



# Sex Discrimination and the United States Supreme Court: Developments in the Law

**Jody Feder**  
Legislative Attorney

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## Summary

In its sex discrimination decisions, the United States Supreme Court not only has defined the applicability of the equal protection guarantees of the Constitution and the nondiscriminatory policies of federal statutes, but also has rejected the use of gender stereotypes and has continued to recognize the discriminatory effect of gender hostility in the workplace and in schools. This report focuses on sex discrimination challenges based on: the equal protection guarantees of the Fourteenth and Fifth Amendments; the prohibition against employment discrimination contained in Title VII of the Civil Rights Act of 1964; and the prohibition against sex discrimination in education contained in Title IX of the Education Amendments of 1972. Although this report focuses on recent legal developments in each of these areas, this report also provides historical context by discussing selected landmark sex discrimination cases.

Despite the fact that the Court's analysis of sex discrimination challenges under the Constitution differs from its analysis of sex discrimination under the two federal statutes discussed in this report, it is apparent that the Court is willing to refine its standards of review under both schemes to accommodate the novel claims presented by these cases. The Court's decisions in cases involving Title VII and Title IX are particularly noteworthy because they illustrate the Court's recognition of sexual harassment in both the workplace and the classroom.

During the recent 2010-2011 term, the Court issued rulings in two high-profile cases involving claims of sex discrimination in employment. In *Thompson v. North American Stainless*, which involved a retaliation claim by a man who was fired three weeks after his then-fiancée filed a sex discrimination complaint, the Court determined that Title VII of the Civil Rights Act protects third parties who have not personally engaged in protected activity from retaliation by employers. In *Wal-Mart Store v. Dukes*, the Court rejected class action status for current and former female Wal-Mart employees who allege that the company has engaged in discrimination regarding pay and promotions.

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In its sex discrimination decisions, the United States Supreme Court not only has defined the applicability of the equal protection guarantees of the Constitution and the nondiscriminatory policies of federal statutes, but also has rejected the use of gender stereotypes and has continued to recognize the discriminatory effect of gender hostility in the workplace and in schools. This report focuses on sex discrimination challenges based on the equal protection guarantees of the Fourteenth and Fifth Amendments;<sup>1</sup> the prohibition against employment discrimination contained in Title VII of the Civil Rights Act of 1964;<sup>2</sup> and the prohibition against sex discrimination in education contained in Title IX of the Education Amendments of 1972.<sup>3</sup> Although this report focuses on recent legal developments in each of these areas, this report also provides historical context by discussing selected landmark sex discrimination cases.

## Equal Protection Cases

Constitutional challenges that allege discrimination on the basis of sex are premised either on the equal protection guarantees of the Fourteenth Amendment or the equal protection component of the Fifth Amendment. To maintain an equal protection challenge, government action must be established; that is, it must be shown that the government, and not a private actor, has acted in a discriminatory manner. While the Fourteenth Amendment prohibits discriminatory conduct by the states, the Fifth Amendment forbids such action by the federal government.

The Fourteenth Amendment provides, in relevant part: “No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; *nor deny to any person within its jurisdiction the equal protection of the laws.*”<sup>4</sup>

Although the Fourteenth Amendment requires equal protection, it does not preclude the classification of individuals. The Court has noted that the Constitution does not require things which are “different in fact or opinion to be treated in law as though they were the same.”<sup>5</sup> A classification will not offend the Constitution unless it is characterized by invidious discrimination.<sup>6</sup> The Court has adopted three levels of review to establish the presence of invidious discrimination:

1. **Strict scrutiny.** This most active form of judicial review has been applied where there is either a suspect classification, such as race, national origin, or alienage, or a burdening of a fundamental interest such as privacy or marriage. A classification will survive strict scrutiny if the government can show that it is *necessary* to achieving a *compelling* interest.<sup>7</sup> Generally, statutory classifications subject to strict scrutiny are invalidated.

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<sup>1</sup> U.S. Const. amend. XIV, §1; U.S. Const. amend. V.

<sup>2</sup> 42 U.S.C. §§2000e et seq.

<sup>3</sup> 20 U.S.C. §§1681 et seq.

<sup>4</sup> U.S. Const. amend. XIV, §1 (emphasis added).

<sup>5</sup> *Tigner v. Texas*, 310 U.S. 141, 147 (1940).

<sup>6</sup> *See Ferguson v. Skrupa*, 372 U.S. 726, 732 (1963).

<sup>7</sup> *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

2. Intermediate scrutiny. This level of review is not as rigorous as strict scrutiny. A classification will survive intermediate scrutiny if it is *substantially related* to achieving an *important* government objective.<sup>8</sup> Sex classifications are subject to intermediate scrutiny.
3. Rational basis review. This least active form of judicial review allows a classification to survive an equal protection challenge if the classification is *rationaly related* to a *legitimate* government interest.<sup>9</sup> This level of review is characterized by its deference to legislative judgment. Most economic regulations are subject to rational basis review.

The Court's adoption of intermediate scrutiny for sex classifications did not occur until 1976. In *Craig v. Boren*, the Court declared unconstitutional an Oklahoma statute that prohibited the sale of "nonintoxicating" 3.2% beer to males under the age of 21 and to females under the age of 18.<sup>10</sup> Females between the ages of 18 and 21, however, were allowed to purchase 3.2% beer. Although the Court agreed with the state's argument that the protection of public health and safety is an important government interest, it found that the gender classification employed by the statute was not substantially related to achieving that goal. The statistical evidence presented by the state to show that more 18 to 20-year-old males were arrested for drunk driving and that males between the ages of 17 and 21 were overrepresented among those injured in traffic accidents could not establish that the statute's gender classification was substantially related to ensuring public health and safety.

In establishing an intermediate level of review for sex classifications, the *Craig* Court identified what has been a common theme in sex discrimination cases under the Fourteenth Amendment: stereotypes and generalizations about the sexes.<sup>11</sup> In *Craig*, the Court acknowledged its previous invalidation of statutes that premised their classifications on misconceptions concerning the role of females. The Court's rejection of the use of stereotypes may be seen in many of the cases in this area.<sup>12</sup> The Court's more recent decisions similarly allude to the use of stereotypes and generalizations.

For example, in *J.E.B. v. Alabama*, the Court determined that the state could not use its peremptory challenges to exclude male jurors in a paternity and child support action.<sup>13</sup> In

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<sup>8</sup> See *Craig v. Boren*, 429 U.S. 190, 197 (1976). In *U.S. v. Virginia*, the Court required the Commonwealth of Virginia to provide an "exceedingly persuasive justification" for its policy of maintaining an all-male military academy. 518 U.S. 515 (1996). It is unclear whether this standard differs from the intermediate scrutiny standard of review. See *infra* text accompanying notes 16-34.

<sup>9</sup> See *Lindsley v. Nat'l Carbonic Gas Co.*, 220 U.S. 61 (1911); *Royster Guano Co. v. Virginia*, 253 U.S. 412 (1920); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973); *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307 (1976); *Maher v. Roe*, 432 U.S. 464 (1977).

<sup>10</sup> 429 U.S. 190 (1976).

<sup>11</sup> *Id.* at 198.

<sup>12</sup> See, e.g., *Califano v. Goldfarb*, 430 U.S. 199 (1977) (invalidating section of the Social Security Act that permitted survivors' benefits for widowers only if they were receiving half of their support from their wives); *Orr v. Orr*, 440 U.S. 268 (1979) (invalidating Alabama statute that imposed alimony obligations on husbands, but not wives); *Caban v. Mohammed*, 441 U.S. 380 (1979) (invalidating New York statute that required the consent of the mother, but not the father, to permit the adoption of an illegitimate child); *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982) (invalidating policy of a state-supported university that limited admission to its nursing school to women on the grounds that it reinforced traditional stereotypes).

<sup>13</sup> 511 U.S. 127, 129 (1994).

reaching its conclusion, the Court reviewed the historical exclusion of women from juries because of the belief that women were “too fragile and virginal to withstand the polluted courtroom atmosphere.”<sup>14</sup> In *J.E.B.*, the Court questioned the state’s generalizations of male jurors being more sympathetic to the arguments of a father in a paternity action and female jurors being more receptive to the mother. The Court maintained that state actors who exercise peremptory challenges in reliance on gender stereotypes “ratify and reinforce prejudicial views of the relative abilities of men and women.”<sup>15</sup> The Court feared that this discriminatory use of peremptory challenges not only would raise questions about the fairness of the entire proceeding, but also would create the impression that the judicial system had acquiesced in the denial of participation by one gender.

In *U.S. v. Virginia*, the Court conducted a more searching form of intermediate scrutiny to find unconstitutional the exclusion of women from the Virginia Military Institute (VMI).<sup>16</sup> Although the Court reiterated that a classification must be substantially related to an important government interest, the Court also required the state to establish an “exceedingly persuasive justification” for its actions.<sup>17</sup>

Virginia advanced two arguments in support of VMI’s exclusion of women: first, the single-sex education offered by VMI contributed to a diversity of educational approaches in Virginia; second, VMI employed a unique adversative method of training that would be destroyed if women were admitted.

After reviewing the history of Virginia’s educational system, the Court concluded that VMI was not established or maintained to promote educational diversity. In fact, VMI’s “historic and constant plan” was to offer a unique educational benefit to only men,<sup>18</sup> rather than to complement other Virginia institutions by providing a single-sex educational option. Further, the Court recognized Virginia’s historic reluctance to allow women to pursue higher education. Any interest Virginia had in maintaining educational diversity seemed to be “proffered in response to litigation.”<sup>19</sup>

In addressing Virginia’s second argument, the Court expressed concern over the exclusion of women from VMI because of generalizations about their ability. While acknowledging that most women would probably not choose the adversative method, the Court maintained that some women had the will and capacity to succeed at VMI. Following *J.E.B.*, the Court cautioned state actors not to rely on overbroad generalizations to perpetuate patterns of discrimination. While the Court believed that the adversative method did promote important goals, it concluded that the exclusion of women was not substantially related to achieving those goals.

After determining that VMI’s exclusion of women violated the Fourteenth Amendment, the Court reviewed the state’s remedy, a separate program for women. Virginia established the Virginia Women’s Institute for Leadership (VWIL) following the adverse decision of the court of appeals. Unlike VMI, VWIL did not use the adversative method because it was believed to be

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<sup>14</sup> *Id.* at 132.

<sup>15</sup> *Id.* at 140.

<sup>16</sup> 518 U.S. 515 (1996).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 540.

<sup>19</sup> *Id.* at 533.

inappropriate for most women,<sup>20</sup> and VWIL lacked the faculty, facilities, and course offerings available at VMI. Because VWIL was not a comparable single-sex institution for women, the Court concluded that it was an inadequate remedy for the state's equal protection violations. VMI subsequently became coeducational.

The Court's most recent equal protection pronouncements with respect to sex discrimination both involved immigration issues. In *Miller v. Albright*, the Court considered a challenge to §309 of the Immigration and Nationality Act.<sup>21</sup> The petitioner, the child of an American father and a Filipino mother, contended that §309 imposed additional requirements for establishing American citizenship when a child is fathered by an American citizen outside of the United States.<sup>22</sup> For children born of a citizen mother and an alien father, citizenship is established at birth. However, for children born of a citizen father and an alien mother, citizenship is not established until the father or the child takes affirmative steps to confirm their relationship by the child's eighteenth birthday. In this case, the petitioner's father did not attempt to establish his relationship with his daughter until after her eighteenth birthday. Thus, the petitioner's application for citizenship was denied.

The case produced five different opinions. While six justices agreed that the petitioner's complaint should be dismissed, they provided different reasons for this conclusion. Justices Stevens and Rehnquist contended that the petitioner's complaint lacked merit, maintaining that §309's distinction between "illegitimate" children of U.S. citizen mothers and "illegitimate" children of U.S. citizen fathers is permissible under heightened scrutiny because it is "eminently reasonable and justified by important Government policies."<sup>23</sup> Justices O'Connor and Kennedy contended, however, that the distinction could withstand only rational basis review and should not satisfy the kind of heightened scrutiny Justice Stevens seemed to conduct. Setting aside the issue of §309's constitutionality, Justices O'Connor and Kennedy believed that the petitioner lacked the standing necessary to even pursue her claim. Finally, Justices Scalia and Thomas contended that the petitioner's complaint should be dismissed because the Court lacks the power to confer citizenship. Having acknowledged that Congress has the exclusive authority to grant citizenship, Justices Scalia and Thomas believed that there was no need to address the constitutionality of §309. Justices Ginsburg, Breyer, and Souter dissented in opinions written by Justices Ginsburg and Breyer.

In their separate opinions, Justices Stevens, O'Connor, Ginsburg, and Breyer each addressed the petitioner's argument that §309 invokes gender stereotypes. The petitioner contended that §309 relies on the belief that an American father "remains aloof from day-to-day child rearing duties," and will not be as close to his child.<sup>24</sup> Justice Stevens, however, maintained that the statute has a non-stereotypical purpose of ensuring the existence of a blood relationship between father and child. Justice Stevens recognized that the distinction is reasonable because mothers have the opportunity to establish parentage at birth, while fathers do not always have that opportunity. Further, he contended that the distinction encourages the development of a healthy relationship between the citizen father and the foreign-born child, and fosters ties between the child and the

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<sup>20</sup> *Id.* at 549.

<sup>21</sup> 523 U.S. 420 (1998).

<sup>22</sup> 8 U.S.C. §1409.

<sup>23</sup> *Miller*, 523 U.S. at 441.

<sup>24</sup> *Id.* at 443.

United States. Thus, §309's additional requirements are appropriate for fathers, but unnecessary for mothers.

In their dissenting opinions, Justices Ginsburg and Breyer contended that §309 relies on generalizations about men and women and the ties they maintain with their children. Justice Ginsburg argued that §309's goals of assuring ties between the citizen father and the foreign-born child, and between the child and the United States can be achieved without reference to gender, while Justice Breyer argued similarly, positing a distinction between caretaker and non-caretaker parents, rather than mother and father.

In *Nguyen v. INS*, the Court considered a second challenge to §309.<sup>25</sup> The facts in *Nguyen* closely resembled those in *Miller*. *Nguyen*, the child of a citizen father and a non-citizen mother, born out of wedlock, challenged §309 on the grounds that its differing requirements for acquiring citizenship, based on the sex of the citizen parent, violated the Fifth Amendment's guarantee of equal protection.

A majority of the Court concluded that §309's differing requirements were justified by two important government objectives. First, the Court found that the government has an important interest in assuring that a biological parent-child relationship exists.<sup>26</sup> While a mother's relationship to a child may be established at birth or from hospital records, a father may not be present at the birth and may not be included on such records. In this way, the Court maintained, fathers and mothers are not similarly situated with regard to establishing biological parenthood.<sup>27</sup> Thus, a "different set of rules ... is neither surprising nor troublesome from a constitutional perspective."<sup>28</sup>

Second, the Court found that the government has an important government interest in ensuring that the child and the citizen parent have some demonstrated opportunity or potential to develop a relationship "that consists of the real, everyday ties that provide a connection between child and citizen parent and, in turn, the United States."<sup>29</sup> The opportunity for a meaningful relationship is presented to the mother at birth. However, the father is not assured of a similar opportunity. The Court concluded that §309 ensures that an opportunity for a meaningful relationship is presented to the father before citizenship is conferred upon his child.

As a result, the Court found that §309's differing requirements were substantially related to the important government interests. The Court noted that by linking citizenship to the child's youth, Congress promoted an opportunity for a parent-child relationship during the formative years of the child's life.<sup>30</sup> Alluding to its decision in *VMI*, the Court maintained that the fit between the §309 requirements and the important government interests was "exceedingly persuasive."<sup>31</sup>

Like the petitioner in *Miller*, *Nguyen* argued that §309 embodied a gender-based stereotype. However, the Court found that §309 addresses an "undeniable difference in the circumstance of

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<sup>25</sup> 533 U.S. 53 (2001).

<sup>26</sup> *Id.* at 62.

<sup>27</sup> *Id.* at 63.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 65.

<sup>30</sup> *Id.* at 68-69.

<sup>31</sup> *Id.* at 70.



the parents at the time a child is born.”<sup>32</sup> This difference is not the result of a stereotype or “a frame of mind resulting from irrational or uncritical analysis.”<sup>33</sup> Rather, §309 recognizes simply that at the moment of birth, the mother’s knowledge of the child is established in a way not guaranteed to the unwed father.

While the Court’s recent decisions involving sex and equal protection illustrate that it is concerned with the stereotyping of men and women, it is unclear whether it will continue to subject sex classifications and any related stereotypes to a traditional form of intermediate scrutiny. The Court’s requirement of an “exceedingly persuasive justification” in *VMI* suggests that it may be interested in conducting a more exacting form of judicial review for sex classifications. In his *Miller* dissent, Justice Breyer emphasized the need to apply the standard established in *VMI*. However, in *Nguyen*, both the majority and the dissenting justices, in discussing an “exceeding persuasive justification,” simply reiterated the traditional test that is used when applying intermediate scrutiny.<sup>34</sup> Thus, it is not clear whether sex classifications in future cases will be subject to a traditional form of intermediate scrutiny or some form of heightened scrutiny.

## **Title VII of the Civil Rights Act of 1964**

Title VII prohibits an employer from discriminating against any individual with respect to hiring or the terms and conditions of employment because of such individual’s race, color, religion, sex, or national origin.<sup>35</sup> Title VII applies to a broad range of employment practices, including discrimination because of sex in hiring, placement, promotion, demotion, transfer, termination, and discipline. Because the statute prohibits sex discrimination with respect to all terms and conditions of employment, discrimination regarding salary, leave, and other benefits may also violate the act. In addition, the statute prohibits discrimination in referrals by employment agencies, actions by unions, and retaliation against employees for filing or participating in a Title VII claim or for opposing an employer’s discriminatory practices. Title VII contains several exceptions to the prohibition against sex discrimination, the most important of which permits otherwise discriminatory conduct that satisfies a bona fide occupational qualification (BFOQ). Under §703(e)(1) of Title VII, an employer may discriminate on the basis of “religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide

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<sup>32</sup> *Id.* at 68.

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

<sup>34</sup> *See, e.g., id.* at 70 (“We have explained that an ‘exceedingly persuasive justification’ is established ‘by showing at least that the classification serves ‘important governmental objectives and that the discriminatory means employed’ are ‘substantially related to the achievement of those objectives.’ ”); *id.* at 74 (“Because the Immigration and Naturalization Service (INS) has not shown an exceedingly persuasive justification for the sex based classification embodied in 8 U.S.C. § 1409(a)(4)—i.e., because it has failed to establish at least that the classification substantially relates to the achievement of important governmental objectives—I would reverse the judgment of the Court of Appeals.”).

<sup>35</sup> Title VII provides, in relevant part, that it is an unlawful employment practice for an employer “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.” 42 U.S.C. §2000e-2.

occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.”<sup>36</sup>

Although a wide variety of Title VII sex discrimination claims have been litigated in the courts, the major Supreme Court sex discrimination cases under Title VII have primarily focused on the following issues: pregnancy discrimination, gender stereotypes, mixed motives, sexual harassment, employer liability, retaliation, and class action status. These issues, as well as a discussion of the two different types of discrimination recognized under Title VII, are described below. This report, however, does not address pay discrimination claims brought under Title VII or the Equal Pay Act. For more information on pay discrimination issues, see CRS Report RL31867, *Pay Equity Legislation*, by Jody Feder.

## **Disparate Treatment and Disparate Impact**

The Court has developed two principal models for proving claims of employment discrimination. The “disparate treatment” model focuses on an employer’s intent to discriminate. Alternately, the “disparate impact” model is concerned with the adverse effects of an employer’s practices on a protected class. Under disparate impact analysis, a facially neutral employment practice may violate Title VII even if there is no evidence of an employer’s intent to discriminate. To succeed, a plaintiff must demonstrate that the application of a specific employment practice has had a different effect on a particular group of employees.<sup>37</sup>

Both disparate treatment and disparate impact analyses involve a system of evidentiary burden shifting. Both models require the plaintiff to establish a prima facie case of discrimination.<sup>38</sup> If such a case can be established, the burden shifts to the employer to articulate a defense for its actions. For example, the employer may produce evidence showing that its actions are justified because of the needs of its business. Ultimately, however, the plaintiff retains the burden of persuasion; that is, the plaintiff must establish that the employer’s assertion of a legitimate, nondiscriminatory reason for its actions was a pretext to obscure unlawful discrimination.<sup>39</sup>

## **Pregnancy Discrimination**

In recent years, the Court has addressed Title VII and sex discrimination most frequently in the context of sexual harassment. In *UAW v. Johnson Controls*, however, the Court considered whether an employer may discriminate against fertile women because of its interest in protecting potential fetuses.<sup>40</sup>

Johnson Controls, a battery manufacturer, implemented a policy that excluded “women who are pregnant or who are capable of bearing children” from jobs that exposed them to lead,<sup>41</sup> which

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<sup>36</sup> 42 U.S.C. §2000e-2(e)(1).

<sup>37</sup> See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

<sup>38</sup> A prima facie case is a case that contains elements that are sufficient to establish a claim unless disproved.

<sup>39</sup> See, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

<sup>40</sup> 499 U.S. 187 (1991).

<sup>41</sup> *Id.* at 192.

was the primary ingredient in the manufacturing process at Johnson Controls. Although fertile women were excluded from employment, fertile men were still permitted to work.

The Court found that Johnson Controls' policy was facially discriminatory because it did not apply to the reproductive capacity of the company's male employees in the same way it applied to that of female employees. The Court's conclusion was bolstered by the Pregnancy Discrimination Act of 1978 (PDA), which provides that discrimination "on the basis of sex" for purposes of violating Title VII includes discrimination "because of or on the basis of pregnancy, childbirth, or related medical conditions."<sup>42</sup>

Although Johnson Controls asserted that sex was a BFOQ for protecting fetal safety, the Court maintained that discrimination on the basis of sex for safety concerns is allowed only in narrow circumstances.<sup>43</sup> The Court stressed that to qualify as a BFOQ, an employment practice must relate to the essence or central mission of the employer's business.<sup>44</sup> Because reproductive capacity does not interfere with a woman's ability to perform work related to battery manufacturing, the Court rejected Johnson Controls' BFOQ defense.

In 2009, the Supreme Court issued a decision in *AT&T v. Hulteen*,<sup>45</sup> a pregnancy discrimination case that involved questions about whether women who took maternity leave before the PDA went into effect were entitled to protection. Prior to enactment of the PDA, AT&T had calculated pension benefits based on a seniority system that considered years of service minus uncredited leave, but had given less leave credit for pregnancy absences than for other types of medical leave. The plaintiffs claimed that, for purposes of calculating their current retirement and other benefits, they were entitled to retroactive credit for the time they spent on maternity leave, while the employer argued that they were not required to account for leave that took place before the PDA went into effect.

Ultimately, the Court ruled in favor of AT&T, ruling that its seniority system did not violate Title VII "when it gives current effect to such rules that operated before the PDA."<sup>46</sup> Under Title VII, it is not unlawful for an employer to provide different levels of benefits pursuant to a bona fide seniority system, as long as there is no intention to discriminate.<sup>47</sup> According to the Court, AT&T's pre-PDA seniority system did not reflect intentional sex discrimination because it was lawful at the time it was adopted. Therefore, the Court held that AT&T's pension calculations were made pursuant to a bona fide seniority system and were permissible under the statute.

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<sup>42</sup> 42 U.S.C. §2000e(k).

<sup>43</sup> *Johnson Controls*, 499 U.S. at 202.

<sup>44</sup> *See, e.g., Dothard v. Rawlinson*, 433 U.S. 321 (1977) (finding sex to be a BFOQ because the employment of a female guard in a maximum-security male penitentiary could create a risk of violence and jeopardize the safety of inmates); *Western Airlines, Inc. v. Criswell*, 472 U.S. 400 (1985) (finding age to be a BFOQ in an ADEA case because the employment of an older flight engineer could cause a safety emergency and jeopardize the safety of passengers).

<sup>45</sup> 129 S. Ct. 1962 (2009).

<sup>46</sup> *Id.* at 1968.

<sup>47</sup> 42 U.S.C. §2000e-2(h).

## Gender Stereotypes

The Supreme Court has also ruled that employment decisions made on the basis of gender stereotypes may constitute unlawful sex discrimination. In *Price Waterhouse v. Hopkins*,<sup>48</sup> the plaintiff, a woman who was denied partnership in the accounting firm where she worked, was apparently rejected because of concerns about her interpersonal skills. Some of these concerns, however, appeared to reflect gender stereotypes. For example, one male partner referred to the plaintiff as “macho,” and another informed her that she could improve her chances of making partner if she learned to “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”<sup>49</sup> Reasoning that sex stereotyping is a form of discrimination on the basis of sex, the Court found that employment decisions that result from sex stereotypes may violate Title VII.<sup>50</sup>

Although the decision was in part a victory for employees who have been victims of employment actions based on gender stereotypes, another aspect of the *Hopkins* ruling favored employers by requiring a lower standard of proof when employers defend their actions in mixed-motive cases. In mixed-motive cases such as *Hopkins*, there are both legitimate and illegitimate reasons for an employer’s adverse employment action. In such cases, the Court held that employers may rebut an employee’s showing that discrimination was a “motivating factor” in the adverse action by proving that they would have made the same decision even if discrimination had not been a factor. This holding made it easier for employers to defend against discrimination lawsuits by their employees.

## Mixed Motives

As noted above, a mixed-motive employment discrimination case is a case in which the employer has both legitimate and illegitimate reasons for taking the challenged employment action. Several years after the Supreme Court ruled in the *Hopkins* case, Congress passed Title VII amendments that partially overturned the decision.<sup>51</sup> In the amendments, Congress added a provision that defined unlawful employment actions to include situations in which discrimination is “a motivating factor for any employment practice, even though other factors also motivated the practice.”<sup>52</sup> If an employer violates this provision but establishes that it would have taken the same employment action absent the illegitimate motive, the amendments specify that courts may grant the plaintiff declaratory and injunctive relief, as well as attorneys’ fees, although plaintiffs are not entitled to damages, hiring, reinstatement, or promotion.<sup>53</sup>

The Title VII amendments, however, did not address certain questions regarding the evidentiary burden of proof in mixed-motive cases. In 2003, the Supreme Court addressed the issue, ruling in *Desert Palace v. Costa* that direct evidence of discrimination is not required in mixed-motive

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<sup>48</sup> 490 U.S. 228 (1989).

<sup>49</sup> *Id.* at 234-35.

<sup>50</sup> *Id.* at 250-51.

<sup>51</sup> Civil Rights Act of 1991, P.L. 102-166, §107(a).

<sup>52</sup> 42 U.S.C. §2000e-2(m).

<sup>53</sup> *Id.* at §2000e-5(g)(2).

cases.<sup>54</sup> By allowing plaintiffs to present circumstantial evidence of discrimination, the decision made it easier for employees to win in mixed-motive cases.

## **Sexual Harassment**

Courts have recognized two forms of sexual harassment under Title VII. The first, *quid pro quo* sexual harassment, occurs when submission to unwelcome sexual advances or other conduct of a sexual nature is made a condition of an individual's employment or is otherwise used as the basis for employment decisions. The second form of harassment involves conduct that has the purpose or effect of interfering unreasonably with an individual's work performance or of creating a hostile or offensive working environment. This second form of sexual harassment, which the Court first recognized as a cognizable claim in *Meritor Savings Bank, FSB v. Vinson*,<sup>55</sup> is referred to as "hostile environment" sexual harassment.

In *Harris v. Forklift Systems, Inc.*, the Court sought to define when a workplace was sufficiently "hostile" for purposes of maintaining a claim under Title VII.<sup>56</sup> The petitioner, a female manager at an equipment rental company, alleged that the company's president created a hostile environment by repeatedly insulting her because of her gender and making her the target of unwanted sexual innuendos.

The Court determined that an employee does not need to suffer injury to assert a hostile environment claim under Title VII: "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."<sup>57</sup> The Court identified four factors that should be considered to determine whether a hostile environment exists: (1) the frequency of the discriminatory conduct; (2) the severity of such conduct; (3) whether the conduct is physically threatening or humiliating; and (4) whether the conduct interferes unreasonably with an employee's work performance.<sup>58</sup> Although the Court recognized these factors as those to be considered in identifying a hostile environment, it emphasized that no single factor is determinative.

## **Same-Sex Sexual Harassment**

In 1998, the Court interpreted Title VII's prohibition against discrimination "because of ... sex" to include harassment involving a plaintiff and defendant of the same sex.<sup>59</sup> The petitioner in *Oncale v. Sundowner Offshore Services, Inc.* alleged that he was physically assaulted in a sexual manner and was threatened with rape by three male co-workers.<sup>60</sup> Two of the co-workers had supervisory authority over the petitioner.

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<sup>54</sup> 539 U.S. 90 (2003).

<sup>55</sup> 477 U.S. 57 (1986).

<sup>56</sup> 510 U.S. 17 (1993).

<sup>57</sup> *Id.* at 22.

<sup>58</sup> *Id.* at 23.

<sup>59</sup> 42 U.S.C. §2000e-2.

<sup>60</sup> 523 U.S. 75, 77 (1998).

Although the Court acknowledged that Congress was “assuredly” not concerned with male-on-male sexual harassment when it enacted Title VII, it found no justification in the statutory language or the Court’s precedents for excluding same-sex harassment claims from the coverage of Title VII.<sup>61</sup> At the same time, the Court stated that inquiries in same-sex harassment cases require careful consideration of the social context in which particular behavior occurs and is experienced by the claimant. For example, the Court distinguished a football player being patted on the butt in a locker room from similar behavior occurring in an office. The Court contended that this kind of consideration would prevent Title VII from becoming a “general civility code” for the American workplace.<sup>62</sup>

## **Employer Liability**

The Court continued its examination of hostile environment sexual harassment in two cases involving vicarious liability. In *Faragher v. City of Boca Raton*, the Court found that an employer is vicariously liable for actionable discrimination caused by a supervisor, subject to an affirmative defense that must consider the reasonableness of the employer’s conduct, as well as the conduct of the employee.<sup>63</sup> The petitioner, a former lifeguard for the Marine Safety Section of Boca Raton’s Parks and Recreation Department, alleged that she was subject to an environment characterized by lewd remarks, gender-biased speech, and uninvited and offensive touching by her former supervisors.

Recognizing that the authority conferred as a result of a supervisor’s relationship with the employer allows the supervisor greater ability to act inappropriately, the Court concluded that an employer could be vicariously liable when a supervisor misuses that authority. As the Court noted, “When a person with supervisory authority discriminates in the terms and conditions of subordinates’ employment, his actions necessarily draw upon his superior position over the people who report to him ... whereas an employee generally cannot check a supervisor’s abusive conduct the same way that she might deal with abuse from a co-worker.”<sup>64</sup>

While the Court recognized that there could be vicarious liability for the misuse of supervisory authority, it established the availability of an affirmative defense for employers. Under this affirmative defense, an employer could assert that it exercised reasonable care to prevent and correct any sexually harassing behavior or establish that the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer. The Court believed that the employer’s ability to assert such an affirmative defense was consistent with Title VII’s objective of encouraging employers to prevent sexual harassment from occurring.<sup>65</sup>

After applying its new rules to the case at bar, the Court concluded that the city did not exercise reasonable care to prevent the supervisors’ harassing conduct. Although the city maintained a policy against sexual harassment, it failed to disseminate that policy to beach employees. Further, the city made no attempt to monitor the conduct of the supervisors or assure employees that they could bypass harassing supervisors to register complaints.

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<sup>61</sup> *Id.* at 79.

<sup>62</sup> *Id.* at 80.

<sup>63</sup> 524 U.S. 775 (1998).

<sup>64</sup> *Id.* at 803.

<sup>65</sup> *Id.* at 805.

The Court revisited the issue of vicarious liability for employers in *Burlington Industries v. Ellerth*, a companion case to *Faragher*.<sup>66</sup> In *Ellerth*, the Court maintained that an employer may be found vicariously liable for harassment by a supervisor even if the employee suffers no adverse, tangible job consequences.

The petitioner in *Ellerth* alleged that she was subjected to repeated offensive remarks and gestures by a mid-level manager who supervised the petitioner's immediate supervisor. On three occasions, the manager made remarks that could be construed as threats to deny the petitioner job benefits. For example, the manager encouraged the petitioner to "loosen up" because he "could make [her] life very hard or very easy at Burlington."<sup>67</sup> Although Burlington maintained a policy against sexual harassment, the petitioner did not inform anyone in authority about the manager's misconduct. Instead, the petitioner resigned from her position, providing reasons unrelated to the harassment. Three weeks after her resignation, the petitioner informed Burlington of her true reasons for leaving.

While the manager's threats suggested that the claim should be analyzed as a quid pro quo claim, the Court categorized it as a hostile environment claim because it involved only unfulfilled threats. After reviewing the petitioner's claim in terms similar to *Faragher*, the Court determined that the manager at Burlington also misused his supervisory authority. The Court concluded that Burlington should be given the opportunity to assert and prove an affirmative defense to liability.

The Court has also addressed the availability of punitive damages for violations of Title VII. In *Kolstad v. American Dental Association*,<sup>68</sup> the Court continued to build on its holdings in *Faragher* and *Ellerth* by concluding that although an employer may be vicariously liable for the misconduct of its supervisory employees, it will not be subject to punitive damages if it has made good faith efforts to comply with Title VII. The Court noted that subjecting employers that adopt antidiscrimination policies to punitive damages would undermine Title VII's objective of encouraging employers to prevent discrimination in the workplace.

In 2004, the Supreme Court considered the defenses, if any, that may be available to an employer against an employee's claim that she was forced to resign because of "intolerable" sexual harassment at the hands of a supervisor. As noted above, an employer may generally assert an affirmative defense to supervisory harassment under the Court's 1998 rulings in *Faragher* and *Ellerth*. The defense is not available, however, if the harassment includes a "tangible employment action," such as discharge or demotion. In *Pennsylvania State Police v. Suders*,<sup>69</sup> the plaintiff claimed the tangible adverse action was supervisory harassment so severe that it drove the employee to quit, a constructive discharge in effect. The Court, in an opinion by Justice Ginsburg, only Justice Thomas dissenting, accepted the theory of a constructive discharge as a tangible employment action, but it also set conditions under which the employer could assert an affirmative defense and avoid strict liability under Title VII of the 1964 Civil Rights Act.<sup>70</sup> The issue was key to determining the scope of employers' vicarious liability in "supervisory" sexual harassment cases alleging a hostile work environment.

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<sup>66</sup> 524 U.S. 742 (1998).

<sup>67</sup> *Id.* at 748.

<sup>68</sup> 527 U.S. 526 (1999).

<sup>69</sup> 542 U.S. 129 (2004).

<sup>70</sup> 42 U.S.C. §§2000e et seq.

In *Faragher* and *Ellerth*, the Court had sought to clarify the nature and scope of an employer's legal liability for the discriminatory and harassing conduct of its supervisors in Title VII cases. It held employers strictly liable for a sexually hostile work environment created by a supervisor, when the challenged discrimination or harassment results in a "tangible employment action."<sup>71</sup> But in the absence of such a "company act" the employer may raise an affirmative defense based on its having in place a reasonable remedial process and on the employee's failure to take advantage of it. Thus, the *Ellerth/Faragher* defense has two components: "(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 preventative or corrective opportunities provided by the employer or to avoid harm otherwise."<sup>72</sup>

The Supreme Court defined a "tangible employment action" categorically to mean any "significant change in employment status," that may—but not always—result in economic harm. Specifically, the term includes "hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits"<sup>73</sup> However, a "constructive discharge," where the employee quits, claiming that conditions are so intolerable that he or she was effectively "fired," presented an unresolved issue. Could an employer, faced with a claim of constructive discharge, still assert the *Ellerth/Faragher* defense?

Ultimately, the Court held that Title VII encompasses employer liability for constructive discharge claims attributable to a supervisor, but ruled that an "employer does not have recourse to the *Ellerth/Faragher* affirmative defense when a supervisor's official act precipitates the constructive discharge; absent such a 'tangible employment action,' however, the defense is available to the employer whose supervisors are charged with harassment."<sup>74</sup> In recognizing hostile environment constructive discharge claims, *Suders* enhanced Title VII protection for employees who quit their jobs over intense sexual harassment by a supervisor. But the decision also makes it easier for an employer to defend against such claims by showing that it has reasonable procedures for reporting and correcting harassment of which the employee failed to avail herself. Only "if the plaintiff quits in reasonable response to an employer-sanctioned adverse action officially changing her employment status or situation, for example, a humiliating demotion, extreme cut in pay, or transfer to a position in which she would face unbearable working condition," is the employer made strictly liable for monetary damages or other Title VII relief.<sup>75</sup>

Moreover, even where there has been a tangible employment action, coupled with a constructive discharge or resignation, the employer may have defenses available. First, the employer may argue that the harassing conduct did not occur as alleged, or was not sufficiently severe, pervasive, or unwelcome to meet standards for a Title VII violation. Second, if the tangible employment action is shown to be unrelated to the alleged harassment, or is taken for legitimate non-discriminatory reasons—particularly, if by persons other than the alleged harasser—the employer might escape liability. Finally, the employer might be able to demonstrate that, whatever form the underlying supervisory harassment may take, it did not meet the standard for constructive discharge: "so intolerable that a reasonable person would have felt compelled to

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<sup>71</sup> 524 U.S. 742, 765 (1998); 524 U.S. 775, 807 (1998).

<sup>72</sup> *Suders*, 542 U.S. at 137-38.

<sup>73</sup> *Ellerth*, 524 U.S. at 761.

<sup>74</sup> *Suders*, 542 U.S. at 140-141.

<sup>75</sup> *Id.* at 209.



resign.”<sup>76</sup> But *Suders* also makes it more difficult to obtain summary judgment and avoid jury trials in sexual harassment cases involving constructive discharge claims. Under the decision, if there is any real dispute about whether the employee suffered a tangible employment action, the employer may not rely on the affirmative defense to obtain summary judgment.

## Retaliation

In recent years, the Court has issued several decisions that have expanded the protections available under Title VII’s anti-retaliation provision. In 2006, the Court issued its decision in *Burlington Northern & Santa Fe Railway Co. v. White*,<sup>77</sup> a case that involved questions about the scope of the retaliation provision under Title VII. In a 9-0 decision with one justice concurring, the Court held that the statute’s retaliation provision encompasses any employer action that “would have been materially adverse to a reasonable employee or job applicant.”<sup>78</sup> This standard, which is much broader than a standard that would have confined the retaliation provision to actions that affect only the terms and conditions of employment, generally makes it easier to sue employers if they retaliate against workers who complain about discrimination. Under the Court’s interpretation, employees must establish only that the employer’s actions might dissuade a worker from making a charge of discrimination. This means that an employee may successfully sue an employer for retaliation even if the employer’s action does not actually result in an adverse employment action, such as being fired or losing wages.

In 2009, the Court issued a decision in *Crawford v. Metropolitan Government of Nashville and Davidson County*,<sup>79</sup> a case in which the plaintiff alleged that her participation in a sexual harassment investigation against her supervisor resulted in her termination. Although the plaintiff cooperated in the investigation and provided testimony regarding explicit comments and actions made by her boss, the fact that she had not filed the sexual harassment complaint or other charges with the Equal Employment Opportunity Commission (EEOC) led the lower court to rule that she was not covered under Title VII’s retaliation provision. In reversing the decision, the Court held that Title VII’s retaliation provision encompasses retaliation against “an employee who speaks out about discrimination not on her own initiative, but in answering questions during an employer’s internal investigation.”<sup>80</sup> The Court emphasized that this result would prevent employers from undermining the purpose of Title VII by silencing employees who might fear being penalized if they reported discrimination during the course of an investigation.

More recently, the Court ruled in *Thompson v. North American Stainless*,<sup>81</sup> a sex discrimination case involving the question of whether Title VII creates a cause of action for third-party retaliation for individuals who have not personally engaged in protected activity. In *Thompson*, the plaintiff, who was fired three weeks after his then-fiancée filed a discrimination claim with the EEOC, alleged that his termination constituted unlawful retaliation in violation of Title VII, while the employer claimed that his discharge was for reasons of performance. The en banc Sixth Circuit, in a fractured opinion, held that the employee was not protected because he had not

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<sup>76</sup> *Id.* at 147.

<sup>77</sup> 548 U.S. 53 (2006).

<sup>78</sup> *Id.* at 57.

<sup>79</sup> 129 S. Ct. 846 (2009).

<sup>80</sup> *Id.* at 849.

<sup>81</sup> 131 S. Ct. 863.

opposed any practice nor participated in a proceeding as required by the anti-retaliation provision of Title VII.<sup>82</sup>

In a unanimous decision, the Court reversed, holding that it had “little difficulty” in concluding that the “firing of Thompson violated Title VII.”<sup>83</sup> Citing *Burlington*’s holding that Title VII’s anti-retaliation provision prohibits actions that might dissuade a reasonable worker from complaining of discrimination, the Court declared “it obvious that a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiance would be fired.”<sup>84</sup> The Court declined to establish fixed rules regarding the types of third-party relationships that are protected, but did indicate “that firing a close family member will almost always meet the *Burlington* standard, and inflicting a milder reprisal on a mere acquaintance will almost never do so....”<sup>85</sup>

## **Class Action Status**

In *Wal-Mart v. Dukes*, the Supreme Court considered whether it was appropriate to approve class action status for up to 1.5 million current and former female employees of Wal-Mart retail stores nationwide. Alleging a pattern of sex discrimination, the plaintiffs claim that women were paid less than male workers in comparable positions and that the company systematically passed over female employees when awarding promotions to management. A federal district court certified the class.<sup>86</sup> Wal-Mart appealed the district court’s class action certification, and a three-judge panel of the appellate court upheld the class action certification,<sup>87</sup> as did a subsequent ruling by a divided panel of appellate judges sitting en banc.<sup>88</sup> In a 5-4 decision, however, the Supreme Court reversed the class certification ruling.<sup>89</sup>

Under the Federal Rules of Civil Procedure, parties seeking class certification must show, among other things, that “(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.”<sup>90</sup>

According to the Court, the *Wal-Mart* plaintiffs failed to meet the commonality requirement because they could not establish that Wal-Mart operated under a common, general policy of discrimination. Rather: “The only corporate policy that the plaintiffs’ evidence convincingly establishes is Wal-Mart’s ‘policy’ of allowing discretion by local supervisors over employment

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<sup>82</sup> 567 F.3d 804, 816 (6<sup>th</sup> Cir. 2009).

<sup>83</sup> *Thompson v. N. Am. Stainless, LP*, 131 S. Ct. 863, 867 (2011). The Court also held that Thompson is an aggrieved person within the meaning of Title VII and therefore has standing to sue. *Id.* at 869-70.

<sup>84</sup> *Id.* at 868.

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

<sup>86</sup> *Dukes et al. v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137 (N.D.Cal. 2004).

<sup>87</sup> *Dukes v. Wal-Mart*, 509 F.3d 1168 (9<sup>th</sup> Cir. 2007).

<sup>88</sup> *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571 (9<sup>th</sup> Cir. 2010).

<sup>89</sup> 131 S. Ct. 2541 (2011). The Court also unanimously held that claims for monetary relief may not be certified pursuant to Rule 23(b)(2), unless the monetary relief is incidental to the injunctive or declaratory relief. *Id.* at 2557.

<sup>90</sup> Fed. R. Civ. P. 23(a).

matters. On its face, of course, that is just the opposite of a uniform employment practice that would provide the commonality needed for a class action.”<sup>91</sup>

In its ruling, the Court emphasized that plaintiffs must provide “significant proof” that a “specific employment practice” led to the discrimination, and rejected as insufficient statistical and anecdotal evidence offered by the plaintiffs.<sup>92</sup> Although the Court’s decision makes it more difficult for employees to receive class certification and thus makes it less likely that large employers will face similar suits in the future, it is not the end of the litigation against Wal-Mart. The plaintiffs may still pursue their claims as individuals, or perhaps as part of a smaller class. Indeed, some of the Wal-Mart plaintiffs have reportedly filed a new lawsuit against the company but have limited their claims to the California stores.<sup>93</sup>

## **Title IX of the Education Amendments of 1972**

Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex in educational programs and activities that receive federal funding. Until recently, Title IX claims have been most common among women and girls challenging inequities in sports programs,<sup>94</sup> but Title IX also provides a basis for challenging sexual harassment in classrooms and on campuses.

Title IX provides, in relevant part, that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance...”<sup>95</sup> The Court’s recent decisions involving Title IX address various issues, including the availability of damages, the parties that are subject to liability, the scope of retaliation claims, and the availability of other statutory remedies.

In an early Title IX case, the Supreme Court held that the statute provides student victims with an avenue of judicial relief. In *Cannon v. University of Chicago*,<sup>96</sup> the Court ruled that an implied right of action exists under Title IX for student victims of sex discrimination who need not exhaust their administrative remedies before filing suit. However, the availability of monetary damages under Title IX remained uncertain until *Franklin v. Gwinnett County Public Schools*.<sup>97</sup> In *Franklin*, a female high school student brought an action for damages under Title IX against her school district alleging that she had been subjected to sexual harassment and abuse by a teacher. Although the harassment became known and an investigation was conducted, teachers and administrators did not act and the petitioner was subsequently discouraged from pressing charges. The Court, which found that sexual harassment by a teacher constituted discrimination on the basis of sex, held that damages were available to the sexual harassment victim if she could prove that the school district had intentionally violated Title IX.

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<sup>91</sup> Wal-Mart, 131 S. Ct. at 2554.

<sup>92</sup> *Id.* at 2553-56.

<sup>93</sup> Andrew Martin, “Female Wal-Mart Employees File New Bias Case,” *New York Times*, October 27, 2011.

<sup>94</sup> See CRS Report RL31709, *Title IX, Sex Discrimination, and Intercollegiate Athletics: A Legal Overview*, by Jody Feder.

<sup>95</sup> 20 U.S.C. §1681(a).

<sup>96</sup> 441 U.S. 677 (1979).

<sup>97</sup> 503 U.S. 60 (1992).

After *Franklin*, it was clear that sexual harassment by a teacher constituted sex discrimination, but the extent to which school districts could be held liable for misconduct by its employees was less clear. The appropriate standard for measuring a school district's liability for sexual abuse of a student by a teacher remained unsettled until the Supreme Court ruling in *Gebser v. Lago Vista Independent School District*.<sup>98</sup> In *Gebser*, the Court determined that a school district will not be held liable under Title IX for a teacher's sexual harassment of a student if the school district did not have actual notice of the harassment and did not exhibit deliberate indifference to the misconduct.<sup>99</sup> The petitioner, a female high school student, was involved in a sexual relationship with one of her teachers. Unlike the situation in *Franklin*, the school district did not have actual notice of any sexual relationship between the petitioner and the teacher until they were discovered by a police officer. The principal of the petitioner's school did learn of inappropriate comments made by the teacher prior to the discovery, but he cautioned the teacher about such comments. After the sexual relationship became known, the school district quickly terminated the teacher. Despite the school district's actions, the petitioner argued that the school district should be found liable on the basis of vicarious liability or constructive notice.<sup>100</sup>

In requiring the school district to have actual notice of the harassment, the Court discussed the absence of an express cause of action under Title IX. Unlike Title VII, Title IX does not address damages or the particular situations in which damages are available.<sup>101</sup> While Title IX does address a denial of funds for noncompliance with its provisions, it does not provide for a private right of action. Instead, a private right of action has been judicially implied.<sup>102</sup>

Because Title IX does not contain any reference to the recovery of damages in private actions, the Court reasoned that its recognition of theories of vicarious liability and constructive notice would allow an unlimited recovery where Congress has not spoken.<sup>103</sup> Stated differently, the Court was reluctant to expand the availability of damages for such theories when Title IX failed to provide initially for a private cause of action. In this way, the Court sought to refine its holding in *Franklin* and limit those situations in which a remedy for damages would lie.

The Court believed that Title IX's remedial scheme would be undermined if it did not require that a school district have actual notice of a teacher's sexual harassment. Under Title IX, financial assistance will not be denied until the "appropriate person or persons" have been advised of the discrimination and have failed to end the discrimination voluntarily.<sup>104</sup> An "appropriate person" is an official of the entity receiving funds who has the authority to take corrective action.<sup>105</sup> Because the school district in *Gebser* did not have actual notice of the sexual relationship, it could not have taken any steps to end the alleged discrimination.

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<sup>98</sup> 524 U.S. 274 (1998).

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

<sup>100</sup> Under a theory of constructive notice, liability would be established on the grounds that the school district knew or should have known about the harassment, but failed to discover and eliminate it.

<sup>101</sup> *Gebser*, 24 U.S. at 283-84.

<sup>102</sup> *See Cannon v. University of Chicago*, 441 U.S. 677 (1979). A private right of action allows an individual to sue in court for violations under a statute rather than wait for a federal agency to pursue a complaint administratively.

<sup>103</sup> *Gebser*, 524 U.S. at 286.

<sup>104</sup> 20 U.S.C. §1682.

<sup>105</sup> *Gebser*, 524 U.S. at 290.

In addition, the Court stated that damages will not be available unless it is shown that a response exhibits a deliberate indifference to the discrimination; that is, there must be “an official decision by the recipient not to remedy the violation.”<sup>106</sup> In *Gebser*, the school district responded to the situation by first cautioning the teacher, and then terminating him once the relationship was discovered. Thus, the Court concluded that the school district did not act with deliberate indifference.

*Davis v. Monroe County Board of Education*, decided in 1999, addressed the standard of liability that should be imposed on school districts to remedy student-on-student harassment.<sup>107</sup> The plaintiff in *Davis* alleged that her fifth-grade daughter had been harassed by another student over a prolonged period—a fact reported to teachers on several occasions—but that school officials had failed to take corrective action. Justice O’Connor, writing for a sharply divided Court, determined that the plaintiff had stated a Title IX claim. Because the statute restricts the actions of federal grant recipients, however, and not the conduct of third parties, the Court again refused to impose vicarious liability on the school district. Instead, “a recipient of federal funds may be liable in damages under Title IX only for its own misconduct.”<sup>108</sup> School authorities’ own “deliberate indifference” to student-on-student harassment could violate Title IX in certain cases. Thus, the Court held, where officials have “actual knowledge” of the harassment, where the “harasser is under the school’s disciplinary authority,” and where the harassment is so severe “that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school,” the district may be held liable for damages under Title IX.<sup>109</sup>

While the development of sex discrimination law under Title IX owes much to Title VII, the *Davis* Court’s recognition of student-on-student harassment highlights dramatic differences between the two statutes. Indeed, in qualifying the *Davis* standard, the Court suggested that student harassment may be far more difficult to prove than sexual harassment in employment. Beyond requiring “actual knowledge,” Justice O’Connor cautioned that “schools are unlike adult workplaces” and disciplinary decisions of school administrators are not to be “second guess[ed]” by lower courts unless “clearly unreasonable” under the circumstances. Additionally, the majority emphasized that “[d]amages are not available for simple acts of teasing and name-calling among school children, even where these comments target differences in gender.”<sup>110</sup> In effect, *Davis* left to school administrators the task of drawing the line between innocent teasing and actionable sexual harassment—a difficult and legally perilous task at best.

In a separate decision the same year, the Court found that a private organization is not subject to Title IX simply because it receives payments from entities that receive federal financial assistance. In *National Collegiate Athletic Association v. Smith*,<sup>111</sup> the respondent, a female graduate student, alleged that the National Collegiate Athletic Association (NCAA) discriminated against her on the basis of sex by denying her permission to play intercollegiate volleyball at two federally assisted institutions. Under NCAA rules, a graduate student is permitted to participate in intercollegiate athletics only at the institution that awarded her undergraduate degree. The respondent, who was enrolled at two different universities for her graduate degree, argued that the

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

<sup>107</sup> 526 U.S. 629 (1999).

<sup>108</sup> *Id.* at 640.

<sup>109</sup> *Id.* at 650.

<sup>110</sup> *Id.* at 648-52.

<sup>111</sup> 525 U.S. 459 (1999).

NCAA granted more waivers from eligibility restrictions to male graduate students than to female graduate students.

The Court concluded that the NCAA was not a recipient of Title IX funds because the NCAA did not receive federal assistance either directly or through an intermediary. Instead, it received dues payments from member institutions. The Court stated, “[a]t most, the Association’s receipt of dues demonstrates that it indirectly benefits from the federal assistance afforded its members. This showing, without more, is insufficient to trigger Title IX coverage.”<sup>112</sup> Because the Court found that the NCAA was not amenable to suit, it did not address the respondent’s substantive allegations of discrimination.

In 2005, the Court handed down its decision in *Jackson v. Birmingham Board of Education*,<sup>113</sup> a case that further broadened the scope of Title IX to include protection against retaliation. In this case, which involved a girl’s basketball coach who claimed that he was removed from his coaching position in retaliation for his complaints about unequal treatment of the girl’s team, the Court held that Title IX not only encompasses retaliation claims, but also is available to individuals who complain about sex discrimination, even if such individuals themselves are not the direct victims of sex discrimination.<sup>114</sup> Reasoning that “Title IX’s enforcement scheme would unravel” “if retaliation were not prohibited,”<sup>115</sup> the Court concluded that “when a funding recipient retaliates against a person because he complains of sex discrimination, this constitutes intentional discrimination on the basis of sex in violation of Title IX.”<sup>116</sup>

More recently, the Court issued a decision in *Fitzgerald v. Barnstable School Committee*,<sup>117</sup> a case in which the Court considered whether Title IX provides the exclusive statutory remedy for unlawful sex discrimination in the education context. The lower court, concluding that Title IX was the exclusive statutory remedy, had rejected a claim that the original plaintiffs filed under 42 U.S.C. §1983 for violations of Title IX and the Equal Protection Clause of the Constitution.<sup>118</sup> In a unanimous decision, the Court reversed, holding that “Title IX was not meant to be an exclusive mechanism for addressing gender discrimination in schools, or a substitute for § 1983 suits as a means of enforcing constitutional rights.”<sup>119</sup> As a result, plaintiffs may file claims related to sex discrimination in education under both statutes in the future.

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<sup>112</sup> *Id.* at 468.

<sup>113</sup> 544 U.S. 167 (2005).

<sup>114</sup> *Id.* at 171.

<sup>115</sup> *Id.* at 180.

<sup>116</sup> *Id.* at 174 (internal quotations omitted).

<sup>117</sup> 129 S. Ct. 788 (2009).

<sup>118</sup> 42 U.S.C. §1983, which provides a remedy for deprivation of rights under color of state law, creates no new substantive rights but rather provides relief where state law is inadequate. Thus, individuals who sue under §1983 must find a source of rights elsewhere. As a result, §1983 is often used to enforce constitutional rights, such as the right to equal protection.

<sup>119</sup> *Fitzgerald*, 129 S. Ct. at 797.

## **Author Contact Information**

Jody Feder  
Legislative Attorney  
jfeder@crs.loc.gov, 7-8088