1

Gender Discrimination

2 Sexual Harassment

3 CITY FAILED TO PREVENT SEXUAL HARASSMENT BY LIFEGUARD SUPERVISORS

*Faragher v. Boca Raton*,

524 U. S. 775 (1998)

4 employer may be held liable for the acts of a supervisory employee

whose sexual harassment of subordinates has created a hostile work environment

5 1992, Faragher brought an action against Terry, Silverman, and the City, asserting claims under Title VII, 42 U. S. C.

6 It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual

7 with respect to his compensation, terms, conditions, or privileges of employment,

because of such individual's race, color, religion, sex, or national origin. 42 U. S. C. Section 2000e-2(a)(1).

8 Faragher alleged created a "sexually hostile atmosphere" at the beach

by repeatedly subjecting Faragher and other female lifeguards

9 to "uninvited and offensive touching,"
making lewd remarks,

and by speaking of women in offensive terms.

10 ABUSIVE WORKING ENVIRONMENT?

11 sexual harassment violates Title VII

when it is “so severe or pervasive as to alter the conditions of the victim's employment and create an abusive working environment.”

12 these “standards for judging hostility are sufficiently demanding

to ensure that Title VII does not become a ‘general civility code’."

13 sexually objectionable environment must be both objectively and subjectively offensive,

reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.

14 whether an environment is sufficiently hostile or abusive by "looking at all the circumstances,"

15 including the frequency of the discriminatory conduct; its severity;

whether it is physically threatening or humiliating, or a mere offensive utterance;

16 and whether it unreasonably interferes with an employee's work performance

17 teasing, offhand comments, and isolated incidents (unless extremely serious)

will not amount to discriminatory changes in the "terms and conditions of employment."

18 such as the sporadic use of abusive language, gender-related jokes

19 reasonable to hold an employer liable for sexual harassment by a supervisor,

particularly when such misconduct is “made possible by abuse of his supervisory authority.”

20 agency relationship affords contact with an employee subjected to a supervisor's sexual harassment,

and the victim may well be reluctant to accept the risks of blowing the whistle on a superior.

21 employer has a greater opportunity to guard against misconduct by supervisors

than by common workers;

22 employers have greater opportunity and incentive to screen them, train

them, and monitor their performance.

23 employee also has a duty to avoid or mitigate harm,

"to use such means as are reasonable under the circumstances to avoid or minimize the damages"

24 defendant employer may avoid such liability

if the following two points can be established:

25 (a) that the employer exercised reasonable care

to prevent and correct promptly any sexually harassing behavior,

26 and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities

provided by the employer or to avoid harm otherwise.

27 Supreme Court held "as a matter of law that the City could NOT be found to have exercised reasonable care

to prevent the supervisors' harassing conduct."

28 City had entirely failed to disseminate its policy against sexual harassment among the beach employees

officials made no attempt to keep track of the conduct of supervisors

29 City's policy did not include any assurance that the harassing supervisors could be bypassed in registering complaints

30 SEXUAL HARASSMENT CLAIM AGAINST WOMEN’S SOCCER COACH

JENNINGS

v. UNIVERSITY OF NORTH CAROLINA (4th Cir. 2007)

31 Jennings, a former student and soccer player at the University of North Carolina at Chapel Hill (UNC or the University),

32 claims that her coach,
Dorrance, persistently and openly pried into and discussed the sex lives of his players

and made sexually charged comments,

33 creating a hostile environment in the women's soccer program.

alleging violations of Title IX.

34 fall of her freshman year Jennings notified UNC about the hostile sexual environment

Dorrance had created within the women's soccer program.

35 dismissed these concerns and suggested that Jennings simply "work it out" with Dorrance.

complaint thus remained unaddressed by the UNC administration.

36 Jennings stayed on the team until she was cut by Dorrance sophomore year,

cited inadequate fitness as the reason.

37 Director of Athletics conducted an administrative review

pursuant to UNC's sexual harassment policy.

38 review ended with Athletic Director sending a letter of apology to Jennings's father

and a brief, mild letter of reprimand to Dorrance.

39 lawsuit was filed, Jennings was threatened and harassed

to the extent that UNC officials warned her that they could not guarantee her safety on campus

40 Title IX provides that "[n]o person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. §1681(a).

41 Discrimination under Title IX includes coach-on-student sexual harassment

that creates a hostile environment in a school sports program.

42 establish a Title IX claim on the basis of sexual harassment must show

(1) she was a student at an educational institution receiving federal funds,

(2) she was subjected to harassment based on her sex,

43 (3) the harassment was sufficiently severe or pervasive to create a hostile (or abusive) environment in an educational program or activity, and

(4) there is a basis for imputing liability to the institution.

44 Sexual harassment occurs when the victim is subjected to sex-specific language

that is aimed to humiliate, ridicule, or intimidate.

45 coach's sexually charged comments in a team setting, even if not directed specifically to the plaintiff, are relevant to determining whether the plaintiff was subjected to sex-based harassment.

46 UNC argues that Dorrance's sex-focused comments were "of a joking and teasing nature"

that did not amount to sexual harassment.

47 Dorrance's persistent, sex-oriented discussions, both in team settings and in private, were degrading and humiliating to his players because they were women.

48 conduct went far beyond simple teasing and qualified as sexual harassment.

49 whether Jennings proffers facts to permit a finding that Dorrance's sex-based harassment was sufficiently severe or pervasive to create a hostile or abusive environment in the women's soccer program.

50 Harassment reaches the sufficiently severe or pervasive level creates "an environment that a reasonable person would find hostile or abusive" and that the victim herself "subjectively perceive[s] . . . to be abusive."

51 All the circumstances are examined, including the positions and ages of the harasser and victim,

52 whether the harassment was frequent, severe, humiliating, or physically threatening

whether it effectively deprived the victim of educational opportunities or benefits.

53 standards for judging hostility ensure that Title IX does not become a "general civility code."

Simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discrimination

54 jury could reasonably find that Dorrance's persistent sexual

harassment

was sufficiently degrading to young women to create a hostile or abusive environment.

55 Dorrance abused his power as coach to ask his players questions a father would not ask

talked openly about his players' sex lives in a way that was disrespectful and degrading.

56 Dorrance was a forty-five-year-old man probing into and commenting about the sexual activities of young women

57 if Jennings's version of the facts is believed,
Dorrance took advantage of the informal team setting to cross the line and engage in real sexual harassment that created a hostile or abusive environment.

58 sexual harassment victim "can be said" to have been deprived of access to educational opportunities or benefits

59 when the harassment has "a concrete, negative effect on [the victim's] ability" to participate in an educational program or activity.

60 evidence showing that Dorrance's severe and pervasive sexual harassment

concretely and negatively affected her ability to participate in the

soccer program.

61 jury could reasonably find that the harassment interfered substantially with Jennings's ability to participate in the soccer program.

62 institution can be held liable for a Title IX violation only if "an official who . . . has authority to address the alleged discrimination and to institute corrective measures . . .

63 has actual knowledge of discrimination in the [institution's] programs

and fails adequately to respond" or displays "deliberate indifference" to discrimination.

64 UNC's highest ranking lawyer and an official responsible for fielding sexual harassment complaints dismissed this complaint

65 telling Jennings that Dorrance was a "great guy" and that she should work out her problems directly with him.

66 University's failure to take any action to remedy the situation

would allow a rational jury to find deliberate indifference to ongoing discrimination.

67 Jennings has presented sufficient evidence to raise triable questions of fact

on all disputed elements of her Title IX claim against UNC,

68 administrative official with authority to take action against Dorrance, failed to act and thereby allowed Dorrance's sexual harassment to continue unchecked.

69 CITY RESPONDS APPROPRIATELY TO SEXUAL HARASSMENT CLAIM

no "employer liability" for the alleged harassment.

70 sexual harassment is a form of sex discrimination

that violates Title VII of the Civil Rights Act of 1964.

71 Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment

72 when this conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance, or creates an intimidating, hostile, or offensive work environment.

73 HOSTILE ENVIRONMENT

74 Nievaard v.
City of Ann Arbor
(6th Cir. 2005)

75 first female hired for the position of Parks Maintenance Foreperson by the City of Ann Arbor

76 in response to Nievaard’s sexual harassment claims, the City’s Human Resources Department (HR) conducted an investigation

77 HR found that Nievaard had been “subject to rumors about her relationships, comments about her appearance and clothing,

78 questions about her competence, questions about her decisions and orders, insubordination by various employees, [and] name calling

79 attitude that has been allowed to pervade the workplace” at the Parks and Recreation Headquarters.

80 HR department made several attempts to eliminate the harassment.

81 tried to “educate Parks and Recreation management about the City's Policy 404, which prohibited discrimination and harassment,

82 harassment was continuing because of a lack of cooperation and follow-through by Parks Department management.”

83 HR Department found
Parks Department senior management, ceased enforcing Policy 404

84 district court concluded that the City's "prompt and adequate remedial measures"

precluded any finding of gender discrimination based upon a hostile

work environment

85 Nievaard appealed.

whether “the City made a good-faith effort to respond to the harassment.”

86 employee alleging a hostile work environment based on sexual harassment must show

(1) the employee was a member of a protected class;

(2) the employee was subjected to unwelcome sexual harassment;

87 (3) the harassment complained of was based on sex;

(4) the charged sexual harassment created a hostile working environment;

and (5) the existence of employer liability.

88 hostile work environment occurs when the workplace is permeated with discriminatory intimidation, ridicule, and insult

89 sufficiently severe or pervasive to alter the conditions of the victim's employment

and create an abusive working environment."

90 conduct must be so severe or pervasive as to constitute a hostile or abusive working environment

both to the reasonable person and the actual victim.”

91 Nievaard had “failed to establish that the City did not respond promptly and adequately to her complaints.”

92 Nievaard had failed to establish employer liability for a hostile work environment based on sexual harassment.

93 employer is only liable "if it knew or should have known of the charged sexual harassment

and failed to implement prompt and appropriate corrective action.

94 employer must demonstrate that it "'exercised reasonable care to prevent and correct promptly any sexually harassing behavior,

95

alleged harassment attributed to her supervisor was not based on Nievaard's gender.

96 supervisor had “questioned her integrity,

and questioned her about her personal use of a city-issued cell phone and truck

97 such incidents are not alleged to have occurred ‘because of sex’."

98 Nievaard had not alleged that a claim of retaliatory discharge in her complaint against the City.

99 alleged that her supervisor had discriminated against her based on gender

when he told her that “if she wanted to fit in, she should dress less femininely.”

100 manager's warning, without more, that plaintiff's clothing is inappropriate in the workplace is not sexual harassment

101 Nievaard had not demonstrated that these particular comments about her dress

were anything more than a legitimate concern about the appropriateness of her attire.

102 only other possibility of sexual harassment had to be committed by Nievaard’s co-workers.

some of the incidents were “clearly based on Nievaard's sex,

103 non-sexual conduct may be illegally sex-based and properly considered in a hostile environment analysis

where it can be shown that but for the employee's sex, she would not have been the object of harassment."

104 Nievaard could not demonstrate employer liability based upon co-worker harassment

because “the City took sufficient action to redress Nievaard's complaints.”

105 employer can only be held liable if it knew or should have known of the charged sexual harassment

and failed to implement prompt and appropriate corrective action.

106 PERMISSIVE INDIFFERENCE

whether an employer’s response was “prompt and appropriate,”

107 mere negligence in fashioning a remedy was not sufficient for the employer to incur liability

108 employer will only be liable if its response to allegations of sexual harassment involving a coworker

“manifests indifference or unreasonableness in light of the facts the employer knew or should have known.”

109 liable for sex discrimination in violation of Title VII only if that remedy

exhibits such indifference as to indicate an attitude of permissiveness that amounts to discrimination

110 “whether the actions taken by the city were "prompt and appropriate."

111 Nievaard argued that “the actions taken by the HR Department cannot insulate the City from liability

if another division of the City, the Parks Department, caused these remedial efforts to be unsuccessful."

112 mere negligence in fashioning a response is not sufficient to hold an employer liable.

113 City actually made several attempts to remedy the discrimination,

the City has not exhibited "such indifference as to indicate an attitude of permissiveness that amounts to discrimination."

114 City took prompt and appropriate remedial action

in response to Nievaard's complaints of co-worker harassment,

115 RECREATION SUPERVISOR GENDER DISCRIMINATION

Demoret
v. Zegarelli,
(2nd Cir. 6/8/2006)

116 alleged the Village mayor and administrator had exposed them to a "hostile work environment

[and] disparate treatment because of their gender,"

117 equal protection claims against the Mayor and Village Administrator under 42 U.S.C. § 1983
(Section 1983).

118 1983 allows an action at law against a "person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . .

119 subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983.

120 whether “Mayor Zegarelli and Village Administrator Douglas could be found to have violated plaintiffs' equal protection rights.”

121 sex-based discrimination may be actionable under § 1983 as a violation of equal protection.”

122 Section 1983 and Equal Protection Clause “protect public employees from various forms of discrimination,

including hostile work environment and disparate treatment, on the basis of gender.”

123 HOSTILE WORK ENVIRONMENT

124 evidence that the workplace is permeated with discriminatory intimidation, ridicule, and insult,

125 that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment

126 must show not only that she subjectively perceived the environment to be abusive,

but also that the environment was objectively hostile and abusive

127 Isolated incidents typically do not rise to the level of a hostile work environment

128 unless they are of sufficient severity to alter the terms and conditions of employment as to create such an environment

129 incidents must be more than episodic;

they must be sufficiently continuous and concerted in order to be deemed pervasive.

130 assess the totality of the circumstances, considering a variety of factors

including the frequency of the discriminatory conduct; its severity;

131 whether it is physically threatening or humiliating, or a mere offensive utterance;

132 and whether it unreasonably interferes with an employee's work performance

consider the extent to which the conduct occurred because of plaintiffs' sex.

133 DISPARATE TREATMENT

establish a claim by demonstrating that:

134 (1) she is a member of a protected class;

(2) her job performance was satisfactory;

135 (3) she suffered adverse employment action; and

(4) the action occurred under conditions giving rise to an inference of discrimination.

136 adverse changes include termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities

137 "[s]ome of the actions about which Pell complains were not adverse employment actions.

various office moves
Village assigned her a Jeep to use instead of a Ford.

138 paid considerably less than other department heads, all of whom were male
paid less than her predecessors even though she took on more responsibility than they had.
even paid less than subordinate male employees that she supervised.

139 Village's "failure to promote Pell to superintendent and the transfer of her employees to another department, which are relevant to her wage claim, may also constitute adverse employment actions.

140 "Pell's allegations regarding her pay, lack of promotion, and removal of

supervisory responsibilities

form sufficient showings of adverse employment action

141 Pell had offered “sufficient evidence that male department heads were given raises and allowed more leeway regarding spending during the relevant time period.”

142 one “could reasonably conclude that Zegarelli and Douglas's managerial reasons were pretextual and that the real reason was discrimination.”

143 CONSTITUTIONAL TEST FOR GENDER DISCRIMINATION IN PUBLIC FACILITIES

144 inquiry regarding alleged gender based discrimination in providing public athletic facilities.

145 In this particular instance, the male leadership of a girls softball association in a metro county

146 claimed that the county (in particular one county commissioner) was intentionally ignoring the construction of needed facilities in his geographical area of the county because it would benefit girls/women participation.

147 According to the softball association, on several occasions, this elected commissioner had stated that he "just doesn't want any county park money spent to benefit the girls".

148 Title IX, however, prohibits discrimination on the basis of sex

"in education programs receiving Federal financial assistance."

149 While athletics are considered an integral part of an institution's education program and are therefore covered by Title IX,

150 Title IX would not necessarily apply to allegations of gender discrimination in the provision of county athletic facilities by a local park and recreation agency

151 since this situation would not involve "education programs receiving Federal financial assistance."

152 Sullivan v.
City of Cleveland Heights
(6th Cir. 03/15/1989)

153 allegations of gender based discrimination may give rise to a federal claim based upon the Equal Protection Clause of the U.S. Constitution.

154 "proper standard for gender-based discrimination"

155 "To withstand constitutional challenge,
must serve important government objectives and
must be substantially related to achievement of those objectives."

156 unequal facility for changing clothes.

whether "Sullivan was accorded treatment by the City of Cleveland

Heights unequal to that accorded her male counterparts."

157 equal protection clause of the fourteenth amendment [to the U.S. Constitution] was violated

unless the difference in the facilities bore a substantial relationship to an important governmental objective."

158 whether there is substantial evidence that "such unequal treatment existed" in the provision of athletic facilities for women in the county.

159 FUNCTIONALLY EQUIVALENT FACILITIES?

Sullivan v.
City of Cleveland Heights,
(6th Cir. 03/15/1989)

160 alleged clothes-changing facilities which were made available for her at a public hockey arena

were unequal to those provided for male hockey players.

161 ten years old
enrolled in the City of Cleveland Heights' hockey program.

162 changed clothes for home games in the women's restroom in the lobby area

163 whether the City had imposed "an unconstitutional classification based

on gender"

by providing Sulivan an alleged "unequal facility for changing clothes."

164 Supreme Court of the United States
Craig v. Boren, 429 U.S. 190

"articulated the proper standard for gender-based discrimination"

165 To withstand constitutional challenge, previous cases establish that classifications by gender

must serve important government objectives and must be substantially related to achievement of those objectives.

166 "whether Sullivan was accorded treatment by the City of Cleveland Heights

unequal to that accorded her male counterparts."

167 Sullivan argued "the clothes-changing facilities made available for her were unequal to the locker room in which the male hockey players changed clothes":

168 less secure
not supervised
caused her to miss pre-game team meetings

169 "Sullivan's claims of unequal treatment were without constitutional merit

170 the facility in which she changed clothes was substantially equal to that in which the male hockey players changed clothes."

171 no indication that the plaintiff, once she has changed, is required to leave her belongings unattended or unguarded in the ladies [sic] restroom,

172 or that she is not permitted to place her belongings in the locker room area with those of the other players.

173 comparing the facilities contained in the locker room to those contained in the ladies' restroom and room attached thereto,

the one is the functional equivalent of the other.

174 they were not only aware that the plaintiff was a girl, but that they made a conscious and concerted effort

not to start any team meetings or engage in any activity, other than changing clothes, without the plaintiff's presence.

175 no evidence that the changing area described been the scene of any violence, assaults, or threats that would in any way endanger the safety or well being of the girl

176 concluded that "the facility afforded to Sullivan was substantially equal to the locker room utilized by the boys on her team

177 GIRL BANNED FROM PRIVATELY SPONSORED BOYS BASKETBALL TOURNAMENT

Perkins v.
Londonderry Basketball Club,
(1st Cir.1999)

178 refused to allow her to play in a youth basketball tournament because of her gender.

179 Fourteenth Amendment

"No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

180 equal protection clause, however, applies only to action by state government or officials (including political subdivisions), and those significantly involved with them.

181 so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action."

182 "regulation of private entities like LBC normally is accomplished through statutes,

not through the Constitution."

183 claim fails for want of state action."

Two members of LBC's five-member board of directors happen to serve as members of the Recreation Commission,

184 LBC uses the town's public school gymnasium for league and tournament play.

185 Like other groups that use the Town's facilities, LBC pays a mandatory security fee to a private service but pays no rent.

186 points of contact between LBC and the Town: LBC holds meetings in school buildings, distributes flyers regarding tryout schedules through the schools

187 PRIVATE PARTY
"STATE ACTION"?

188 no direct "state action" because "LBC is not structurally an arm of municipal government."

actions by a private entity could become "state action" if the private entity:

189 1) assumes a traditional public function when it undertakes to perform the challenged conduct, or

190 (2) an elaborate financial or regulatory nexus ties the challenged conduct to the State, or

(3) a symbiotic relationship exists between the private entity and the State.

191 TRADITIONAL

PUBLIC FUNCTION TEST

192 Perkins argued that LBC had "assumed a traditional public function" because "LBC took over the task of operating the youth basketball program from the town's recreation director."

193 public function analysis is designed to flush out a State's attempt to evade its responsibilities

by delegating them to private entities.

194 plaintiff must show more than the mere performance of a public function by a private entity

195 must show that the function is one exclusively reserved to the State.

196 administration of an amateur sports program lacks the element of exclusivity

and therefore is not a traditional public function

197 Neither the conduct nor the coordination of amateur sports has been a traditional governmental function

198 held that LBC's conduct did not constitute "state action" under the traditional public function test

199 LBC's basketball program, like most youth sports programs, was not "not exclusively governmental."

200 NEXUS TEST

201 show a close nexus between the State and the challenged action of the private entity

so that the action of the latter may be fairly treated as that of the State itself."

202 show that the State has exercised coercive power or has provided such significant encouragement, either overt or covert,

that the challenged conduct fairly can be attributed to the State.

203 town's "sanctioning requirements and the reserved power to regulate the use of school gymnasium"

of generic benefits /such as the rent-free use of facilities)" did not constitute state action.

204 PARK POLICE PREGNANCY DISCRIMINATION CLAIM

205 Title VII of the federal Civil Rights Act of 1964 makes it unlawful to "discriminate against any individual

206 with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin."

42 U.S.C. §2000e-2.

207 1978, Title VII was amended by the Pregnancy Discrimination Act ("PDA"), 42 U.S.C. § 2000e(k)

208 clarify that pregnancy discrimination is a form of gender discrimination prohibited by Title VII.

209 "a woman affected by pregnancy shall be treated the same for all employment-related purposes

as other persons not so affected but similar in their ability or inability to work." 42 U.S.C. § 2000e(k).

210 six female police officers in Suffolk County, New York commenced a pregnancy discrimination lawsuit against the County
(Lochren v. Suffolk County).

211 eligibility for light-duty assignments was limited to county police officers suffering from a work-related injury.

212 Germain v.
County of Suffolk
(E.D. N.Y. 5/29/2009),

213 County refused her request to be assigned to light duty during the course of her pregnancy.

214 Germain was "ineligible for light-duty because such assignments were reserved only for Park Department police officers who suffered from injuries sustained on the job."

215 Germain exhausted all of her accrued leave time.

forced to take unpaid leave.

216 Germain was also without health benefits and did not accrue seniority for this time period.

217 Germain's husband, a county police officer, had requested permission to transfer his accrued sick leave to his wife so that she would not have to take unpaid leave.

218 labor relations director denied the request

director told Germain's husband that he would not consider his request while his wife's lawsuit was pending.

219 labor relations director indicated that he would attempt to accommodate the husband's request for a transfer of his sick leave to his wife

if Germain withdrew her Title VII lawsuit.

220

DISPARATE IMPACT

221 discrimination claim under Title VII may be based upon "disparate impact."

222 employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity.

223 Germain alleged that "the Park Department's policy of limiting light-duty assignments only to those officers who suffer from occupational injuries has a disparate impact on pregnant women,"

224 County had argued that "the policy does not offend the PDA because the Park Department has applied the policy consistently to all officers,

225 whether pregnant or not, who have sought light-duty assignments because of non-occupational injuries."

226 federal district court rejected this argument.

227 Under the PDA, the issue is whether the impact of the challenged policy is disparate or more onerous on pregnant women than other similarly situated employees,

228 not the nature of the condition which gave rise to an inability to work.

229 SIMILAR INABILITY TO WORK

230 PDA only requires Germain to show that non-pregnant Park Department officers similarly unable to perform full-duty assignments

were treated more favorably than her."

231 PDA would not require Germain to "demonstrate that the employee who received more favorable treatment

be similarly situated in all respects."

232 PDA requires only that the employee be similar in his or her "ability or inability to work."

233 court found "the distinction the Park Department's policy draws between occupational and non-occupational injuries

necessarily excludes pregnant women from light-duty."

234 pregnant officer and the non-pregnant officer

are similarly situated in their inability to perform full-duty work."

235 Park Department's light-duty policy has a disparate impact on pregnant women"

in violation of the PDA.

236 burden would ordinarily shift to the employer County to show that the challenged policy

was consistent with "business necessity."

237 Germain had shown she was qualified for assignment to light-duty work because she was unable to work full-duty and there was light-duty work available in the park police department.

238 Germain contended that "the Park Department's refusal to amend its policy in the wake of the Lochren consent decree reflected its animus [i.e., prejudiced ill will] towards pregnant women."

239 federal district court found that a jury should also determine "whether Suffolk County's failure to amend the Park Department's light-duty policy reflects the County's animus toward women."

240 RETALIATION

241 alleged that "Suffolk County's refusal to permit her husband to transfer his accrued sick leave time to her was an act of retaliation within the meaning of Title VII."

242 letter from the county's director of labor relations, for a reasonable jury to conclude that "Suffolk County's stated reason for denying Germain's request was a pretext for unlawful retaliation."

243 denied the County's motions for summary judgment, Geramin would have an opportunity to prove her PDA claims in a jury trial.

244 TRANSSEXUAL ADVANTAGE IN WOMEN'S COMPETITION?

245 whether a transsexual person, formerly male but now female, is considered a female for sports team purposes

246 GENDER DETERMINATION
*Richards v. United States Tennis Association*, 93 Misc. 2d 713; 400 N.Y.S.2d 267 (8/16/1977),

247 whether a male who had had sex reassignment surgery could qualify to participate in a women's tennis tournament.

248 July 1976, for the first time, the USTA required a sex determination test for women in connection with the United States

249 USTA refused Richards' request to waive the sex determination test.

250 USTA stated that it had adopted the required test to determine the presence of a second "x" chromosome in the "normal female" and, thus, insure competitive fairness

251 USTA, such a test was necessary to avoid "a competitive advantage for a male who has undergone 'sex change' surgery as a result of physical training and development as a male."

252 opinion of the surgeon, Richards would have no unfair advantage "when competing against other women."

253 surgeon found Richards' "muscle development, weight, height and physique fit within the female norm."

254 USTA's chromosomal test would classify Richards as a man,

255 another physician stated that Richards "would be considered a female by any reasonable test of sexuality

256 has the external genital appearance, the internal organ appearance, gonadal identity, endocrinological makeup and psychological and social development of a female."

257 UNFAIR TEST

258 USTA's decision to require a sex determination test for the 1976 United States Open was "a direct result of plaintiff's application to the 1976 United States Open."

259 until August, 1976, "there had been no sex determination test in the 95-year history of the USTA national championships, other than a simple phenotype test (observation of primary and secondary sexual characteristics)."

260 court found USTA's requirement that Richards pass a chromosomal test "in order to be eligible to participate in the women's singles of the United States Open"

261 was "grossly unfair, discriminatory and inequitable, and violative of her rights under the Human Rights Law of this State."

262 only justification for using a sex determination test in athletic competition is to prevent fraud, i.e., men masquerading as women, competing against women.

263 court found USTA had violated the state human rights law

264 granted plaintiff's request for a court order which would allow her to "qualify and/or participate in the United States Open Tennis Tournament, as a woman in the Women's Division."

265