CIVIL RIGHTS—Maintaining a Sexually Hostile Work Environment Through Sexual Harassment Is a Form of Illegal Sex Discrimination Under Section 601A.6(1)(a) of the Iowa Civil Rights Act—*Lynch v. City of Des Moines*, 454 N.W.2d 827 (Iowa 1990).

I. BACKGROUND

For more than seven years Deborah Ann Lynch ("Ms. Lynch") was employed as a police officer by the City of Des Moines ("City").[1] Ms. Lynch joined the City's police department ("Department") in 1981 and retired in 1988.[2] Prior to March 1985, Ms. Lynch was assigned to a squad with officers Timothy Lynch ("T. Lynch")[3] and Merlin D. Nielsen ("Nielsen").[4] The three worked together until March 29, 1985, when Ms. Lynch filed a formal sexual harassment complaint against T. Lynch and Nielsen with the Department's internal affairs unit.[5]

After investigating Ms. Lynch's complaint, the Department's chief of police on May 13, 1985 concluded the accused officers' conduct had violated both city and department policies prohibiting sexual harassment.[6] As a result, T. Lynch and Nielsen were suspended for thirty days, reassigned to a different watch, and warned they would be dismissed for any further acts of sexual harassment.[7] The police chief also suspended Sergeant Dale Anderson ("Anderson"), Ms. Lynch's supervisor, for failing to supervise adequately the accused officers after Ms. Lynch filed her complaint.[8]

In addition to the complaint filed with the Department, Ms. Lynch on May 21, 1985 filed an administrative complaint with the Iowa Civil Rights Commission ("Commission").[9] She asserted the City sexually discriminated against her in violation of section 601A.6(1)(a) of the 1965 Iowa Civil Rights Act ("Act"),[10] and retaliated against her in violation of section 601A.11(2) of

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1. Lynch v. City of Des Moines, 454 N.W.2d 827, 828-29 (Iowa 1990).
2. *Id.* at 829. Ms. Lynch retired due to a knee injury suffered while on duty. *Id.* The injury was not related to her suit. *Id.* Had Ms. Lynch not been injured she would probably still be employed as a member of the City's police force. *Id.*
3. Timothy Lynch and Deborah Lynch are not related to each other. *Id.*
4. *Id.* The three officers were assigned to the 10:30 p.m. to 6:30 a.m. duty watch. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.* Ms. Lynch filed her complaint, and her case was decided, under chapter 601A of the 1985 Iowa Code. *Id.* Section 601A.6(1)(a) states: "It shall be an unfair or discriminatory practice for any: Person to . . . discriminate in employment against . . . any employee because of the age, race, creed, color, *sex*, national origin, religion or disability of such . . . employee, unless based upon the nature of the occupation." IOWA CODE § 601A.6(1)(a) (1985) (as amended 1987) (emphasis added).

the Act for complaining about the working environment at the Department.[11] Ms. Lynch based her complaint on the same allegations she made to the Department:

> [F]rom September 1984 to March 29, 1985, officers T. Lynch and Nielsen made sexual comments toward [Ms.] Lynch. . . . [T]he comments had been reported to [her] superiors and to the internal affairs unit, [but] . . . the situation was not effectively remedied. . . . [A]s a result of her reports [she] was reassigned to another patrol territory while her harassers were given privileged treatment.[12]

Ms. Lynch then filed suit in September 1985 in the Polk County District Court, naming the City, Anderson, T. Lynch, and Nielsen as defendants.[13] In December 1988, the district court found in favor of Ms. Lynch, determining the City had violated chapter 601A of the Iowa Code by sexually discriminating against her and by retaliating against her for filing the complaints.[14]

The district court found the "repeated incidents of sexually derogatory remarks, vulgar insults, and requests for sexual favors" by Anderson, T. Lynch, and Nielsen were "demeaning and insulting to [Ms.] Lynch," rather than mere "teasing" and "joking" as the City had claimed.[15] Furthermore, the

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11. Lynch v. City of Des Moines, 454 N.W.2d at 829-30. Section 601A.11(2) of the Act states:

> It shall be an unfair or discriminatory practice for:
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> . . . .
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> Any person to discriminate against another person in any of the rights protected against discrimination [by this chapter] on the basis of . . . sex . . . because such person has lawfully opposed any practice forbidden under this chapter . . . or has filed a complaint, testified, or assisted in any proceeding under this chapter.

IOWA CODE § 601A.11(2) (1985).

12. Lynch v. City of Des Moines, 454 N.W.2d at 829-30.

13. *Id.* at 830. By November, Ms. Lynch had received a right to sue letter from the Commission regarding her May 21 administrative complaint. *Id.* Initially, she pleaded several common-law tort causes of action against the defendants, but subsequently amended her petition to include the chapter 601A civil rights claims. *Id.* The tort claims were resolved before trial. *Id.* Thus, the issues at trial centered solely around the chapter 601A claims. *Id.*

14. *Id.* at 829.

15. *Id.* at 830. In its analysis, the Iowa Supreme Court chose not to "dignify" the officers' conduct by disclosing specific details of their harassing conduct. *Id.* Although the court's desire not to discuss graphically the disturbing facts in this case is understandable, it is the author's belief that some of the incidents should be mentioned to make clear the deplorable working conditions Ms. Lynch was forced to endure.

Generally, the incidents consisted of repeated references to and for oral sex, along with sexual comments about Ms. Lynch's anatomy and that of her seven-year old daughter. *See* Lynch v. City of Des Moines, No. 63 Civ. 36881 at 4-8 (Polk County Dist. Ct., Iowa 1988). For example, while on duty one of the officers would unzip his pants, and ask Ms. Lynch, "'[H]ow about a head job?'" *Id.* at 4. At roll call T. Lynch also commented to Ms. Lynch about her "'ugly old pussy lips hanging down to her ankles.'" *Id.* at 5. In another incident, T. Lynch and Nielsen approached Ms. Lynch in the presence of another officer and asked her, "How many assistant chiefs . . . did you have to fuck to get this job?'" *Id.* T. Lynch then asked her, "'Are you going to

court found the incidents had interfered with and affected her work performance.[16] Ms. Lynch had repeatedly asked the officers to stop the harassment, and brought their conduct to the attention of her superiors, who had been present during some of the incidents.[17]

The district court also found merit in Ms. Lynch's retaliation claim.[18] Lieutenant Jack Rose ("Rose"), who supervised her during 1985 and 1986, treated her differently after the officers were disciplined.[19] For example, Rose asked officers at roll call to collect "negative information" on Ms. Lynch, believing she had placed the City in a precarious legal position.[20] Rose also followed her home for "no valid reason" on one occasion, and on another occasion ordered her "to pick up paper soiled with human defecation under a pretext of gathering evidence."[21] In addition, Rose began to criticize and report her fingernail length and hair style.[22]

The district court awarded Ms. Lynch $10,000 for emotional distress and ordered the City "to develop and implement an education and training plan to prevent, detect and correct sexual harassment" at the Department.[23]

The City appealed the order, challenging, among other things, the district court's conclusion that the City had violated chapter 601A.[24] The City also questioned the district court's "authority to consider certain incidents of alleged sexual harassment and retaliation aimed at [Ms.] Lynch."[25] Finally, the City sought to reverse the damage award for emotional distress and to void the order that the City develop and implement a plan to eradicate sexual harassment at the Department.[26] On cross-appeal, Ms. Lynch challenged the district court's award of $10,000 as "grossly inadequate."[27]

Finding no error of law and substantial evidence to support the district court's findings of fact, the Iowa Supreme Court *held*, affirmed on appeal and cross-appeal.[28] Maintaining a sexually hostile work environment through

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raise your daughter to fuck her way to the top?,'" which made her so upset she left the office crying. *Id.* at 5-6. Ms. Lynch was further traumatized by Anderson during a conversation in which Anderson asked her "to turn around so he could observe her 'sweet little butt.'" *Id.* at 6.

16. Lynch v. City of Des Moines, 454 N.W.2d at 830.

17. *Id.* Rather than investigate and remedy the situation, Anderson at one point suggested she "take matters into her own hands" by informing Nielsen's wife of his conduct. *Id.* After another plea for assistance, Anderson suggested Ms. Lynch was "unstable and needed psychological counseling." Lynch v. City of Des Moines, No. 63 Civ. 36881 at 6.

18. Lynch v. City of Des Moines, 454 N.W.2d at 830.

19. *Id.*

20. *Id.*

21. *Id.* at 830-31.

22. *Id.* at 830.

23. *Id.* at 829.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* Because the case was originally tried at law, the supreme court's review was for correction of errors. *Id.* (citing Frank v. American Freight Sys., 398 N.W.2d 797, 799 (Iowa

sexual harassment is a form of sex discrimination prohibited under section 601A.6(1)(a) of the Iowa Civil Rights Act. *Lynch v. City of Des Moines*, 454 N.W.2d 827 (Iowa 1990).

II. THE SUPREME COURT'S DECISION

A. *City's Procedural Arguments*

1. *The Sexual Harassment Claim*

The City contended section 601A.15(12) of the Iowa Code allowed the district court to consider only those claims filed within 180 days of the date the alleged discrimination occurred.[29] Because Ms. Lynch's administrative complaint was filed on May 21, 1985, the City argued the district court should have considered only those incidents occurring approximately after November 21, 1984.[30] Because Ms. Lynch claimed in her administrative complaint to have been harassed only "'from September 1984 to March 29, 1985,'" the City also challenged the district court's authority to consider any incident occurring before September 1984 not specifically pleaded to the Commission.[31]

The supreme court did not agree with either contention, primarily because it did not believe a sexually hostile work environment claim could be demonstrated by a single incident of sexual harassment.[32] "Unlike a charge of discriminatory discharge or failure to hire," the court reasoned, "the essence of a sexually hostile work environment claim clearly is that of a *pattern of harassment*, a violation over time . . . ."[33] By not considering incidents of sexual harassment occurring outside the 180 day limitation period, "a plaintiff would be forced to endure the hostile environment until

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1987)). Also, the district court's findings of fact were "entitled to the weight of a special verdict"; thus, the court was bound to accept the findings if supported by substantial evidence. *Id.* (citing Blunt, Ellis & Loewi, Inc. v. Igram, 319 N.W.2d 189, 192 (Iowa 1982)).

29. *Id.* at 831. Section 601A.15(12) of the Act states: "A claim under this chapter shall not be maintained unless a complaint is filed with the [C]ommission within [180] days after the alleged discriminatory or unfair practice occurred." IOWA CODE § 601A.15(12) (1985).

30. Lynch v. City of Des Moines, 454 N.W.2d at 831.

31. *Id.*

32. *Id.* at 832. The *Lynch* court noted that decisions under Title VII of the United States Civil Rights Act of 1964 "may be persuasive in construing the Iowa Civil Rights Act, although . . . not binding . . . when construing the Iowa statute." *Id.* at 833 n.5 (citing Sommers v. Iowa Civil Rights Comm'n, 337 N.W.2d 470, 474 (Iowa 1983)). Title VII of the federal Civil Rights Act prohibits sexual harassment in the workplace by making it "an unlawful discriminatory employment practice . . . to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex." 42 U.S.C. §§ 2000e-2(a)(1) (1991).

33. Lynch v. City of Des Moines, 454 N.W.2d at 832 (emphasis added).

sufficient incidents had occurred to show that the environment existed."[34] Such a delay might cause the claim to be dismissed merely "because some incidents occurred outside the limitations period."[35] Thus, in the present case, the court held the district court properly considered evidence of incidents that began within the limitations period and those that occurred prior to November 21, 1984.[36]

The court also concluded that when a sexually hostile work environment claim has been maintained against an employer, "the alleged discriminatory practice must be viewed as a so-called 'continuing violation' of chapter 601A."[37] "Specific incidents of sexual harassment are evidence of the validity of the claim," rather than claims in themselves.[38] Accordingly, the district court had authority to consider incidents occurring prior to September 1984 even though Ms. Lynch did not specifically plead them to the Commission.[39]

2. *The Retaliation Claim*

The City also argued Ms. Lynch's retaliation claim lacked merit because she did not specifically mention Lieutenant Rose's conduct in her administrative complaint.[40] The court rejected this challenge, however, because Rose's conduct did not occur "until after [Ms.] Lynch's claims were filed with the [C]ommission."[41] Rose's retaliatory conduct began after the police chief's disciplinary action, continued until September 1986, and was reasonably related to Ms. Lynch's other claims before the court.[42] To have required "an additional administrative proceeding on Rose's conduct" would have erected "a needless procedural barrier to hearing the merits of [Ms.] Lynch's case."[43]

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34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.* at 831.
39. *Id.* at 831-32.
40. *Id.* at 832.
41. *Id.*
42. *Id.* at 832-33.
43. *Id.* at 833 (citing Hulme v. Barrett, 449 N.W.2d 629, 633 (Iowa 1989)). In *Hulme*, the plaintiff brought an age discrimination action against her employer and its vice president. Hulme v. Barrett, 449 N.W.2d at 630. The trial court dismissed two of the plaintiff's claims because they were not specifically pleaded to the Commission. *Id.* at 632. The Iowa Supreme Court ruled, however, that in order to avoid "needless procedural barriers," a plaintiff was not required to file a "'new administrative charge with each continuing incident of discrimination'" as long as each incident was reasonably related to the plaintiff's first claim. *Id.* at 633 (quoting Oubichon v. North American Rockwell Corp., 482 F.2d 569, 571 (9th Cir. 1973)).

B. *Sexually Hostile Work Environment Claim*

After concluding the district court had authority to consider Ms. Lynch's claims, the supreme court questioned whether "maintenance of a sexually hostile work environment through sexual harassment" is a form of illegal sex discrimination under section 601A.6(1)(a) of the Act.[44] The court concluded that a broad construction of the Act does permit such a claim.[45]

The court adopted the analysis of *Chauffeurs, Teamsters & Helpers Local Union No. 238 v. Iowa Civil Rights Commission*[46] as the standard to be applied to a claim of a hostile work environment through sexual harassment.[47] Consequently, the court held the following conditions must be met:

> (1) [T]he plaintiff belongs to a protected class; (2) the plaintiff was subject to unwelcome sexual harassment; (3) the harassment was based upon sex; (4) the harassment affected a term, condition or privilege of employment; and (5) the employer knew or should have known of the harassment and failed to take prompt and appropriate remedial action.[48]

The City agreed that *Chauffeurs* provided the correct standard, but argued that Ms. Lynch did not sufficiently prove all the requisite conditions.[49]

First, the City asserted the officers' conduct was not "unwelcome" to Ms. Lynch.[50] It relied on evidence that "[Ms.] Lynch herself voluntarily engaged in 'raw sexual banter'" with the officers—language similar to that she later claimed was offensive.[51] The court conceded a plaintiff's conduct is relevant in determining "unwelcomeness," and noted Ms. Lynch "sometimes

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44. Lynch v. City of Des Moines, 454 N.W.2d at 833.

45. *Id.*

46. Chauffeurs, Teamsters & Helpers Local Union No. 238 v. Iowa Civil Rights Comm'n, 394 N.W.2d 375, 378-81 (Iowa 1986).

47. Lynch v. City of Des Moines, 454 N.W.2d at 833 (citing Chauffeurs, Teamsters & Helpers Local Union No. 238 v. Iowa Civil Rights Comm'n, 394 N.W.2d at 378). The Iowa Supreme Court borrowed the *Chauffeurs'* standard from the Eleventh Circuit's decision in *Henson v. City of Dundee*. *Id.* (explaining Henson v. City of Dundee, 682 F.2d 897, 903-05 (11th Cir. 1982) (setting forth their standard for a federal claim of a hostile work environment through sexual harassment)).

48. *Id.*

49. *Id.* at 834.

50. *Id.*

51. *Id.* The City cited *Henson v. City of Dundee* in support of its claim. *Id.* According to *Henson*, sexually harassing conduct is "unwelcome" when "the employee did not solicit or incite it, and in the sense that the employee regarded the conduct as undesirable or offensive." Henson v. City of Dundee, 682 F.2d at 903. Finding against the City, the district court held that "[t]he correct inquiry is whether [Ms.] Lynch, by her conduct, indicated the alleged sexual harassment was unwelcome, not whether her actual participation in the vulgar, sexually explicit banter was voluntary." Lynch v. City of Des Moines, No. 63 Civ. 36881 at 12 (Polk County Dist. Ct., Iowa 1988) (citing Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 68 (1986) (holding sexual discrimination creating a hostile or abusive work environment violates Title VII of the federal Civil Rights Act)).

gave as much as she got."[52] This was not sufficient, however, to overcome the fact that she was "often visibly upset by [her fellow officers'] comments and actions" and also "repeatedly indicated to T. Lynch, Nielsen, and her superiors that [the] state of affairs was offensive and unacceptable."[53] Thus, the record sufficiently indicated that Ms. Lynch "acted reasonably under the circumstances," and that the officers' conduct was unwelcome.[54]

Second, the City claimed the harassment was not based on Ms. Lynch's gender "because T. Lynch and Nielsen 'used obscene language all the time to everyone.'"[55] The court again concluded that substantial evidence supported the district court's finding.[56] Although the sexually-charged language at the Department had not been exclusively reserved for women, "[m]any of the insulting comments aimed at [Ms.] Lynch were particularly reserved for women."[57] "[Ms.] Lynch would not have been subjected to such pervasive harassment, but for the fact she is a woman."[58]

Third, the City argued that no term, condition, or privilege of Ms. Lynch's employment had been affected because the officers' conduct did not deny her a "tangible job benefit."[59] The court rejected the "suggestion that only cases involving the loss of a tangible job benefit [were] actionable" under the Act.[60] The Act was designed to place women and men on an equal footing in the workplace, and it "must be construed broadly to that end."[61] Consequently, the court held that when "sexual harassment in the workplace is so pervasive and severe that it creates a hostile or abusive work environment, so that the plaintiff must endure an unreasonably offensive environment or quit working, the sexual harassment affects a condition of employment."[62] This, the court emphasized, was exactly the "situation that the . . . Act sought to remedy."[63] In Ms. Lynch's case, her psychological and emotional well-being had been so subjected to a polluted work environment that she either had to endure it or quit the Department.[64] Accordingly, the officers' conduct had affected a condition of her employment.[65]

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52. Lynch v. City of Des Moines, 454 N.W.2d at 834.
53. *Id.*
54. *Id.* The district court reasoned: "Even though Lynch participated in the vulgar 'horseplay,' her participation was an attempt to fit into her work environment." Lynch v. City of Des Moines, No. 63 Civ. 36881 at 13.
55. Lynch v. City of Des Moines, 454 N.W.2d at 834.
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.* (citing Sommers v. Iowa Civil Rights Comm'n, 337 N.W.2d 470, 474 (Iowa 1983); IOWA CODE § 601A.18 (1985)).
62. *Id.*
63. *Id.* at 835.
64. *Id.*
65. *Id.*

Finally, the City argued the police chief's disciplinary actions were prompt and appropriate remedial steps, and therefore asserted it was insulated from liability.[66] According to the court, however, this argument overlooked the fact that Ms. Lynch's superiors did nothing to stop the harassment, even though they had known about it months before she was forced to seek assistance from the internal affairs unit.[67]

C. *Remedies Under the Civil Rights Act*

The City also challenged the remedies awarded under chapter 601A of the Act. First, it asserted the district court should not have awarded Ms. Lynch damages for emotional distress without finding the offensive conduct to be "outrageous" and the emotional distress "severe."[68] Second, the City argued the Act does not establish affirmative action remedies.[69]

The court found no merit in either argument. Damages for emotional distress are awardable under the Act "even without a showing of physical injury, severe distress, or outrageous conduct."[70] Furthermore, the court stated that a broad construction of the Act authorizes affirmative action remedies.[71] Under section 601A.16(5) of the Iowa Code, district courts have the same remedial power available to the Commission in an administrative proceeding.[72] "To remedy discriminatory practices, the [C]ommission is empowered to . . . *'take the necessary remedial action as in the judgment of the [C]ommission will carry out the purposes of th[e] chapter.'*"[73] Thus, although affirmative action remedies are not specifically enumerated within the Act, the district court was "*not* limited to those remedies specifically enumerated

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66. *Id.*

67. *Id.* Accepting the district court's findings, the supreme court also dismissed without explanation the City's argument that "[Ms.] Lynch failed to prove her claim of illegal retaliation under Iowa Code [§] 601A.11(2)." *Id.* See also *supra* text accompanying notes 18-22 for the district court's findings regarding Ms. Lynch's retaliation claim.

68. Lynch v. City of Des Moines, 454 N.W.2d at 835.

69. *Id.*

70. *Id.* (citing Hy-Vee Food Stores v. Iowa Civil Rights Comm'n, 453 N.W.2d 512, 525-26 (Iowa 1990)); *see also* Harmer v. Iowa Civil Rights Comm'n, 472 N.W.2d 259, 266 (Iowa 1991). In *Hy-Vee*, a female grocery store checker successfully brought gender and national origin discrimination claims against the grocery store chain. Hy-Vee Food Stores v. Iowa Civil Rights Comm'n, 453 N.W.2d at 532. The supreme court held for the first time that "a civil rights complainant may recover compensable damages for emotional distress without a showing of physical injury, severe distress, or outrageous conduct." *Id.* at 526; *see also* Daniel S. Alcorn, Case Note, 40 DRAKE L. REV. 415 (1991) (discussing *Hy-Vee*).

71. Lynch v. City of Des Moines, 454 N.W.2d at 835-36.

72. *Id.* at 835. Section 601A.16(5) allows the district court to "grant any relief in an action" authorized by § 601A.15(8), including "reasonable attorney's fees and court costs when the court finds that the complainant's action was frivolous." IOWA CODE § 601A.16 (1985) (as amended 1986); *see also* IOWA CODE § 601A.15(8) (1985) (listing remedies available to the Commission).

73. Lynch v. City of Des Moines, 454 N.W.2d at 835 (quoting IOWA CODE § 601A.15(8) (1985)) (alterations in original).

in the statute."[74] It was therefore within the district court's discretion to eliminate sexual harassment in the Department by ordering the City to "educate and train its employees not to engage in conduct prohibited by the Act."[75]

D. *Adequacy of Damages*

On cross-appeal, Ms. Lynch requested that the court increase the award on its own or remand the case with instructions to increase her award of $10,000.[76] Ms. Lynch argued the award was grossly inadequate in light of awards granted in similar sexual harassment cases.[77] She also complained that the district court neglected to award the special damages she had requested.[78]

Using an abuse of discretion standard, the court noted that "[t]he adequacy of the award in a particular case depends on the unique facts of that case," rather than those of comparable cases.[79] Although "[Ms.] Lynch suffered mental anguish and depression as a result of the City's illegal conduct," the court was persuaded by the finding that "much of the emotional distress [Ms.] Lynch blamed on the City was attributable to turmoil in [her]

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74. *Id.* at 836 (citing IOWA CODE § 601A.15(8)(a) (1985)).

75. *Id.* at 835-36. "It [is] the *practice of discrimination*, not merely the humiliating treatment . . . at which the Commission and the trial court [take] aim . . . ." *Id.* at 836 (citing Iron Workers Local No. 67 v. Hart, 191 N.W.2d 758, 770 (Iowa 1971)).

The supreme court also ruled against the City on two other arguments. First, the City had argued the language "or to otherwise discriminate in employment" of Iowa Code § 601A.6(1)(a) was unconstitutionally vague, and thus violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Id.* at 837. The court held, however, it would not surprise a "person of ordinary intelligence, when confronted with the statute and its history of judicial enforcement . . . to learn that the City's conduct . . . was illegal." *Id.* (citing City of Cedar Falls v. Flett, 330 N.W.2d 251, 256 (Iowa 1983)). "The statute plainly bans *any* sex discrimination in employment, unless based upon the nature of the occupation." *Id.* In so ruling, the court noted its holding was consistent with federal court decisions interpreting similar statutory language. *Id.* (citing Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986) (interpreting United States Civil Rights Act); Hall v. Gus Const. Co., 842 F.2d 1010 (8th Cir. 1988) (interpreting both United States and Iowa Civil Rights Acts)).

Second, the City argued the district court erred by not allowing it to amend its appeal, and asserted that "if the Iowa Civil Rights Act prohibited the conduct of T. Lynch and Nielsen, then it unconstitutionally proscribed" their First Amendment rights. *Id.* at 838. The City made its request at the pretrial hearing, days before trial and "nearly three years after the lawsuit was filed." *Id.* The court held it was not an abuse of discretion to deny the request because such an amendment "would have injected a complex constitutional issue into [the] case only days before trial." *Id.* (citing Bremicker v. MCI Telecomms. Corp., 420 N.W.2d 427, 429 (Iowa 1988)).

76. *Id.* at 836.

77. *Id.*

78. *Id.*

79. *Id.* (citing Witte v. Vogt, 443 N.W.2d 715, 716 (Iowa 1989); Householder v. Town of Clayton, 221 N.W.2d 488, 493 (Iowa 1974)).

personal life."[80] Ms. Lynch also failed to prove the harassment caused any permanent damage.[81] Consequently, the court found the district court's award "reasonably related to the loss [she] suffered."[82]

III. CONCLUSION

In *Lynch v. City of Des Moines*, the Iowa Supreme Court ruled for the first time that maintaining a sexually hostile work environment through sexual harassment is a form of sex discrimination violative of section 601A.6(1)(a) of the Iowa Civil Rights Act.[83] To effectuate the purpose of the Act, courts may order a violator not only to pay damages for emotional distress, but also to implement an affirmative action plan "to educate and train its employees not to engage in conduct prohibited under the Act."[84]

A sexually hostile work environment claim will exist under *Lynch* if the following conditions are established:

> (1) [T]he plaintiff belongs to a protected class; (2) the plaintiff was subject to unwelcome sexual harassment; (3) the harassment was based upon sex; (4) the harassment affected a term, condition or privilege of employment; and (5) the employer knew or should have known of the harassment and failed to take prompt and appropriate remedial action.[85]

This decision will have a dramatic effect on the work environment in Iowa. It sends a clear message that employment discrimination through sexual harassment will not be tolerated. Yet, some questions remain. For example, it is unclear how broadly and from whose perspective "unwelcome" harassment will be interpreted—questions that will be influenced by the United States Supreme Court in the near future.[86] Moreover, the supreme

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80. *Id.* The district court attributed most of Ms. Lynch's emotional distress to two causes. One was the termination of a personal relationship with a member of the police force. Lynch v. City of Des Moines, No. 63 Civ. 36881 at 3, 18-19 (Polk County Dist. Ct., Iowa 1988). The other cause was the alleged molestation of her daughter by another former boyfriend who was also a member of the police force. *Id.* Ms. Lynch reported the allegation to the internal affairs unit of the Department, but on December 3, 1984, the Department ruled there was insufficient evidence to substantiate the violation of a departmental regulation. *Id.* at 3.

81. Lynch v. City of Des Moines, 454 N.W.2d at 836.

82. *Id.* The district court also awarded Ms. Lynch attorney fees and costs pursuant to Iowa Code § 601A.15(8)(a)(8) (1985). Lynch v. City of Des Moines, 454 N.W.2d at 836. This award, set at $95,139, was also challenged by both parties. *See* Lynch v. City of Des Moines, 464 N.W.2d 236, 238 (Iowa 1990) (en banc). The Iowa Supreme Court ultimately upheld the award. *Id.* at 237. See also Hamer v. Iowa Civil Rights Comm'n, 472 N.W.2d 259, 266 (Iowa 1991) for a discussion of appropriate attorney fee awards under the Act.

83. Lynch v. City of Des Moines, 454 N.W.2d at 833.

84. *Id.* at 836.

85. *Id.* at 833.

86. As the district court stated, "[w]hether particular conduct was indeed unwelcome presents difficult problems of proof and turns largely on the credibility determinations

court did not elaborate on when an employer will be held to have knowledge, or expected to have knowledge, of the prohibited conduct.[87] Similarly, the court did not provide a standard for what will constitute "prompt and appropriate remedial actions" by employers.[88] With the litigation that can be expected to follow, Iowa courts will surely begin to provide answers to these questions soon.

Jerold P. McMillen

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committed to the trier of fact." Lynch v. City of Des Moines, No. 63 Civ. 36881 at 12 (Polk County Dist. Ct., Iowa 1988). The United States Supreme Court will provide much needed guidance in this area soon. It has agreed to review whether a Tennessee district court properly dismissed a hostile work environment through sexual harassment claim, filed pursuant to Title VII of the 1964 Civil Rights Act, because the plaintiff failed to show a "serious psychological injury." *See* Harris v. Forklift Sys., Inc., 976 F.2d 733 (unreported opinion), *cert. granted*, No. 92-1168, 1992 WL 414596 (U.S. Mar. 1, 1993); *see also* 61 U.S.L.W. 3596 (Mar. 2, 1993). Even though the district court found the plaintiff was subjected to conduct that would offend a reasonable woman, it nevertheless dismissed the action because the she failed to establish a serious psychological injury. *See* 61 U.S.L.W. 3596 (Mar. 2, 1993).

Several circuit courts have adopted a "reasonable woman" standard in determining whether the conduct is unwelcome and sufficiently severe to uphold a cause of action under Title VII of the federal Civil Rights Act. For example, the Ninth Circuit has held that "a female plaintiff states a prima facie case of hostile environment sexual harassment when she alleges conduct that a reasonable woman would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment." Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991). This reasonableness standard is not static. "As the views of reasonable women change, so too does the Title VII standard of acceptable behavior." *Id.* at 879 n.12. *See also* Andrews v. City of Philadelphia, 895 F.2d 1469, 1482 (3d Cir. 1990) (adopting reasonable person of "same sex" standard to be applied to claims filed under Title VII); Yates v. Avco Corp., 819 F.2d 630, 637 (6th Cir. 1987) (adopting reasonable woman standard); *cf.* Daniels v. Essex Group, 937 F.2d 1264, 1271-72 (7th Cir. 1991) (applying both subjective and objective tests to claims filed under Title VII).

87. *See* Davis v. Tri-State Mack Distribs., No. 91-3574, 1992 WL 357795, at *3-4 (8th Cir. Dec. 8, 1992) (citing Burns v. McGregor Elec. Indus., 955 F.2d 559, 564 (8th Cir. 1992) (holding employer liable under Title VII for sexual harassment if employer "knew or should have known of the harassment and failed to take proper remedial action."); Hall v. Gus Const. Co., 842 F.2d 1010, 1015 (8th Cir. 1988) (holding employer has notice "if management-level employees knew or . . . should have known about offensive conduct")).

88. *See* Davis v. Tri-State Mack Distribs., No. 91-3574, 1992 WL at *4 (holding merely apologizing to employee insufficient) (citing Ellison v. Brady, 924 F.2d at 882 (holding "Title VII requires more than a mere request to refrain from discriminatory conduct."); Barrett v. Omaha Nat'l Bank, 726 F.2d 424, 427 (8th Cir. 1984) (finding that employer who fully investigated the complaint, disciplined the harasser by placing him on probation for 90 days, and warned him that further misconduct would result in discharge undertook appropriate remedial action)).

CONSTITUTIONAL LAW—Random Bus Searches Conducted Pursuant to a Passenger's Consent Are Not Per Se Unconstitutional Violations of the Fourth Amendment Search and Seizure Clause—*Florida v. Bostick*, 111 S. Ct. 2382 (1991).

I. INTRODUCTION

Terrance Bostick rested on a bag in the back of a bus traveling from Miami to Atlanta, which had stopped in Fort Lauderdale.[1] The bus was about to depart when two Broward County, Florida, sheriff's officers boarded.[2] The officers, adorned with police badges and insignia, and one holding a recognizable pouch containing a pistol, began to eye the passengers on the bus.[3]

Randomly and "without articulable suspicion," the officers approached Bostick.[4] They first asked to inspect Bostick's ticket and identification, which the officers "immediately returned to him as unremarkable."[5] The officers then explained to Bostick that they were narcotics agents looking for illegal drugs and requested Bostick's consent to search his luggage.[6]

While questioning Bostick, one of the officers positioned himself between Bostick and the only possible exit from the bus.[7] The officer "had his hand in a black pouch that appeared to contain a gun."[8] The officers obtained consent from Bostick to search the bag he was using as a pillow, which did not belong to him, but they found nothing.[9] The officers then searched Bostick's other bag and discovered it contained cocaine.[10] They immediately arrested Bostick and charged him with drug trafficking.[11]

At trial Bostick made a motion to suppress the cocaine, arguing it "had been seized in violation of his Fourth Amendment rights."[12] The testimony at trial was conflicting as to whether Bostick consented to have *his* bag searched and "'was informed of his right to refuse consent.'"[13] The trial court reasoned

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1. Bostick v. State, 554 So. 2d 1153, 1154-57 (Fla. 1989), *rev'd*, Florida v. Bostick, 111 S. Ct. 2382 (1991).
2. Florida v. Bostick, 111 S. Ct. at 2384.
3. *Id.*
4. *Id.* at 2384-85.
5. *Id.* at 2385.
6. *Id.* at 2384.
7. Bostick v. State, 554 So. 2d 1153, 1157 (Fla. 1989), *rev'd*, Florida v. Bostick, 111 S. Ct. 2382 (1991).
8. *Id.*
9. Bostick v. State, 593 So. 2d 494, 495 (Fla. 1992) (Barkett, J., dissenting) (on remand from Florida v. Bostick, 111 S. Ct. 2382 (1991)).
10. Florida v. Bostick, 111 S. Ct. at 2384.
11. *Id.* at 2385.
12. *Id.* The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. CONST. amend. IV.
13. Florida v. Bostick, 111 S. Ct. at 2385 (quoting Bostick v. State, 554 So. 2d 1153, 1154-55 (Fla. 1989), *rev'd*, Florida v. Bostick, 111 S. Ct. 2382 (1991)).

that "any conflict must be resolved in favor of the state" because consent was a "question of fact decided by the trial judge," and found the police had specifically advised Bostick of his rights. The trial court therefore denied Bostick's suppression motion.[14]

The Florida District Court of Appeal affirmed the trial court's ruling, but presented a certified question to the Florida Supreme Court:[15] "Does an impermissible seizure result when police mount a drug search on buses during scheduled stops and question boarded passengers without articulable reasons for doing so, thereby obtaining consent to search the passengers' luggage?"[16] The Florida Supreme Court answered the question in the affirmative and reversed the lower courts' rulings.[17]

The Florida Supreme Court held the government "exceeded its power to interfere with the privacy of an individual citizen who is not even suspected of any criminal wrongdoing."[18] The United States Supreme Court granted certiorari because it was concerned the Florida Supreme Court had adopted "a *per se* rule that the Broward County Sheriff's practice of 'working the buses' is unconstitutional."[19]

The Court noted two particular facts in making its ruling. First, the police had advised Bostick of his right to refuse consent to the search.[20] Second, the officer who carried a gun never removed it from its pouch, pointed it at Bostick, or threatened Bostick with it.[21] The sole issue for the Court on appeal was whether Bostick's police encounter "necessarily constitute[d] a 'seizure' within the meaning of the Fourth Amendment."[22] The Supreme Court *held*, reversed.[23] Random bus searches conducted pursuant to a passenger's consent are not per se unconstitutional violations of the Fourth Amendment Search and Seizure Clause. *Florida v. Bostick*, 111 S. Ct. 2382 (1991).

II. THE MAJORITY OPINION

Justice O'Connor, writing for the majority, accepted that "for purposes of this decision, the officers lacked the reasonable suspicion required to justify a seizure."[24] Accordingly, if the Court found a seizure had taken place, the

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14. *Id.*
15. *Id.*
16. Bostick v. State, 554 So. 2d 1153, 1154 (Fla. 1989), *rev'd*, Florida v. Bostick, 111 S. Ct. 2382 (1991).
17. *Id.*
18. *Id.* at 1158.
19. Florida v. Bostick, 111 S. Ct. at 2385.
20. *Id.*
21. *Id.*
22. *Id.* at 2386.
23. *Id.* at 2389. On remand, the Florida Supreme Court, "[i]n light of the Supreme Court's opinion," approved the district court's decision. Bostick v. State, 593 So. 2d 494, 495 (Fla. 1992).
24. Florida v. Bostick, 111 S. Ct. at 2386.

evidence of the drugs would be suppressed as a Fourth Amendment violation.[25]

A. *Fourth Amendment Precedents*

The Court noted "a seizure does not occur simply because a police officer approaches an individual and asks a few questions."[26] Normally, when police question an individual, Fourth Amendment scrutiny is not triggered unless the encounter loses its consensual nature.[27] A seizure occurs only when the police "'by means of physical force or show of authority'" in some way restrain an individual's liberty.[28] Furthermore, the Court has held that police are not required to have a basis for suspicion in order to question someone.[29]

The officers' lack of suspicion troubled the Florida Supreme Court when it upheld Bostick's motion to suppress. The court first determined Bostick was "detained by the activities" of the officers, which constituted a form of "seizure" of Bostick's person.[30] The court then held that "[t]he broad princi-

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25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.* (quoting Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968)). In *Terry*, a landmark Fourth Amendment case, a police officer approached two men who "didn't look right," suspecting the men of planning a stick-up. Terry v. Ohio, 392 U.S. at 5-6. When the officer asked the men their names, they "mumbled" in response, and the officer grabbed defendant Terry. *Id.* at 7. The officer felt a pistol in Terry's coat, ordered him to remove his coat, and took possession of the pistol. *Id.* The Court held the gun was admissible as evidence because, under all the circumstances, Terry's right to personal security was not violated by an unreasonable search and seizure. *Id.* at 9.

The Court noted its general interest was "of effective crime prevention and detection." *Id.* at 22. It held, in appropriate circumstances and in an appropriate manner, police officers may approach a person to investigate possible criminal behavior "even though there is no probable cause to make an arrest." *Id.* The Court also cautioned, however, that a "police officer must be able to point to specific and articulable facts which . . . reasonably warrant [the] intrusion." *Id.* at 21. When an officer searches an individual for weapons, the appropriate question is whether "a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." *Id.* at 27.

Consider also California v. Hodari, 111 S. Ct. 1547 (1991). In *Hodari*, a police officer was pursuing defendant Hodari on foot when Hodari tossed away what appeared to be a small rock, which was actually crack cocaine. *Id.* at 1549. Immediately thereafter, the officer tackled Hodari and handcuffed him. *Id.* The Court reasoned the word "seizure" indicates "a laying on of hands or application of physical force to restrain movement." *Id.* at 1550. It does not, however, apply to police pursuit of a fleeing person that refuses to stop. *Id.* The Court therefore denied Hodari's motion to suppress the cocaine, holding that at the time Hodari dropped the drugs, he was not "seized" within the meaning of the Fourth Amendment. *Id.* at 1552.

29. Florida v. Bostick, 111 S. Ct. at 2386 (citing INS v. Delgado, 466 U.S. 210, 216 (1984) (holding immigration officials could approach workers in a factory, ask questions about their citizenship, and request identification without violating the Fourth Amendment); Florida v. Rodriguez, 469 U.S. 1, 3-4 (1984) (holding there was sufficient articulable suspicion for officers to approach men in an airport and ask to search their luggage, when one man was twice overheard urging the other two to "get out of here")).

30. Bostick v. State, 554 So. 2d 1153, 1157 (Fla. 1989), *rev'd*, Florida v. Bostick, 111 S. Ct. 2382 (1991).

ples of federal law, as well as the specific requirements of Florida law, require that the police . . . at least at a minimum must have had a reasonable articulable suspicion before they detained Bostick."[31]

The Florida Supreme Court also applied the test set forth in *United States v. Mendenhall*[32] to determine whether a seizure had occurred.[33] According to *Mendenhall*, a Fourth Amendment seizure occurs "only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."[34] The Florida Supreme Court noted that because Bostick's bus was about to depart, he could not readily leave and was thus restricted to the confines of the bus.[35] Under such circumstances, the court held, "a reasonable traveler would not have felt . . . 'free to leave' or . . . 'free to disregard the questions and walk away.'"[36]

The United States Supreme Court found the Florida Supreme Court erred in its interpretation of the "free to leave" principle.[37] The Court noted past cases of encounters in airports, similar to Bostick's encounter on the bus, that were consensual and did not implicate Fourth Amendment interests.[38]

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31. *Id.* at 1157-58 (citing United States v. Sokolow, 490 U.S. 1 (1989); United States v. Cortez, 449 U.S. 411 (1981); FLA. CONST. art. I, § 12).

32. United States v. Mendenhall, 446 U.S. 544, 554 (1980).

33. Bostick v. State, 554 So. 2d at 1157.

34. United States v. Mendenhall, 446 U.S. at 554. In *Mendenhall*, two narcotics agents approached Mendenhall as she was walking through an airport. *Id.* at 547. The agents asked to see her identification and her ticket, which she produced. *Id.* at 548. The agents then identified themselves as narcotics agents, and asked Mendenhall to accompany them to the airport Drug Enforcement Agency office. *Id.* Mendenhall followed the agents, and was later asked if she would allow a search of her handbag and of her person. *Id.* She was told she had the right to refuse the search. *Id.* Mendenhall consented to the personal search, which revealed she was carrying two packets of heroin. *Id.* at 548-49.

The Sixth Circuit found the search unconstitutional, but the Supreme Court reversed. *Id.* at 549, 560. The Court concluded the test to determine if a person has been seized within the meaning of the Fourth Amendment is whether "in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Id.* at 554. Reasoning that Mendenhall had remained free to disregard the agents' questions and walk away, the Court found no illegal search and seizure. *Id.* at 555. The Court also held its reasoning was "not affected by the fact that the respondent was not expressly told by the agents that she was free to decline to cooperate with their inquiry, for the voluntariness of her responses [did] not depend on her having been so informed." *Id.* Because Mendenhall's response was so adverse to her self-interest, the Court rejected the inference that she must have felt compelled to answer the agents' questions. *Id.*

35. Bostick v. State, 554 So. 2d 1153, 1157 (Fla. 1989), *rev'd*, Florida v. Bostick, 111 S. Ct. 2382 (1991).

36. *Id.* (quoting United States v. Mendenhall, 446 U.S. at 554).

37. Florida v. Bostick, 111 S. Ct. at 2387.

38. *Id.* at 2386 (citing Florida v. Rodriguez, 469 U.S. 1 (1984)). In *Rodriquez*, two detectives followed a group of three men in an airport because they "behaved in an unusual manner while leaving the . . . ticket counter." Florida v. Rodriguez, 469 U.S. at 3. As the officers followed the men up an escalator, they saw the men glance at them and heard one of them say, "Get out of here." *Id.* at 3-4. When the men tried to run, the detectives identified themselves as narcotics officers and asked consent to see the men's tickets and then to search their luggage. *Id.* at 4. The officers did not advise the men they could "refuse consent to the search." *Id.*

The Court held the encounter was "clearly the sort of consensual encounter that implicates no Fourth Amendment interest." *Id.* at 5-6. It found the claim to a reasonable privacy expectation was weak when the encounter takes place in a major international airport. *Id.* at 6.

In these cases, the Court ruled no seizure had occurred.[39] The Court also noted that had Bostick's encounter occurred before he boarded the bus or in the bus terminal lobby, there was no doubt "it would not rise to the level of a seizure."[40]

Bostick argued, and the Florida Supreme Court agreed, that his situation was different from an airport or bus terminal seizure, because he was confronted in "the cramped confines of a bus" where he was not free to leave.[41] The United States Supreme Court, however, disagreed.[42] When one is confronted by police while walking "down the street or through an airport," the Court reasoned, it is sensible to ask "whether a reasonable person would feel free to keep walking."[43] When one is confronted on a bus, however, "and has no desire to leave,"[44] the proper measure of the coercive effect of a police encounter is *not* whether that person feels free to leave.[45]

B. *New Test for Seizures on Buses*

The "free to leave" standard has been employed by the Court on several occasions to determine if an unlawful seizure has occurred.[46] This standard changed only slightly in another recent Supreme Court case in which the Court held an encounter is consensual if a reasonable person would feel free "'to ignore the police presence and go about his business.'"[47]

The Court found the "free to leave" test to be insufficient, however, to determine the coerciveness of police encounters on buses.[48] The fact that Bostick may not have felt free to leave the bus did not necessarily mean the

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Moreover, the Court noted that "the State need not prove that a defendant consenting to a search knew that he had the right to withhold his consent, although . . . knowledge of the right to refuse consent could be taken into account in determining whether or not a consent was 'voluntary.'" *Id.* at 6-7.

39. Florida v. Bostick, 111 S. Ct. at 2386.
40. *Id.*
41. *Id.* at 2386-87.
42. *Id.* at 2387.
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.* (quoting Michigan v. Chesternut, 486 U.S. 567 (1988)). In *Chesternut*, police officers gave chase when the defendant Chesternut ran upon sighting the police. Michigan v. Chesternut, 486 U.S. at 569. As he ran, Chesternut discarded a number of packets of pills from his pocket. *Id.* The officers arrested Chesternut after discovering the pills contained codeine, and a search of the defendant revealed he possessed heroin and a hypodermic needle. *Id.* The Court held the test of "whether or not a reasonable person would have believed that he was not free to leave" is necessarily imprecise because it does not focus on the particular police conduct at issue, which must be considered "*along with the setting in which the conduct occurr[ed].*" *Id.* at 573 (emphasis added). The Court held the police did not seize Chesternut because the officers' conduct in chasing Chesternut "would not have communicated to the reasonable person an attempt to capture or otherwise intrude upon [his] freedom of movement." *Id.* at 575. In other words, a reasonable person would not have felt "he was not at liberty to ignore the police presence and go about his business." *Id.* at 569.
48. Florida v. Bostick, 111 S. Ct. at 2387.

police seized him.[49] The bus was scheduled to depart, and Bostick "would not have felt free to leave the bus even if the police had not been present."[50] Any confinement of Bostick's movements, the Court held, was the "natural result of his decision to take the bus."[51] Thus, the "free to leave" test said nothing about the coercive nature of the police conduct.[52]

Instead, the Court compared Bostick's situation to that of the factory employees in *INS v. Delgado*,[53] who were visited by Immigration and Naturalization Service agents searching for illegal aliens.[54] Some agents stood near the factory's exits while others passed through the factory questioning workers.[55] The agents wore badges and were armed, but never drew their weapons.[56] They approached several employees, identified themselves, and asked the workers questions regarding their citizenship.[57]

The Court found no seizure had occurred.[58] It reasoned that although the workers were not free to leave the building without being questioned, their confinement was a result of their voluntary obligation to their employer, not the agents' conduct.[59] Thus, the agents' presence should not have given workers "reason to believe that they would be detained if they gave truthful answers . . . or if they simply refused to answer."[60]

Similarly, in Bostick's case, the Court found Bostick's freedom to move or to leave was restricted by his being a passenger on a bus, not necessarily by the police conduct.[61] The appropriate inquiry in such a situation, the Court held, was "whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter."[62]

That the encounter took place on a bus was only one factor the Court considered in determining whether Bostick was coerced into cooperation.[63] According to the Court, refusing to cooperate would not bring prosecution and would not furnish the police with justification for detainment or seizure.[64] Furthermore, police are authorized to conduct searches of bus passengers

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49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*
53. INS v. Delgado, 466 U.S. 210 (1984).
54. *Id.* at 212.
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.* at 218.
59. *Id.*
60. *Id.* Justices Brennan and Marshall concurred in part and dissented in part. *Id.* at 225. Justice Brennan wrote that "[a]lthough none of the [workers] was physically restrained by the INS agents during the questioning, it is nonetheless plain beyond cavil that the manner in which the INS conducted these surveys demonstrated a 'show of authority' of sufficient size and force to overbear the will of any reasonable person." *Id.* at 229 (Brennan, J., dissenting).
61. Florida v. Bostick, 111 S. Ct. at 2387.
62. *Id.*
63. *Id.*
64. *Id.*

only if voluntary consent is given, and "consent that is the product of official intimidation or harassment is not consent at all."[65]

The "crucial" Fourth Amendment test adopted by the Court, therefore, was whether, given all the circumstances of the encounter, "the police conduct would 'have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.'"[66] This rule, the Court held, "applies to encounters that take place on a city street or in an airport lobby, and it applies equally to encounters on a bus."[67]

III. THE DISSENT

Justice Marshall, joined by Justices Blackmun and Stevens, dissented.[68] Justice Marshall agreed with the majority's test that a passenger approached by police on a bus should "feel free to decline the officers' requests or otherwise terminate the encounter."[69] He objected strongly, however, to the imposition of police questions on the basic liberty of the American citizen and to the majority's application of the Fourth Amendment test to the facts of Bostick's case.[70]

Marshall pinpointed the nation's "war on drugs" as a decisive factor in the majority's opinion.[71] He acknowledged that law-enforcement officials must devise effective weapons for fighting this war.[72] Nonetheless, he wrote, "the effectiveness of a law-enforcement technique is not proof of its constitutionality."[73] In Marshall's view, the "suspicionless police sweep of buses in intrastate or interstate travel," particularly the one in this case, violates the core of the Fourth Amendment.[74]

Marshall cited several recent decisions regarding the police practice of "working the buses"[75]—an "increasingly common tactic in the war on drugs."[76] He noted these sweeps occur within the cramped confines of the bus, with the officers often blocking the exit with their bodies while they question a

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65. *Id.* at 2388.
66. *Id.* at 2387 (quoting Michigan v. Chesternut, 486 U.S. 567, 569 (1988)).
67. *Id.* at 2389.
68. *Id.* (Marshall, J., dissenting).
69. *Id.* at 2391 (Marshall, J., dissenting).
70. *Id.* (Marshall, J., dissenting).
71. *Id.* at 2389 (Marshall, J., dissenting).
72. *Id.* (Marshall, J., dissenting).
73. *Id.* (Marshall, J., dissenting).
74. *Id.* (Marshall, J., dissenting).
75. *Id.* (Marshall, J., dissenting) (citing United States v. Lewis, 921 F.2d 1294 (D.C. Cir. 1990); United States v. Flowers, 912 F.2d 707 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 2895 (1991); United States v. Chandler, 744 F. Supp. 333 (D.D.C. 1990)).
76. Florida v. Bostick, 111 S. Ct. at 2389 (Marshall, J., dissenting) (citing United States v. Chandler, 744 F. Supp. at 335 ("It has become routine to subject interstate travelers to warrantless searches and intimidating interviews while sitting aboard a bus stopped for a short layover in the capital.")).

passenger.[77] Furthermore, because the bus has stopped only temporarily, the passenger is usually in no position to leave the bus to avoid the questioning.[78] Police sweeps, Marshall wrote, "burden[] the experience of traveling by bus with a degree of governmental interference to which, until now, our society has been proudly unaccustomed."[79]

Marshall disagreed that Bostick had been informed of his right to refuse the officers' search of his luggage, and that his consent was therefore voluntary.[80] He noted the officers "made a visible display of their badges," wore noticeable police insignia, and carried weapons, all constituting an intimidating "show of authority."[81] He also noted the officers did not advise Bostick of his right to refuse to answer their questions.[82] According to Marshall, the issue was therefore "whether [Bostick]—without being apprised of his rights—would have felt free to terminate the antecedent encounter with the police."[83] Marshall concluded the answer was clearly no.[84]

Marshall also disagreed with the majority's interpretation of *INS v. Delgado*.[85] He reasoned that workers approached at their workplace by the INS officials could have avoided unwanted questioning without abandoning their personal belongings and venturing into unfamiliar places.[86] A passenger on a bus stopped at an intermediate point in its journey does not have such freedom.[87] Moreover, a factory worker may move about the entire factory to escape questions, whereas a bus passenger is considerably more confined.[88] Marshall also noted the INS officials did not confront the workers "with guns in hand," unlike the officers who questioned Bostick.[89]

Like the Florida Supreme Court, Marshall felt the Fourth Amendment prohibits "the suspicionless, dragnet-style sweep of intrastate or interstate

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77. *Id.* at 2390 (Marshall, J., dissenting). Justice Marshall described a typical police procedure as one where a group of state or federal officers boards a bus at its intermediate stopping point on a route. Marshall explained:

> Often displaying badges, weapons or other indicia of authority, the officers identify themselves and announce their purpose to intercept drug traffickers. They proceed to approach individual passengers, requesting them to show identification, produce their tickets, and explain the purpose of their travels. Never do the officers advise the passengers that they are free not to speak with the officers. An 'interview' of this type ordinarily culminates in a request for consent to search the passenger's luggage.

Id. (Marshall, J., dissenting) (citing United States v. Lewis, 921 F.2d at 1296; United States v. Flowers, 912 F.2d at 708-09).

78. *Id.* (Marshall, J., dissenting).
79. *Id.* (Marshall, J., dissenting).
80. *Id.* at 2392-93 (Marshall, J., dissenting).
81. *Id.* at 2392 (Marshall, J., dissenting).
82. *Id.* (Marshall, J., dissenting).
83. *Id.* at 2393 (Marshall, J., dissenting).
84. *Id.* (Marshall, J., dissenting).
85. *Id.* at 2394 (Marshall, J., dissenting).
86. *Id.* (Marshall, J., dissenting).
87. *Id.* (Marshall, J., dissenting).
88. *Id.* (Marshall, J., dissenting).
89. *Id.* (Marshall, J., dissenting).

buses."[90] He insisted the drug war would not be lost by restricting such searches.[91] Law enforcement personnel would still be free to approach passengers whom they reasonably suspect of criminal wrongdoing.[92] According to Marshall, however, the police conduct of consciously singling out persons on buses, without articulable suspicion for choosing them, puts passengers to the choice of cooperating or of exiting the bus in an unfamiliar place, which is effectively no "choice" at all.[93]

IV. CONCLUSION

The United States Supreme Court's decision in *Florida v. Bostick* pits two important national policies against one another. The first is the "war on drugs," an important national policy.[94] The second is the long standing tradition of freedom from unwanted police encounters in everyday activities.[95] In *Bostick*, the drug war policy won: police officers looking for illegal narcotics may detain and search citizens on city streets, in airports, in bus terminals, and now on buses, without reasonable suspicion that the individual is actually engaged in any criminal activity.[96]

An officer may ask to inspect an individual's identification and request consent to search her luggage without implicating a Fourth Amendment inquiry. The only mandate is that the officer must not convey a message that the individual is required to comply with the officer's request.[97] Of course, the officer may not harass or physically threaten a citizen in order to obtain such "consent." But the test for whether true consent has been given was weakened in the past by the Court,[98] and as a result of the *Bostick* decision, becomes considerably weaker.

The Court claims it "breaks no new ground" with its holding.[99] Rather, it simply holds the location of a police encounter is not a dispositive factor in the seizure test, even when that location, by its design and function, serves to limit an individual's freedom to move. A court must consider all the circumstances surrounding a police encounter to determine if a person confronted by police felt free to terminate the encounter.[100]

Notably, the Court still required a showing of consent and held unequivocally that without voluntary permission to search, the police may not

90. *Id.* (Marshall, J., dissenting).
91. *Id.* (Marshall, J., dissenting).
92. *Id.* (Marshall, J., dissenting).
93. *Id.* (Marshall, J., dissenting).
94. *Id.* at 2389 (Marshall, J., dissenting).
95. *Id.* at 2391 (Marshall, J., dissenting).
96. *See generally id.* at 2389.
97. *Id.* at 2388.
98. *See supra* note 47 and accompanying text.
99. Florida v. Bostick, 111 S. Ct. at 2388.
100. *Id.* at 2387.

search at all.[101] The Court did not, however, refer to its holding in *Florida v. Royer*:[102] "[W]here the validity of a search rests on consent, the *State* has the burden of proving that the necessary consent was obtained and that it was freely and voluntarily given."[103] This burden is not satisfied by a showing of "mere submission to a claim of lawful authority."[104]

The parties disputed at the trial court level the issue of whether Bostick's consent was voluntary.[105] Rather than place the burden of establishing consent on the State, the district court simply resolved the conflict in favor of the State, effectively finding Bostick had been informed of his right to refuse consent and his consent was therefore voluntary.[106] On appeal, the primary issue was whether Bostick was so intimidated by the police conduct that his consent was invalid under the Fourth Amendment.[107] Although the majority found Bostick was not unlawfully seized,[108] it did not mention that the burden to establish legal consent rests with the State.

The Supreme Court also failed to analyze the facts of Bostick's case in light of the factors set forth in *United States v. Mendenhall*.[109] The Court in *Mendenhall* first established the "free to leave" test, and then provided examples of circumstances that might indicate a seizure.[110] Among them were "the threatening presence of several officers" and "the display of a weapon by an officer."[111] Bostick was confronted by two police officers, at least one of whom was noticeably carrying a weapon.[112] Rather than consider these events important circumstances in Bostick's encounter, the Court merely noted the officer never removed the gun from its pouch, pointed it at Bostick, or threatened him with it.[113]

Mendenhall could be read more broadly, however, to encompass situations when an officer simply makes it known that he has a weapon, but does not actually point it at a citizen. It is likely the level of intimidation in that instance is still great enough to constitute coerced consent. By not considering the presence of the two officers and that one conspicuously carried a gun, the Court further narrowed its definition of seizure and restricted the possibility of finding Fourth Amendment violations in future cases.

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101. *Id.* at 2388.
102. Florida v. Royer, 460 U.S. 491 (1983).
103. *Id.* at 497 (emphasis added).
104. *Id.*
105. Florida v. Bostick, 111 S. Ct. at 2385.
106. *Id.*
107. *Id.* at 2386.
108. *Id.* at 2389.
109. United States v. Mendenhall, 446 U.S. 544, 554 (1980).
110. *Id.*
111. *Id.*
112. Bostick v. State, 554 So. 2d 1153, 1157 (Fla. 1989), *rev'd*, Florida v. Bostick, 111 S. Ct. 2382 (1991).
113. Florida v. Bostick, 111 S. Ct. at 2385.

The Court also further relaxed the requirement that police officers have at least an "articulable suspicion" of wrongdoing.[114] Several dangers may foreseeably arise from this holding. Among them is the likelihood of discriminatory practices by law enforcement officers who might randomly and without reasonable suspicion select individuals for questioning on the basis of race.[115] Another danger is that many individuals will not feel comfortable in denying police access to their luggage or other belongings simply because they do not realize they have the right to refuse consent. It is quite likely most people are intimidated by the mere presence of police officers, and even more intimidated by a direct confrontation with them. Most would probably feel compelled to answer the officers' questions regardless of whether they were told compliance was not required. Although the Court has repeatedly held the State does not have to prove a defendant knew he had the right to withhold consent, it has also held this lack of knowledge could be considered in determining if the consent was voluntary.[116] The Court's disregard for this general societal premise indicates either an ignorance of the ability of an average person to refuse consent, or a conscious policy decision that the importance of allowing police encounters for drug searches outweighs any discomfort an individual may feel when randomly approached by police.

The Court nevertheless continues to maintain the strict standard that voluntary consent must be given in order for a search of an individual's belongings to be valid and constitutional. This requirement, along with the standard that police convey a message that one need not respond to questioning, may still provide an individual with the basic freedoms Justice Marshall and the Florida Supreme Court feared were unnecessary casualties in the "war on drugs."[117] Courts must use the Supreme Court's test of the "consensual nature" of the encounter carefully, however, and apply it with an eye to justice and to the rights of citizens.

Rita H. McMillen

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114. *Id.* at 2386, 2388.

115. At least one officer who routinely confronted interstate travelers on buses admitted race influenced his decision of whom to approach for questioning. Florida v. Bostick, 111 S. Ct. at 2390 n.1 (Marshall, J., dissenting).

116. *See* Florida v. Rodriguez, 469 U.S. 1, 6-7 (1984).

117. *See supra* text accompanying notes 68-93.