

Amicus Curiae Briefs Employment Issues

Employment Discrimination

Case: *Walters v. Metropolitan Educational Enterprises, Inc*

Court: Supreme Court of the United States, October 1996

Amicus Brief: Women's Legal Defense Fund

Case: Walters filed a Title VII discrimination claim against Metropolitan Educational Enterprises. She was subsequently fired and the EEOC filed suit alleging that Metropolitan violated Title VII's prohibition against retaliatory firings. Metropolitan claimed that it was not covered by Title VII because it did not meet the definition of an employer who has fifteen or more employees. The Seventh Circuit followed the "day-to-day" method of counting employees, which looked to a specific day to see if an employee actually worked on that day or was being paid on that day despite an absence. The EEOC claimed that the correct method of computation was the "payroll" method of counting employees, which looked to see if an employer-employee relationship existed on a given day as evidenced by the employer's payroll.

Amicus Brief: The brief argues that the "day-to-day" method excludes many individuals who require a flexible work schedule, such as four days on, one day off or who may work from home. By excluding more employers than the "payroll" method, the "day-to-day" method limits the reach of Title VII's protections and, therefore, leaves more workers unprotected. Furthermore, because the "day-to-day" approach tends to exclude employers with hourly employees, as opposed to salaried employees, the employers left beyond the reach of Title VII are those who disproportionately employ lower-income workers, women, and racial minorities; workers who may be more likely to be victims of discrimination.

CWEALF: CWEALF joined the brief because it believes that an important step in gaining gender equity is to make sure that all employees are considered the same for purposes of considering what constitutes an employer-employee relationship. CWEALF also believes that setting a uniform standard for counting employees that places more employers within the reach of Title VII will eventually protect more employees.

Holding: The Supreme Court reversed the Seventh Circuit, adopting the "payroll" method for counting employees and remanded the case for further hearings.

Case: *Bryan County v. Brown*

Court: United States Supreme Court, 1997

Amicus Brief: Now Legal Defense and Education Fund

Case: Jill Brown brought a claim for damages pursuant to 42 U.S.C. § 1983 and Oklahoma State law against Reserve Deputy Stacy Burns and Bryan County, Oklahoma based on allegations of excessive force related to a high traffic chase and subsequent detention. Brown's suit against Bryan County was based on Burns employ and the sheriff's admission at trial that he had not reviewed Burns' past criminal record that listed several misdemeanors, even though he had it in

his possession at the time he hired Burns. The County had a policy of not hiring individuals who had been convicted of a felony, but it would hire those individuals who had been convicted of a misdemeanor. The Fifth Circuit found for Brown, affirming the jury's decision. Bryan County appealed.

Amicus Brief: The brief outlines case law that serves as a precedent to considering a single policy decision by a municipality that leads to the deprivation of constitutional rights of individuals to implicate the municipalities liability for damages. The municipality should be found liable because the sheriff was deliberately indifferent to the harm posed by his hiring decision; had it been mere negligence, no liability would attach. Recognizing an attachment of liability from a single policy decision that has foreseeable ramifications ultimately protects individuals. Within this framework, the brief illustrates several examples where women have been victims of sexual harassment, sexual abuse, and sex discrimination because of such policy decisions. If something more is required, these women will be unprotected.

CWEALF: CWEALF joined in the brief because it recognizes that single policy decisions often have lasting effects that can implicate the protections afforded to women both in and outside the workplace.

Holding: The Court reversed the Fifth Circuit's decision and rejected Bryan County's liability under 42 U.S.C. § 1983 for the hiring decision that resulted in the violation of Brown's constitutional rights. The Court required more than mere foreseeability to impose liability; rather, the Court requires that it be fairly obvious to the policy maker that the consequences that did occur will occur as a result of his/her decision.

Sex Discrimination

Case: *Board of Directors of Rotary International v. Rotary Club of Duarte*

Court: Supreme Court of the United States, 1987

Amicus Brief: NOW Legal Defense and Education Fund

Case: The Rotary Club of Duarte, California was a member club of the larger Rotary International. Membership in Rotary Clubs traditionally had been limited to men, though women were invited to attend meetings, give speeches, and receive awards. The Duarte Club admitted three women to active membership in 1977. As a result, the Duarte club was notified that admitting women to the club violated Rotary International's constitution, and Rotary International revoked the Duarte Club's charter, terminating its membership in Rotary International. The Duarte Club filed a complaint in California, claiming that the charter revocation violated California's Civil Rights Act. The trial court concluded that neither Rotary International nor the Duarte Club were business establishments covered by the act and, accordingly, found for Rotary International. The California Court of Appeal reversed. Upon the California Supreme Court's refusal of certiorari, Rotary International appealed to the United States Supreme Court, claiming that forcing Rotary International to admit women violates the organization's First Amendment rights.

Amicus Brief: The brief explains that exclusion of women to Rotary Clubs results in women being denied business opportunities and access to business leaders worldwide.

The brief argues that states have a compelling interest to protect the right of women to non-discriminatory access to commercial opportunities. Rotary International is not entitled to First Amendment Protection of intimate associations since the club itself has sacrificed such intimate association by its large size, its welcoming of publicity, its inclusion of non-members in most events, and its selection of members based on business attributes. When looking at these characteristics, it is obvious that Rotary International cannot claim protection geared towards the formation and preservation of certain kinds of highly personalized relationships. The brief also argues that Rotary International cannot claim protection under the First Amendment's right to expressional association because that protection, by its very nature, applies only to those who associate for the advancement of beliefs and ideas, not for commercial activity. Rotary International has not made a showing that its members come together in order to advance a particular belief or idea. However, even if Rotary International were entitled to some protection for expressive association, the application of California's Civil Rights Act does not interfere with that expressive association for the inclusion of women does not affect the advancement of any particular belief or idea the business-related organization could advance other than one based solely on the members' social preference of not involving women. The brief explains that this social preference has never been enough to warrant First Amendment Protection or to insulate a group from a state's Civil Rights legislation. Furthermore, any infringement on the right to expressive association is constitutional since the application of the statute burdens this association only so much as is necessary to serve California's compelling interest in protecting women from discrimination and the statute is not aimed at suppressing speech or other expressive activity.

CWEALF: CWEALF joined the brief because it believes that women need to have the same access as men to the social circles in which business associations are created in order to equalize the commercial playing-field. Only by making these associations with business leaders can women obtain equal footing.

Holding: The Court affirmed the California Court of Appeals' decision. The Court held that, in part due to its size, Rotary International cannot claim protection of intimate associations. Likewise, the Court found that admitting women will not have an limiting or adverse affect on the rotary club's ability to pursue or carry out expressive purposes, whether the activities in which they are engaged are political, service, or community-based. Furthermore, the Court held that any infringement on expressive activity that does occur is justified because such infringement serves the state's compelling interest in eliminating discrimination against women. This is especially so because the Civil Rights Act is viewpoint neutral.

Case: *United Auto Workers (UAW) v. Johnson Controls*

Court: Supreme Court of the United States, 1991

Amicus Brief: American Civil Liberties Union—Women's Rights Project

Case: Johnson Controls manufactures batteries, and during the manufacturing process, employees may be exposed to lead, which is a primary ingredient. This exposure can lead to health risks, including the risk of harm to a fetus carried by a female employee. In seeming

response to eight employees becoming pregnant while having high levels of lead in their blood, Johnson developed a policy that women who were capable of bearing children would not be placed into jobs involving lead exposure or into jobs which could lead them to jobs involving lead exposure through job bidding, promotion, transfer or bumping. If a woman wanted to work in such a job, she had to provide medical documentation that she was incapable of bearing children. The UAW filed suit, claiming that this “fetal protection” policy constituted sex discrimination in violation of Title VII. The District Court found for Johnson Controls on summary judgement, holding that the policy was a business necessity. This holding was affirmed by the Seventh Circuit, which would have found for Johnson either under a business necessity defense or under a bona fide occupational qualification analysis. The UAW appealed to the Supreme Court.

Amicus Brief: The brief argues that by utilizing this policy, Johnson Controls effectively ignores any health risk to its male employees and “protects” women by denying them employment opportunities. The appropriate step to take would be for Johnson to hire both men and women and create a workplace environment that complies with OSHA standards. The policy is in direct contradiction to the objectives Congress sought to achieve by enacting Title VII, subsequently amended by the addition of the Pregnancy Discrimination Act. Congress believed that women were entitled to employment opportunities based on their ability or inability to work, not based on their ability or inability to bear children. While Johnson may argue that the policy is aimed only at child-bearing women, the classifications are drawn along gender lines—only reproductively capable women, not reproductively capable men, are barred from working in lead-exposed areas. The brief explains that access to higher-paid jobs for unskilled workers are as important, if not more important, for women as for men. Without these jobs, many women and their children face poverty. The brief argues that Johnson’s policy assumes that all women who are capable of bearing children may be pregnant at any time—a gross generalization that has nothing to do with the individual characteristics of the women who might choose to work at Johnson Controls given the opportunity. The brief notes that one of the underlying purposes of Title VII was for women to be able to combine work and family life. This policy, which makes infertility a prerequisite to employment, is in direct contradiction to Congress’ intention. The brief argues that infertility cannot be a BFOQ, for being pregnant has nothing to do with actual job performance, the main focus of a BFOQ. This is unchanged even if the employer must suffer an increase in costs in order to comply with an act of Congress.

CWEALF: CWEALF joined this brief because of its dedication to ending sex discrimination in employment. CWEALF believes that if female infertility is a recognized bona fide occupational qualification, numerous jobs will be closed to women. Such a policy supports a paternalistic view serving only to perpetuate gender stereotypes and gender discrimination. It also places women at an extreme economic loss under the guise of protecting them.

Holding: The Court found that the policy was not facially neutral for it did not seek to protect the unconceived children of all its employees. Instead, the policy concerned only the unborn offspring of its female employees. Thus, the policy is facially discriminatory on the basis of sex. The Court further held that even if Johnson Controls was not motivated by gender bias, its lack of a discriminatory motive does not change a discriminatory policy into a benign policy. The Court explained that a BFOQ defense is extremely narrow and the discrimination it permits must

be reasonably necessary to the normal operation of a particular business. As such, more than mere generalizations are required to satisfy a BFOQ. The Court noted its previous holding in *Dothard v. Rawlinson*, that danger to women was not enough to justify discrimination under a BFOQ. While the health or safety of third parties may be considered for a BFOQ, possible fetal health is a concern that must rest solely with the parent(s).

Case: *J.E.B. v. Alabama ex. rel. T.B.*

Court: Supreme Court of the United States, 1994

Amicus Brief: National Women's Law Center

Case: Alabama instituted a paternity and child support action against J.E.B. At trial, Alabama used nine of its ten peremptory challenges to exclude males from the jury, with the jury eventually being comprised entirely of women. Relying on the Supreme Court's decision in *Batson v. Kentucky* (which held that peremptory strikes based solely on race violated the Equal Protection Clause), J.E.B. claimed that peremptory strikes based solely on gender violated the Equal Protection Clause. The trial court rejected this claim, a decision that the court affirmed on a post-judgment motion. The Alabama Court of Civil Appeals affirmed and the Alabama Supreme Court denied certiorari. J.E.B. appealed to the United States Supreme Court.

Amicus Brief: The brief argues that gender-based peremptory challenges are based on gender stereotypes and these stereotypes perpetuate the history of discrimination in the jury system that women have suffered. The brief notes that it was not until 1975 that the Court held that the systematic exclusion of women from juries violated a defendant's Sixth Amendment rights. However, by allowing peremptory strikes based on gender, the harm suffered by excluding women continues. In addition to harming women and men because such strikes reinforce gender stereotypes, the use of peremptory strikes undermines the public's confidence in the jury selection process and the justice juries dispense. The brief also argues that the use of peremptory challenges based solely on gender violates the Equal Protection Clause, much as the Court determined that peremptory challenges based solely on race violated the Equal Protection Clause in *Batson v. Kentucky*. Under Equal Protection analysis, the use of such challenges must be substantially related to an important governmental interest in order to survive intermediate scrutiny. In this case, Alabama is unable to show any important governmental interest. While empanelling an impartial jury is an important interest, the use of gender stereotypes to exclude women (or men) from a jury does not create the required nexus between the use of peremptory challenges based solely on gender and obtaining an impartial jury.

CWEALF: CWEALF joined this brief because of its belief that the continued use of peremptory challenges based solely on gender perpetuates discrimination against women. CWEALF believes that such discrimination has no place in a system that has its fundamental structures based in fairness and equity.

Holding: The Court reversed the decision of the Alabama Civil Court of Appeals and remanded the case for further proceedings. The Court held that peremptory challenges based solely on gender violated the Equal Protection Clause and the use of such challenges constituted intentional and invidious discrimination on the basis of gender. Using intermediate scrutiny, the Court found that discrimination on the basis of gender in jury selection does not substantially

further the state's legitimate interest in achieving a fair and impartial trial. The Court further found that there existed no evidence that gender could be used as a proxy for a more individualized determination of a particular juror's biases.

Case: *State of Connecticut v. Walker*

Court: Connecticut Appellate Court, 1994

Amicus Brief: Connecticut Women's Education and Legal Fund

Case: The defendant had been charged with murder, a crime for which the jury found the defendant guilty after laborious deliberations (the jury was deadlocked twice). The defendant appealed the convictions charging (1) that the trial court's instructions given prior to voir dire violated the defendant's constitutional rights, (2) the trial court's jury instructions violated the defendant's constitutional rights, and (3) the evidence was insufficient to sustain a conviction. At trial, four eyewitnesses testified. Two of them were unable to identify the defendant at trial and one of them had deliberately misled the police at first. Three other eyewitnesses testified that the shooter was not the defendant. One of these had told the police he had not seen the shooting and the other two never spoke to the police about what they had seen. The instructions the trial court gave prior to voir dire regarded what constituted a "reasonable doubt." The court said, "You know, women, of course, if you ask them well, why did they do certain things...if a woman's only answer is my woman's intuition told me it was the proper thing to do...then you may not use your women's intuition to determine reasonable doubt, or facts or issues in a criminal case." The jury instructions did not discuss "women's intuition," and the defendant did not protest the instructions at the time they were given.

Amicus Brief: The brief argues that the trial court's preliminary instructions is a prime example of gender stereotyping, which has the effect of placing women in an inferior social and legal status without regard to individual capabilities. This comment also reinforced the idea that the legal sphere is a male sphere in which a woman's thought processes have no place. Judicial expressions of gender bias cannot be condoned by the Court for it is this Court's role to be a leader in the judicial system in eradicating gender bias.

CWEALF: CWEALF authored the brief because it believes that the trial judge's instructions perpetuate the impression that women do not make decisions in a rational manner. The bald stereotyping has no place in a court in which equality of treatment and fairness are supposed to be the hallmarks of justice.

Holding: The court specifically found that the trial judge's preliminary instructions regarding "women's intuition," were inappropriate for gender bias has no place in the courtroom. However, the court held that this preliminary instruction, when not reinforced by jury instructions that also included the imprimatur of gender bias and non-legal definitions of reasonable doubt, could not have affected the jury's determination of reasonable doubt in the case. Therefore, the court determined that there had been no constitutional violation and affirmed the defendant's conviction.

Case: *Faulkner v. Jones*

Court: United States Court of Appeals for the Fourth Circuit, 1995

Amicus Brief: National Women's Law Center

Case: Faulkner had applied and been conditionally accepted to the all-male Citadel, a South Carolina military college. Upon discovering she was a female, however, the Citadel withdrew its acceptance. Faulkner filed suit to compel her admission, claiming that the Citadel's males-only admissions policy violated the Fourteenth Amendment's Equal Protection Clause. The District Court found insufficient the State's claim that the reason for discriminating against women was the lack of substantial interest in a state-funded public education for women. Finding that the State had done nothing to quickly find and implement a remedy for this particular plaintiff, and that time for this plaintiff was running out, the District Court ordered her immediate admission to the Corps of Cadets. The District Court also permitted the State to construct a remedial plan for all other future female applicants.

Amicus Brief: The brief argues that the admissions policy facially discriminates against women and, therefore, the State needs to provide an exceedingly persuasive justification for that discrimination in order to satisfy intermediate scrutiny, the appropriate level of review for classifications drawn on the basis of sex. That South Carolina's over-all system of higher education may be neutral is irrelevant; the Citadel only admits male students and it is the only publicly-funded program of its kind in South Carolina. The Citadel's admissions policy, not the entire State higher education system, is at issue in this case. The brief also argues that South Carolina's "rational" justification, that not enough women wish to attend a Citadel-type program, is insufficient. Rationality is not enough to survive heightened scrutiny, and the State's assessment of demand is flawed due to the long history of refusing to admit women to the Citadel. Furthermore, when speaking in terms of the Equal Protection Clause, constitutional rights are of a personal nature and it is irrelevant that the rights may be asserted by a class of one. The deprivation of this right requires an immediate remedy; the only available remedy is immediate admission to the Corps of Cadets program. This contention is supported even further by the fact that the State has delayed time and time again in developing a remedy other than that suggested by the District Court.

CWEALF: CWEALF joined the brief because it believes that equal opportunities for women in education are fundamental to ending sex discrimination.

Holding: The court affirmed the District Court's decision that the males-only admissions policy violated Faulkner's Equal Protection rights. The court remanded the case to the District Court with instructions that the court was to set forth a time schedule in which the State could remedy the constitutional violation. If the State could not put in place such a remedy prior to August 1995, then Faulkner was to be admitted into the Corps of Cadets. Note: Following the United States Supreme Court's decision in *VMI*, the Citadel immediately opened its doors to women and actively recruited women to apply to the school. The Citadel and the United States government entered into an agreement whereby the Citadel agreed to develop an assimilation plan for female cadets.

Case: *United States of America v. Virginia*

Court: United States Court of Appeals for the Fourth Circuit, 1995

Amicus Brief: National Women's Law Center

Case: Virginia Military Institute (VMI) was the only all-male institution of fifteen state schools. The school's mission was to produce "citizen soldiers" and prepare men for leadership roles in both the military and civilian life. The United States sued VMI in response to a claim by a female high school student who sought admission to the university and claimed its males-only admissions policy violated the Fourteenth Amendment. The District Court found in favor of VMI, noting that the State had an important interest in providing a unique single-sex educational experience for men and that VMI's educational experience would be altered drastically if women were to attend. If women were admitted to VMI, the school would have to provide for some modicum of privacy for the students and for some alterations in the physical education requirements. These two alterations would have a disadvantageous impact on VMI's educational offerings. The Fourth Circuit reversed the District Court's finding that the State had an important interest in providing single-sex education for men, but the court accepted the District Court's finding that the educational environment of lack of privacy, physical training, and adversative approach would require alteration if women were admitted. The court gave three remedial options to VMI, one of which was for VMI to establish a parallel institution or program.

In response to the Fourth Circuit's opinion, Virginia proposed the Virginia Women's Institute for Leadership (VWIL), which was opened, originally, to 25 women on the campus of Mary Baldwin College (a private liberal arts college for women). Some of the differences between VMI and this program include: (1) lower SAT scores for VWIL freshmen; (2) fewer faculty holding PhDs at VWIL; (3) a more limited offering of degrees at VWIL; (4) a smaller endowment for VWIL; (5) a lack of military format at VWIL; (6) a cooperative as opposed to adversative method of education at VWIL; and a relatively non-existent as opposed to a well-cultivated alumni network at VWIL. The District Court found the new VWIL program to be a constitutional remedy, finding that "controlling legal principles do not require the Commonwealth to provide a mirror image VMI for women."

Amicus Brief: The brief argues that the District Court's assessment of the VWIL program was based on stereotypes of what women needed from an educational program. The court's opinion effectively said that women who were capable of succeeding in VMI's environment were not entitled to the same rights and benefits that environment provided men, especially since VWIL's program fails to provide comparable benefits. Therefore, in addition to being segregated, the VWIL and VMI programs are inherently unequal. The brief argues that, for these reasons, Virginia's refusal to admit women to the VMI program violates the Fourteenth Amendment's Equal Protection Clause.

CWEALF: CWEALF joined the brief because it believes that equal opportunities for women in education are fundamental to ending sex discrimination. Unlike private schools offering single-sex education, VMI receives funding from the State to offer a unique educational experience unmatched by any other university. This state-funded unique experience and all the benefits that

flow from it are unilaterally denied to female students. Such a deprivation of opportunity hinders rather than helps the final goal of ending sex discrimination.

Holding: The Fourth Circuit affirmed the District Court's decision. The court reaffirmed its finding that single-sex education was pedagogically justifiable, regardless of to which sex it was tailored. The court also reaffirmed its finding that admitting women to VMI would require alterations to the program that would destroy the program's very essence. According much deference to the Virginia Legislature, the court determined that the State's choice of single-sex education as a pedagogical technique was a legitimate and important governmental objective. The court also determined that single-sex education was a means substantially related to the State's objective of achieving the results provided by an adversative educational environment, as such an environment could not be successful with a sexually heterogeneous population. The court determined that the sexually exclusive programs would be constitutional so long as the benefits provided by the programs were substantially comparable. The court, after determining that the intended results were comparable, concluded that the method by which those results were reached was something that should be left to professional educators, not to the courts.

Case: *United States of America v. Virginia*

Court: Supreme Court of the United States, 1996

Amicus Brief: National Women's Law Center

Case: See above.

Amicus Brief: The brief argues that intermediate scrutiny has become an unworkable standard under which to review classifications based on sex. This is due, in large part, to the varied applications of the test that make it strong in some situations and weak in others. The brief argues that classifications based on sex should be subjected to strict scrutiny since (1) sex is an immutable characteristic, unrelated to ability, (2) there exists a long history of discrimination against women, and (3) women remain relatively underrepresented in the political process and, therefore, remain politically powerless.

CWEALF: CWEALF joined the brief because it believes that equal opportunities for women in education are fundamental to ending sex discrimination. CWEALF believes that so long as classifications based on sex can be reviewed under the weaker intermediate scrutiny, those classifications may be seen as constitutional when they are based on nothing more than stereotypes. CWEALF believes that it is essential that classifications based on sex be fashioned in the narrowest manner possible so as to keep from perpetuating the very gender stereotypes upon which the Fourth Circuit, the District Court, and the State of Virginia based its new VWIL program.

Holding: The Supreme Court, applying a very strict intermediate scrutiny standard, found the VWIL program incapable of curing the constitutional violation presented by the single-sex education available at state-sponsored VMI, especially as both programs were based solely on the "inherent" differences between men and women and the way in which both sexes learned best. The Court reversed the decision of the Fourth Circuit, finding the program at VMI not to be inherently unsuited to women.

Sexual Harassment/Title VII

Case: *Newsday, Inc. v. Long Island Typographical Union, No. 915*

Court: United States Court of Appeals for the Second Circuit

Amicus Brief: NOW Legal Defense and Education Fund

Case: Waters, a member of the union, was first discharged in 1983 for sexually harassing female employees. He was reinstated through arbitration proceedings, and the arbitrator's opinion explicitly provided that any further action qualifying as sexually harassment on the part of Waters would serve as grounds for his immediate discharge. Pursuant to this opinion, Waters was discharged again in 1988 for sexually harassing female editors. The Union argues that the three incidents of sexual harassment did not occur, though the arbitrator found for Newsday on the facts. However, the arbitrator ordered Waters reinstated and provided with progressive discipline as opposed to discharge. Newsday appealed the arbitrator's decision to the District Court. The District Court found for Newsday on summary judgment, stating that the award of reinstatement offended the strong public policy condemning sexual harassment in the workplace. The Union appealed to the Second Circuit.

Amicus Brief: The brief argues that the District Court's overturning of the arbitration award should be affirmed. The brief argues that the arbitration award should not be awarded its usual finality because the award is a clear violation of a public policy against permitting sexual harassment in the workplace. Furthermore, granting the arbitrator a final say in this matter effectively denies individuals their rights under Title VII. This is in contradiction to the clear Congressional intent to have discrimination issues handled by the courts and not by arbitrators and to give the aggrieved a forum in which to be heard.

CWEALF: CWEALF joined the brief because of its belief that women have the right to feel safe in their work environments that is free from sexual harassment. CWEALF believes that an order reinstating a repeat harasser only perpetuates the harassment and subjugation of women and implicitly condones such action.

Holding: The Second Circuit upheld the District Court's decision to vacate the reinstatement award. The court held that the public policy against sexual harassment in the workplace is well-recognized under Title VII, the EEOC guidelines, New York Law, and extensive case law. The Second Circuit found that the arbitrator's award of reinstatement was in direct contradiction to this public policy, making the District Court's vacating of the award appropriate.

Case: Comments to Proposed Guidelines on Harassment Based on Race, Color, Religion, Gender, National Origin, Age, and Disability

Agency: Equal Employment Opportunity Commission

Comments: National Women's Law Center

Background: The EEOC published proposed guidelines meant to provide a framework for identifying and analyzing discriminatory conduct. The EEOC had stated that the new guidelines were meant to complement, not replace, the existing guidelines on sexual harassment. However,

the EEOC did not include in its proposed guidelines for employer liability for gender-based discrimination perpetrated by a supervisor acting under authority granted him/her by the employer. The EEOC guidelines did provide that employers could be liable for the harassment perpetrated by non-employees where the employer knew or should have known of the harassment.

Comments: The comments request that the EEOC provide clarity regarding the distinction between sexual harassment and gender-based discrimination, and should further specify that in circumstances where both sexual harassment and gender-based discrimination are present, the EEOC will apply both sets of guidelines, as opposed to focussing on only one type of action. The comments also suggest that the EEOC make it clear that even though a reasonable person standard can be used to measure the discriminatory or harassing nature of any conduct, this “reasonable person” must take into consideration the victim’s gender and should not consider any harassment “reasonable” simply because there is a history of harassment or discrimination in a particular workplace. Neither should the harassment be considered “reasonable” merely because the employer can show that other similarly situated employees were not offended nor because the fact finder would not be offended by such conduct. The comments also suggest that the EEOC make it clear that an employer who grants a supervisor supervisory authority which is then used to perpetuate harassment or discrimination should be liable even without actual notice. The comments request that, in addition to holding employers responsible for the harassment of non-employees where the employer knew or should have known of the harassment, the guidelines should clarify that an employer structures an office so that an employee is supervised by a non-employee, the non-employee’s failure to respond to the sexual harassment or to report it to the employer should impose liability on the employer for the harassment.

CWEALF: CWEALF joined the comments because it believes that strong and clear legal protections on the job for female employees help to end discrimination and harassment in the workplace.

Outcome: The proposed guidelines were withdrawn from consideration because they did not achieve the stated goal of “consolidating, clarifying and explicating” existing law pertaining to harassment on these bases. This resulted in the 1990 guidelines remaining intact.

Case: *Harris v. Forklift Systems, Inc.*

Court: Supreme Court of the United States, 1993

Amicus Brief: Now Legal Defense and Education Fund

Case: Teresa Harris sued her former boss, Forklift Systems, alleging that the president of Forklift had, in violation of Title VII of the Civil Rights Act of 1964, harassed her because of her gender. The District Court had described the case as “close” but had ultimately decided that the conduct (which included gender-motivated insults and unwanted sexual innuendoes) did not create an abusive environment because they were not “so severe to . . . seriously affect [Harris’] psychological well-being” or lead her to “suffer injury.” The Court of Appeals affirmed.

Amicus Brief: This brief argues that the correct test was stated in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), which stated that to establish liability for hostile work environment

sexual harassment a plaintiff must prove that unwelcome sex-based conduct altered the “terms, conditions, or privileges of employment.” *Meritor* instructs that a plaintiff has established actionable sexual harassment when the conduct (1) was so severe or pervasive as to alter the conditions of employment, creating an abusive working environment, or (2) had the purpose or effect of unreasonably interfering with her work performance, or (3) had the purpose or effect of creating an intimidating, hostile, or offensive working environment. The brief argues that the Sixth Circuit deviated from this standard, thwarted the goals of Title VII, and violated the standards the court set in *Meritor*.

CWEALF: CWEALF joined this brief because it believes that the court’s deviation from the correct test shows a significant misunderstanding of sexual harassment. A test, which requires a victim to prove the extent of her injury improperly, places the focus on the plaintiff’s conduct rather than the defendant’s conduct. CWEALF hopes to bring understanding of the true nature of sexual harassment and hopes to promote a test that places the concentration on the offending party.

Holding: The Supreme Court held that the lower courts incorrectly applied the *Meritor* standard. The District Court erred in relying on whether the conduct “seriously affected plaintiff’s psychological well-being” or led her to “suffer injury.” The Supreme Court held that such an inquiry may focus attention on concrete psychological harm, which is not an element required by Title VII. As long as the environment would reasonably be perceived, and is perceived, as hostile or abusive, there is no need for it to be psychologically injurious. The Court reversed the judgment of the Court of Appeals, and remanded the case for further proceedings.

Case: *Gary v. Long*

Court: United States Supreme Court (petition for writ of certiorari), 1995

Amicus Brief: National Women’s Law Center

Case: Gary claimed that her supervisor, Long, subjected her to verbal and physical sexual harassment, both quid pro quo sexual harassment and a hostile work environment. The harassment took the form of threats of adverse job consequences if Gary would not have sex with Long, unwanted touching, and, eventually, rape. Gary was never fired. She eventually complained to the employer, who gave her leave to sue and transferred her out of Long’s area. Gary brought suit in District Court, suing her employer for sex discrimination under Title VII. Her claim was dismissed by both the District Court and the DC Circuit. The DC Circuit held that no agency principles could impute liability to an employer for employee actions of which the employer knew nothing when that employer had policies and measures in place to handle sexual harassment claims and when the employee harassed should have known that the harasser was acting outside the scope of his employment. The DC Circuit also held that there existed no quid pro quo claim where the threats of adverse job consequences were never carried out.

Amicus Brief: No brief on file.

CWEALF: CWEALF joined the brief because of its belief that only by making employers responsible for sexual harassment perpetrated by its employees would employers have the motivation to create effective processes by which individuals could register complaints of sexual

harassment and by which individuals would be penalized for harassing other employees. CWEALF believes that employers need to take these actions in order to create safe working environments for all employees, and these safe working environments will help in equalizing employment opportunities for women.

Holding: The Supreme Court denied certiorari.

Case: *CHRO ex. Rel. Bilodeau v. United Technologies, Pratt & Whitney*

Court: Commission on Human Rights and Opportunities (CHRO), 1996

Amicus Brief: CWEALF (as intervenor)

Case: Bilodeau worked for Pratt & Whitney. In her department, there were displayed several calendars advertising Snap-On Tools by using scantily clad female models. Several male employees also carried and displayed nude pictures of women in their personal toolboxes. In addition, there were numerous incidents of other employees engaging in mock sexual activity. Bilodeau did not report these activities to the union, but she did report them to her supervisor. The supervisor investigated her allegations, ordered the removal of the calendars, and reaffirmed the company's anti-sexual harassment policy. Bilodeau brought a complaint through the CHRO. During the proceedings, the hearing officer made a ruling permitting Pratt & Whitney to cross-examine Bilodeau on details of abuse during her childhood and to delve into communications made during the course of therapeutic relationships. CWEALF intervened on Bilodeau's behalf.

Memorandum: The memo argues that, since psychological injury is not an element of a sexual harassment claim, there is no need to delve into the psychologist-patient relationship. This is in direct contrast to the common law negligence cases on which the respondent relies, where actual harm is an element of the cause of action. Rather, the proper focus of a sexual harassment inquiry is the discriminatory conduct and whether that conduct unreasonably interfered with the terms and conditions of the complainant's job. In addition to be irrelevant to sexual harassment analysis, such an inquiry violates the statutory privilege of psychologist-patient confidences. This privilege cannot be effectively waived merely because the respondent wishes to use such confidences to impeach the claimant's character.

The memo urges that if, by requesting damages for pain and suffering which resulted from the respondent's sexual harassment, the claimant has put her mental health at issue, the hearing officer should implement procedures which would ensure that disclosure of otherwise privileged confides is narrowly tailored so that the victim need not suffer additional injury for choosing to bring a claim before the CHRO. The memo suggests that the hearing officer first conclude whether pain and suffering damages are available under the act; if such damages are not available, there is no reason to delve into psychologist-patient confidences in order to determine complainant's mental condition. The memo also suggests that the hearing officer bifurcate the proceedings into a liability phase and a damages phase so that the complainant's mental health only becomes an issue during the damages phase of the proceedings. During the damages phase, the complainant's confidences should be maintained unless there is no other less intrusive means of obtaining the requisite information.

The memo notes that permitting cross-examination of complainants on past abuses which they may have discussed with therapists severely chills such victims' access to services and the exercise of their rights to redress for sexual harassment.

CWEALF: CWEALF intervened in this case because it believes that the hearing officer's ruling would undermine the legal avenues open to complainants of sexual harassment by re-victimizing them as opposed to permitting them to freely exercise their rights without the fear of further harm. If victims of sexual harassment are afraid to come forward, the move toward eradicating such harassment and other forms of sex discrimination will be stilted.

Outcome: The hearing officer bifurcated the hearing into a liability hearing and a hearing on damages if liability were found. The hearing officer found no showing of liability because (1) the complainant was unable to show that the conduct was so severe and pervasive so as to change the terms and conditions of her job and (2) the complainant was unable to establish respondent superior liability because the respondent took reasonable and appropriate steps to address the complainant's concerns.

Case: *Angelsea Productions v. Commission on Human Rights and Opportunities*

Court: Supreme Court of the State of Connecticut, 1996

Amicus Brief: University of Connecticut School of Law Civil Rights Clinic

Case: Hyde had been employed with Angelsea Productions. Several months after tendering her resignation, she filed a complaint against Angelsea with the CHRO. Twenty three months after Hyde filed her complaint, Angelsea sought for the complaint to be dismissed due to the Commission's failure to issue an assessment of the complaint within the statutory nine-month period. This motion was eventually denied. Several weeks later, the Commission issued a finding of reasonable cause for Hyde's complaint. Eight months following the finding of reasonable cause, Angelsea filed another motion to dismiss due to the Commission's failure to hold a hearing within the statutorily prescribed ninety-day period. The Commission denied this motion as well, finding the statutorily prescribed periods to be directory rather than mandatory and thus finding that the Commission retained jurisdiction over the issues. The decision was appealed and the Connecticut Supreme Court found the statutory language, which included the word "shall," to be mandatory and not discretionary since the mandate regarded a substantive matter, namely the relief afforded each party while the Commission's investigation of the complaint is pending. Finding the Commission in violation of the statutorily mandated time period in which to issue its findings, the court found that the Commission no longer had jurisdiction over the claim. Defendants petitioned for re-argument en banc.

Amicus Brief: The brief argues that the court's earlier decision effectively closes off relief to many claimants who are not well-equipped to mount judicial proceedings against discriminatory employment practices. While the Connecticut Supreme Court found that ample alternative in the manner of civil suits remained open to potential claimants, those ample alternatives dissipate in the face of real economic hardship. Furthermore, individuals like Hyde are barred by statute from bringing their actions in court; the statute of limitations in which such a private cause of action could be brought expired while Hyde believed the CHRO to have retained jurisdiction. By

finding that the CHRO lost such jurisdiction by missing the statutorily prescribed deadlines, the court effectively denies victims of employment discrimination of any remedy.

CWEALF: CWEALF joins the brief because of its belief in ending employment discrimination and making those harmed by such discrimination as whole as possible via available remedies. CWEALF recognizes that the court's decision leaves many victims without such a remedy and, as such, worsens the effects of the discrimination.

Holding: In May 1996, amici filed this brief in support of defendants' motion for re-argument en banc. In June 1996, the Connecticut State Legislature enacted a statute granting the CHRO continuing jurisdiction over claims on which it had lost such jurisdiction due to its lack of adherence to time constraints. The same day the statute was enacted, the Connecticut Supreme Court denied the motion for re-argument. Subsequently, Angelsea filed a motion for judgment in Superior Court, claiming that the Act did not apply retroactively. The Superior Court found that the Act did apply retroactively, thereby denying the motion and permitting the original claim to be adjudicated by the CHRO. On appeal, the Connecticut Supreme Court affirmed.

Case: *Jenson v. Eleventh Taconite Co.*

Court: United States Court of Appeals for the Eighth Circuit, 1997

Amicus Brief: NOW Legal Defense and Education Fund

Case: This was a class action brought by all women who have been employed at Eleventh Mines since December 30, 1983. The class included sixteen women. The District Court found the defendant liable for sex discrimination in promotion practices and sexual harassment. The District Court appointed a Special Master to consider compensatory and punitive damages. The Special Master allowed extensive discovery into private areas of the plaintiffs' lives, eventually returning with a minimal award of damages. The District Court affirmed and the plaintiffs appealed to the Eighth Circuit.

Amicus Brief: The brief raises amici's independent argument on appeal – reversing the Special Masters' decision because of pervasive gender bias. This bias was apparent in the judge's obvious lack of regard for sexual harassment cases and his minimization of events that traumatized the women and the way in which those events affected them. This bias was further evidenced by the Special Masters' refusal to recognize as reasonable the fear felt by the plaintiffs and his refusal to recognize as sexual harassment events that occurred between individuals at the workplace, instead calling such events "private." The brief argues that this gender bias is also evidenced by the Special Masters' discovery and admission of evidence which pried into the most personal areas of the plaintiffs' lives, evidence that was completely irrelevant to the issues at hand. Furthermore, the Special Master refused to admit expert testimony regarding the cause of the plaintiffs' mental anguish.

CWEALF: CWEALF joined this brief because it found the Special Masters' decision an affront, both to women and the law. When judges make decisions based on their individual biases, they revictimize the very people the law was enacted to protect. This action then further victimizes women as a class because it conveys to women the idea that if they speak out about being victims of sexual harassment, they will be met only with disbelief and ridicule. As such,

decisions such as this one frustrates rather than furthers CWEALF's goal of helping to end gender discrimination.

Holding: The Eighth Circuit did not reach the issue of reversal based on the Special Masters' gender bias, holding that this claim was not raised by the plaintiffs but by amici. The court found that the Special Maser applied an erroneous standard of proof for causation of the plaintiffs' mental anguish and erroneously excluded the plaintiffs' expert witness testimony. The court reversed the Special Masters' decision and remanded the case to the District Court for an expedited new trial. The case settled in January 1999, shortly before this new trial was to begin, for an undisclosed amount.

Case: *Keslar v. Bartu*

Court: United States Court of Appeals for the Eighth Circuit, 1999

Amicus Brief: Now Legal Defense and Education Fund

Case: Keslar worked as a court reporter in the Nebraska Superior Court. While employed there, she was repeatedly exposed to sexual harassment perpetuated by Judge Bartu. She did not file a complaint against him via the normal channels, because she could not be promised job protection against retaliatory discharge. After searching for some time, Keslar finally found an attorney to represent her. After more than two years of costly litigation, the case finally settled, with Keslar receiving a small monetary award as well as a significant change in reporting practices and the naming of the plaintiff as the prevailing party with leave to recover attorney's fees. Keslar's attorney, Ms. Comstock, sought fees of \$423,797.50 for 3400 hours of work and costs of \$34,017.88. The District Court judge granted \$35,875 in fees and only \$17,009 in costs. This appeal followed.

Amicus Brief: The brief argues that gender bias must be eradicated from the judicial system because it is contrary to the very underpinnings of the judicial system. Therefore, gender bias should be considered an impermissible factor upon which to base judicial decisions and the use of such a factor should amount to reversible error. The brief argues that the District Court judge's gender bias was discernible through its trivializing of the harassment suffered at the hands of the judiciary, the courage it took counsel to represent Keslar considering the power wielded by the judge, and the weight the judge gave to gender-biased affidavits from other attorneys concerning Ms. Comstock's previous casework.

CWEALF: CWEALF joined the brief because of its belief that all individuals who sexually harass women need to be held accountable, regardless of his/her station in life. CWEALF believes that if attorneys who represent women against harassers occupying positions of power are left unable to collect attorney's fees and thereby are left monetarily impotent, cases against such harassers will not be pursued. By not pursuing cases of sexual harassment, gender discrimination is silently permitted rather than condemned.

Holding: The court held that the District Court did not abuse its discretion in its award of attorney's fees and costs. A dissenting judge noted his belief that the district judge abused his discretion by giving too little weight to certain factors (specifically the courage it took to pursue the defendants and the importance of the injunctive relief obtained through settlement).

However, the judge stated that he did not believe the district judge's actions were motivated by gender bias.

Case: *Brittell v. State of Connecticut Department of Corrections*

Court: Connecticut Supreme Court, 1998

Amicus Brief: Connecticut Women's Education and Legal Fund

Case: The plaintiff was hired as a correctional officer. Throughout her employment with the defendant, including during her six weeks of training, the plaintiff was the object of numerous comments regarding her sexual orientation, sex, and gender identity. These comments circulated amongst both the staff and the inmates, creating an uncomfortable and possibly dangerous environment for the plaintiff. At several times during her employ, she reported some of the comments to her superiors. Follow-up by those superiors appeared to be minimal and fruitless. One of the plaintiff's supervisors met with a representative of the employee assistance program who told her that, due to the plaintiff's psychological condition, she should not return to work. The plaintiff was placed on medical leave and, upon her return, was given a job away from the inmate population. The plaintiff was offered a transfer to any correctional institution of her choice, but she refused this offer as a way to ameliorate the situation. Eventually, the plaintiff went on medical leave again, which continued for almost two years before she was considered to have resigned. The plaintiff filed suit claiming that the defendant violated the Fair Employment Practices Act by creating a hostile working environment and that she was constructively discharged from her employment as a correctional officer. The trial court found that, although the defendant had notice of the hostile work environment, the plaintiff had not shown that the defendant had failed to take adequate remedial action so as to incur liability for creating or supporting a hostile work environment.

Amicus Brief: The brief focuses first on the fact that the defendant employer did little, if anything, in the first year in which the plaintiff complained about the hostile environment. The brief argues that, under the Fair Employment Practices Act fashioned on Title VII, an employer has a duty to take reasonable steps to eliminate a hostile work environment and to prevent recurrence. The brief argues that the defendant employer's investigation of the plaintiff's complaint was neither prompt nor adequate. In fact, the employer did not even begin to investigate until eight months after the first complaint was made. Nor did it ever investigate the one person the plaintiff named as responsible. Furthermore, the employer's only attempt at ameliorating the hostile work environment was remove the plaintiff from that environment by transferring her to another job location.

CWEALF: CWEALF appeared as amicus curiae in order to highlight the importance of employer action in ending discrimination in the workplace. CWEALF believes that, especially in positions in law enforcement, where women traditionally have been excluded, it is of the utmost importance that employers do all that is possible to create a welcoming environment. When faced with sexual harassment, it is important for these employers to make it clear that they will not tolerate such behavior nor allow their female employees to be chased off the job by that type of behavior.

Holding: The court, reviewing the trial court's determinations under a clearly erroneous standard, held that there was enough evidence on the record to support the trial court's finding that the defendant took reasonable steps to ameliorate the hostile work environment. The court found that the offer of a transfer, in light of the fact that the defendant was dealing with uncooperative inmates and officers, was a reasonable response that accommodated the legitimate interests and concerns of the plaintiff. Given the reasonableness of this transfer offer, the court held that the plaintiff had no claim of constructive discharge for there was a way for her to remain in the defendant's employ without being in the hostile environment.

Case: *Oncale v. Sundowner*

Court: United States Supreme Court, 1998

Amicus Brief: Lambda Legal Defense and Education Fund

Case: Oncale was an oilrig worker with the offshore drilling company of Sundowner Offshore Services. He was part of an eight-man crew, employed on a drilling platform in the Gulf of Mexico. While secluded there, Oncale was subjected to various physical sexual assaults by his co-workers. Oncale complained to his supervisors, which resulted in no remedial action. Eventually, the fear of continuing sexual abuse and rape caused Oncale to quit. Oncale filed suit in the District Court, which dismissed the case for failure to state a claim upon which relief could be granted. The court found no actionable sexual harassment claim of a male worker against other males. The Fifth Circuit affirmed and the Supreme Court granted certiorari.

Amicus Brief: The brief argues that the ability to state a claim for sexual harassment should bear neither on the sex of the perpetrator and victim nor on the sexual orientation of either which might provide the harasser with an impetus for his/her actions. Rather, claims of sexual harassment need be based solely on the presence of unwelcome verbal or physical conduct of a sexual nature sufficiently severe to alter the workplace environment. The brief argues that conduct of a sexual nature is always based on "sex" regardless of the perpetrator and is therefore under the coverage of Title VII. That a harasser may be an "equal opportunity harasser in that s/he harasses both men and women does not negate the fact that the harassment is of a sexual nature and, as such, falls under Title VII's coverage of discrimination based on sex.

CWEALF: CWEALF joined the brief because of its belief that claims of sexual harassment should be based on the conduct complained of, not the actual or perceived sex or sexual orientation of harasser and victim. If the court takes into account sex and sexual orientation, the court is limiting Title VII in the exact manner that Title VII precludes—it discriminates, by refusing to hear claims, based on sex.

Holding: The Supreme Court held that harassing conduct did not need to be motivated by sexual desire in order to support a claim of sexual harassment. As such, it was unnecessary to limit Title VII's application to opposite-sex sexual harassment or to delve into and discover the sexual orientation of the harasser in order to state a claim for same-sex sexual harassment.

Case: *Rocque v. Freedom of Information Commission*

Court: Supreme Court of Connecticut, 2001

Amicus Brief: Permanent Commission on the Status of Women and CWEALF

Case: The Freedom of Information Commission ordered Rocque, the Commissioner of the Department of Environmental Protection, to supply the Hartford Courant with information relating to a sexual harassment complaint, including information as to the complainant's identity. The trial court found that such information was exempt from public disclosure as an invasion of personal privacy under the Freedom of Information Act. The defendants appealed and the Connecticut Supreme Court transferred the appeals from the Appellate Court.

Amicus Brief: The brief argues that, absent exceptional circumstances, the identity of a sexual harassment complainant must remain private; otherwise victims will feel compelled to stay silent due to fear of public humiliation. Because the effectiveness of laws prohibiting sexual harassment are dependent on victims coming forward, these laws will be frustrated if all sexual harassment victims risk public disclosure merely by making a complaint. The brief also argues, however, that information other than the complainant's identity should be available to the public so that the public may judge the manner in which a particular agency handles claims of sexual harassment. This can easily be accomplished without revealing the identity of the victim.

CWEALF: CWEALF co-authored the brief because of its belief that victims of sexual harassment need to be encouraged to come forward, not scared into silence. CWEALF believes that it is possible to expose a public agency's method of handling sexual harassment complaints without disclosing the names of complainants.

Holding: The court applied a two-prong test to determine when information could be excluded from public disclosure. The information must meet both of the following: (1) the information must not be a matter of legitimate public concern and (2) the information must be highly offensive to a reasonable person. Applying this test, the court determined that a sexual harassment complaint was open to public disclosure excepting information regarding the complainant's identity, sexually explicit information, and information about intimate personal relationships. The court determined, however, that this two-prong test must be applied on a case-by-case basis and should not be read to mean that a complainant's identity is always exempt from public disclosure.

Case: *Pollard v. DuPont*

Court: United States Supreme Court, 2001

Amicus Brief: National Employment Lawyers Association

Case: Sharon Pollard brought an action under Title VII against her former employer, alleging that she had been subjected to a hostile work environment based on her sex and that such harassment resulted in her taking a medical leave from her job. The District Court found for Pollard and awarded, among other damages, \$300,000 in compensatory damages, the maximum permitted under the statute, while noting that such award was insufficient to make her whole. The Sixth Circuit affirmed, and the Supreme Court granted certiorari to resolve a circuit split regarding whether front pay, money awarded during the period between judgment and

reinstatement or in lieu of reinstatement, constitutes “compensatory damages” as defined under the statute and, thus, is limited to the \$300,000 cap.

Amicus Brief: The brief first points out that all Circuit Courts, other than the Sixth Circuit, have held that compensatory damages, within the meaning of the Act, do not include front pay. The brief argues that front pay is an equitable remedy, the purpose of which is to make the victim whole. This purpose is frustrated rather than furthered when a victim is unable to be made whole because the harm suffered exceeds the maximum amount of damages permitted by the cap.

CWEALF: CWEALF joined the brief because of its belief that front pay, when not subjected to the cap for compensatory damages, can help to make a victim of sexual harassment monetarily whole. Furthermore, CWEALF believes that such damages will not act as a deterrent to employers if the amount of damages awarded are not equal to the harm caused by the employer’s action or inaction.

Holding: The Court held that while the definition of compensatory damages could be read so as to include front pay, such a reading would not be in accord with Congress’s intentions. Congress allowed for front pay as additional damages after finding that such damages were needed to deter intentional discrimination and harassment in the workplace. The Court further found that it would be illogical to treat front pay awarded when the plaintiff is reinstated differently from front pay awarded when the plaintiff is not reinstated, thereby holding that front pay in either situation would not be subjected to the \$300,000 cap.

Pregnancy Discrimination

Case: *In re Valerie D.*

Court: Connecticut Supreme Court, 1992

Amicus Brief: Connecticut Women’s Education and Legal Fund

Case: In August 1989, the Department of Children and Youth Services (DCYS) petitioned the court for termination of parental rights of Jean D. and John M. The court terminated the mother’s rights after finding that her injection of cocaine eight hours prior to delivery constituted a non-accidental serious physical injury to the child amounting to abuse. The ingestion of cocaine most likely caused the infant to pass stool prior to the birth, and this passage of stool caused complications during the birth. In determining that the mother’s cocaine ingestion constituted abuse, the court stated that injecting cocaine into the bloodstream of a newborn would amount to abuse and this finding should be no different when the cocaine is injected through the mother’s bloodstream prior to birth. The mother appealed the court’s decision, claiming that her acts while pregnant could not be the sole basis for terminating her parental rights. The Connecticut Appellate Court affirmed the termination of parental rights, drawing analogies between infants who have birth defects because of acts committed against them while they are in utero having an action in tort with infants who have been harmed by the acts of their mothers while in utero. In so doing, the court determined that a petition for neglect or termination of parental rights can be based solely on a mother’s prenatal conduct. The mother appealed to the Connecticut Supreme Court.

Amicus Brief: The brief argues that by permitting termination of parental rights based solely on the mother's prenatal drug use, the courts have sanctioned a state policy of policing women and their actions in a way they do not police men and their actions. Such dissimilar treatment of the sexes is unconstitutional under Connecticut's Equal Protection Clause unless the state can show it has a compelling interest in treating women differently from men. The brief argues that while protecting children from neglect and abuse is a compelling state interest, the state cannot show that this post-birth objective is met by treating female parents differently from male parents at the time of birth. Therefore, the fit between means and end is not tight enough to satisfy strict scrutiny. The brief also argues that the interpretation of the statute utilized by the trial court is unconstitutionally vague so as to deny women of their due process rights for they cannot be sure of what conduct is prohibited under the statute as interpreted. This vagueness, and the immense discretion it grants to those enforcing it, will cause the statute to be enforced selectively against poor women and women of color because of this population's close contact with government health care and other government service providers.

CWEALF: CWEALF wrote the brief because it believes that policing women's behavior while they are pregnant will have only adverse effects. It will cause women to refuse prenatal care because of the valid fear that their children will be taken away from them and they will be jailed for their behavior. Such policing also promotes the view of women as carrying vessels for children as opposed to human beings with a right to reproductive privacy. CWEALF believes that once women are stripped of their reproductive privacy, their array of reproductive choices becomes endangered as well.

Holding: The court reversed the appellate court's decision and held that only conduct occurring after the child's birth could be considered in a petition for termination of parental rights. As such, the court did not reach any constitutional claims.

Case: *Ferguson v. City of Charleston*

Court: Supreme Court of the United States, 2000

Amicus Brief: Now Legal Defense and Education Fund

Case: A Charleston public hospital operated by the Medical University of South Carolina worked with police and local officials to put in place a policy under which pregnant women who came to the hospital for prenatal care would be tested for drug use. Those women who were tested were done so without having been presented with a warrant and without giving their consent. Regardless of the results of the drug test, the infants, when born, were not treated differently and the prenatal care of all women remained the same. Several women who were arrested under the policy filed suit. A District Court jury found for the City and the Fourth Circuit affirmed the decision, holding that the searches were reasonable as a matter of law for the search policy was designed to meet non-law enforcement ends and the searches fit into the "special needs" exception to traditional Fourth Amendment requirements.

Amicus Brief: The brief sets forth that in order to meet the "special needs" exception to traditional Fourth Amendment requirements, the state must show (1) that its policy is unrelated to normal law enforcement ends and (2) the individuals targeted by the search have an expectation of diminished privacy rights. The brief focuses on the second prong of the test and

argues that such a diminished expectation of privacy has only been found where the State takes on a supervisory position of the individuals within the group; women do not become wards of the state simply because they are pregnant. Application of the special needs exception would reduce the status of pregnant women to something less than full adults. Furthermore, allowing the state to exercise such control over pregnant women in this instance would open the door to allowing more infringements on the privacy of pregnant women simply because they are pregnant.

CWEALF: CWEALF joined the brief because a ruling that upholds the diminished capacity of pregnant women would set a precedent for prohibiting a wide range of activities for pregnant women. It would relegate women to a position of lesser status in society and, as such, perpetuate gender inequality.

HOLDING: The lower court decision was reversed. The Court held the policy unconstitutional for all patients in a hospital, regardless of whether or not they are pregnant, have a reasonable expectation that any results of his/her tests will not be shared with non-medical personnel without his/her consent.

Family and Medical Leave Act

Case: Testimony and Comments to the Advisory Commission on Intergovernmental Relations Regarding the Family and Medical Leave Act, 1996.

Author: Women's Legal Defense Fund

Issue: The ACIR planned to hold hearings on its preliminary report to Congress suggesting that state and local employees not be covered under FMLA because of the hardship it placed on state and local employers to comply with FMLA provisions.

Testimony: State and local employees are not exempt from the public policy reasons from whence FMLA stemmed—the need for families to have job and financial security. These public policy reasons constitute a compelling national purpose, which far outweighs any minimal increase employers experience in FMLA-related costs. State and local employers also have great flexibility in implementing FMLA, for FMLA sets the minimal policies an employer must offer and employers often provide much more or different options to their employees. However, even though these employers do provide more than what is required by FMLA, these employers should not be exempt or excluded from FMLA, in part because of the certainty FMLA provides employees in regards to both benefits and process.

CWEALF: CWEALF joined the comments because it believes all employees should be granted the same ability to spend necessary time with their families, regardless of with whom they are employed. Likewise, all employees should be guaranteed job stability when devoting like time to their families.

Holding: State and local employers are still covered as employers under the FMLA's provision concerning public agencies. *See* 29 CFR 825.108.

Case: *Hibbs v. Nevada Department of Human Resources*

Court: Supreme Court of the United States, 2003

Amicus Brief: National Women's Law Center

Case: State employee William Hibbs sued the State of Nevada for money damages deriving from an alleged violation of the Family Medical Leave Act. The State moved for summary judgment in the District Court, claiming that, even if it had violated the FMLA, it was immune from having to pay money damages by virtue of the Eleventh Amendment of the United States Constitution. The District Court granted the motion for summary judgment, and Hibbs appealed to the Ninth Circuit. The Ninth Circuit found that the FMLA was a valid exercise of Congress' power under the Fourteenth Amendment and reversed. The Supreme Court granted certiorari to resolve the issue of whether, under FMLA, a state employee can recover money damages for the state's violation of the FMLA.

Amicus Brief: The brief argues that the FMLA is a constitutional exercise of Congress's power under the Fourteenth Amendment because it acts as a "congruent and proportional" remedy to sex discrimination in the workplace. The brief notes that the Court has reviewed sex-based classifications under heightened scrutiny and has continually recognized that many states still pass laws rife with gender-bias and gender-based stereotypes. The Court has also recognized that ending gender discrimination is a compelling purpose, and Congress's enactment of the FMLA was based on just that purpose. The provisions of the FMLA providing for a gender-neutral leave are means substantially related to the end of eradicating gender discrimination, for it permits employees job security while tending to family needs in a manner which does not question gender roles within family life. Monetary relief to those injured by the failure of the state to abide by FMLA is the only way to ensure enforcement and to make harmed individuals whole. States have ceded some of their sovereign immunity to Congress through § 5 of the Fourteenth Amendment. By requiring monetary damages, Congress is not exceeding its power or taking more than that which the states have already given under § 5, for the harm targeted by the statute – gender based stereotypes and gender bias in the workplace – is the same harm that has caused the Court to view sex-based classifications under heightened scrutiny for over fifteen years.

CWEALF: CWEALF joined brief because CWEALF believes that the FMLA provides much-needed job protection for workers and acts as a step in removing some of the gender-bias that is attached to notions of family leave. CWEALF believes that requiring states to pay monetary damages for their failure to abide by FMLA provisions is the only way to ensure that states comply with FMLA and the only way to remedy the monetary injury suffered by employees wrongly terminated by states' failure to comply.

Holding: The Supreme Court affirmed the Ninth Circuit's decision, holding that state employees could recover monetary damages under the FMLA. The Court found that the FMLA was Congress's direct response, based on weighty evidence, to gender discrimination and notions of proper gender roles within private family life perpetuated by state laws and practices. The Court held that the FMLA was a "congruent and proportional" remedy to such discrimination.