

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
**THE SUPREME COURT**  
**OF THE**  
**UNITED STATES**

CAPTION: BETH ANN FARAGHER, Petitioner v. CITY OF BOCA  
RATON.

CASE NO: 97-282

PLACE: Washington, D.C.

DATE: Wednesday, March 25, 1998

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**Supreme Court U.S.**

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 BETH ANN FARAGHER, :

4 Petitioner :

5 v. : No. 97-282

6 CITY OF BOCA RATON. :

7 - - - - -X

8 Washington, D.C.

9 Wednesday, March 25, 1998

10 The above-entitled matter came on for oral  
11 argument before the Supreme Court of the United States at  
12 10:07 a.m.

13 APPEARANCES:

14 WILLIAM R. AMLONG, ESQ., Fort Lauderdale, Florida; on  
15 behalf of the Petitioner.

16 IRVING L. GORNSTEIN, ESQ., Assistant to the Solicitor  
17 General, Department of Justice, Washington, D.C.; as  
18 amicus curiae, supporting the Petitioner.

19 HARRY A. RISSETTO, ESQ., Washington, D.C.; on behalf of  
20 the Respondent.

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1 P R O C E E D I N G S

2 (10:07 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 first this morning in Number 97-282, Beth Ann Faragher v.  
5 the City of Boca Raton.

6 Now, Mr. Amlong.

7 ORAL ARGUMENT OF WILLIAM R. AMLONG

8 ON BEHALF OF THE PETITIONER

9 MR. AMLONG: Mr. Chief Justice, and may it  
10 please the Court:

11 This is an employment discrimination case in  
12 which there are two issues facing the Court. The first is  
13 whether the Court of Appeals applied too narrow a standard  
14 in the application of agency principles to supervisory  
15 liability under Title VII for sexual harassment. The  
16 second is whether the Court of Appeals erred in reversing  
17 the findings of the District Court, who had found  
18 constructive and actual knowledge by an agent of the City,  
19 Robert Gordon, and had also imputed constructive knowledge  
20 to the City through the pervasiveness of the sexual  
21 harassment in this case.

22 The relief that we ask --

23 QUESTION: That isn't precisely the two  
24 questions in your petition, is it?

25 MR. AMLONG: No, Your Honor. It's phrased

1 somewhat differently.

2 QUESTION: So the second question in your  
3 petition you see as basically: Should the Court of  
4 Appeals have affirmed the District Court?

5 MR. AMLONG: Based on the factors I set forth in  
6 the petition, Mr. Chief Justice, that there was the  
7 pervasiveness that could give rise to constructive  
8 knowledge, and it should be re -- clearly erroneous  
9 standard, that there was notice to an intermediate agent,  
10 Mr. Gordon, and that there was no dissemination of the  
11 sexual harassment policy.

12 QUESTION: Well, what -- what do you mean by  
13 permit pervasiveness?

14 MR. AMLONG: I mean, by pervasiveness, Mr. Chief  
15 Justice, that there were eight women who were sexually  
16 harassed by Mr. Terry and/or Mr. Silverman over a period  
17 of 4 years. That's what the record evidence showed. And  
18 that's what the District Court found.

19 QUESTION: So pervasiveness means multiple  
20 victims, then?

21 MR. AMLONG: Pervasiveness can have more than  
22 one meaning. But in this case, yes, it does, Your Honor.  
23 Pervasiveness in the sense of Harris v. Forklift Systems,  
24 could mean one person with -- kind of be secret  
25 pervasiveness without --

1 QUESTION: Secret pervasiveness. That's --

2 MR. AMLONG: A pervasiveness -- a pervasiveness,  
3 Mr. Chief Justice, that would apply only to that person.  
4 In this case, the pervasiveness is not only as to Beth Ann  
5 Faragher, the Petitioner, who was repeatedly and  
6 consistently sexually harassed, but was also to seven  
7 other women. Now, it is that pervasiveness, Your Honor,  
8 that I argue gives rise to constructive notice. It is  
9 that pervasiveness, Your Honor, that differs from the  
10 pervasiveness in Harris.

11 QUESTION: I don't know how -- I mean,  
12 constructive notice, I can't imagine how secret  
13 pervasiveness could ever -- could ever give rise to  
14 constructive notice.

15 MR. AMLONG: Nor can I.

16 QUESTION: Okay. So you're saying that it was  
17 so obvious that the employer must have known about it?

18 MR. AMLONG: Either must have known about it or  
19 was engaged in willful ignorance about it. Did not wish  
20 to know about it. You can't sexually harass eight women  
21 over a 4-year period and not expect the employer to know  
22 about it.

23 QUESTION: The employer is downtown, in -- in  
24 city hall. And all of this is going on across the  
25 highway, on the beach. Now, is -- is it implausible that

1 he would know about it -- that -- that the employer would  
2 not know about it?

3 MR. AMLONG: Not at all, Your Honor. Because,  
4 Justice Scalia, number one, the beach is 1.5 miles from  
5 city hall, roughly the distance from this Court to the  
6 Washington Monument. Number two, corporations throughout  
7 this Nation have offices -- IBM, for example, has offices  
8 throughout the Nation, headquartered in New York. You  
9 can't say that if there was sexual harassment going on in  
10 the IBM plant in Boca Raton, that IBM should not be  
11 responsible for it.

12 Here, they were not -- here, they did not know  
13 about it because of two things. Number one, Robert  
14 Gordon, who was a captain, an intermediate supervisor and  
15 someone who should be expected to have carried the message  
16 forward to city hall, declined to do so when he was told  
17 by --

18 QUESTION: He wasn't asked to do so. I thought  
19 he was asked as a friend. He was told as a friend, and  
20 asked what he thought, as a friend. Isn't that what it  
21 seemed from the testimony?

22 MR. AMLONG: No, Justice Ginsburg. What is in  
23 the testimony is that they did -- and what the trial judge  
24 found -- is that they did find -- that they did hold  
25 Mr. Gordon in very high repute. And that's why they came



1 to him. Mr. Gordon testified, however, that Nancy  
2 Ewanchew, a co-plaintiff below, had asked him repeatedly,  
3 What can you do about this? Can you make this stop?  
4 Other women had complained to him.

5 Did they complain to him as a friend? Yes.

6 Did that take away his status as an agent of the  
7 City? No, Your Honor, it did not.

8 QUESTION: Well, let me ask you about the  
9 third -- what you list under "C." Suppose the City had  
10 had just a fine policy against this kind of conduct. And  
11 it was included in the manual that every employee got.  
12 And it had the telephone number in city hall to call when  
13 incidents like this came up. And everything else is the  
14 same. Would there be Title VII liability for -- what was  
15 it -- Silverman and Terry's conduct on the part of the  
16 City?

17 MR. AMLONG: Yes, Justice Ginsburg, there would  
18 be. And that goes to the second ground on which we seek  
19 to hold the City liable. Which is the invocation of the  
20 kind of agency principles that are embodied in the second  
21 clause --

22 QUESTION: Well, then, what you make -- you seem  
23 to make quite a thing out of this -- there was no  
24 procedure that was -- that was well-known. But now you  
25 say it doesn't make any difference.

1 MR. AMLONG: No, Your Honor. It does make a  
2 difference. Because what we are asking in the 219(2)(d)  
3 argument that we're making is -- and the Court of Appeals  
4 held that to impose liability on the City in those  
5 circumstances, that -- under 219(2)(d) -- that  
6 Mr. Gordon -- I'm sorry -- Mr. Silverman and Mr. Terry  
7 would have had to explicitly threatened Ms. Faragher or to  
8 actually used their power to harm.

9 What we are arguing, Justice Ginsburg, is that  
10 the dynamic of a supervisor/subordinate relationship gives  
11 rise to a reasonable fear of retaliation, so that these  
12 women will put up with this stuff.

13 Now, the City --

14 QUESTION: Is -- is that -- that sounds like  
15 strict liability to me.

16 QUESTION: That sounds like strict liability.

17 MR. AMLONG: No, it does not, Your Honor, with  
18 all due respect. I believe it would be strict liability,  
19 Mr. Chief Justice and Justice Kennedy, if we argued,  
20 perhaps, under 219(1), that they were doing this in the  
21 course of their employment.

22 What we're saying is that there is liability  
23 when they are aided in the commission of the tortious  
24 behavior.

25 QUESTION: Well, but I -- I inferred from your

1 remarks -- maybe improperly so -- that the -- they were  
2 aided, under the 219(d) formulation because of the  
3 subordinate/superior relation.

4 MR. AMLONG: Yes, Your Honor.

5 QUESTION: Well, that's strict liability.

6 MR. AMLONG: No, it's not, Your Honor,  
7 respectfully. Strict liability is --

8 QUESTION: That's strict liability whenever  
9 there is a -- a superior that harasses a subordinate.

10 MR. AMLONG: Strict liability, Justice Kennedy,  
11 is in such instances as somebody convicted of shooting  
12 birds over a baited field, somebody who is shown to have  
13 made a profit on insider trading, in -- in short-swing  
14 investments under 16(b) of the Securities Act of 1934.  
15 Here --

16 QUESTION: Well, could you give us some examples  
17 of situations in which the employer would not be liable  
18 under your hypothesis?

19 MR. AMLONG: Yes, I can, Justice O'Connor. Yes,  
20 I can.

21 QUESTION: Well, would you?

22 (Laughter.)

23 MR. AMLONG: Yes.

24 One example, for example, was in the Bouton v.  
25 BMW of North America case, out of the Third Circuit, where

1 the -- where the company had a strong policy against  
2 sexual harassment, communicated it broadly, that the  
3 plaintiff had herself used before.

4 What we're asking --

5 QUESTION: Well, you have just informed Justice  
6 Ginsburg that if the employer had had a strong policy,  
7 fully communicated, that it wouldn't make any difference.  
8 Now, what position are you taking?

9 MR. AMLONG: I am taking the position, Your  
10 Honor, that, number one, in this case, there was no  
11 policy. Number two, that the existence of a policy is a  
12 strong mitigating factor against imposing liability. But  
13 that, number three --

14 QUESTION: Well, then your answer to Justice  
15 Ginsburg was incorrect -- it would make a difference if  
16 the employer had a policy --

17 MR. AMLONG: Oh, it would certainly --

18 QUESTION: -- and that would be an excuse, so  
19 there would not be strict liability?

20 MR. AMLONG: It would certainly make a  
21 difference. And it would be one of those things to be  
22 weighed. Because the plaintiff would have the burden of  
23 proof, to prove that the fear that she was expressing was  
24 a reasonable fear.

25 What we seek is --



1 QUESTION: Is there any other example of when an  
2 employer would not be liable.

3 MR. AMLONG: Yes, Justice O'Connor, there is.  
4 For example, if a female police officer, on the midnight  
5 shift, complained about harassment by a sergeant on the  
6 afternoon shift, he would not be responsible then. If  
7 a --

8 QUESTION: Well, that's because he's not a  
9 direct supervisor, presumably.

10 MR. AMLONG: Yes, Mr. Chief Justice.

11 QUESTION: I thought Justice O'Connor was asking  
12 for an example where there was a direct supervisor who  
13 would not be liable.

14 QUESTION: Exactly. Exactly.

15 MR. AMLONG: Mr. Chief Justice, the -- we can't  
16 envision every case. The Bouton case was one in which  
17 there was a policy that was disseminated and had been  
18 used. You're going to have -- the --

19 QUESTION: You would at least say that all of  
20 these cases have to go to trial?

21 MR. AMLONG: Yes.

22 QUESTION: You would never be able to get -- to  
23 get these cases disposed of before a full-fledged trial --

24 MR. AMLONG: Justice --

25 QUESTION: -- as to whether -- whether the woman

1 had a, quote, reasonable fear?

2 MR. AMLONG: Justice Scalia, I don't want to say  
3 "never." I would say that it is unlikely that summary  
4 judgment would be --

5 QUESTION: Well, when -- when would it be, if  
6 all the woman has to do is say, I had a reasonable fear?

7 MR. AMLONG: If it could be shown that her fear  
8 was unreasonable. But, like negligence, the reasonability  
9 of her fear is something that likely is going to have to  
10 be weighed by the trier of fact.

11 QUESTION: Well, the company could have the  
12 clearest policy, and -- and many other employees could  
13 have -- could have used that policy to stop this kind of  
14 intimidation. But if a particular woman has not used it,  
15 she could still have a trial on -- on whether she was  
16 fearful enough -- that -- that's an excuse?

17 MR. AMLONG: If she had not used it, and if she  
18 could explain why she did not use it. We ask only that an  
19 objectively reasonable fear be taken into account.

20 QUESTION: Well, incidentally, reasonable fear  
21 of what: ridicule, retaliation, embarrassment? Because  
22 I -- I assume some of those will always be present.

23 MR. AMLONG: Well, in the cases in the studies  
24 cited at, I believe, note 32 of our brief, there is  
25 widespread fear amongst women of retaliation if they

1 complain about sexual harassment.

2 QUESTION: Okay, retaliation.

3 MR. AMLONG: Retaliation.

4 QUESTION: That -- that is to say, demotion and  
5 further bad treatment, et cetera?

6 MR. AMLONG: Yes, Your Honor.

7 QUESTION: It's just women?

8 MR. AMLONG: No -- no, Your Honor.

9 QUESTION: And is it just sexual harassment? I  
10 mean, do you know anybody who isn't -- who isn't afraid  
11 of -- of, you know, criticizing his supervisor?

12 MR. AMLONG: Precisely not, Your Honor.

13 QUESTION: Jumping over the chain of command,  
14 and crit -- nobody is not afraid of that, is he?

15 MR. AMLONG: I do -- I do not, Your Honor. And  
16 there -- and that's why there is a reasonable fear in the  
17 work place for complaining about this.

18 QUESTION: And that's -- that's why there's an  
19 absolute liability.

20 QUESTION: Yes. There's always going to be  
21 reasonable fear. And, therefore, there's always going to  
22 be absolute liability.

23 MR. AMLONG: No, Justice Souter, there is not  
24 always going to be reasonable fear. Because -- there is  
25 going to be reasonable fear at the summary judgment stage.

1 I am not suggesting that these cases are going to be  
2 disposed of on summary judgment. I think there's plenty  
3 of time, however, that the juries will say, This is  
4 nonsense. This woman --

5 QUESTION: But let's go back to what you  
6 conceded, at least I thought. There's a very clear  
7 policy. It has been used successfully -- the Third  
8 Circuit case. So that could go to summary judgment, or  
9 not?

10 MR. AMLONG: That case did not go to summary  
11 judgment. I think that comes closer to it.

12 QUESTION: Yes, but you said --

13 MR. AMLONG: I think -- I think it's a --

14 QUESTION: -- you said it could be mitigating,  
15 and it -- I'm sort of fuzzy about -- you give -- on the  
16 one hand, you give: have a clear policy, great  
17 prominence; but then it kind of drifts off into the wind.

18 MR. AMLONG: Well, Justice Ginsburg, it's going  
19 to depend on the -- the factors of the work place. Is the  
20 policy enforced? How much power does --

21 QUESTION: I really gave you an example of a  
22 policy that's included in the manual. Let's have it  
23 posted on the guardhouse door. Everyone knows about it,  
24 and there's a number, in big letters, to call. And I  
25 asked you -- and everything else is the -- the same.



1 These supervisors are just as gross.

2 Would there be a Title VII claim against the  
3 employer?

4 MR. AMLONG: If the employee could demonstrate  
5 that, notwithstanding the policy, that she had a  
6 reasonable fear of retaliation if she came forward. This  
7 would depend on --

8 QUESTION: This is an objective fear or  
9 subjective?

10 MR. AMLONG: No. An objectively reasonable  
11 fear.

12 I would want to point out to the trier of fact  
13 the degree of control that the employer -- that the  
14 supervisor exercised over the work place. I would want to  
15 point out the other kind of rules they have there. Is he  
16 allowed to hire and fire at whim? I would want to point  
17 out his history in dealing with employees. I would want  
18 to deal with whether he -- whether he has the reputation  
19 as a bully.

20 What we're saying is that if the supervisor is  
21 allowed to get away with this behavior, that that gives  
22 rise to a reasonable fear, Justice Ginsburg.

23 If I may reserve the rest of my time for  
24 rebuttal.

25 QUESTION: Very well, Mr. Amlong.

1 MR. AMLONG: Thank you, Chief Justice.

2 QUESTION: Mr. Gornstein, we'll hear from you.

3 ORAL ARGUMENT OF IRVING L. GORNSTEIN

4 FOR UNITED STATES, AS AMICUS CURIAE

5 SUPPORTING PETITIONER

6 MR. GORNSTEIN: Mr. Chief Justice, and may it  
7 please the Court:

8 Our position is that Respondent is potentially  
9 liable for the hostile work environment experienced by  
10 Petitioner on three different grounds. First, that  
11 Respondent's delegation of authority to Terry to run the  
12 beach, coupled with the failure to disseminate an  
13 anti-harassment policy, made the creation of a hostile  
14 work environment possible. Second, that knowledge of --

15 QUESTION: Now, you -- you would say that, and  
16 that alone, is -- is sufficient to impose liability?

17 MR. GORNSTEIN: That's correct. Although, I --  
18 I would have to elaborate on the standard for deciding  
19 when it is that the delegation of power has made the  
20 creation of the hostile work environment possible.

21 QUESTION: You don't -- this is not a negligence  
22 argument? You're not --

23 MR. GORNSTEIN: This is not an negligence  
24 argument.

25 The second ground is that the Respondent --

1 knowledge of it should be imputed to Respondent, because  
2 one of Respondent's supervisors knew about it. And third  
3 a possible ground of liability is that the Respondent  
4 should have known about it, but did not, because it failed  
5 to disseminate an anti-harassment policy.

6 QUESTION: And that is negligence?

7 MR. GORNSTEIN: That is a "should have known"  
8 standard. And the --

9 QUESTION: Is it a negligence standard?

10 MR. GORNSTEIN: Correct. And --

11 QUESTION: But it's a -- it's a negligence --  
12 it's a negligence standard that will always be satisfied  
13 if there is no policy?

14 MR. GORNSTEIN: That's --

15 QUESTION: So, in effect, it's kind of an -- an  
16 absolute policy standard?

17 MR. GORNSTEIN: No. I -- I -- I -- I -- there  
18 is a causation issue that goes along with the third  
19 theory.

20 QUESTION: Well, is there a causation issue --  
21 well, a causation issue on the first theory, too, then?

22 MR. GORNSTEIN: There -- that -- that's correct.

23 QUESTION: You say they made it possible  
24 because --

25 MR. GORNSTEIN: That's correct. And on the

1 third theory, it would have been, had the policy -- would  
2 they have known about it had they had distributed -- had  
3 they distributed a policy -- an effective policy. So  
4 there is a causation issue on the third question.

5 QUESTION: How will -- how will we ever know  
6 that if they haven't distributed a policy? Because we'll  
7 never know how the -- the -- the policy, contrary to fact,  
8 would have worked.

9 MR. GORNSTEIN: Yes.

10 QUESTION: So won't -- won't the effect of your  
11 third prong always be liability when there's no policy?

12 MR. GORNSTEIN: Justice Souter, there is --  
13 there will be uncertainty in -- in many cases. And then  
14 the question will be who bears the risk of uncertainty in  
15 that situation.

16 QUESTION: And who is it going to be?

17 MR. GORNSTEIN: Well, I think a fair argument  
18 could be made that the employer of that situation -- in  
19 that situation -- should bear the risk --

20 QUESTION: Well, if that's -- if that's the  
21 case, and -- and what we're uncertain about is how a  
22 policy that was never promulgated would have worked in  
23 fact, then the practical effect of the third prong is  
24 always to make the employer liable if there's no policy.

25 MR. GORNSTEIN: Well, if -- if the -- unless the



1 employer can make that showing. Or you reject --

2 QUESTION: Yes, but how can you ever do it?

3 MR. GORNSTEIN: Or if you reject the view that  
4 he should have the burden, and place the burden on the  
5 plaintiff. A plaintiff could satisfy that burden in a  
6 number of ways. For example, in this case, the plaintiff  
7 herself could have testified that had there been an  
8 effective policy, I would have complained. And then if  
9 that testimony is believed, causation is demonstrated.

10 QUESTION: That sounds like running around Robin  
11 Hood's barn. I mean, we're looking for something that's  
12 fairly simple and easy to administer. And that isn't it.

13 MR. GORNSTEIN: Yes, Mr. -- yes, Mr. Chief  
14 Justice. But that -- that is a -- that is the classic  
15 negligence theory. Which is, should the employer know --  
16 known about it. I would like to --

17 QUESTION: Why do you need -- why do you need a  
18 special policy? I mean, isn't it -- do you really have to  
19 tell somebody that if your supervisor is doing something  
20 that you think is wrong or improper, you should talk to  
21 your supervisor's supervisor? Why do you need a policy  
22 for that?

23 MR. GORNSTEIN: I -- I think that the -- the --  
24 the problem is difficult enough, that in most cases, if an  
25 employer does not adopt a policy, they would not be

1 exercising reasonable care. But I would leave room for  
2 cases in which an employer could show that it has  
3 exercised reasonable care in relationship to this problem  
4 if they have adopt -- adopted policies.

5 QUESTION: Yes, but don't you think every  
6 employee in the country knows that if they're mistreated,  
7 they can complain to somebody higher up the ladder? I  
8 mean, it's not like everybody is totally ignorant of these  
9 situations.

10 MR. GORNSTEIN: Well, there are two -- two  
11 problems. Not everybody knows about it, first of all,  
12 Justice O'Connor. But even if they know about it, they  
13 may not be -- they may not know that the employer is  
14 willing to do something about it. And that's why the --  
15 the -- a policy -- a clear policy against discrimination  
16 that is disseminated to everyone, and where the -- the  
17 employer -- it's made clear --

18 QUESTION: Well, it's obviously helpful to have.  
19 But I think we have a case here that requires us to  
20 grapple with a situation where there wasn't an articulated  
21 policy. And we're trying to look at what reasonable  
22 people know and understand. And I would have thought most  
23 people would know and understand that if you're being  
24 mistreated, you can complain to a higher-up.

25 MR. GORNSTEIN: But I think that returns me to

1 the first potential line -- liability here. And that is  
2 that there should be liability when the supervisor is  
3 aided by the agency relationship, in the sense that he is  
4 able to impose a hostile work environment because the  
5 employee reasonably fears adverse employment consequences  
6 if she resists or if she complains.

7 QUESTION: But that -- that's a form of strict  
8 liability, it seems to me. Because I think any employee  
9 is going to fear adverse consequences from -- from a  
10 supervisor, even though the supervisor -- the harassing  
11 supervisor has not made any threat at all, just by virtue  
12 of the position.

13 QUESTION: That's why you laugh at his jokes. I  
14 mean, everybody knows that.

15 QUESTION: That -- that's a --

16 MR. GORNSTEIN: Mr. Chief Justice, I think that  
17 when there is an effective policy in place, it has the  
18 capacity to remove reasonable fear. And when an employer  
19 can show that it -- its policy has all the elements of a  
20 good policy, and they're listed in the EEOC guidance, and  
21 that that policy has been effectively disseminated to  
22 everyone, and that it's clearly understood that the -- the  
23 employer takes this seriously, there's a complaint  
24 mechanism, then the plaintiff would have to show, through  
25 case-specific evidence, that notwithstanding such an

1 effective policy, she nonetheless reasonably feared  
2 adverse employment consequences if she resisted or  
3 complained. I think that --

4 QUESTION: What would you do if you have the  
5 model employer, who does everything that they can, but  
6 he -- there is one bad apple, a supervisor, and he offers  
7 a quid pro quo -- promotion in exchange for sexual favors,  
8 et cetera -- is that a completely different case, or is it  
9 governed by this same rule?

10 MR. GORNSTEIN: That -- that is a different  
11 case, Mr. Justice -- Justice Kennedy. And in -- in that  
12 case, we would say that the employer is liable. And the  
13 employer is liable because there the role of supervisory  
14 power is clear. And the employer is liable in that  
15 situation.

16 Now, the reason the employer is liable there is  
17 the same reason that an employer is liable when a  
18 supervisor fires a black employee because he has a  
19 personal aversion to blacks in the work place,  
20 notwithstanding anything that the employer might have done  
21 to prevent that from happening. And that's -- that is  
22 because, in that case, it's still the case that the  
23 discrimination was made possible by the delegation of  
24 power from the employer to the supervisor.

25 QUESTION: What if the woman is not -- is not



1 fired, because -- because she -- she yields to the -- to  
2 the harassment, and provides the sexual favor requested?

3 MR. GORNSTEIN: We -- if it's -- if it's -- if  
4 it's an explicit request --

5 QUESTION: Right.

6 MR. GORNSTEIN: -- if it's an explicit threat of  
7 adverse employment consequences --

8 QUESTION: Right.

9 MR. GORNSTEIN: -- again, we would say that the  
10 employer is liable in that situation, where there's an  
11 invocation of power.

12 QUESTION: Now, I -- I find that -- why is that?  
13 That seems to me very strange. I mean, so it would make  
14 all the difference in this case -- let's assume -- let's  
15 assume that -- that -- that there would otherwise be  
16 liability on the basis of employer negligence only. Let's  
17 assume we were to adopt that rule.

18 MR. GORNSTEIN: Yes.

19 QUESTION: You say, however, that if in this  
20 case one of the lifeguards had said, You know, unless you  
21 let me continue to abuse you in this fashion, I'm going to  
22 assign you to that tower, that life tower -- lifesaving  
23 tower that doesn't have a screen on it --

24 MR. GORNSTEIN: Yes, we are -- we are -- now we  
25 are getting to the --

1 QUESTION: That would be quid pro quo, I guess,  
2 right?

3 MR. GORNSTEIN: That -- that's correct. And  
4 that's the --

5 QUESTION: And suddenly everything would  
6 transform, even though the employer knows nothing about  
7 it. All you have to allege is that he said he was going  
8 to send me to this other tower. And suddenly it becomes a  
9 totally different case.

10 MR. GORNSTEIN: It does. And that's because, in  
11 that case --

12 QUESTION: I don't understand why.

13 MR. GORNSTEIN: -- the invocation of power is  
14 clear. And I -- I might add that this is the case the  
15 Court is essentially is going to have next sitting. So  
16 I'm not sure I want to spend that much time on it. That  
17 is what is at issue in Eller for -- for the Court next  
18 sitting. But --

19 QUESTION: Well, maybe because it's a little  
20 difficult to see where the line is between that kind of  
21 case and this kind of case. I mean, it's one thing to go  
22 off to the tower without any windows; it's -- is it so  
23 different to be subjected to this kind of leering and  
24 groping and foul mouth every day?

25 MR. GORNSTEIN: But the question is: Has the --

1 that harassment been made possible by the delegation of  
2 power from the employer to the supervisor? And the line  
3 we draw is between those cases in which supervisory power  
4 makes it possible and those cases in which the supervisor  
5 is simply taking advantage of proximity in the same way  
6 that a co-worker would.

7 And the reason that we -- we hold employer  
8 liable in those situations is -- is twofold. It serves  
9 two important Title VII purposes. First, it provides a  
10 greater incentive for employers to root out discrimination  
11 from their work places. And, second, it provides  
12 compensation to an innocent employee --

13 QUESTION: Well, but in -- in situations where  
14 the harassment is carried out by the supervisor, but there  
15 is no retaliation suggested or in fact imposed by the  
16 supervisor, he just does these gross things, but otherwise  
17 the -- the employment relationship stays the same, why do  
18 you say the employer has aided the supervisor in doing it?  
19 Why isn't it closer to the co-employee harassment  
20 situation?

21 MR. GORNSTEIN: Because, by the delegation of  
22 power itself, and by the absence of an effective policy  
23 providing the person a way around, there will --there can  
24 be a reasonable fear that adverse employment consequences  
25 will be imposed.

1 QUESTION: Thank you, Mr. Gornstein.

2 Mr. Risetto, we'll hear from you.

3 ORAL ARGUMENT OF HARRY A. RISSETTO

4 ON BEHALF OF RESPONDENT

5 MR. RISSETTO: Mr. Chief Justice, may it please  
6 the Court:

7 Hostile environment sexual harassment is seldom  
8 within the scope of employment. It is seldom within the  
9 authority that is given to a supervisor. We believe that  
10 the United States Court of Appeals for the Eleventh  
11 Circuit properly applied a test, that is essentially a  
12 test of negligence, to deal with this situation. Was --

13 QUESTION: Is -- is firing someone just because  
14 of the color of his skin, when the employer has a -- a  
15 policy against race discrimination, is that within the  
16 scope of employment?

17 MR. RISSETTO: Excuse me, Ms. Justice, I didn't  
18 hear the first part of your question.

19 QUESTION: You -- you had said that this kind of  
20 thing can't be within the scope of employment because no  
21 rational employer would sanction -- would allow such a  
22 thing. And I said, well, suppose you have a bigot running  
23 the personnel office and the employer doesn't know about  
24 it. And that that person is making decisions strictly on  
25 the basis of race. Surely, not within the scope of



1 employment anymore.

2 MR. RISSETTO: No, that is -- that is no longer  
3 a case of hostile environment sexual harassment, it is a  
4 case of disparate treatment. I mean, I grew up in a world  
5 where most discrimination that occurred was disparate  
6 treatment, that people were treated differently because of  
7 their gender or their race.

8 QUESTION: Yes. But as far as attributing it to  
9 the employer, the employer in both cases says that's  
10 certainly not any policy that I authorized.

11 MR. RISSETTO: When -- when -- when a supervisor  
12 takes what Justice Posner, in the Jansen case, called is a  
13 company act, the hiring somebody or not hiring somebody,  
14 that is an act that's separate from the motivation of the  
15 act. It is -- it is an act that's an official act of the  
16 company. And if that act is tainted by a discriminatory  
17 motive or a discriminatory intent, it's a violation of  
18 Title VII. It's always been.

19 And -- and that is the -- that is the -- at  
20 least the fundamental distinction between a quid pro quo  
21 situation or a disparate treatment situation on one side,  
22 and hostile environment situation on the other.

23 QUESTION: I don't understand --

24 QUESTION: But it isn't because -- because, I  
25 think, as -- as your -- your -- your friend on the other

1 side indicated, it's still a quid pro quo. Even if the  
2 person is not fired, but -- but yields and -- and -- and  
3 gives the sexual favor demanded, isn't that still quid pro  
4 quo?

5 MR. RISSETTO: That is an unsettled question,  
6 since I believe the lower courts are wrestling at the  
7 present time as to what a quid pro quo violation is. At  
8 least --

9 QUESTION: So you think that -- that should make  
10 the difference, the -- the -- the woman who is so  
11 intimidated that she yields is -- does not get the  
12 advantage of the quid pro quo rule, whereas the one who --  
13 who is tougher and is fired does?

14 MR. RISSETTO: Well, there is a -- there is a --  
15 there are three categories of quid pro quo, one where the  
16 person is fired. That's a company act. That is, if I  
17 fire somebody because of their gender, that's a violation  
18 of Title VII. I don't believe that that principle is in  
19 dispute.

20 QUESTION: And you're not arguing that there  
21 should be a negligence test for that?

22 MR. RISSETTO: No. When there is disparate  
23 treatment discrimination, it's not a matter of employer  
24 negligence.

25 QUESTION: But, Mr. Risetto, may I just ask

1 this question? You draw the distinction because the  
2 personnel supervisor, in the course of his or her regular  
3 responsibilities, hires and fires people. That's -- but  
4 why isn't it true that the supervisor in this case, in the  
5 course of his regular responsibilities, is responsible for  
6 the conduct that occurs at the beach? What's the  
7 difference?

8 MR. RISSETTO: He is responsible for the conduct  
9 of -- that occurs at the beach.

10 QUESTION: Including how the employees deal with  
11 one another.

12 MR. RISSETTO: But when that supervisor departs  
13 from the scope of the employment --

14 QUESTION: Well, but didn't the personnel  
15 officer depart from the scope when he based it on race  
16 rather than merit?

17 MR. RISSETTO: No. In that case, he made a  
18 hiring decision.

19 QUESTION: Well, here, this supervisor made a --  
20 a -- employment decision in the sense it related to how  
21 people had to interact with one another under his  
22 supervision. Why isn't that an employment decision?

23 MR. RISSETTO: But the -- in -- in -- in the  
24 case of hostile environment, the -- the effect of -- on  
25 the terms and conditions of employment are as a result of

an action that's outside the scope of the employment by the supervisor. In a normal disparate treatment case, the effect on the terms and conditions of -- of employment, at least in one respect, is as a result of not being hired or being fired or not being promoted. And that is a fundamental distinction. And it makes -- and it makes the hostile environment cases difficult to fit into the normal disparate treatment mold.

QUESTION: My question is, why is it a fundamental distinction? That's what I don't quite follow.

MR. RISSETTO: I'm sorry?

QUESTION: My question is, why is it a fundamental distinction? That's what I don't quite follow.

MR. RISSETTO: Because in --

QUESTION: Because in both cases, the -- the supervisor is performing his -- his or her general official responsibilities, but deviates from company policy. And you say, in one deviation, is outside the scope of the employment, but the other is not.

MR. RISSETTO: Because in one case there is an employment action that is -- that is within the -- the supervisor's authority. The right to hire and fire is within the supervisor's authority.





1 QUESTION: But so is the right to tell how  
2 people behave on the beach.

3 MR. RISSETTO: And this is a case where the  
4 supervisor his self -- himself or herself -- is departing  
5 from the scope of that authority.

6 QUESTION: Well, but think of the situation  
7 where the employer tells the supervisor to run an errand,  
8 drive the car downtown to buy supplies for the beach. And  
9 on the way, the employ -- the supervisor drives  
10 negligently and hits somebody. Employer liable? Sure.  
11 Sure. Not a frolic of his own.

12 MR. RISSETTO: But if --

13 QUESTION: So -- so how do you relate what  
14 happened here to that concept?

15 MR. RISSETTO: Because in this particular case,  
16 the activities of the supervisor in question were in  
17 pursuit of his own personal agenda. They weren't -- they  
18 weren't carrying out the responsibilities that he had in  
19 operating the beach.

20 QUESTION: Well, his responsibilities included  
21 supervising the employees.

22 MR. RISSETTO: It included supervising the  
23 employees.

24 QUESTION: Yes.

25 MR. RISSETTO: And -- and there is no question

1 that Mr. Terry and Mr. Silverman --

2 QUESTION: And he carried it out in a grossly  
3 improper fashion.

4 MR. RISSETTO: Well, I would suggest that  
5 there's a distinction between his supervisory actions and  
6 the frolics, or improprieties and misconduct, that he  
7 committed outside his supervisory responsibilities. We  
8 would suggest that the record in this case suggests that  
9 most of the things that went on that were offensive to the  
10 lifeguards at Boca Raton were done outside the normal  
11 responsibilities -- the regular responsibilities of either  
12 Mr. Terry or Mr. Silverman.

13 QUESTION: No, but I think you're --

14 QUESTION: Would it make a difference if -- if  
15 one of the other -- or both of them -- said, I'm going to  
16 have my way with you once a week, and everything else is  
17 the same, would the employer be reachable more readily  
18 than you contend, where there was just groping and leering  
19 and foul language?

20 MR. RISSETTO: Well, if -- if he says, I'm going  
21 to have my way with you once a week, there is legitimately  
22 a negative implication in that statement that if I don't,  
23 you're going to be fired or something bad is going to  
24 happen to you. In that case, you're on the way over to  
25 a -- a quid pro quo kind of situation that's before the

1 Court in Burlington --

2 QUESTION: Well, why don't we just concentrate  
3 on the act rather than -- he doesn't say, I'm going to  
4 fire you. He's going to say, you're here, I'm stronger,  
5 once a week.

6 MR. RISSETTO: Your Honor, I don't think it  
7 would make a difference in the outcome. It would still be  
8 a hostile environment sexual discrimination for the employ  
9 -- for the supervisor to say that to the employee. That  
10 would -- that -- that there is -- we believe that the --

11 QUESTION: In other words, if that -- if that  
12 were a term and condition of her employment imposed by the  
13 supervisor, there would still be no liability on the part  
14 of the employer?

15 MR. RISSETTO: Your Honor, at -- at the point  
16 we're on in the hypothetical, we're only a threat that the  
17 employer -- that the supervisor says to the --

18 QUESTION: I'm not talking about words, because  
19 there were deeds here, too.

20 MR. RISSETTO: Okay.

21 QUESTION: They didn't go that far. So let's  
22 take this case, where there's no words, just deeds. That  
23 happens once a week. And it's a -- she describes it as a  
24 term or condition -- a condition of her employment. Would  
25 it not be, if that in fact is what her boss -- her



1 supervisor did?

2 MR. RISSETTO: If there was -- if -- if there  
3 were no nexus to an employment action, if it was not a  
4 condition of her employment, it would -- it would fit into  
5 the --

6 QUESTION: Well, that's the problem. Is it or  
7 is it not? How do I know? Or I know the fact that once a  
8 week this goes on.

9 MR. RISSETTO: Well, we know in this case  
10 that -- that -- that there was no evidence in the record  
11 that the activities that these -- that Silverman and Terry  
12 engaged in was anything more than gratuitous.

13 QUESTION: Well, I'm just trying to find out, as  
14 far as the employer's liability is concerned, which is the  
15 issue before us, whether these are differences in degrees  
16 or difference in kind, whether it makes any difference.

17 MR. RISSETTO: Well, the degree of grossness or  
18 the degree of coarseness, or whether it's verbal or -- or  
19 physical, ought not to make an operative difference in the  
20 outcome. In either event, the -- the Title VII works best  
21 when a regime of communication is -- is created, where  
22 employees that are the subject of either criminal activity  
23 or improper activity or misconduct --

24 QUESTION: Well -- well, I'm not so sure. In  
25 the case of very gross misconduct of the kind in the

1 hypothetical, in one sense, the employee is -- almost has  
2 less fear because she knows the employer will stop that.  
3 It's these -- it's these less offensive, but still gross  
4 and vulgar, situations, where she is really concerned that  
5 the employer might brush her off or not -- not care, not  
6 act.

7 MR. RISSETTO: Well, in this particular case --  
8 and it's difficult to extrapolate from an anecdote -- as  
9 soon as Miss Ewanchew wrote -- wrote the letter, something  
10 happened. An investigation took place, and disciplinary  
11 action was taken.

12 But as -- I am not offering that as -- as the  
13 paradigm example. What I am offering is -- is an argument  
14 from policy that suggests that from an employer's  
15 perspective, trying to find out the sexual harassment of  
16 the subtle variety that you hypothesized is going on in  
17 the work place is nearly impossible. A lot -- if --  
18 reading the record in this case --

19 QUESTION: What is subtle about the behavior  
20 that's described here?

21 MR. RISSETTO: Well, to the extent that you're  
22 in a room and -- and someone grabs a part of your anatomy  
23 and -- and -- and does so secretly, it is difficult for an  
24 outsider --

25 QUESTION: But there was nothing here, as far as

1 I can tell, that was secret. It was on the beach, right?

2 MR. RISSETTO: There was -- there's a -- there's  
3 a variety of -- of anecdotes, some of which -- for  
4 example, a number of the lifeguards -- female lifeguards  
5 testified that they weren't aware that conduct vis-a-vis  
6 other lifeguards was even going on. Which goes to the  
7 obviousness of the -- of -- of a lot of the activities.  
8 Some of the verbal activity was relatively public among  
9 the lifeguards.

10 QUESTION: Is that the nub of your argument,  
11 that it is -- that it is more difficult for the employer  
12 to -- to become aware of this kind of harassment than it  
13 is for the employer to become aware of racially  
14 discriminatory hiring? Is that the nub of it? Is that  
15 why you -- you would -- you would call for different  
16 treatment of employer liability in those two cases?

17 MR. RISSETTO: That's part of it, Justice  
18 Souter. I think --

19 QUESTION: What's the other -- what's the other  
20 part?

21 MR. RISSETTO: The other part of it is that when  
22 the employee takes an employment action, hiring somebody  
23 or not hiring somebody in a discriminatory fashion, the  
24 person taking that ultimate action is acting within the  
25 scope of his or her work.

1 QUESTION: No. But that's just a matter of  
2 definition. I mean, what you're saying is the person in  
3 your example, who -- who fires or hires for a racially  
4 discriminatory purpose, is exercising a power that the  
5 employer has -- has given him. But you could just as well  
6 define it by saying no, the employer has simply given an  
7 authority to hire and fire for legitimate reasons.

8 So it seems to me that that distinction, which  
9 you've stated several times, is simply a distinction  
10 that's based on an arbitrary definition that -- that you  
11 are assuming here. And the real reason, if I understand  
12 your argument, is that it's more difficult for the  
13 employer to become aware of the harassment than to become  
14 aware of the racial discrimination. And you -- you said a  
15 second ago that that is one of your reasons.

16 My question is: Why is it more difficult? All  
17 sorts of hiring decisions are made. And they may -- they  
18 may be made very legitimately, even though the -- the two  
19 parties, the -- the supervisor and the person hired or  
20 fired are of different races. How is it easier for the  
21 employer in the racial situation to know that something  
22 wrong is going on, but not in the harassment situation?

23 MR. RISSETTO: I don't believe there is a -- a  
24 distinction in knowledge, particularly with respect to  
25 far-flung employers, with operations that are run, where



1 hiring decisions are made by supervisors. I think, as a  
2 practical matter, there is a -- there is a -- a great  
3 degree of difficulty in ensuring that personnel decisions  
4 are made in a manner that are consistent with Title VII.

5 However, in -- in the case of -- of an employer  
6 making that decision with somebody acting within the scope  
7 of -- of its employment, I don't believe that an employer  
8 can define away its Title VII responsibilities by saying,  
9 Joe, you can hire these people, but I don't want you to  
10 discriminate against Title VII; and remember, your job  
11 only entails hiring within the confines of Title VII.

12 In that situation, the law of agency is clear,  
13 that --

14 QUESTION: Why is the situation any different  
15 when we get to sex harassment?

16 MR. RISSETTO: Because in this particular case,  
17 the activity that was engaged in by the individual  
18 supervisors had nothing to do with the exercise of their  
19 supervisory authority.

20 QUESTION: No. But you're saying -- your  
21 response to my definitional objection was, in effect,  
22 it's -- it's easier to define with reference to the  
23 prohibited act in the one case than in the other. And --  
24 and that's what I don't understand. I don't -- I don't  
25 understand why the definitional responsibility and the

1 practical consequences of it are different in the race  
2 situation from the sex situation.

3 MR. RISSETTO: Well, I think if you -- under  
4 the -- the historic law of agency, there is a -- a  
5 premise. And the premise is that supervisors can act  
6 outside the scope of their employment. And when they do,  
7 they're on their own. Justice Hand had a bosun's case,  
8 where a drunken bosun beat up a -- a sailor --

9 QUESTION: Okay. And that's true with respect  
10 to improper racial considerations. It's true with respect  
11 to improper sex considerations. What's the difference?

12 MR. RISSETTO: Well, the difference is that,  
13 in -- in the case when the supervisor departs from the  
14 scope of employment, he's acting on his own. And --

15 QUESTION: Well, if -- if -- if IBM refuses to  
16 hire a woman, and thereby violates the prohibition against  
17 discrimination based on sex, you don't need vicarious  
18 liability on the part of a supervisor or on the part of  
19 the hiring manager. She tried to get on IBM's payroll and  
20 did not succeed. So it seems to me you're not talking  
21 about vicarious liability there at all. You're talking  
22 about liability on the part of the employer directly.

23 MR. RISSETTO: Yes, because the -- but in -- in  
24 every case of a corporation, the employer is acting  
25 through individuals, and the act of the individual is the

1 act of the corporation, unless the -- the supervisor  
2 departs from the scope of his employment.

3 If Mr. Terry decided that he was going to begin  
4 to steal from the -- from the -- from the women  
5 lifeguards, on -- on the -- because they were women,  
6 and -- so disparate treat -- disparate action with respect  
7 to -- on the basis of sex with respect to the women  
8 lifeguards. And he does this stealing. The question is:  
9 Is he within the scope of his employment? Should the  
10 employer be automatically liable to the women lifeguards  
11 for the theft?

12 Now, you get back to the question --

13 QUESTION: Suppose -- suppose I -- I'm a hiring  
14 officer for a company, and I hire somebody because he's my  
15 son-in-law. Am I acting --

16 MR. RISSETTO: -- cases Your Honor --

17 QUESTION: Am I -- am I acting in the scope of  
18 my employment?

19 MR. RISSETTO: It depends whether or not the --  
20 a -- the court will find that that's part of a pattern of  
21 not engaging equally -- equal employment hiring decisions.

22 QUESTION: No, no, no. Apart from whether --  
23 there's no discrimination. There's no Title VII involved.

24 MR. RISSETTO: Okay, no discrimination.

25 QUESTION: I'm clearly not acting in the scope

1 of my employment if the only reason I hired a person is  
2 because he's my son-in-law.

3 MR. RISSETTO: Well, if -- if you assume he's  
4 not qual --

5 QUESTION: He's incompetent.

6 QUESTION: Yes.

7 QUESTION: But he's making hiring decisions.

8 QUESTION: I don't care if he's qualified.

9 (Laughter.)

10 QUESTION: I don't care whether he's qualified;  
11 he's my son-in-law. I mean --

12 (Laughter.)

13 QUESTION: What's family for? Right.

14 (Laughter.)

15 MR. RISSETTO: The act -- precisely -- the act  
16 of hiring is within the scope of his employment. Why he  
17 hires --

18 QUESTION: I,m --

19 MR. RISSETTO: That's the reason we don't let  
20 them off the hook when they don't hire somebody because  
21 they're a woman or because they're black. Because the act  
22 of hiring is within the scope of employment.

23 QUESTION: May I ask another --

24 MR. RISSETTO: Yes.

25 QUESTION: -- if you could get away from the



1 hiring for a second. Supposing a -- a company -- the  
2 supervisor has a -- the work place has got asbestos in it  
3 or it's dirty or unhealthy or something like that. And it  
4 makes it an undesirable place in which to work, which  
5 causes harm to the employee. Should there be a different  
6 standard of liability on the -- on the principle there  
7 than in -- in this particular work environment situation?

8 MR. RISSETTO: Well, in that particular case,  
9 there are -- are -- vicarious liability can flow to the  
10 employer by virtue of the conditions --

11 QUESTION: But why is it different in that?

12 MR. RISSETTO: Because it's a dangerous  
13 condition is one of the historic exceptions to -- that  
14 creates vicarious liability. The Court had a case 20  
15 years ago involving feces in a -- in a food warehouse.  
16 And found --

17 QUESTION: Right.

18 MR. RISSETTO: -- vicarious derivative liability  
19 to the -- to the president of the company, who knew  
20 nothing about it. The Court, in its decision, concluded  
21 that it was a -- that there was a public health -- an  
22 overriding public health justification for the regulation  
23 that created --

24 QUESTION: But if there was -- it wasn't -- it  
25 was not within the public health exception, but just a

1 general dirty place, and squalid -- I suppose most of  
2 these do come down to health, don't they?

3 MR. RISSETTO: Yes.

4 QUESTION: But if it's some -- if it's just  
5 simply unpleasant, you'd say you would not -- you would  
6 not attribute it to the employer in this case?

7 MR. RISSETTO: Well, if it's noisy, Your  
8 Honor -- I mean, I -- I think --

9 QUESTION: Unless which actually caused harm.  
10 But, again, you're -- you're in the health area.

11 MR. RISSETTO: Yes. I'm reluctant to try to  
12 an -- analogize a hostile environment sexual  
13 discrimination --

14 QUESTION: What you're saying is the public  
15 interest in avoiding this kind of environment is not as  
16 strong as the public interest in protecting the health of  
17 the worker?

18 MR. RISSETTO: Well, from the perspective of the  
19 City of Boca Raton, they do have a strong interest in --  
20 in -- in avoiding this. I mean, this is a terrible  
21 situation. The -- the conduct of these supervisors --

22 QUESTION: Sure. But what is the interest  
23 different here from the interest in the race situation or  
24 the interest in the health situation? Why is it lesser?  
25 That's -- because I think that's what you're -- at the

1 moment, I think that's what you're telling us we should  
2 find. And what are the reasons for finding it?

3 MR. RISSETTO: Well, hostile environment because  
4 of race is a -- is -- is -- is -- I would analogize it to  
5 this situation. And -- and I think the same --

6 QUESTION: So the standards are to be the same?

7 MR. RISSETTO: It -- yes, in a parallel  
8 situation. If -- if these -- if the things that happened  
9 to these lifeguards happened because they were black or  
10 because they were, you know, --

11 QUESTION: Then why don't you lose?

12 MR. RISSETTO: We don't -- I'm -- Your Honor,  
13 I'm suggesting that -- that -- that there is -- at least  
14 the lower court decisions do not draw a distinction  
15 between a hostile environment situation involving race and  
16 one involving sex.

17 QUESTION: All right. Why is the -- why is the  
18 necessity different between a hostile environment  
19 situation in sex and a hiring/firing decision on race?

20 MR. RISSETTO: Because in a hiring/firing  
21 decision because of race, there's a company action made  
22 for which the company is responsible.

23 QUESTION: Yes. But why?

24 MR. RISSETTO: Why? I'm sorry --

25 QUESTION: Why do you say it's not vicarious

1 liability in the one case but it is vicarious liability in  
2 the other case? The President of IBM does not know when  
3 the personnel manager in Pasadena, California  
4 discriminates on the basis of race any more than he knows  
5 that a supervisor is creating or tolerating a hostile  
6 environment based on sex -- doesn't know in either case.  
7 Why is the treatment different?

8 MR. RISSETTO: I'm embarrassed to give you the  
9 same answer that I -- I gave you before, Your Honor. I  
10 apologize for this. But in -- in -- in one case there is  
11 a corporate action being taken within the scope of the  
12 employment -- not hiring or promoting -- and --

13 QUESTION: May -- may I be sure I understood  
14 your answer to the comparative, two different kinds of  
15 hostile environment, one caused by the kind of situation  
16 we have here, and the other caused by a supervisor who  
17 doesn't like African Americans and he puts them all in the  
18 corner. You say the same standard of -- of agency  
19 liability would apply to both of those cases?

20 MR. RISSETTO: Yes, that would be the  
21 position --

22 QUESTION: I see.

23 MR. RISSETTO: -- that negligence -- the -- the  
24 employer -- in -- in a case where the supervisor is not  
25 exercising --



1 QUESTION: Have we ever --

2 MR. RISSETTO: -- and your hypothetical is  
3 slightly off --

4 QUESTION: Yes.

5 MR. RISSETTO: -- but assuming that it -- it was  
6 not within the scope of employment and he was not --

7 QUESTION: Well, the company has a policy in  
8 both cases against sexual harassment on the one kind, and  
9 against treating blacks differently than whites. But the  
10 supervisor happens to be a member of the Ku Klux Klan in  
11 one case, and he happens to be the lifeguard in this case.  
12 Are they parallel, in terms of agency principles?

13 MR. RISSETTO: They should be. But if, in both  
14 cases the employer assigns -- makes adverse assignments  
15 or -- or --

16 QUESTION: Well, the supervisor does it. The  
17 people in city hall don't know about it in either case.

18 MR. RISSETTO: But -- but the act of making  
19 assignments down in the beach was in the scope of Terry's  
20 employment. And if Terry's --

21 QUESTION: Well, but the same is true of my --  
22 the same is true of my -- my black/white case, too.

23 MR. RISSETTO: They would be parallel. They  
24 would --

25 QUESTION: Yes, they would be parallel.

1 MR. RISSETTO: -- they would be parallel.

2 MR. RISSETTO: And there'd be -- and there would  
3 not be liability in the -- in the racial discrimination  
4 context unless there's actual knowledge?

5 MR. RISSETTO: For a gratuitous comment made by  
6 a supervisor --

7 QUESTION: No, no, no, not a gratuitous comment.  
8 A steady, every-day policy of making the black secretary  
9 sit off in a dark corner.

10 MR. RISSETTO: Well, but now -- that --  
11 that's -- I think in the case of the lifeguard and in the  
12 case of the -- of the secretary --

13 QUESTION: Right.

14 MR. RISSETTO: -- race and sex, you would have  
15 the same outcome. The employer would be liable in both  
16 cases. Because there --

17 QUESTION: Oh, but if you say liable in both  
18 cases -- but you're saying in this case your client is not  
19 liable.

20 MR. RISSETTO: Because the distinction is when I  
21 make assignments on a discriminatory basis, I'm liable.  
22 When I make gratuitous comments and -- and do gross things  
23 and make coarse comments to an employee, I am not acting  
24 within the scope of -- of my employment.

25 QUESTION: But -- but you --

1 MR. RISSETTO: And that is the fundamental  
2 distinction.

3 QUESTION: Well, suppose -- so you'd say, in my  
4 case, if the hostile environment for the black secretary  
5 was partly the assignment, but consisted mostly of racial  
6 epithets and the like, then it would be the same case?

7 MR. RISSETTO: Then it would be the same case.

8 QUESTION: Okay.

9 QUESTION: Can -- can you say what -- what harm  
10 do you do to the fabric of the law -- and I'm not saying  
11 you don't -- but what harm do you do if you say the -- the  
12 policing of the environment, the policing of the work  
13 environment for a high-level supervisor, is precisely  
14 analogous to hiring and firing in respect to a hirer? And  
15 if you do the hiring wrong, even for personal motives, the  
16 company is liable because the hiring/firing decision is  
17 the company. And if you do the policing of the  
18 environment wrong, your company is liable, because the  
19 policing of the environment is a company responsibility.

20 I think that's what Justice Stevens and  
21 everybody has been trying to get at -- I think. And --  
22 and you're saying, Well, that would be somewhat novel.  
23 But there is an analogy, I take it, in the asbestos area.  
24 And is there other harm that would be occurring if --  
25 if -- I mean, is -- would the law be hurt? Is that very

1 novel? Is it contrary to other? You see what I'm -- I'm  
2 trying to get a --

3 MR. RISSETTO: We believe the objectives of  
4 Title VII would be hurt.

5 QUESTION: And that's because of your policy  
6 argument. And I've been think -- in my -- my -- the  
7 reaction that I wanted to ask you about that is, is  
8 that -- in other words, the difficulty of the employer  
9 finding out -- is that a problem with the liability  
10 assessment? Or is it a problem with the substantive  
11 standard?

12 MR. RISSETTO: I --

13 QUESTION: That is, if you have a tough  
14 substantive standard, you risk, let's say, creating too  
15 much tension in the work place. If you have too relaxed a  
16 standard, you risk injuring women or minorities in the  
17 work place. It's very hard to get the right standard.  
18 But is the policy problem that you're worried about  
19 related to the standard or is it related to this problem  
20 of liability? That's my whole question.

21 MR. RISSETTO: I -- I think it's related to the  
22 problem of liability, as a practical matter. And --  
23 and -- and to speak somewhat cynically for a moment, if --  
24 if the law was such that if whatever the -- the standard  
25 is, the -- an employer/supervisor violated the standard,



1     there was automatic liability -- if I'm an employee in the  
2     work place and a gross comment is made to me, but I'm --  
3     you know, I can live with it -- but all of a sudden, one  
4     day it dawns on me, hey, there may be some money here. So  
5     I let this conduct continue. I don't object to it. I  
6     don't, you know, say, Stop it, to the supervisor doing it  
7     to me. I just go on and on.

8             And at some point in time, I reach the magic  
9     moment. Either it permeated or pervasive, whatever the  
10    standard you want to use. And I say -- and I drop my  
11    charge in with the EEOC.

12            QUESTION: Then you sue and you recover \$1.

13            (Laughter.)

14            MR. RISSETTO: Well, we --

15            QUESTION: That's what happened here.

16            MR. RISSETTO: -- this -- unfortunate -- or  
17    fortunately for the City of Boca Raton, this was prior to  
18    the amendments in 1991. Now, we have compensatory damages  
19    and -- and at least with respect to private employers, you  
20    have punitive damages that are available.

21            QUESTION: We are going to have to address at --  
22    I think, at some point in this case, the constructive  
23    notice by reason of -- of Gordon's involvement, and by his  
24    failure to report. Could you just comment on your  
25    friend's argument in that respect?

1 MR. RISSETTO: Yes. With respect to Gordon,  
2 it's -- we believe that -- that the conversations that  
3 occurred with Gordon, one, were not complaints, were not  
4 made with an expectation that Mr. Gordon would take the  
5 matter up. He communicated back to the people, saying,  
6 I'm -- it's not -- I'm not going to take it up.

7 QUESTION: Is -- is one standard whether or not  
8 he would have been disciplined for failure to make the  
9 report?

10 MR. RISSETTO: Well, I think that the standard  
11 is whether he had a duty. And at least in agency law, one  
12 standard would be whether he had a duty to make the  
13 report, or was he higher management and can deal with it?  
14 Gordon was no -- in no position to deal with Terry. Terry  
15 was --

16 QUESTION: It seem -- it seemed to me that  
17 the -- the counsel, in the Petitioner's brief, made the  
18 point, if he had -- if Gordon had known that -- I think  
19 Terry -- was stealing money, I assume he probably would  
20 have been disciplined by the City for failure to report  
21 that. Maybe I'm wrong.

22 MR. RISSETTO: Well, Mr. Bender, when he  
23 testified, thought that the lifeguards themselves should  
24 have reported it to him that this was going on. He  
25 thought that Mr. Gordon should have reported it. But

1 it -- it isn't -- there is nothing in Mr. Gordon -- in --  
2 in Mr. Gordon's duties, as the training captain of this --  
3 on this beach, that -- that requires --

4 QUESTION: Well, suppose I -- suppose I knew  
5 that Gordon would be disciplined for failure to report  
6 theft by Terry, even though Gordon is not Terry's  
7 supervisor.

8 MR. RISSETTO: Yes.

9 QUESTION: Would that mean that he should also  
10 report this? Or is there -- does he have a different  
11 obligation?

12 MR. RISSETTO: No. I think the obligations  
13 would be in tandem. I don't believe that --

14 QUESTION: So if he has the obligation to report  
15 theft, he'd also have the obligation to report sexual  
16 harassment?

17 MR. RISSETTO: I would assume that there would  
18 be a presumption that that was correct. And, you know,  
19 without looking at more facts with respect to the duties  
20 and responsibilities set out in the regulations and  
21 handbooks and training --

22 QUESTION: What -- what are the duties of  
23 supervisors? I -- I would have thought that every  
24 employee has the duty to -- to -- if he's a loyal  
25 employee -- to tell his employer about -- about violations

1 of law that are occurring.

2 MR. RISSETTO: Well, there's an expectation and  
3 a hope. And I think that was evident in Mr. Bender's  
4 testimony. But I don't know that there is a duty, a legal  
5 duty, that is -- that is punishable in some way for  
6 failing to make that kind of report. I mean,  
7 particularly --

8 QUESTION: Well, didn't Mr. Bender -- wasn't he  
9 the witness who admitted that Gordon had an obligation to  
10 report this?

11 MR. RISSETTO: Yes, he said, in the same  
12 sentence, he said he also thought the lifeguards had an  
13 obligation to report it, too. And I -- so I think  
14 Mr. Bender was speaking optimistically, as a manager  
15 speaks about what you would hope that your employees would  
16 do in a --

17 QUESTION: Mr. Rissetto, what difference does it  
18 make in your view, legally, whether the employer has a  
19 clear policy about sexual harassment and where to complain  
20 and so on, or the lack thereof? How does that fit in with  
21 it?

22 MR. RISSETTO: I -- I think it is relevant to  
23 the question of negligence. I think it's important to  
24 note that we're back in 1985 with these cases. And the  
25 country's sensitivity about these matters were --



1 QUESTION: Well, today, if an employer has such  
2 a policy, then -- then is the employer protected or not?

3 MR. RISSETTO: I -- no, I don't believe the  
4 employer is protected.

5 QUESTION: How does it --

6 MR. RISSETTO: I think the -- the question in  
7 all cases is whether he knew or should have known. And  
8 if -- if he didn't know, was the employer playing an  
9 ostrich, like -- that's a question of proof that would be  
10 presented under a negligence standard.

11 In this particular case, Ms. Faragher, in 1990,  
12 after she had decided to go to law school, had the policy.

13 Thank you, Your Honor. If there are no further  
14 questions --

15 QUESTION: Thank you, Mr. Risetto.

16 Mr. Amlong, you have 4 minutes remaining.

17 REBUTTAL ARGUMENT OF WILLIAM R. AMLONG

18 ON BEHALF OF THE PETITIONER

19 MR. AMLONG: Thank you, Your Honor.

20 Justice O'Connor, the -- the need for a policy,  
21 even back in 1985, is -- is exemplified by the knowledge  
22 by that time of sexual harassment in the work place. The  
23 EEOC's policy requiring employers to do something had been  
24 on the books since 1980. There was widespread knowledge  
25 about it.

1           The movie, "9 to 5," people knew sexual  
2 harassment was going on. And the -- and the -- the  
3 problem with the Court of Appeals' approach is that it  
4 discourages persons to come forward and -- I'm sorry -- it  
5 discourages employers from having the kind of policy that  
6 will bring these reports to their attention. As Judge  
7 Tjoflat noted in dissent, this rewards ostrich-like  
8 behavior. It's hear no evil, see no evil, pay no lawsuit.

9           QUESTION: But your position was, even if there  
10 was a policy, it would make no difference; there would  
11 still be a trial.

12          MR. AMLONG: Justice Ginsburg, my position is  
13 that if there was a policy, it would not make an automatic  
14 difference, that -- but it would be a factor to be  
15 considered.

16          Now, they had a policy. They just didn't tell  
17 anybody about it. And, in fact, the policy said, on the  
18 issue of whether or not Mr. Gordon had an obligation to --  
19 to report, the policy, which is found at page 267 of the  
20 joint appendix, says, in pertinent part, a -- speaking  
21 about the EEOC guidelines: Under the guidelines, an  
22 employer is responsible for the actions of its supervisory  
23 employees or agents and, in some cases, for the acts of  
24 others when the employer or a supervisory employee knows  
25 of, or should have known, the behavior.

1           Now, Mr. Gordon knew of the behavior. He had  
2 actual -- actual knowledge. He did not report it.

3           The behavior of which he knew, Justice Souter,  
4 was of -- just like discrimination against African  
5 Americans. It is that -- this is not somebody asking for  
6 a date. This is two supervisors, for whatever purpose,  
7 engaging in the crudest treatment possible of these two  
8 women. It is not merely a frolic. It is the same kind of  
9 behavior that, were it to have been directed to an African  
10 American, were he to have been called these epithets, and  
11 were he to have been badgered repeatedly, there would be  
12 no question that this was discrimination.

13           QUESTION: Well, your brother -- your brother  
14 says there would be no liability there. He -- I mean,  
15 he's drawing the distinction, if I understand it, between  
16 the hiring/firing distinction, because supervisors, at  
17 least, are authorized to hire and fire, and the  
18 discrimination, or the harassment situation, in which they  
19 are not authorized to harass. And he says a -- a  
20 definition of what is or is not within the scope of  
21 employment is -- is -- is subject to legitimate  
22 distinctions between those two cases.

23           What -- what do you think of that distinction?

24           MR. AMLONG: Justice Souter, there is no  
25 principal distinction between that kind of discrimination

1 and this kind of discrimination.

2 QUESTION: Well, what about the claim that it's  
3 harder to find out -- it's harder for the upper-level  
4 employees, the management, to find out about hostile  
5 environments than it is for them to find out about  
6 discriminatory hiring and firing?

7 MR. AMLONG: It's especially hard to find out if  
8 there is no policy, and if Robert Gordon does not report  
9 it up, number one.

10 QUESTION: All right. That's a different --  
11 that's a different argument.

12 MR. AMLONG: The -- it is -- I do not expect  
13 that a Klansman personnel manager is going to announce:  
14 Mr. Smith, I'm not hiring you because you're black. So it  
15 is -- it is not that much harder for them to find out.

16 What we have here is we have Terry and  
17 Silverman, through their acts, altering the terms and  
18 conditions of the employment.

19 Thank you.

20 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Amlong.  
21 The case is submitted.

22 (Whereupon, at 11:04 a.m., the case in the  
23 above-entitled matter was submitted.)  
24  
25



## CERTIFICATION

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BETH ANN FARAGHER, Petitioner v. CITY OF BOCA RATON.  
CASE NO: 97-282

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BY Donna Maria Fedirko-----

(REPORTER)