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FAMILY AND MEDICAL LEAVE ACT ENACTED INTO LAW

On February 5, President Clinton signed the Family and Medical Leave Act into law (PL 103-3) capping an eight year struggle to enact the bill including two vetoes by former President George Bush in 1990 and 1992.

The House passed the bill on February 3 by a vote of 265-163. On February 4, the Senate passed a different version of the bill by a vote of 71-27, and the House agreed to the Senate-passed version the same day by a vote of 247-152.

The bill goes into effect four months after enactment, June 5, 1993.

PROVISIONS OF THE ACT

The following borrows heavily from a fact sheet prepared by the Women's Legal Defense Fund.

Unpaid Leave

The Act requires employers to grant employees up to 12 weeks of leave in any 12 month period to care for a newborn child or for a child newly placed for adoption or foster care; to care for an employee's child, parent, or spouse with a serious health condition; or to care for an employee's own serious health condition.

The Act allows employers to limit the aggregate number of weeks of leave to 12 when both the husband and wife are employed by the same employer.

Workers are allowed to substitute accrued paid leave for any part of the unpaid 12 week leave. Employers may require employees to substitute accrued paid leave for the unpaid leave. For example, if a company grants six weeks of paid leave it must grant six additional weeks of unpaid leave but is not required to provide 12 weeks of unpaid in addition to the six weeks of paid leave.

Employee Eligibility

The Act covers employees who have worked for the employer for at least 12 months in all, and for at least 1,250 hours during the 12-month period immediately preceding the commencement of the leave. This is about 25 hours per week.

Employer Coverage

The Act applies to all private employers with 50 or more employees as well as to the Federal Government, state and local governments, and to the Congress.

Job Protection

The Act provides that upon return from leave, an employee is entitled to be restored to the employee's previous position, or to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.

An employer is not required to restore an employee to the previous or equivalent position if the employee is salaried and is among the highest paid 10 percent of the employees employed within 75 miles of the site where the employee works.

Maintenance of Health Insurance Benefits

The Act requires an employer to maintain health insurance benefits during the period of leave at the level and under the conditions coverage would have been provided if the employee had not taken leave.

An employer can recapture health insurance premiums paid during leave from an employee who fails to return to work after leave, unless the employee cannot return to work because of the serious health condition of a family member, the employee's own serious health condition, or other circumstances beyond the employee's control.

Notification Requirements

The Act requires that if an employee needs leave for the birth or adoption of a child or for planned medical treatment, the employee must provide the employer with at least 30 days' notice of the need for leave.

This 30-day advance notice is not required in cases of medical emergency or other unforeseen events, like a premature birth, or a sudden change in a patient's condition requiring a change in planned medical treatment.

In cases in which an employee cannot provide 30 days' advance notice, the employee must provide as much notice as is practicable under the circumstances.

Certification Requirements

The Act provides that if an employee needs leave for a health condition (that of a family member or the employee's own), the employer may ask for a certification issued by a doctor or other health care provider, stating the date on which the serious health condition began, its probable duration, and other appropriate medical facts.

The Act allows the employer to require, at the expense of the employer, a second opinion of a doctor or health care provider, not in the employer's regular employ, and in cases where the second opinion differs from the first, a third opinion also at the expense of the employer. The third opinion is binding upon the employer and employee.

Enforcement

The Act provides that an employee whose rights under the Act are violated may bring an action in federal or state court to recover damages or equitable relief from an employer. The employee's right to bring such an action will terminate, however, upon the filing of a complaint by the Secretary of Labor to recover damages or equitable relief on behalf of the employee.

Relief for Violation of Rights

The Act provides that an employee whose rights under the Act are violated is entitled to damages (including wages, salary, employment benefits or other compensation lost by the employee because of the violation, and actual monetary losses suffered by the employee, with interest), equitable relief (including employment, reinstatement, or promotion), and reasonable attorney's fees, reasonable expert witness fees, and other costs.

Regulations

The Department of Labor is to publish regulations for the implementation of the Act no later than 120 days after enactment.

State Leave Laws

States may provide more generous family and medical leave rights than those required by the FMLA. To the extent that states provide narrower rights, those provisions of their laws are preempted by the federal law.

Collective Bargaining Agreements

Like state laws, more generous contract provisions will prevail, and less generous provisions will be displaced by the requirements of the federal FMLA.

Effective Date

The Act provides that parts of the Act covering employment will take effect six months after the date of enactment. If a collective bargaining agreement is in effect on that date, the Act will take effect in that bargaining unit on the earlier of the date of the termination of such agreement, or twelve months after the date of the enactment of the Act, i.e., by February 5, 1994 at the latest.

MOTOR VOTER LEGISLATION PASSES CONGRESS

On February 4, 1993, the House passed the National Voter Registration Act, H.R. 2, by a vote of 259-160. The bill as passed by the House would require states to establish procedures to allow people to register when they apply for or renew their drivers' license or when they apply for public services such as welfare and unemployment compensation or marriage licenses or hunting permits, and to establish mail-in registration.

The Senate passed a version of the bill (S. 460) on March 17 by a vote of 62-37. The Senate failed on March 16 to invoke cloture by one vote, 59-41. Following the failed cloture vote, the Senate voted 99-0 to accept a

package of amendments (concessions to Republican opponents) offered by Senator Wendell Ford (D-KY), the principal sponsor of the bill. The Senate bill requires states to allow citizens to register to vote when they apply for or renew driver licenses, and to establish mail-in registration procedures, but allows the states to decide whether they will offer registration at other public agencies.

Because the House and Senate passed different versions of the bill, a conference committee of House and Senate members will meet to work out the differences after the Spring recess. The conferees are Senators Ford (D-KY), Pell (D-RI), Inouye (D-HI), McConnell (R-KY), and Warner (R-VA), and Representatives Swift (D-WA), Hoyer (D-MD), Frost (D-TX), Kleczka (D-WI), Conyers (D-MI), Thomas (R-CA), Livingston (R-LA), and Roberts (R-KS).

Senate Amendments

The following borrows heavily from a Memorandum to the House Conferees that was prepared by the Motor Voter Coalition working to gain passage of the legislation. The Coalition states that the most devastating elements of the Senate amendments are:

1. the elimination of the requirement for mandatory voter registration services at agencies serving persons with disabilities, the poor, and the unemployed;
2. the addition of a provision allowing the States to require documentary proof of citizenship on a selective basis prior to registration; and
3. the addition of a provision permitting States to require a voter who has moved within the jurisdiction to vote only at a 'central location' instead of allowing that voter the option of voting at the previous polling place or at a central location.

The Coalition states that "[t]he motor vehicle agency registration provision...is likely to result in an appreciable increase in voter registration. However, whites will be significantly overrepresented in that figure and African Americans, Latinos, Asians, disabled persons and women will be significantly under-represented." The Senate Committee on Rules and Administration's Report on the Motor Voter bill states:

"A Department of Transportation study noted that almost 50 percent of those persons who do not have a driver's license have annual incomes of less than \$10,000. As a result, motor-voter registration may not adequately reach low income citizens and minorities. Active public...agency-based voter registration programs...engaged in providing services to persons with disabilities...are more likely to reach these eligible citizens, who are likely to have contact with a number of these agencies. Agency voter registration programs provide an institutional solution to the problem of unequal access to the voting booth."

The Coalition memorandum also states that the provision in the Senate bill that allows states to require proof of citizenship such as a birth certificate or a passport provides "an opportunity for recalcitrant local officials to discriminate selectively against potential registrants based solely on ethnicity, race, English language proficiency, physical ability or characteristics, or any other arbitrary criteria..."

As to the provision that allows states to require a voter who has moved within the jurisdiction to vote only at a central location, the Coalition asserts that the original language in the House passed bill allowing voters who had moved but were still within the same registrar's jurisdiction to have the option of voting in the old polling place, the new polling place or in a central location is needed since minority voters have often faced problems with registration and voting because of state-sanctioned abuses of discretion.

"Shifting the decision back to the registrar may not cause a problem in places without a history of discrimination in voting but could lead to a bureaucratic nightmare if a registrar wanted to prevent that mover from voting by sending that person on a wild goose chase."

Changes in the Senate bill which the Coalition is not opposing are new anti-fraud provisions, a provision that allows states to confirm mail registration through a special follow-up mailing with the modification that poor mail delivery does not disenfranchise voters, a requirement that all voter registration forms include a description of penalties under the law, the addition of military recruitment centers to the list of agencies that must provide voter registration services, a provision that agencies will not be required to provide assistance in filling out registration forms and a clarification that an affirmative act is not required to register to vote.

VOTING RIGHTS EXTENSION ACT OF 1993

INTRODUCED IN THE HOUSE

On January 5, 1993, Representative Don Edwards (D-CA) introduced the Voting Rights Extension Act of 1993, H.R. 174. The bill would "amend the Voting Rights Act of 1965 to clarify certain aspects of its coverage and to provide for the recovery of additional litigation expenses by litigants." Representative Edwards introduced a similar bill in the 102nd Congress which was voted out of the House Judiciary Committee but saw no floor action.

The bill seeks to overturn the Supreme Court's 6-3 decision in *Presley v. Etowah County Commission*, 112 S.Ct. 820 (1992), that section 5 of the Voting Rights Act does not require covered jurisdictions to submit changes in the decision-making authority or allocation of power among state and local officials to the Department of Justice or to the U.S. District Court for the District of Columbia for pre-clearance. The *Presley* majority asserted that "such changes have no direct relation to, or impact on, voting." The case involved the county commission as a body voting to change the budgetary authority of individual commissioners after the election of the first African-American to the commission since Reconstruction. With this change, the majority white commission downgraded the authority of the African American commissioner to overseeing upkeep of the courthouse, and removed authority for overseeing bridge and road construction in his district. For a thorough discussion of *Presley* see the CIVIL RIGHTS MONITOR, Spring 1992.

The bill would also overturn the Supreme Court's affirmance of *Rojas v. Victoria Independent School District*, Civ. Act. No. V-87-16 (S.D. TX, Mar. 29, 1988), aff'd 490 U.S. 1001 (1989), which also involved a change in the procedure or authority of a governing body following the election of a minority member. In *Rojas*, after the election of the first Latina member of the school board, the board voted to change the procedural rules to give the chair discretion to require two rather than one vote in order to place an item on the agenda for discussion.

Hearing

A hearing on the bill was held before the House Subcommittee on Civil and Constitutional Rights on March 18, 1993. Representative Edwards in his opening statement said:

"Congress intended that the Voting Rights Act of 1965 be used to end voting discrimination in forms known and unknown to it in 1965. Legislators had tired of persistent local and state governments crafting new laws in response to outlawed discriminatory devices. They recognized, and the Supreme Court later affirmed that 'unremitting and ingenious defiance' of the Fifteenth Amendment necessitated the passage of a broad and powerful law. Therefore, the Voting Rights Act not only provided plaintiffs with a right of action, but also required certain jurisdictions to obtain approval before altering all voting related laws.

"For many years, the Supreme Court interpreted the Voting Rights Act in a manner that maintained its original intent. Thus, it was both alarming and disappointing when the Supreme Court affirmed *Rojas v. Victoria Independent School District* and later rendered its decision in *Presley v. Etowah County Commission*.

"Both the *Rojas* and *Presley* decisions are evidence of the newest forms of voter discrimination and the Supreme Court's narrow view of the Voting Rights Act. Though these machinations are new and subtle, their ability to deny minorities the right to representation is undeniable. The Voting Rights Act was crafted to address these circumstances. Thus, it is appropriate that we hold this hearing and discuss this problem confronting the nation."

Dayna L. Cunningham, Assistant Counsel, NAACP Legal Defense and Educational Fund, provided testimony about numerous incidents in local jurisdictions where governmental rules changed after minorities win election to office to prevent the minority elected officials from having an equal role in the governing process. Such incidents are not new and Ms. Cunningham said that during the hearings on the Voting Rights Act of 1965 Congress heard testimony about such efforts by recalcitrant state and local government officials. She pointed out that in 1970, the U.S. Commission on Civil Rights documented such tactics, i.e., attempts to extend the terms of offices held by white incumbents; outright abolishment of offices sought by African American can-

didates; and making local elective offices appointive in predominantly black counties but not in predominantly white counties.

Such efforts, Ms. Cunningham said, are numerous enough to allow for grouping into six categories: 1) shifts of authority away from a local body that has significant minority representation; 2) creation of an executive position that is elected at large to oversee the operations of a governing body on which there is minority representation; 3) changes in decision-making authority of elected bodies; 4) changes in legislative voting procedures; 5) holding of quasi-official, racially exclusive meetings of white officials to make official decisions and 6) imposition of additional requirements for office-holding. Ms. Cunningham discussed in some detail the Department of Justice's objections to these changes prior to *Presley* under its section 5 preclearance authority.

Charles J. Cooper, who had been Special Assistant to the Assistant Attorney General for Civil Rights during the Reagan Administration, testified in opposition to the bill. His argument against the bill focused on the burden of administrative preclearance and the impact of "freezing" existing governmental structures, and contended that redress in such circumstances is available through constitutional challenges.

"...subjecting all legislative changes that affect an elected official's decisionmaking authority to Section 5 preclearance not only would work a breathtaking expansion of the preclearance burden on covered jurisdictions and the Justice Department, but also would operate to freeze existing government structures and allocations of authority in many jurisdictions, no matter how compelling the need for change may be....

"A covered jurisdiction is entitled to preclearance under Section 5 only if it can demonstrate that the proposed change 'does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color.'...The discriminatory 'effect' prohibited by Section 5 has been defined by the Supreme Court in terms of 'retrogression': '[T]he purpose of section 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the franchise....

"Under standard retrogression analysis, any measure reducing any authority of an elected official or body controlled by a racial minority constituency would have a discriminatory effect prohibited by Section 5."

Mr. Cooper went on to say that a change in the decisionmaking authority of an elected official based on race would violate the Fourteenth Amendment, whether the jurisdiction was subject to Section 5 preclearance or not, and an action could be brought in federal court.

Ms. Cunningham spoke to the issue of the burden preclearance would create. She stated:

"The Department of Justice has a comprehensive administrative mechanism that is well-equipped to carry out its enforcement responsibility under section 5 to review 'all changes, no matter how small' that have the potential to discriminate. Under this command, the Department capably reviews voluminous changes including every change of polling places from one side of a street to the other, every change in candidate filing fees and every change from paper ballots to voting machines that is submitted from every covered jurisdiction. Surely the Department effectively can process as it did before 1992 the *Presley*-type change that may have a discriminatory impact on minority voters."

Similarly, James U. Blacksher, a voting rights lawyer from Alabama and one of the attorneys for black citizens in the *Presley* case, said:

"But, the opponents have said, where will all this lead? Won't every legislative decision of state and local governments be reviewable under section 5 of the Voting Rights Act? Adoption of budgets? The appointment of coffee committees? 'Floodgates' arguments like these have confronted every stage of Voting Rights Act development; as before, common sense and experience show they are groundless. With respect to circumstances like those in *Presley*, governmental actions implicate voting only if they affect in some systematic, structural, institutional way the power or influence minority representatives can hope to exert over ordinary decisions.

"The key here, as always, is the Attorney General's continued adjustment of section 5

regulations and enforcement procedures as new circumstances require. From the Act's beginning, Congress has understood that, once it undertakes the project of guaranteeing political justice for disadvantaged racial and ethnic minorities, there will be no simple formulas that can corral fundamental unfairness in political processes. So Congress wisely commissioned the Attorney General to confront the emerging varieties of particular situations and to work out procedures that advance, but do not overreach, the Act's remedial purposes."

Theresa A. Gutierrez, a member of the Victoria Independent School Board and the school board member affected in the *Rojas* decision, provided gripping testimony about her experience as the first minority member of the board and the difficulty she had in getting a second board member to request an item Gutierrez wanted placed on the agenda. She said:

"Most recently, the policy has been used to block my attempt to request approval of travel expenditures to the April 1992 meeting of the national convention of the National Association of School Boards and the meeting of the National Caucus of Hispanic School Board Members. The Caucus is an affiliate of the National Association of School Board Members, and meets at the same time as the annual convention of the National Association of School Boards. The 1992 meeting was one at which I was to be sworn in as President of the...[NAHSBM], after a recent election....

"I approached another school board member seeking a second to place the item of the payment of my expenses for the trip on the agenda. The member I asked to help me have the item placed on the agenda declined to do so, telling me that Mexican Americans are a special interest group and he would not help me secure funding to advance the interests of a special interest group or to attend their meetings...the public again [became] incensed over the actions of the Board in labeling the majority of students in the district, their needs and interests as 'special interest' because the children are not white."

SUPREME COURT ACCEPTS TWO CASES TO REVIEW WHETHER THE CIVIL RIGHTS ACT OF 1991 IS TO BE APPLIED RETROACTIVELY

On February 22, 1993, the Supreme Court granted review of two cases that raise the question whether the Civil Rights Act of 1991 is to be applied to cases pending at the time of enactment. The cases are:

- *Rivers v. Roadway Express*, No. 92-938
- *Landgraf v. USI Film Industries*, No. 92-757

The cases have been consolidated for oral argument with review limited to question 1 presented by the petitioner in *Rivers* (see below).

Background

Section 402 of the Civil Rights Act of 1991 provides that "except as otherwise provided, the amendments made by this Act shall take effect upon enactment." Civil rights advocates argue that the bill generally covers cases that were pending at the time of enactment, and applies to pre-Act conduct for which a suit might have been brought after the CRA 1991 became law.

Other relevant provisions of the Act that provide "otherwise" are:

Section 402(b) stating that "notwithstanding any other provision of this Act, nothing in this Act shall apply to any disparate impact case for which a complaint was filed before March 1, 1975 and for which an initial decision was rendered after October 30, 1983." The effect of this provision is to prevent application of any rule prescribed by the 1991 Act to the long running *Wards Cove* case, the only known case to which this exemption applies.

Section 109(c) which, in allowing citizens of the U.S. working abroad for U.S. based employers to sue for discrimination, stipulates that this section does not apply to "conduct occurring before the date of the enactment of this Act."

On December 27, 1991, the Equal Employment Opportunity Commission took the position that "the Commission will not seek damages under the Civil Rights Act of 1991 for events occurring before November 21, 1991," the date on which President Bush signed the measure into law. On April 14, 1993, the EEOC voted "to rescind effective immediately, the EEOC's Policy Guidance on the Application of Damages Provisions of the Civil Rights Act of 1991 to Pending Charges and Pre-Act Conduct that was issued on Dec. 27, 1991." The commissioners also directed the Executive Secretariat "to communicate this position to the Office of General Counsel for prompt transmission to the Solicitor General and to other Commission offices for prompt effectuation." The Department of Justice will file an amicus curiae brief before the Supreme Court in *Rivers*.

The 5th, 6th, 7th, 8th, 11th and District of Columbia federal courts of appeals have all issued decisions on the application of the Civil Rights Act to pending cases, concluding that the Act should not be applied to cases that were pending on the date it became law. The 9th Circuit has held unanimously in an expert-fees case that the plain language of the Act showed that it was intended to apply to pending cases and to pre-Act conduct which can still be challenged. The court reasoned that the limitation contained in sections 109 and 402(b) would be surplusage unless the Act generally applied to pending pre-Act cases and to conduct which was still challengeable. In another case the 9th Circuit held on February 9, 1993 that the 1991 CRA applied to pending cases and thus entitled the plaintiff-appellee to pre and post-judgment interest on her damage award in a wrongful discharge suit.

Rivers and Davison v. Roadway Express

The NAACP Legal Defense and Educational Fund along with a Detroit Michigan attorney, filed a petition for review on December 2, 1992, and review was granted on February 22. The only question that the Court agreed to consider is:

"1. Does the Civil Rights Act of 1991 apply to cases that were pending when the Act was passed?

The facts as presented in the petitioner's petition for review are:

"Rivers and Davison worked...for Roadway from 1972 and 1973, respectively, until they were discharged in 1986. On August 22, 1986, without the contractually required prior written notice routinely provided to white employees, Roadway managers told Rivers and Davison to attend disciplinary hearings on their...work records. Both petitioners refused to attend because of the inadequate notice. Both were disciplined in their absence. They filed successful grievances complaining of the peremptory, racially discriminatory disciplinary proceedings. In retaliation for their success in the grievance proceedings, however, Roadway again convened disciplinary hearings, again without the requisite notice, and discharged the petitioners on September 26, 1986 after they refused to attend."

Petitioners sued in federal court under 42 U.S.C. section 1981 and Title VII of the Civil Rights Act of 1964 alleging racial discrimination in their discharge. They later also alleged a 1981 claim of retaliation for successfully enforcing the labor agreement. The district court dismissed petitioners' 1981 discharge and retaliation claims after the Supreme Court's subsequent decision in *Patterson* [Court limited the reach of section 1981 by ruling that the law's prohibition of racial discrimination in the making and enforcing of contracts covers hiring, but not problems or behavior such as racial harassment that may arise on the job.] The Court of Appeals for the Sixth Circuit reversed and reinstated the claim of retaliation stating that it survived *Patterson* as section 1981 reaches the ability to enforce contracts and the plaintiffs' "ability to enforce claimed contract rights was impaired because of their race."

The Court of Appeals affirmed the dismissal of the race discrimination in firing on the ground that the CRA 1991 is not to be applied retroactively. On remand under *Patterson*, as applied in this case by the 6th Circuit, plaintiffs must prove race-based retaliation relating to their exercise of a contract right. If section 101 of the CRA 1991 applied, proof of race discrimination in any aspect of the employment relation would entitle the petitioners to relief as the CRA 1991 overturned the *Patterson* decision and made clear that section 1981's prohibition against discrimination covers all aspects of the employment relationship.

The appellants' brief on the merits is due April 30, 1993, and the respondents' brief is due 30 days later. Oral

argument will not be heard until the Fall 1993 term.

Landgraf v. USI Film Products

The Lawyers Committee for Civil Rights Under Law filed a petition for review on October 26, 1992, which the Court granted on February 22, 1993.

The petition for review asserts that Ms. Landgraf filed a discrimination charge with the Equal Employment Opportunity Commission alleging that from September 4, 1984, through January 17, 1986, while she was employed by USI Film Products she was subjected to sexual harassment from a fellow co-worker. The EEOC issued a Notice of Right to Sue and on July 21, 1989, Ms. Landgraf filed suit in U.S. District Court for the Eastern District of Texas alleging sexual harassment under Title VII of the Civil Rights Act of 1964. On May 22, 1991, the District Court found:

- Ms. Landgraf had been subjected to continuous sexual harassment consisting of 'continuous and repeated inappropriate verbal comments and physical contact' from a co-worker, John Williams;
- Ms. Landgraf's direct supervisor, Bobby Martin, had taken no action to halt the harassment, even though Ms. Landgraf reported the harassment on several occasions;
- Remedial actions were eventually instituted after Sam Forsgard, supervisor of personnel matters, conducted an investigation which resulted in corroboration of Ms. Landgraf's allegations, and these actions alleviated the harassment;
- Ms. Landgraf subsequently resigned because she had difficulty getting along with her co-workers, and this situation was unrelated to sexual harassment; and
- Ms. Landgraf 'suffered mental anguish as a result of the sexual harassment she was subjected to while working at USI.'

The District Court held that Ms. Landgraf was the victim of unlawful sexual harassment in violation of Title VII of the Civil Rights Act of 1964 but that she was not constructively discharged within the meaning of *Bourque v. Powell Electrical Manufacturing Co.*, 617 F.2d 61 (5th Cir. 1980) and thus was not entitled to relief, i.e., back pay. [Constructive discharge occurs when employer created or employer tolerated working conditions are so unpleasant that a reasonable person would feel compelled to resign.]

Ms. Landgraf appealed from the dismissal of her constructive discharge claim and also asserted that the compensatory and punitive damages and the jury trial provisions of the Civil Rights Act of 1991 which were enacted after the District Court's decision were applicable to her case. On July 30, 1992, the Court of Appeals for the Fifth Circuit affirmed the district court's ruling and rejected her argument as to the applicability of the 1991 CRA which was enacted on November 21, 1991, stating that the compensatory and punitive damages sections of the Act did not apply to conduct occurring before [the Act's] effective date.

SUPREME COURT GRANTS REVIEW OF SEXUAL HARASSMENT CASE

On March 1, 1993, the Supreme Court granted review of the judgment and opinion of the U.S. Court of Appeals for the Sixth Circuit affirming the judgment of the district court in a sexual harassment case brought under Title VII of the Civil Rights Act of 1964, *Harris v. Forklift Systems*, No. 92-1168. The plaintiff alleges that she was constructively discharged because of a sexually hostile work environment created by the company's president.

The question presented to the Court is:

"Is a plaintiff in a sexual harassment case also required to prove, in order to prevail, that she suffered severe psychological injury when the Trial Court has found that she was offended by conduct that would have offended a reasonable victim in the position of the plaintiff?"

Background

Title VII of the Civil Rights Act of 1964 prohibits discrimination against any individual with respect to compensation, terms, conditions or privileges of employment because of the individual's race, color, religion, sex, or national origin. In 1986, the Supreme Court held in *Meritor Savings Bank v. Vinson*, 477 U.S. 57, that a work environment violated Title VII where sexual harassment was "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." The Court went on to state that "one can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers."

Three federal circuits the 6th, 7th, and 11th have held that to prevail in a sexual harassment claim under Title VII, the plaintiff must prove that the conduct would have offended a reasonable person **and** that the victim suffered serious psychological injury because of the conduct. In contrast, three other circuits the 3rd, 8th, and 9th have held that the plaintiff need show only that the conduct would have offended a reasonable person.

Facts of the Case

Teresa Harris was employed by Forklift Systems, Inc. as a Rental Manager from April 22, 1985 until October 1, 1987. During this time she was the object of a pattern of sex-based derogatory conduct from the president of the company, Charles Hardy, as were other female employees. The conduct included the following:

"Hardy stated to plaintiff in the presence of other employees at Forklift, 'You're a woman, what do you know,' on a number of occasions during the period of plaintiff's employment, and 'You're a dumb ass woman,' at least once....

"Hardy asked plaintiff and other female employees, but not male employees of Forklift, to retrieve coins from his front pants pocket....

"Hardy threw objects on the ground in front of plaintiff and other female employees of Forklift, but not male employees, and asked them to pick the object up, thereafter making comments about female employees' attire..."

Harris testified that by August 1987, "she was experiencing anxiety and was emotionally upset because of Hardy's behavior. She did not want to go to work; she cried frequently and began drinking heavily; and her relationship with her children became strained." She met with Hardy in August to complain of her treatment and he indicated that he had meant the comments as a joke, was unaware that she took them otherwise, and would refrain from such behavior in the future. Shortly, after the meeting, the sexual harassment on the part of Hardy resumed. In September, Hardy made a comment to Harris that suggested she had promised a customer sexual favors in order to obtain a contract. On October 1, Harris left her place of employment, and on October 5 filed a complaint with the Equal Employment Opportunity Commission. She filed a complaint seeking damages and injunctive relief in the U.S. District Court for the Middle District of Tennessee on July 7, 1989. The case was tried before a U.S. Magistrate who issued his Report and Recommendation on November 28, 1991. The Report and Recommendation was adopted by the District Court on January 18, 1991. On September 17, 1992, the Sixth Circuit issued its opinion affirming the District Court.

The District Court found that Hardy's "behavior was crude and vulgar and would have offended a reasonable female manager." However, the court dismissed Harris' complaint finding that she had not suffered serious psychological injury." The Magistrate's Report and Recommendation states:

"I believe that some of Hardy's inappropriate sexual comments, especially this last one, offended plaintiff, and would offend the reasonable woman. However, I do not believe they were so severe as to be expected to seriously affect plaintiff's psychological well-being. A reasonable woman manager under like circumstances would have been offended by Hardy, but his conduct would not have risen to the level of interfering with that person's work performance.

"Neither do I believe that plaintiff was subjectively so offended that she suffered injury, despite her testimony to the contrary. Plaintiff repeatedly testified that she loved her job. She and her husband socialized with Hardy and his wife, and plaintiff often drank beer and socialized with Hardy and her co-workers. Plaintiff herself cursed and joked and appeared to her co-workers to fit in quite well with the work environment. The channels of communication were open between plaintiff and Hardy, but plaintiff was not inspired to broach the issue with him until she had been working at Forklift for

over two years. Although Hardy may at times have genuinely offended plaintiff, I do not believe that he created a working environment so poisoned as to be intimidating or abusive to plaintiff....

"As plaintiff has not shown that she was subjected to a hostile work environment, neither can she show that she was constructively discharged. An employee is not constructively discharged unless she can show that a reasonable person in her shoes that is subjected to the same working conditions would have found the working conditions so unpleasant that she would have felt compelled to resign...."

The petitioners have requested and received additional time to file their brief. It is due April 30, and respondents have 30 days from that date to file their responsive brief. Oral argument will be heard in the Fall 1993 term.

EEOC WINS FIRST SUIT UNDER THE AMERICANS WITH DISABILITIES ACT

On March 19, 1993, in the U.S. District Court in Chicago, Illinois, a jury returned a \$572,000 verdict in the first case brought by Equal Employment Opportunity Commission under the Americans with Disabilities Act, *EEOC v. AIC Security Investigations*. The Chicago firm of AIC Security Investigations, Ltd., and its owner Ruth Vrdolyak were charged with employment discrimination for discharging the firm's Executive Director, Charles H. Wessel, because he had terminal lung cancer.

Background

The employment title of the ADA provides that an employer, employment agency, labor organization, or joint labor-management committee may not discriminate against a "qualified individual" with a disability because of the disability in regard to any term, condition or privilege of employment. The bill covers employers of 15 or more employees.

Under the law a qualified person means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.

Charles Wessel was employed at AIC from February 1986 until he was fired on July 31, 1992. Wessel was diagnosed as having lung cancer in June 1987. He underwent surgery for his condition and returned to work. In July 1991 he became ill again and was again diagnosed with lung cancer for which he received treatment and returned to work. In April 1992 two additional tumors were discovered and in June 1992 another two, and Wessel was informed by his doctors that the condition was terminal and that he had six months to two years to live. He began receiving radiation treatments to help prolong his life.

AIC contended that Mr. Wessel was not a qualified individual with a disability because regular full-time attendance was necessary to perform the responsibilities of Executive Director and Mr. Wessel could not perform these duties regardless of any reasonable accommodation. The EEOC was able to demonstrate to the jury that Wessel was able to perform his job despite his illness and that at no time prior to his firing was Wessel informed by anyone at AIC that his performance was found lacking.

The award includes \$22,000 in back pay, \$50,000 in compensatory damages and \$250,000 each against AIC and owner Ruth Vrdolyak in punitive damages.

A spokesperson for the company had indicated to the press that they plan to appeal the decision. The judge is considering motions on the issue of whether there are limits to the damages that can be awarded under the ADA.

ADA Complaints at EEOC

Complaints filed with EEOC under the Americans with Disabilities Act account for 13 percent of the agency's overall complaints. Since the employment provisions of the ADA went into effect in July 1992, there have been 5,500 complaints filed under that title and the rate is increasing: 1,200 were filed in February 1993, nearly double the number filed in October 1992. The ratio of resolutions to the number of complaints

received is lower for the ADA than for other statutes; during the last seven months 75 percent of all the complaints received have been resolved compared to 10.9 percent for ADA complaints. A larger percent of the complaints involve accommodation (20.8) and hiring (8.9) than complaints under other statutes where the corresponding percentages are 2.6 and 8.9.

CIVIL RIGHTS AND ENVIRONMENTAL GROUPS UNITE TO ADDRESS ENVIRONMENTAL JUSTICE

A number of civil rights and environmental organizations are working with Members of Congress and their staff to draft legislation to address the issue of environmental justice or racism. Professor Robert D. Bullard, Professor of Sociology at the University of California, defines environmental racism as "any [environmental] policy, practice, or directive that, intentionally or unintentionally, differentially impacts or disadvantages individuals, groups, or communities based on race or color. The term also refers to exclusionary and restrictive practices that limit participation by people of color in [environmental] decision-making boards, commissions, and staffs."

The Executive Committee of the Leadership Conference on Civil Rights recently endorsed the environmental justice issue as a legislative priority. The United Church of Christ has long been a leader in the area and in 1987 issued a report on the distribution of hazardous waste sites in the U.S. (see background below). The NAACP Legal Defense Fund has launched a new legal campaign to secure environmental justice, and recently helped a predominantly African-American and Latino community in Palm Beach County, Florida prevent a school board from building a high school on land containing toxic waste.

In March of this year, the Lawyers' Committee for Civil Rights Under Law held a conference in Washington, D.C. to look at ways to reverse the pattern of environmental discrimination against people of color and the poor. Barbara Arnwine, Executive Director of the Lawyers Committee, said that "across the nation, people of color are being threatened by air, water, and soil pollution, pesticides, and other hazards caused by landfills, incinerators, industries, and toxic waste dumps. In Dallas, Texas, African American and Latino families live in the shadow of a lead smelter and watch technicians from the Environmental Protection Agency, wearing protective moonsuits, excavate the contaminated school playground where their children play. Navajo teenagers in Arizona, who live near uranium mines, have an incidence of organ cancer 17 times higher than the national average. More than 50 Native American communities have been approached by private industries that seek to place landfills, incinerators, and sludge pits on Indian lands."

Ms. Arnwine said that the Lawyers' Committee will work with civil rights and environmental groups "to devise new legal and policy strategies to challenge environmental racism in America."

Carol Browner, Administrator of the U.S. Environmental Protection Agency, addressed the Lawyers Committee conference and pledged her and the Clinton Administration's "deep commitment" to finding solutions to this problem. She said that it should come as no surprise to anyone that poor and minority communities have been asked to bear the burden of environmental waste and that the groups represented at the conference deserved the credit for bringing this issue to the forefront. Administrator Browner said that over the next four years there will be a change in attitude at EPA, a recognition of the issue and incorporation of the concern into everything that is done at EPA.

EPA has an Office of Environmental Equity and Ms. Browner identified the need for this office to undertake education and outreach, community economic development, and technical and financial assistance. She also said that she supports integration of equity programs across all divisions of EPA. Browner identified the need for EPA to do a better job to get the information from environmental justice groups, to improve the health effects data base, to target enforcement actions and to identify the "hot spots". She called for open lines of communication between EPA and the environmental justice community. Finally, she said she was committed to establishing a workforce at EPA that is more culturally and racially diverse at all levels.

Background

Several studies have documented that race is the factor most predictive of exposure to environmental toxins. The National Law Journal reported in September 1992:

"There is a racial divide in the way the U.S. government cleans up toxic waste sites and punishes polluters. White communities see faster action, better results and stiffer

penalties than communities where blacks, Hispanics and other minorities live. This unequal protection often occurs whether the community is wealthy or poor."

The National Law Journal's investigation of this issue included a computer-assisted analysis of census data, review of the civil court case docket of the Environmental Protection Agency, and the agency's own record of performance at 1,777 Superfund toxic waste sites.

The major findings of the investigation are:

"Penalties under hazardous waste laws at sites having the greatest white population were about 500 percent higher than penalties at sites with the greatest minority population, averaging \$335,566 for the white areas, compared to \$55,318 for minority areas.

"The disparity under the toxic waste law occurs by race alone, not income. The average penalty in areas with the lowest median incomes is \$113,491, 3 percent more than the \$109,606 average penalty in areas with the highest median incomes.

"For all the federal environmental laws aimed at protecting citizens from air, water and waste pollution, penalties in white communities were 46 percent higher than in minority communities.

"Under the giant Superfund cleanup program, abandoned hazardous waste sites in minority areas take 20 percent longer to be placed on the national priority action list than those in white areas.

"In more than half of the 10 autonomous regions that administer EPA programs around the country, action on cleanup at Superfund sites begins from 12 to 42 percent later at minority sites than at white sites.

"At the minority sites, the EPA chooses 'containment,' the capping or walling off of a hazardous dump site, 7 percent more frequently than the cleanup method preferred under the law, permanent 'treatment,' to eliminate the waste or rid it of its toxins. At white sites, the EPA orders treatment 22 percent more often than containment."

In 1983, a decade ago, the General Accounting Office undertook an investigation of the sites of hazardous waste facilities and the race and socioeconomic status of the surrounding communities in the Environmental Protection Agency's Region IV (Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina and Tennessee). GAO found that three of the four off-site hazardous waste landfills were located in majority African-American communities. While African-Americans comprised one-fifth of the region's population, three-fourths of the landfills were located in African-American communities.

In 1987, the United Church of Christ, a leader in the environmental justice movement, issued a report that reported that "the proportion of residents who are minorities in communities that have a commercial hazardous waste facility is about double the proportion of minorities in communities without such facilities. Where two or more such facilities are located the proportion of residents who are minorities is more than triple." The study also found that race was the single best predictor of the location of commercial hazardous waste facilities even after controlling for community characteristics of average household income, and average value of home.

The study also found:

- Three out of five African Americans live in communities with abandoned toxic waste sites.
- 60 percent (15 million) of African Americans live in communities with one or more abandoned toxic waste sites.
- Three of the five largest commercial hazardous waste landfills are located in predominantly African American or Latino communities and account for 40 percent of the nation's total estimated commercial landfill capacity.
- African Americans are heavily over represented in the population of cities with the largest number of abandoned toxic waste sites, which include Memphis, St. Louis,

Houston, Cleveland, Chicago, and Atlanta.

An analysis by Professors Paul Mohai and Bunyon Bryant of the School of Natural Resources, University of Michigan, of 15 empirical studies which looked at the distribution of environmental hazards by income and race found both a class and race bias.

"Furthermore, [they found] that the racial bias is not simply a function of poverty...All but one of the 11 studies which have examined the distribution of environmental hazards by race have found a significant bias. In addition, in 5 of the 8 studies where it was possible to assess the relative importance of race with income, racial biases have been found to be more significant. Noteworthy also is the fact that all 3 studies which have been national in scope and which have provided both income and race information have found race to be more importantly related to the distribution of environmental hazards than income. Taken together, these findings thus appear to support the assertion of those who have argued that race has an additional effect on the distribution of environmental hazards that is independent of class."

Mohai and Bryant also did an analysis of the distribution of commercial hazardous waste facilities in the Detroit metropolitan area using multivariate analysis "to weigh the relative strength of the relationship of race and income with the distribution of the sites." They found that the relationship between race and the location of commercial hazardous waste facilities in the Detroit area is independent of income and that it is race that is the best predictor. In the Detroit area, the minority residents were 48 percent of the residents living within one mile of a commercial hazardous waste facility; 39 percent of residents from one to one and a half miles; and 18 percent of those more than one and a half miles. For those residents living below the poverty line, the corresponding percentages were 29, 18, and 10.

For your information....

On March 1, 1993, the Milton S. Eisenhower Foundation issued a report to commemorate the 25th Anniversary of the National Advisory Commission on Civil Disorders

In its 350-page report, *Investing in Children and Youth, Reconstructing Our Cities: Doing What Works to Reverse the Betrayal of American Democracy*, the foundation concludes:

"Overall, in spite of some gains since the 1960s but especially because of the federal disinvestments of the 1980s, the famous prophesy of the Kerner Commission, of two societies, one black, one white separate and unequal is more relevant today than in 1968, and more complex, with the emergence of multiracial disparities and growing income segregation."

The Foundation asks that the nation invest in its children, youth, and urban infrastructure at a level that catches up with countries like France, Germany and Japan.

Copies of the report can be obtained by writing the Foundation, Suite 200, 1660 L Street, N.W., Washington, D.C. 20036.

The National Women's Political Caucus' 11th Biennial National Convention, "Changing the Face of American Politics", will be held in Los Angeles, California on July 8-11. Political leaders Ann Richards, Kathleen Brown, U.S. Senators, Congresswomen, Cabinet Members, and state officials will participate in the convention. For more information, contact Kris Munro at the NWPC national office, (202) 898-1100.

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Ralph G. Neas, Executive Director

Karen McGill Arrington, Deputy Director

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