ORIGINAL

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-1979

TITLE MERITOR SAVINGS BANK, FSB, Petitioner V. MECHELLE VINSON, ET AL.

PLACE Washington, D. C.

DATE March 25, 1986

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IN THE SUPREME COURT OF THE UNITED STATES

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MERITOR SAVINGS BANK, FSB, :

Petitioner, :

v. : No. 84-1979

MECHELLE VINSON, ET AL. :

- -x

Washington, D.C.

Tuesday, March 25, 1986

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:12 o'clock a.m.

APPEARANCES:

F. ROBERT TROLL, JR., ESQ., Washington, D.C.;
on behalf of Petitioner.

PATRICIA J. BARRY, ESQ., Grover City, Cal.;
on behalf of Respondents.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: The Ccurt will hear arguments first this mcrning in Meritor Savings Bank against Vinscn.

Mr. Troll, you may proceed whenever you're ready. You may elevate that lectern if you wish. The other direction.

(Pause.)

ORAL ARGUMENT OF

F. ROBERT TROLL, JR., ESQ.

ON BEHALF OF PETITIONERS

MR. TROLL: Mr. Chief Justice, may it please the Court.

The primary question in this case is whether a corporate employer is automatically liable under Title VII for a supervisor's sexual advances toward a subordinate even though the employer did not know about the advances and never had a chance to stop them.

The district court, after taking eleven days of evidence, found that the employee had suffered no Title VII discriminatien and it rendered judgment against her. The district court also found that the bank had nc nctice of the supervisor's alleged discrimination and therefore it could not be liable as a matter of law. The Court of Appeals reversed and

remanded.

Let me turn to the specific facts of this proceeding. Ms. Vinson, plaintiff in this case, went to work as a teller trainee at one of the bank's branch offices in September 1974. Over the next four years, she was promoted to teller, head teller, and finally to assistant branch manager. It was undisputed at trial that these promotions were based on merit.

Ms. Vinson's immediate supervisor throughout this period was Sidney L. Taylor. Mr. Taylor was the branch manager and an assistant vice president. At trial Ms. Vinson claimed that she and Mr. Taylor began a sexual affair in May 1975, to which she consented out of fear of losing her job.

She claimed that for the next two and one-half years Mr. Taylor repeatedly demanded sex from her and otherwise harassed her physically and verbally. But she admitted that she never complained to the bank about Mr. Taylor, even though she herself was a supervisory employee and had regular contact with higher bank officers.

Mr. Taylor denied having a sexual relationship with her, and he further denied all of her accusations of harassment. He offered evidence that just before Ms. Vinson left the bank and filed this lawsuit that they

had had a continuing dispute about her failure to carry cut his instructions tc train a new teller.

The bank showed that it had a written policy expressly prohibiting sex discrimination and had appointed one of its senior cfficials as its EEO cfficer to enforce the non-discrimination policy. It also had a written grievance procedure for resclving employee complaints.

QUESTION: Counsel, Mr. Taylor is not here, is he?

MR. TROLL: He is not before this Court.

QUESTION: Have yeu represented him in the past?

MR. TROLL: Nc, we have not. We have represented strictly the bank in all proceedings before the district ccurt and the Ccurt of Appeals.

QUESTION: Is he any longer employed by the bank?

MR. TROLL: Although I don't think it's part of the record, it is my understanding that he is still employed with the bank and is still at the branch premises where the alleged incidents occurred.

The bank denied that Ms. Vinson or anyone else had ever complained about any harassment or any other discriminatory activity. The bank alsc showed that Ms.

Vinson had been offered routine transfers away from Mr. Taylor to other bank departments, but that she had turned these down.

Judge Penn found that Ms. Vinson's participation in any sexual affair with her supervisor, if indeed there was one, was voluntary and had nothing to do with employment. In so finding, Judge Penn necessarily disbelieved her testimony about Mr. Taylor's harassment and coercion.

In fact, the court pointedly referred to testimony from one of Ms. Vinson's own witnesses, a co-worker, who said that Ms. Vinson did not appear to be afraid of Mr. Taylor.

Judge Penn also expressly found that the bank was without notice of any sexual improprieties. The court said -- and I'm reading from Judge Penn's findings: "The alleged sexual harassment involving Mechelle Vinson was not reported by her or by anyone on her behalf to the police or to any officials at the association."

And he also said: "Mechelle Vinson never filed an informal or formal grievance against defendant Sidney L. Taylor, pursuant to the Association's employee manual."

The district court's findings of fact not only

support, but indeed compel, the conclusions both that Ms. Vinson was not the victim of sexual harassment and that the bank could not be liable for Mr. Taylor's conduct without having been placed on some form of notice.

Despite these findings, the Court of Appeals reversed and remanded the case on three grounds. First, the Court of Appeals said that the trial court failed to consider whether the employee had a claim based on a sexually offensive work environment, even though she lost no promotions or other job benefits.

Second, the Court of Appeals said that evidence of the employee's own voluntary sexual behavior at work should not have been admitted at trial.

Third and most unsettling, the Court of Appeals stated that an innocent employer is liable automatically for a supervisor's sexual conduct.

QUESTION: Mr. Troll, do you concede that the trial court simply didn't handle the case as one involving a recognition of a sexual harassment or hostile environment type claim?

MR. TROLL: We would concede, Your Honor, that at the time this case was tried before Judge Penn, of course, that theory of law had not been applied to sexual harassment cases.

QUESTION: Okay. So you agree that the district court really didn't try the case with that theory in mind.

MR. TROLL: We agree that he did not. However, I would hasten --

QUESTION: Now, do you agree today that that is a valid claim or could be a valid claim under Title VII?

MR. TROLL: As we've mentioned in our brief, if the employee has sustained some form of tangible job detriment we feel indeed it would be cognizable.

QUESTION: Well, even without detriment other than the suffering that occurs in the hostile environment itself, do you agree that such a claim might exist? I notice that the Solicitor General in an amicus brief suggests that there is such a claim.

MR. TROLL: They do in fact suggest that, Your Honor. It is our position that if there is some form of tangible job benefit over and above pure psychological or emotional harm, that yes, there would indeed exist such a claim.

But in analyzing that particular issue in the case, it appears to us, as we've argued in our brief, that Congress was concerned with tangible economic loss, not with psychological or emotional injury.

QUESTION: Would you say that if it were a racial harmful environment claim that a tangible effect on employment is a necessary element of such a claim?

MR. TROLL: We would believe, Your Honor, that a reasoned argument could be made contrary to our position. Simply put, we felt that, because this Court had never before considered the issue, because the legislative history did not address psychological or emotional harm but only tangible economic loss, that that matter should be raised as it was.

QUESTION: Do you think the principle should apply similarly in a sexual harassment claim as it would to a racial?

MR. TROLL: Yes, we do.

The Court of Appeals secondly said that evidence of the employee's own voluntary sexual behavior at work should not have been admitted. We submit that the Court of Appeals was wrong for ordering a remand in this case.

A remand is pointless and unnecessary. First, the one to one sexual relationship and harassment Ms. Vinson alleged in this case, even if true, is not a condition of employment under Title VII. Therefore, there is no need for the case to go back to the trial judge for further consideration.

Second, regardless of whether --

QUESTION: Let me interrupt you right there. I'm not sure I understand your argument. You say it's not a condition of employment. That means there is no such thing as a sexual harassment hostile environment claim.

MR. TROLL: Under the allegations in this case of a one to one sexual relationship, where the employee has remained in the environment for over a period of four years, we submit there is not, Your Honor.

QUESTION: Because in effect the claim just has been waived, or what is the theory? I mean, you're not denying that there can be such a case?

MR. TROLL: I'm not denying that there can be such a case. But in this particular case, it is our argument that the employee suffered no tangible job loss whatsoever, that she suffered --

QUESTION: Does that mean even if there were psychological harm, it would be --

MR. TROLL: It would be our feeling that if there was psychological harm or emotional disturbance as a result of this conduct, that it would in fact constitute a state tort remedy and that would be where this employee would seek relief.

QUESTION: I see. This is I guess another way

of stating your answer to Justice O'Connor, that there must be some tangible loss of job economic benefit.

MR. TROLL: In order to measure, in order to show what exactly occurs.

QUESTION: Wasn't the Respondent fired?

MR. TROLL: No, she was not, Your Honor.

QUESTION: How did she become unemployed?

MR. TROLL: The facts of this record indicate that the Respondent here filed this lawsuit before she became unemployed. She then called in sick the following day, indicated she would be on indefinite sick leave, and she thereafter failed to return to her employment. And some 60 days later, she sent a letter saying she resigned due to harassment, on the same date a letter had been sent to her.

QUESTION: Do you rely fully on the point that the bank was not notified?

MR. TROLL: Absolutely.

QUESTION: Isn't that your point?

MR. TROLL: The point is the bank was never notified.

QUESTION: Now, where is the statute or anyplace else do you get the need to notify the bank?

MR. TROLL: Well, Your Honor, in reading the statute, of course, as we've indicated in our brief, it

requires intentional discrimination. We feel that the clearest indication of intent, an intend to discriminate, comes from a notice and opportunity to cure rule, which clearly demonstrates what the employer's intent is.

We read it therefore out of the intentional requirement of the statute.

QUESTION: What type of protest do you want?

MR. TROLL: Pardon me, Your Honor?

QUESTION: Do you need a written one or oral?

MR. TROLL: No, sir. It is our opinion that any form of notice will suffice if in fact the notice is given to an employee internally of sufficient authority to control the situation, to stop the harassment in its tracks.

QUESTION: Well, they did have notice after she filed the charges.

MR. TROLL: We had notice once this lawsuit was filed.

QUESTION: May I ask on that point, do I correctly read your brief to indicate that you would not make the same notice argument if it were a quid pro quo type of claim? And if so, why do you distinguish between the two?

MR. TROLL: We don't necessarily distinguish

between the two, Your Honor. We feel that a notice requirement, at least in this case, is absolutely essential. In a quid pro quo case, however, of course, a supervisor may act with the authority actually vested in it by the employer in making an employment decision about an employee.

QUESTION: Yes, but is that any different from acting with respect to the conditions, working conditions around the office?

MR. TROLL: The problem is is that in one case the intent of the employer can be measured, whereas in the other it cannot unless there is in fact notice to the employer.

QUESTION: Well, Mr. Troll, isn't supervision -- isn't part of supervision the creation of a productive work environment and the proper management of the employees who are supervised?

MR. TROLL: I would agree with that, Justice O'Connor. The particular problem here is that the --

QUESTION: Why wouldn't the agency theory then cover an assumption that the supervisor is going to create a proper and productive work environment for the employees being supervised?

MR. TROLL: The employer here has in no way authorized supervisory personnel to harass its other

subordinate employes, such that under an agency concept the acts of the supervisor would be outside the scope, actual or apparent, of the supervisor, and Title VII would probably not impose any liability.

It is our position that the statute imposes a direct form, rather than an indirect form, of liability.

QUESTION: Well, but if the supervisor discharged an employee within his apparent authority to do so, but his real reason was a racial discriminatory reason, do you think the employer has a defense?

MR. TROLL: I think that the employee then has a duty to go forward to someone at the employer and to notify the employer. Once that notice is received by the employer, the employer I feel then has a duty to investigate and, if it in fact determines that the employee was discharged for a discriminatory reason, to stop the discrimination, to take prompt action to correct the problem.

It is our position in a case such as this that the plaintiff must show defendant knew about the offensive environment and had a chance to correct it before that defendant can be held liable. Our position is consistent with the language of the statute. It furthers the objective of Title VII and, above all, it

is fair.

QUESTION: Mr. Troll, can a supervisor who is not an employer be made a defendant in a Title VII action?

MR. TROLL: It is our understanding that, under the definitional section of the statute, an agent of the employer could include a supervisor.

QUESTION: So that a supervisor who was not an employer could be named as a defendant?

MR. TROLL: You're saying is not an employer. You mean in the meaning of the statute, Your Honor?

QUESTION: Well, I mean, supposing that in this case Ms. Vinson had simply decided to bring a Title VII action against the supervisor.

MR. TROLL: That is our reading of the statute, Your Honor; that would be perfectly within the statute and within its meaning.

QUESTION: So you do not have to be an employer in your view to be named a defendant?

MR. TROLL: That is correct, that would be our feeling.

Let me begin with the statute. Section 706(g) requires a finding that a defendant intentionally engaged in the unlawful employment practice. Intent presupposes knowledge or at least reason to know. When

a corporation is the defendant, how does the fact finder determine corporate intent, as he is obligated to do under the statute?

QUESTION: But of course, supposing you had just a common law fraud action, where your fraud required intent to deceive. Now, a salesman for the corporation, if that salesman has intent to deceive, couldn't the corporation be held liable even though you couldn't show that the board of directors know about the salesman's intent to deceive?

MR. TROLL: It would depend upon, I think, some further circumstances: the scope of the authority actually vested, the scope of the apparent authority of the salesman.

And in fact, there is absolutely no apparent or real authority to harass fellow employees. It's clear that the supervisor is there for the purpose of supervising employees, not harassing them. That is not what's intended by the employer in the common law setting.

And if in fact there is an intentional tort, if you will, committed, the employer may well not be liable.

QUESTION: May I ask you on that question, supposing the harassment, if it did occur -- and of

course, we don't really know exactly what did happen here. But assume that there were ten employees and a supervisor, and nine of the employees harassed the other, the tenth.

The supervisor just sat there and watched and didn't do anything about it, but nobody ever reported it to the home office. Would you make the same argument then?

MR. TROLL: Well, under the EEOC guidelines there would have to be notice in that case, and it would be my feeling that, if the supervisor was charged with responsibility, as he would be, with maintaining a good working environment, you couldn't determine the corporate intent, however, unless one of those employees complained above the supervisor. There'd be no way of knowing.

QUESTION: The answer is you would make the same argument?

MR. TROLL: I would make the same argument. There would be no way of knowing what the employer intended until the employer knew what was going on.

QUESTION: Well, there certainly are a substantial number of lower court cases dealing with, for example, racial harassment by co-employees, that don't adopt your theory at all. And they go off on the

theory that if the supervisor knows or has reason to know of the racial environment claims of co-employees, that's enough.

Don't you agree --

MR. TROLL: There are several cases --

QUESTION: -- that there is a body of opinion?

MR. TROLL: There are several cases of that ilk. A close examination also shows in those cases that some form of management knew about what was going on and failed to stop the harassment.

QUESTION: Well, but some form of management, of course, is the supervisor. He's the person in place and who's in charge of trying to protect the work environment for the employees. That's part of the job.

MR. TROLL: We would submit that the majority of those cases do involve employer toleration of a condition. That of course is not our case here. The employer did not tolerate any form of working environment.

QUESTION: I thought that the district court kept out evidence that was offered of the supervisor's treatment of other employes.

MR. TROLL: As the district court said in its opinion, some of that form of evidence was allowed in in

the plaintiff's case in chief, some of it was not. But the plaintiff here concedes, and conceded before the lower court, that that case -- that evidence came in in this case, albeit haphazardly and in unplanned fashion. But there was an express concession that it came in.

The reason why it really doesn't make any difference whether that did or did not come in are the ultimate two legal defenses that the bank has in this case: first, that this was a voluntary relationship, indicating that the advances were welcomed by the plaintiff, they were not unwelcome; and secondly, in any event, the bank was without any notice whatsoever of this environmental problem if in fact there was one.

QUESTION: To whom do you have to give the notice to be able to say the employer knew?

MR. TROLL: We think and we submit that internally notice should go to someone with requisite authority --

QUESTION: Well, who is that? You can't just notify a corporation. You have to notify somebody.

MR. TROLL: Well, in this particular case --

QUESTION: Would the supervisor's boss, this particular supervisor's boss, be adequate, that you gave him notice?

MR. TROLL: At some point in time you would

reach a corporate level --

QUESTION: Well, which? What about in this particular case? Where would notice have to go? You know your client, so --

MR. TROLL: In this particular case, Your Honor, we feel that notice should have gone to the EEC officer, with whom the plaintiff had frequent contact. It's as simple as that. She had discussions with him. The record indicates she talked with him.

QUESTION: What officer?

MR. TROLL: The equal opportunity employment officer that this bank had in place.

QUESTION: Well, did he have any authority over the supervisor?

MR. TROLL: Yes, sir, he certainly did, and the record so indicates.

QUESTION: Well, was that officer an officer of the bank?

MR. TROLL: He was a senior bank officer who had also been designated as the equal opportunity employment official to carry out the bank's policy of non-discrimination.

QUESTION: What level of notice? How high in the hierarchy do you have to go to give notice?

MR. TROLL: It would be our feeling that if

notice goes to one who has requisite authority to correct the situation, that is all that's sufficient.

QUESTION: Well, suppose the vice president was guilty. Would that be notice to the corporation?

MR. TROLL: Well, if you're positing a question in terms of --

QUESTION: I don't want anything added. I just said vice president.

MR. TROLL: If there would still be the president left to complain to, certainly that could be a complaint. But we don't rule out the fact that she could go directly to the EEC.

QUESTION: The Court of Appeals said you couldn't use tort law anyhow.

MR. TROLL: That's true, that's true.

QUESTION: Do you agree with that?

MR. TROLL: We feel that's correct. We feel that there's a separate liability standard under the statute.

The best evidence and the clearest indication is what the defendant does or does not do when the plaintiff complains. Does the employer investigates, take prompt action, or is the complaint met with indifference? Most important is his receptiveness to employee grievances.

In this case, Ms. Vinson did not prove that the bank had actual knowledge. She also did not prove that the bank had any reason to know about it. In sum, she failed to offer any believable evidence of discrimination.

We also feel that the objectives of Title VII are best promoted by basing liability on some form of notice. It encourages employees to speak up promptly, rather than to suffer in silence, and it permits the employer to end the problem before it worsens, and it encourages employers to address the problem because if they do they exonerate themselves from Title VII liability.

Prompt, voluntary action is far superior to a belated federal injunction. There is simply nothing unfair about requiring an employee to speak up when she perceives that her supervisor is harassing her. After all, sooner or later she'll have to make a complaint to someone if she wants Title VII relief.

But there is something, we submit, very unfair about hailing an innocent employer into court for a problem that it was unaware of and would have corrected voluntarily. We submit that Title VII calls upon the court to do equity. It is contrary to equity to hold an innocent employer automatically liable where the

complainant has waited in silence and intensified her injuries.

Notice and opportunity to cure is consistent with the statute, it furthers the statute's goals, and it's fair. We believe that the Court of Appeals's decision must be reversed.

Mr. Chief Justice, I would ask to reserve the balance of my time, please.

CHIEF JUSTICE BURGER: Very well.

Ms. Barry.

ORAL ARGUMENT OF

PATRICIA J. BARRY, ESQ.,

ON BEHALF OF RESPONDENTS

MS. BARRY: Mr. Chief Justice, may it please the Court:

The writ was improvidently granted and should be dismissed by this Court. The bank is asking this Court to rule on whether environmental sexual harassment is prohibited under Title VII. Yet, the bank did not cross-appeal in this case and consequently the issue of whether environmental harassment is actionable under Title VII was not before the Court of Appeals.

Rather, the Court of Appeals determined that the trial court had not considered this case under the legal theory of environmental sexual harassment and

remanded with directions to the trial court to grant Ms. Vinson an adjudication of that claim on the evidence, as stated at 21A of the appendix.

QUESTION: Ms. Barry, did you represent the plaintiff in the action below?

MS. BARRY: Yes, I was the trial attorney. I took over at the stage of motions for summary judgment and I represented her at the trial, which lasted for eleven days, and at the Court of Appeals level.

QUESTION: Did the plaintiff and you on her behalf make clear in the proceedings below that you were proceeding on the basis of a hostile environment theory?

MS. BARRY: Your Honor, in our Respondents' brief it's cited where I say to the trial court: "Your Honor, this evidence is being presented to show the poison environment in which Ms. Vinson found herself." I couched it at that time "pattern and practice." Bundy versus Jackson had not yet been decided. That was decided in January of 1981. We were conducting this trial in January 1980.

I was going on the theory of the Andrus, the D.C. Circuit case of pattern and practice. That is, evidence of how a supervisor treated other members of the protected class, other employees, is evidence that

he treated this particular employee in a discriminatory fashion.

But the trial court repeatedly stated: I only want to hear what happened between Ms. Vinson and Mr. Taylor, and consequently excluded that evidence. It came in in a haphazard fashion, but, contrary to what the bank argues, in my opening brief at pages 38 and 40 I never said all the evidence came in, but that that kind of evidence came in.

It came in under a haphazard fashion, and certainly under no legal theory of environmental harassment. It is clear that the trial court did not believe that such a cause of action existed under Title VII.

QUESTION: May I ask, before you leave that particular point.

MS. BARRY: Yes, Justice.

QUESTION: Which section in your complaint do you rely on as supporting environmental harassment?

MS. BARRY: If you go to the joint complaint, one of the allegations is that there was a pattern of sexual misconduct -- I am paraphrasing -- engaged in by Sidney Taylor, that the bank should have known about and therefore acquiesced in and ratified.

QUESTION: Is that in your complaint that was

filed September 22nd, 1978?

MS. BARRY: That's correct, Justice.

QUESTION: Which paragraph?

MS. BARRY: Begging the Court -- paragraph 14 at page 5 of the joint appendix.

QUESTION: Yes.

MS. BARRY: "Defendant Taylor has also sexually harassed numerous other female employees of the defendant asscciation, and said conduct constitutes a well-known pattern of behavior which has been known to the officials of the defendant association for many years and which thereby and therefore has been condcned by the defendant association."

QUESTION: There's nc mention of environment in that paragraph.

MS. BARRY: That's correct, Your Honor.

At page 20 of the Respondents' brief, there was an objection sustained to evidence proffered to shcw -- and I quote what I'm saying -- "the daily environment encountered whenever Mr. Taylor was in that office." And our citation, Justice, is tc the transcript of January 23rd, volume 3, page 4.

Thus, we have nc factual recerd made by the trial court on the specific legal theory of environmental sexual harassment. This Court has ruled

in Tacon versus Arizona, 410 U.S. at 352, that issues not raised by the Petitioner below would not be ruled on by this Court for the first time, and dismissed the writ of cert as improvidently granted.

Thus, because we are on remand with no final judgment issued by the Court of Appeals, the only finding on the existence of harassment is that there was none at this point. Yet, Petitioner would have the Court rule on employer liability without the trial court considering and ruling on whether environmental sexual harassment existis in this case.

QUESTION: What if we agreed with one of the submissions of the bank, namely that voluntariness is a defense to a suit like this.

MS. BARRY: Well, Your Honor, the question has to be looked at in the context of environmental harassment. That is to say, if the trial court now understands that what Ms. Vinson saw being done to the other women, what she understood being done to the other women before she was made the demand of intercourse, the trial court might just likely recast its findings of fact and determine that perhaps this aspect of voluntariness was no longer there.

QUESTION: Well, the Court of Appeals ruled that voluntariness was irrelevant.

MS. BARRY: It did in the way that the trial court captioned its findings of fact. It found it very ambiguous, because it was cast in a hypothetical finding of fact.

QUESTION: Nevertheless, the Court of Appeals thought that a hostile environment suit was quite proper, and it felt it necessary to rule on the voluntariness and the notice claim.

MS. BARRY: That's right. With respect to the voluntariness, I think the concern was it was unclear to them whether the trial court was considering whether the fact that there appeared to be merely an acquiescence, is that what the trial court meant by voluntariness.

QUESTION: Well, are you defending the Court of Appeals' rulings on notice and voluntariness?

MS. BARRY: I'm certainly defending the Court of Appeals' position on notice. I defend the Court of Appeals' position on voluntariness if it means that, by what the Court of Appeals is saying, that the trial court had to find something more than the fact there was, at least with respect to the first act testified to, no act of violence involved.

QUESTION: It's been suggested that an element is a sexual harassment claim is that the conduct complained of be unwelcome.

MS. BARRY: Yes, Justice.

QUESTION: Is the term "unwelcome" the same as -- does that equate with whether it's voluntary or not, or is there a difference in your view?

MS. BARRY: Well, that again I think goes back to what the Court of Appeals was trying to say. The decisional law uses as a term of art unwelcomeness or welcomeness. It does not talk about voluntariness, because then you get caught up in this word game of, does it mean like, because she acquiesced, therefore she's capitulated her right to later legal redress?

QUESTION: Well, do you think the Court of Appeals had in mind as an element of a sexual harassment claim that the conduct must be unwelcome?

MS. BARRY: Yes. Yes, Justice O'Connor. In fact, it specifically states in part of its opinion that the touchstone of this cause of action has to be that the nature of the advances are unwelcome.

And with respect to that prima facie case, it's well articulated, set out in Henson at 682 Fed. Second at 903-904 --

QUESTION: That's hard to reconcile, Ms. Barry, with -- your view of the unwelcomeness, with the Court of Appeals' ruling that evidence of the complaining employee's work place dress and voluntary

conduct couldn't be admitted.

MS. BARRY: Your Honor, Justice Rehnquist, with respect to evidence of the dress, evidence of the dress by itself without anything more does not make it more likely or less likely under the Federal Rules of Evidence that she welcomed the advances of the supervisor.

QUESTION: Well now, is that for you as a lawyer to say, that no finder of fact could find that relevant?

MS. BARRY: Yes, that dress by itself is so subjective, Justice Rehnquist, that it has little probative value. And to the extent that it has probative value, the federal court has full authority to control the admission of evidence through Rule 4 --

QUESTION: Yes, and the district court in this case controlled it by letting it in.

MS. BARRY: And did so, created such prejudice that he never got to the primary fact-finding responsibility in this case, Justice Rehnquist. He became -- the Court of Appeals surmised that perhaps the trial court did become highly prejudiced by this evidence that it found inadmissible to the primary fact, that is were there sexual advances made and were they unwelcome; that he never determined whether in fact

there was the act of intercourse, whether these advances were made.

We have to keep in --

QUESTION: So you say, then, that evidence of the complaining employee's work place dress and voluntary conduct is not admissible on the issue of whether or not the thing was unwelcome?

MS. BARRY: Justice Rehnquist, what I'm saying to you --

QUESTION: Are you or are you not?

MS. BARRY: No, I'm not saying that. Okay, what I am saying, Justice Rehnquist, is that evidence of dress by itself standing alone is not admissible in a case involving sexual harassment.

QUESTION: Well, of course it isn't standing alone here. There's other evidence as well. So I think you have to consider it in light of all the evidence. Now, what evidence can come in properly on the question of whether it's unwelcome, does the whole picture emerge so that the tryer of fact can make that determination?

MS. BARRY: If we're talking about work place conduct is a sexual harassment case, the California Rules of Evidence -- I think it's 1103 or 1105 -- provides an excellent guidance, and it would be a good guidance for a federal court to follow in making rules

of evidence.

Work conduct related to the alleged perpetrator is relevant.

QUESTION: Ms. Barry.

MS. BARRY: Yes, Justice.

QUESTION: May I ask whether the Court of Appeals found that any of the findings of fact by the district court were clearly erroneous?

MS. BARRY: No, it did not, Justice.

QUESTION: And do you consider you are bound by all 21 of those findings of fact?

MS. BARRY: Yes, unless this Court determines that it would like to review the full record and order the production of the trial transcript.

Justice, I tried on four occasions to obtain the trial transcript. I was without funds. My client was without funds. Of course the trial transcript is very important on making a Rule 52 challenge, and I could not do so because we were without funds and the trial court determined that this case would not make any substantial law.

QUESTION: The final finding by the trial court was that --

(Laughter.)

MS. BARRY: So we didn't get the trial

transcript.

I'm sorry, Justice.

QUESTION: I was just going to say, the final finding was that the plaintiff was not the victim -- this is on page 44A of the petition: "Plaintiff was not the victim of sexual harassment or sexual discrimination."

That puts this Court, it seems to me, in a rather difficult position, doesn't it?

MS. BARRY: Well, Justice, I don't think it does, because the trial court at 44A of the appendix makes it very clear what in its mind constitutes sexual harassment, and the trial court says: "It is without question that sexual harassment of female employees in which they are asked or required to submit to sexual demands as a condition to obtain employment" -- "as a condition to obtain employment" -- "or to maintain employment or to obtain promotions falls within the protection of Title VII."

He was thinking of the positive aspects of employment, keeping your job, getting those promotions. He obviously, that is the trial court, and for good reason -- the guidelines had not yet come out; they came out in April of '80, he decided this case in January of '80, and Bundy had not been decided.

So he was not thinking in terms of, well, what about noxious environment, poisoned with sexual innuendoes, insults, aggressive behavior that was unwanted, that in this case let to a constructive discharge.

But of course, we're not saying that one need prove economic injury, only psychological injury of a sort that creates an environment that is all-pervasive. We're not saying that it's only one isolated act. We agree with Henson in its prima facie case that the employee has a duty to show that it was environmental harassment, Justice.

And for those reasons, I am of the belief that, now that the trial court has instructions from the Court of Appeals to reconsider this case under the theory of environmental harassment -- that is, gets the whole picture -- he will recast his findings of fact. We will ask him, please make a finding of fact on the credibility. Mr. Taylor said nothing happened, and the trial court never made that finding of fact.

My client said something happened and that it was very bad. So we just don't have an issue of the supervisor coming forward and saying that there was a consensual relationship. That's not what was said in this case.

QUESTION: May I ask one more question.

MS. BARRY: Yes, Justice.

QUESTION: In your rebuttal testimony, did you introduce evidence by any other women that they had been harassed?

MS. BARRY: I did not present that at that time. Certainly if a trial court tells me that I can put on some evidence that I couldn't before, I would do it. We did not have the money to recall these women.

QUESTION: But the trial court did say you could have introduced that in rebuttal?

MS. BARRY: In the rebuttal, but there would be no purpose because, unless the defendant, either one of the defendants or both of them, was putting on a case of environmental harassment, it would not, even under the rules of evidence, be proper rebuttal.

As I understand rebuttal testimony, it has to be to controvert that which the defendant has said or to controvert, in a Title VII case under Aukens, to show the proper, legitimate, non-discriminatory reasons for the alleged discrimination was pretextual.

QUESTION: But whatever the reason, so far as this Court is concerned we have only the testimony of your client?

MS. BARRY: You're saying that is lodged with

the Court?

QUESTION: Yes.

MS. BARRY: We have that transcribed, because that's --

QUESTION: Only the testimony of your client as to sexual harassment or as to the environment.

MS. BARRY: That's correct, Your Honor, Justice. And for that reason, it may be well that this go back on remand so that all of the testimony of all of the women can be considered, and then if an appeal is taken, somehow get the money together to get the full trial transcript.

We are at a very complete disadvantage, because in that eleven day bench trial there was testimony presented by a number of women for different evidentiary reasons that the trial court never discussed in its findings of fact.

Now, the court wishes to -- has emphasized in its opening brief that we never raised the evidence question in the Court of Appeals. That is completely correct. This issue of evidence and dress is now before this Court without also having been briefed in the Court of Appeals.

QUESTION: The Court of Appeals decided that question, didn't it?

MS. BARRY: Yes, it did, without it being briefed by either the bank or myself. I made comments because I considered it to be a form of sexual character assassination.

And going back to the earlier question of Justice O'Connor, what about the work place conduct, that is the kind of evidence that could be admitted by the defendant under Aikens saying: look here, there was a consensual relationship, but she welcomed it, and I'm going to show it by the way she acted towards the alleged perpetrator.

What we have here is what we call general character evidence. And it was not ever properly proffered under 608(b). You cannot present specific acts of conduct to impeach the credibility of a witness by extrinsic evidence. You have to ask the person directly and you're estopped there.

They never even asked my client, Ms. Vinson, whether she wore these kinds of clothing.

QUESTION: Well, you don't have to use that sort of evidence as impeaching evidence. You can use it as evidence from which a tryer of fact can deduce a relevant fact, not just as impeaching evidence.

MS. BARRY: Well, the federal rules of evidence frown on using general character evidence as

proof that that person acted in conformity with that character at a specific time, and that's exactly what this evidence was designed to do.

This is not the case of conduct towards the alleged perpetrator. Nobody said, Justice Rehnquist, that she had these conversations in front of Mr. Taylor, or that she directed them to Mr. Taylor. And most importantly, they don't even deal with Mr. Taylor. And most importantly, they do not deal with her sexual conduct with another person, but what she said she fantasized about sexual conduct with another person unrelated to the work site.

It has absolutely no relevancy as a determination of whether there were advances made by Mr. Taylor, which the bank, Mr. Burton, denied were, which Ms. McCullugh denied were made, and which Mr. Taylor denied were made, and that she welcomed them.

How a person having a sex fantasy about an individual totally unrelated to the work site -- it is not alleged or said that she made that statement about the sex fantasy to the alleged perpetrator, in this case the supervisor, or that the content of the fantasy dealt with the supervisor.

And for that reason, it would constitute general --

QUESTION: Well, the district court in a bench trial has a great deal of latitude in deciding what kind of evidence it's admitting. And I think the standards you're setting up are far more restrictive than any decision that's ever come out of this Court.

MS. BARRY: Justice Rehnquist, it would be analogous, for example, in a rape case the tryer of fact certainly would not permit the defendant to present evidence of how the victim dressed to prove the issue of consent. Likewise it should be in a sexual harassment situation.

QUESTION: I'm not entirely sure you're correct. I'm not sure the cases support you on that.

MS. BARRY: In terms of that they could present evidence of how --

QUESTION: In a civil action.

MS. BARRY: Well, Justice Rehnquist, the evidence of dress is so subjective and has so much to do with so many other factors other than proving that that particular individual, that woman, consented to the advances.

QUESTION: This may be a good argument to make to the district court. But after the district court has resolved it against you, with all the discretion that a district court has in admitting evidence in a bench

trial, I just don't think you're going to win in many Courts of Appeals. I think it's very unusual that you won in this particular Court of Appeals.

MS. BARRY: Well, Justice Rehnquist, just once more, just alluding to the California Rules of Evidence --

QUESTION: Well, we're not governed by the California Rules of Evidence, Ms. Barry.

MS. BARRY: Yes, Justice.

QUESTION: We're practicing under federal rules of evidence.

MS. BARRY: Yes. I was just saying that the analogy would be that the federal courts do have -- can control this kind of evidence relating to the general sexual character of the victim.

QUESTION: And the district court did exercise some control. He admitted it.

MS. BARRY: Yes, and for that reason we're arguing that in this particular case, because of what I've just argue to you, Justice Rehnquist, it was wholly irrelevant. Again, I would like to say we're not saying you cannot exclude evidence of how she comported herself.

But in this case the environment was the supervisor. Therefore, how she conducted herself

towards the supervisor is the kind of evidence that would be directly relevant and on point. And in fact, the trial court said over and over again that, I want to hear what happened between Ms. Vinson and Mr. Taylor. And only when they brought in this general sexual character evidence did he say that now a very broad-based kind of evidence would be allowed to come in.

But also underlying that assumption, as I understand the arguments of the Petitioner, Justice Rehnquist, is that the evidence is being proffered for two reasons: either because she fantasized the charges, which is the bank's position and Mr. Taylor's position, the acts never occurred; or it's evidence that, in case you decide to believe her that something happened, that she volunteered to it.

So what we have in this case is just not alternative pleadings, but alternative proof of facts. It either has to go in on one theory or it has to go in on the other, and they have argued in their brief on both theories.

Now, if they're saying that this was evidence of voluntary work place conduct that proved that the relationship was a consensual one, then what they're saying, Justice Rehnquist, is that their own supervisor

committed perjury in a court of law. And for that reason, we have to look carefully at this evidence, because maybe the Court of Appeals was right, the trial court used that evidence, as I say, to jump the gun and say, well, whatever happened, it had to be voluntary and I don't really care what happened.

It's very important in this case to determine what happened, and if we're allowed to go back on remand that would be the first responsibility of the tryer of fact, to determine who is credible in this case, who is telling the truth with respect to the most important issue: Was it Mr. Taylor or was it Ms. Vinson?

QUESTION: Counsel, I might have missed it, but how do you answer the question about notice?

MS. BARRY: With respect to notice, we rely on the definition of employer set out in Section 701(a), which talks about an employer is a person, which is anyone engaged in commerce and employing so many employees, and an agent of that employer.

That is to say, for purposes of Title VII liability there is no imputation of notice. Sidney Taylor becomes the bank because he is a supervisor. Now, in the definitions there is no direct reference of supervisor.

QUESTION: That was when he was out at the

motel?

MS. BARRY: Excuse me, Justice?

QUESTION: He was the supervisor when he was out at the motel?

MS. BARRY: Yes, because the conditions of being out there was, like I have the power to hire you, I have the power to fire you. It was under the conditions of being the supervisor of Ms. Vinson that he extracted this sexual favor from her, and it was only because he was the supervisor, it was only because he was the bank at the Northeast branch, that he was able to accomplish this.

And for that reason, when they say we have to have notice, notice to Sidney Taylor when she told him to stop doing these things was sufficient notice to the bank. Also --

QUESTION: I agree that the statute defines an agent of an employer as an employer himself or herself. But that doesn't mean that -- all that means is there are two employers in this case; one is Taylor and the other is the bank.

But the statute doesn't say that each employer is liable for the acts of the other. It just says that Taylor is an employer.

MS. BARRY: And it is the --

QUESTION: And can be sued for it.

MS. BARRY: That's right, Justice.

QUESTION: I don't see why you think that notice to Taylor is notice to another employer.

MS. BARRY: Well, the employer in the sense of being the collective entity, the bank.

QUESTION: Well, I know. Of course the bank is an employer, and so is Taylor. But why do you conclude that notice to Taylor, who is an employer, is notice to another employer, the bank.

MS. BARRY: Because --

QUESTION: That isn't what the statute says.

MS. BARRY: Well, the statute says that the definition of employer shall include the agent, and --

QUESTION: I agree with you, and all that means is that the agent is an employer.

MS. BARRY: That's correct, and therefore --

QUESTION: Well, that's all it means. It doesn't now -- where do you get the therefore, that therefore notice to an agent is notice to the other employer?

MS. BARRY: Well, it says that the employer is the person, the employer is the agent. So that when you --

QUESTION: Well, that just means an agent is

an employer.

MS. BARRY: Yes. And so you --

QUESTION: That's all.

MS. BARRY: All right. And so you have a collective entity called the bank, made up of individuals who perform the functions on behalf of this collective entity.

QUESTION: Well, that's quite a gloss on what the statute says, I must say. Just you can sue, and in this case you could sue two employers. You could sue Taylor and you could sue the bank.

MS. BARRY: Well, in fact --

QUESTION: And could you sue them both?

MS. BARRY: Yes.

QUESTION: And the only reason you could sue Taylor is not because he was an agent of the bank, but because the statute says you could sue him as an employer.

MS. BARRY: But for purposes of Title VII liability the courts have routinely held that the collective entity, which would be Meritor Bank in this case, Justice, would, if there were discriminatory intent and a discriminatory act proven on the part of Sidney Taylor, the supervisor, then the collective entity becomes liable. And that's important, Justice,

because we --

QUESTION: What about, what would you say if a co-employee, not a supervisor, did this harassing?

MS. BARRY: Then the issue of notice would come into operation.

QUESTION: Well, why? Isn't the co-employee an agent of the bank?

MS. BARRY: No, either under Title VII definitions or even under principles of traditional common law concepts of principal-agency doctrine, that just wouldn't operate.

The theory -- there was a public policy, there's good public policy interests underwriting Title VII.

QUESTION: So you couldn't so a co-employee?

MS. BARRY: Yes, you could.

QUESTION: Under Title VII?

MS. BARRY: I'm sorry. You can't sue. You can sue the employer for Title VII violations if a co-worker engaged in acts of environmental harassment, provided notice is given to the employer.

What is the difference in this case and there the cutoff is is the theory is that the bank or any employer is in the best position to control the actions of the supervisors. They don't have that same kind of

control over co-workers.

They can discipline supervisors, they can send them to seminars. They can do all of these kinds of things.

And by the way, in Title VII law the cases or the courts called upon to construe Title VII liability with respect to the discriminatory actions of a supervisor have uniformly held that the defendants are -- that the defendant employer becomes necessarily responsible for actions of all of its employees in expressing or carrying out feelings of hostility towards women, but the defendant is responsible for acts of supervisory personnel. And that's citing Fechty versus United States Steel Corporation, 353 Fed. Supp. 1177.

QUESTION: Suppose Mr. Taylor was embezzling money from the bank regularly, unknown to anyone else in the bank. The bank discovers it and makes a claim against an insurer, an insurance company that insures against such things.

Would the knowledge of Mr. Taylor about his own embezzlements be imputed to the bank?

MS. BARRY: Chief Justice, I would doubt that to be the case, because there we can distinguish that particular hypothetical from the instant one. Here we're dealing with the employer-employee relationship,

and with respect to the Northeast branch of the Meritor Bank or Capital City Mr. Taylor was the bank for purposes of establishing the employer-employee relationship.

CHIEF JUSTICE BURGER: Your time is expired now.

MS. BARRY: All right.

CHIEF JUSTICE BURGER: The light is covered, but the red light is on.

MS. BARRY: I'm sorry, I had it covered up.

QUESTION: Very good.

CHIEF JUSTICE BURGER: You have two minutes remaining, Mr. Troll.

REBUTTAL ARGUMENT OF

F. ROBERT TROLL, ESQ.

ON BEHALF OF PETITIONER

MR. TROLL: Very briefly, the reason why notice to Mr. Taylor is not notice to the bank is that notice to the actual perpetrator in and of itself can never constitute notice. The perpetrator is motivated to keep his conduct secret and to keep it concealed from his superiors, who may discipline him for it.

This rule requiring notice is particularly heightened in this form of sexual harassment case, where one on one conduct occurs. Simply put, the victim knows

that notice will more than likely not come from her supervisor. If she wishes relief, she must complain.

In the example given, I think, where a complaint is made to a vice president, notice can never go to the perpetrator, but it can in fact go to an EEO officer or somebody higher up, or even to the EEOC.

Thank you.

CHIEF JUSTICE BURGER: Thank you, counsel. The case is submitted.

(Whereupon, at 11:11 a.m., oral argument in the above-entitled case was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#84-1979 - MERITOR SAVINGS BANK, FSB, Petitioner V. MECHELLE VINSON, ET A

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)