Chapter 4

SEX IN THE WORKPLACE

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I. Introduction

Wittenberg: Good Afternoon. Welcome to the workshop on sex in the workplace. When Chris Knowlton asked me to put together this panel, the first thing I did was go back to our Academy books and re-read the presidential address of Jean McKelvy, who was our first female president. In 1971, Jean wrote an article called, *Sex and the Single Arbitrator.*[1] Jean was very much a woman ahead of her time. She addressed what were then major issues in labor arbitration, basically whether arbitrators would interpret contract language in cases involving sex discrimination in light of state protective labor laws governing the employment of women. In particular, Jean looked at the arbitration awards of arbitrators who, at that time, routinely upheld an employer's right to deny certain jobs to women on the basis that they were required to lift 25 pounds regularly. This sounds impossible today, but it was very controversial at the time. That was also a time when companies maintained separate seniority lists for men and women, and certain jobs were labeled "female" or "male". Jean also expressed

[1]Jean Trepp McKelvey, *Sex and the single arbitrator,* Industrial and Labor Relations Review, Apr. 1971, at 335–353.

concern in her paper that it would be the judiciary that would be responsible for eliminating sex discrimination in the workplace and not arbitrators.

Well, it is true that the judiciary has set standards for sex discrimination in the workplace, but it also is true that things have changed in collective bargaining and labor arbitration. Contracts have been reformed, and it is routine for arbitrators faced with anti-discrimination clauses to enforce statutory standards in labor arbitration. It also is true that we have come a very long way in the kinds of issues that we deal with: sexual harassment, hostile work environment, retaliation, and transgender issues. Those are some of the issues that we are going to talk about today.

We have an extraordinary panel of experts from New York and Los Angeles with us today. It is my pleasure to introduce them, and I'm going to do so in the order in which they will speak. Closest to me is Adam Levin, a partner in the firm of Mitchell Silberberg & Knupp, a management-side labor and employment firm. Adam specializes in entertainment law, and today he is going to present the case of *Lyle v. Warner Brothers Television.*[2] For those who follow this field, this is the *Friends* television case. We are very lucky to have Adam with us today as he was the lead counsel for Warner Brothers in the case.

Next to Adam, we have Maureen Stamp. I know your program says that Anne Vladeck is going to be a speaker. Anne, unfortunately, is unable to join us today, and Maureen is appearing in her stead. We are very pleased to have her with us. She is a partner with the firm of Vladeck, Elias, Waldman & Engelhard. She specializes in labor, employment, and ERISA litigation. Maureen is going to talk about the ground-breaking 2006 decision of the Supreme Court in *Burlington Northern and Santa Fe Railway Co. v. White*,[3] a case that deals with the issue of retaliation.

I want to take a moment at this time to give tribute to one of the founders of the Vladeck firm, and that is Judith Vladeck who died earlier this year. Judith made enormous contributions to the equality of women at work and was responsible for helping to set

[2]38 Cal. 4th 264 (2006).
[3]458 U.S. 53 (2006).

up programs to promote the career opportunities for both blue-collar and white-collar women. She will be sorely missed.

Next to Maureen, we have Kathleen McKenna who is a partner with the Proskauer Rose firm. She is labor and employment counsel to a variety of companies. Kathleen can be found defending a multinational bank against a charge of discrimination one day and sitting across the table from mailers and delivery drivers the next day and be equally comfortable. She's going to talk today about sexual harassment, particularly in terms of the e-mail environment in which we now live.

On my far right is Nathan Goldberg who is a partner with Allred, Maroko & Goldberg. He is one of the leading plaintiffs' counsel in the country, and he handles cases involving discrimination, wrongful termination, and whistle-blower matters in a variety of industries. Not only is Nathan highly regarded by the plaintiffs' bar, he is extremely well respected by opposing counsel; and I know him as a plaintiffs' lawyer who is truly beloved by his clients. He is going to speak about transgender rights by focusing on a case study developed from a case that he handled very recently.

II. "So This Guy Walks Into A Bar. . . .": Dirty Jokes and Vulgar Language in the Workplace After the California Supreme Court's "*Friends*" Decision

Adam Levin* and Taylor Ball**

The California Supreme Court recently wrote the epilogue of the hit *Friends* television series. Plaintiff Amaani Lyle, hired as a writers' assistant on the show, alleged that the use of sexual jokes,

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stories, comments, and expressive gestures by the show's writers constituted sexual harassment. In a unanimous decision, the seven justices of the Supreme Court rejected Lyle's claim against Warner Bros. Television Production, and writers and producers of *Friends*, ruling that because the alleged conduct was not directed at or about the plaintiff, the conduct did not violate California law.[1] It is not the use of sexual speech that is prohibited by state and federal employment laws, the court explained, but speech and conduct that is directed at an employee or group of employees *because of* their gender.[2] With its ruling, the California Supreme Court brought California law into line with decisions interpreting Title VII of the Civil Rights Act of 1964.

A contrary decision would have severely limited the free speech rights of writers, directors, actors, journalists, advertising executives, and other creative persons, whose jobs, at times, involve the use of sexually coarse and vulgar language. Further, employers throughout California would have been forced to assume the uncomfortable roll of workplace censor, charged with protecting employees from all manner of offensive speech they might have been exposed to in the course of their jobs. Instead, employers can rely on the court's decision to develop and enforce reasonable sexual harassment policies tailored to their specific business needs without having to adopt "Big Brother"-type surveillance of their employees.

Sexually Coarse and Vulgar Does Not Equal Discriminatory

In the brief four months that plaintiff Amaani Lyle was employed as a writers' assistant on the *Friends* production, she allegedly witnessed male (and female) writers engage in a myriad of offensive conduct including sexual banter, comments, and jokes about the writers' own personal sexual experiences; vulgar expressions; sexually graphic drawings; and simulated masturbation.[3] Although this conduct was generally related to the creating of an adult-themed situation comedy, and none of it was directed at Lyle or other female employees in the writers' room, Lyle nonetheless claimed that mere utterance of certain vulgar words by the male writers

[1] *Lyle v. Warner Brothers Television*, 38 Cal. 4th 264, 132 P.3d 211 (Cal. 2006).
[2] *Id.* at 286.
[3] *Id.* at 274–77.

was inherently discriminatory and created an unlawful, hostile work environment under the Fair Employment and Housing Act (FEHA), which prohibits harassment "because of" sex.[4]

The California Supreme Court flatly rejected Lyle's argument, ruling "it is the disparate treatment of an employee on the basis of sex—not the mere discussion of sex or use of vulgar language—that is the essence of a sexual harassment claim."[5] A sexual harassment plaintiff must show that "gender is a substantial factor in the discrimination, and that if the plaintiff had been a man she would not have been treated in the same manner."[6]

Lyle's harassment claim, no matter how salacious the alleged details, could not meet this standard because she had no evidence of jokes, comments, or pictures directed at her *because of* her gender.[7] All of the writers' assistants on the *Friends* production, both male and female, were privy to the same creative process, including the same sorts of jokes, stories, gestures, and comments.[8] If Lyle "had been a man," she would have experienced the exact same conditions of employment. And, although Lyle attempted to base a claim on a few purported disparaging remarks made by the writers about the show's female actors (all of which were vehemently denied by the writers), the court found that even these were not actionable as harassment because they were neither severe nor pervasive.[9]

Lyle Not Limited to Creative Workplaces

In *Lyle*, the writers on *Friends* used sexual speech as a tool of the trade to foster a "creative" work environment geared towards generating scripts for a show featuring sexual themes.[10] The California Supreme Court clearly considered the writers' nondiscriminatory motives to be an important factor in rejecting Lyle's claim. As a result, several commentators, attempting to downplay the significance of the court's holding, have dismissed the case as merely a context-specific exception to the purported general

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[4]Cal. Gov't Code §12940 (2006).
[5]*Lyle*, 38 Cal. 4th at 280.
[6]*Id.*
[7]*Id.* at 287.
[8]*Id.*
[9]*Id.* at 291.
[10]*Id.* at 288.

rule that coarse language in the workplace constitutes harassment "because of" sex. However, the broad legal principles articulated by the court, primarily based on federal case law, make clear that the court's holdings are not limited to creative work environments or to employees who serve in creative capacities.

The court's decision in *Lyle* brings California law into line with the standard currently governing harassment claims under Title VII: Sexual language is actionable as harassment only if it is discriminatorily targeted at an employee or group of employees because of their sex.[11] Under this standard, federal courts have consistently held an array of sexually charged speech not actionable in a variety of industries. For example, the Seventh Circuit Court of Appeals held that vulgar expressions like "fuck me" and "kiss my ass" are "commonplace in certain circles," and did not constitute unlawful harassment when used by warehouse employees (both with and without accompanying crotch-grabbing gestures) in the absence of evidence that the comments were directed at an employee because of gender.[12] The Second Circuit would not permit the punishment of a display of graphic caricatures by postal employees.[13] Even though the derogatory cartoons had the name of a specific employee written on them, the court held that the hostility was grounded in workplace dynamics unrelated to the plaintiff's sex and did not reflect an attack on her because she was a woman.[14] Similarly, the D.C. Circuit held that a campaign of vulgarity by a security guard, including kissing gestures and oral sex comments, was a "workplace grudge match" and, therefore, not directed at an employee because of sex.[15] And, the district court for the Northern District of Illinois held that statements graphically describing male homosexual activity by a bank manager could not be the basis for a claim of harassment by a heterosexual female co-manager.[16] These cases reflect a general unwillingness of courts to impose liability for sexual harassment unless speech or conduct is directed at a particular employee, or group of employees, because of sex, regardless of how vulgar, graphic, or unnecessary to the purposes of the job the speech or conduct may be.

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[11] *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998).
[12] *Johnson v. Hondo, Inc.*, 125 F.3d 408, 412 (7th Cir. 1997).
[13] *Brown v. Henderson*, 257 F.3d 246, 256 (2d Cir. 2001).
[14] *Id.*
[15] *Davis v. International Sec., Inc.*, 275 F.3d 1119, 1123 (D.C. Cir. 2002).
[16] *Crawford v. Bank of Am.*, 181 F.R.D. 363, 364–65 (N.D. Ill. 1998).

It is inevitable that employees will gather around the water cooler to tell dirty jokes and discuss sexual exploits, salacious celebrity gossip, or even last night's rerun of *Sex and the City.* For the majority of employers outside of creative work environments, these discussions are not likely to be job related. However, under *Lyle,* these discussions may not constitute unlawful sexual harassment, unless motivated by the gender of employees. The same is true of vulgar language and even sexually graphic visual displays. The employee who slides down his trousers on a single occasion to show a group of his male and female co-workers a new, strategically placed tattoo or piercing likely is not guilty of unlawful harassment— other things, perhaps, but not sexual harassment.

In the Wake of *Lyle*

Lyle provides employers with strong defenses to harassment claims based on undirected speech. Beyond that, the California Supreme Court has offered valuable practical guidance throughout the decision that employers would be wise to heed.

Warn Applicants and Employees About Potentially Offensive Speech

In evaluating the sufficiency of Lyle's factual showing, the court repeatedly observed that Lyle was warned—before she was hired—that the show *Friends* dealt with sexually suggestive subject matter and that as an assistant to the comedy writers she would be exposed to their jokes and discussions about sex.[17] Although the court did not explicitly rule that such advance notice is legally required, providing such a notice (preferably in writing) to job applicants and employees may nonetheless serve useful purposes in workplaces in which exposure to offensive speech is an inherent part of the job.

Practically speaking, a written notice is an effective way to weed out easily offended employees—the proverbial "eggshell" plaintiffs. An applicant who is truly uncomfortable with, or offended by, sexual speech, will likely opt to work elsewhere upon receiving such notice. Moreover, from a legal perspective, employees who sign an acknowledgment and accept the position will have a

[17] *Lyle,* 38 Cal. 4th at 271, 287.

more difficult time later establishing that the sexual speech was so severe or pervasive that it altered the conditions of employment as required by California law.

Implement Effective Complaint Procedures

Lyle's failure to complain about the writers' purported offensive epithets directed at other women was a factor that the California Supreme Court considered in concluding that Lyle did not subjectively perceive such comments as hostile and abusive to her own work environment.[18] The court's finding serves as a reminder to employers that it is critical to provide employees with a comprehensive and well-publicized process for registering complaints about harassment. Employees should be encouraged to report inappropriate sexual speech or conduct to human resources, their supervisors, or a neutral management designee for prompt investigation. Employees also should be reassured that they will not be retaliated against for their complaints. With such a process in place, an employee who chooses not to complain about perceived sexual harassment will, after *Lyle*, have a difficult time showing that he or she subjectively perceived the conduct as severe or pervasive. Furthermore, when litigating a hostile work environment claim, an employer will be able to raise as an affirmative defense that the employee unreasonably failed to take advantage of preventative or corrective opportunities provided by the employer to avoid the harm.[19]

First Amendment Protections Are Alive and Well

The majority of the California Supreme Court left for a later day the complex issue of the scope of First Amendment protections in California workplaces. Nevertheless, in a separate concurring opinion, Justice Ming Chin explained why, in Justice Chin's words, Lyle's attack on the *Friends* creative process, "has very little to do with sexual harassment and very much to do with core First

[18] *Id.* at 291.

[19] *Faragher v. City of Boca Raton*, 524 U.S. 775, 787 (1998); *State Dept. of Health Servs. v. Superior Court*, 31 Cal. 4th 1026, 1034 (2003) (holding that the avoidable consequences doctrine applies to damage claims under the FEHA, and that under that doctrine a plaintiff's recoverable damages do not include those damages that the plaintiff could have avoided with reasonable effort and without undue risk, expense, or humiliation).

Amendment free speech rights."[20] Justice Chin's concurrence suggests that speech arising in the context of a creative or editorial process (like a writers' room or newsroom) should be actionable only if directed at the plaintiff.[21] In future litigation over workplace speech, Justice Chin's opinion may serve as an important starting point for an employer seeking to build a formidable constitutional defense.[22]

Conclusion

The California Supreme Court's decision in *Lyle* makes clear that the purpose of the FEHA is to prevent discrimination against an individual because of his or her protected characteristics; it is not meant to be enforced as a general civility code.[23] Simply because an employee uses a four-letter expletive when he loses a sale or burns himself on the coffeemaker does not mean that the employer has to send that employee out immediately for remedial training. However, if an employee regularly greets male employees with a handshake, while greeting a female employee with a lingering stare (either with or without an accompanying crotch-grabbing gesture), state and federal law may be implicated.

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[20] *Lyle*, 38 Cal. 4th at 296 (Chin, J., *concurring*).
[21] *Id.* at 300.
[22] To avoid waiving what may ultimately prove to be a viable and powerful defense, the defense should be pled in the answer. *Carranza v. Noroian*, 240 Cal. App. 2d 481, 488 (1996) (affirmative defenses not raised in the answer are irrelevant at trial).
[23] *Lyle*, 38 Cal. 4th at 295.

III. PANEL DISCUSSION

Wittenberg: Okay, Nathan, what are the implications of this decision for a workplace that's not a "creative environment?"

Goldberg: Well, we have a very fundamental disagreement about the implications of this decision. I think Adam did a very good job on the case, but, obviously, he had a couple of things going for him. One, the employee knew what she was getting into before she ever got the job. And two, it was a creative environment. This second factor permeates the opinion. The opinion constantly refers to the fact this is a creative environment, and that you can't micro- manage that process. And, that there were both men and women involved in this creative process.

So how far do you want to run with this? The questions that I posed to Adam before we started today involve two fact patterns. One—and this is a case I had recently—a woman is a new manager in a department store. All of the other mangers are men. Every morning they have a meeting at which they're supposed to discuss business-related subjects. Every day when she comes in what they, in fact, talk about is sex. They talk about their sexual conquests, the positions they like, the positions they don't like, and what they think turns women on. Over a period of time, this becomes more and more bothersome to the female manager. I suggest in that situation a court is going to find that this conduct creates a hostile environment for a woman.

The other hypothetical I posed to Adam is: What if, before a woman ever goes into this work setting, the men are used to posting up naked pictures and they have them all over the workplace. None of the men are offended. Then, a woman goes to work there, and she doesn't like it. So, they have to take the pictures down after all. It's not because she's a woman. They did it even before and they did it openly. So Adam, what do you think?

Levin: Well, the law as written now prohibits disparate treatment. So the starting point for any analysis is going to be, are women being treated differently than the men? And in a situation where men are simply talking about sex, it's not very different, frankly, from what happened in the *Lyle* case except that the context may be different. The context may be, for example, a ship yard as opposed to the writing room on a television sitcom, but the legal standard is no different. Ultimately, it's the plaintiff's burden to show that if she had been a man, she would have been treated differently.

Now, what Nathan is articulating is basically a disparate impact–type theory. This is a theory that the California Supreme Court has rejected. It's a theory that because these men are talking about sex that women are somehow harmed more than men. I'd like to submit that if I worked in that environment, I would find that conduct offensive. Does that give me a claim? I don't think so. So, why would a woman have a claim but I wouldn't have a claim? The only response, I think, that Nathan can give you is, well, women have more fragile sensibilities when it comes to sex talk or certain language is more offensive to women than to men. I submit that this view is based on age-old stereotypes that have been rejected and that many women find offensive.

Wittenberg: Kathleen?

McKenna: I think that the *Lyle* decision was correctly decided. But, as a management labor lawyer—and there are people in this room who know me and know that "frail" and "sensitive" are not words that would describe me—I think that, with all due respect, Adam's conclusion is incorrect. I do not think that the court really is drawing a distinction between a treatment and an impact analysis. When the Supreme Court stated the new rules for liability in *Faragher*[1] and *Ellerth*,[2] it did not throw out the window the construct that courts have traditionally looked at in determining whether conduct is sexually harassing. Whether we have liability for it is the second issue. The first issue is whether the conduct is sexually harassing. The classic definition and the Equal Employment Opportunity Commission's (EEOC's) definition of hostile work environment harassment say we have unwelcome sexual conduct that has the purpose or the effect of making your work environment miserable. Purpose or effect, as I say when I do training, this means it's not about you. This means it's not about, "It was a joke." It's not about, "I wasn't trying to offend you." It is about the receiving end of the conduct. The issue, essentially, is whether sexual conduct makes the workplace miserable. So, I think the decision was analytically right in *Lyle*. I think it is impacted by the creative environment because it lacks the purpose or effect of making the work environment hostile. The fact that sexual talk was a function of the job is relevant to that standard. Had that kind of sex talk taken place in an accounting department or a law firm, it would not be a function, by and large, unless you do the kind of cases we

[1]524 U.S. 775 (1998).
[2]524 U.S. 742 (1998).

do, in which case that kind of talk happens all the time. [Laughter.] But, by and large, it is not a condition of your employment. It's not the work environment. And, *Oncale*[3] makes clear that both men and women would have a basis for saying that this makes their work environment hostile.

I remember not too long ago interviewing a young man at a law firm where the partner's habit was to call his team together and daily tell them all the disgusting sexual jokes he had learned the night before. The young man complaining of this conduct said, "I resent that because I'm a man he thinks that this is welcome, that he thinks this is acceptable." I don't think it has anything to do with the fragility of women. We are talking about sexual conduct and whether or not it is welcome or unwelcome and whether it is severe or pervasive enough to make the working environment hostile. So, for that reason, the one off joke, the one off comment, maybe even many jokes is not enough to make the work environment pervasively filled with unwelcome sexual conduct.

Wittenberg: Okay. I'm going to give Adam the last word; and then we're going to have to move on.

Levin: It's me against the world. But, that's how it was with the *Lyle* case also. Let me say this, first of all: I'm not an advocate for employees walking around telling dirty jokes and using vulgar language. In fact, I think employers are well advised to set standards that are higher than what the law sets and to punish speech that runs afoul of those standards.

That being said, the federal courts have consistently rejected claims under Title VII based on vulgar language. Unless that vulgar language is targeted at a woman or a man because of his or her gender, the courts have said this does not meet the threshold requirement for liability. So, I understand, theoretically, that we're all uncomfortable with the notion that male employees get to goof around using really dirty language; but at the moment, anyways, the law allows that. It is not a violation of Title VII, and now it's also not a violation of California law for employees to use that kind of language.

Wittenberg: Okay. We're going to move on now from dirty language to the assignment of dirty work. Maureen?

Stamp: Thank you, Carol. Let me express Anne Vladeck's regret that she was not able to be here with you. I will try to fill her shoes. My topic is not as hot and not as sexy as Adam's topic,

[3]523 U.S. 75 (1998).

but it's a case that plaintiffs' lawyers and union lawyers are thrilled about. I've been asked to speak about *Burlington Northern v. White*.[4] This is a Supreme Court case that came up to us through the Sixth Circuit not once, but twice. The Supreme Court in *Burlington Northern* acknowledged unequivocally what union and plaintiffs' lawyers have always known: that an employer's retaliation is not limited to discriminatory actions that affect terms and conditions of employment. An employer also can take action that has retaliatory effects outside the workplace. The Supreme Court, for the first time, acknowledged that reality.

Burlington Northern presents an interesting case study for a number of reasons. One of the things that makes this case so interesting is that it settled a disagreement among the circuits and, indeed, within the Sixth Circuit, regarding the proper standard to be applied in Title VII retaliation cases. The other thing that I think is interesting is the procedural posture of the case, and I just want to go through the facts briefly.

Sheila White was the only woman working in the labor department of the railroad. She was employed as a track laborer. Soon after she became employed, she was given the job to operate a forklift because she had some prior experience. There was a lot of evidence in the district court that the forklift job was one of the more desirable jobs. Soon thereafter, White complained that her immediate supervisor was creating a hostile work environment for her based on inappropriate comments.

Burlington, to its credit, investigated and suspended the supervisor. Now, this is where it got really tricky for the employer: It soon after removed White from the forklift assignment based on comments or complaints by her co-workers. Now, any plaintiff lawyer and any good management lawyer will know that a red signal is going to go off at that point because here you have a woman who was complaining about a hostile work environment. Soon after she was taken off a desirable job and put back to be a track laborer. She promptly filed an EEOC charge claiming that the removal was unlawful gender discrimination and also retaliation. A few days after that, she had a disagreement with another supervisor who claimed that she was insubordinate, and they suspended her indefinitely without pay. She triggered her grievance procedure, and, eventually, she was reinstated and awarded full back pay for the 37 days that she was out.

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[4]548 U.S. 53, 126 S. Ct. 2405, 165 L. Ed. 2d 345 (2006).

White, again, filed a substantive discrimination claim and a retaliation claim based on these actions. She claimed that the reassignment and the 37-day suspension were both substantive discrimination and retaliation. The jury at the district court level found for her on both retaliation claims, but not on the substantive discrimination claim.

Burlington appealed up to the Sixth Circuit. A divided Sixth Circuit reversed the judgment and found in favor of Burlington. The full court of appeals vacated the panel's decision and heard the matter en banc. All members voted to affirm the judgment in the district court in White's favor and against Burlington on both the retaliation claims but they differed as to the proper standard to apply. So, White won when the Sixth Circuit convened en banc.

Why did the Supreme Court take this case? I think that is an interesting question. Another interesting question is why did the Court's holding concern itself with addressing the topic of retaliatory action outside of the workplace when the two retaliation claims that White asserted both involved the workplace? I think those are really interesting. The Supreme Court had a circuit split to resolve. The disagreement among the circuits had to do with whether a plaintiff's challenged action must be employment- or workplace-related and how harmful it must be to constitute retaliation as prohibited by Title VII. Some circuits, including the Second, Fifth, Sixth, and Eighth, applied the same standard of substantive discrimination to retaliation claims, requiring the challenged action to result in an adverse effect on terms and conditions or benefits of employment.

In contrast, other circuits, like the Seventh, Ninth, and D.C., used a broader definition in the context of retaliation, asking instead whether the employer's challenged action would have been material even if not necessarily directly linked to the terms of employment of that employee. Justice Breyer's majority decision adopted the broader of these two interpretations. By concluding that the scope of the anti-retaliation provision extends beyond workplace-related or employment-related retaliatory actions, the court squarely grounded its decision in the central language of Title VII. In the core discrimination provision of Title VII, it specifically talks about discrimination with respect to compensation, terms, conditions, and privileges of employment.

The anti-retaliation provision of Title VII talks about discrimination against employees who have opposed any practice made

unlawful by Title VII. The statute explicitly limits the scope of substantive discrimination to actions that affect employment or alter the conditions of the workplace. But, no such limiting words appear in the retaliation portion of the statute.

In *Burlington Northern*, the Court explicitly acknowledged the truth that we, as union lawyers and plaintiffs' lawyers, always knew: An employer's retaliation is not always limited to actions that affect terms and conditions of employment. In *Burlington Northern*, the Court cited two examples to explicate this thought: It looked to a D.C. Circuit case where the FBI retaliated against an employee and that retaliation took the form of the FBI's refusal, contrary to its policies, to investigate death threats a federal prisoner made against an agent and his wife. It also looked to a California case where the employer filed false criminal charges against a former employee who complained about discrimination. In those cases, even though the employer's action may be completely outside of the workplace, they had a chilling effect on an employee who had complained about discrimination.

Some commentators have said that it's rather anomalous that the Supreme Court would read the anti-retaliation provision to afford broader protection for victims of retaliation than for those whom Title VII primarily seeks to protect. The Court, however, reasoned that Congress made retaliation unlawful to prevent harm to individuals who take action opposing discrimination. In this context, the employer's retaliation appears to be even more invidious because it would have a chilling effect on employees trying to assert their statutory rights.

As a union lawyer, I didn't think that the Court's decision to read the anti-retaliation provision broader than the substantive discrimination was surprising because I have seen that outcome before. The first thing that comes to mind is the National Labor Relations Act where the substantive provision of that Act prohibits employer discrimination with regard to any term or condition of employment to encourage or discourage membership in any labor organization. The retaliation provision of that statute makes it unlawful for an employer to discharge or otherwise discriminate against an employee because he or she has filed charges. In 1983, the Supreme Court in *Bill Johnson's Restaurants*[5] construed the anti-retaliation provision to prohibit a wide variety of employer conduct. This includes conduct that is intended to restrain or that

[5]461 U.S. 731 (1983).

has the effect of restraining employees in the exercise of their Title VII rights.

The Supreme Court in *Burlington Northern* went to great pains to emphasize that the anti-retaliation provision of Title VII protects not all forms of retaliation but only retaliatory action that is materially adverse. Thus, a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which, in this context, means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.

In light of *Burlington Northern*, we need to think about the types of retaliatory action that will now be considered. The first thing that we're going to notice is that actions that were considered rather innocuous before could now be considered retaliatory because the significance of any given act by the employer will depend upon the particular circumstances. The context is going to matter. So, although an employer's change of a work schedule might seem innocuous, under *Burlington Northern* the change in schedule might have a materially adverse effect on a young mother who has set her schedule so that she can take care of her children. When you look at that context, it might be considered retaliatory.

The *Burlington Northern* decision also is likely to foster some additional changes. You are likely to see courts applying the broader anti-retaliation standard to other areas of law. You will see it perhaps in the Employment Retirement Income Security Act (ERISA) area and in the First Amendment area. The other thing that will happen is that discovery is going to be broader now. And for arbitrators who hear these cases, they should be cognizant of the fact that discovery is going to be broader under *Burlington Northern* because it's going to have to reach to the employer's conduct outside of the workplace.

Thank you.

Wittenberg: Kathleen, do you agree that *Burlington Northern* has now set the standard for what is materially adverse?

McKenna: I certainly think with respect to retaliation cases that the Supreme Court has been very loud and clear in saying that the standard for finding liability for retaliation cases is now materially different from the standard of finding discrimination as a general matter. In terms of courts concluding what "materially adverse" is, one has to focus on the Supreme Court's definition. So what the Supreme Court has said is whether a reasonable employee "would

have found the challenge action materially adverse," which, in this context, means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.

The court has moved to a victim's perspective here; a perspective that in straight discrimination cases the Ninth Circuit adopted in the *Brady* case and the New Jersey Supreme Court adopted in the *Toys-R-Us* decision. In retaliation cases, the Court is saying, "context matters." That phrase—"context matters"—we're going to hear coming at us time and time again in these cases. The Court says that whether a particular reassignment is materially adverse depends on the circumstances of the particular case and should be judged by the perspective of a reasonable person in the plaintiff's situation considering all of the circumstances. I think this was all foreshadowed by the Supreme Court's decision on the *Oncale* case, which stated that the existence of actionable harassment depends upon the particular constellation of circumstances and events. Here, as well, the Court in retaliation cases has moved to a victim's perspective.

Audience Member: One of the interesting parts of the opinion concerns the fact that the plaintiff lost 37 days of pay. Then the company made it up, and they paid her the lost wages. So, the argument was that we paid her back that money, where is the adverse employment action? Where has she been harmed? The Court basically said if you haven't been paid for 37 days, you've been harmed. Think about it from the victim's perspective. When you don't get your paycheck, how does that impact your life even if you get it later? It's a very favorable standard for the employee.

Audience Member: I think it's important to point out that she served the 37 days over the Christmas period. And, her make-whole remedy was the back pay. But my question for the panel is to ask whether this case places labor arbitrators in a position where they look at broader remedies like compensatory damages. Do you see that happening?

Stamp: Oh, absolutely. I think that arbitrators should have been finding a way to do that even before this case. But I think *Burlington Northern* compels arbitrators to do that because the courts have said that giving her the money she lost doesn't make her whole. There are other things that you will have to come up with, other remedies that you will have to fashion in order to make her whole. So, just giving her what she lost monetarily isn't sufficient. I think *Burlington Northern* compels arbitrators to find other kinds of remedies, and compensatory damages is one example.

Audience Member: Are there any circumstances in which an employer might want an arbitrator to do that?

Panel Member: Where Carol and I are from in the Second Circuit, there is great deference to arbitration awards. The Second Circuit has taken footnote 10 of *Gardner Denver*[6] very seriously and looks at whether or not statutory claims can be decided in arbitration and whether or not those decisions will be upheld. So, if I knew I had a really good arbitrator, then I would take my shot at the risk of compensatory and maybe even punitive damages rather than taking that to a jury.

One of the things to keep in mind, at least in those circuits in which there will be deference to arbitration, is to think also about punitive damages, because the EEOC compliance manual says that retaliation cases are particularly well-suited for punitive damages. If I'm going to run the risk of punitive damages, then maybe I'm going to take that to trial because at least I get an appeal.

Wittenberg: Anybody else?

Audience Member: One observation I make in the wake of this case is that I think there's going to be far more battles over causal connection and nexus. The employee still has the burden to prove that the adverse action the employee seeks to rely upon was related in some way to the complaint that was made. Without that proof, there is no claim. In the wake of this decision, I've seen a lot more battling over whether there is a causal connection and far less over whether there was an injury or whether there was adverse action.

Wittenberg: Great. I'm going to hold additional questions until the end; otherwise, we're not going to be able to get all four presentations. We're going to move from dirty work to dirty e-mail. Kathleen?

McKenna: We have a hypothetical that we're going to discuss. First, a question for the audience: How many people in the audience use e-mail? Awesome! How many use it every day? How many people IM? How many people have employees who IM? How many people have cell phones with cameras in them? The reason I ask this is because it demonstrates, I suspect, what we all know, which is that technology is now ubiquitous. I suppose ever was it thus from the invention of fire to the invention of a cell phone

[6]415 U.S. 36 (1974).

with a camera in it that the minute we have an invention, it can be used both for good and for ill. And, in a rising number of claims of sexual harassment, we are seeing people using technology to further their sexual or prurient interests, and it presents considerable challenges to finders of fact and to litigators to manage the impact that technology now has in the workplace.

I'm going to briefly summarize the facts of the hypothetical you have in front of you. In this fact pattern, we have a supervisor, Lee. He is a line supervisor and represented by the union. He is 55 years of age, and he is married to his very understanding wife, Cheryl. Of the five individuals who report to Lee, one is Connie Knuck, which I assume as you will see from the facts, is short for knucklehead. She is Lee's administrative assistant and a 32-year-old divorcee. Also, reporting to Lee and a peer of Connie's is Ron Ritchie, who is an IT specialist. He is 29 years old, single, and fancy free.

Lee and Cheryl sometimes socialize with Connie. During one evening when all three were at a strip club, Connie bared her breasts. While she did that, Lee photographed them; and he's kept them in a little album, presumably close to his heart. Connie and Lee e-mail each other regularly from their home computers. Their e-mails are extremely sexually explicit. They discuss their sexual lives in intimate detail.

In addition to all of that, Lee, Connie, and Ron were traveling on business last August, and Connie felt compelled to whip off her shirt and ride in the car in her bra. Lee did not discipline her, even comment on it, at least unfavorably, so far as the facts tell us. Then this past March, Lee recommended both Connie and Ron for a promotion, and that promotion is pending.

During this time, Connie decides that she's going to start dating Ron. They have a hot and heavy relationship including one time when they were at work and traveling in the car, they pulled into the local park and engaged in sexual activity. Lee reacts to this, not by asking, "what are you doing screwing on company time?", but by e-mailing her from home that she never should have gotten involved with Ron. His radar is up with that guy. What is she doing with him? Lee then begins to tell Connie how he really feels about her and begins to express how attracted he is to her. He sends her a series of e-mails from his home describing his interest in her.

With that, Connie goes to Human Resources and complains that Lee is sexually harassing her.

The company investigates. After Connie complained but before the company has completed its investigation, Lee has a conversation with Connie in which he tells her, by the way, that he's noticed that her performance has deteriorated substantially since she started dating Ron. The company also learns that Lee had recommended Connie for a transfer because other employees have complained about Connie and Ron's relationship and how it has affected her work performance. The transfer was raised by Lee, but never implemented. Nothing has happened to Connie.

During the investigation, the company learns that Lee also has engaged in lewd behavior on the job. The company also learned that Lee was aware of other acts of lewd behavior between Ron and Connie in addition to the screwing in the park and that he had not disciplined or spoken to either of them. Upon completing its investigation, the company terminates Lee. The union has dutifully filed a grievance on Lee's behalf.

So, the questions that are before the house are: Whither goest Lee? And what do you make of that Connie? And, I don't think, personally, that Ron is a lucky man; but, you know, that's just one woman's feel.

Let's talk a little bit about the legal backdrop against which this soap opera takes place. We know that the EEOC guidelines define sexual harassment very unhelpfully as, unwelcome sexual conduct, requests for sexual favors, and other verbal or physical conduct of a sexual nature. That general definition, thankfully, is supplemented by two theories of sexual harassment about which I know you are all familiar: quid pro quo and hostile work environment. Quid pro quo harassment occurs where we have unwelcome sexual conduct, which either implicitly or explicitly is made a term and condition of employment or where submission to unwelcome sexual advances or your rejection to unwelcome sexual advances is the basis for making some employment decision.

In the hostile work environment sphere, again, we have unwelcome sexual conduct that has the purpose or the effect of interfering with an individual's working performance or creating a hostile, intimidating, or offensive working environment. Once we've defined what might be sexual harassing conduct, the question becomes: When should the employer be responsible for

employee conduct, particularly when the conduct is that of a supervisor? The Supreme Court, as I think you all know, in the *Faragher* and *Ellerth* decisions began to talk about how to fashion respondeat superior in a way that makes sense when we're dealing with unwelcome sexual conduct. The Supreme Court concluded that where we have a supervisor who engages in sexual harassment and that sexual harassment culminates in a tangible employment action—a firing, a demotion, or a significant change in duties or responsibilities or benefits—there is strict liability. Take out the checkbook. The only thing we're trying in those cases is: Did it happen? And: What's the measure of damages?

If a supervisor engages in harassment but there's no tangible employment action—no one gets fired, no one gets demoted, no one gets transferred to a lousy job–then the employer is entitled to an affirmative defense. If the employer can show that it acted to prevent these things from occurring or to correct them promptly and where the complaining party didn't take advantage of the complaint procedure or otherwise act in a fashion to avoid harm, then the employer gets a defense to liability. It's not that the harassment didn't happen, it's that the employer gets to defend itself from liability.

It's against this backdrop that we examine the escapades of Lee, Connie, and Ron. We have a situation, here, where Lee has now engaged in some sexual communications with his subordinate, but they have taken place outside of the working environment. They have engaged in sexual discussions off work time, on their home computers. The first question, I suppose, is whether or not Lee has engaged in sexual harassment of Connie. The key, of course, to finding sexual harassment is unwelcomness. Where Connie is e-mailing him and talking to him about her sex life and talking about her sexual interests, I think, no reasonable person could conclude that Lee's actions were unwelcome. However, when we get to him expressing his romantic or sexual interest in her, there isn't any indication that she found that behavior to be welcome. The record isn't as developed as we might want it to be; so one of the things we would want to know, for example, is did Connie say, "I'm not interested," or "Thanks, but I think of you only as a friend."

It is important to consider whether we have a quid pro quo claim here. Did Lee, as Connie's supervisor, condition her submis-

sion to his sexual advances? Did it effect an employment decision? Here, it's not so clear that there was any effect on an employment decision. He says to her, "You know, I think your performance has deteriorated since you started seeing Ron." But, it's not clear that it affected her job or her compensation. The transfer that he discussed with someone did not go through, so it doesn't sound like there was any tangible employment action. So, it sounds like there's not only no sexual harassment, but no liability for Lee's actions.

Having said that, the second question is: Even if Lee did not engage in sexual harassment as a matter of law, is there just cause for the employer to terminate or discipline Lee? There is, of course, the fact that Lee's conduct did create the risk of liability for the company. It at least put the company in the position where Connie might file a lawsuit and it's going to spend a lot of time and money defending itself from those claims.

This fact pattern is Exhibit A for why companies have anti-fraternization rules. Employers do have a legitimate interest in ensuring that romantic or sexual relationships don't interfere with the supervisor's subordinate role. Lee lost his way here. Does he say to Connie, "Hey, put your shirt back on?", or "Hey, how come you're on work time in the park doing the nasty with Ron?" Lee kind of loses his sense of perspective and his responsibilities as a supervisor with respect to his subordinate. And lastly, of course, there are issues presented about whether Lee engaged in retaliatory behavior because of his reaction to Connie's behavior. I know Carol has particular questions about this fact pattern with which she is familiar.

Wittenberg: Here is my question to the panel. Does anyone see this as retaliation under *Burlington Northern*?

Panel Member: I don't think there's any way that anyone can really make a good argument that this would constitute retaliation. As to Connie, nothing happened to her. There was some discussion about a possible transfer, but it didn't occur. It just doesn't seem like there's any real way to argue retaliation.

Wittenberg: Okay. I'm going to move ahead now. We're going to change gears, and we're going to turn to Nathan to talk about a case study that was actually based on one of his cases concerning transgender rights.

Goldberg: How many people here have ever had a transgender case? Okay, four people. Well, I've had two in the last year. I'm not

sure why. I've been practicing for 33 years; and I'd never had one before that. But, in the last year, two wound up on my doorstep. Both were heavily litigated. Both settled; one right before trial, and one in the middle of the litigation process. The fact pattern that I want to share with you is from the second of those cases. One of the things that makes these situations so interesting and difficult is that the concept of transgender can be a lot of different things. Generally, it starts with somebody who has gender dysphoria, which is, essentially, confusion about sexual identity. Most people who have transgender issues have had them for a very long time, typically starting in childhood and sometimes going all the way through their teenage years into adulthood. In one of the cases that I handled, the person whom we represented was born a man, had married, had children, but always had this issue about gender identity. At various times in his adulthood he would explore going through a change of sex, but stop because it was so difficult. Eventually, he did go through sex reassignment surgery.

As far as the employment situation is concerned, transgender issues can manifest themselves at various points in this process. It could manifest itself when an individual starts dressing differently or changes his or her appearance somehow as part of an experimentation to decide whether or not he or she wants to go forward. It could manifest itself when he or she starts taking hormones. Or, it could manifest itself when the individual actually goes through sex reassignment surgery.

Let me tell you about the fact pattern of this case. In this case, my client began her life as a boy and always suffered from gender dysphoria. Much later in life, after his children were grown, he decided to go forward with the process of sex reassignment surgery. He did everything along the path—it takes several years—and eventually went through the surgery.

After undergoing the surgery, she wanted to live her life as a woman. She didn't want people to know about her gender reassignment surgery, so she changed cities. She got a job in a dealership selling cars and was very successful. When she applied for the job, they ran a background check. Human resources came back and said, "There's a problem because we ran your Social Security number and what came back is the name, Cliff; so what's that about?" She said, "Well, I can tell you what it's about, but you have to promise me that it's going to be kept confidential." The HR person, who is in a small Texas town, said, "Of course we'll keep

it confidential." She proceeded to say, "I used to be a man named Cliff; now, I'm a woman named Doris." She then faxed information to HR that showed that she had gone through all the legal steps to change her name and gender to that of a woman.

She was very successful as a salesperson, but for reasons that she could never quite figure out, she didn't get any promotions. People who were not doing nearly as well as she was doing would get the promotions instead. Then, her manager left the dealership, and as he was going out he says, "Look, Doris, I need to tell you something. Everybody knows about you." She goes, "What do you mean, everybody knows?" "Well," the manager replied, "when you were hired, the HR person told everybody about your secret." That upset Doris very much. After that, because people knew that she knew that they knew, the questions started. One of the managers would corner her and say, "So, what's the deal? Do you prefer to sleep with boys or with girls?" And one of the managers started addressing her in public as "Sir."

One time, she goes to a company party. There are about 20 people standing around, and she notices that everybody's kind of snickering and rolling their eyes when she approaches. The next day she goes to work and there is a big sign on her desk that reads: "God does not make mistakes." And then things deteriorated. There's a retreat, and at the retreat one of the general managers gets a little drunk, comes over to her and says, "Look, are you really a man? I want to know." She's embarrassed and upset. She won't answer him, and he starts getting belligerent and throws some furniture against the wall. That's it. She can't take it any more, and she goes out on a disability leave and essentially becomes unable to work. That's essentially the end of her career.

We sued under a variety of theories, some of which were really unique to these fact circumstances. We sued for misrepresentation and fraud because they told her they would keep it confidential, and they didn't. We sued under the theory that it was a violation of the Health Insurance Portability and Accountability Act (HIPAA) because she revealed confidential medical information, which HR did not keep confidential. We sued under the theory that this was a violation of her rights of privacy under the California Constitution. And we also sued under Title VII and under the California equivalent on the basis that what this really was about was the fact that she was being punished because of gender-based stereotypes. The case law on that subject really started with *Price Waterhouse*

v. Hopkins[7] where the Court dealt with the situation of a woman who didn't make partner at an accounting firm because she was considered to be not feminine enough. The Court opined in that case that sexual stereotyping of that type is discrimination because of sex. More recently, there have been a couple of federal appeals court decisions out of the Sixth Circuit, which have found that the same logic can be applied to transgenders. One of the decisions involved a firefighter who was going through a gender reassignment and started coming to work wearing different clothing and makeup. Almost immediately, everybody tried to figure out a way to get rid of him. So, he sued. The court of appeals ultimately held that he was able to state a cause of action under Title VII. A year later, 2005, a police officer, I think it was in Ohio, was singled out. They tried to fire him and denied him a promotional opportunity because he started coming to work with makeup and things that you just normally wouldn't see a male police officer wear or do. There are a number of lower court opinions, as well.

One of the interesting issues in all this is that there have been a number of opinions on the issue of restrooms, which have gone various ways. Adam and I had a discussion about this last night. There is one opinion by the Supreme Court of Minnesota that said that an employer is perfectly free to decide who uses which restrooms and, essentially, you can't challenge it. But, there are other courts that say that people should be pretty much free to decide which restroom they want to use, and it should not be up to the employer to make that decision. So, it is extremely difficult right now to know what the rules are with regard to restrooms.

This is an area where we are going to see a lot more cases. If homosexuals have discrimination issues, you can only imagine the kind of issues that people have once they start changing their gender identity, because we all identify people by their gender identity. We associate certain things with it: How do you dress? How do you look? How do you wear your hair? So the minute that somebody challenges those stereotypes, it flies in the face of our expectations. Anybody who's transgender is going to have a difficult time at work by definition, and we're probably going to see a lot more of those cases. And the law is going to be evolving in that area.

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[7]490 U.S. 228 (1989).

Wittenberg: Nathan talked about this case taking place in a small town, and I guess one of the questions that I'd like the panel to address is whether Doris had a reasonable expectation of privacy here.

Audience Member: Well, I'll tell you what, had I been representing the employer in this case, I would have sent Nathan a bottle of whiskey and an invitation to mediate. Clearly, the employer screwed up. The conduct in this case would meet the definition of harassment whether it be under the Title VII standard or under the Fair Employment and Housing Act standard. It was motivated by gender identity. Arguably, it was severe and pervasive and altered the conditions of employment. She had to leave the work circumstances because of what happened. She confided in HR, and HR had an obligation to keep medical information of this sort confidential. And apparently, HR violated that duty of confidence and disclosed the information to employees who had no reason to know the information. Under California law, there is a constitutional right of privacy, which seems implicated here. This is a case that the employer should settle, and settle quickly.

Goldberg: They did. They settled well.

Wittenberg: Okay. We have just a few more minutes. I'm happy to take questions.

Audience Member: I have a client whom I've dealt with for years, and he recently announced that he was going to undergo a change from a man to a woman. He is the city manager of a sizeable suburb near where I live. The city council immediately fired him. He always had a perfect record for some 14 or 15 years and was a very decent person in the field. What do you think his chances are of succeeding in a lawsuit?

Goldberg: Well, right now, based upon these two Sixth Circuit cases, I think his chances are excellent because that is the exact situation of what happened to the police officer in this case. They fired this guy simply because he was in the process of changing his sexual identity. So, I think that he's in pretty good shape under federal law.

Wittenberg: I think there are some decisions out there where the courts say that transgendered status is not explicitly protected. If he's in a pre-operative state, and he's not changed his dress or changed his behavior, and all he did was announce his decision, I would be troubled. I certainly would never have counseled my

client to terminate him. But, the case law is not entirely clear here. There are some cases out there that say a transgender person is not protected under Title VII.

Audience Member: There is another issue as to whether this might be a disability-type issue as well. Federal law under the Americans With Disabilities Act (ADA) requires that there be a substantial impairment of a major life activity. California law has a lesser standard that there be an impairment of a major life activity. It's not clear whether this is a psychological condition that would impair the major life activity, for example, of work. I don't think that there is case law in that area, but it's certainly a theory that I would think a lawyer like Nathan would probably pursue.

Goldberg: For sure.

Wittenberg: Yes?

Audience Member: Could you discuss how these scenarios might be impacted where some of the communications take place on a blog?

McKenna: Actually, you can read my chapter of *Proskauer on Privacy*, which has a section on blogging.[8] It sort of depends what's on the blog and whether you can identify who's doing the blogging. It is useful for clients and for employers to have policies that say that you can't act in ways that are detrimental to the business of the company. You can't act in a way to disparage the company. That walks a fine line between someone actually being a legitimate whistle blower. You know, "You're putting lead in the food, and I think you're a terrible agribusiness." If someone put that on a blog, you probably ought not to take any action. But, people who act in ways that cause disrepute to their employers is an area where employers can think about taking discipline. The problem is a practical one. It's often hard, if not impossible, to find out who these people are who are setting up the blog. A lot of people do it anonymously and pretty viciously. And I can tell you, you won't have much luck suing any of the service providers to find out who it is.

Wittenberg: Last question?

Audience Member: Isn't there a paradox in using the *Price Waterhouse* argument in connection with a post-operative transsexual because she is no longer a man?

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[8]Practicing Law Institute (2006).

Goldberg: You're right. It is a paradox. It's an easier argument to make when you're dealing with someone who is pre-operative. There aren't any cases where it's been used on someone who's post-operative. The courts have not yet addressed that issue. But, you're absolutely right.

Audience Member: There is a decision that I think had to do with medical benefits, perhaps under ERISA. In that case, the court said, "I don't care if you've had your genitalia changed, because your DNA says that you are still the same gender as your birth sex. Therefore, you don't have a claim here."

Wittenberg: Okay. We're going to have to wrap this up. I want to thank each of the panel members for the time and effort that they put into this session. It was extremely interesting, and I thank you all for your participation.