by Jeremy Rabkin

The Supreme Feminist Court

Sexual harassment claims make a stunning comeback.

Many people have had the thought: whatever else emerges from the Clinton scandals, at least they have put a stop to feminist ranting about sexual harassment. The Supreme Court, however, is not ready to offer that consolation. In late June, at the end of its term, the Court decided to dig in more deeply on this matter.

Prior to this term, the Court had only seen fit to take up three cases on sexual harassment in a dozen years. This year it took up four. All were docketed before the Lewinsky and Willey scandals came to light, so the Court was not making a subtle point about the president's abuses. Rather, the justices were responding to the enormous number and complexity of cases working their way through the lower courts. But the Court's decisions this term, rather than reduce the mess, simply confirm that it will all have to be thrashed out in federal courts for years and years.

Oncale v. *Sundowners* was in some ways the simplest, and in fact, was the only decision to receive unanimous approval from the justices. At issue was whether the general prohibition on "sex discrimination" in Title VII of the 1964 Civil Rights Act—the statutory basis for most federal harassment claims—extends to harassment of a male employee by other males. Despite disagreement among the lower courts, the opinion by Justice Scalia found the issue quite straightforward—by analyzing it with antiseptic legalism. In past cases, Scalia noted, the Court had been willing to consider whether affirmative action policies on behalf of women had discriminatory impact on men, even when the responsible managers were also male. So, he concluded, it must be possible to have men discriminating against fellow men "on the basis of sex."

Though this satisfied the entire Supreme Court, it is hardly a satisfying argument. Joseph Oncale had been employed on an off-shore drilling rig and quit his job after rowdy conduct by other drillers made him uncomfortable. He did not claim that they were sexually attracted to him, simply that they made lewd, demeaning, and sexually explicit remarks that generated a "hostile environment."

Justice Scalia's opinion acknowledges the warning from business groups that "liability for same-sex harassment will transform Title VII into a general civility code for the American workplace." His answer is remarkably complacent: "Common sense and an appropriate sensitivity to social context will enable courts and juries to distinguish between simple teasing or rough-housing, among members of the same sex, and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive."

With all respect to Justice Scalia, this is surely wishful thinking. In *Oncale* itself, "in the interest of both brevity and dignity," his opinion declines to describe the relevant facts in any detail. In Scalia's view, it seems, the question is not whether the conduct relates in any way to "sex," but simply whether it is "severely hostile and abusive." To say that the judge and jury will consider "the context" is not much help when that context is quite removed from the experience of judges and juries. How do men usually relieve stress and boredom during long hours of isolation on a mid-ocean drilling platform with only eight people?

In two other cases this term, with more conventional settings but equally troubling facts, the Court (over dissents by Justices Scalia and Thomas) gave plaintiffs a much bigger club to wield against employers. In *Beth Ann Faragher* v. *City of Boca Raton*, the plaintiff worked as a life guard at the Boca Raton city beach. It was a summer job she held while working her way through college. She came back for five summers. Although the city had a formal policy against sexual harassment, Faragher never invoked it. Two years after she stopped working for the city, another female lifeguard filed a harassment case that led to immediate disciplinary sanctions against her supervisors. Faragher then decided to file her own lawsuit, insisting that one of her bosses had "put his arm around [her], with his hand on her buttocks," "once made contact with another female lifeguard in a motion of sexual simulation," "made crudely demeaning references to women generally," and so on.

In *Burlington Industries* v. *Kimberly Ellerth*, the plaintiff complained that her immediate supervisor had invited her to the hotel lounge during a business trip, and once there, had made comments about her breasts. He then told her to "loosen up," warning, "You know, Kim, I could make your life very hard or very easy at Burlington." On a subsequent occasion, this same supervisor expressed reservations about giving her a promotion and "touched her knee." She did get the promotion, however, and never filed

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any complaint under the company's harassment policy until several weeks after resigning.

In both of these cases, lower courts struggled with the facts—in *Ellerth* the Seventh Circuit Court of Appeals struggled so hard, it produced eight separate opinions for the same case. Both appeals courts overruled trial courts, with opposite outcomes. Yet the Supreme Court confidently insisted in both these cases that an employer is responsible for the misconduct of employees even when the employer is unaware of it. The proper standard, the Court insisted, was not even negligence—which would allow the employer to show that it had taken reasonable precautions, even if they happened to fail. Instead, the Court insisted on the more severe standard of "vicarious liability," which would make the employer fully liable for any wrongful conduct by employees, unless certain very vague "affirmative defenses" could be made.

Justice Thomas's dissent got it just right: "Sexual harassment is simply not something that employers can wholly prevent without taking extraordinary measures—constant video and audio surveillance for example—that would revolutionize the workplace in a manner incompatible with a free society." Yet short of such draconian measures, the Court's majority does not tell employers what to do. As Justice Thomas protested, the Court "provides shockingly little guidance about how employers can actually avoid vicarious liability. Instead it issues only Delphic pronouncements and leaves the dirty work to the lower courts."

In the final case, by a 5-4 majority, the Court rejected the principle of employer liability it had adopted elsewhere. In *Alida Star Gebser* v. *Lago Vista Independent School District*, the Court faced a complaint under Title IX, a statute prohibiting "discrimination on the basis of sex" in federally funded educational institutions. The case concerned a high school student and one of her teachers, who "had sexual intercourse on a number of occasions" over a two-year period, "often...during class time, although never on school property." The student never filed any complaint, explaining subsequently that "if I was to blow the whistle on that, then I wouldn't be able to have this person as a teacher anymore" and he was "the person in Lago administration...who I most trusted."

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The affair abruptly ended when a policeman caught the couple in the act. The teacher at once lost his job and teaching license, but the girl and her parents wanted compensation, so they sued the school district for punitive damages. The Court's majority held that the statute did not make the school district liable in such circumstances, since the damage claim might well exceed the amount in total federal grants it receives. But as the dissenters pointed out, the Court had previously held that Title IX can be invoked for private suits seeking damages. The essence of the ruling is that school districts are not liable on the same rigorous terms as private employers.

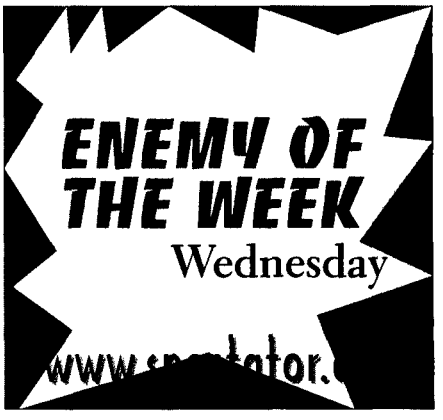
There is a good deal of irony in this. After all, no one is forced to work for any particular employer and most people change jobs quite often. But students are forced to attend school, and public law (partly at the demand of the Supreme Court itself) imposes heavy financial burdens on people who seek private alternatives to the public schools. Moreover, if there is a case for paternalistic government control, surely it applies most strongly to minors. Every state has laws against statutory rape, making it a crime to have sex with an underage female, who is considered to be, by definition, a "victim." Whatever Alida Gebser herself may have thought, her parents were certainly entitled to think she had been victimized. And the Court's opinion repeatedly refers to the underlying offense as "sexual abuse."

So, for the more severe offense involving the more vulnerable, under-age victim, we have no employer liability. But for rudeness and innuendo to grown-up women (and men), we smack the employer with suits for punitive damages. Does this make sense? Two facts in the background may help to explain this result.

First, damage claims against school districts get passed on right away to local taxpayers—either in higher taxes or in service cuts affecting the taxpayers' children. The premise of sexual harassment litigation is that "the company" pays, and that this affects neither consumers, stock holders, nor other workers. So, when it comes to private employers, the Court feels freer about offering bait to trial lawyers.

Second, the Court has treated school districts as "government," thereby acknowledging that some First Amendment protections for free speech apply to public school policies. The premise seems to be that nothing private employers do to restrain "harassment" can ever be a suppression of free speech because it is done "voluntarily" and by "private" actors.

Meanwhile, Bill Clinton's Justice Department has taken the side of the plaintiffs in every one of these cases, urging wider liability for harassment. Although this policy would seem to work against the interests of the White House, it merely confirms Clinton's bargain with the feminist establishment: ignore what Bill himself does and his team will keep the feminist litigation engine going at full throttle. Yet we might have expected better from the Supreme Court.



by Grover G. Norquist

Calling the House

Why the Republicans will win very big this fall.

The November 3 elections are coming into sharper focus. While Republicans expect to pick up three or four governorships and two or three Senate seats, all eyes are on the 435 campaigns that will determine which party controls the House of Representatives come January 1999.

The Democrats' hopes of winning a net eleven seats—necessary for taking control of the House—are fading. A National Monitor poll conducted June 24-28 found likely voters planning to vote 43 to 37 percent Republican over Democrat for the House. A *National Journal* poll of congressional staffers found staffers of both parties expecting Republicans to retain a majority there.

History also suggests that the GOP will keep, and even increase, its House majority. Only once this century (in 1934) has the party in the White House gained House seats in an off-year election. Every other such election has found the opposition party gaining in the House. Moreover, 1998 is not just an off-year election, but the sixth year under a two-term president. Similar elections in the past have handed substantial gains to the party out of the White House. In 1938, Republicans gained 81 seats running against Franklin Roosevelt. In 1958, Republicans lost 48 seats under President Eisenhower. In 1966, the GOP picked up 47 house seats running against LBJ's Great Society. In 1974, with help from the recession and Richard Nixon's resignation, Democrats picked up 74 seats. With Reagan in the White House in 1986, Republicans lost only 5 seats—the best record for any president's party since WWII. While it is true that 1938, 1958, and 1974 were all bad economic years, 1986 and 1966 were times of prosperity. The six-year itch remains a mysterious but undeniable trend.

Yet history is one of the weaker reasons for Republican optimism. More significant is that 1998 was a poor recruitment year for Democratic candidates—thanks in part to Monica Lewinsky. On January 21, just when serious politicians were committing themselves to running for the November election, a seemingly devastating scandal descended on the White House. Fully 138 Democrats who had been mentioned in the press as possible candidates subsequently declined to run. (In Alabama, a Democrat expected to oppose Rep. Spencer Bachus specifically mentioned Clinton's problem as his reason for dropping out.) At least 51 Republicans will find themselves with no Democratic opponent on the November ballot. Only 32 Democrats will run unopposed.

The results of recent elections reveal a Republican trend. Since Clinton won in 1992, Republicans have gained a net 50 seats in the House and 11 in the Senate, and 14 governorships. Nineteen state legislative chambers have come under GOP control, and more than 370 elected Democrat officeholders have become Republicans.

The 1993 off-year elections in New Jersey and Virginia, along with several special House elections, presaged the 1994 Republican victories. So, too, the 1997 and 1998 special elections bode well for the GOP. In November of 1997, Republicans re-elected Christie Whitman as governor of New Jersey, and held onto both the assembly and senate in that state; swept the governorship and all other statewide offices in Virginia, winning the state senate and tying in the state house; and won the mayors' races in New York, Los Angeles, St. Paul, and Jersey City. Republicans also won four of five special House elections: Bill Redmond in New Mexico's third district; Heather Wilson in New Mexico's first; Vito Fossella in New York to replace Susan Molinari; and Sonny Bono's widow, Mary, in California. The one exception was Tom Bordonaro's loss to Rep. Walter Capps's widow, Lois, in California.

Money is another cause for Republican optimism. Clinton's fundraising juggernaut has been slowed down by scandal, and the Democratic Congressional Campaign Committee (DCCC) has only $4 million in cash on hand, compared to $10 million for its counterpart, the National Republican Campaign Committee (NRCC). Individual races reflect this disparity. In mid-July, Rep. Robert Aderholt of Alabama's fourth district had $510,377 cash on hand while his opponent had only $10,546, even though the Democrats had made this seat a major target. In the 17th district in Illinois, Republican challenger Mark Baker had $449,283 to incumbent Lane Evans's $321,174. Bill Redmond of New Mexico had $246,679 compared with famous son Tom Udall's $33,351.

Democrats have been spending money faster than Republicans because, lacking strong incumbents and local party structures, they are forced to run their campaigns all the way from Washington. On the other hand, Republican governors in Texas, Pennsylvania, New York, Michigan, Wisconsin, Connecticut, and Arkansas are running strong,

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