



1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	ERIC SCHNAPPER, ESQ.	
4	On behalf of the Petitioner	3
5	LISA S. BLATT, ESQ.	
6	On behalf of the United States, as amicus	
7	curiae, supporting the Petitioner	17
8	FRANCIS H. YOUNG, ESQ.	
9	On behalf of the Respondent	27
10	REBUTTAL ARGUMENT OF	
11	ERIC SCHNAPPER, ESQ.	
12	On behalf of the Petitioner	52
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1 P R O C E E D I N G S

2 (12:59 p.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument  
4 next in Case 06-1595, Crawford v. The Metropolitan  
5 Government of Nashville and Davidson County, Tennessee.  
6 Mr. Schnapper.

7 ORAL ARGUMENT OF ERIC SCHNAPPER

8 ON BEHALF OF THE PETITIONER

9 MR. SCHNAPPER: Mr. Chief Justice, and may  
10 it please the Court:

11 When Vicky Crawford reported to city  
12 officials that she had been repeatedly harassed by the  
13 board's director of employee relations, her conduct was  
14 protected by section 704(a) of Title VII. It is  
15 protected first by the first clause of section 704(a),  
16 which is known as the opposition clause. The opposition  
17 clause has three elements that must be proven. Only one  
18 of them is at issue here. But just to set the context,  
19 first a plaintiff will have to prove that the employer  
20 acted with a retaliatory motive. Second, the employee's  
21 statement or conduct must relate to action that was  
22 unlawful under Title VII. It might be something that  
23 happened in the past. It might be a concern about  
24 something that might happen in the future.

25 And third, the conduct must be in the nature

1 of opposition, and that's the question in dispute in  
2 this particular case.

3 It is our view that the -- it is sufficient  
4 to establish that element if a reasonable person would  
5 conclude from the employee's statement or conduct that  
6 the employee disapproved of or objected to the  
7 employment practice in question.

8 JUSTICE SCALIA: So a co-worker of your  
9 client says: You know, the boss really was guilty of  
10 sexual harassment and the co-worker says: Gee, that's  
11 terrible.

12 MR. SCHNAPPER: Yes, yes.

13 JUSTICE SCALIA: That's enough? That's  
14 opposition?

15 MR. SCHNAPPER: Yes. Yes, it is. In fact,  
16 there are cases involving --

17 CHIEF JUSTICE ROBERTS: What if it's just,  
18 sexual harassment is terrible?

19 MR. SCHNAPPER: That would be covered. If  
20 an employee wore a button --

21 CHIEF JUSTICE ROBERTS: Even if there's no  
22 link, there's no link to the person that the original --  
23 the complainant says was engaged in that activity?

24 MR. SCHNAPPER: The opposition doesn't have  
25 to be directed at a particular event.

1 JUSTICE SCALIA: What about, violating the  
2 law is terrible?

3 MR. SCHNAPPER: I think if there's no  
4 reference to Title VII that wouldn't suffice.

5 JUSTICE SCALIA: Okay. But if she said that  
6 in response to the remark by the co-worker that she had  
7 been subjected to sexual harassment and then the remark  
8 was "Violating the law is terrible," that's opposition?

9 MR. SCHNAPPER: I think a trier of fact  
10 could conclude she was referring to what the co-worker  
11 had just said.

12 CHIEF JUSTICE ROBERTS: So if Mr. Jones, the  
13 person, did that, that's terrible.

14 MR. SCHNAPPER: Yes.

15 CHIEF JUSTICE ROBERTS: That's actionable as  
16 opposition to the practices?

17 MR. SCHNAPPER: It is protected. If the  
18 employer comes in and fires her for having said that.  
19 The case --

20 JUSTICE GINSBURG: Mr. Schnapper --

21 JUSTICE KENNEDY: I was going to say in part  
22 it seems to me that in isolation it seems harmless,  
23 almost trivial, but the whole point is that the employer  
24 doesn't think it is trivial. The employer uses it, by  
25 hypothesis, as a basis to retaliate.

1                   MR. SCHNAPPER: Right. That's why the  
2 elements are important. If the employer fires a worker  
3 for that --

4                   JUSTICE SCALIA: But that doesn't solve the  
5 problem of having too broad an entry into this thing.  
6 You get to the jury by just showing that she said "Oh,  
7 if he did that, it's terrible," and then it's up to the  
8 jury all of a sudden whether that is the reason that the  
9 employer fired this person or not. I mean, that just  
10 leaves -- lays the employer open to a lot of jury  
11 determinations that he shouldn't be subject to, it seems  
12 to me.

13                  MR. SCHNAPPER: With all deference, Your  
14 Honor, the plaintiff must have sufficient evidence to  
15 get to the jury on all three elements. Retaliation  
16 claims are routinely dismissed on the causation element.  
17 There's not usually a dispute about whether the conduct  
18 was protected, and this case in that regard is unusual.  
19 But the --

20                  JUSTICE SOUTER: Do you believe, as I  
21 understood you to suggest a moment ago, that you could  
22 prove causation if the statement "It is terrible" or  
23 "Sexual harassment is terrible" had been uttered in  
24 effect in the abstract without reference to particular  
25 behavior or a charge of particular behavior on the part

1 of a co-worker or an employer? In other words, if A  
2 says "Sexual harassment is terrible" and elsewhere in  
3 the company sexual harassment is going on and A is then  
4 fired, would it be your view that A would at least state  
5 a claim if A said, I had expressed disapproval of sexual  
6 harassment, it turns out there was sexual harassment  
7 being gone -- taking place elsewhere; and I was fired  
8 for that reason. Would that at least state a claim that  
9 would get a harassment case into court?

10 MR. SCHNAPPER: Up --

11 JUSTICE SOUTER: What I'm getting at,  
12 doesn't the statement "It's terrible" or whatever the  
13 opposition may be have to be made in relation to some  
14 specific activity?

15 MR. SCHNAPPER: No, Your Honor. No, Your  
16 Honor.

17 JUSTICE SOUTER: Then what is the limit? It  
18 seems to me you've got a cause of action in effect under  
19 the statute that would be virtually unlimited. Anybody  
20 who thinks sexual harassment is bad and later gets fired  
21 can claim retaliation under the statute if it turns out  
22 just as a matter of good luck that somebody was being  
23 sexually harassed unbeknownst to the speaker.

24 MR. SCHNAPPER: That's at least two  
25 questions. Let me try to answer them both. With regard

1 to what would constitute protected activity, it is our  
2 view -- and I think this is consistent with the lower  
3 courts and the view of the government -- that there  
4 doesn't have to actually be a violation. If a worker  
5 walks into the office with a button saying "Violations  
6 of Title VII are bad and I'm against them," she can  
7 be -- and fired for that, that's illegal even though  
8 nothing was going wrong.

9 JUSTICE GINSBURG: But why are we -- why are  
10 we spending so much time on hypotheticals that are so  
11 far from this case? This was a person who appeared at  
12 an internal proceeding, she gave testimony, very  
13 specific testimony. She wasn't saying: I'm against  
14 harassment. She said: This boss harassed me. It is  
15 about as specific as you get. So we're dealing with a  
16 particular case of somebody who was a witness in an  
17 internal investigation. Why do we have to reach the  
18 outer boundaries of this claim in this case?

19 MR. SCHNAPPER: You do not, Your Honor.

20 CHIEF JUSTICE ROBERTS: Well, but, you know,  
21 that's why we ask hypotheticals that aren't related to  
22 the specific facts, because we're interested in how  
23 broadly the proposition you're asking for goes. I'd  
24 still like to find out where you draw the limit. What  
25 if the person says: Mr. Jones would never do anything



1     like that, but if he did that would be terrible. Now,  
2     is that actionable as opposition?

3                 MR. SCHNAPPER: Yes. Expressing  
4     disagreement with conduct that violates the law is what  
5     the opposition clause protects. It doesn't have to be  
6     about a specific instance, although it emphatically is  
7     so here. It doesn't have to reference the statute.

8                 JUSTICE SCALIA: And there does not have to  
9     have been sexual harassment in the employment unit.

10                MR. SCHNAPPER: That's right.

11                JUSTICE SCALIA: So this is a law directed  
12     against expressive activity.

13                MR. SCHNAPPER: Yes. Yes.

14                JUSTICE SCALIA: Are those laws good? I  
15     thought we had a First Amendment.

16                MR. SCHNAPPER: No, no. It is a law that  
17     protect expressive activity and those laws are  
18     excellent. It protects the activity.

19                JUSTICE ALITO: What if the employee just  
20     made -- reports factual information: Supervisor did  
21     such and such; doesn't express opposition to it. Or  
22     what if the employee goes further and says: Supervisor  
23     did such and such, but I know he was just kidding; or I  
24     hope you don't take any action against that person.  
25     Would that be opposition?

1 MR. SCHNAPPER: Not necessarily. Again, it  
2 depends on the question that was asked and the answer  
3 that was given. If I might, for example, in this case  
4 the question was did Mr. Hughes engage in inappropriate  
5 activity. That was a request -- I think a trier of fact  
6 could understand that that was a request for a  
7 description of something that the witness objected to.

8 JUSTICE ALITO: Let me ask this. Suppose  
9 the employer conducts an investigation because it  
10 believes that the supervisor has engaged in improper  
11 activity. So what they are trying to do is substantiate  
12 grounds for dismissal or some other sanction. And then  
13 an employee provides information that's exculpatory.  
14 Can -- is that protected? Is that -- is that  
15 information protected.

16 MR. SCHNAPPER: It's our view that that is  
17 not protected by the opposition clause. It is our view  
18 it would be protected by the participation clause.

19 If I might get back to the question --

20 JUSTICE ALITO: Isn't it strange when there  
21 are many situations in which testimony or the reporting  
22 of information is protected, but when it's done, isn't  
23 it usually done both ways, as it is under the  
24 participation clause? So that the testimony is --  
25 cannot be the subject of retaliation or the reporting of

1 information cannot be the subject of retaliation, but  
2 not it's protected only if it goes in one direction?  
3 Isn't that a very odd approach to that situation?

4 MR. SCHNAPPER: That's why we're advancing  
5 the view that the participation clause here provides as  
6 well, so that it's clear that exculpatory witnesses are  
7 protected. It is not unimaginable that an exculpatory  
8 witness would anger someone.

9 But going back to the question you asked  
10 earlier, it's possible that in response to a question an  
11 answer might be given which a reasonable person would  
12 not conclude reflected disapproval such as, well, he  
13 told that joke, and I thought it was funny.

14 And, indeed, in the Harris v. Forklift case  
15 there were witnesses like that who -- who confirmed that  
16 the owner of Harris Forklift had made the jokes in  
17 question but said they didn't mind. That that would not  
18 be our position at --

19 JUSTICE ALITO: Wouldn't that be very  
20 strange? Suppose that this -- the factual situation  
21 actually is very severe and is enough to -- to establish  
22 liability on the employer's part, but this particular  
23 reporting employee doesn't think so. So then the  
24 employer might well be very annoyed that this  
25 information which can be the -- the basis for liability

1 has been brought out against the employer, and the  
2 employer might want to retaliate.

3 Why would that be unprotected just because  
4 this employee adds his or her opinion that it isn't  
5 serious?

6 MR. SCHNAPPER: We think it is protected by  
7 the participation clause.

8 JUSTICE BREYER: Why don't you follow what  
9 the EEOC says? I mean, the EEOC, as I understand it,  
10 has said the very fact the employer has initiated an  
11 investigation of an alleged discrimination is sufficient  
12 to demonstrate the reasonableness of the employee's  
13 belief that by providing information relevant to the  
14 inquiry she is opposing an employment practice made  
15 unlawful by Title VII.

16 And then they go on. To be absolutely clear  
17 about it, they say an employee who assists her or her  
18 employer in the endeavor, i.e., you go and testify; so  
19 the sun was shining on that day; you are assisting your  
20 employee by telling the truth-- is by definition -- is  
21 opposing practices made unlawful by Title VII.

22 So here we have a difficult question, quite  
23 an interstitial question, defining precisely "opposing,"  
24 and here we have the EEOC doing it. So why don't we  
25 just follow what they say?

1 MR. SCHNAPPER: Well, I -- that would --  
2 that would certainly be fine with us.

3 JUSTICE SCALIA: It wouldn't be fine with  
4 me.

5 MR. SCHNAPPER: We get to the same place --  
6 we get to the same place by a different route.

7 JUSTICE SCALIA: What if -- what if I am  
8 indeed very much in favor of sexual harassment? I am a  
9 world class sexual harasser, but I'm also not a liar,  
10 and I'm -- I am subpoenaed or called up by the employer  
11 in connection with this internal investigation and asked  
12 whether so-and-so harassed a particular worker. And I'd  
13 say, yes, as a matter of fact, he did, and a good thing  
14 too.

15 Is that expressing opposition?

16 MR. SCHNAPPER: No. We believe it is  
17 covered by the participation clause. We think --

18 JUSTICE SCALIA: Covered by the  
19 participation clause?

20 MR. SCHNAPPER: Because our view is that the  
21 employer's internal processes for detecting and rooting  
22 out sexual harassment, for example, is a -- is a process  
23 -- is a process that's under this title within the  
24 meaning of --

25 JUSTICE BREYER: Is this a real problem? I

1 mean, let's suppose the opposition clause protects  
2 everybody in the internal investigation who could be at  
3 all interpreted as favorable to the complainant. It  
4 also protects everybody who could possibly be viewed as  
5 neutral.

6 Then you have a problem about what about a  
7 person who loves sexual harassment? This is the  
8 hypothetical: he comes in, testifies: I love sexual  
9 harassment; it's wonderful, and they fire him. Now is  
10 this a real problem?

11 MR. SCHNAPPER: It -- it is not, Your Honor.  
12 But -- but as the -- as the Chief Justice pointed out,  
13 I'm -- you know, I'm here to answer hypothetical  
14 questions, and I'm going to do so.

15 JUSTICE GINSBURG: But I thought that --  
16 [Laughter.]

17 JUSTICE GINSBURG: But I thought that the --  
18 real case -- the real case that we're dealing with is  
19 somebody who appeared in an internal investigation, and  
20 I thought that what was the debate between the two  
21 sides; anyone who made a charge, testified, assisted, or  
22 participated in any manner in the investigation, I  
23 thought that the other side's position was, well, this  
24 is not an "investigation" within the meaning of the  
25 statute. That what goes on internally doesn't qualify.

1 "Investigation," "proceeding," or "hearing"  
2 under Title VII requires first that there be a Title VII  
3 charge. I thought that that's what the controversy  
4 we're talking about today is about: Is this a  
5 qualifying investigation?

6 MR. SCHNAPPER: Your Honor, there actually  
7 are two distinct questions here. One of them is whether  
8 the conduct is protected by the opposition clause and  
9 whether it constitutes opposition.

10 The second question is whether this conduct  
11 is protected by the participation clause and would be an  
12 investigation under Title VII. We are asserting  
13 arguments under both claims, and -- and the Respondents  
14 disagree with us on both.

15 CHIEF JUSTICE ROBERTS: And those are  
16 overlapping but not whatever it -- concurring --

17 MR. SCHNAPPER: Redundant.

18 CHIEF JUSTICE ROBERTS: -- positions. You  
19 can oppose without participating. You can participate  
20 without opposing.

21 MR. SCHNAPPER: Right. Right. This case is  
22 both. But -- but there are circumstances which are only  
23 one or the other.

24 And this is -- this is a statute that --  
25 that is deliberately written with overlapping provisions

1 to be sure nothing is missed.

2 In the phrase in the Fort Stewart case, I  
3 think, Justice Scalia, it is ex abundante cotilla, out  
4 of an abundance of caution, or in modern terms boots --  
5 belt and suspenders. So these are deliberately  
6 overlapping provisions to -- to assure that --

7 JUSTICE ALITO: What is the test for  
8 determining whether an investigation has been done, and  
9 the person has testified? What degree of formality, if  
10 anything, is necessary?

11 If -- if somebody in -- in the company  
12 simply goes to the office of an employee or the  
13 workplace of an employee or encounters the employee in  
14 the hallway or someplace and asks a question, is that  
15 enough? Does it have to be --

16 MR. SCHNAPPER: No.

17 JUSTICE ALITO: -- a sort of a formal  
18 proceeding in -- in some sense?

19 MR. SCHNAPPER: It -- it -- in our view, it  
20 doesn't have to be formal, but there are two essential  
21 elements to an investigation or a proceeding or anything  
22 other internal being under this title. The first is  
23 that the employer must have a rule or policy forbidding  
24 the type of discrimination in question which is similar  
25 to the requirements in section 706(c) for State and



1 local agencies.

2 Second, the individual -- the official who  
3 did whatever you describe has to have been specifically  
4 authorized by the employer to play that role. Vicarious  
5 here wouldn't cover it.

6 If I could reserve the balance.

7 CHIEF JUSTICE ROBERTS: Thank you, counsel.

8 Ms. Blatt.

9 ORAL ARGUMENT OF LISA S. BLATT

10 ON BEHALF OF THE UNITED STATES,

11 AS AMICUS CURIAE,

12 SUPPORTING THE PETITIONER

13 MS. BLATT: Thank you, Mr. Chief Justice,  
14 and may it please the Court.

15 We think this case is best resolved under  
16 the opposition clause, and that clause does not require  
17 employees to utter magic words of opposition or to  
18 initiate the interview in which they express opposition  
19 to unlawful conduct. Rather, the clause is satisfied  
20 when a reasonable person would understand that the  
21 employee has objected to sexual harassment in the  
22 workplace.

23 And when an employee discloses or reports  
24 that she has been subject to unlawful sexual harassment,  
25 a reasonable person could certainly infer that the

1 employee opposes a practice made unlawful by the  
2 statute.

3 CHIEF JUSTICE ROBERTS: In that case,  
4 doesn't the opposing employee herself have a direct  
5 cause of action under Title VII? Given what  
6 Ms. Crawford described, you know, "that happened to me,  
7 too," she could proceed under Title VII herself.

8 MS. BLATT: Right. She has got timing  
9 requirements. So if she hasn't complained to the EEOC  
10 within the relevant time, she wouldn't have a cause of  
11 action for discrimination. But once she has  
12 retaliated -- an adverse action is taken against her  
13 because of what she has reported, then she has timing  
14 requirements on when she has to sue for the retaliation,  
15 and she did that here.

16 And this is a case where the Sixth Circuit  
17 tossed the case out on summary judgment, and it erred in  
18 doing so because the facts alleged in this case were  
19 more than ample to survive summary judgment on the  
20 question of whether she opposed what the Director of  
21 Employee Relations did to her.

22 She alleged that in the context of a sexual  
23 harassment investigation in which she was asked to  
24 disclose inappropriate behavior by the director, she  
25 reported repeated instances of offensive, objectionable,

1 and unwelcome conduct by him. For instance, she said  
2 that she had her head pulled into his lap and that in  
3 response she threw him out of the office, thereby  
4 indicating that she did not like this conduct.

5 The jury could easily infer from those facts  
6 that she opposed the director's conduct. Now, that  
7 timing would --

8 CHIEF JUSTICE ROBERTS: Would you go as far  
9 as Mr. Schnapper in determining what constitutes  
10 "opposition"? I mean, do you agree with him that a case  
11 where somebody says, "oh, Mr. Jones would never do that,  
12 and if he did, I think that would be awful" -- is that  
13 "opposition"?

14 MS. BLATT: If you -- yes, if a reasonable  
15 person could infer that. I think that we are similar.

16 But if you just are a reporter of unlawful  
17 conduct, that's enough. But this case is easier, much  
18 easier. She was a victim.

19 CHIEF JUSTICE ROBERTS: Yes, yes, I know,  
20 but -- I know, but --

21 MS. BLATT: I understand that. And if --  
22 you can either decide the broader question or the  
23 question of the Petitioner here, which she reported that  
24 she was subject, and it makes it all the more evident,  
25 and certainly a jury could have found that she opposed

1 the conduct.

2 But we do think that at least a reasonable  
3 inference could be drawn -- when you report facts that  
4 would constitute unlawful activity, the reasonable  
5 inference is that you have objected.

6 CHIEF JUSTICE ROBERTS: Facts that would  
7 constitute unlawful activity. What about facts that --  
8 I mean, many of these cases, of course, are  
9 he-said/she-said cases, and what about the facts that  
10 you are reporting confirm one side or the other? They  
11 just ask you, look -- and, you know, the person says,  
12 "Well, every day at three o'clock he came in and do  
13 this," and you're outside. And he says, "No, I wasn't  
14 there."

15 MS. BLATT: Right. If you just have a --

16 CHIEF JUSTICE ROBERTS: Are you opposing it  
17 if you say -- you know, you are asked, "Well, you know,  
18 you sit outside the office; did he come in there or  
19 not?" And you say, "Yes, he did."

20 MS. BLATT: I think this is where we have  
21 not embraced the position of the EEOC, that we don't  
22 think that expresses opposition if all you do is say,  
23 "here's what a person's job duties were and he was in  
24 town on that day" or "I had lunch with him on that day,"  
25 and that would verify -- it may verify a victim's

1 statement or corroborate it and thereby be the essential  
2 evidence in the case, but it wouldn't come within the  
3 statutory language of opposing.

4 CHIEF JUSTICE ROBERTS: Even you knew that  
5 that was the critical fact in resolving the complaint?

6 MS. BLATT: If a reasonable -- well, if a  
7 reasonable person knew from all the circumstances, then  
8 maybe. If this -- unfortunately, if you don't like jury  
9 trials, this is a jury question whether you oppose the  
10 practice or not, and it would have to go to a jury based  
11 on the totality of the evidence.

12 JUSTICE SCALIA: Well, since this is a case  
13 where the --

14 JUSTICE KENNEDY: It seems to me that the  
15 participation clause is the line of least resistance. I  
16 understand we have to say what a hearing is and so  
17 forth. Are you asking us to resolve on the opposition  
18 clause because that will give more guidance to the  
19 system or --

20 MS. BLATT: No. When you said "least  
21 resistance," it certainly is the most sweeping and broad  
22 coverage. In that sense, you cover all witnesses and  
23 participants in the process, and we think Congress  
24 intended to do so here.

25 CHIEF JUSTICE ROBERTS: The opposition

1 clause is?

2 MS. BLATT: The participation clause is much  
3 broader coverage. It could -- it would cover anyone who  
4 participates in the investigation, whether or not they  
5 oppose the practice.

6 CHIEF JUSTICE ROBERTS: Well, it depends how  
7 you define the investigation --

8 MS. BLATT: Opposition.

9 CHIEF JUSTICE ROBERTS: -- the inquiry, and  
10 that's kind of a tough issue, it seems to me.

11 MS. BLATT: If this were before the EEOC,  
12 everybody who testifies in that proceeding or  
13 participates in the investigation would be covered. It  
14 doesn't matter whether you oppose a practice.

15 CHIEF JUSTICE ROBERTS: Right.

16 MS. BLATT: So in that sense, it's broader.  
17 The reason why this case is easier for you, under the  
18 opposition clause, is it's a narrow holding and it  
19 doesn't get you into the question of whether just an  
20 employer investigation is an investigation --

21 CHIEF JUSTICE ROBERTS: Well, I guess the  
22 question I was asking earlier, you have overlapping but  
23 not concentric categories, so the "opposing" may be  
24 broader than the "participating in" depending upon how  
25 we define either one.

1 MS. BLATT: That's exactly right, but at a  
2 minimum when you have a victim of sexual harassment who  
3 reports it to her employer in the context of an  
4 investigation where she's asked was there anything  
5 inappropriate and she recounts here, it's so clearly  
6 opposition. It so clearly should not have been thrown  
7 out on summary judgment. And it so clearly can force --

8 JUSTICE STEVENS: You think -- you think the  
9 conduct in this case is also covered by the  
10 participation clause?

11 MS. BLATT: Absolutely.

12 JUSTICE STEVENS: You do?

13 MS. BLATT: Yes.

14 JUSTICE BREYER: The problem with that is  
15 that I -- while I have the EEOC with me, say, on --  
16 assuming your thing -- on, from what I read, on the  
17 opposition clause, when I looked into what the EEOC  
18 actually said here on the participation clause, I don't  
19 think I can characterize it, except for their litigation  
20 position.

21 MS. BLATT: But that --

22 JUSTICE BREYER: I can't characterize what  
23 they've said in their compliance manual as being with  
24 you on that.

25 MS. BLATT: That's correct. We don't and

1     neither does the EEOC interpret their compliance manual  
2     as --

3                 JUSTICE BREYER:   And they could easily  
4     change it.   They could easily change it.

5                 MS. BLATT:   Yes, it is true that it's in a  
6     brief, it's on their Website, it's on home page, on  
7     their Website.

8                 JUSTICE BREYER:   Yes.   It's not in their  
9     manual.

10                MS. BLATT:   It's not in their compliance  
11    manual; it's in our amicus brief, but it is the EEOC's  
12    position.   And, again, that's why I think it's an easier  
13    case for you under the opposition clause.

14                JUSTICE ALITO:   Can you think of any other  
15    situation in which the law says that a person who  
16    testifies or provides information is protected against  
17    retaliation only if that person gives testimony of a  
18    particular type or gives a statement of a particular  
19    type?

20                MS. BLATT:   No, but you have to remember  
21    there are two separate clauses.   The statute under the  
22    opposition clause just says "oppose a practice made  
23    unlawful."   If you didn't oppose a practice, you're not  
24    covered under that.   You would be covered under -- in  
25    the proceeding, why there is such broad coverage.   Once



1    you're under the participation clause, no matter what  
2    the substance of your testimony is, it's covered. It  
3    protects the process itself, regardless of whether it  
4    was -- it was determined true.

5                   JUSTICE ALITO: Well, I understand that, but  
6    I'm -- what I'm asking is, is the reason to doubt  
7    whether Congress intended in the opposition clause to  
8    provide protection only for people who testify or  
9    provide information that goes in a particular direction?

10                  MS. BLATT: I think --

11                  JUSTICE ALITO: If the purpose is to -- is  
12    to elicit information and protect the people who come  
13    forward with the information, then why don't you provide  
14    the protection irrespective of what the person says?

15                  MS. BLATT: I think that position is  
16    consistent with the EEOC, and I don't think we would  
17    oppose that position in the sense that it would give the  
18    greatest and broadest protection.

19                  And what is so upsetting about this case is  
20    the gaping hole in statutory coverage that the Sixth  
21    Circuit left. It is an inexplicable gap that a  
22    complaining witness in an employer investigation would  
23    be unprotected from retaliation. The statute simply  
24    can't function, as intended by Congress, as intended by  
25    this Court, if there are all these incentives for

1 employees to investigate unlawful activity, witnesses  
2 come forward and report that they, in fact, have been  
3 subjected to sexual harassment, and employers are free  
4 to retaliate. They --

5 JUSTICE KENNEDY: I think that's a very  
6 strong argument for the participation clause.

7 MS. BLATT: It is. It is, but it's all the  
8 more reason that she has to be covered under one of them  
9 if not both of them. Witnesses simply are going to be  
10 afraid to fully cooperate if they're not given  
11 protection.

12 And if there are no questions, we'd ask that  
13 the Sixth Circuit be --

14 JUSTICE GINSBURG: The -- the other side  
15 says this is not an investigation. There was no charge  
16 filed. She's filed no charge. So this is not a  
17 qualifying investigation. What is the government's  
18 position on that?

19 MS. BLATT: Well, I mean, we think that is  
20 border-line absurd, although all courts that have  
21 reached the issue have held that. And it just -- it  
22 makes no sense, and it -- I'm not even --

23 CHIEF JUSTICE ROBERTS: I'm sorry. Have  
24 held what?

25 MS. BLATT: Have held that -- that the

1 internal investigation is covered as long as somebody  
2 has filed a charge. It's not clear who or that it has  
3 to be related to the subject matter. And that would  
4 mean if the investigation is conducted on the day a  
5 charge is filed at noon, all the witnesses who came in,  
6 in the morning, are unprotected; yet all the witnesses  
7 who came in, in the afternoon, would be protected. Yet  
8 nobody even knows that a charge has been filed. And  
9 that's just not something that Congress possibly could  
10 have intended and wanted to leave the morning witnesses  
11 unprotected from retaliation.

12 So I don't think the current state of the  
13 law under the participation clause is supported by the  
14 text, and it's certainly not supported by any policy  
15 under Title VII.

16 No questions?

17 CHIEF JUSTICE ROBERTS: Thank you, counsel.

18 Mr. Young.

19 ORAL ARGUMENT OF FRANCIS H. YOUNG

20 ON BEHALF OF THE RESPONDENT

21 MR. YOUNG: Thank you, Mr. Chief Justice,  
22 and may it please the Court:

23 Title VII was the result of a congressional  
24 compromise which struck a balance between protecting the  
25 interests of employees and employers.

1                   In relation to the anti-retaliation  
2   provisions of section 704, that balance was struck to  
3   protect the rights of employees to report allegedly  
4   discriminatory activity, as well as employers' rights to  
5   manage their workplaces. The participation clause  
6   covers activity or conduct in the course of an  
7   investigation, proceeding, or hearing under Title VII.

8                   The opposition clause -- the actual words of  
9   the opposition clause protect an employee who has  
10  opposed a particular unlawful practice.

11                  CHIEF JUSTICE ROBERTS: What -- what more  
12  could Ms. Crawford do to make it clear that she opposes  
13  what was alleged in this case?

14                  MR. YOUNG: She could have -- she could have  
15  initiated making contact with the government official to  
16  register a complaint or an objection.

17                  Instead, she made a disclosure or she  
18  cooperated in the investigation, Your Honor.

19                  CHIEF JUSTICE ROBERTS: Well, how can the  
20  fact that what led to the statement change the  
21  characterization of the statement? She can initiate it,  
22  go in and say, "I oppose what's going on," or if  
23  somebody just asks her, you know, "how do you feel about  
24  what's going on," she says she opposes it. It seems to  
25  me in either case you look at the statement and not what

1 led to the statement.

2 MR. YOUNG: Congress chose to use the word  
3 "oppose," Your Honor. That's why the short --

4 CHIEF JUSTICE ROBERTS: That's why my  
5 hypothetical uses the word "oppose." In the first case,  
6 she goes in of own volition and says, "I oppose"; in the  
7 second case, she says "I oppose" in response to a  
8 question. Congress used the word "oppose," and my  
9 hypothetical in both cases used the word "oppose."

10 MR. YOUNG: If she's not taking the  
11 initiative, then she has to report it and request that  
12 something be done about it. Does the word -- if she  
13 uses the word "oppose," as in your hypothetical, that  
14 would not be the facts of this case, but that would  
15 probably nudge it to the line of opposition conduct  
16 because she's using the word "oppose."

17 CHIEF JUSTICE ROBERTS: Right. Well, is it  
18 real a magic word? She comes in and says, "you won't  
19 believe" -- you know -- "you think that's bad, wait till  
20 I tell you what he did to me," and goes on tells -- it's  
21 quite obvious from the context that she opposes it.

22 MR. YOUNG: Well, that's why we advocate a  
23 reasonableness standard, Your Honor, in the ears of the  
24 person receiving the information, but under the facts of  
25 this case, that standard was not met.

1           The true opposition activity -- it's called  
2   the opposition clause, not the disclosure clause, not  
3   the cooperation clause. There's an element -- and all  
4   the parties have provided the Court with a dictionary --  
5   the various dictionary definitions of the word "oppose,"  
6   all of which contain the common theme of resistance,  
7   coming up against something, communicating resistance.

8           When the -- when what Mrs. Crawford said to  
9   the human resources investigator in response to  
10   questioning is actually examined, it is making a  
11   disclosure. There's no request that anything be done  
12   about it. The time lag between the end of the alleged  
13   harassment and the actual reporting is over two months.  
14   Mrs. Crawford had multiple opportunities to report to  
15   her supervisor, her supervisor's supervisor, the  
16   director of employee --

17           JUSTICE SOUTER: You mean if she had made  
18   complaints after she had answered the questions in --  
19   and given the information at issue here, that would  
20   convert her prior statements into opposition?

21           MR. YOUNG: That would -- the fact that Your  
22   Honor chose the term "complaint" would be a different  
23   situation from what we had here. A subsequent --

24           JUSTICE SOUTER: I'm asking you. You're in  
25   effect saying there has got to be some kind of what you

1 call active opposition; and I took it from what you said  
2 a moment ago that if she had given the evidence in  
3 question here, and then in the period, subsequent period  
4 of two months, made some sort of complaint, that that  
5 complaint would have qualified her original evidence as  
6 opposition.

7 Is that your position?

8 MR. YOUNG: That complaint would undoubtedly  
9 be opposition. Would it reach back --

10 JUSTICE SOUTER: You're taking about --

11 MR. YOUNG: Would it retroactively imbue the  
12 initial disclosure with an opposition quality? Yes.  
13 Yes.

14 JUSTICE SCALIA: It would? Why? It doesn't  
15 seem so to me. I mean, it either was or wasn't. You're  
16 making the argument, essentially, that "oppose" has two  
17 quite different meanings. You can ask somebody, you  
18 know, do you oppose the war in Iraq? And all you're  
19 asking is what is your opinion of the war in Iraq. Do  
20 you think it is good or bad?

21 But "oppose" is also used in a quite  
22 different sense. He -- you say somebody opposed the war  
23 in Iraq, you mean he went out and -- and paraded against  
24 it and so forth.

25 And your assertion is that in this

1 legislation, it has the latter meaning. It just doesn't  
2 ask for your opinion about whether sexual harassment is  
3 good or bad. It asks whether you were actively --  
4 actively opposing it.

5 Now, once you adopt that position, I don't  
6 see how the fact that you -- that something that was not  
7 active opposition can be converted into active  
8 opposition by something that occurred later.

9 I mean, if you want to abandon your other  
10 argument, that's fine with me, but --

11 (Laughter.)

12 MR. YOUNG: Your Honor, I'm uncomfortable  
13 with the concept that subsequent -- a subsequent  
14 complaint can imbue a prior statement with that --

15 JUSTICE SCALIA: Would that uncomfortable?  
16 Say it doesn't. I mean, I -- I don't care if you're  
17 uncomfortable with it. Does it or doesn't it?

18 MR. YOUNG: Perhaps yes. But if it does --

19 JUSTICE SCALIA: Then I don't understand  
20 your case.

21 MR. YOUNG: Well, Your Honor, I -- I don't  
22 see that distinction as being relevant. Because if --  
23 if a subsequent complaint is made a month, two months  
24 after the initial disclosing conduct, then we're -- then  
25 we're traveling on that subsequent complaint.



1           And the fact that a disclosure was made a  
2   month or two prior doesn't become a relevant watershed  
3   date in terms of when the protections of the statute  
4   arise.

5           The -- the -- the concept is something more  
6   than disclosure, something more than mere cooperation.  
7   The language of the statute is he or she has opposed a  
8   specific practice, not just opposition to the war in  
9   Iraq in general; not just opposition to sexual  
10   harassment in general; but that a specific --

11           JUSTICE SCALIA: It isn't just a specific --  
12   again, if I don't understand your case, it isn't just a  
13   matter of the specific practice.

14           Your point is it is not asking your opinion.  
15   It is asking whether you are actively trying to  
16   eliminate it.

17           I think even if -- if you were asked your  
18   opinion, you know, do you -- do you oppose what, you  
19   know, what this supervisor did? And -- and you said  
20   yes, I don't favor it, I think it's bad, I think it's a  
21   bad idea, I -- as I understand your case, that's not  
22   opposition.

23           MR. YOUNG: Your Honor --

24           JUSTICE SCALIA: And I don't see how that is  
25   changed at all when you put it in the context of a

1 specific act of harassment as opposed to putting it in  
2 the context of harassment in general.

3           You -- you -- if you're hiding behind the --  
4 the defenses you've built up, it seems to me those  
5 defenses require something more than an expression of  
6 your opinion of whether it's good or bad.

7           Your opinion is whether it's good or bad is  
8 not opposition.

9           MR. YOUNG: I agree with that, Your Honor.  
10 I used the term "practice" inartfully. Our argument is  
11 there is a specific act that the employee considers to  
12 be unlawful, and that's what the employee is opposing.  
13 So that is what needs to be communicated to a reasonable  
14 person within the government or within --

15           JUSTICE SOUTER: If the -- if the employee  
16 in response to the inquiry that's being made says yes, I  
17 saw my employer do "X" and it happened -- and I think  
18 it's terrible, that is certainly specific to the act.

19           MR. YOUNG: It's specific to the act, Your  
20 Honor, but I -- I would argue that does not cross the  
21 line into "and I oppose it."

22           JUSTICE SOUTER: But the reason -- but the  
23 reason it doesn't cross the line is you are, in effect,  
24 saying that "oppose" within the meaning of the statute  
25 has got to be read more narrowly than the -- than the

1 notion of oppose as we commonly use that word in common  
2 speech.

3 And I don't know why -- I don't know what  
4 your -- what your authority is for saying that "oppose"  
5 was not used in its commonsense everyday connotation.

6 MR. YOUNG: Well, I think the word "oppose"  
7 can be used in a specific sense in common everyday  
8 speech and can be used in a general sense, Your Honor.  
9 And I think --

10 JUSTICE SOUTER: But in my hypothetical,  
11 we're not talking about a general sense. In my  
12 hypothetical we were talking about a reference to a very  
13 specific act. So the generality problem doesn't arise.  
14 And yet despite the specificity, you say, and despite  
15 the fact that in common speech a -- a specific statement  
16 like that would be taken as opposition, you say it  
17 shouldn't be under the statute.

18 And the statute doesn't have any definition  
19 that narrows it. Common speech wouldn't narrow it your  
20 way.

21 Why should it be narrowed your way?

22 MR. YOUNG: The -- Your Honor's hypothetical  
23 of saying something is terrible would -- would -- would  
24 not be commonly understood to communicate opposition  
25 to --

1 JUSTICE STEVENS: Mr. Young, even under your  
2 definition, why is not the statement that's made in this  
3 case, "get the hell out of my office," wouldn't that be  
4 opposition even under your statement, under your  
5 definition? She's opposing his advance to her. That's  
6 an active opposition it seems.

7 MR. YOUNG: Her statement to him to get out  
8 of my office would --

9 JUSTICE STEVENS: Get the hell out of my  
10 office.

11 MR. YOUNG: Yes, Your Honor.

12 (Laughter.)

13 JUSTICE STEVENS: Why isn't that opposition  
14 under your statement -- under your definition?

15 MR. YOUNG: Well, the -- because the -- in  
16 the context of anti-retaliation provisions, making a  
17 statement to an alleged harasser to stop the harassment  
18 or get out of my office does not rise to opposition  
19 conduct, because the -- the -- the essence of the  
20 opposition clause is somehow putting the employer on  
21 notice.

22 If every employee who was a victim of sexual  
23 harassment and says stop, if that -- if that constitutes  
24 opposition conduct under the retaliation clause,  
25 suddenly that employee has two causes of action, one for

1 sexual harassment and one for retaliation.

2 JUSTICE BREYER: Well, that isn't even --  
3 look, the best way to oppose a crime is to cooperate  
4 with the police when they investigate individual  
5 instances.

6 The best way to oppose sexual discrimination  
7 in the workplace is to cooperate with the employer when,  
8 in fact, he investigates individual instances.

9 Is what I've just said English? Does it  
10 make sense? And indeed, I'm just quoting the EEOC's own  
11 definition.

12 MR. YOUNG: Yes, it was in English. Yes, it  
13 makes sense, Your Honor, but I would beg to differ,  
14 respectfully. The best way to oppose sexual harassment  
15 is to go and make a complaint about it.

16 JUSTICE BREYER: It is your opinion. The  
17 EEOC's opinion is, as they state, the best way to oppose  
18 is to cooperate.

19 Now, what are we to do with, at  
20 least ambiguity, giving you that, I'll give you  
21 ambiguity. But we have the agency charged with the  
22 enforcement of this taking the side of it that is the  
23 opposite side that you are taking.

24 MR. YOUNG: Yes, Your Honor. There is --  
25 there are enough contradictory statements in the

1 compliance manual itself that any deference that this  
2 Court is inclined to give to the EEOC's compliance  
3 manual should be tempered by the fact that even the EEOC  
4 recognizes the importance of employees taking initiative  
5 to report harassment and not --

6 CHIEF JUSTICE ROBERTS: I'm sorry. Please  
7 finish your answer.

8 MR. YOUNG: -- and not sitting back and  
9 waiting for the investigation to come to them.

10 JUSTICE GINSBURG: The investigation is not  
11 of her. She's testifying as a witness.

12 MR. YOUNG: She's offering a statement in an  
13 interview, Your Honor, as a witness, yes.

14 JUSTICE GINSBURG: And this is an act that's  
15 meant to protect people against discrimination in the  
16 workplace, including harassment.

17 MR. YOUNG: Yes.

18 JUSTICE GINSBURG: This is a woman who  
19 testified truthfully -- we have to assume that because  
20 this was tossed out at the very threshold, so we have to  
21 assume that everything she alleged in her complaint is  
22 true, right?

23 MR. YOUNG: It is not up -- it is not before  
24 this Court on a Rule 12 standard of assuming all the  
25 allegations are true, Your Honor; but it comes to the

1 Court on summary judgment.

2 JUSTICE GINSBURG: There is no -- no dis --  
3 then there has to be no genuine dispute as to any  
4 material fact. That means we must take her allegations  
5 of fact as true at this point.

6 But in any case this is a statute that's  
7 meant to govern the workplace with all of its realities.

8 One of them was when they asked, well, why  
9 didn't you make a complaint, use whatever internal  
10 remedies are there are? She said, because the person in  
11 this outfit who is charged with receiving complaints is  
12 the harasser.

13 MR. YOUNG: That isn't -- that was her  
14 contention. That's not necessarily true.

15 JUSTICE GINSBURG: But we have to --  
16 everything -- for you to prevail, since there has been  
17 no trial on the facts, we have to take the facts as she  
18 alleges them.

19 MR. YOUNG: There are multiple places to  
20 report sexual harassment, Your Honor. She -- she didn't  
21 even report it to her boss. She didn't report it to her  
22 boss's boss, and she didn't report it to the Director of  
23 Human Resources.

24 JUSTICE SCALIA: Well, I suppose your point  
25 would be it doesn't matter what the reason was that she

1 didn't report it. In order to recover here she has to  
2 have taken a public stand; and whatever the reason why  
3 she didn't, the fact is that she didn't.

4 Why do you get into, you know, the reason  
5 that she didn't?

6 MR. YOUNG: I agree with you, Your Honor.  
7 The reasons why she didn't make a report are immaterial.

8 JUSTICE SCALIA: And -- and I suppose that  
9 you -- you would require the -- the opposition to be  
10 somehow a public -- a public expression of opposition.  
11 No?

12 MR. YOUNG: Yes.

13 JUSTICE SCALIA: I mean, if one political  
14 candidate says that the other one opposed the war in  
15 Iraq, do you think the other candidate could say, that's  
16 a lie? I'm sorry, that the charge would be held to be  
17 correct if, in fact, the other candidate had never said  
18 anything about the war in Iraq, although deep in his  
19 heart he thought it was probably a bad idea.

20 Would you say that he opposed the war in  
21 Iraq? I don't think so.

22 MR. YOUNG: Your Honor, even when --

23 JUSTICE SCALIA: The implication is --

24 MR. YOUNG: Even when --

25 JUSTICE SCALIA: The implication is that he



1 came out with some public position opposing it, and  
2 that's your position as to the meaning of --

3 MR. YOUNG: Yes, Your Honor. And even the  
4 EEOC in its own compliance manual as set forth on page  
5 38 of the red brief, the examples of opposition cited by  
6 the EEOC are threatening to file a charge, complaining,  
7 protesting, picketing. These are active verbs.

8 JUSTICE ALITO: Why wouldn't this fall  
9 within the participation clause? There was an  
10 investigation, and -- and you described the people who  
11 provided information as "witnesses."

12 MR. YOUNG: Yes.

13 JUSTICE ALITO: So why doesn't it fall under  
14 the participation clause?

15 MR. YOUNG: An -- an employer's internal  
16 sexual harassment investigation is not an investigation  
17 under this title.

18 JUSTICE ALITO: Never, even after -- even  
19 after a charge has been filed with the EEOC?

20 MR. YOUNG: Well, the five circuits that  
21 have squarely considered the issue have held that that's  
22 the trigger that brings the internal investigation under  
23 the rubric of the participation clause here, Your Honor.

24 JUSTICE ALITO: And what's your argument?

25 MR. YOUNG: I'll -- I'll take that.

1 JUSTICE GINSBURG: And how about taking our  
2 decisions in the Faragher and Ellerth case which in a  
3 sense made the employer's internal investigation part of  
4 the EEO process because it says to the employer, if you  
5 don't have that find of effective internal complaint and  
6 investigation procedure, then you're going to be stuck  
7 on respondeat superior liability. If you do, then you  
8 will be shielded.

9 So this Court's decision in those two cases  
10 seemed to me to say to every employer, as part of your  
11 EEO compliance you had better have this internal  
12 complaint procedure and investigation.

13 MR. YOUNG: I agree. Faragher and Ellerth  
14 put the carrot on the stick in front of the employers  
15 and say, here's an affirmative defense that will be  
16 available to you in certain harassment cases if you  
17 adopt a -- an anti-harassment policy which includes an  
18 investigation mechanism. However, such a policy and  
19 such a mechanism is not made mandatory by Faragher and  
20 Ellerth. The argument of --

21 JUSTICE SOUTER: Well, you say it's not made  
22 mandatory. Any employer who doesn't go through it is  
23 crazy. And I don't see how this Court, having imposed  
24 in practical terms the requirement that Justice Ginsburg  
25 just described, can then say, oh, but we're going to

1     construe this indefinite term of "investigation"  
2     to exclude this kind of employer activity which our  
3     construction of the statute has virtually mandated.

4                 So that if in fact the employer's  
5     investigation succeeds in ending the problem and there  
6     is no EEOC complaint, those who participated in the  
7     investigation are absolutely helpless against  
8     retaliation. That would be a bizarre way to interpret a  
9     -- a statute in which we have any -- any opportunity to  
10    interpret "investigation" to include this kind of  
11    investigation.

12                What do you say to that?

13                MR. YOUNG: The fact that Faragher and  
14    Ellerth create an incentive to employers to develop  
15    these policies with investigate -- which include  
16    investigations, does not elevate such investigations to  
17    fall under the statutory requirement of being --

18                JUSTICE SOUTER: No. But I'm -- I'm giving  
19    you an argument as to why we should construe it to  
20    elevate it, and -- and the argument is that we, in  
21    effect, in what I think were correct decisions -- you  
22    agree, you said a moment ago, were correct decisions --  
23    have in practical terms mandated this kind of an  
24    inquiry.

25                Why then would it be reasonable for us, if

1 we have any option in construing the term  
2 "investigation," to construe it to exclude this kind of  
3 investigation and exclude coverage of the people who  
4 under our decisions are supposed to come forward and --  
5 and answer questions? Why would that be a reasonable  
6 construction?

7 MR. YOUNG: Because at some point, Your  
8 Honor, the construction departs so far from what can  
9 reasonably be supported by the language of the statute  
10 itself that it --

11 JUSTICE SOUTER: Well, why isn't it -- why  
12 isn't an investigation by the employer an  
13 "investigation"? That's the language of the statute.

14 MR. YOUNG: It -- it is an "investigation."  
15 Our contention is it does not fall under the category of  
16 an "investigation" under this title even despite  
17 Faragher and Ellerth.

18 CHIEF JUSTICE ROBERTS: I thought Faragher  
19 and Ellerth --

20 JUSTICE SCALIA: Why couldn't he -- I'm  
21 sorry, Chief Justice.

22 CHIEF JUSTICE ROBERTS: I thought Faragher  
23 and Ellerth were limited to the hostile work environment  
24 cases.

25 MR. YOUNG: Of supervisory harassment,

1     that's true, Your Honor.

2                   CHIEF JUSTICE ROBERTS: Well -- well, that's  
3     a different question. Is the defense we recognized in  
4     Ellerth and Faragher in the hostile work environment  
5     case or in the specific action case as well?

6                   MR. YOUNG: My understanding of Faragher and  
7     Ellerth is that it -- it applies in the hostile work  
8     environment case involving harassment by a supervisor.

9                   JUSTICE SCALIA: I thought you were going to  
10    answer Justice Souter with the assertion that if indeed  
11    the Court wants employers to conduct these  
12    investigations, it does not want to reduce the incentive  
13    to do so.

14                   And the rule that is urged by the other side  
15    means whenever the -- whenever the employer conducts  
16    such an investigation, any employee who is smart enough  
17    to come in and testify against -- against sexual  
18    harassment has a guaranteed job. It is almost like --  
19    almost like being a Federal judge.

20                   [Laughter.]

21                   JUSTICE SCALIA: You can't be fired after  
22    that, or the employer can't fire her without opening  
23    himself up to a lawsuit under -- under this provision.  
24    And he might win the lawsuit, but it's going to cost  
25    money. So why -- maybe an employer would rather say,

1    you know, I'd rather roll the dice and -- and not  
2    conduct an investigation and insulate all of my hostile  
3    employees from -- from employment actions.

4                   MR. YOUNG:   That would be the -- that would  
5    be the employer's interest.   The disincentive that the  
6    employers would have to comply with these -- with this  
7    Court's directives or strong suggestions in Faragher and  
8    Ellerth is employers would stop conducting these  
9    investigations if everyone they interviewed was going to  
10   be a potential retaliation claim.

11                   JUSTICE SOUTER:   And instead they would  
12   substitute the -- the response to an EEOC investigation  
13   in which they would not have the leg to stand on in  
14   opposing respondeat superior.   I suppose that would be  
15   an inducement for them to go ahead with the  
16   investigation; wouldn't you?

17                   MR. YOUNG:   Their -- they would lose the  
18   protections of Faragher and Ellerth.   We would be back  
19   to respondeat superior liability.   It sounds illogical,  
20   but I -- I submit to the Court that if -- that if it is  
21   going to be a Hobson's choice and it -- it would be a  
22   situation in which employers would have an incentive to  
23   choose not to -- would choose to abandon their policies  
24   and take their chances.

25                   If they have to interview 20 people in a --

1 in a retaliation -- in a sexual harassment case, there's  
2 20 potential plaintiffs because they all participated.  
3 It doesn't even matter if the employer knows what the  
4 employees said. If -- if some type of discipline or  
5 adverse action is imposed by the employer on any of  
6 those employees, there is an instant retaliation claim.

7 JUSTICE SOUTER: By the way, I take it in --  
8 in this case, although this is not the issue before us,  
9 that if you -- if you lose on the issues before us, it  
10 is still your position that ultimately you should win  
11 this case, because you have good evidence, you say in  
12 your briefs, to indicate that the reason for firing had  
13 nothing to do with retaliation.

14 That's true, isn't it?

15 MR. YOUNG: I have two arguments left in my  
16 quiver on summary judgment, Your Honor, that the trial  
17 court didn't even consider. So if this case goes back  
18 down, that's what I'm going to ask the trial court to  
19 consider.

20 JUSTICE GINSBURG: What are the other  
21 arguments on summary judgment.

22 MR. YOUNG: The lack of causation, the lack  
23 of knowledge between whatever told the investigator in  
24 this confidential interview as to which confidentiality  
25 was promised and delivered, the lack of any knowledge --

1 -- the lack of any evidence that the decision-makers  
2 regarding Ms. Crawford and her job, that they knew what  
3 she said in this interview. The lack of causation is my  
4 first ground and the lack of pretext is my second ground  
5 that has yet to be considered. Because of the abundant  
6 evidence of misconduct which was discovered regarding  
7 how Ms. Crawford was not running her office.

8 JUSTICE GINSBURG: When you say it's not  
9 that the employer is stuck because there's a potential  
10 retaliation claim, if the employer is certain of its  
11 grounds, that this discharge had nothing to do with her  
12 testimony, then go ahead and discharge her.

13 MR. YOUNG: Yes, Your Honor.

14 JUSTICE SCALIA: Do you get your litigation  
15 fees if you win? If the plaintiff here loses, does she  
16 pay all the attorneys' fees that this employer has  
17 incurred on this litigation?

18 MR. YOUNG: It is very difficult for a  
19 victorious defendant to recover attorneys' fees under  
20 section 1988, Your Honor. The threshold is very high.  
21 I've never recovered the fees in my 14 years working for  
22 this office in a section 1983 case.

23 JUSTICE SCALIA: So even when you win you  
24 lose.

25 MR. YOUNG: Yes. In that sense, yes, Your



1 Honor. Or a Title VII case.

2 JUSTICE GINSBURG: On the other side, that  
3 attorney, there's a large disincentive. He hasn't got a  
4 good case. He's not going to be paid any retainer as  
5 you might be. And he's not going to get any counsel  
6 fees. Why should such -- why should it -- counsel be  
7 available to a person who obviously was discharged for  
8 having her hand in the till and not because she was  
9 harassed?

10 MR. YOUNG: First of all, there is no  
11 allegation that Ms. Crawford embezzled or took money.  
12 There is no allegation, and she was not disciplined.  
13 She was not discharged based on any allegation she was  
14 stealing money. That's simply not a factor.

15 JUSTICE GINSBURG: No. I meant that as a  
16 hypothetical.

17 MR. YOUNG: Oh, I'm sorry.

18 JUSTICE GINSBURG: What was the reason that  
19 she was -- what was the employer's reason for  
20 discharging her?

21 MR. YOUNG: Multiple -- she was the payroll  
22 coordinator and her office -- all these checks were  
23 sitting in her office and they were not being processed.  
24 Some of them were six, eight, ten months old. Her  
25 office was in complete disarray. And this came to light

1 as a result of this sexual harassment investigation when  
2 her subordinates were interviewed and they provided  
3 testimony regarding how she was running her office, and  
4 that eventually got to the finance department of the  
5 government, which hired an outside auditor which went in  
6 and generated all this evidence at great expense to the  
7 metropolitan government to hire this outside auditor.

8 That's where the evidence was developed to  
9 terminate Ms. Crawford six months after the statement to  
10 the investigators. So that's -- those were the facts on  
11 how it happened.

12 I forgot Your Honor's original question, or  
13 maybe I answered it. I don't know.

14 JUSTICE GINSBURG: I said if you have a  
15 really strong case of having discharged this person for  
16 cause that has nothing at all to do with harassment, you  
17 are going to win the lawsuit and it would be hard for  
18 the plaintiff to get a decent lawyer to represent her  
19 side of the case because she's going to lose.

20 MR. YOUNG: In theory, yes; but the burdens  
21 of litigation, which is part of the congressional  
22 compromise -- back in 1964 in order to gain passage of  
23 the Civil Rights Act, employer's interests were deemed  
24 to be of equal magnitude as employees'.

25 CHIEF JUSTICE ROBERTS: You're not going to

1 win -- you're not going to win this case; you're going  
2 to settle if you lose up here, right?

3 MR. YOUNG: If I lose up here, first I've  
4 got two more shots at summary judgment, Your Honor.

5 JUSTICE KENNEDY: You don't have to answer  
6 that. We'll be glad to see you again.

7 (Laughter.)

8 MR. YOUNG: I hope I'm not --

9 CHIEF JUSTICE ROBERTS: My point is simply  
10 that the incentive system is skewed because if you lose  
11 you pay not only your attorneys' fees but the  
12 complainants'. If you win, you have to incur yours.

13 MR. YOUNG: In civil rights cases the  
14 incentives, that incentive fee, that incentive system,  
15 is skewed against the defendants because of the public  
16 policy reason favoring --

17 CHIEF JUSTICE ROBERTS: I'm not saying it  
18 shouldn't be. But in terms of the pressures towards  
19 settlement, it is a very strong incentive.

20 MR. YOUNG: Yes.

21 JUSTICE STEVENS: Is bringing frivolous  
22 cases cost-free for the plaintiffs? There are certain  
23 costs.

24 MR. YOUNG: Well, Your Honor, many of these  
25 types of cases are taken on a contingent fee basis

1 except for hard costs.

2 JUSTICE BREYER: It is a mix. I mean, you  
3 know, a lot of plaintiffs might be afraid to bring these  
4 cases because they'll be accused of doing all kinds of  
5 bad things. They don't want their reputations ruined.  
6 They have lawyers who take contingent fees because they  
7 have to pay for it. Oh the other hand, you have  
8 problems with your costs and you have problems  
9 dismissing people who should be dismissed. Everybody  
10 has problems in this area. That's why we have law and  
11 lawyers. They try to minimize it. This doesn't seem  
12 fruitful to me.

13 JUSTICE SCALIA: Isn't it true that  
14 financially it is always cost-free for the plaintiff  
15 because she has an attorney who is taking it on a  
16 contingent basis? Now, you could say it's not cost-free  
17 to the lawyer; but even that's not always true because  
18 if the lawyer has nothing else to do he may as well be  
19 doing this, you know, whatever the odds are.

20 MR. YOUNG: I agree with that, Your Honor.  
21 And if the Court has no more questions,  
22 thank you.

23 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
24 Mr. Schnapper, you have four minutes  
25 remaining.

1 REBUTTAL ARGUMENT OF ERIC SCHNAPPER

2 ON BEHALF OF THE PETITIONER

3 MR. SCHNAPPER: Thank you, Your Honor, may  
4 it please the Court:

5 Protecting witnesses from being fired  
6 because they provide information in internal  
7 investigates is not going to interfere with the conduct  
8 of those investigations or deter them. We know that  
9 from experience. Until the decision in this case, no  
10 one had questioned the applicability of the opposition  
11 clause to a witness in an investigation who complains  
12 about sexual harassment. It was simply not in dispute.  
13 The compliance manual in this regard was entirely clear  
14 since 2000 because the Commission took the position  
15 witnesses who complained were protected by the  
16 opposition clause. None of the problems Mr. Young  
17 expressed concern about had happened.

18 CHIEF JUSTICE ROBERTS: Counsel, Ms. Blatt  
19 said the government would prefer a decision under the  
20 opposition ground as opposed to the participation. Do  
21 you have a preference?

22 MR. SCHNAPPER: I think she said she thought  
23 it was easier. We don't have a preference. But I'd  
24 like to address briefly the participation clause. The  
25 participation clause does have the singular value, as

1 Justice Alito suggested, that it is evenhanded, that it  
2 will protect witnesses for both sides. And the  
3 integrity of the process is certainly strengthened if  
4 both witnesses, witnesses on both sides, know they're  
5 protected from retaliation.

6 JUSTICE KENNEDY: Is the only question --  
7 -the participation is not in doubt. The only question  
8 is whether it's an investigation under this subtitle.

9 MR. SCHNAPPER: But the question is under  
10 this title. That language its certainly broad enough,  
11 as Justice Souter suggested, to encompass the sort of  
12 process that's at issue here. As Justice Ginsburg  
13 pointed out, this Court's decisions in Faragher  
14 virtually mandate these decisions.

15 In response to the Chief Justice's point --

16 JUSTICE SCALIA: You think the language  
17 "investigation under this title" is the equivalent of  
18 "investigation with respect to an alleged offense under  
19 this title"? That doesn't strike me as self-evident at  
20 all. It seems to me "investigation under this title" to  
21 me means an investigation under this title, which is not  
22 an investigation by the employer.

23 MR. SCHNAPPER: I think the words under this  
24 title are elastic enough to support either meaning. The  
25 context of the statute and the way this Court has

1 repeatedly construed it give meaning to it. In response  
2 to the concern that the Chief Justice raised, Faragher  
3 and Ellerth are not the only decisions that provide an  
4 incentive for these investigations. The Court's  
5 decision in Kolstad makes the existence of this sort of  
6 process essential to avoid awards of punitive damages.  
7 So even in non-harassment cases that same incentive has  
8 been created by the courts.

9 In a situation involving harassment, the  
10 contours of the investigation are fact largely shaped by  
11 Federal law, not only policy guidance which the EEOC has  
12 issued helping employers figure out what to do, but a  
13 large and growing body of case law under Faragher and  
14 Ellerth elucidating what those requirements are.  
15 Particularly importantly here, the victims of sexual  
16 harassment are virtually required by the court to use  
17 these processes. Ms. Crawford had to speak up at some  
18 point or she had had no claim.

19 And last, as a practical matter, if sexual  
20 harassment is going to be stopped, it's mostly going to  
21 happen through these internal processes. By the time  
22 most of these controversies about sexual harassment get  
23 to the EEOC or the courts, the victims have left their  
24 jobs. In this Court's decision in Pollard, the  
25 individual had been fired. In Souter she had been

1 driven from her job. In Faragher and Ellerth and  
2 Harris, those had quit. If you look at the array of  
3 lower court decisions involving sexual harassment, by  
4 the time a case gets to the Commission in most of those  
5 cases the victim has give up and left.

6 So it's exceptionally important that these  
7 processes be effective and evenhanded.

8 No further questions.

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
10 The case is submitted.

11 (Whereupon, at 1:59 p.m., the case in the  
12 above-entitled matter was submitted.)

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<b>A</b>	<b>afraid</b> 26:10 52:3 <b>afternoon</b> 27:7 <b>agencies</b> 17:1 <b>agency</b> 37:21 <b>ago</b> 6:21 31:2 43:22 <b>agree</b> 19:10 34:9 40:6 42:13 43:22 52:20 <b>ahead</b> 46:15 48:12 <b>Alito</b> 9:19 10:8 10:20 11:19 16:7,17 24:14 25:5,11 41:8 41:13,18,24 54:1 <b>allegation</b> 49:11 49:12,13 <b>allegations</b> 38:25 39:4 <b>alleged</b> 12:11 18:18,22 28:13 30:12 36:17 38:21 54:18 <b>allegedly</b> 28:3 <b>alleges</b> 39:18 <b>ambiguity</b> 37:20 37:21 <b>Amendment</b> 9:15 <b>amicus</b> 1:21 2:6 17:11 24:11 <b>ample</b> 18:19 <b>anger</b> 11:8 <b>annoyed</b> 11:24 <b>answer</b> 7:25 10:2 11:11 14:13 38:7 44:5 45:10 51:5 <b>answered</b> 30:18 50:13 <b>anti-harassme...</b> 42:17 <b>anti-retaliation</b>	28:1 36:16 <b>Anybody</b> 7:19 <b>APPEARAN...</b> 1:16 <b>appeared</b> 8:11 14:19 <b>applicability</b> 53:10 <b>applies</b> 45:7 <b>approach</b> 11:3 <b>area</b> 52:10 <b>argue</b> 34:20 <b>argument</b> 1:14 2:2,10 3:3,7 17:9 26:6 27:19 31:16 32:10 34:10 41:24 42:20 43:19,20 53:1 <b>arguments</b> 15:13 47:15,21 <b>array</b> 56:2 <b>asked</b> 10:2 11:9 13:11 18:23 20:17 23:4 33:17 39:8 <b>asking</b> 8:23 21:17 22:22 25:6 30:24 31:19 33:14,15 <b>asks</b> 16:14 28:23 32:3 <b>asserting</b> 15:12 <b>assertion</b> 31:25 45:10 <b>Assistant</b> 1:19 1:23 <b>assisted</b> 14:21 <b>assisting</b> 12:19 <b>assists</b> 12:17 <b>assume</b> 38:19,21 <b>assuming</b> 23:16 38:24 <b>assure</b> 16:6 <b>attorney</b> 1:23 49:3 52:15 <b>attorneys</b> 48:16	48:19 51:11 <b>auditor</b> 50:5,7 <b>authority</b> 35:4 <b>authorized</b> 17:4 <b>available</b> 42:16 49:7 <b>avoid</b> 55:6 <b>awards</b> 55:6 <b>awful</b> 19:12 <b>B</b> <b>back</b> 10:19 11:9 31:9 38:8 46:18 47:17 50:22 <b>bad</b> 7:20 8:6 29:19 31:20 32:3 33:20,21 34:6,7 40:19 52:5 <b>balance</b> 17:6 27:24 28:2 <b>based</b> 21:10 49:13 <b>basis</b> 5:25 11:25 51:25 52:16 <b>beg</b> 37:13 <b>behalf</b> 1:17,20 1:24 2:4,6,9,12 3:8 17:10 27:20 53:2 <b>behavior</b> 6:25 6:25 18:24 <b>belief</b> 12:13 <b>believe</b> 6:20 13:16 29:19 <b>believes</b> 10:10 <b>belt</b> 16:5 <b>best</b> 17:15 37:3 37:6,14,17 <b>better</b> 42:11 <b>bizarre</b> 43:8 <b>Blatt</b> 1:19 2:5 17:8,9,13 18:8 19:14,21 20:15 20:20 21:6,20 22:2,8,11,16	23:1,11,13,21 23:25 24:5,10 24:20 25:10,15 26:7,19,25 53:18 <b>board's</b> 3:13 <b>body</b> 55:13 <b>boots</b> 16:4 <b>border-line</b> 26:20 <b>boss</b> 4:9 8:14 39:21,22 <b>boss's</b> 39:22 <b>boundaries</b> 8:18 <b>BREYER</b> 12:8 13:25 23:14,22 24:3,8 37:2,16 52:2 <b>brief</b> 24:6,11 41:5 <b>briefly</b> 53:24 <b>briefs</b> 47:12 <b>bring</b> 52:3 <b>bringing</b> 51:21 <b>brings</b> 41:22 <b>broad</b> 6:5 21:21 24:25 54:10 <b>broader</b> 19:22 22:3,16,24 <b>broadest</b> 25:18 <b>broadly</b> 8:23 <b>brought</b> 12:1 <b>built</b> 34:4 <b>burdens</b> 50:20 <b>button</b> 4:20 8:5 <b>C</b> <b>C</b> 2:1 3:1 <b>call</b> 31:1 <b>called</b> 13:10 30:1 <b>candidate</b> 40:14 40:15,17 <b>care</b> 32:16 <b>carrot</b> 42:14 <b>case</b> 3:4 4:2 5:19 6:18 7:9 8:11
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8:16,18 10:3 11:14 14:18,18 15:21 16:2 17:15 18:3,16 18:17,18 19:10 19:17 21:2,12 22:17 23:9 24:13 25:19 28:13,25 29:5 29:7,14,25 32:20 33:12,21 36:3 39:6 42:2 45:5,5,8 47:1,8 47:11,17 48:22 49:1,4 50:15 50:19 51:1 53:9 55:13 56:4,10,11 <b>cases</b> 4:16 20:8 20:9 29:9 42:9 42:16 44:24 51:13,22,25 52:4 55:7 56:5 <b>categories</b> 22:23 <b>category</b> 44:15 <b>causation</b> 6:16 6:22 47:22 48:3 <b>cause</b> 7:18 18:5 18:10 50:16 <b>causes</b> 36:25 <b>caution</b> 16:4 <b>certain</b> 42:16 48:10 51:22 <b>certainly</b> 13:2 17:25 19:25 21:21 27:14 34:18 54:3,10 <b>chances</b> 46:24 <b>change</b> 24:4,4 28:20 <b>changed</b> 33:25 <b>characterizati...</b> 28:21 <b>characterize</b> 23:19,22 <b>charge</b> 6:25	14:21 15:3 26:15,16 27:2 27:5,8 40:16 41:6,19 <b>charged</b> 37:21 39:11 <b>checks</b> 49:22 <b>Chief</b> 3:3,9 4:17 4:21 5:12,15 8:20 14:12 15:15,18 17:7 17:13 18:3 19:8,19 20:6 20:16 21:4,25 22:6,9,15,21 26:23 27:17,21 28:11,19 29:4 29:17 38:6 44:18,21,22 45:2 50:25 51:9,17 52:23 53:18 54:15 55:2 56:9 <b>choice</b> 46:21 <b>choose</b> 46:23,23 <b>chose</b> 29:2 30:22 <b>Circuit</b> 18:16 25:21 26:13 <b>circuits</b> 41:20 <b>circumstances</b> 15:22 21:7 <b>cited</b> 41:5 <b>city</b> 3:11 <b>civil</b> 50:23 51:13 <b>claim</b> 7:5,8,21 8:18 46:10 47:6 48:10 55:18 <b>claims</b> 6:16 15:13 <b>class</b> 13:9 <b>clause</b> 3:15,16 3:17 9:5 10:17 10:18,24 11:5 12:7 13:17,19 14:1 15:8,11 17:16,16,19	21:15,18 22:1 22:2,18 23:10 23:17,18 24:13 24:22 25:1,7 26:6 27:13 28:5,8,9 30:2,2 30:3 36:20,24 41:9,14,23 53:11,16,24,25 <b>clauses</b> 24:21 <b>clear</b> 11:6 12:16 27:2 28:12 53:13 <b>clearly</b> 23:5,6,7 <b>client</b> 4:9 <b>come</b> 20:18 21:2 25:12 26:2 38:9 44:4 45:17 <b>comes</b> 5:18 14:8 29:18 38:25 <b>coming</b> 30:7 <b>Commission</b> 53:14 56:4 <b>common</b> 30:6 35:1,7,15,19 <b>commonly</b> 35:1 35:24 <b>commonsense</b> 35:5 <b>communicate</b> 35:24 <b>communicated</b> 34:13 <b>communicating</b> 30:7 <b>company</b> 7:3 16:11 <b>complainant</b> 4:23 14:3 <b>complainants</b> 51:12 <b>complained</b> 18:9 53:15 <b>complaining</b> 25:22 41:6 <b>complains</b> 53:11	<b>complaint</b> 21:5 28:16 30:22 31:4,5,8 32:14 32:23,25 37:15 38:21 39:9 42:5,12 43:6 <b>complaints</b> 30:18 39:11 <b>complete</b> 49:25 <b>compliance</b> 23:23 24:1,10 38:1,2 41:4 42:11 53:13 <b>comply</b> 46:6 <b>compromise</b> 27:24 50:22 <b>concentric</b> 22:23 <b>concept</b> 32:13 33:5 <b>concern</b> 3:23 53:17 55:2 <b>conclude</b> 4:5 5:10 11:12 <b>concurring</b> 15:16 <b>conduct</b> 3:13,21 3:25 4:5 6:17 9:4 15:8,10 17:19 19:1,4,6 19:17 20:1 23:9 28:6 29:15 32:24 36:19,24 45:11 46:2 53:7 <b>conducted</b> 27:4 <b>conducting</b> 46:8 <b>conducts</b> 10:9 45:15 <b>confidential</b> 47:24 <b>confidentiality</b> 47:24 <b>confirm</b> 20:10 <b>confirmed</b> 11:15 <b>Congress</b> 21:23 25:7,24 27:9	29:2,8 <b>congressional</b> 27:23 50:21 <b>connection</b> 13:11 <b>connotation</b> 35:5 <b>consider</b> 47:17 47:19 <b>considered</b> 41:21 48:5 <b>considers</b> 34:11 <b>consistent</b> 8:2 25:16 <b>constitute</b> 8:1 20:4,7 <b>constitutes</b> 15:9 19:9 36:23 <b>construction</b> 43:3 44:6,8 <b>construe</b> 43:1,19 44:2 <b>construed</b> 55:1 <b>construing</b> 44:1 <b>contact</b> 28:15 <b>contain</b> 30:6 <b>contention</b> 39:14 44:15 <b>context</b> 3:18 18:22 23:3 29:21 33:25 34:2 36:16 54:25 <b>contingent</b> 51:25 52:6,16 <b>contours</b> 55:10 <b>contradictory</b> 37:25 <b>controversies</b> 55:22 <b>controversy</b> 15:3 <b>convert</b> 30:20 <b>converted</b> 32:7 <b>cooperate</b> 26:10 37:3,7,18 <b>cooperated</b>
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<p>28:18  <b>cooperation</b>  30:3 33:6  <b>coordinator</b>  49:22  <b>correct</b> 23:25  40:17 43:21,22  <b>corroborate</b>  21:1  <b>cost</b> 45:24  <b>costs</b> 51:23 52:1  52:8  <b>cost-free</b> 51:22  52:14,16  <b>cotilla</b> 16:3  <b>counsel</b> 17:7  27:17 49:5,6  52:23 53:18  56:9  <b>County</b> 1:8 3:5  <b>course</b> 20:8 28:6  <b>court</b> 1:1,14  3:10 7:9 17:14  25:25 27:22  30:4 38:2,24  39:1 42:23  45:11 46:20  47:17,18 52:21  53:4 54:25  55:16 56:3  <b>courts</b> 8:3 26:20  55:8,23  <b>Court's</b> 42:9  46:7 54:13  55:4,24  <b>cover</b> 17:5 21:22  22:3  <b>coverage</b> 21:22  22:3 24:25  25:20 44:3  <b>covered</b> 4:19  13:17,18 22:13  23:9 24:24,24  25:2 26:8 27:1  <b>covers</b> 28:6  <b>co-worker</b> 4:8  4:10 5:6,10 7:1</p>	<p><b>Crawford</b> 1:3  3:4,11 18:6  28:12 30:8,14  48:2,7 49:11  50:9 55:17  <b>crazy</b> 42:23  <b>create</b> 43:14  <b>created</b> 55:8  <b>crime</b> 37:3  <b>critical</b> 21:5  <b>cross</b> 34:20,23  <b>curiae</b> 1:21 2:7  17:11  <b>current</b> 27:12</p> <hr/> <p style="text-align: center;"><b>D</b></p> <hr/> <p><b>D</b> 3:1  <b>damages</b> 55:6  <b>date</b> 33:3  <b>Davidson</b> 1:7  3:5  <b>day</b> 12:19 20:12  20:24,24 27:4  <b>dealing</b> 8:15  14:18  <b>debate</b> 14:20  <b>decent</b> 50:18  <b>decide</b> 19:22  <b>decision</b> 42:9  53:9,19 55:5  55:24  <b>decisions</b> 42:2  43:21,22 44:4  54:13,14 55:3  56:3  <b>decision-make...</b>  48:1  <b>deemed</b> 50:23  <b>deep</b> 40:18  <b>defendant</b> 48:19  <b>defendants</b>  51:15  <b>defense</b> 42:15  45:3  <b>defenses</b> 34:4,5  <b>deference</b> 6:13  38:1</p>	<p><b>define</b> 22:7,25  <b>defining</b> 12:23  <b>definition</b> 12:20  35:18 36:2,5  36:14 37:11  <b>definitions</b> 30:5  <b>degree</b> 16:9  <b>deliberately</b>  15:25 16:5  <b>delivered</b> 47:25  12:12  <b>department</b>  1:20 50:4  <b>departs</b> 44:8  <b>depending</b>  22:24  <b>depends</b> 10:2  22:6  <b>describe</b> 17:3  <b>described</b> 18:6  41:10 42:25  <b>description</b> 10:7  <b>despite</b> 35:14,14  44:16  <b>detecting</b> 13:21  <b>deter</b> 53:8  <b>determinations</b>  6:11  <b>determined</b> 25:4  <b>determining</b>  16:8 19:9  <b>develop</b> 43:14  <b>developed</b> 50:8  <b>dice</b> 46:1  <b>dictionary</b> 30:4  30:5  <b>differ</b> 37:13  <b>different</b> 13:6  30:22 31:17,22  45:3  <b>difficult</b> 12:22  48:18  <b>direct</b> 18:4  <b>directed</b> 4:25  9:11  <b>direction</b> 11:2</p>	<p>25:9  <b>directives</b> 46:7  <b>director</b> 3:13  18:20,24 30:16  39:22  <b>director's</b> 19:6  <b>dis</b> 39:2  <b>disagree</b> 15:14  <b>disagreement</b>  9:4  <b>disapproval</b> 7:5  11:12  <b>disapproved</b> 4:6  <b>disarray</b> 49:25  <b>discharge</b> 48:11  48:12  <b>discharged</b> 49:7  49:13 50:15  <b>discharging</b>  49:20  <b>discipline</b> 47:4  <b>disciplined</b>  49:12  <b>disclose</b> 18:24  <b>discloses</b> 17:23  <b>disclosing</b> 32:24  <b>disclosure</b> 28:17  30:2,11 31:12  33:1,6  <b>discovered</b> 48:6  <b>discrimination</b>  12:11 16:24  18:11 37:6  38:15  <b>discriminatory</b>  28:4  <b>disincentive</b>  46:5 49:3  <b>dismissal</b> 10:12  <b>dismissed</b> 6:16  52:9  <b>dismissing</b> 52:9  <b>dispute</b> 4:1 6:17  39:3 53:12  <b>distinct</b> 15:7  <b>distinction</b>  32:22</p>	<p><b>doing</b> 12:24  18:18 52:4,19  <b>doubt</b> 25:6 54:7  <b>draw</b> 8:24  <b>drawn</b> 20:3  <b>driven</b> 56:1  <b>duties</b> 20:23  <b>D.C</b> 1:10,20</p> <hr/> <p style="text-align: center;"><b>E</b></p> <hr/> <p><b>E</b> 2:1 3:1,1  <b>earlier</b> 11:10  22:22  <b>ears</b> 29:23  <b>easier</b> 19:17,18  22:17 24:12  53:23  <b>easily</b> 19:5 24:3  24:4  <b>EEO</b> 42:4,11  <b>EEOC</b> 12:9,9,24  18:9 20:21  22:11 23:15,17  24:1 25:16  38:3 41:4,6,19  43:6 46:12  55:11,23  <b>EEOC's</b> 24:11  37:10,17 38:2  <b>effect</b> 6:24 7:18  30:25 34:23  43:21  <b>effective</b> 42:5  56:7  <b>eight</b> 49:24  <b>either</b> 19:22  22:25 28:25  31:15 54:24  <b>elastic</b> 54:24  <b>element</b> 4:4 6:16  30:3  <b>elements</b> 3:17  6:2,15 16:21  <b>elevate</b> 43:16,20  <b>elicit</b> 25:12  <b>eliminate</b> 33:16  <b>Ellerth</b> 42:2,13</p>
---	--	--	---	--

<p>44:17,19,23 45:4,7 46:8,18 55:3,14 56:1 <b>elucidating</b> 55:14 <b>embezzled</b> 49:11 <b>embraced</b> 20:21 <b>emphatically</b> 9:6 <b>employee</b> 3:13 4:6,20 9:19,22 10:13 11:23 12:4,17,20 16:12,13,13 17:21,23 18:1 18:4,21 28:9 30:16 34:11,12 34:15 36:22,25 45:16 <b>employees</b> 17:17 26:1 27:25 28:3 38:4 46:3 47:4,6 50:24 <b>employee's</b> 3:20 4:5 12:12 <b>employer</b> 3:19 5:18,23,24 6:2 6:9,10 7:1 10:9 11:24 12:1,2 12:10,18 13:10 16:23 17:4 22:20 23:3 25:22 34:17 36:20 37:7 42:4,10,22 43:2 44:12 45:15,22,25 47:3,5 48:9,10 48:16 54:22 <b>employers</b> 26:3 27:25 28:4 42:14 43:14 45:11 46:6,8 46:22 55:12 <b>employer's</b> 11:22 13:21 41:15 42:3</p>	<p>43:4 46:5 49:19 50:23 <b>employment</b> 4:7 9:9 12:14 46:3 <b>encompass</b> 54:11 <b>encounters</b> 16:13 <b>endeavor</b> 12:18 <b>enforcement</b> 37:22 <b>engage</b> 10:4 <b>engaged</b> 4:23 10:10 <b>English</b> 37:9,12 <b>entirely</b> 53:13 <b>entry</b> 6:5 <b>environment</b> 44:23 45:4,8 <b>equal</b> 50:24 <b>equivalent</b> 54:17 <b>ERIC</b> 1:17 2:3 2:11 3:7 53:1 <b>erred</b> 18:17 <b>ESQ</b> 1:17,19,23 2:3,5,8,11 <b>essence</b> 36:19 <b>essential</b> 16:20 21:1 55:6 <b>essentially</b> 31:16 <b>establish</b> 4:4 11:21 <b>evenhanded</b> 54:1 56:7 <b>event</b> 4:25 <b>eventually</b> 50:4 <b>everybody</b> 14:2 14:4 22:12 52:9 <b>everyday</b> 35:5,7 <b>evidence</b> 6:14 21:2,11 31:2,5 47:11 48:1,6 50:6,8 <b>evident</b> 19:24 <b>ex</b> 16:3</p>	<p><b>exactly</b> 23:1 <b>examined</b> 30:10 <b>example</b> 10:3 13:22 <b>examples</b> 41:5 <b>excellent</b> 9:18 <b>exceptionally</b> 56:6 <b>exclude</b> 43:2 44:2,3 <b>exculpatory</b> 10:13 11:6,7 <b>existence</b> 55:5 <b>expense</b> 50:6 <b>experience</b> 53:9 <b>express</b> 9:21 17:18 <b>expressed</b> 7:5 53:17 <b>expresses</b> 20:22 <b>expressing</b> 9:3 13:15 <b>expression</b> 34:5 40:10 <b>expressive</b> 9:12 9:17</p> <hr/> <p><b>F</b></p> <p><b>fact</b> 4:15 5:9 10:5 12:10 13:13 21:5 26:2 28:20 30:21 32:6 33:1 35:15 37:8 38:3 39:4 39:5 40:3,17 43:4,13 55:10 <b>factor</b> 49:14 <b>facts</b> 8:22 18:18 19:5 20:3,6,7,9 29:14,24 39:17 39:17 50:10 <b>factual</b> 9:20 11:20 <b>fall</b> 41:8,13 43:17 44:15 <b>far</b> 8:11 19:8</p>	<p>44:8 <b>Faragher</b> 42:2 42:13,19 43:13 44:17,18,22 45:4,6 46:7,18 54:13 55:2,13 56:1 <b>favor</b> 13:8 33:20 <b>favorable</b> 14:3 <b>favoring</b> 51:16 <b>Federal</b> 45:19 55:11 <b>fee</b> 51:14,25 <b>feel</b> 28:23 <b>fees</b> 48:15,16,19 48:21 49:6 51:11 52:6 <b>figure</b> 55:12 <b>file</b> 41:6 <b>filed</b> 26:16,16 27:2,5,8 41:19 <b>finance</b> 50:4 <b>financially</b> 52:14 <b>find</b> 8:24 42:5 <b>fine</b> 13:2,3 32:10 <b>finish</b> 38:7 <b>fire</b> 14:9 45:22 <b>fired</b> 6:9 7:4,7 7:20 8:7 45:21 53:5 55:25 <b>fires</b> 5:18 6:2 <b>firing</b> 47:12 <b>first</b> 3:15,15,19 9:15 15:2 16:22 29:5 48:4 49:10 51:3 <b>five</b> 41:20 <b>follow</b> 12:8,25 <b>forbidding</b> 16:23 <b>force</b> 23:7 <b>forgot</b> 50:12 <b>Forklift</b> 11:14 11:16 <b>formal</b> 16:17,20</p>	<p><b>formality</b> 16:9 <b>Fort</b> 16:2 <b>forth</b> 21:17 31:24 41:4 <b>forward</b> 25:13 26:2 44:4 <b>found</b> 19:25 <b>four</b> 52:24 <b>FRANCIS</b> 1:23 2:8 27:19 <b>free</b> 26:3 <b>frivolous</b> 51:21 <b>front</b> 42:14 <b>fruitful</b> 52:12 <b>fully</b> 26:10 <b>function</b> 25:24 <b>funny</b> 11:13 <b>further</b> 9:22 56:8 <b>future</b> 3:24</p> <hr/> <p><b>G</b></p> <p><b>G</b> 3:1 <b>gain</b> 50:22 <b>gap</b> 25:21 <b>gaping</b> 25:20 <b>Gee</b> 4:10 <b>general</b> 1:19 33:9,10 34:2 35:8,11 <b>generality</b> 35:13 <b>generated</b> 50:6 <b>genuine</b> 39:3 <b>getting</b> 7:11 <b>Ginsburg</b> 5:20 8:9 14:15,17 26:14 38:10,14 38:18 39:2,15 42:1,24 47:20 48:8 49:2,15 49:18 50:14 54:12 <b>give</b> 21:18 25:17 37:20 38:2 55:1 56:5 <b>given</b> 10:3 11:11 18:5 26:10</p>
--	--	---	---	--

30:19 31:2 <b>gives</b> 24:17,18 <b>giving</b> 37:20 43:18 <b>glad</b> 51:6 <b>go</b> 12:16,18 19:8 21:10 28:22 37:15 42:22 46:15 48:12 <b>goes</b> 8:23 9:22 11:2 14:25 16:12 25:9 29:6,20 47:17 <b>going</b> 5:21 7:3 8:8 11:9 14:14 26:9 28:22,24 42:6,25 45:9 45:24 46:9,21 47:18 49:4,5 50:17,19,25 51:1,1 53:7 55:20,20 <b>good</b> 7:22 9:14 13:13 31:20 32:3 34:6,7 47:11 49:4 <b>govern</b> 39:7 <b>government</b> 1:6 3:5 8:3 28:15 34:14 50:5,7 53:19 <b>government's</b> 26:17 <b>great</b> 50:6 <b>greatest</b> 25:18 <b>ground</b> 48:4,4 53:20 <b>grounds</b> 10:12 48:11 <b>growing</b> 55:13 <b>guaranteed</b> 45:18 <b>guess</b> 22:21 <b>guidance</b> 21:18 55:11 <b>guilty</b> 4:9	<hr/> <b>H</b> <hr/> <b>H</b> 1:23 2:8 27:19 <b>hallway</b> 16:14 <b>hand</b> 49:8 52:7 <b>happen</b> 3:24 55:21 <b>happened</b> 3:23 18:6 34:17 50:11 53:17 <b>harassed</b> 3:12 7:23 8:14 13:12 49:9 <b>harasser</b> 13:9 36:17 39:12 <b>harassment</b> 4:10,18 5:7 6:23 7:2,3,6,6 7:9,20 8:14 9:9 13:8,22 14:7,9 17:21,24 18:23 23:2 26:3 30:13 32:2 33:10 34:1,2 36:17,23 37:1 37:14 38:5,16 39:20 41:16 42:16 44:25 45:8,18 47:1 50:1,16 53:12 55:9,16,20,22 56:3 <b>hard</b> 50:17 52:1 <b>harmless</b> 5:22 <b>Harris</b> 11:14,16 56:2 <b>head</b> 19:2 <b>hear</b> 3:3 <b>hearing</b> 15:1 21:16 28:7 <b>heart</b> 40:19 <b>held</b> 26:21,24,25 40:16 41:21 <b>hell</b> 36:3,9 <b>helping</b> 55:12 <b>helpless</b> 43:7 <b>he-said/she-said</b> 20:9	<b>hiding</b> 34:3 <b>high</b> 48:20 <b>hire</b> 50:7 <b>hired</b> 50:5 <b>Hobson's</b> 46:21 <b>holding</b> 22:18 <b>hole</b> 25:20 <b>home</b> 24:6 <b>Honor</b> 6:14 7:15 7:16 8:19 14:11 15:6 28:18 29:3,23 30:22 32:12,21 33:23 34:9,20 35:8 36:11 37:13,24 38:13 38:25 39:20 40:6,22 41:3 41:23 44:8 45:1 47:16 48:13,20 49:1 51:4,24 52:20 53:3 <b>Honor's</b> 35:22 50:12 <b>hope</b> 9:24 51:8 <b>hostile</b> 44:23 45:4,7 46:2 <b>Hughes</b> 10:4 <b>human</b> 30:9 39:23 <b>hypothesis</b> 5:25 <b>hypothetical</b> 14:8,13 29:5,9 29:13 35:10,12 35:22 49:16 <b>hypotheticals</b> 8:10,21	<hr/> <b>I</b> <hr/> <b>idea</b> 33:21 40:19 <b>illegal</b> 8:7 <b>illogical</b> 46:19 <b>imbue</b> 31:11 32:14 <b>immaterial</b> 40:7 <b>implication</b>	40:23,25 <b>importance</b> 38:4 <b>important</b> 6:2 56:6 <b>importantly</b> 55:15 <b>imposed</b> 42:23 47:5 <b>improper</b> 10:10 <b>inappropriate</b> 10:4 18:24 23:5 <b>inartfully</b> 34:10 <b>incentive</b> 43:14 45:12 46:22 51:10,14,14,19 55:4,7 <b>incentives</b> 25:25 51:14 <b>inclined</b> 38:2 <b>include</b> 43:10,15 <b>includes</b> 42:17 <b>including</b> 38:16 <b>incur</b> 51:12 <b>incurred</b> 48:17 <b>indefinite</b> 43:1 <b>indicate</b> 47:12 <b>indicating</b> 19:4 <b>individual</b> 17:2 37:4,8 55:25 <b>inducement</b> 46:15 <b>inexplicable</b> 25:21 <b>infer</b> 17:25 19:5 19:15 <b>inference</b> 20:3,5 <b>information</b> 9:20 10:13,15 10:22 11:1,25 12:13 24:16 25:9,12,13 29:24 30:19 41:11 53:6 <b>initial</b> 31:12 32:24 <b>initiate</b> 17:18	28:21 <b>initiated</b> 12:10 28:15 <b>initiative</b> 29:11 38:4 <b>inquiry</b> 12:14 22:9 34:16 43:24 <b>instance</b> 9:6 19:1 <b>instances</b> 18:25 37:5,8 <b>instant</b> 47:6 <b>insulate</b> 46:2 <b>integrity</b> 54:3 <b>intended</b> 21:24 25:7,24,24 27:10 <b>interest</b> 46:5 <b>interested</b> 8:22 <b>interests</b> 27:25 50:23 <b>interfere</b> 53:7 <b>internal</b> 8:12,17 13:11,21 14:2 14:19 16:22 27:1 39:9 41:15,22 42:3 42:5,11 53:6 55:21 <b>internally</b> 14:25 <b>interpret</b> 24:1 43:8,10 <b>interpreted</b> 14:3 <b>interstitial</b> 12:23 <b>interview</b> 17:18 38:13 46:25 47:24 48:3 <b>interviewed</b> 46:9 50:2 <b>investigate</b> 26:1 37:4 43:15 <b>investigates</b> 37:8 53:7 <b>investigation</b> 8:17 10:9
---	--	--	---	---	---

12:11 13:11 14:2,19,22,24 15:1,5,12 16:8 16:21 18:23 22:4,7,13,20 22:20 23:4 25:22 26:15,17 27:1,4 28:7,18 38:9,10 41:10 41:16,16,22 42:3,6,12,18 43:1,5,7,10,11 44:2,3,12,13 44:14,16 45:16 46:2,12,16 50:1 53:11 54:8,17,18,20 54:21,22 55:10 <b>investigations</b> 43:16,16 45:12 46:9 53:8 55:4 <b>investigator</b> 30:9 47:23 <b>investigators</b> 50:10 <b>involving</b> 4:16 45:8 55:9 56:3 <b>Iraq</b> 31:18,19,23 33:9 40:15,18 40:21 <b>irrespective</b> 25:14 <b>isolation</b> 5:22 <b>issue</b> 3:18 22:10 26:21 30:19 41:21 47:8 54:12 <b>issued</b> 55:12 <b>issues</b> 47:9 <b>i.e</b> 12:18	<b>Jones</b> 5:12 8:25 19:11 <b>judge</b> 45:19 <b>judgment</b> 18:17 18:19 23:7 39:1 47:16,21 51:4 <b>jury</b> 6:6,8,10,15 19:5,25 21:8,9 21:10 <b>Justice</b> 1:20 3:3 3:9 4:8,13,17 4:21 5:1,5,12 5:15,20,21 6:4 6:20 7:11,17 8:9,20 9:8,11 9:14,19 10:8 10:20 11:19 12:8 13:3,7,18 13:25 14:12,15 14:17 15:15,18 16:3,7,17 17:7 17:13 18:3 19:8,19 20:6 20:16 21:4,12 21:14,25 22:6 22:9,15,21 23:8,12,14,22 24:3,8,14 25:5 25:11 26:5,14 26:23 27:17,21 28:11,19 29:4 29:17 30:17,24 31:10,14 32:15 32:19 33:11,24 34:15,22 35:10 36:1,9,13 37:2 37:16 38:6,10 38:14,18 39:2 39:15,24 40:8 40:13,23,25 41:8,13,18,24 42:1,21,24 43:18 44:11,18 44:20,21,22 45:2,9,10,21 46:11 47:7,20	48:8,14,23 49:2,15,18 50:14,25 51:5 51:9,17,21 52:2,13,23 53:18 54:1,6 54:11,12,16 55:2 56:9 <b>Justice's</b> 54:15	<b>Laughter</b> 14:16 32:11 36:12 45:20 51:7 <b>law</b> 5:2,8 9:4,11 9:16 24:15 27:13 52:10 55:11,13 <b>laws</b> 9:14,17 <b>lawsuit</b> 45:23,24 50:17 <b>lawyer</b> 50:18 52:17,18 <b>lawyers</b> 52:6,11 <b>lays</b> 6:10 <b>leave</b> 27:10 <b>leaves</b> 6:10 <b>led</b> 28:20 29:1 <b>left</b> 25:21 47:15 55:23 56:5 <b>leg</b> 46:13 <b>legislation</b> 32:1 <b>let's</b> 14:1 <b>liability</b> 11:22 11:25 42:7 46:19 <b>liar</b> 13:9 <b>lie</b> 40:16 <b>light</b> 49:25 <b>limit</b> 7:17 8:24 <b>limited</b> 44:23 <b>line</b> 21:15 29:15 34:21,23 <b>link</b> 4:22,22 <b>LISA</b> 1:19 2:5 17:9 <b>litigation</b> 23:19 48:14,17 50:21 <b>local</b> 17:1 <b>long</b> 27:1 <b>look</b> 20:11 28:25 37:3 56:2 <b>looked</b> 23:17 <b>lose</b> 46:17 47:9 48:24 50:19 51:2,3,10 <b>loses</b> 48:15 <b>lot</b> 6:10 52:3	<b>love</b> 14:8 <b>loves</b> 14:7 <b>lower</b> 8:2 56:3 <b>luck</b> 7:22 <b>lunch</b> 20:24
<b>M</b>				
		<b>K</b>		
		<b>KENNEDY</b> 5:21 21:14 26:5 51:5 54:6 <b>kidding</b> 9:23 <b>kind</b> 22:10 30:25 43:2,10 43:23 44:2 <b>kinds</b> 52:4 <b>knew</b> 21:4,7 48:2 <b>know</b> 4:9 8:20 9:23 14:13 18:6 19:19,20 20:11,17,17 28:23 29:19 31:18 33:18,19 35:3,3 40:4 46:1 50:13 52:3,19 53:8 54:4 <b>knowledge</b> 47:23,25 <b>known</b> 3:16 <b>knows</b> 27:8 47:3 <b>Kolstad</b> 55:5		<b>magic</b> 17:17 29:18 <b>magnitude</b> 50:24 <b>making</b> 28:15 30:10 31:16 36:16 <b>manage</b> 28:5 <b>mandate</b> 54:14 <b>mandated</b> 43:3 43:23 <b>mandatory</b> 42:19,22 <b>manner</b> 14:22 <b>manual</b> 23:23 24:1,9,11 38:1 38:3 41:4 53:13 <b>material</b> 39:4 <b>matter</b> 1:13 7:22 13:13 22:14 25:1 27:3 33:13 39:25 47:3 55:19 56:12 <b>mean</b> 6:9 12:9 14:1 19:10 20:8 26:19 27:4 30:17 31:15,23 32:9 32:16 40:13 52:2 <b>meaning</b> 13:24 14:24 32:1 34:24 41:2 54:24 55:1 <b>meanings</b> 31:17 <b>means</b> 39:4 45:15 54:21 <b>meant</b> 38:15
		<b>L</b>		
<b>J</b>		<b>lack</b> 47:22,22,25 48:1,3,4 <b>lag</b> 30:12 <b>language</b> 21:3 33:7 44:9,13 54:10,16 <b>lap</b> 19:2 <b>large</b> 49:3 55:13 <b>largely</b> 55:10		
<b>job</b> 20:23 45:18 48:2 56:1 <b>jobs</b> 55:24 <b>joke</b> 11:13 <b>jokes</b> 11:16				

39:7 49:15 <b>mechanism</b> 42:18,19 <b>mere</b> 33:6 <b>met</b> 29:25 <b>metropolitan</b> 1:6,23 3:4 50:7 <b>mind</b> 11:17 <b>minimize</b> 52:11 <b>minimum</b> 23:2 <b>minutes</b> 52:24 <b>misconduct</b> 48:6 <b>missed</b> 16:1 <b>mix</b> 52:2 <b>modern</b> 16:4 <b>moment</b> 6:21 31:2 43:22 <b>money</b> 45:25 49:11,14 <b>month</b> 32:23 33:2 <b>months</b> 30:13 31:4 32:23 49:24 50:9 <b>morning</b> 27:6,10 <b>motive</b> 3:20 <b>multiple</b> 30:14 39:19 49:21	48:21 <b>non-harassment</b> 55:7 <b>noon</b> 27:5 <b>notice</b> 36:21 <b>notion</b> 35:1 <b>nudge</b> 29:15	30:14 <b>opportunity</b> 43:9 <b>oppose</b> 15:19 21:9 22:5,14 24:22,23 25:17 28:22 29:3,5,6 29:7,8,9,13,16 30:5 31:16,18 31:21 33:18 34:21,24 35:1 35:4,6 37:3,6 37:14,17 <b>opposed</b> 18:20 19:6,25 28:10 31:22 33:7 34:1 40:14,20 53:20 <b>opposes</b> 18:1 28:12,24 29:21 <b>opposing</b> 12:14 12:21,23 15:20 18:4 20:16 21:3 22:23 32:4 34:12 36:5 41:1 46:14 <b>opposite</b> 37:23 <b>opposition</b> 3:16 3:16 4:1,14,24 5:8,16 7:13 9:2 9:5,21,25 10:17 13:15 14:1 15:8,9 17:16,17,18 19:10,13 20:22 21:17,25 22:8 22:18 23:6,17 24:13,22 25:7 28:8,9 29:15 30:1,2,20 31:1 31:6,9,12 32:7 32:8 33:8,9,22 34:8 35:16,24 36:4,6,13,18 36:20,24 40:9 40:10 41:5	53:10,16,20 <b>option</b> 44:1 <b>oral</b> 1:13 2:2 3:7 17:9 27:19 <b>order</b> 40:1 50:22 <b>original</b> 4:22 31:5 50:12 <b>outer</b> 8:18 <b>outfit</b> 39:11 <b>outside</b> 20:13,18 50:5,7 <b>overlapping</b> 15:16,25 16:6 22:22 <b>owner</b> 11:16 <b>o'clock</b> 20:12	<b>particular</b> 4:2 4:25 6:24,25 8:16 11:22 13:12 24:18,18 25:9 28:10 <b>Particularly</b> 55:15 <b>parties</b> 30:4 <b>passage</b> 50:22 <b>pay</b> 48:16 51:11 52:7 <b>payroll</b> 49:21 <b>people</b> 25:8,12 38:15 41:10 44:3 46:25 52:9 <b>period</b> 31:3,3 <b>person</b> 4:4,22 5:13 6:9 8:11 8:25 9:24 11:11 14:7 16:9 17:20,25 19:15 20:11 21:7 24:15,17 25:14 29:24 34:14 39:10 49:7 50:15 <b>person's</b> 20:23 <b>Petitioner</b> 1:4 1:18,22 2:4,7 2:12 3:8 17:12 19:23 53:2 <b>phrase</b> 16:2 <b>picketing</b> 41:7 <b>place</b> 7:7 13:5,6 <b>places</b> 39:19 <b>plaintiff</b> 3:19 6:14 48:15 50:18 52:14 <b>plaintiffs</b> 47:2 51:22 52:3 <b>play</b> 17:4 <b>please</b> 3:10 17:14 27:22 38:6 53:4 <b>point</b> 5:23 33:14 39:5,24 44:7
<b>N</b> N 2:1,1 3:1 <b>narrow</b> 22:18 35:19 <b>narrowed</b> 35:21 <b>narrowly</b> 34:25 <b>narrows</b> 35:19 <b>Nashville</b> 1:7,24 3:5 <b>nature</b> 3:25 <b>necessarily</b> 10:1 39:14 <b>necessary</b> 16:10 <b>needs</b> 34:13 <b>neither</b> 24:1 <b>neutral</b> 14:5 <b>never</b> 8:25 19:11 40:17 41:18	<b>O</b> O 2:1 3:1 <b>objected</b> 4:6 10:7 17:21 20:5 <b>objection</b> 28:16 <b>objectionable</b> 18:25 <b>obvious</b> 29:21 <b>obviously</b> 49:7 <b>occurred</b> 32:8 <b>October</b> 1:11 <b>odd</b> 11:3 <b>odds</b> 52:19 <b>offense</b> 54:18 <b>offensive</b> 18:25 <b>offering</b> 38:12 <b>office</b> 8:5 16:12 19:3 20:18 36:3,8,10,18 48:7,22 49:22 49:23,25 50:3 <b>official</b> 17:2 28:15 <b>officials</b> 3:12 <b>oh</b> 6:6 19:11 42:25 49:17 52:7 <b>Okay</b> 5:5 <b>old</b> 49:24 <b>once</b> 18:11 24:25 32:5 <b>open</b> 6:10 <b>opening</b> 45:22 <b>opinion</b> 12:4 31:19 32:2 33:14,18 34:6 34:7 37:16,17 <b>opportunities</b>	<b>P</b> P 3:1 <b>page</b> 2:2 24:6 41:4 <b>paid</b> 49:4 <b>paraded</b> 31:23 <b>part</b> 5:21 6:25 11:22 42:3,10 50:21 <b>participants</b> 21:23 <b>participate</b> 15:19 <b>participated</b> 14:22 43:6 47:2 <b>participates</b> 22:4,13 <b>participating</b> 15:19 22:24 <b>participation</b> 10:18,24 11:5 12:7 13:17,19 15:11 21:15 22:2 23:10,18 25:1 26:6 27:13 28:5 41:9,14,23 53:20,24,25 54:7		

<p>51:9 54:15 55:18 <b>pointed</b> 14:12 54:13 <b>police</b> 37:4 <b>policies</b> 43:15 46:23 <b>policy</b> 16:23 27:14 42:17,18 51:16 55:11 <b>political</b> 40:13 <b>Pollard</b> 55:24 <b>position</b> 11:18 14:23 20:21 23:20 24:12 25:15,17 26:18 31:7 32:5 41:1 41:2 47:10 53:14 <b>positions</b> 15:18 <b>possible</b> 11:10 <b>possibly</b> 14:4 27:9 <b>potential</b> 46:10 47:2 48:9 <b>practical</b> 42:24 43:23 55:19 <b>practice</b> 4:7 12:14 18:1 21:10 22:5,14 24:22,23 28:10 33:8,13 34:10 <b>practices</b> 5:16 12:21 <b>precisely</b> 12:23 <b>prefer</b> 53:19 <b>preference</b> 53:21,23 <b>pressures</b> 51:18 <b>pretext</b> 48:4 <b>prevail</b> 39:16 <b>prior</b> 30:20 32:14 33:2 <b>probably</b> 29:15 40:19 <b>problem</b> 6:5 13:25 14:6,10</p>	<p>23:14 35:13 43:5 <b>problems</b> 52:8,8 52:10 53:16 <b>procedure</b> 42:6 42:12 <b>proceed</b> 18:7 <b>proceeding</b> 8:12 15:1 16:18,21 22:12 24:25 28:7 <b>process</b> 13:22,23 21:23 25:3 42:4 54:3,12 55:6 <b>processed</b> 49:23 <b>processes</b> 13:21 55:17,21 56:7 <b>promised</b> 47:25 <b>proposition</b> 8:23 <b>protect</b> 9:17 25:12 28:3,9 38:15 54:2 <b>protected</b> 3:14 3:15 5:17 6:18 8:1 10:14,15 10:17,18,22 11:2,7 12:6 15:8,11 24:16 27:7 53:15 54:5 <b>protecting</b> 27:24 53:5 <b>protection</b> 25:8 25:14,18 26:11 <b>protections</b> 33:3 46:18 <b>protects</b> 9:5,18 14:1,4 25:3 <b>protesting</b> 41:7 <b>prove</b> 3:19 6:22 <b>proven</b> 3:17 <b>provide</b> 25:8,9 25:13 53:6 55:3 <b>provided</b> 30:4 41:11 50:2</p>	<p><b>provides</b> 10:13 11:5 24:16 <b>providing</b> 12:13 <b>provision</b> 45:23 <b>provisions</b> 15:25 16:6 28:2 36:16 <b>public</b> 40:2,10 40:10 41:1 51:15 <b>pulled</b> 19:2 <b>punitive</b> 55:6 <b>purpose</b> 25:11 <b>put</b> 33:25 42:14 <b>putting</b> 34:1 36:20 <b>p.m</b> 1:15 3:2 56:11</p> <hr/> <p><b>Q</b></p> <p><b>qualified</b> 31:5 <b>qualify</b> 14:25 <b>qualifying</b> 15:5 26:17 <b>quality</b> 31:12 <b>question</b> 4:1,7 10:2,4,19 11:9 11:10,17 12:22 12:23 15:10 16:14,24 18:20 19:22,23 21:9 22:19,22 29:8 31:3 45:3 50:12 54:6,7,9 <b>questioned</b> 53:10 <b>questioning</b> 30:10 <b>questions</b> 7:25 14:14 15:7 26:12 27:16 30:18 44:5 52:21 56:8 <b>quit</b> 56:2 <b>quite</b> 12:22 29:21 31:17,21 <b>quiver</b> 47:16</p>	<p><b>quoting</b> 37:10</p> <hr/> <p><b>R</b></p> <p><b>R</b> 3:1 <b>raised</b> 55:2 <b>reach</b> 8:17 31:9 <b>reached</b> 26:21 <b>read</b> 23:16 34:25 <b>real</b> 13:25 14:10 14:18,18 29:18 <b>realities</b> 39:7 <b>really</b> 4:9 50:15 <b>reason</b> 6:8 7:8 22:17 25:6 26:8 34:22,23 39:25 40:2,4 47:12 49:18,19 51:16 <b>reasonable</b> 4:4 11:11 17:20,25 19:14 20:2,4 21:6,7 34:13 43:25 44:5 <b>reasonableness</b> 12:12 29:23 <b>reasonably</b> 44:9 <b>reasons</b> 40:7 <b>REBUTTAL</b> 2:10 53:1 <b>receiving</b> 29:24 39:11 <b>recognized</b> 45:3 <b>recognizes</b> 38:4 <b>recounts</b> 23:5 <b>recover</b> 40:1 48:19 <b>recovered</b> 48:21 <b>red</b> 41:5 <b>reduce</b> 45:12 <b>Redundant</b> 15:17 <b>reference</b> 5:4 6:24 9:7 35:12 <b>referring</b> 5:10 <b>reflected</b> 11:12 <b>regard</b> 6:18 7:25</p>	<p>53:13 <b>regarding</b> 48:2 48:6 50:3 <b>regardless</b> 25:3 <b>register</b> 28:16 <b>relate</b> 3:21 <b>related</b> 8:21 27:3 <b>relation</b> 7:13 28:1 <b>relations</b> 3:13 18:21 <b>relevant</b> 12:13 18:10 32:22 33:2 <b>remaining</b> 52:25 <b>remark</b> 5:6,7 <b>remedies</b> 39:10 <b>remember</b> 24:20 <b>repeated</b> 18:25 <b>repeatedly</b> 3:12 55:1 <b>report</b> 20:3 26:2 28:3 29:11 30:14 38:5 39:20,21,21,22 40:1,7 <b>reported</b> 3:11 18:13,25 19:23 <b>reporter</b> 19:16 <b>reporting</b> 10:21 10:25 11:23 20:10 30:13 <b>reports</b> 9:20 17:23 23:3 <b>represent</b> 50:18 <b>reputations</b> 52:5 <b>request</b> 10:5,6 29:11 30:11 <b>require</b> 17:16 34:5 40:9 <b>required</b> 55:16 <b>requirement</b> 42:24 43:17 <b>requirements</b> 16:25 18:9,14</p>
---	--	---	--	--



<p>55:14  <b>requires</b> 15:2  <b>reserve</b> 17:6  <b>resistance</b> 21:15  21:21 30:6,7  <b>resolve</b> 21:17  <b>resolved</b> 17:15  <b>resolving</b> 21:5  <b>resources</b> 30:9  39:23  <b>respect</b> 54:18  <b>respectfully</b>  37:14  <b>respondeat</b> 42:7  46:14,19  <b>Respondent</b>  1:24 2:9 27:20  <b>Respondents</b>  15:13  <b>response</b> 5:6  11:10 19:3  29:7 30:9  34:16 46:12  54:15 55:1  <b>result</b> 27:23  50:1  <b>retainer</b> 49:4  <b>retaliate</b> 5:25  12:2 26:4  <b>retaliated</b> 18:12  <b>retaliation</b> 6:15  7:21 10:25  11:1 18:14  24:17 25:23  27:11 36:24  37:1 43:8  46:10 47:1,6  47:13 48:10  54:5  <b>retaliatory</b> 3:20  <b>retroactively</b>  31:11  <b>right</b> 6:1 9:10  15:21,21 18:8  20:15 22:15  23:1 29:17  38:22 51:2</p>	<p><b>rights</b> 28:3,4  50:23 51:13  <b>rise</b> 36:18  <b>ROBERTS</b> 3:3  4:17,21 5:12  5:15 8:20  15:15,18 17:7  18:3 19:8,19  20:6,16 21:4  21:25 22:6,9  22:15,21 26:23  27:17 28:11,19  29:4,17 38:6  44:18,22 45:2  50:25 51:9,17  52:23 53:18  56:9  <b>role</b> 17:4  <b>roll</b> 46:1  <b>rooting</b> 13:21  <b>route</b> 13:6  <b>routinely</b> 6:16  <b>rubric</b> 41:23  <b>ruined</b> 52:5  <b>rule</b> 16:23 38:24  45:14  <b>running</b> 48:7  50:3</p> <hr/> <p style="text-align: center;"><b>S</b></p> <hr/> <p><b>S</b> 1:3,19 2:1,5  3:1 17:9  <b>sanction</b> 10:12  <b>satisfied</b> 17:19  <b>saw</b> 34:17  <b>saying</b> 8:5,13  30:25 34:24  35:4,23 51:17  <b>says</b> 4:9,10,23  7:2 8:25 9:22  12:9 19:11  20:11,13 24:15  24:22 25:14  26:15 28:24  29:6,7,18  34:16 36:23  40:14 42:4</p>	<p><b>Scalia</b> 4:8,13 5:1  5:5 6:4 9:8,11  9:14 13:3,7,18  16:3 21:12  31:14 32:15,19  33:11,24 39:24  40:8,13,23,25  44:20 45:9,21  48:14,23 52:13  54:16  <b>Schnapper</b> 1:17  2:3,11 3:6,7,9  4:12,15,19,24  5:3,9,14,17,20  6:1,13 7:10,15  7:24 8:19 9:3  9:10,13,16  10:1,16 11:4  12:6 13:1,5,16  13:20 14:11  15:6,17,21  16:16,19 19:9  52:24 53:1,3  53:22 54:9,23  <b>Seattle</b> 1:17  <b>second</b> 3:20  15:10 17:2  29:7 48:4  <b>section</b> 3:14,15  16:25 28:2  48:20,22  <b>see</b> 32:6,22  33:24 42:23  51:6  <b>self-evident</b>  54:19  <b>sense</b> 16:18  21:22 22:16  25:17 26:22  31:22 35:7,8  35:11 37:10,13  42:3 48:25  <b>separate</b> 24:21  <b>serious</b> 12:5  <b>set</b> 3:18 41:4  <b>settle</b> 51:2  <b>settlement</b> 51:19</p>	<p><b>severe</b> 11:21  <b>sexual</b> 4:10,18  5:7 6:23 7:2,3  7:5,6,20 9:9  13:8,9,22 14:7  14:8 17:21,24  18:22 23:2  26:3 32:2 33:9  36:22 37:1,6  37:14 39:20  41:16 45:17  47:1 50:1  53:12 55:15,19  55:22 56:3  <b>sexually</b> 7:23  <b>shaped</b> 55:10  <b>shielded</b> 42:8  <b>shining</b> 12:19  <b>short</b> 29:3  <b>shots</b> 51:4  <b>showing</b> 6:6  <b>side</b> 20:10 26:14  37:22,23 45:14  49:2 50:19  <b>sides</b> 14:21 54:2  54:4  <b>side's</b> 14:23  <b>similar</b> 16:24  19:15  <b>simply</b> 16:12  25:23 26:9  49:14 51:9  53:12  <b>singular</b> 53:25  <b>sit</b> 20:18  <b>sitting</b> 38:8  49:23  <b>situation</b> 11:3  11:20 24:15  30:23 46:22  55:9  <b>situations</b> 10:21  <b>six</b> 49:24 50:9  <b>Sixth</b> 18:16  25:20 26:13  <b>skewed</b> 51:10,15  <b>smart</b> 45:16</p>	<p><b>Solicitor</b> 1:19  <b>solve</b> 6:4  <b>somebody</b> 7:22  8:16 14:19  16:11 19:11  27:1 28:23  31:17,22  <b>someplace</b> 16:14  <b>sorry</b> 26:23 38:6  40:16 44:21  49:17  <b>sort</b> 16:17 31:4  54:11 55:5  <b>sounds</b> 46:19  <b>Souter</b> 6:20 7:11  7:17 30:17,24  31:10 34:15,22  35:10 42:21  43:18 44:11  45:10 46:11  47:7 54:11  55:25  <b>so-and-so</b> 13:12  <b>speak</b> 55:17  <b>speaker</b> 7:23  <b>specific</b> 7:14  8:13,15,22 9:6  33:8,10,11,13  34:1,11,18,19  35:7,13,15  45:5  <b>specifically</b> 17:3  <b>specificity</b> 35:14  <b>speech</b> 35:2,8,15  35:19  <b>spending</b> 8:10  <b>squarely</b> 41:21  <b>stand</b> 40:2 46:13  <b>standard</b> 29:23  29:25 38:24  <b>state</b> 7:4,8 16:25  27:12 37:17  <b>statement</b> 3:21  4:5 6:22 7:12  21:1 24:18  28:20,21,25  29:1 32:14</p>
---	--	--	---	--

35:15 36:2,4,7 36:14,17 38:12 50:9 <b>statements</b> 30:20 37:25 <b>States</b> 1:1,14,21 2:6 17:10 <b>statute</b> 7:19,21 9:7 14:25 15:24 18:2 24:21 25:23 33:3,7 34:24 35:17,18 39:6 43:3,9 44:9,13 54:25 <b>statutory</b> 21:3 25:20 43:17 <b>stealing</b> 49:14 <b>STEVENS</b> 23:8 23:12 36:1,9 36:13 51:21 <b>Stewart</b> 16:2 <b>stick</b> 42:14 <b>stop</b> 36:17,23 46:8 <b>stopped</b> 55:20 <b>strange</b> 10:20 11:20 <b>strengthened</b> 54:3 <b>strike</b> 54:19 <b>strong</b> 26:6 46:7 50:15 51:19 <b>struck</b> 27:24 28:2 <b>stuck</b> 42:6 48:9 <b>subject</b> 6:11 10:25 11:1 17:24 19:24 27:3 <b>subjected</b> 5:7 26:3 <b>submit</b> 46:20 <b>submitted</b> 56:10 56:12 <b>subordinates</b> 50:2	<b>subpoenaed</b> 13:10 <b>subsequent</b> 30:23 31:3 32:13,13,23,25 <b>substance</b> 25:2 <b>substantiate</b> 10:11 <b>substitute</b> 46:12 <b>subtitle</b> 54:8 <b>succeeds</b> 43:5 <b>sudden</b> 6:8 <b>suddenly</b> 36:25 <b>sue</b> 18:14 <b>suffice</b> 5:4 <b>sufficient</b> 4:3 6:14 12:11 <b>suggest</b> 6:21 <b>suggested</b> 54:1 54:11 <b>suggestions</b> 46:7 <b>summary</b> 18:17 18:19 23:7 39:1 47:16,21 51:4 <b>sun</b> 12:19 <b>superior</b> 42:7 46:14,19 <b>supervisor</b> 9:20 9:22 10:10 30:15,15 33:19 45:8 <b>supervisory</b> 44:25 <b>supervisor's</b> 30:15 <b>support</b> 54:24 <b>supported</b> 27:13 27:14 44:9 <b>supporting</b> 1:21 2:7 17:12 <b>suppose</b> 10:8 11:20 14:1 39:24 40:8 46:14 <b>supposed</b> 44:4 <b>Supreme</b> 1:1,14	<b>sure</b> 16:1 <b>survive</b> 18:19 <b>suspenders</b> 16:5 <b>sweeping</b> 21:21 <b>system</b> 21:19 51:10,14 <hr/> <b>T</b> <hr/> <b>T</b> 2:1,1 <b>take</b> 9:24 39:4 39:17 41:25 46:24 47:7 52:6 <b>taken</b> 18:12 35:16 40:2 51:25 <b>talking</b> 15:4 35:11,12 <b>tell</b> 29:20 <b>telling</b> 12:20 <b>tells</b> 29:20 <b>tempered</b> 38:3 <b>ten</b> 49:24 <b>Tenn</b> 1:24 <b>Tennessee</b> 1:8 3:5 <b>term</b> 30:22 34:10 43:1 44:1 <b>terminate</b> 50:9 <b>terms</b> 16:4 33:3 42:24 43:23 51:18 <b>terrible</b> 4:11,18 5:2,8,13 6:7,22 6:23 7:2,12 9:1 34:18 35:23 <b>test</b> 16:7 <b>testified</b> 14:21 16:9 38:19 <b>testifies</b> 14:8 22:12 24:16 <b>testify</b> 12:18 25:8 45:17 <b>testifying</b> 38:11 <b>testimony</b> 8:12 8:13 10:21,24	24:17 25:2 48:12 50:3 <b>text</b> 27:14 <b>thank</b> 17:7,13 27:17,21 52:22 52:23 53:3 56:9 <b>theme</b> 30:6 <b>theory</b> 50:20 <b>thing</b> 6:5 13:13 23:16 <b>things</b> 52:5 <b>think</b> 5:3,9,24 8:2 10:5 11:23 12:6 13:17 16:3 17:15 19:12,15 20:2 20:20,22 21:23 23:8,8,19 24:12,14 25:10 25:15,16 26:5 26:19 27:12 29:19 31:20 33:17,20,20 34:17 35:6,9 40:15,21 43:21 53:22 54:16,23 <b>thinks</b> 7:20 <b>third</b> 3:25 <b>thought</b> 9:15 11:13 14:15,17 14:20,23 15:3 40:19 44:18,22 45:9 53:22 <b>threatening</b> 41:6 <b>three</b> 3:17 6:15 20:12 <b>threshold</b> 38:20 48:20 <b>threw</b> 19:3 <b>thrown</b> 23:6 <b>till</b> 29:19 49:8 <b>time</b> 8:10 18:10 30:12 55:21 56:4 <b>timing</b> 18:8,13	19:7 <b>title</b> 3:14,22 5:4 8:6 12:15,21 13:23 15:2,2 15:12 16:22 18:5,7 27:15 27:23 28:7 41:17 44:16 49:1 54:10,17 54:19,20,21,24 <b>today</b> 15:4 <b>told</b> 11:13 47:23 <b>tossed</b> 18:17 38:20 <b>totality</b> 21:11 <b>tough</b> 22:10 <b>town</b> 20:24 <b>traveling</b> 32:25 <b>trial</b> 39:17 47:16 47:18 <b>trials</b> 21:9 <b>trier</b> 5:9 10:5 <b>trigger</b> 41:22 <b>trivial</b> 5:23,24 <b>true</b> 24:5 25:4 30:1 38:22,25 39:5,14 45:1 47:14 52:13,17 <b>truth</b> 12:20 <b>truthfully</b> 38:19 <b>try</b> 7:25 52:11 <b>trying</b> 10:11 33:15 <b>turns</b> 7:6,21 <b>two</b> 7:24 14:20 15:7 16:20 24:21 30:13 31:4,16 32:23 33:2 36:25 42:9 47:15 51:4 <b>type</b> 16:24 24:18 24:19 47:4 <b>types</b> 51:25 <hr/> <b>U</b> <hr/> <b>ultimately</b> 47:10
---	--	--	---	--

<b>unbeknownst</b> 7:23	<b>value</b> 53:25	<b>watershed</b> 33:2	<b>wouldn't</b> 5:4	<b>1983</b> 48:22
<b>uncomfortable</b> 32:12,15,17	<b>various</b> 30:5	<b>way</b> 35:20,21	11:19 13:3	<b>1988</b> 48:20
<b>understand</b> 10:6	<b>verbs</b> 41:7	37:3,6,14,17	17:5 18:10	<hr/>
12:9 17:20	<b>verify</b> 20:25,25	43:8 47:7	21:2 35:19	<b>2</b>
19:21 21:16	<b>Vicarious</b> 17:4	54:25	36:3 41:8	<b>20</b> 46:25 47:2
25:5 32:19	<b>Vicky</b> 1:3 3:11	<b>ways</b> 10:23	46:16	<b>2000</b> 53:14
33:12,21	<b>victim</b> 19:18	<b>Website</b> 24:6,7	<b>written</b> 15:25	<b>2008</b> 1:11
<b>understanding</b> 45:6	23:2 36:22	<b>Wednesday</b>	<b>wrong</b> 8:8	<b>27</b> 2:9
<b>understood</b> 6:21	56:5	1:11	<hr/>	<hr/>
35:24	<b>victims</b> 55:15,23	<b>went</b> 31:23 50:5	<b>X</b>	<b>3</b>
<b>undoubtedly</b> 31:8	<b>victim's</b> 20:25	<b>We'll</b> 3:3 51:6	x 1:2,9 34:17	<b>3</b> 2:4
<b>unfortunately</b> 21:8	<b>victorious</b> 48:19	<b>we're</b> 8:15,22	<hr/>	<b>38</b> 41:5
<b>unimaginable</b> 11:7	<b>view</b> 4:3 7:4 8:2	11:4 14:18	<b>Y</b>	<hr/>
<b>unit</b> 9:9	8:3 10:16,17	15:4 32:24,25	<b>years</b> 48:21	<b>5</b>
<b>United</b> 1:1,14,21	11:5 13:20	35:11 42:25	<b>Young</b> 1:23 2:8	<b>52</b> 2:12
2:6 17:10	16:19	<b>win</b> 45:24 47:10	27:18,19,21	<hr/>
<b>unlawful</b> 3:22	<b>viewed</b> 14:4	48:15,23 50:17	28:14 29:2,10	<b>7</b>
12:15,21 17:19	<b>VII</b> 3:14,22 5:4	51:1,1,12	29:22 30:21	<b>704</b> 28:2
17:24 18:1	8:6 12:15,21	<b>witness</b> 8:16	31:8,11 32:12	<b>704(a)</b> 3:14,15
19:16 20:4,7	15:2,2,12 18:5	10:7 11:8	32:18,21 33:23	<b>706(c)</b> 16:25
24:23 26:1	18:7 27:15,23	25:22 38:11,13	34:9,19 35:6	<hr/>
28:10 34:12	28:7 49:1	53:11	35:22 36:1,7	<b>8</b>
<b>unlimited</b> 7:19	<b>violates</b> 9:4	<b>witnesses</b> 11:6	36:11,15 37:12	<b>8</b> 1:11
<b>unprotected</b> 12:3 25:23	<b>violating</b> 5:1,8	11:15 21:22	37:24 38:8,12	
27:6,11	<b>violation</b> 8:4	26:1,9 27:5,6	38:17,23 39:13	
<b>unusual</b> 6:18	<b>Violations</b> 8:5	27:10 41:11	39:19 40:6,12	
<b>unwelcome</b> 19:1	<b>virtually</b> 7:19	53:5,15 54:2,4	40:22,24 41:3	
<b>upsetting</b> 25:19	43:3 54:14	54:4	41:12,15,20,25	
<b>urged</b> 45:14	55:16	<b>woman</b> 38:18	42:13 43:13	
<b>use</b> 29:2 35:1	<b>volition</b> 29:6	<b>wonderful</b> 14:9	44:7,14,25	
39:9 55:16	<hr/>	<b>word</b> 29:2,5,8,9	45:6 46:4,17	
<b>uses</b> 5:24 29:5	<b>W</b>	29:12,13,16,18	47:15,22 48:13	
29:13	<b>wait</b> 29:19	30:5 35:1,6	48:18,25 49:10	
<b>usually</b> 6:17	<b>waiting</b> 38:9	<b>words</b> 7:1 17:17	49:17,21 50:20	
10:23	<b>walks</b> 8:5	28:8 54:23	51:3,8,13,20	
<b>utter</b> 17:17	<b>want</b> 12:2 32:9	<b>wore</b> 4:20	51:24 52:20	
<b>uttered</b> 6:23	45:12 52:5	<b>work</b> 44:23 45:4	53:16	
<hr/>	<b>wanted</b> 27:10	45:7	<hr/>	
<b>V</b>	<b>wants</b> 45:11	<b>worker</b> 6:2 8:4	<b>0</b>	
<b>v</b> 1:5 3:4 11:14	<b>war</b> 31:18,19,22	13:12	<b>06-1595</b> 1:5 3:4	
	33:8 40:14,18	<b>working</b> 48:21	<hr/>	
	40:20	<b>workplace</b>	<b>1</b>	
	<b>Wash</b> 1:17	16:13 17:22	<b>1:59</b> 56:11	
	<b>Washington</b>	37:7 38:16	<b>12</b> 38:24	
	1:10,20	39:7	<b>12:59</b> 1:15 3:2	
	<b>wasn't</b> 8:13	<b>workplaces</b> 28:5	<b>14</b> 48:21	
	20:13 31:15	<b>world</b> 13:9	<b>17</b> 2:7	
			<b>1964</b> 50:22	