University v. Simon*, 416 US 725 (1974)

In January of 1975 the IRS officially revoked the University's tax-exempt status. The University began to pay taxes but only for one employee and then appealed for a refund. When the refund was denied and the IRS requested nearly a half million dollars in back taxes, the University filed the complaint. The US District Court found that the IRS exceeded its authority in revoking the University's tax-exempt status on the basis that it violated the First Amendment to the Constitution's Religious clause. The IRS was ordered to refund the taxes to the University.

The IRS appealed to the Fourth Circuit which issued a divided opinion. According to the Fourth Circuit, to be eligible to be considered a "charitable" institution, the institution, in this case the University, must not have policies that are "contrary to public policy." Since the University's racial policies were contradictory to public policy, then it violated the definition used by the IRS. The Appeals Court held that the IRS was within its authority to revoke the University's tax-exempt status and thus did not violate the First Amendment to the U.S. Constitution.

The University appealed to the U.S. Supreme Court. On May 24, 1983 the Court upheld the decision of the Appeals Court. The Supreme Court found that the position of the IRS that "racially discriminatory private school is not charitable within the common law concepts reflected in the (IRS) Code." The University argued that the IRS's revocation of its tax-exempt status violated the Establishment Clause of the First Amendment in that it gave preference to religious institutions that did not have policies against race mixing. The Supreme Court rejected this argument by saying that the "Government has a fundamental overriding interest in eradicating racial discrimination in education." The University also argued that is did not discriminate based on race as it admits all races to its school and only restricts certain conduct. The Court rejected that argument by stating that the restrictions prohibit free association and that is a form of racial discrimination.

Other significant cases:

*Texas v. Lesage*, 528 US 18, 120 S.Ct 467, 145 L. Ed. 2d 347 (1999)

Lesage was an African immigrant who applied for admission to the Ph.D. program in counseling psychology at the University of Texas. The University used race as a factor in admitting process. Lesage was rejected for admission and filed suit in the US District Court for the Western District of Texas. The court rejected his claim that race was a factor in his rejection and dismissed his suit on a motion for summary judgment. He appealed to the Fifth Circuit which reversed holding that summary judgment was inappropriate.

The State appealed to the U.S. Supreme Court which reversed the Fifth Circuit. The Court ruled that Lesage would have been rejected under a race-neutral policy. The Court said that even if the criteria used in making the adverse decision should not have used but the same conclusion would have been reached then there is no liability. Hence, no harm no foul.

## B Gender[1]

*Board of Trustees of Keene State College et al. v Christine M. Sweeney*, 439 US 24, 58 L.Ed 2d 216, 99 S. Ct. 295 (1978)

Keene State College is part of the University of New Hampshire State System. Christine Sweeney was an associate professor of Education hired by Keene State College in January of 1969. Prior to being hired at Keene, Sweeney had worked as a teacher at the elementary and level and also taught undergraduate and graduate levels at Catholic University. She left Catholic University to take a position at Emmanuel College in 1965. Sweeney had a normal teaching load and did the virtually the same amount of committee work as her colleagues.

In 1970 Keene had instituted an exchange program with several schools in England. Students from England would travel to Keene with a teacher and an advisor and students, a teacher and advisor would travel from Keene to England for a semester. A committee determined which faculty members would make the trip. The year before the first trip was scheduled; Sweeney was the chair of the Foreign Studies Committee. She was unanimously nominated to be one of the two advisors for the trip to England. A male professor was given the second trip. A female professor was made an alternate in case one of the other could not attend or would be the person to go on a third trip if one was scheduled. Prior to her taking the trip, Sweeney was informed that the Dean of the College had vetoed her nomination for the trip. She was not given a reason nor was anyone else who questioned his action. Sweeney tried to meet with the President to find out the reason for her not being allowed to travel but no meeting took place. During her tenure at Keene, Sweeney was the only faculty member to be denied the opportunity to travel to England notwithstanding a unanimous recommendation.

In 1972, Sweeney came up for tenure review. She received a positive recommendation from the chair of the department. She was given a unanimous endorsement by the Faculty Evaluation Advisory Committee (FEAC), the committee that reviews and makes tenure recommendations to the Dean of the College. The Dean granted her tenure beginning on July 1, 1972. During the 1972-73 academic year, the Chair of the Education Department recommended that Sweeney be promoted to Full Professor. The FEAC unanimously voted against this recommendation. The Dean of the College agreed with the FEAC and denied Sweeney promotion to full professor. Sweeney met with the Dean to discuss not only the promotion issue but also why she was not allowed to travel to England. The dean refused to provide an answer. Sweeney appealed the denial of the promotion. The Appeals Committee took its time in reviewing the matter. Sweeney, while awaiting the verdict of her appeal did not apply for promotion during the next academic year. The Appeals Committee believed this to be a mistake and asked that pending its decision, the College allow her candidacy to be reviewed even though she had not applied. The President denied the request and stated that the Appeals Committee exceeded its authority by making such request. The Appeals Committee also denied Sweeney's appeal.

In April of 1974, Sweeney filed a charge of discrimination with the New Hampshire Commission for Human Rights. Prior to filing such a charge, Sweeney had not voice any complaint to anyone at the College that she had been the victim of discrimination as the reason she was denied promotion to full professor.

Prior to the court hearing her complaint, Sweeney was promoted to full professor in 1976.

Sweeney then filed a complaint in Federal District Court in New Hampshire. She claimed that the College had been discriminated on the basis of her sex by not promoting and by under paying her

[1] This section contains cases involving discrimination and harassment

under Title IX of the Education Amendments of 1972, Title VII of the Civil Rights Act of 1964, and the Fair Labors Standards Act of 1938. After hearing from a number of witnesses and viewing more then 70 exhibits, the court ruled that Keene State College had discriminated against women faculty members as it relates to hiring, promotion and salary. Sweeney was entitled to a back dating of her promotion to July 1, 1976, back pay as a full professor and attorney fees and costs.

Keene State College appealed the decision of the District Court to the First Circuit Court of Appeals. On appeal, the First Circuit ruled that the District Court was correct in its findings. The Court noted that there was a "scarcity of women in the upper ranks" which contributed to their lack of representation on the various committees that made the decisions regarding promotions and appeals. The court relied on the statistical evidence that was presented at the district court hearing to reach its decision.

Keene appealed to the U.S. Supreme Court which issued its decision on November 13, 1978. The Supreme Court, in a 5-4 per curiam decision, vacated the decision of the First Circuit. In making its decision the Court relied on its ruling in *McDonnell Douglas Corp. v. Green*, 411 US 792, 36 L Ed2d 668, 93, S.Ct 1817 (1973), by stating that the "plaintiff "must .. be afforded a fair opportunity to show that [the employer's] stated reason for [the plaintiff'] rejection was in fact pretext." The Court believed that the Appeals court imposed a "heavier burden on the employer" then necessary.

This matter was sent back to the District Court which again ruled in Sweeney's favor. Upon appeal to the First Circuit for a second time, the First Circuit, again reviewing all the evidence introduced by the parties again ruled in favor of Sweeney that her denial of a promotion was the result of sex discrimination.

*Franklin v Gwinnett County Public Schools and William Prescott*, 503 US 60, 112 S.Ct. 1028, 117 L.Ed 2d 208 (1992)

Christine Franklin, a high school student, filed a complaint that alleged that she was harassed by Andrew Hill, a teacher and a coach at her school. She alleged that Hill had initiated contact of a sexual nature towards Franklin and that others who observed this informed teachers, a guidance counselor and the assistant principal but no action was taken. Franklin alleged that when she tried to inform the principal he discouraged her from going forward by warning her of the negative publicity. At the end of the school year, Hill resigned and the principal retired thereby closing the investigation. Franklin filed a complaint with the Department of Education's Office of Civil Rights. However, they relied on information that the school system provided regarding future compliance with Title IX and their file was closed.

Franklin filed a complaint with the Federal District Court under Title IX of the Education Amendments of 1972. The school system moved to dismiss the matter for failure to state a claim upon which relief can be granted. The court agreed by saying that Title IX does not provide for the award of damages.

Franklin appealed to the Eleventh Circuit Court of Appeals. The appeals court noted that Title IX was modeled after Title VI of the Civil Rights Act of 1964. In their decision, the court cited several Title VI cases to make their point in affirming the dismissal by the District Court. In one case, *Drayden v. Needville Independent School District* 642 F.2d 129 (5th Cir. 1981), the court upheld the dismissal of a Title VI action. They quoted *Drayden* by saying that a "private right of action allowed under Title VI encompasses no more than an attempt to have any discriminatory activity ceased." Franklin argued that damages were available and therefore the court should use the reasoning set forth in *Guardians Associations v. Civil Service Commission*, 463 US 582, 103 S. Ct 3221, 77 L.Ed 2d 866 (1983). The court rejected that argument saying that *Drayden* , while decided before *Guardian Association*, still controlled because there was no intentional discrimination.

Franklin appealed to the United States Supreme Court which reversed the Eleventh Circuit. The Supreme Court said that, over time, federal courts have been allowed to grant "remedial relief." The court noted that while the statute did not explicitly authorize such relief, previous decisions by the court have upheld the issuing of such relief when Congress did not specifically authorize it. The Court ruled that the Appeals Court was incorrect in its interpretation that *Guardians Associations* was not controlling and the court could have granted relief. The Court went on to say "Congress did not intend to limit the remedies available in a suit brought under Title IX."

The court rejected the school system's argument that relief was not something that Congress envisioned. The court used the analogy that a teacher harassing a student was the same as a supervisor harassing an employee such as in the *Meritor Savings Bank* case. If monetary damages could be awarded for one then they could be awarded for the other. They also rejected the argument that relief could only be in the form of back pay or prospective relief. Since Franklin is a student, back pay does not apply. Since the alleged harasser is no longer teaching within the system, there can be no prospective relief. The only relief available to Franklin was for the awarding of damages if she should prevail.

*Harris Forklift Systems, Inc.*, 510 US 17, 114 S. Ct. 367, 126, L. Ed 2d 295 (1983)

Teresa Harris, an employee of Forklift Systems, Inc., filed suit alleging that the President of the company created an abusive [hostile] work environment on the basis of gender by making unwanted sexual comments to her. Upon consideration of this matter, the District Court held that the President's comments did not create an abusive work environment. In so ruling that court found that, although some of the comments were offensive and would offend a "reasonable women", the comments were not so severe as to seriously effect Harris' psychological well and the comments did not rise to a level of interfering with her work performance, nor did the comments create a working environment that subjectively so offended the plaintiff that she suffered injury. On appeal the Appeals Court upheld that the decision of the District Court. Harris appealed to the United States Supreme Court, which granted certiorari.

The United States Supreme Court reversed the decision of lower courts. Justice O'Connor, writing for the court, wrote that Title VII of the Civil Rights Act of 1964 makes it an unlawful employment practice for an employer to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment because of a person's race, color, religion, sex, or national origin. She further noted that this proscription is not limited to economic or tangible discrimination, but proscribes discriminatory intimidation, ridicule, and insult that is sufficiently severe to pervasive to alter the condition of a victim's employment and create and abusive working environment. Justice O'Connor held that "so long as the environment would reasonably be perceived, and is perceived, as hostile or abusive, there is no need for it also to be psychologically injurious." She emphasized that determination of whether an abusive environment existed is depends upon numerous factors such as the frequency of the offensive conduct, its severity; whether it is physically threatening or humiliating or a mere offensive utterance, and whether it interferes and employee's work performance.

*Meritor Savings Bank, FSB v. Vinson et al.*, 477 US 57, 91 L.Ed2d 49, 106 S.Ct. 2399 (1979)

Mechelle Vinson was employed by Meritor Savings Bank. In September 1978 she notified her supervisor that she was taking sick leave. She had worked at the bank for four years. In November, she was notified that she was being terminated for taking excessive time off. She then filed a complaint with the U.S. District Court for the District of Columbia alleging that her Civil Rights had been violated under Title VII of the Civil Rights Act of 1964. During her employment she alleged that her male supervisor, a bank vice president and a branch manager, was harassing her. Her allegations included public fondling and demands for sex. According to Vinson, the harassment began after her probation period had ended. She said that her supervisor would invite her out for dinner and then suggest having sex. She says that she

submitted to the demand for sex out of fear she would be fired. She also suggests that he had raped her several times. The supervisor denied any sexual relationship. The Court ruled against Vinson saying she had not out a case for sex discrimination. The Court decided that the sexual conduct could have been voluntary and was not part of her employment. The Court did not allow Vinson to call any witnesses that had similar experiences wit h the supervisor. The Court also noted that Vinson had not informed the bank of any improper actions on the part of the supervisor.

The U.S. Court of Appeals for the District of Columbia Circuit reversed and remanded. Under Title VII there are two types of sexual harassment. The first involves "conditioning of employment benefits on sexual favors." The second, creating a hostile work environment. In this case, the Court noted it was the later that Vinson was claiming and the District Court had ignored. The Appeals Court also found that the employer was liable whether or not it knew of the supervisor's actions since, under Title VII's definitions, the supervisor could be considered an agent. The bank filed an appeal with the U.S. Supreme Court.

The Supreme Court affirmed the decision of the Appeals Court but did not follow all of that court's reasoning. The Supreme Court agreed that the District Court was incorrect in failing to consider the hostile work environment. The Supreme Court also agreed that the District Court was incorrect in not looking at the supervisor's conduct as being unwelcome instead of being voluntary. The Supreme Court rejected the bank's argument that having a policy regarding discrimination and grievance procedures reduced its risk. The Court pointed out that the bank's policy did not specifically address sexual harassment. Also, the policy required the employees to notify their supervisor first of any problem. In this case, the supervisor was the problem. The Court found that the Appeals court was incorrect in imposing absolute liability upon the employer without looking at all the circumstances. However, this did not affect the fact that the District Court had erred in its original ruling.

*Gebster v. Lago Vista Independent School District*, 524 US 274, 118 S.Ct. 1989, 141 L.Ed.2d 277 (1998)

Frank Waldrop was a teacher at the Lago Vista High School when he first met Gebster who was a student in his wife's eight-grade honors class. When Gebster entered ninth grade she was enrolled in Waldrop's honors social studies class. Gebster alleged that Waldrop made sexually suggestive comments during class. In the spring of 1992, Waldrop initiated sexual contact with Gebster at her home. Over time they were regularly having sexual intercourse. The relationship ended when they were discovered by a Lago Vista police officer. At no time did any of their sexual relations take place on school property nor did anyone at the high school know of their relationship. Gebster never reported the relationship to anyone at the school district. Waldrop had been warned about his comments by the principal because other parents had complained.

Gebster and her mother sued the school district for negligence and for violation of §1983 and Title IX. The original suit was filed in state court but removed to the Federal District Court for the Western District of Texas. The district court granted summary judgment for the Defendant on both claims. Gebster appealed only the Title IX claim to the Fifth Circuit Court of Appeals. The issue before the Fifth Circuit was whether the District Court had erred in granting summary judgment for the School District on the issue of when a school district is liable under Title IX of the Education Amendments of 1972 for a teacher's sexual harassment of a student. The Fifth Circuit upheld the District Court's decision.

The Fifth Circuit had previously ruled in *Canutillo Independent School District v. Leija*, 101 F.3d 393 (1996) that "Title IX creates strict liability in teacher-student sexual harassment cases" and "reversed a denial of summary judgment where a teacher sexually molested a second grade student during movies on school grounds and another teacher had notice." The Court also stated that "A school district is not absolutely liable because, simply put, strict liability is not part of the Title IX contract."

Gebster did not present any evidence that the school district had any knowledge of their relationship. While the school district had complaints about inappropriate remarks that Waldrop had made none of those complaints involved Gebster. Gebster relied on the theory of the common law rule that an employer is "vicariously liable for the tort of an employee, even if that tort was outside the scope of employment, if the employee 'was aided in accomplishing the tort by the existence of the agency relationship." *Restatement (Second) of Agency* §219(2)(d)(1959). However, the Fifth Circuit rejected that theory in its *Rosa H. v. San Elizario Indep. School Dist.*, 196 F3d 648 (1997) decision. In *Rosa,* the Fifth Circuit held that "school districts are not liable in tort for teacher-student harassment under Title IX unless an employee who has been invested by the school board with supervisory power over the offending employee actually knew of the abuse, had the power to end the abuse and failed to do so." The question before the court was whether a school district may be held liable in damages in an implied right of action under Title IX of the Education Amendments of 1972 as amended. In an Opinion written by Justice O'Connor the Court affirmed the Fifth Circuit's decision. The Court held that "Damages may not be recovered for teacher-student sexual harassment in an implied private action under Title IX unless a school district official 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 conduct."

Gebster appealed to the U.S. Supreme Court which granted cert. The case was argued on March 25, 1998 and decided on June 22, 1998. Gebster based her appeal to the Supreme Court on the *Franklin v. Gwinnett County Public Schools* decision. Gebster relied on a passage in *Franklin* that says "Unquestionably, Title IX placed on the Gwinnett County Public Schools the duty not to discriminate on the basis of sex, and 'when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor discriminates on the basis of sex" (quoting *Meritor Savings Bank, FSB v. Vinson,* 477 US 57, 1986). Doe believes that the "comparison of teacher-student harassment with supervisor-employee harassment, agency principles should likewise apply in Title IX actions." To advance their position, Doe advances two possible standards on which the school district would be liable for Waldrop's conduct. First, Doe relies on the 1997 "Policy Guidance" issued by the Dept. of Education which says "they would hold a school district liable in damages under Title IX where a teacher is 'aided in carrying out the sexual harassment of students by his or her position of authority with the institution,' irrespective of whether school district officials had any knowledge of the harassment and irrespective of their response upon becoming aware."[2] The second point advanced by Gebster was that "a school district should at a minimum be liable for damages based on a theory of constructive notice, i.e. where the district knew or should have know about harassment but failed to uncover and eliminate it."[3]

*Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742; 118 S. Ct. 2257; 141 L. Ed. 2d 633 (1998)

Kimberly Ellerth was a salesperson at Burlington Industries. Ellerth alleges that she was harassed by her supervisor, Ted Slowik, and because of the harassment she quit her job after working only fifteen months. The supervisor had the authority to both hire and promote employees with the approval of his supervisor. Slowik's level did not rise to that of a decision-maker according to his supervisor. According to Ellerth, Slowik constantly made offensive remarks and gestures. For example, while they were on a business trip together, Slowik invited Ellerth for a drink in the hotel lounge. He then made remarks about her breasts and commented on how he could make her life easy or hard. There were other examples of Slowik's behavior such as touching her knee and making comments about what she was wearing. When Ellerth quit she did not say it was because of the harassment. She did so several weeks later. She then

[2] Petitioners brief quoting Dept. of Ed. OCR, Sexual Harassment Policy Guidance, 62 Fed. Reg. 12034 (1997)

[3] Petitioners brief, U.S. brief as Amicus Curiae, 15-16

filed a complaint with the EEOC which issued her a right to sue letter. Ellerth filed suit in the Federal District Court for the Northern District of Illinois. In her complaint Ellerth alleged constructive discharge under Title VII and sexual harassment. Burlington moved for summary judgment which the court granted.

Ellerth appealed to the Seventh Circuit Court of Appeals. The Court, sitting en banc, reversed the District Court but issued eight separate opinions. However, the did agree that, "Vicarious liability, not failure to comply with a duty of care, was the essence of Ellerth's case against Burlington on appeal." Several of the judges did agree that Ellerth did have a valid quid pro quo claim even though she had been promoted without any retaliation.

Burlington Industries appealed to the U.S. Supreme Court. The Supreme Court first used the terms "Quid pro quo" and "hostile work environment" in their *Meritor Savings Bank* decision. Over time, courts further clarified the significance of those terms including a requirement that "severe or pervasive conduct" must be found. The District Court, while granting summary judgment, did find that the conduct of the supervisor was severe or pervasive. The issue the Court had to decide was whether an employer has vicarious liability when a supervisor creates a hostile work environment by making explicit threats to alter a subordinate's terms or conditions of employment, based on sex but does not fulfill the threat. *Burlington Industries v. Ellerth*

The Court, in deciding this matter, focused on the “agency theory”, or specifically, the “master-servant” aspect. The Court took great pains to list the relevant subsections of the Restatement of Torts §219(2) regarding master-servant. The Court focused on Subsection 219(d) regarding vicarious liability for intentional torts. The Court held that Title VII did impose vicarious liability upon an employer when a supervisor discriminated against an employee by using employment conditions to control that employee. The Court also held that a company can defend against such a claim by an employee if it can prove two things. One that it exercised reasonable care to prevent harassment. Two, that the employee did not use such resources, remedies or other avenues the company made available to avoid or limit the harassment. The employer loses the right to use these two prongs as affirmative defenses if the supervisor should terminate, demote or take any other action against the employee which can be seen as detrimental.

*Faragher v. City of Boca Raton*, 524 US 775, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998)

The *Faragher* decision was issued the same day as the *Ellerth* decision.

Beth Ann Faragher was a college student who worked summers as a lifeguard for the City of Boca Raton in Florida. She was employed from 1985 to 1990. Lifeguards worked out of a one-story building that contained an office, a unisex locker room with a shower and a meeting room. There were 40 to 50 lifeguards that worked for the City with approximately 4 to 6 being female. At the beginning of Faragher's tenure, the City introduced a sexual harassment policy.

While employed, one of her supervisors, Bill Terry, would touch the female lifeguards inappropriately and make cruel and demeaning remarks to them. As for Faragher, he would grab her bottom and put his arms around her. While she never made any formal complaints to any of Terry's supervisors she did have a conversation with one of his supervisor's Robert Gordon. Since Gordon did not view it as a formal complaint, he did not do anything about it.

In 1990 Faragher quit. Prior to Faragher quitting, a complaint was filed against Terry and another supervisor by another female lifeguard. Terry and the other supervisor were reprimanded and given additional punishment which they selected.

Faragher then filed suit in US District Court for the Southern District of Florida against the City for Title VII and §1983 violations and for negligent retention and supervision of Terry. She also made a claim of battery against Terry. The Court found that Terry's conduct was such serious and pervasive. The court also found that since Faragher had spoken with Gordon, the City had

knowledge, regardless of the fact that Gordon made the decision not to pursue the matter or send it to a higher authority. Finally, the Court ruled that Terry was an agent of the City and as such, the City was liable for his actions.

The City appealed to the Eleventh Circuit which reversed. The three-judge panel ruled that Terry did not act within the scope of his employment and therefore was not an agent of the city. The panel also ruled that even though Gordon had knowledge, the City did not have "constructive knowledge."

Faragher appealed for an en banc hearing. On a 7-5 vote, the en banc panel adopted the ruling of the three-judge panel. The full Court relied on the Supreme Court's ruling in *Meritor Savings Bank* to show that Faragher did not meet the obligations necessary to prove that Terry was an agent of the City and that the city could not be held liable. The Court went on to say that when Terry did those harassing things they were not within the scope of his employment but doing so for his own enjoyment.

Faragher appealed to the United States Supreme Court. The Supreme Court reversed the Eleventh Circuit and ordered that a judgment in favor of Faragher be entered. The Court ruled that while the City did have a harassment policy, it failed to properly disseminate it. There was also no assurance that one could bypass the supervisor when one needed to lodge a complaint against said supervisor. In the decision, Justice Souter quoted Eleventh Circuit Court of Appeals Justice Barkett's dissent in which he said

> A pervasively hostile work environment of sexual harassment is never (one would hope) authorized, but the supervisor is clearly charged with maintaining a productive, safe work environment. The supervisor directions and controls the conduct of the employees, and the manner of doing so may inure to the employer's benefit or detriment including subjecting the employer to Title VII liability.

111 F.3d at 1542

The City had argued that the agency analysis did not apply. The Court disagreed and held that the City was vicariously liable for the conduct of Terry. The Court also used its reasoning in *Ellerth* in that the City could not avail itself of the affirmative defenses that it articulated in *Ellerth* and therefore was liable for the supervisor's actions.

**C. Age**

*Public Employees Retirement System of Ohio v. Betts*, 492 US 158, 109 S.Ct. 2854, 106 L. Ed. 134 (1989)

*Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S. Ct 2097 (2000)

Reeves worked at Sanderson Plumbing Products for 40 years. Sanderson was the maker of toilet seats and covers. Reeves was a frontline supervisor in the Hinge Room when he was discharged at age 57. One of his jobs was to review attendance reports. He was also to make sure that employees were actually working. He was not responsible for disciplining employees.

The Director of Manufacturing, who was married to the Owner of Sanderson Plumbing Products, had an audit done in Reeves' area to determine productivity. He was convinced that productivity had decreased under Reeves' supervision. The audit seemed to show that inaccuracies and misrepresentations. The paperwork that Reeves produced did not show any of the problems that the audit did. Due to the audit results, Reeves was placed on 90-days probation. Two years later, the Director had a second audit performed that found violations that should have resulted in employees being disciplined. The Director recommended to the owner that Reeves be terminated which he was.

Reeves filed a complaint in Federal District Court for the Northern District of Mississippi in which he alleged age discrimination under the ADEA. During the trial, the company maintained that Reeves was fired for not maintaining proper records by failing to record attendance and hours of employees in his department. During testimony, the director made reference to an incident in which an employee was absent for two days but the attendance records did not reflect such an absence. Reeves, during his examination noted that he had been in the hospital those days and it was the responsibility of the manager to note the absences. Reeves also testified that the director had made comments about his age such as saying that Reeves was "so old he must have come over on the Mayflower."

The jury found in Reeves favor and awarded him $35,000 which was doubled to $70,000 for the discrimination claim. Reeves also was awarded front pay for two years. The company appealed to the Fifth Circuit Court of Appeals. That court, while acknowledging that Reeves had provided sufficient evidence for the jury to make its findings, the Appeals Court reversed by saying that the evidence did not amount to a pretext for discrimination.

Sanderson appealed to the U.S. Supreme Court. The Supreme Court was asked to decide if the kind and amount of evidence necessary to sustain a jury's verdict that an employer unlawfully discriminated on the basis of age was sufficient to overcome the Fifth Circuit's view that it did not amount to a pretext for discrimination. Specifically, the Court was asked if a defendant is entitled to judgment as a matter of law when the plaintiff's case consists exclusively of a prima facie case of discrimination and sufficient evidence for the trier of fact to disbelieve the defendant's legitimate, nondiscriminatory explanation for its action. The Court was also asked to decide whether the employer was entitled to judgment as a matter of law under the particular circumstances presented. In a unanimous ruling, the Court overturned the Appeals Court and reinstated the jury verdict. The Court found that Sanderson, by offering enough evidence to show that the explanation offered for his termination was not the real reason, allowed the jury to infer that there must have been another reason he was fired. The Supreme Court found that the Fifth Circuit ignored evidence that the director had treated other younger employees differently then Reeves when it came to discipline issues.

*O'Connor v. Consolidated Coin Caterers Corp*, 517 U.S. 308; 116 S.Ct. 1307; 134 L. Ed. 2d 433 (1996)

Consolidated Coin Caterers, Corp. operates cafeterias and vending machines that are located in industrial plants. O'Connor was employed as a district manager and based in Charlotte, North Carolina. Consolidated, in 1990, reorganized and downsized its workforce. O'Connor, 56 year old at the time of the reorganization, was fired after working there for twelve years. O'Connor's territory was given to a 40-year-old man. After being terminated, O'Connor filed a complaint in Federal District Court of the Western District of North Carolina. He alleged that his discharge violated the Age Discrimination in Employment Act of 1967 (ADEA). Consolidated Coin Caterers moved for summary judgment. The District Court granted the employer's summary judgment motion. The District Court relied on the Fourth Circuit's reasoning that O'Connor needed to prove the following four elements to avoid the Court's granting of the motion:

1. He was in the protected age group class under the ADEA at the time of the decision to terminate him;
2. That he was in fact, discharged;
3. At the time he was terminated, he was performing his job at a level that met his employer's legitimate expectations; and
4. He was replaced by someone of comparable or lesser qualifications outside the protected class.

(Equal Employment Opportunity Commission v. Western Electric Co. 713 F.2d 1011, 4th Cir. 1983)

While O'Connor presented testimony that the general manager made comments concerning his age and ability to do or not do certain things because of his age, the Court ruled that they did not constitute proof of discrimination. Because O'Connor could not "present the objective evidence necessary to rely on *the McDonnell Douglas Corp. v. Green*, 411 U.S. 792, scheme of proof and cannot present direct or indirect evidence necessary to prevail under traditional principles of proof, the Court must grant summary judgment for Defendant."

O'Connor appealed to the Fourth Circuit Court of Appeals. The Court of Appeals affirmed the District Court's decision to grant summary judgment, holding that O'Connor failed to make out a prima facie case of age discrimination under *McDonnell Douglas*, because he failed to show that he was replaced by someone outside the age group protected by the ADEA. The appeals court reviewed the same elements that the District Court did to determine whether or not O'Connor could prove his case. According to the appeals court, O'Connor could prove both one and two, that he was in a protected class and that he had been terminated. The appeals court relied on testimony from the general manager that O'Connor was not retained and given the new territory because his performance had declined and had already reduced the area he had been in charge of. As to the fourth element, the court found that O'Connor's declining performance contributed to giving not only his territory but additional territory to another employee regardless of their age.

O'Connor filed an appeal with the United States Supreme Court. A unanimous Supreme Court reversed the previous decisions and held that assuming that Title VII's McDonnell Douglas framework is applicable to ADEA cases, there must be at least a logical connection between each element of the prima facie case and the illegal discrimination. Replacement by someone under 40 fails this requirement. Although the ADEA limits its protection to those who are 40 or older, it prohibits discrimination against those protected employees on the basis of age, not class membership. That one member of the protected class lost out to another member is irrelevant, so long as he lost out because of his age. The latter is more reliably indicated by the fact that his replacement was substantially younger than by the fact that his replacement was not a member of the protected class.

Upon remand, the Fourth Circuit again decided that O'Connor could not prevail and sustained the District Court's granting of summary judgment for the company.

**D. Religion**

Rosenberger et al. v Rector and Visitors of the University of Virginia et al., 515 US 819, 115 S.Ct. 2510, 132 L.Ed2d 700 (1995)

In yet another 5-4 vote, a majority of the Supreme Court held that the University of Virginia's refusal to provide funds (from a mandatory student activity fee used to subsidize a variety of student activities) to a religiously constituted student group violated the First Amendment rights and Free-Speech Rights of the students. The Court also held that funding of the particular organization would not violate the First Amendment's prohibition against the "establishment of religion. Although the discussion focused on whether the University's position represented viewpoint discrimination (the majority view) as opposed to subject matter distinction (the minority view), the several excerpts from the opinion may offer some perspective on access as well as religion and its place in a diverse institution:

> As we have noted, discrimination against one set of views or ideas is but a subset or particular instance of the more general phenomenon of content discrimination. See, e.g., R.A.V., supra, at 391. And, it must be acknowledged the distinction is not a precise one. It is, in a sense, something of an understatement to speak of religious thought and discussion as just a viewpoint, as distinct from a comprehensive body of thought. The nature of our origins and destiny and their dependence upon the existence of a divine being have been subjects of philosophic inquiry throughout human history. We conclude, sophic

> nonetheless, that here, as in *Lamb's Chapel*, viewpoint discrimination is the proper way to interpret the University's objections to Wide Awake. By the ver terms of the SAF prohibition, the University does not exclude religion as a subject matter but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints. Religion may be a vast area of inquiry, but it also provides, as it did here, a specific premise, a perspective, a standpoint, from which a variety of subjects may be discussed and considered.
>
> and
>
> Vital First Amendment speech principles are at stake here. The first danger to liberty lies in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and if so, for the State to classify them. The second, and corollary, danger is to speech from the chilling of individual thought and expression. That danger is especially real in the University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition. See *Healy v. James*, 408 U.S. 169, 180-181 (1972); *Keyishian v. Board of Regents, State University of N.Y.*, 385 U.S. 589, 603 (1967; *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). In ancient Athens, and; as Europe entered into a new period of intellectual awakening, n places like Bologna, Oxford, and Paris, universities began as voluntary and spontaneous assemblages or concourses for students to speak and to writ and to learn. See generally R. Palmer & J. Colton, A History of the Modern World 39 (7th ed. 1992). The quality and creative power of student intellectual life to this day remains a vital measure of a school's influence and attainment. For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital center for the nation's intellectual life, its college and university campuses.
>
> Justice Kennedy for the Majority

At the conclusion of a lengthy dissent, in which he distinguishes Widmar v. Vincent 454 U.S. 263 (1981) and Lamb's Chapel regarding entitlement to access for speaking purposes, Justice Souter offers the following warning which might well describe the situation colleges and universities face today:

> Since I cannot see the future I cannot tell whether today's decision portends much more than making a shambles out of student activity fees in public colleges. Still, my apprehension is whetted by Chief Justice Burger's warning in *Lemon v. Kurtzman*, 403 U.S. 602, 624 (1971); "in constitutional adjudication some steps, which when taken were thought to approach 'the verge,' have become the platform for yet further steps. A certain momentum develops in constitutional theory and it can be a 'downhill thrust' easily set in motion but difficult to retard or stop."

**E. Disability**

Southeastern Community College v. Davis, 442 US 397, 60 99 S.Ct. 2361, 60 Led. 2d 980 (1979)

Frances Davis was a Licensed Practical Nurse (LPN) who wished to become a Registered Nurse (RN). She enrolled in the College Parallel program of Southeastern Community College, located in North Carolina. By completing this program she hoped to move on to Southeastern Community College's Associate Degree program which would, upon completion, make her eligible to become a RN. Davis was hearing impaired. During her interview for admission she had difficulty understanding the questions being asked. She explained that she was hearing

impaired and that she wore a hearing aid for assistance. She used lip-reading to compensate for impairment. After the interview she was examined further by an audiologist and found that she needed to make a change in hearing aids. While the new hearing aid improved her hearing it did not mean she could fully decipher all sounds and would still need to rely on her lip-reading skills. The audiologist then filed a report with North Carolina Board of Nursing. The supervisor made the decision that Davis' hearing disqualified her from being admitted to the nursing program. The supervisor believed that her disability made it "unsafe for her to practice as a nurse." Davis appealed but was denied. She filed a lawsuit with the U.S. District Court for the Eastern District of North Carolina alleging that her rights had been violated under the Rehabilitation Act of 1973 and that she was denied equal protection and due process. This matter was heard before the judge who ruled in favor of the Community College. The Court said that her "handicap actually prevents her from safely performing in both her training program and her proposed profession." The court cited as an example the fact that in operating rooms, post-natal care units and other places, doctors and others wear surgical masks which make lip-reading impossible. In these situations, where urgency in following instructions is at it highest, there exists the possibility that the doctor could not get Davis' attention. The court ruled that Davis was "not an otherwise qualified handicapped individual protected against discrimination by §504."

Davis appealed to the Fourth Circuit Court of Appeals. The Appeals Court overturned the District Court saying that the Judge "misconstrued §504." The Appeals Court said that the District Court should not have taken into account Davis' handicap but ruled as to whether or not she was "otherwise qualified" as to her "academic and technical qualifications." The court further suggested that the Community College should modify its program to accommodate its applicants who may be disabled even if those modifications are found to be expensive.

Southeastern appealed to the U.S. Supreme Court. The Supreme Court agreed with the District Court and overturned the Fourth Circuit ruling. Davis had argued that §504 "compels Southeastern to undertake affirmative action that would dispense with the need for effect oral communication." (442 US at 407). She also argues that she does not need to be trained in all the tasks that a registered nurse might perform. To prove her case, she cited portions of regulations issued by the Department of Heath Education and Welfare.

> Academic requirements. A recipient [of federal funds] to which this subpart applies shall make such modifications to its academic requirements as are necessary to ensure that such requirements do not discriminate or have the effect of discriminating, on the basis of handicap, against a qualified handicapped applicant or student. Academic requirements that the recipient can demonstrate are essential to the program on instruction being pursued by such student or to any directly related licensing requirement will not be regarded as discriminatory within the meeting of this section. Modifications may include changes in the length of time permitted for the completion of degree requirements, substitution of specific courses required for the completion of degree requirements and adaptation of the manner in which specific courses are conducted.

Footnote 9 at 442 US 408

However, the Court, upon reviewing the record, found that only "close, individual attention by a nursing instructor would be sufficient to ensure patient safety if respondent took part in the clinical phase of the nursing program. (442 US at 409 citing 424 F. supp. at 1346) The Court held that making extensive modifications to the academic program to allow Davis to participate would question the validity of the program. If Davis was allowed to participate in the nursing program with modification, the standards by which she was judged would be lower then those of other nursing students. The court noted that no where in the regulations does it state that a school must lower it standards to accommodate someone who is handicapped.

*University of Texas v. Camenisch*, 451 US 390, 101 S. Ct. 1830, 68 L.Ed 2d. 175 (1981)

Walter Camenisch is a graduate student at the University of Texas who is also deaf. He filed a complaint in the U.S. District Court for the Western District of Texas against the University for violating §504 of the Rehabilitation Act of 1973 by refusing to pay for a sign-language interpreter. He was granted a temporary injunction. The University appealed to the Fifth Circuit Court of Appeal, however, by the time it heard the case, Camenisch had graduated and the University had provided the interpreter. The only issue outstanding was who was to pay for the interpreter but that was not before the Court. The issue before the court was whether the District Court had abused its discretion in issuing the injunction ordering the University to pay for the interpreter that the Court found was justified.

The University appealed to the Supreme Court on the basis that the lower court should have had to make a final ruling on who was to pay for the interpreter. The Supreme Court vacated and remanded this matter. The Court ruled that this matter should be sent back to the District Court for a full hearing so the University has a chance to fully argue its case regarding the payment for the interpreter. The court said that

> Whether the preliminary injunction should be issued depended on the balance of factors listed in Canal Authority, while whether the University should ultimately bear the cost of the interpreter depends on a final resolution of the merits of Camenisch's case.

451 US at 393

Because a preliminary injunction has been issued does not mean that the court has decided the merits of the case. The court said that you cannot "equate likelihood of success with success" as it "ignores the significant procedural differences between preliminary and permanent injunctions."

Whether the injunction should have been issued no longer is the question (the court called it moot), the question is whether or not the University must pay for the interpreter. The only way to resolve that question is for the District Court to hold a hearing.

*Board of Trustees of University of Alabama v. Garrett*, 531 US 356, 121 S.Ct. 955, 148 L. Ed. 2d 866 (2001)

This is a consolidated case of two University employees who both became ill and requested medical leaves. Garrett was a registered nurse who developed breast cancer and was told by her supervisor that she had to give up her position as director of nursing services upon her return to work. She also had to take a lower paying job. The second employee was a security officer who had chronic asthma and requested that he be reassigned to minimize his exposure to carbon monoxide and cigarette smoke. He also asked to be reassigned to the day shift as he was also diagnosed with sleep apnea. Both sued the University under the ADA. The district court dismissed both cases on a summary judgment motion made by the University. The Eleventh Circuit reversed and the University appealed to the U.S. Supreme Court.

The issue before the Court was whether Alabama State employees could recover monetary damages if the state fails to comply with Title I of the ADA. The Supreme Court reversed on the basis that such suits are barred by the Eleventh Amendment. Congress made no exception for states to be sued or give up their immunity to be sued under the ADA. The two employees had no right to recover money damages for Alabama's alleged disability discrimination.

*Murphy v. United Parcel Service, Inc.*, 527 US 516,119 S. Ct 2133, 144 L.Ed.2d 484 (1999)

United Parcel Serve, better known as UPS, is a company that transports packages nation-wide. The U.S. Department of Transportation (DOT) regulates UPS and all employees must meet

health standards set by the Department. Vaughn Murphy was a mechanic hired by UPS in 1994. For employment purposes, Murphy was required to submit to a physical which he passed. He was given a heath card issued by the DOT. It was later learned that Murphy had high blood pressure. Having such a condition violated the terms of his holding a DOT issued health card. DOT regulations specifically mention high blood pressure as follows:

> (b) A person is physically qualified to drive a commercial motor vehicle if that person…
> (6) Has no current clinical diagnosis of high blood pressure likely to interfere with his/her ability to operate a commercial motor vehicle safely

*Murphy v United Parcel Service*, 946 F. Supp 872 (1996)

Murphy was given another blood pressure test which still came out higher then the range mandated by both UPS and the DOT. He was subsequently fired. Murphy then filed a complaint in U.S. District Court for the District of Kansas alleging a violation of the Americans with Disabilities Act. His specific claim was that he was fired for his hypertension.

UPS claimed that high blood pressure did not qualify as a disability under the ADA. UPS also claimed that having such a problem prevented him from being able to perform his job which was to drive a truck due to the standards set by the DOT. UPS moved for summary judgment. According to the Court, Murphy had been diagnosed with hypertension since he was ten years old. He had been a mechanic for more then twenty years before being hired by UPS. No DOT certification was needed for any of the positions he held as a mechanic prior to his working for UPS. The Court citing *Dutton v. Johnson County Board of County Commissioners*, 859 F. Supp 498 at 504 said, "Plaintiff has the burden to establish that he is 'disabled' and 'qualified' to perform the essential functions of the job either with or without reasonable accommodation."

The Court had to determine if Murphy was a "qualified individual" under the ADA. One of Murphy's duties was to be able to drive a truck. Murphy tried to show that driving a truck was not an "essential function." However, one aspect of his job was to drive a truck to determine the type of problem that needed to be fixed. Another was to drive a new truck out to where an UPS truck had broken down so the driver could switch to the new truck. After reviewing all the facts, the Court granted UPS's motion for summary judgment.

On appeal, the Tenth Circuit Court of Appeals, upheld the district court's granting of UPS's motion for summary judgment. The court relied on the reasoning provided by the district court. The Circuit Court also relied on another case it had ruled on, *Sutton v. United Air Lines, Inc.*, 130 F.3d 893 (1997), in which it said, "Determination of whether an individual's impairment substantially limits a major life activity should take into consideration mitigating or corrective measures utilized by the individual." As Murphy's blood pressure did not limit his activities, he had no disability and therefore, no claim.

Murphy then appealed to the United States Supreme Court. The Supreme Court affirmed the decision of the Tenth Circuit. The Supreme Court ruled that because Murphy could control his high blood pressure with medication and his major life activities were not affected, he could not be considered as disabled under the ADA. In fact, Justice O'Connor, in the Court's opinion cited ADA regulation §1630.2(j)(3)(I), which says, "The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." See also *Sutton v United Air Lines, Inc.*, 527 US 471, 119 S.Ct. 2139, 144 L.Ed2d 450 (1999)