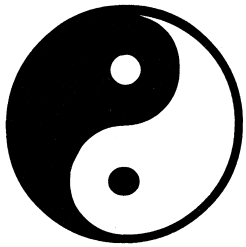

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How (Not) to Litigate a Sexual Harassment Class Action

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I. Introduction

Who needs John Grisham or Scott Turow? The truth can be more compelling and fascinating than any fictionalized account of the legal world. Bingham and Gansler have done this, and more, with their account—*Class Action* (2002)—of a sexual harassment class action, *Jenson et al. v. Eveleth Taconite et al.*, involving many of the female employees at the Eveleth Taconite iron ore mines in remote northern Minnesota.[1]

This book illustrates, all too well, the advantages and costs, both economic and emotional, of litigating a harassment class action and perhaps explains why so few harassment class actions ever go to trial.[2] Civil procedure students are now cutting their teeth on Jonathan Harr's *A Civil Action* (1995), the made-for-movie account of the Woburn (Massachusetts) mass tort class action, and I can confidently predict that *Class Action* will similarly become required reading for employment discrimination law classes, if not a Hollywood movie.

This review will summarize the litigation of the Eveleth class action, if only to whet the reader's appetite for reading the entire book, and then will discuss how recent statutory changes and Supreme Court decisions have changed the legal landscape, so that some of the issues that arose during this litigation would now be resolved differently.

At the outset, it must be emphasized that this book is written from the plaintiffs' viewpoint, since relatively few of the Eveleth managers

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1. Clara Bingham & Laura Leedy Gansler, CLASS ACTION: THE STORY OF LOIS JENSON AND THE LANDMARK CASE THAT CHANGED SEXUAL HARASSMENT LAW (2002).

2. *See* David Hechler, *A White Buffalo*, NAT'L L.J., Mar. 31, 2003, at A1 ("One lawyer calls a sexual harassment class action trial 'a white buffalo.' So many cases are settled that trials are never seen. Or almost never."). Recently, the Dial Corporation settled a sexual harassment class action on the eve of trial; under the settlement, Dial will pay $10 million into a compensation fund to be administered by the EEOC and will be subjected to extended outside monitoring. *See* Gary Young, *Pretrial Rulings Pushed Dial to Settle,* NAT'L L.J., May 5, 2003, at A5; *see generally Use of "Pattern and Practice" Theory in Sexual Harassment Cases Debated*, 71 U.S.L.W. 2735, 2735–36 (May 20, 2003) (discussing Dial Corporation class action litigation, EEOC v. Dial Corp., No. 1:99-CV-3356 (N.D. Ill. 2003)).

were willing to speak to the authors, and even then, mostly off the record.[3] Also, given that the district court docket runs to seventy-eight pages and 974 entries, and the appellate docket runs to an additional fifteen pages and sixty-six entries, the book and this review can only cover some of the highlights.

II. Women Join the Workforce at Eveleth Taconite

Officially, this story begins in 1974, when nine steel industry companies in the Midwest, including Eveleth Taconite, signed consent decrees with the Equal Employment Opportunity Commission and the Department of Labor through which they agreed to redress past race and gender discrimination by guaranteeing 20 percent of new jobs to women and minorities.[4] Actually, the story begins much earlier, in the 1890s, when iron ore mining began in northern Minnesota and the highly paid all-male workforce became unionized after several bitter strikes including one led by Mother Jones.[5] The workers' primary loyalty was to their union—the source of their pensions—and not to their employers.[6] All union members had to recite the union oath, "I will never knowingly wrong a member or see a member wronged," which was widely understood to mean that one could not squeal on a coworker for any reason.[7]

In March 1975, Lois Jenson—the lead plaintiff and one who the reader will seemingly get to know better than did her own family—began her employment at Eveleth Taconite.[8] Jobs at the open-pit mines and the adjacent iron ore processing plants were highly desirable, since they paid nearly three times the minimum wage, and had generous benefits, particularly the union pension plan.[9] Yet on her second day at work, she was told by a coworker that "[y]ou f___ing women don't belong here."[10] A few weeks later, another coworker told her a dirty joke in front of other men while wearing a plastic penis on his nose.[11] Her coworkers were openly betting on how long women would last at Eveleth, with the longest bet being for a mere nine months.[12] Even training sessions were used to harass Lois Jenson—when she was taught how to drive the 85-ton dump trucker, the first instructor urinated on a truck tire in her presence, and then told her several dirty jokes and obscene stories about his wife.[13]

3. Bingham & Gansler, *supra* note 1, at 386.
4. *Id.* at 8.
5. *Id.* at 20–21, 29–30.
6. *Id.* at 34.
7. *Id.* at 41.
8. *Id.* at 3.
9. *Id.* at 8.
10. *Id.* at 14.
11. *Id.* at 16.
12. *Id.*
13. *Id.* at 18–19.

Other women who were hired at Eveleth during the mid-1970s were similarly harassed at work and stalked by coworkers, ultimately leading to an attempted rape of one woman.[14] Although each worker had his or her own private locker, with a separate locker room for the women, one or more men would enter the women's locker room and ejaculate on the clothing in their lockers.[15] When this was reported to a foreman, he replied, "Oh, I don't believe it," and did no investigation; indeed, that foreman later propositioned the victim.[16] Eveleth refused to provide a separate bathroom for the women, and there were few portable toilets in the mine pits, so the women were told that "you got to learn to piss like a man" in the field.[17]

The union president, Stan Daniels, told one woman that she should not report a male harasser, as that would violate the union oath, and he refused to discipline union members since he saw his job as protecting union members from discipline.[18] The male coworkers, even those who did not harass the new female hires, were generally reluctant to get involved, since they saw the women as taking jobs away from their brothers, sons, and nephews. Similarly, the wives of the male employees distrusted the female miners, whom they viewed as "mining sluts" and "mining whores."[19]

Meanwhile, throughout the 1980s, the sexual harassment of the women at Eveleth escalated. Lois Jenson received eight harassing letters, totaling ninety-three pages, from Steve Povroznik, a senior engineer, which discussed what he wanted in a woman.[20] Povroznik later engineered the promotion of Lois Jenson to be his direct report.[21] After she refused to return the eight letters, he tried to wrestle her to the ground, but she escaped and told him that his actions constituted sexual harassment.[22] Shortly thereafter, while preparing the budget, he told her that he needed to know the nature of their relationship, so that

14. *Id.* at 41–47, 57–58.
15. *Id*. at 47.
16. *Id.* at 48.
17. *Id.* at 55–56. Even today, providing adequate toilet facilities to miners remains a contentious subject. In April 2003, the Mine Safety and Health Administration proposed revisions to the regulations governing sanitary facilities at mines, which were subsequently adopted notwithstanding complaints from miners' unions. *See* Standards for Sanitary Toilets in Coal Mines, 68 Fed. Reg. 19,477–82 (Apr. 21, 2003) (amendments to be codified at 30 C.F.R. §§ 71.500, 75.1712–6); Standards for Sanitary Toilets in Coal Mines, 68 Fed. Reg. 37,082–87 (Jun. 23, 2003) (adopting final rule); *see generally* C. Skrzycki, *Lifting the Lid on a Streamlining Idea for Mines*, WASH. POST, May 20, 2003, at E1, E5 (discussing controversy over proposed amendments and noting that the Mine Safety and Health Administration, since 1998, "has recorded 238 violations of the [current] toilet standards in numerous mines").
18. Bingham & Gansler, *supra* note 1, at 64.
19. *Id.* at 75–76.
20. *Id.* at 83–86.
21. *Id.* at 91.
22. *Id.* at 95.

he could decide whether to include her in the budget.[23] At this point, Lois Jenson finally filed a union grievance, if only because Povroznik was a manager, not a union member.[24] Patricia (Pat) Kosmach, a feisty union member, supported Lois Jenson, and warned management that any attempt to remove her would be retaliation, and that Eveleth should have a sexual harassment policy.[25] Eveleth's investigative report, which partially blamed Lois Jenson for "encouraging" other men, was a whitewash.[26] Even so, Eveleth's Director of Personnel, Bob Raich, furious with the report since it did not completely exonerate Eveleth, rescinded the proposed sexual harassment policy, and blocked the transfer of Povroznik.[27]

Finally, in October 1984, Lois Jenson, at the instigation of Pat Kosmach, filed a discrimination complaint with the Minnesota Department of Human Rights.[28] One week later, all four tires on her car were slashed in the Eveleth parking lot.[29]

III. "Justice Delayed Is Justice Denied"[30]

Here, the case took the first of several unexpected and prolonged delays. Although the complaint was filed with the state agency in 1984, it would not be until January 1987, after conciliation had failed, before the agency assigned the case to an attorney, Helen Rubenstein, for litigation.[31] Rubenstein suggested that this case should become a class action, even though she did not know whether sexual harassment claims could be maintained on a class action basis![32] In any event, most of the women did not want to be publicly identified as class representatives, so a civil action under state law was filed in March 1987 on behalf of Lois Jenson, Pat Kosmach, and Michele Mesich, requesting injunctive relief (a sexual harassment policy) and monetary relief (punitive damages of $6,000 to each class member and a $1 million civil penalty to the state).[33] Although the union contract now ostensibly had

23. *Id.* at 96–97.
24. *Id.* at 100.
25. *Id.* at 100–01.
26. *Id.* at 102–03.
27. *Id.*
28. *Id.* at 109.
29. *Id.* at 111.
30. Variously attributed to William Gladstone (1809–1898) or Roscoe Pound (1870–1964), but without citation to any of those savants' speeches or publications. *Compare* Martel v. County of Los Angeles, 56 F.3d 993, 1003 (9th Cir. 1995) (en banc) (Reinhardt, J., dissenting) ("Roscoe Pound said 'justice delayed is justice denied . . .'") *with* Geo. Walter Brewing Co. v. Henseleit, 132 N.W. 631, 632 (Wis. 1911) ("Gladstone has truly said: 'When the case is proved, and the hour is come, justice delayed is justice denied.'"). *But see* McMullen v. Bay Ship Management, 335 F.3d 215, 219 (3d Cir. 2003) ("We are all too often reminded that 'justice delayed is justice denied.' But, it is equally true that in some situations 'justice rushed is justice crushed.'").
31. Bingham & Gansler, *supra* note 1, at 112.
32. *Id.* at 116.
33. *Id.* at 116, 119.

a sexual harassment policy, it provided no definition of sexual harassment, did not include any training, had no reporting procedure, and established no penalties for violations of this toothless policy.[34]

Although the plaintiffs—whose identities became widely known throughout Eveleth—were shunned by their male coworkers, they continued with their work and preserved the evidentiary record by taking photographs of the escalating sexist and obscene graffiti, notes, and props that became ever more prevalent in the workplace.[35] When Rubenstein arranged a tour of the mine, accompanied by Lois Jenson, Bob Raich (Director of Personnel), and Ray Erickson (Eveleth's outside counsel), they saw lots of graffiti and nude photos in the workplace, even though management had hastily attempted to "clean up" prior to this tour.[36] Indeed, they saw a sign inside a locked glass case, "Sexual Harassment in this area will not be reported. However, it will be graded."[37]

The civil case was assigned to an administrative law judge, but Ray Erickson, the defense counsel, constantly stonewalled Rubenstein, who (perhaps understandably) got battle fatigue and transferred to the state antitrust division.[38] Once again, this case stalled for the rest of 1987.[39] Lois Jenson attempted to obtain a private attorney, but most refused to have anything to do with her case, and the rest never returned her calls.[40] Ultimately, she was referred to several plaintiffs' attorneys in Minneapolis and St. Paul, including Paul Sprenger, who had filed the first Title VII class action in the Eighth Circuit, back in 1973.[41]

In March 1988, Sprenger, his fellow partner Jane Lang, and an associate, Jean Boler, agreed to represent the Eveleth plaintiffs on a contingency basis.[42] They filed a class action in federal court under both Title VII and the Minnesota employment discrimination statute, alleging both sexual harassment and gender-based failure to hire and promote.[43] The harassment and shunning of the plaintiffs continued unabated, and some of the female miners even circulated a petition opposing the lawsuit because they naively thought it might jeopardize their own jobs.[44] Inevitably, the lawsuit ended up consuming the plaintiffs' daily lives. In addition, Pat Kosmach was recently diagnosed with

34. *Id.* at 123.
35. *Id.* at 130.
36. *Id*. at 129–35.
37. *Id.* at 130–32.
38. *Id.* at 133–34.
39. *Id.*
40. *Id.* at 140.
41. *Id.* at 140–41.
42. *Id.* at 153.
43. *Id.* at 163.
44. *Id.* at 164.

Lou Gehrig's disease (ALS) and told that she only had one to three years to live with this debilitating disease.[45]

Discovery commenced, and the reader will not be surprised to learn that this case demonstrated some of the worst aspects of civil discovery in employment litigation. Even though Magistrate Judge Paul McNulty had entered a confidential stipulation and order governing plaintiffs' medical and personnel files,[46] the defense attorneys, led by Erickson, undertook the classic "nuts and sluts" defense by relentlessly questioning the plaintiffs, during their depositions, about their mental health history, past pregnancies, and suicide attempts.[47]

Meanwhile, Sprenger and Lang took depositions of the senior management of Oglebay Norton, the Cleveland corporation that owned Eveleth Taconite. The Vice President of Industrial Relations and Personnel readily admitted that Oglebay Norton never disseminated any sexual harassment policy to Eveleth or any other subsidiary, but stated that he did not think that any policy was necessary, and did not view nude photos in the workplace as sexual harassment.[48] Yet, he conceded that the sexist graffiti and props in the workplace were sexual harassment.[49] He and other Oglebay managers generally viewed graffiti as not being in "proper taste" or consistent with "common decency," as opposed to violating the employees' civil rights.[50]

Throughout the litigation, Sprenger made a number of settlement proposals to Oglebay Norton. The plaintiffs' first proposal, made in the summer of 1990 (after the first round of depositions), sought a sexual harassment policy, damages of $465,000, and attorneys' fees and costs of $210,000.[51] Oglebay Norton agreed to consider the offer, but never responded.[52] The authors aptly comment that this failure to respond constituted "irrational decision-making: the plaintiffs' lawyer's worst nightmare."[53] Later settlement proposals, necessarily at higher amounts since the fees and costs were increasing, were similarly ignored or rejected.[54]

IV. The Class Is Certified

In 1991, the case was assigned to Judge James Rosenbaum, and the plaintiffs moved to certify the class action and for a preliminary

45. *Id.* at 173.
46. Jenson et al. v. Eveleth Taconite Co. et al., No. 88-CV-163 (D. Minn.), Confidentiality Stipulation and Order (July 13, 1989).
47. Bingham & Gansler, *supra* note 1, at 194–95.
48. *Id.* at 187.
49. *Id*. at 188.
50. *Id.* at 189.
51. *Id.* at 197.
52. *Id.*
53. *Id.* at 198.
54. *Id.* at 250.

injunction.[55] During the seven-day evidentiary hearing, at which the plaintiffs testified about the pervasive harassment that they suffered, Judge Rosenbaum appeared visibly surprised by their testimony and seemed incredulous that such conduct was happening.[56] Judge Rosenbaum quickly denied the request for a preliminary injunction, but eventually certified the class action in December 1991.[57] This was newsworthy, since it was the first sexual harassment case to be certified as a class action.

The evidentiary hearing and the class certification decision generated much favorable publicity for the plaintiffs, which defendants used as a sword against the plaintiffs. A glossy article in *Glamour* magazine, with a photograph of Lois Jenson, was posted throughout Eveleth, but defaced with abusive graffiti.[58] Lois Jenson manifested symptoms of post-traumatic stress disorder and went on sick leave, as did one of the new plaintiffs, Kathy Anderson.[59]

In March 1992, perhaps as a result of Erickson's firm's unsuccessful attempts to defeat the class certification, Eveleth fired his firm and hired Faegre & Benson, a large Minneapolis firm, with Mary Stumo as the lead counsel.[60] Several months later, Magistrate Judge McNulty, who was overseeing discovery, was forced to retire early for unexplained reasons and was replaced by none other than Erickson, newly appointed as a magistrate judge.[61]

In April 1992, Sprenger made a new settlement offer of $1.3 million, which included more than $800,000 in attorney's fees and costs, but Stumo made no counteroffer because even though she was the lead defense counsel, she inexplicably had no authority to do so.[62] Boler, the Sprenger & Lang associate who was devoting all of her time to this case, percipiently recognized that Stumo "did not have the personality for settlement, [which] requires a give and take, a dialog."[63]

V. The Liability Phase of the Trial

In July 1992, the case was then reassigned to Judge Richard Kyle, a new appointee known to have prodigious, hard-working habits.[64] Judge Kyle quickly scheduled a pretrial conference, with the trial testimony to be limited to any supplemental facts, since he informed the

55. Jenson et al. v. Eveleth Taconite Co. et al., No. 88-CV-163 (D. Minn.), Motion by Plaintiff to Certify the Class Action and to Consolidate Consideration of Class Issues with Trial (Feb. 1, 1991); Motion by Plaintiffs for Preliminary Injunction (Apr. 15, 1991).
56. Bingham & Gansler, *supra* note 1, at 210.
57. *Id.* at 236; Jenson v. Eveleth Taconite Co., 139 F.R.D. 657, 667 (D. Minn. 1991).
58. Bingham & Gansler, *supra* note 1, at 242–43.
59. *Id.* at 244, 246.
60. *Id.* at 249.
61. *Id.* at 248.
62. *Id.* at 250.
63. *Id.* at 251.
64. *Id.* at 253.

parties that he had already read the entire transcript of the evidentiary hearing before Judge Rosenbaum.[65] The plaintiffs successfully moved for bifurcation of liability and damages, since Sprenger did not want to subject the plaintiffs to damages testimony regarding their mental and physical health unless necessary.[66]

The liability phase of the trial began on December 17, 1992, with all of the female miners now "sitting on the same side of the aisle."[67] During the cross-examination of Lois Jenson, Stumo asked her to put red stickers on a map of the Eveleth plant to indicate where various sexist exhibits were located, which suggested that these were mostly in a small area of the plant, generally not where Lois Jenson herself worked.[68] On re-direct, Sprenger rehabilitated her by having her use blue stickers to indicate, on the same map, where numerous other obscene graffiti and props were found. Thus, Stumo's map became blanketed with these blue stickers, thereby completely undercutting what defendants thought would be their key demonstrative exhibit![69]

On May 14, 1993, after considering the voluminous post-trial briefs, Judge Kyle issued his decision, which limited the class to the hourly workers (and not the salaried workers), and limited the discrimination claims to promotion claims (and not hiring, compensation, or training claims).[70] Judge Kyle found that there was pervasive sexual harassment at Eveleth, and that any failure to report this harassment was not a defense to liability, since it was so pervasive that Eveleth and Oglebay management must have been aware of it.[71] He granted injunctive relief, including implementation of a sexual harassment policy and procedures, and attorneys' fees.[72]

During the June 22, 1993, hearing before Judge Kyle on injunctive relief, the defendants successfully claimed that the plaintiffs' proposed sexual harassment policy was unnecessary, since they would implement their own, even though any such policy had not yet even been drafted.[73]

VI. The Damages Phase of the Trial

Sprenger, to his eternal regret, proposed that a Special Master be appointed to hold mini-trials for each class member during the damages phase of this action.[74] Although Sprenger nominated several respected

65. *Id.* at 253–54.
66. *Id.*
67. *Id.* at 256.
68. *Id.* at 258–61.
69. *Id.*
70. *Id.* at 270–72; Jenson v. Eveleth Taconite Co., 824 F. Supp. 847, 889 (D. Minn. 1993).
71. *Jenson*, 824 F. Supp. at 879–80, 887–88.
72. *Id.* at 888–89.
73. Bingham & Gansler, *supra* note 1, at 275.
74. *Id.* at 276–78.

attorneys from the Twin Cities, Judge Kyle appointed former Magistrate Judge McNulty, who was widely regarded as being past his prime and who had made a pass at a female attorney when she was trying a case before him.[75]

Once again, there was intrusive and overbroad discovery into the plaintiffs' physical and emotional health, this time conducted by the Faegre & Benson attorneys. The authors aptly remarked that the defense attorneys were "going full guns with the tried-and-true nuts-and-sluts defense" to send a message to the plaintiffs, which worked since one plaintiff withdrew rather than disclose that her son had been convicted of murder.[76] Remarkably, both Judge Kyle and Special Master McNulty agreed that the defendants could depose the fathers of Lois Jenson's two children, one fathered by a rapist, even though neither father had any involvement in her life in many years.[77] In November 1994, Pat Kosmach died, outlasting her diagnosis by several years, and having valiantly participated in the litigation after renouncing the union for its consistent failure to support the female miners.[78]

Faegre & Benson, perhaps to convince Oglebay Norton to retain it, initially claimed that its total legal costs for this case would come to $450,000.[79] Two years later, in June 1994, Faegre & Benson revised this budget to $900,000, and revised it again in August 1994 to $1.2 million.[80] Meanwhile, Oglebay Norton agreed to mediation in the summer of 1994, but offered only $1.5 million including fees, even though the plaintiffs' attorneys' fees alone already totaled $2.3 million.[81] In January 1995, Oglebay Norton made a new and lower settlement offer of only $1 million, on the eve of the damages phase of the trial.[82]

The damages phase of the trial, in the spring of 1995, rapidly became a fiasco, since it was obvious that Special Master McNulty was unable to rule on the preliminary motions *in limine* or on objections because he did not know the evidentiary law in this area.[83] Defense counsel, during the cross-examination of the plaintiffs, asked questions that apparently had no purpose but to embarrass the plaintiffs, and McNulty seemed to enjoy this testimony.[84] One plaintiff was forced to testify about her childhood sexual abuse by her uncle, and about her two abusive ex-spouses.[85]

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75. *Id.*
76. *Id.* at 283–86.
77. *Id.* at 296.
78. *Id.* at 300.
79. *Id.* at 291.
80. *Id.* at 293.
81. *Id.*
82. *Id.* at 305.
83. *Id.* at 311–12.
84. *Id*. at 321–23.
85. *Id.* at 322.

McNulty allowed Stumo and her co-counsel, David Goldstein, full latitude in presenting their evidence, and even fell asleep on the bench during some of the testimony.[86] The authors note that Sprenger was able to see victory in defeat, as McNulty was repeatedly making reversible errors, and Stumo was her own worst enemy in overstating and misstating the law.[87] Thus, Sprenger and Boler, at this time, were focused on preserving the record for appeal.[88]

In November 1995, before McNulty issued any decision on the damages phase, Oglebay Norton, at the direction of its insurers, fired Faegre & Benson.[89] Oglebay Norton did an audit, which discovered that Faegre & Benson, while proposing a litigation budget of $1.2 million, had actually billed for $2.7 million.[90] Oglebay Norton fired Faegre & Benson for "grossly deficient litigation estimates" and for its "excessive and unreasonable billing practices," including the use of seventy-one attorneys, paralegals, and law clerks.[91] Faegre & Benson then sued the insurers for payment of its bills, and the insurers countersued for excessive and unreasonable fees.[92] This lawsuit was settled, but the resolution is not publicly known.[93]

Not until March 28, 1996, nearly nine months after the damages phase of the trial, did Special Master McNulty issue his 416-page "Report and Recommendation" to Judge Kyle.[94] This report was announced on the local television news and at Eveleth even before the plaintiffs' attorneys received their copy.[95] The damages awards were pitiably low, ranging from $3,000 to $25,000, for a total of $182,500, with Lois Jenson receiving the highest award.[96] McNulty claimed that the plaintiffs had the burden of proving that sexual harassment caused their harms, but he refused to allow them to proffer any expert testimony to prove their mental or emotional harm.[97] McNulty, in an attempt to blame the victim, wrote that "sexual harassment claimants" tend to be "histrionic," to "exaggerate," and to misinterpret "reasonably expectable interpersonal conflicts in sexual terms."[98] McNulty concluded that workplace statements that women should be at home and pregnant were just protected free speech and reflected the exchange of ideas, and that Eveleth should not be penalized for local cultural norms.[99] Even though

86. *Id.*
87. *Id.* at 320–21.
88. *Id.*
89. *Id.* at 343–44.
90. *Id.* at 344.
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.* at 345–46.
95. *Id.*
96. *Id.*
97. *Id.* at 346.
98. *Id.*
99. *Id.* at 351.

McNulty, as a magistrate judge in 1989, entered the confidentiality agreement, he himself discussed the sealed testimony about the rape of Lois Jenson.[100] McNulty dismissed the rape as consensual sex and used it as a basis to discredit her testimony.[101]

Sprenger and Boler carefully prepared a 126-page brief to Judge Kyle that identified eighteen legal errors in McNulty's report, primarily regarding the burden of proof, the proper use of expert testimony to prove causation, and the failure to consider the totality of the circumstances.[102] Shortly thereafter, McNulty was arrested for shoplifting cigarettes![103] The store employees told the police that they had seen him doing this before and were watching him.[104] The state court judge allowed McNulty to plead not guilty and dismissed the case for a probationary period of six months.[105] This bizarre turn of events confirmed to plaintiffs' counsel that McNulty was unbalanced; McNulty died shortly thereafter in 1997.[106]

VII. The Appeal to the Eighth Circuit

To plaintiffs' surprise, Judge Kyle upheld McNulty's report in all respects, but for one minor statute of limitations issue.[107] The plaintiffs promptly filed a notice of appeal to the Eighth Circuit. Sprenger's firm called upon their "old friend" Dan Edelman, who "knows how to state the case emotionally, to make it compelling in human and legal terms."[108] Edelman, after reviewing the copious record, identified two key reversible errors made by McNulty: (1) placing the burden of proof on plaintiffs for causation and (2) refusing to admit their expert testimony on causation.[109] McNulty contradicted himself by allowing the defendants their "scorched earth" discovery, because he initially thought that defendants had the burden of proving that the mental damages were not caused by the workplace harassment, but he then shifted this burden to the plaintiffs in his report.[110]

The appeal was assigned to three experienced judges—Judge McMillian and Senior Judges Gibson and Lay—whom Boler recognized as all being "from the old school of Democratic, civil rights oriented appellate judges who took civil rights issues seriously."[111] Tellingly, the

100. *Id.* at 348–50.
101. *Id.*
102. *Id.* at 354.
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.* at 354, 359.
107. *Id.* at 356.
108. *Id.* at 357. In full disclosure, this reviewer has co-counseled several cases with Dan Edelman.
109. Bingham & Gansler, *supra* note 1, at 357.
110. *Id.*
111. *Id.* at 357–58.

oral argument was scheduled to take place at the William Mitchell College of Law in St. Paul, so that law students could more readily attend, and not in the federal courthouse.[112] The authors provide a good discussion of the strategic planning that went into preparing for the oral argument, which was attended by nearly 300 law students.[113] Boler, who handled the oral argument after much rehearsal, did a fine job.[114] Eveleth, now represented by David Jendrezejek of Moss & Barnett, attempted to justify McNulty's report by arguing that McNulty had "worked so hard," to which Judge Lay promptly retorted: "Well, who cares how long and hard he worked, if he was wrong?"[115]

The Eighth Circuit panel issued its decision in record time, within seven weeks.[116] The opinion, written by Senior Judge Lay, threw out the McNulty report in its entirety and ordered a new trial on damages to be conducted by the district judge.[117] Naturally, the plaintiffs were elated by this favorable decision.[118] The opinion forthrightly started with the recognition that this litigation "has a long, tortured, and unfortunate history," and expressed the panel's concern "with the Special Master's erroneous application of legal principles governing the [damages] award, and his restrictive rulings limiting the testimony of plaintiffs' expert witnesses."[119] The panel "emphatically reject[ed] the Special Master's conclusion in his Report that the fact that the culture of the Iron Range mining industry allowed sexual harassment is a mitigating factor for Eveleth Mines. Instead, we find this observation underscores the overall culpability of Eveleth Mines."[120] The panel agreed that much of the "scorched earth" discovery should not have been allowed, and held that the tortfeasor is obligated to take the plaintiff as it finds her.[121]

Regarding the expert testimony, the panel expressed its incredulity with McNulty's findings, since the "record strongly suggests the Special Master foreclosed consideration of the [plaintiffs' expert] evidence based on his own preconceived notions relating to psychiatric proof. The Special Master did not attempt to hide his hostility toward psychological evidence in sexual harassment claims."[122] The panel emphasized that

112. *Id.*
113. *Id.* at 358–59.
114. *Id.* at 359–62.
115. *Id.* at 362.
116. Jenson v. Eveleth Taconite Co., 130 F.3d 1287 (8th Cir. 1997).
117. *Id.* at 1304; Bingham & Gansler, *supra* note 1, at 363–66.
118. Bingham & Gansler, *supra* note 1, at 365.
119. *Jenson*, 130 F.3d at 1290–91.
120. *Id.* at 1292.
121. *Id.* at 1292–95.
122. *Id.* at 1297.

> It should be obvious that the callous pattern and practice of sexual harassment engaged in by Eveleth Mines inevitably destroyed the self-esteem of the working women exposed to it. . . . The humiliation and degradation suffered by these women is irreparable. Although money damage cannot begin to make these women whole or even begin to repair the injury done, it can serve to set a precedent that in the environment of the working place such hostility will not be tolerated.[123]

The panel concluded by expressing its concern with the "inordinate delay encountered by the parties" and placed some of the blame on the "lawyers in this case [who] delayed its resolution by exercising senseless and irrelevant discovery, and by making endless objections at trial,"[124] which unambiguously referred to defense counsel.

The authors note that Oglebay Norton unsuccessfully petitioned for certiorari with the Supreme Court.[125] However, the authors omit the fact that Oglebay first moved for rehearing and rehearing *en banc* by the Eighth Circuit. According to the PACER docket, of the ten active duty judges, five voted to grant the *en banc* rehearing, which was a remarkably close call, but one vote shy of a majority.[126]

VIII. Remand and Settlement

On remand, the case was rotated yet again, to a new judge, John Tunheim, who set a new trial date and limited discovery to one year before the start of the class period (1983).[127] Sprenger renewed the settlement negotiations, with an offer of $18 million; a jury consultant, using two mock trials, obtained estimated verdicts in the $30 million range.[128] Oglebay Norton counteroffered with $1.6 million for the entire case, which would not even cover the plaintiffs' attorneys' fees and costs.[129] After *voir dire*, the parties, at Judge Tunheim's instigation,

123. *Id.* at 1304.

124. *Id.*

125. Oglebay Norton Co. v. Jenson, 524 U.S. 953 (1998); Bingham & Gansler, *supra* note 1, at 367.

126. Jenson et al. v. Eveleth Taconite Co. et al., No. 97-1147 (8th Cir.), Order denying petition for rehearing with suggestion for rehearing en banc (Feb. 18, 1998). Of the ten active duty judges, Judges Fagg, Wollman, Beam, Hansen, and M.S. Arnold voted to grant the suggestion for rehearing en banc; Judge Loken was recused; and the remaining four active duty judges, Judges McMillian, R.S. Arnold, Bowman, and Murphy, voted to deny the suggestion for rehearing en banc. Under the Eighth Circuit's procedures, a majority of all the active duty judges, not merely a majority of the nonrecused active duty judges, is required to grant a suggestion for rehearing en banc. *See* U.S. Court of Appeals for the Eighth Circuit, Internal Operating Procedures, at IV.D (rev. 2002); PRACTITIONER'S HANDBOOK FOR APPEALS TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, at cx–cxi (1996 ed.). Thus, since Judges Lay and Gibson, who served on the three-judge panel, were both senior judges, they were ineligible to vote on the suggestion for rehearing en banc, although if rehearing en banc had been granted, they could have served on the en banc court.

127. Bingham & Gansler, *supra* note 1, at 368.

128. *Id.* at 368.

129. *Id*. at 369.

entered into mediation and agreed to a total of about $3.5 million in damages—nearly fourteen years after Lois Jenson filed her complaint![130]

In December 1998, Judge Tunheim approved the settlement agreement.[131] In March 2000, he approved most of the plaintiffs' petition for attorneys' fees and costs, for $5,665,660.94 in fees for over 22,000 billable hours and $614,505.93 in costs.[132] The authors did not mention that the parties evidently entered into subsequent settlement negotiations regarding this award (presumably because Oglebay Norton intended to appeal the award), since the docket reflects that Judge Tunheim then granted the joint motion to vacate the award and dismissed the case in April 2000.[133]

IX. What Happened to the Parties and Their Lawyers?

The Eighth Circuit aptly recognized that monetary damages could not begin to restore the plaintiffs to their full emotional and physical health. Although Lois Jenson was able to wean herself from psychiatric medications, she is still functioning at a low level because of post-traumatic stress disorder.[134] Pat Kosmach, who died before the damages awards were determined, never recovered any damages.[135] Only four of the nearly twenty plaintiffs still work at Eveleth, and they now recognize that they should have spoken up much earlier instead of cooperating with the union.[136] This case exemplifies the maxim that harassment plaintiffs can be victimized three times: (1) by their supervisors and coworkers in the workplace; (2) by defense counsel and their retained experts; and (3) by the court, when faced with judicial decision makers such as McNulty.

It is fair to say that the plaintiffs' attorneys were burned out by this "scorched earth" litigation. Indeed, Boler, who devoted nearly her entire career at Sprenger & Lang to this one case, moved to Seattle and only works on a part-time basis, and Lang has similarly scaled back her legal work and devotes most of her time to an arts education foundation.[137] At least the plaintiffs' attorneys did not turn out like Jan

130. *Id.* at 371–74.

131. Jenson et al. v. Eveleth Taconite Co. et al., No. 88-CV-163 (D. Minn.), Order Approving Settlement (Dec. 31, 1998).

132. Jenson et al. v. Eveleth Taconite Co. et al., No. 88-CV-163 (D. Minn.), Memorandum Opinion and Order (Mar. 14, 2000); *see also* Bingham & Gansler, *supra* note 1, at 380–81.

133. Jenson et al. v. Eveleth Taconite Co. et al., No. 88-CV-163 (D. Minn.), Joint Motion to Vacate Memorandum Opinion and Order on Plaintiffs' Motion for Attorneys' Fees (Apr. 3, 2000); Order (Apr. 4, 2000) (granting joint motion); Stipulation and Order (Apr. 7, 2000) (dismissing all remaining claims with prejudice and without costs).

134. Bingham & Gansler, *supra* note 1, at 384.

135. *Id.*

136. *Id.* at 383.

137. *Id.* at 381.

Schlichtmann, the lead counsel in *A Civil Action*, who ended up in bankruptcy as a result of the costs of litigating that case.[138]

As for the defense counsel, there seems to be selective amnesia. The Faegre & Benson Web site, in its biography for Mary Stumo, actually listed this case as an accomplishment: "A sex discrimination and sex harassment class action in which damages of $8,000,000 were sought. After a trial to the court on class liability and a trial to a special master on individual liability and damages, only $189,000 was awarded. (1998)."[139] The authors note that this blurb conveniently overlooks the dispositive fact that this low, employer-friendly award was decisively reversed on appeal, and that the client had fired Faegre & Benson.[140] The authors' remark may explain why Faegre & Benson, sometime in early 2003, eliminated this narrative from its Web site.[141]

Oglebay Norton, to its credit, completely replaced its upper management, so that it no longer employs any of the senior managers who disclaimed any responsibility for what happened at Eveleth.[142] The authors note, without attribution, that this litigation "cost Oglebay Norton and its insurers more than $15 million," which vastly exceeded the plaintiffs' initial settlement offers.[143]

X. Significance of This Case

The authors correctly identified three significant consequences of this litigation: (1) limiting abusive discovery in sexual harassment litigation; (2) recognizing that sexual harassment can form the basis of a class action; and (3) making corporate America realize the importance of preventing sexual harassment.[144] Perhaps the third reason explains why so few sexual and racial harassment class actions, once certified, ever go to trial—the defendant will invariably settle instead of going to trial, particularly if the certification is upheld on appeal.

However, the authors seem to overlook another key consequence of this litigation: the Eighth Circuit's emphatic rejection of the defendants' and McNulty's approach towards allocating the burden of proof for parsing the emotional and physical injuries between that caused by

138. *See* Cadle Co. v. Schlichtmann, 267 F.3d 14 (1st Cir. 2001) (discussing bankruptcy proceedings), *cert. denied*, 535 U.S. 1018 (2002).

139. Faegre & Benson, LLP, *Mary E. Stumo*, *available at* http://www.faegre.com (last visited Feb. 17, 2003) (on file with author).

140. Bingham & Gansler, *supra* note 1, at 381.

141. Interestingly, some time in May or June of 2003, this Web page was edited to remove any narrative about Ms. Stumo's representation of Eveleth Mines, other than listing this case as the only entry under "Class Action: Sex Discrimination" in her online biography. *See* Faegre & Benson, *Mary E. Stumo*, *available at* http://www.faegre.com/lawyer_print.asp?key=7182 (last visited July 2, 2003) (on file with author).

142. Bingham & Gansler, *supra* note 1, at 368.

143. *Id.* at 381.

144. *Id.* at 382.

harassment and that caused by outside factors (such as preexisting emotional stressors from childhood or family issues). Essentially, McNulty adopted defendants' position in holding that it was the plaintiffs' burden to parse out their emotional and physical injuries; yet McNulty then believed that it was impossible for plaintiffs to do so, and he would not allow any expert psychiatric testimony on this issue.[145] The Eighth Circuit rejected this, based on Edelman's appellate brief, which argued that if the plaintiff could show that she had suffered substantial harm from the defendants' unlawful conduct, then it was the defendants' burden to demonstrate that the harm can be parsed, and if so, to parse it.[146] Indeed, if emotional and physical harm could not be parsed, then that was Eveleth's problem, not one for the plaintiffs.[147] Thus, if the defendants want to engage in "nuts and sluts" discovery, or even delve into other stressors as potential causes of plaintiffs' injuries, then it is the defendants' burden to show, first, that the distress can be parsed; if so, then to show what part of plaintiff's injuries were caused by outside stressors.[148]

But it is not clear that all employers "get it." For example, the Michigan Court of Appeals recently upheld a sexual harassment damages award of $21 million to a plaintiff who was a blue-collar employee at a Chrysler plant and who suffered from crude sexist remarks, graffiti and props, much as did the Eveleth plaintiffs.[149] The Texas Court of Appeals similarly upheld a $9,957,536 award in a single-plaintiff sexual harassment case, where the plaintiff also suffered exceedingly crude and egregious harassing conduct by her supervisor.[150] The U.S. Court of Appeals for the Second Circuit determined that Delta Air Lines was liable for the rape of a female flight attendant by a male coworker at a hotel during an overnight layover between flights, even though Delta argued that it could not be responsible for rapes that took place

145. Jenson v. Eveleth Taconite Co., 130 F.3d 1287, 1293 (8th Cir. 1997) (quoting McNulty's report).

146. *Id.* at 1293–94.

147. *Id.* at 1294 ("Assuming the doctrine [of apportionment] is applicable, it is the *defendant* who must prove that any damage caused by other factors was divisible, and if so, what portion of damages the defendant caused. . . . However, what the plaintiffs did not have to prove was that other factors did *not* contribute to that harm.").

148. *Id.* ("To limit its liability through apportionment, a defendant must prove that a plaintiff's damages are divisible, and other outside factors contributed to the plaintiff's harm. This the defendants were required to do; this the defendants failed to do.").

149. Gilbert v. DaimlerChrysler Corp., No. 227392, 2002 WL 1767672, at *31 (Mich. Ct. App. July 30, 2002) (*per curiam*); *see also* Adam Liptak, *Pain-and-Suffering Awards Let Juries Avoid New Limits*, N.Y. TIMES, Oct. 28, 2002, at A14 (discussing this decision). On April 9, 2003, the Michigan Supreme Court granted DaimlerChrysler's petition for certiorari. *See* Thomas Bray, *Fieger Continues His War on Judiciary*, DETROIT NEWS, May 14, 2003, at 11A; Brian Dickerson, *Fieger Puts Justices in a Tricky Spot*, DETROIT FREE PRESS, May 7, 2003, at 1B; Editorial, *Justices Should Take Chrysler Case*, DETROIT NEWS, Aug. 9, 2002, at 8A.

150. Hoffman-LaRoche, Inc. v. Zeltwanger, 69 S.W.3d 634, 640–49 (Tex. App. 2002), *rev. granted*, No. 02-0120 (Tex. Oct. 31, 2002).

off the worksite, much as Eveleth argued that it could not be responsible for the rape of a plaintiff at her home by her coworker.[151] Indeed, one mining law practitioner recently commented, regarding this and other sexual harassment cases, "Do courts really expect miners to have the manners of judges? As implausible as that may seem, it's certainly the direction the law is taking."[152]

XI. How Might This Case Turn Out Differently Today?

A series of statutory amendments and Supreme Court decisions have significantly altered the legal landscape, so that a sexual or racial harassment class action with comparable facts would undoubtedly reach a faster resolution, and one with fewer barriers to the plaintiffs. The authors acknowledge the two statutory changes, but do not discuss the intervening Supreme Court decisions.[153]

The first significant statutory change was the November 1991 amendment to Title VII to allow compensatory and punitive damages, under 42 U.S.C. section 1981a, and for a jury trial on Title VII claims.[154] Since this amendment was not retroactive, the Eveleth plaintiffs could only collect such damages under Title VII based on conduct that occurred after its effective date.

The second significant statutory change was to Federal Rules of Evidence 412, the rape shield provision, which was amended in 1994 to provide that evidence regarding the victim's prior sexual conduct or alleged sexual disposition is generally not admissible in any civil or criminal proceeding.[155] If the tortfeasor seeks to introduce such evidence, Rule 412(c) requires that party to file a written motion at least fourteen days prior to trial, and the court must hold a sealed hearing on this issue.[156] Critically, although this 1994 amendment took effect as of December 1, 1994 (not August 1994, as the authors state on pages 285–86), McNulty failed to apply it during the 1995 evidentiary hearing in the damages phase of the trial.[157]

The Eighth Circuit had anticipated this heightened threshold in 1993 in holding that a plaintiff's private life cannot "provide lawful

151. Ferris v. Delta Air Lines, Inc., 277 F.3d 128, 136–37 (2d Cir. 2001).

152. Rosemary Collyer, "*Miners Will Be Miners?"—It's No Defense to Sexual Harassment Claims*, MINING LAW MONITOR, April 2000, *available at* http://www.crowell.com/content/Resources/Publications/BrowsebyPracticeGroup/Mining/art_rc_miners400.htm (on file with author).

153. Bingham & Gansler, *supra* note 1, at 240, 285–86.

154. Civil Rights Act of 1991, Pub. L. No. 102–166, Title I, § 102, 105 Stat. 1071, 1072 (1991).

155. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103–322, Title IV, § 40141(b), 108 Stat. 1919 (1994).

156. FED. R. EVID. 412(c).

157. Pub. L. No. 103-322, at § 40141(a) ("The proposed amendments to the Federal Rules of Evidence . . . shall take effect on December 1, 1994, as otherwise provided by law, but with the amendment made by subsection (b).").

acquiescence to unwanted sexual advances at her work place by her employer," since the opposite conclusion would "allow a complete stranger to pursue sexual behavior at work that a female worker would accept from her husband or boyfriend [at home]."[158] The 1994 amendments to Rule 412, by changing the standard of admissibility for evidence of the victim's past sexual behavior or alleged sexual predisposition, give sexual harassment plaintiffs an important source of protection by requiring the employer to convince the court of the relevancy of the proposed evidence and forcing the employer to narrowly tailor its inquiries during discovery and trial. Under Rule 412, evidence of past sexual conduct, especially if the conduct occurs outside of the workplace and does not involve coworkers or managers, should generally be ruled to be irrelevant. Thus, under the current version of Rule 412, it is highly unlikely that Eveleth Taconite could have conducted such highly intrusive "nuts and sluts" discovery into the plaintiffs' private lives.[159]

The Supreme Court's June 1998 *Ellerth* and *Faragher* decisions have significantly recast the legal landscape regarding employer liability (respondeat superior) in hostile work environment cases where the harasser is a supervisor or manager.[160] On the one hand, if the plaintiff suffers a "tangible employment action [which] constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits," then the employer is *strictly liable* for the conduct of its supervisor or agent.[161]

On the other hand, when there is no such tangible employment action (*i.e.,* the employee is still employed with no adverse change in her status), then the employer is only vicariously liable for the supervisor's conduct, and can raise an affirmative defense to this vicarious liability:

> The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreason-

158. Burns v. McGregor Elec. Indus., Inc., 989 F.2d 959, 963 (8th Cir. 1993).

159. *See, e.g.*, Jaros v. LodgeNet Entertainment Corp., 294 F.3d 960, 965 (8th Cir. 2002) (excluding evidence under Rule 412 in harassment case); B.K.B. v. Maui Police Dep't, 276 F.3d 1091, 1104 (9th Cir. 2002) (same); Wolak v. Spucci, 217 F.3d 157, 160–61 (2d Cir. 2000) (same); Excel Corp. v. Bosley, 165 F.3d 635, 640–41 (8th Cir. 1999) (same). However, if the plaintiff herself engaged in sex-related banter in the workplace, and introduced evidence of that conduct at trial, then she has waived any objection under Rule 412. Beard v. Flying J, Inc., 116 F. Supp. 2d 1077, 1084–86 (S.D. Iowa 2000), *aff'd in relevant part, rev'd on other grounds*, 266 F.3d 792, 801–02 (8th Cir. 2001).

160. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 764–65 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998).

161. *Ellerth*, 524 U.S. at 761–63; *see also Faragher*, 524 U.S. at 790 (discussing "this apparently unanimous rule").

> ably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. While proof that an employer had promulgated an anti-harassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing any unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense.[162]

It is unlikely that Eveleth could have successfully invoked this affirmative defense, which would only be available with respect to those plaintiffs who were not forced out of their jobs, i.e., did not suffer a constructive discharge.[163] It was patently obvious to the Eighth Circuit that Eveleth did not have any effective or reasonable mechanism for deterring and remedying workplace discrimination and harassment. Even when the Eveleth employees reported the harassment, management took ineffectual or no steps to remedy the harassment. Thus, the first element of the *Ellerth/Faragher* test could not possibly be satisfied. Indeed, this case is much like *Faragher*, where the employer had "entirely failed to disseminate its policy against sexual harassment among the beach employees" and this "policy did not include any assurance that the harassing supervisors could be bypassed in registering complaints."[164]

The Supreme Court's 1999 *Kolstad* decision held that the evidentiary standard for awarding punitive damages under Title VII was the statutory "malice or reckless indifference standard," and not the "egre-

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162. *Ellerth*, 524 U.S. at 765; *see also Faragher*, 524 U.S. at 807 (citing *Ellerth*).

163. Most courts that have ruled on this issue, including the Third and Eighth Circuits, have held that a constructive discharge is a tangible employment action that forecloses the *Ellerth/Faragher* affirmative defense. *See* Suders v. Easton, 325 F.3d 432, 452–55 (3d Cir. 2003) (collecting cases), *petition for cert. filed*, 72 U.S.L.W. 3124 (U.S. Jul. 14, 2003) (No. 03–95); *Jaros*, 294 F.3d at 966. *But see* Caridad v. Metro-North Commuter R.R., 191 F.3d 283, 294 (2d Cir. 1999) ("constructive discharge does not constitute a 'tangible employment action,' as that term is used in *Ellerth* and *Faragher*"). The Eleventh Circuit, in cases that were decided before *Ellerth* and *Faragher*, held that "constructive discharge qualifies as an adverse employment decision." Poole v. Country Club of Columbus, Inc., 129 F.3d 551, 553 n.2 (11th Cir. 1997) (collecting cases). The First Circuit recently concluded that this issue required a fact-specific determination that precluded any blanket rule as to whether or not a constructive discharge was a tangible employment action. *See* Reed v. MBNA Marketing Sys., Inc., 333 F.3d 27, 33 (1st Cir. 2003) ("Nothing is gained by arguing in the abstract about whether a constructive discharge is or is not a discharge; for some purposes or rubrics, it might be so treated, and for others not.") (internal citation omitted).

164. *Faragher*, 524 U.S. at 808 ("we hold as a matter of law that the [defendant] could not be found to have exercised reasonable care to prevent the supervisors' harassing conduct").

giousness" standard used by several circuits.[165] *Kolstad* lowered the burden on the plaintiffs seeking punitive damages, since it is no longer necessary for plaintiffs to prove that the employers' conduct be characterized as egregious.[166] Prior to *Kolstad*, at least two decisions from the Eighth Circuit had required "outrageous" conduct beyond the statutory malice or reckless indifference standard, while another decision had correctly anticipated *Kolstad*.[167]

The *Kolstad* Court went on to hold that "in the punitive damages context, an employer may not be vicariously liable for the discriminatory employment decisions of managerial agents where those decisions are contrary to the employer's 'good faith efforts to comply with Title VII.'"[168] However, it is beyond doubt that Eveleth would not have been able to assert this defense to liability for punitive damages, given that the record evidence, as discussed herein, in the *Class Action* book, and in the Eighth Circuit's decision, abundantly showed that Eveleth made no "good faith efforts" to comply with the antidiscrimination statutes.

The Supreme Court's 1998 *Oncale* decision emphasized that the court should judge the severity of the workplace harassment "from the perspective of a reasonable person in the plaintiff's position."[169] The Supreme Court set forth an analysis based upon the objective reasonable person standard, looking at "the social context in which particular behavior occurs and is experienced by its target," which inevitably "depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed."[170] It is difficult to conceive of a "social context" under which sexual, let alone racial, harassment would not be found offensive, but *Oncale* may permit the harassed employee to argue that the harassment should be judged from the perspective of a person of her own gender, race, or ethnic group, and not that of society at large. *Oncale* should prevent an employer such as Eveleth from arguing that an employee assumed the risk of harassment by working in a predominately male, blue-collar workplace where local "cultural norms" meant that women at work were viewed as sex objects.[171]

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165. Kolstad v. American Dental Ass'n, 527 U.S. 526, 533–39 (1999).

166. *Id.*

167. *Compare* Varner v. National Super Mkts., Inc., 94 F.3d 1209, 1214 (8th Cir. 1996) (requiring "outrageousness"), *and* Karcher v. Emerson Elec. Co., 94 F.3d 502, 509 (8th Cir. 1996) (same), *with* Kim v. Nash Finch Co., 123 F.3d 1046, 1065–66 (8th Cir. 1997).

168. *Kolstad*, 527 U.S. at 545.

169. Oncale v. Sundowner Offshore Serv., Inc., 523 U.S. 75, 81 (1998).

170. *Id.* at 81–82.

171. In 2002, a panel of the Fourth Circuit held that there could be no sexual harassment where the alleged conduct preexisted the arrival of women in the workplace, *i.e.*, the defendant's male employees on the factory floor routinely made derogatory comments about women in general, long before the defendant hired women to work in those

In its June 2002 *Morgan* decision, the Supreme Court held that the continuing violation doctrine applies to hostile work environment claims, but not to discrete discrimination claims, such as termination or failuretopromote claims.[172] This allows the harassment plaintiff to include conduct occurring prior to Title VII's statutory 300-day deadline or the applicable section 1981 statute of limitations period, provided that at least one event occurred within the limitations period.[173] Notably, the Supreme Court vacated a recent Eighth Circuit decision that refused to allow Title VII plaintiffs to recover damages for harassment occurring prior to the 300-day deadline, thereby rejecting the narrow reading taken in that circuit for the temporal scope of hostile work environment claims.[174] At the same time, *Morgan* does mean that some of the Eveleth plaintiffs' promotion, hiring, and training claims would not have survived this jurisdictional bar.

Finally, in its April 2003 *State Farm* decision, which naturally was issued after this book was published, the Supreme Court held that there are constitutionally-mandated limits to punitive damages under the Due Process Clause. Critically, the Court suggested that punitive damages ordinarily should not exceed compensatory damages by a ratio of more than 10:1 and that the defendants' net worth should not be used in determining punitive damages.[175] In the *Eveleth* case, most of

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blue-collar positions. Thus, Judge Williams, joined by Judge Niemeyer, opined that these sexist comments occurred regardless of whether women were present in the workplace. Ocheltree v. Scollon Prods., Inc., 308 F.3d 351, 356–57 (4th Cir. 2002), *vacated on reh'g en banc* (4th Cir. Dec. 16, 2002). Judge Michael's dissenting opinion tartly questioned whether racial harassment, such as the "daily use of the meanest racial slur against African-Americans" could similarly be excused on the grounds that "the workplace had previously been all white and that the pattern of racial slurs was the same both before and after the plaintiff's arrival." *Ocheltree*, 308 F.3d at 376 (Michael, J., dissenting). The Fourth Circuit held its *en banc* oral argument on February 25, 2003. *See* Deborah Sontag, *The Power of the Fourth: How One Appellate Court Is Quietly Moving America Ever Rightward*, N.Y. TIMES MAG., Mar. 9, 2003, at 38 (discussing oral argument).

On July 18, 2003, the Fourth Circuit issued its *en banc* decision in *Ocheltree*, which rejected the panel's rationale for denying any recovery to the plaintiff. *See* Ocheltree v. Scollon Prods., Inc., 335 F.3d 325 (4th Cir. 2003) (*en banc*). The *en banc* decision had a complete reversal in the lineup of the judges: Judge Michael, joined by eight of the twelve circuit judges, wrote the majority opinion; Judge Williams authored a dissenting opinion that was only joined by Judge Widener; and Judge Niemeyer wrote an opinion concurring in the judgment alone. The *en banc* court held that Ms. Ocheltree established that the harassment was because of her sex: even though the sexual atmosphere predated her arrival, the remarks and conduct escalated significantly after her arrival, particularly after she complained during a shop meeting. *Id.* at 331–33. Moreover, several of the acts were expressly directed towards her. In contrast, the remarks and conducts were never directed towards her male coworkers, even if they had the incidental effect of embarrassing some of them. *Id.*

172. National R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 115–17 (2002).

173. *Id.*

174. Madison v. IBP, Inc., 257 F.3d 780, 796–97 (8th Cir. 2001), *vacated*, 536 U.S. 919 (2002).

175. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. ___, 123 S. Ct. 1513, 1524–25 (2003).

the plaintiffs suffered substantial compensatory damages, particularly for emotional distress, and some also had physical injuries caused by workplace conditions. If this case were to be tried anew today, it is likely that the compensatory damages would have supported a sizable punitive damages award under Title VII, so that *State Farm* would not change the outcome.

XII. A General Critique of *Class Action*

It is obvious that Bingham and Gansler have written a compelling and page-turning account that capably presents complex litigation in terms that a general reader can comprehend. Perhaps in an attempt to satisfy multiple audiences—the lay public, law students, and employment lawyers—the authors had to make several compromises that have sacrificed the overall quality of their book.

First, there is no index to this book, so the reader who wants to refer back to previous events is forced to flip through numerous pages, or else take detailed notes. Indeed, this reviewer prepared a detailed twenty-two-page chronology in order to keep track of the litigation.

Second, there are no photographs in this book. I expected to see photographs of the plaintiffs, the worksite, the attorneys, the judges, and a sampling of the sexist notes, graffiti, and props. Such photographs are readily available and were published in various newspapers, including the *Washington Post*, which allowed the reader to visualize the persons and objects. Although one picture may be worth a thousand words, the authors seem to have taken to heart the admonition that lawyers should prefer to use a thousand words!

Nor are there any maps showing the location of the Eveleth facilities—which are quite remote from Duluth, let alone the Twin Cities—or the various nearby towns and villages mentioned throughout the authors' narrative.

Moreover, there are no case citations to any of the published opinions in this litigation, which makes it needlessly difficult for the lay public to find the opinions at their local law library or on the Internet.[176] Further, the authors blithely state that the 416-page report by Special Master McNulty is a "published opinion."[177] However, this report is not available in Westlaw, was not published in the *Federal Supplement* or *Federal Rules Decisions*, and does not appear to be available on the Internet, as confirmed by several searches.

Perhaps some of these limitations can be remedied through the publication of a law school source book, which could include a timeline,

176. Although the Eighth Circuit's opinion is posted on its Web site, *available at* http://www.ca8.uscourts.gov, and http://www.findlaw.com, the district court's decisions are not posted on that court's Web site, *available at* http://www.mnd.uscourts.gov.

177. Bingham & Gansler, *supra* note 1, at 351.

photographs, and excerpts from some of the pleadings and decisions, much as has been done for *A Civil Action*.[178]

Finally, although the authors mention the 1991 amendments to Title VII (permitting jury trial and monetary damages) and the 1994 amendments to Federal Rules of Evidence 412 (excluding evidence regarding the sexual conduct of victims), they made no attempt to discuss how the legal landscape has substantially changed as a result of intervening Supreme Court decisions.

XIII. The Verdict

I highly recommend this book to employment lawyers, judges and their clerks, and law students. It provides a fascinating picture of the litigation of a complex employment discrimination class action, with many cautionary lessons that are equally applicable to single-plaintiff cases. This book also forms a useful companion to Paul Barrett's *The Good Black: A True Story of Race in America* (1999), an account of a race discrimination case brought by a law firm associate.[179] Notwithstanding several limitations, the authors are to be commended for having made the effort to document the history of this important case.

178. A DOCUMENTARY COMPANION TO A CIVIL ACTION; WITH NOTES, COMMENTS, AND QUESTIONS (Lewis A. Grossman & Robert G. Vaughn eds., rev. ed. 2002).

179. Mungin v. Katten Muchin & Zavis, 941 F. Supp. 153 (D.D.C. 1996), *rev'd,* 116 F.3d 1549 (D.C. Cir. 1997). Professor Wilkins has published an excellent analysis of this book and the underlying issues. David B. Wilkins, *Book Review: On Being Good and Black*, 112 HARV. L. REV. 1924 (1999).