TESTING THE STRENGTH OF TITLE VII SEXUAL HARASSMENT PROTECTION: CAN IT SUPPORT A HOSTILE WORK ENVIRONMENT CLAIM BROUGHT BY A NUDE DANCER?

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INTRODUCTION

> *The job we perform influences nearly everything about out lives: where we live, how we dress and style our hair, when we sleep, [and] whom we have as friends.... It determines our status or lack thereof in the community, it fuels how others see us, and how we see ourselves.*[1]

Thus Lynn Snowden explains her journey of undertaking nine different occupations in one year. In her book, Snowden asks, "Where would I notice more sexual harassment—as a cocktail waitress or as a stripper? Where is the power in working in a uniform, a business suit, or nothing at all? Which jobs would be the most lucrative, the most fun, the most demanding, the most demeaning?"[2]

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1. LYNN SNOWDEN, NINE LIVES: FROM STRIPPER TO SCHOOLTEACHER: MY YEAR-LONG ODYSSEY IN THE WORKPLACE 12 (1994).

2. *Id.* at 14.

This note will focus on whether or not nude dancers[3] should be entitled to protection under Title VII of the 1964 Civil Rights Act,[4] particularly when they face hostile work environment sexual harassment by non-employees, i.e. customers. The introduction briefly describes the industry and surveys the academic and political debate about the value of this industry for women.

Section I explains the basic law of hostile work environment sexual harassment and employer liability for non-employees' actions. Relevant legal issues are discussed, including the requirement that an employee be required to wear a provocative uniform, the defense of bona fide occupational qualification ("BFOQ"), borrowed from the hiring context, and the "essence-of-the-job" test, previously used in case law regarding cocktail waitresses, Love Air, and Playboy Bunnies.

Against this background on the legal standards, Section II will examine a Minnesota lawsuit brought against the Hooters restaurant chain for sexual harassment. It considers the precedential value of this case to the issue of nude dancers.

Section III discusses a hypothetical situation: the viability of litigation brought by a nude dancer. This inquiry will ask if sexual harassment of nude dancers occurs. It will present the possible plaintiff's arguments, and focus on the assumption-of-risk defense with reference to a law review article by Kelly Ann Cahill.[5] It also will address the defenses of welcomeness and consent, and Robert J. Aalberts' and Lorne H. Seidman's law review article arguing for a sliding-scale approach to these claims.[6] Under these theories, a nude dancer could lose protection because of the nature of the job she took.

Section IV argues that nude dancers should be afforded Title VII protections against hostile work environments by non-employees. This section

3. I will use the terms "nude dancers" and "strippers" generally interchangeably to indicate women who work in the sex industry by dancing or stripping in bars or clubs. I do not include pornography actresses, prostitutes, or other sex workers who, as part of their work, engage in intercourse or other forms of sex. I focus on women because they are more prominent than men in these categories and traditionally face more sexual harassment than men. Not all customers are men, however. *See* Vinita Srivastava, *Women Lap It Up*, VILLAGE VOICE, Dec. 5, 1995, at 9 (noting that one club has a weekly lap dancing night for women customers only). Other nude or topless jobs exist, but generally there is another service involved, thus clouding the issue. *See* Evelyn Nieves, *A Modest Delicatessen Finds Fame, Immodestly*, N.Y. TIMES, Aug. 18, 1995, at B5 (reporting that "there are topless carwashes and topless maid services somewhere out there, but who'd ever heard of a topless deli?").

4. 42 U.S.C. § 2000e (1988 & Supp. 1991).

5. Kelly Ann Cahill, *Hooters: Should There Be an Assumption of Risk Defense to Some Hostile Work Environment Sexual Harassment Claims?*, 48 VAND. L. REV. 1107 (1995).

6. Robert J. Aalberts & Lorne H. Seidman, *Sexual Harassment of Employees by Non-Employees: When Does the Employer Become Liable?*, 21 PEPP. L. REV. 447 (1994). Although Cahill and Aalberts & Seidman are by no means the first commentators to discuss possible defenses to sexual harassment, their approaches are recent examples of such arguments, and Cahill is the first to focus exclusively on Hooters.

confronts some of the difficulties posed by advancing complaints by nude dancers under a body of law developed under claims by workers in more traditional office environments. Finally, the utility of other remedies will be addressed.

Underlying the legal discussion of the viability of sexual harassment claims for nude dancers are strongly contested normative debates about the industry itself. Some see nude dancing as a free form of sexuality or source of empowerment, while others consider it inherently degrading. Because this debate necessarily will inform any discussion of the legal issues, this section will briefly outline the competing viewpoints. A more in depth exploration of this divide is beyond the scope of this article.

The debate about nude dance clubs[7] is far from an academic one, given the growth of the industry. One commentator described nude dance clubs as "an expanding $3-billion-a-year industry that [in 1995] drew 10 million customers to about 2,200 clubs around the country."[8] They have become a common "male bastion of business wheeling and dealing,. . .where topless dancers gyrate across stages, swing around poles, and cozy up to customers."[9] Jay Bildstein, the founder of Scores, an upscale New York nude dance club, called his ideal customer "a high-powered attorney who needed some safe way to recharge his batteries."[10] He saw his

7. I will use the term "nude dance clubs" and "strip clubs" to include all such businesses, both the traditional seedy establishments and the more recent incarnation of "gentlemen's clubs," such as Scores on East 60th Street, considered one of the most upscale clubs in New York. *See* Brian Moore, *Strip Clubs: The Naked Truth*, MANHATTAN SPIRIT, Mar. 1, 1996, at 46 (rating New York's strip clubs); Lily Burana, *Naked City: One Woman's Journey Through the Heart of New York Stripping*, NEW YORK, Sept. 25, 1995, at 56 (ranking New York's strip clubs through the eyes of a nude dancer and comparing clubs of the 1980's to today's "gentlemen's clubs"). These clubs have become extremely popular in today's culture. *See* Ty Burr, *Day of the Doffin'*, ENT. WKLY., Jan. 12, 1996, at 63 (reviewing three recent movies about nude dancers and strip clubs); Vern E. Smith, *Not Only Divers Work Topless*, NEWSWEEK, Feb. 19, 1996, at 62 (noting that Olympics organizers were concerned by Atlanta's annual $200 million adult-entertainment industry); Stephen Schiff & Annie Leibovitz, *Showgirls*, NEW YORKER, Jan. 29, 1996, at 69 (profiling Las Vegas topless dancers in a photo-essay). Actress Demi Moore reportedly earned $12.5 million for appearing in the movie STRIPTEASE (Castle Rock Entertainment 1996). *See* Jonathan Franzen, *Live Nude Heroes*, NEW YORK, July 8, 1996, at 9 (quoting Demi Moore as saying that strip clubs were no longer "seedy places where men go to jerk off" and then mockingly referring to them as "capital-intensive female-empowerment zones where men go to jerk off."). For more information on "upscale" strip clubs in general and Scores in particular, see JAY BILDSTEIN & JERRY SCHMETTERER, THE KING OF CLUBS (1996). For more information on Scores, see David W. Chen, *Topless Club is Province of Celebrities*, N.Y. TIMES, Jan. 22, 1998, at B7 (reporting that Scores "ranks as the creme de la creme, the kind of establishment in which celebrities, sports figures, and newsmakers can be spotted regularly.").

8. James Brooke, *Rockies Ski Resorts Send Strip Clubs Packing*, N.Y. TIMES, Sept. 25, 1996, at A14.

9. Robyn Meredith, *Strip Clubs Under Siege as Salesman's Haven*, N.Y. TIMES, Sept. 20, 1997, at A1, D3 (reporting that two Detroit lawsuits claim female auto part suppliers faced discrimination and harassment when their male co-workers entertained prospective customers at strip clubs).

10. BILDSTEIN & SCHMETTERER, *supra* note 7, at 181.

"gentlemen's club" as a fantasy, aided by attitude, costume, atmosphere, easy chairs, and silk lingerie.[11]

Dancers describe many positive aspects of their career, including good incomes, and a sense of liberation or enjoyment. In her autobiography, Lynn Snowden writes, "I figure I make anywhere from $60 to $300 a night for six hours of work. This sounds paltry for a stripper, but it's by far the highest-paying job I'll have all year."[12] Another woman explains, "I wanted to see what being a working girl was like. . . .It's incredible how much money you can make topless. They're just breasts—come on!"[13] Other dancers echo the importance of income: "I always thought money meant freedom. I guess that's why I started dancing,"[14]; "I started dancing to put myself through school."[15]; or, "I first started dancing. . .two months after my nineteenth birthday. I had been working at Burger King since I was seventeen at minimum wage, and I just couldn't make it on that. I've always loved to dance. So I figured if I could make money at it, why not go for it?"[16]

Whether strippers earn $60 a night or "more than $2,000 a night,"[17] some people argue that women who work in the sex industry nevertheless are victims of exploitation due to the inherently degrading nature of the job itself. There is a powerful argument that some women may be forced by their economic needs to take these jobs even if they would not have done so had they a "real" choice. Norma Ramos, general legal counsel for Women Against Pornography, says, "I never see women stripping. . .as a function of choice. I always see it as a function of lack of choice."[18] Ramos also believes, "It is a form of prostitution. It is a form of sexual harassment."[19] Some nude dancers agree: "You feel like you're just a piece of meat. . . .During the reviews, those are the worst because they have all the dancers up at once, it's kind of like, pick which piece looks the best."[20] Another says simply, "We are human jockstraps."[21]

Others, however, disagree with Ramos. One stripper argues that stripping does not exploit women—it is a voluntary choice:

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11. *See Id.* at 189-90.

12. SNOWDEN, *supra* note 1, at 202.

13. Brian Moore, *Student Bodies: Enterprising Coeds Are Finding a Way to Beat the Cost of Higher Education—Taking It Off in the City's Strip Clubs*, MANHATTAN SPIRIT, Nov. 16, 1995, at 10.

14. MARILYN SURIANI FUTTERMAN, DANCING NAKED IN THE MATERIAL WORLD 20 (1992) (quoting Reneé).

15. *Id.* at 40 (quoting Cheryl).

16. *Id.* at 82 (quoting Rita).

17. BILDSTEIN & SCHMETTERER, supra note 7, at 214. *See* also SNOWDEN, *supra* note 1, at 202 (reporting earnings of between 60 and 300 dollars per night).

18. Moore, *supra* note 13, at 10.

19. Sonya Live: *Topless Bars* (CNN television broadcast, Mar. 5, 1992).

20. FUTTERMAN, *supra* note 14, at 28 (quoting Carmen).

21. *Id.* (quoting Anonymous).

> What it really exploits to an extent are the men, because unfortunately they are biologically geared and it's something they have reduced control over. Sexuality is a very large facet of their being and that's something all women find very easy to exploit. . . .Men are on the short end of the stick. Their glands sort of drive them into the joint. If you want to limit it to the scope of the men who are in the clubs, yeah, they are victims. I am not ashamed in the least of what I do.[22]

Aside from economic considerations, the second reason some women become nude dancers may be found in the recent attempt by women to reclaim the sexual realm from male definition. This "sex-positivism" is a movement generally by younger women who believe that female sexuality has been subjugated for too long, as historically sexuality has been defined predominantly by men.[23] "Key to it all is breaking free of the narrow definition of sex based on genital contact and a reproduction-driven script that focuses on intercourse, and male-centered performance criteria," writes one commentator. "This view of sexuality encompasses a broad continuum of activities that may provide sexual pleasure - a dream, a thought, a conversation, cuddling, kissing, sensual massage, dancing, oral/genital stimulation, and intercourse. . . .people can be totally sexual without intercourse."[24]

Perhaps this "sex-positivist" attitude empowers some women in the nude dancing business. Some women even may enjoy dancing nude at these clubs, as a reaffirmation of their sexual power. One stripper writes,

> Dancing nude is the epitome of woman as sex object. As the weeks passed, I found I liked being a sex object, because the context was appropriate. I resent being treated as a sex object on the street or at the office. But as an erotic dancer, that is my purpose. . . .[O]ur very existence provides a distinction and a choice as to when a woman should be treated like a sex object and when she should not be. At the theater, yes; on the street, no. Having the distinction played out so obviously at work, I felt more personal power on the street.[25]

Snowden writes that men are "on our turf in a strip club, and they don't want to do something wrong or they'll be thrown out."[26] Since men often make an "automatic mental link between their concepts of power and

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22. *Id.* at 72 (quoting Sydney).

23. For more information about "sex-positivism," see *Hot Unscripted Sex: How Women Are Redefining Sensuality & Pleasure*, Ms., Nov./Dec. 1995 (cover story).

24. Rebecca Chalker, *Sexual Pleasure Unscripted*, Ms., Nov./Dec. 1995, at 49.

25. Debi Sundahl, *Stripper*, *in* SEX WORK: WRITINGS BY WOMEN IN THE SEX INDUSTRY, 175, 176 (Frederique Delacoste & Priscilla Alexander eds., 1987).

26. SNOWDEN, *supra* note 1, at 186.

sex,"[27] one may ask whether stripping may help women regain some of this power in the sexual realm. Yet the power Snowden felt may not be sexual in nature. "The power is exciting, and it's fun to dance well for an audience, but I didn't find it—nor did any strippers I asked—sexually exciting."[28]

Some, though, may find an exciting sexual component in dancing. In a cable television show about topless dancers, a talk-show host noted that "[T]here is a fantasy that many, many women have where they see themselves as a stripper and somehow involved in voyeuristic activity and the eyes of all men are on them."[29] One nude dancer notes, "When I'm at the club I can flirt and be sexual and have fun. It's an ego trip."[30] Another says, "I never considered what I did 'sexy,' though I portrayed an animalistic sexuality that was not a basic part of my nature. In a relationship I would never be that uninhibited."[31]

Another dancer looks at the power she felt:

> Back at the club - we were all sex workers, exhibiting our nearly nude bodies, erotically moving our torsos, hips, pelvises. From the stage, we literally looked down upon the men, with their beaming, grinning faces. Their howls, horny male barks, whistles, and cat calls made them look like a pack of dogs or wolves, all waiting to get at some fresh meat or get it on with a 'bitch in heat.' We felt as if we were above it all, because we were sexy, desirable, young, gorgeous, confident, and proud to be female. Knowing their eyes were all on me, I was empowered, in control.[32]

Bildstein quotes "Marina," who worked for him occasionally at Scores, "I'm really an exhibitionist. I love to take my clothes off and dance nude in front of men. That is, I like it when they can't touch me. . . .The topless bars put the power in the girl's hands."[33] Yet another stripper echoes the idea that the dancing is not just for the male customers: "Dancing is satisfying in many ways. It allows you to enact a mutually beneficial fantasy. One in which you can be any woman you want to be and a man can idealize you in a relaxed environment." Yet she adds that "most of the women who are drawn to this kind of work. . .have a perpetual longing for acceptance and approval that was somehow inadequate earlier in their lives."[34] With

27. John A. Bargh & Paula Raymond, *The Naive Misuse of Power: Nonconscious Sources of Sexual Harassment*, 51 J. Soc. Issues 85, 87 (1995).

28. Snowden, *supra* note 1, at 201 (italics omitted).

29. Sonya Live: *Topless Bars*, *supra* note 19.

30. Futterman, *supra* note 14, at 30 (quoting Tracy).

31. *Id.* at 120 (quoting Sintana).

32. Aline, *Good Girls Go to Heaven, Bad Girls Go Everywhere*, *in* Sex Work, *supra* note 25, 131, 132-33.

33. Bildstein & Schmetterer, *supra* note 7, at 253-54.

34. Futterman, *supra* note 14, at 115 (quoting Carmen).

respect to emotional need, another adds that "it's been very gratifying and, oddly enough, stabilizing for me psychologically."[35]

Some women cite a combination of their pride in working in the sex business and the economic benefits derived therefrom. After describing some of the negative aspects of the business, one nude dancer claims that "stripping can give you a chance to define yourself sexually in a way that can be compared to the worship of fertility goddesses. You're a life force on a pedestal." And when asked whether men pay tribute, she responded, "Sure. With their money—and in this society, that's power."[36] Another concurs, "The independence was definitely tied to money."[37] But perhaps there is a down side to this empowerment:

> The issue of power interests me a lot. Having a presence and physical body which men found sexually attractive was important to my self-esteem. Having men pay to get turned on by me was an affirmation of my sexual power. . . .I'd just be so sexy I could have any man I wanted. Although, of course, I didn't want any of them. What I never saw was that in basing my self-worth on men's desire I was far from developing a true sense of worth based on self love.[38]

Futterman summarizes, "Nude dancing, then, offers young women several advantages: It pays well for relatively unskilled work; the performer is not bound by a nine-to-five job; and the work, at least initially, seems glamorous. However, the costs are high."[39] These costs may include sexual degradation, loss of self-respect, and, of relevance to this inquiry, the possibility of sexual harassment.

Avoiding the issue of whether stripping is a lucrative industry and/or a tool for the continued oppression of women, this article will not take a position on whether some or all sex-related jobs should be allowed, or where to draw the line in protecting against the degradation of women. Instead I will defer to the choices of women (and men) to decide whether they want to undertake certain jobs. From there, legislation should protect people from sexual harassment and other discrimination.

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35. *Id.* at 104 (quoting Susie the Floozie).

36. Melanie Bush, *Gyn-Economy: Can Sex Work Be Self-Expression?*, VILLAGE VOICE, May 21, 1996, at 29.

37. Judy Helfand, *Silence Again*, in SEX WORK, *supra* note 25, at 100.

38. *Id.* at 101.

39. FUTTERMAN, *supra* note 14, at 132.

I.
THE BASIC LAW OF HOSTILE WORK ENVIRONMENT SEXUAL HARASSMENT, AND HOW IT RELATES TO NUDE DANCERS

In addressing the particular aspects of sexual harassment as the claim relates to nude dance clubs, it is important first to establish the background of the hostile work environment claim. This is not intended to give a complete history of sexual harassment law; rather, this section contains just a sketch of the general law as it is today, and the relevant tests for a prospective hostile work environment claim brought by a nude dancer.

A. Title VII and Case Law

Title VII of the 1964 Civil Rights Act, as amended by other legislation including the 1991 Civil Rights Act, forbids discrimination on the basis of, among other characteristics, sex:[40] "It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[41]

On November 10, 1980, the Equal Employment Opportunity Commission issued Guidelines on Discrimination Because of Sex. Codifying the idea that sexual harassment was a form of sex discrimination prohibited by Title VII, the EEOC wrote:

> (a) Harassment on the basis of sex is a violation of section 703 of [T]itle VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when
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> (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment,
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> (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or
>
> (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

40. *See* 42 U.S.C. § 2000e-2,3.

41. 42 U.S.C. § 2000e-2(a)(1). This law restricts its application to any employer "engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or proceeding calendar year." 42 U.S.C. § 2000e(b). State and local laws have similar restrictions. This article will not become concerned with these specifics. Instead, as its focus is on the theoretical implications of the law in the untested context of nude dancers, assume that Title VII applies.

> (b) In determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case by case basis.[42]

While the EEOC is not a court, and thus its pronouncements and rulings are considered less persuasive authority than judicial decisions, the issuance of these guidelines came at a time when the legal world was in search of a general definition of sexual harassment. In fact, the year before, Catharine MacKinnon published her landmark book, Sexual Harassment of Working Women. In that book, she devotes a very large chapter[43] to showing that sexual harassment is a form of sex discrimination prohibited by Title VII.

Sexual harassment generally occurs in two forms, derived from the EEOC's language: (1) "quid pro quo," where sexual favors are demanded in exchange for a job, a promotion, or other work-related benefit, and (2) "hostile work environment," when the atmosphere or situation at work becomes unbearably uncomfortable or offensive due to jokes, posters, comments, touching, or other behavior. Just six years after the EEOC Guidelines, the Supreme Court released its first major decision that interpreted Title VII and the EEOC Guidelines to find that a hostile work environment was actionable as a form of sexual harassment; that case was *Meritor Savings Bank v. Vinson* in 1986.[44] Until that point, courts were not in complete agreement, and only "quid pro quo" sexual harassment was clearly recognized. *Meritor* involved a woman, Mechelle Vinson, who worked at a bank and claimed that she faced repeated sexual harassment by her boss, Sidney Taylor.[45]

Justice William Rehnquist, in writing for a unanimous Court, found that the language of Title VII was not limited to economic or tangible discrimination, and ruled that harassment leading to non-economic injury also could violate the law.[46] He then turned to the EEOC Guidelines and wrote, "In concluding that so-called 'hostile work environment' (i.e., non quid pro quo) harassment violates Title VII, the EEOC drew upon a substantial body of judicial decisions and EEOC precedent holding that Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult."[47] He then stated the holding

42. 29 C.F.R. § 1604.11 (1995).

43. *See* CATHERINE A. MCKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 143-213 (1979).

44. Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986).

45. *See Id.* at 60.

46. *See Id.* at 64-65.

47. *Id.* at 65.

of the case, explaining, "Since the Guidelines were issued, courts have uniformly held, and we agree, that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment."[48] He further ruled that "[f]or [non quid pro quo] sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"[49]

The Supreme Court refined its test for hostile work environment sexual harassment in 1993 in *Harris v. Forklift Systems, Inc.*,[50] another unanimous decision. There had been a split in the circuit courts over the requirement that a plaintiff must suffer psychological harm in order to recover damages for this type of harassment. In ruling that such proof was not necessary, Justice Sandra Day O'Connor explained, "A discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers."[51] She then enunciated the new standards for finding hostile work environment sexual harassment:

> [W]e can say that whether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. The effect on the employee's psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive. But while psychological harm, like any other relevant factor, may be taken into account, no single factor is required.[52]

The combined reading under *Meritor* and *Harris* is the current law of hostile work environment sexual harassment, and presumably the standard under which any nude dancer's claim of such discriminatory action would be tested.

Note that there is one important part of the test on which the Supreme Court has not ruled yet: whether the standard to be applied should be the "reasonable person," as in most cases, or the "reasonable woman," as the Ninth Circuit proposed in Ellison v. Brady.[53] While this distinction does not apply to this inquiry, it is an issue worthy of its own study. In addition,

48. *Id.* at 66.

49. *Id.* at 67 (quoting Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971)).

50. Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993).

51. *Id.* at 22.

52. *Id.* at 23. In light of this decision, courts "looking at all the circumstances" must view sexual harassment claims both objectively and from the plaintiff's subjective standpoint.

53. Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991).

it may become important in future litigation, given that the vast majority of likely nude dancer plaintiffs are women, and that different standards still are being developed by the federal circuit courts.

B. Employer Liability for Non-employee Harassment

As this inquiry is about the liability of nude dance clubs for the sexual harassment of nude dancers by non-employees, it is imperative to understand the general law of when employers may be liable for these activities. The 1980 EEOC Guidelines address this question:

> An employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing these cases the Commission will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees.[54]

The EEOC supplemented this general rule with a much more detailed policy guide on March 19, 1990, entitled EEOC Policy Guidance on Employer Liability for Sexual Harassment.[55] Again, the weight of this authority would be less forceful than that of the courts, but as explored below, the courts have tended to accept this policy. Its preamble explains that the agency issued this new policy guide to EEOC field office personnel in order to "define[ ] sexual harassment and establish[ ] employer liability in light of recent court decisions."[56] The EEOC was most interested in responding to the Meritor Court's refusal to issue a definitive rule on employer liability, in the following part of the opinion:

> [W]e hold that the Court of Appeals erred in concluding that employers are always automatically liable for sexual harassment by their supervisors. . .[and] was wrong to entirely disregard agency principles and impose absolute liability on employers for the acts of their supervisors, regardless of the circumstances of a particular case.[57]

While most cases about employer liability, including those that troubled the EEOC, involve harassment of employees by fellow employees, coworkers, or supervisors, there has been a sporadic line of cases where the

54. 29 C.F.R. § 1604.11(e) (1995).

55. EEOC POLICY GUIDANCE ON EMPLOYER LIABILITY FOR SEXUAL HARASSMENT (1990) [hereinafter EEOC POLICY GUIDANCE], reprinted in RALPH H. BAXTER JR. & LYNNE C. HERMLE, SEXUAL HARASSMENT IN THE WORKPLACE 125-159 (1994).

56. EEOC Policy Guidance, reprinted in BAXTER & HERMLE, *supra* note 55, at 125.

57. Meritor Sav. Bank, 477 U.S. at 72-73.

harassers were non-employees. Many of these cases involve uniforms or sexualized dress; these will be explored in the next section. First, this article will look at the more general cases, in the non-dress context, where courts have found or indicated the possibility of employer liability for sexual harassment of employees by non-employees. One general reason for third-party harassment by non-employees may be that non-employees, such as customers or clients, might "perceive that the victim is 'working for them.' Therefore, the third parties feel they can impose themselves on the employee due to their relatively powerful position. Others may feel that because the victim is fortunate enough to have the harasser's business, she is obligated to tolerate his manner of handling relationships."[58]

It was the EEOC which first held in a major non-dress case that employers could be liable for sexual harassment by non-employees. In a 1984 decision,[59] the Commission ruled in favor of a waitress who faced explicit jokes and comments of a sexual nature from four customers. In addition, one attempted to grab her breasts, and then slid his hand under her dress and squeezed her buttocks.[60] The EEOC ruled that "it is the Commission's position that an employer is responsible under Title VII for the sexual harassment of an employee by a non-employee where the employer fails to take corrective measures within its control once it knows or has reason to know of the non-employee's conduct."[61] In a footnote, the EEOC explained, "Holding an employer responsible for sexual harassment in such circumstances is consistent with the Commission's long-standing position that under Title VII an employer has an affirmative duty to maintain a working environment free from unlawful harassment, intimidation, or insult, and that the duty encompasses a requirement to take positive action where necessary to eliminate such practices or remedy their effects."[62]

Federal courts have reached such conclusions as well. In a well-publicized trial court case from 1992, a Nevada district court judge ruled that the Las Vegas Hilton was liable for the sexual harassment of a female blackjack dealer by male customers on a few different occasions.[63] The conduct included verbal harassment, such as one customer screaming that she had "great tits" and another telling her she had "great legs." When she complained to her supervisor, she was told to take it as a compliment. Another time she complained about a customer staring at her, but her supervisor told her that the customer "was allowed to stare at whatever he wants for as long as he wants." The final straw for the plaintiff was another customer

58. Aalberts & Seidman, *supra* note 6, at 450 (footnotes omitted).
59. EEOC Dec. No. 84-3, 1984 WL 23399 (EEOC Feb. 16, 1984).
60. *See Id.* at *1.
61. *Id.* at *5.
62. *Id.* at *7.
63. Powell v. Las Vegas Hilton Corp., 841 F. Supp. 1024 (D. Nev. 1992).

staring at her for ten to twenty minutes, while making gestures at her. That was when she quit.[64]

The court asked four questions in reaching its conclusion: Was the conduct of a sexual nature? Was the conduct unwelcome? Was the conduct severe or pervasive? Was defendant's action appropriate? It answered the first three affirmatively, and then answered the fourth by quoting from a 1989 case from the Ninth Circuit:[65] "The prevailing trend of the case law. . .seems to hold that employers are liable for failing to remedy or prevent a hostile or offensive work environment of which management-level employees knew, or in the exercise of reasonable care should have known."[66] Although the plaintiff won summary judgment on the issue of employer liability for non-employee sexual harassment, meaning that the Las Vegas Hilton could be held liable if the trier of fact determined that the employer was responsible, she lost the jury verdict in the subsequent trial.[67]

Another case where a court found employer liability for this form of non-employee sexual harassment involved a female truck driver who faced unwanted sexual propositions, sexual touching, and exposure by male coworkers and one male customer.[68] When she complained that her breast was touched at a customer's plant, her company's safety director responded, "The customer is always right."[69] Other examples of cases finding such liability involved a female automobile sales trainer who faced sexual harassment when visiting dealerships to monitor their sales and marketing of Volkswagen cars,[70] and a female manager of a company selling electric and industrial equipment, Occidental International, who faced harassment by an official of one of its clients, the Puerto Rico Electrical Power Authority.[71] These courts reasoned that once an employer is made aware of the situation, it faces the responsibility of restoring a non-harassing environment.

Although the Supreme Court has not ruled on the specific issue of employer liability for hostile work environment sexual harassment by non-employees (such as strip club patrons), it has expanded the idea of employer liability in general. In *Burlington v. Ellerth*[72] and *Faragher v. City of Boca Raton*,[73] the Court ruled that an employer is subject to vicarious liability to an employee for harassment by a supervisor, even when the employer has no notice of the inappropriate conduct and the victim does not

64. *See Id.* at 1025-26.
65. EEOC v. Hacienda Hotel, 881 F.2d 1504 (9th Cir. 1989).
66. *Id.* at 1515-16.
67. *See* Powell, 841 F. Supp. at 1026.
68. Llewellyn v. Celanese Corp., 693 F. Supp. 369 (W.D.N.C. 1988).
69. *Id.* at 372.
70. Magnuson v. Peak Technical Services, Inc., 808 F. Supp. 500 (E.D. Va. 1992).
71. Hernandez v. Miranda Velez, Civ. No. 92-2701 (JAF), 1994 WL 394855 (D.P.R. July 20, 1994).
72. Burlington v. Ellerth, 118 S.Ct. 2257 (1998).
73. Faragher v. City of Boca Raton, 118 S.Ct. 2275 (1998).

suffer adverse job consequences. How the Supreme Court may rule on harassment by non-employees is an area for future debate.

In the last few years, therefore, employers' legal responsibility for non-employee harassment has become a viable cause of action, and thus, an important concern for business. Even so, the women,

> who are harassed by customers or suppliers apparently take a 'grin and bear it' philosophy. They realize there is usually an economic interest at stake for their employer. . . .Some women say they endure third-party sexual harassment because they don't want to be perceived as being unable to handle their job responsibilities.[74]

This has been an area of law open to much judicial interpretation, to which a case brought by a stripper plaintiff would add an interesting dimension.

C. Provocative Dress

As explained above, a look at the provocative dress cases may be of interest to a court weighing a case involving sexual harassment of nude dancers. While a dress code that differentiates between the sexes legitimately would be acceptable, such a requirement that foreseeably encourages sexual harassment would be considered generally unlawful. These can be called "dress code" or "provocative dress" cases in the employment context.[75] Many of these involve cocktail and restaurant waitresses, and the uniforms their employers require them to wear. This case law is relevant to the issue of nude dancers, since it could be argued that they are forced to "wear" a "uniform" of skimpy clothing which they strip off, or a "uniform" of a topless or naked woman.

Note that, generally, employer dress codes that impose different standards for the sexes are not unlawful unless they reflect demeaning sexual stereotypes. Employers are liable, however, for sexual harassment of their employees by non-employees if that harassment was brought about in part by the uniform or dress required by the employer. Of course, the employer is liable only if it knew or should have known of the harassment, and failed to take immediate action. Whether nudity can be said to be "sexually suggestive attire" may be an issue in this inquiry. Regarding dress codes, Christina Bull writes:

> Dress codes are often used to both control and objectify women. This refers not to a uniform that makes all employees look alike,

74. L. A. Winokur, *Workplace: Harassment of Workers by "Third Parties" Can Lead Into Maze of Legal, Moral Issues*, WALL ST. J., Oct. 26, 1992, at B1.

75. This term often is used to refer to general cases in which a defendant argues that the plaintiff welcomed the harassment as illustrated by her "provocative dress." In the employment cases cited, an important addition to this scenario is that the employer required the uniforms at issue.

> but rather to a dress code that, ironically, requires women to dress in a sexually provocative manner. Some plaintiffs complain of dress codes that effectively subject women to sexual harassment because the required clothes are so revealing. Employers, therefore, essentially make their female employees ornamental, not affording them the respect of professionals, and then subject them to sexual harassment accordingly. Dress codes that emphasize sexuality keep women subject to a male definition of female sexuality and effectively enforce the notion that women are sexual objects in the workplace.[76]

In learning how to serve as a cocktail waitress in Las Vegas, Snowden writes of being taught "the lean" by a friend: "'You get yourself a push-up bra, and then when you serve a drink to a customer,' Jerry bends over at the waist, offering an imaginary drink. He's jutting his chest out farther than even his chin. 'You lean way in like this. See? That's how you get big tips.'" Later a friend asked her, "Aren't you worried about the outfit? Some of those Vegas waitress getups look really humiliating." Her response was to hope for good shoes.[77] Snowden claims that she faced sexual harassment as a cocktail waitress, perhaps due to the "tiny garment cut low in front and low in the back, with an extremely short flared skirt"[78] that she had to wear. Some examples of inappropriate behavior she cited: "creepy fat guys would interrupt their clapping just long enough to beckon me over and put their arm [sic] around my waist";[79] "[a]t 3 A.M., one of the married members of this [bachelor] party decided to put his head up my skirt while I was taking their drink orders";[80] and a customer from the casino who, upon sitting next to her on an airplane flight, asked, "Is it okay if I lay my head on your shoulder?"[81] It is fair to argue that her skimpy uniform sent a message to male customers that she was somehow more open to such behavior. This is a constant issue throughout the provocative dress cases, and clearly would be included in a lawsuit by a stripper.

Interestingly, the first major sexual harassment case regarding a provocative uniform did not involve a waitress. In EEOC v. Sage Realty Corp.,[82] the management company of an office building in New York required a female lobby attendant, Margaret Hasselman, to wear a uniform known as the Bicentennial. The court tells the story best, including a description of the uniform:

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76. Christina A. Bull, *The Implications of Admitting Evidence of a Sexual Harassment Plaintiff's Speech and Dress in the Aftermath of* Meritor Savings Bank v. Vinson, 116 U.C.L.A. L. REV. 117, 141-42 (1993).

77. *See* SNOWDEN, *supra* note 1, at 106-107.

78. *Id.* at 118.

79. *Id.* at 118.

80. *Id.* at 120. She then wrote sarcastically, "And I was worried about ass-pinching?"

81. *Id.* at 135.

82. EEOC v. Sage Realty Corp., 507 F. Supp. 599 (S.D.N.Y. 1981).

> The Bicentennial uniform was constructed in the shape of a red-white-and-blue octagon with an opening in the center for the lobby attendant's head. The spring 1976 outfit was to be worn as a poncho, or cape, draped over the shoulders, with snaps at each wrist and stitching in the form of tacks, one tack at each side. The uniform was otherwise open at the sides. Underneath the poncho the lobby attendants wore blue dancer pants and sheer stockings. The Bicentennial uniform was to be worn with white, low-heeled shoes. The lobby attendants were not permitted to wear a shirt or blouse, a Danskin, pants, or a skirt under the outfit.
>
> . . . .
>
> . . . When Hasselman tried on her uniform, she found it short and revealing on both sides. Her thighs and portions of her buttocks were exposed and understandably she was concerned about wearing the outfit in the 711 Third Avenue lobby.[83]. . . .
>
> . . . While wearing the Bicentennial uniform and as a result of wearing it, Hasselman was subjected to repeated harassment. She received a number of sexual propositions and endured lewd comments and gestures.[84]
>
> . . . .
>
> . . . In requiring Hasselman to wear the revealing Bicentennial uniform in the lobby of 711 Third Avenue, defendants made her acquiescence in sexual harassment by the public, and perhaps by building tenants, a prerequisite of her employment as a lobby attendant.[85]
>
> Judge Robert Ward ruled that the management company was liable, because it forced her to wear a sexually-provocative uniform that subjected her to sexual harassment by others.[86]

Other courts have ruled similarly to Ward in waitress uniform cases. One year previously, a Michigan district judge had written that the law was open to the possibility of employer liability in such a situation, although he dismissed the case on mootness grounds.[87] "The Court believes that a sexually provocative dress code imposed as a condition of employment which subjects persons to sexual harassment could well violate the true spirit and the literal language of Title VII."[88]

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83. *Id.* at 604.
84. *Id.* at 605.
85. *Id.* at 609-10.
86. *Id.* at 610-11.
87. *See* Marentette v. Michigan Host, Inc., 506 F. Supp. 909 (E.D. Mich. 1980).
88. *Id.* at 912.

Other prominent waitress uniform cases help our inquiry. In EEOC v. Newtown Inn Assocs.,[89] the EEOC charged that the "cocktail waitresses were required by their employer pursuant to a marketing scheme called the 'confetti concept' to project an air of sexual availability to customers through the use of provocative outfits. . .[and] were required to flirt with customers and to dance, both with customers and alone, in a sexually provocative and degrading fashion."[90] Furthermore, they "were required to dress in revealing, thematic attire for events such as 'Bikini Night,' 'P.J. Night,' and 'Whips and Chains Night.' As a consequence, the employees were subjected to unwelcome sexual proposals and both verbal and physical abuse of a sexual nature."[91]

In Priest v. Rotary,[92] another district judge ruled in favor of a cocktail waitress. The court found that Priest was subjected to sexual harassment of a very physical nature. Priest was transferred from the lounge to the coffee shop after refusing to wear "something low-cut and slinky," as her employer demanded. She was later fired for spurning the employer's sexual advances. In the decision, the court reasoned that Title VII is violated "when an employer requires a female employee to wear sexually suggestive attire as a condition of employment."[93]

In another case, a California intermediate court ruled in favor of Michelle Marie Ehlers, finding that she was deprived of a harassment-free work environment.[94] The Bahia Lodge "furnished its bartenders and waitresses with uniforms consisting of revealing short skirts and low tops with black and white ruffles."[95]

In addition to federal district courts and the Ninth Circuit, the EEOC also has looked at this issue. One Commission decision finding employer liability for sexual harassment brought about by uniforms was a 1981 ruling in favor of a receptionist who was forced to wear a sexually-revealing costume that consisted of a halter-bra top and a mini-skirt with a slit in front that ran up her thighs.[96] Her provocative clothing elicited verbal abuse from male customers, and, according to the Commission, unreasonably interfered with her work and created an "intimidating and offensive working environment."[97]

The United States Court of Appeals for the Ninth Circuit, in a 1997 dress case, became the first federal circuit court to state that employers could be held liable for a sexual harassment claim based on behavior by a

89. EEOC v. Newton Inn Assoc., 647 F. Supp. 957 (E.D. Va. 1986).
90. *Id.* at 958.
91. *Id.*
92. Priest v. Rotary, 634 F. Supp. 571 (N.D. Cal. 1986).
93. *Id.* at 574.
94. Donald Schriver, Inc. v. Fair Employment & Hous. Comm'n, 220 Cal. App. 3d 396 (1986).
95. *Id.* at 400.
96. EEOC Dec. No. 81-17, 27 FEP Cases 1791 (Feb. 6, 1981).
97. *Id.* at 1793.

customer. In Folkerson v. Circus Circus Enterprises, Inc.,[98] the plaintiff, who portrayed a mime in a casino, sued her employer when a customer attempted to hug her to prove whether or not she were real. The court ruled against her, but noted in dicta:

> We now hold that an employer may be held liable for sexual harassment on the part of a private individual, such as the casino patron, where the employer either ratifies or acquiesces in the harassment by not taking immediate and/or corrective actions when it knew or should have known of the conduct.[99]

Although the court spoke about employer liability for customer actions only generally, the ramifications of this language for a stripper plaintiff should be clear.

D. BFOQ and Essence of the Job

In addition to the uniform or provocative dress cases, courts may borrow the Bona Fide Occupational Qualification (BFOQ) doctrine from the hiring context if challenged to address the concerns of a nude dancer plaintiff. Title VII includes the following provision:

> It shall not be an unlawful employment practice for an employer to hire and employ employees. . .on the basis of [their] religion, sex, or national origin in those certain circumstances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.[100]

While the BFOQ theory is used in the hiring context, it may be useful to the inquiry of sexual harassment of strippers because this is an untested area of sexual discrimination law, and courts may search for more than just the general standards of sexual harassment tests. This is especially true because BFOQ is an area of law that allows for different standards based on sex, and that may be an important focus of any judge or jury faced with deciding a sexual harassment lawsuit brought by a nude dancer. The same may be true for the "essence of the job" test (discussed below), where courts similarly may look at how necessary one's sex may be to the job in question.

Under the BFOQ doctrine, there may be particular positions for which one's sex can be a necessary requirement to be hired. The clearest examples are wet nurses and sperm donors. A more difficult case was Dothard v. Rawlinson,[101] in which the Supreme Court upheld Alabama's restriction on hiring women as guards for male prisons, basing it on a security concern

98. Folkerson v. Circus Circus Enterprises, Inc., 107 F.3d 754 (9th Cir. 1997).
99. *Id.* at 756.
100. 42 U.S.C. § 2000e-2(e)(1) (1988 & Supp. 1991).
101. Dothard v. Rawlinson, 433 U.S. 321 (1977).

that women in those jobs would be specially vulnerable to sexual assault. Deborah Rhode criticizes this decision, as it "has served to justify gender classifications in a wide variety of unrelated cases, including everything from bans on male nurses to disparate penalties in criminal-sentencing statutes," and calls for "further legislative or judicial curtailment of the BFOQ defense."[102] Presumably, however, it would be legitimate to hire only women to strip for heterosexual men, as long as it were equally legitimate to hire only men to strip for heterosexual women. Similar reasoning would apply for gay and lesbian nude dance clubs.

Many BFOQ cases involved airline flight attendants. In the first major case, a class of men sued Pan Am because the company hired only women for that position.[103] The Fifth Circuit ruled, "Because we feel that being a female is not a 'bona fide occupational qualification' for the job of flight cabin attendant, appellee's refusal to hire appellant's class solely because of their sex, does constitute a violation of the Act."[104]

A district court case that became even more famous than Diaz involved Southwest Airlines's marketing ploy of calling itself Love Air.[105] "Southwest projects an image of feminine spirit, fun, and sex appeal. Its ads promise to provide 'tender loving care' to its predominantly male, business passengers. The first advertisements run by the airline featured the slogan, 'AT LAST THERE IS SOMEBODY UP THERE WHO LOVES YOU.'"[106] The court explained further in a footnote:

> Unabashed allusions to love and sex pervade all aspects of Southwest's public image. Its T.V. commercials feature attractive attendants in fitted outfits, catering to male passengers while an alluring feminine voice promises in-flight love. On board, attendants in hot-pants (skirts are now optional) serve "love bites" (toasted almonds) and "love potions" (cocktails). Even Southwest's ticketing system features a "quickie machine" to provide "instant gratification."[107]

Gregory R. Wilson and a class of over one hundred other men sued Southwest, challenging the airline's open refusal to hire men. The Northern District of Texas ruled in favor of the class:

> While possession of female allure and sex appeal have been made qualifications for Southwest's contact personnel by virtue of the "love" campaign, the functions served by employee sexuality in Southwest's operations are not dominant ones. According to

102. DEBORAH L. RHODE, JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW 96-97 (1991).

103. Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385 (5th Cir. 1971).

104. *Id.* at 386.

105. Wilson v. Southwest Airlines Co., 517 F. Supp. 292 (N.D. Tex. 1981).

106. *Id.* at 294.

107. *Id.* at 294 n.4.

> Southwest, female sex appeal serves two purposes: (1) attracting and entertaining male passengers and (2) fulfilling customer expectations for female service engendered by Southwest's advertising which features female personnel. As in Diaz, these non-mechanical, sex-linked job functions are only "tangential" to the essence of the occupations and business involved. Southwest is not a business where vicarious sex entertainment is the primary service provided. Accordingly, the ability of the airline to perform its primary business function, the transportation of passengers, would not be jeopardized by hiring males.[108]

This language set out the "essence of the job" test, under which courts will look at whether one's sex is necessary for, or at least of dominant importance to, the adequate performance of the "essence" of the job.[109]

Two years before Wilson, there was a similar case in which a group of female plaintiffs sued an airline for sexual harassment based on a similar advertising campaign, but they lost.[110] Nancy Doyle and five other flight attendants sued Continental, arguing that the company's advertising slogan, "We really move our tail for you," caused the public to treat them as sex objects. This included comments such as, "Are you going to move your tail for me?"; "You're not moving your tail for me fast enough"; "Why don't you come over here and move your tail for me?"; and "How's your tail?"[111] The plaintiffs also complained that passengers asked inappropriate questions about their personal lives, and disobeyed their safety instructions.[112]

The possible relevance of the BFOQ and essence language to a nude dancer plaintiff can be seen in the "Playboy Bunny" case from the early 1970's.[113] There, the New York State Human Rights Appeal Board ruled

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108. *Id.* at 302.

109. The essence of a flight attendant's job may involve passenger comfort, but in a much different sense from the Love Air idea. Today, flight attendants are seen as professional well-trained women and men who can take charge in case of an emergency, and are directly responsible for passenger safety. For more information on the history of the flight attendant, see Kathleen Heenan, *Fighting the "Fly-Me" Airlines*, 3 CIV. LIBERTIES REV. 48, Dec. 1976 / Jan. 1977; Pamela Whitesides, *Flight Attendant Weight Policies: A Title VII Wrong Without a Remedy*, 64 S. CAL. L. REV. 175 (1990); Rose Ciotta, *Update: Are Flight Attendants in Friendlier Skies?*, Ms., Nov./Dec. 1995, at 40. Sadly, some other countries' flight attendants may still face sexist assumptions. For example, modern-day Japan "is reminiscent of America in the 1960's, when serving food and drink on airplanes had a glamorous popular image. . . . For Japanese flight attendants—almost all of whom are women—youth and beauty are absolute requirements, even if the airlines won't say so directly." Peter Landers, *In Japan a Stewardess Flies High on Glamour*, NEWSDAY, Apr. 7, 1996, at D13.

110. Doyle v. Continental Air Lines, Inc., No. 75-C-2407 (N.D. Ill. Oct. 29, 1979).

111. *See Id.*, slip. op. at 1-3.

112. *See Id.* at 3.

113. St. Cross v. Playboy Club of New York, Inc., Appeal No. 773, Case No. CSF 22618-70, State Human Rights Appeal Bd. (N.Y. 1971), *cited in* Guardian Capital Corp. v. New York State Div. of Human Rights, 46 A.D.2d 832 (N.Y. App. Div. 3d Dep't 1974).

that hiring only women to be Playboy Bunnies was not sexual discrimination, and accepted the employer's quasi-BFOQ, essence-of-the-job defense. The Board found that a bunny's duties required her "to titillate and entice" male customers.[114] At around the same time, however, a New York State intermediate appellate court ruled that the BFOQ defense did not apply in a case where a restaurant replaced its waiters with sexually-attractive waitresses dressed in alluring costumes.[115] In light of Wilson and the waitress cases, it is unclear if the Playboy Club rule would still hold today; much would depend on how courts define the "essence" of people's jobs.[116]

Note again that although the BFOQ defense applies only to hiring, it may be relevant to the inquiry of sexual harassment of nude dancers because it brings forth the question of the essence of one's job. One likely defense by a strip club to such a law suit may be that the essence of the job necessarily involved the sexual subjugation of the female nude dancers to heterosexual male customers; a club may argue that this is precisely why it does not hire men for these positions.

Many of these cases establishing a BFOQ defense or an "essence-of-the-job" defense involved sexual discrimination generally, and not sexual harassment. Even so, the doctrines of BFOQ and essence-of-the-job have important applications to the question of sexual harassment of nude dancers, as do the issues of uniforms and other provocative dress. "Employers should bear a strong BFOQ burden. . .in attempting to justify sex-based requirements that convey disparaging messages about women or restrict them in gender-based ways—for example, policies requiring high heels that restrict mobility or tight bodices that accentuate women's breasts and reinforce their sexual objectification."[117] Whether nude dancers "wear" a uniform, whether their jobs have a legitimate BFOQ, and whether the essence of their job necessarily involves sexual harassment are questions that involve the application of the law explored in this section.

II.
HOOTERS

The restaurant chain known as "Hooters" represents an intermediate step between airline flight attendants and cocktail waitresses at one end,

114. *See Id.*

115. *See* Guardian Capital Corp. v. New York State Div. of Human Rights, 46 A.D.2d 832 (N.Y. App. Div. 3d Dep't 1974).

116. It is interesting to note that the Playboy Club contradicted its own BFOQ argument in the 1980's when, in an attempt to save its failing club industry, it added male "rabbits." *See* Kathleen Rockwell Lawrence, *Hers*, N.Y. TIMES, Nov. 21, 1985, at C2. Deborah Rhode wryly comments that "[i]n the mid-1980's, the sexual integration of the Playboy bunny force turned out to be no more unimaginable than the sexual integration of the legal profession had been a century earlier." RHODE, *supra* note 102, at 96.

117. Katharine T. Bartlett, *Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms, and Workplace Equality*, 92 MICH. L. REV. 2541, 2570-71 (1994).

and nude dancers at the other.[118] While courts ruled that there was nothing sexual in ensuring passenger safety or serving alcohol to patrons in a bar, the mission of Hooters is a dual one: it sells food in a sexualized setting, where waitresses wear skimpy and revealing outfits. At the end of the continuum are nude dancers, whose only mission is sexual in nature. Thus the impact of the law and legal arguments surrounding Hooters may be informative in addressing sexual harassment of strippers.

According to Vice President Mike McNeil, "Hooters Girls," as the waitresses are called, "have been the basis of our business since the first Hooters opened in 1983. A lot of places serve good burgers. The Hooters Girls, with their charm and all-American sex-appeal, are what our customers come for, and what keeps them coming back."[119] The company's public relations fact sheet explains, "The Hooters concept is based on the 'Hooters Girl,' the 'all-American cheerleader,' the surfer girl next door. These women are the face of Hooters stores and establish Hooters' ambiance and fun beach-like environment. The stores hire as Hooters Girls women who can perform this function and maintain Hooters' image."[120]

This image includes wearing the Hooters uniform: "Hooters T-shirt, 1/2 shirt, or tank top (Hooters Girls only), orange 'Dolfin's shorts, white bra, suntan panty hose (non-design), clean white tennis shoes and socks, name-badge, pouch/belt, prom-like appearance (hair, make-up and nails done neatly), positive attitude showing through, prettiest smile in the whole world!"[121]

Hooters is selling sex, although it has not always admitted that directly. In an editorial from November 1995 about the EEOC suing Hooters for not hiring men, a reporter explained the company's changing history of what it sold.

> It seems like just yesterday that spokesmen for the Hooters restaurant chain were insisting that they were in the business of selling chicken wings, not sex. The name "Hooters" referred to an owl, they insisted, rather than to some part of the female sex anatomy, and those who thought otherwise must have their minds in the gutter. At the time, of course, Hooters was trying to fend off lawsuits alleging sexual harassment and exploitation of its waitresses. But now the owl is hooting a different tune. Perhaps

118. Founded in 1983 in Clearwater, Florida and today based in Atlanta, the chain is comprised of 234 Hooters restaurants in forty-one states and twelve countries. *See* John M. Gilonna, *Body Politics*, L.A. TIMES, Sept. 2, 1998, at B1.

119. Statement by Mike McNeil, Vice President of Hooters of America, Inc. (Nov. 15, 1995) (on file with the *N.Y.U. Review of Law & Social Change*).

120. Hooters of America, Inc., The Hooters Companies Fact Sheet (on file with the *N.Y.U. Review of Law & Social Change*).

121. Rajan Chaudhry, *Holding Hooters Close to Heart*, RESTAURANTS & INSTITUTIONS, Aug. 15, 1995, at 30 (quoting HOOTERS EMPLOYEE HANDBOOK, at 24).

> convinced by the chain's oh-so-sincere denial of any sexist intentions, the [EEOC] has suggested that Hooters back up its rhetoric by hiring male waiters as well as females. Hooters officials are now saying the order will ruin their business.[122]

Hooters currently admits, therefore, that it sells sex appeal, and thus is a good inquiry to undertake, a step beyond cocktail waitresses but a step before nude dancing.

Under the law as thus far presented in this article, "Hooters Girls" probably would be seen as similar to cocktail waitresses, and thus protected against sexual harassment brought about by their uniforms, although their affirmatively stated "dual" job of serving food in a sexualized setting adds a new wrinkle. Presumably the law would not treat them more akin to nude dancers, as the essence of the job of a nude dancer is clearly sexual in nature; they do not serve food and drink, but instead provide sexually-provocative entertainment.[123]

A. The Minnesota Case: Sexual Harassment at Hooters?

Given the uniform and other requirements of the job of a "Hooters Girl," it is perhaps not surprising that plaintiffs have brought lawsuits against Hooters for non-employee hostile work environment sexual harassment by customers. Dawn Felepe represented a class of seven women in the most famous of these suits, brought by attorney Lori Peterson against the Hooters at the Mall of America in Bloomington, Minnesota.[124] In the complaint, Peterson argued that many different types of sexual harassment

122. Equality for Owls, ATLANTA J. & CONST., Nov. 18, 1995, at 10A. This article will not address the litigation between the EEOC and Hooters over hiring men as waiters. Note, though, that to some degree it focuses on issues of BFOQ and essence of the job. In late 1997, Hooters settled with men who had brought a class action law suit with an argument similar to that of the EEOC. Under the settlement, Hooters will pay $3.75 million, but still will be allowed to hire only women as "Hooters Girls," the principal waitresses who serve food and drink. The restaurant chain, though, agreed to allow men to compete with women for other visible positions. *See Hooters Chain is Freed of Job Bias Inquiry*, N.Y. TIMES, May 2, 1996, at B10 (reporting that EEOC ended investigation due to limited resources); Adam Zagorin, *Sexism Will Be Served: In Settling a Sex-Discrimination Case, the Hooters Restaurant Chain Protects its Jiggly Hiring Practices*, TIME, Oct. 13, 1997, at 65; Christopher Simon, *Restaurant Seeks Waitresses After Suit*, WALL ST. J., Oct. 7, 1997, at B10; *Hooters Settles Suit by Men Denied Jobs*, N.Y. TIMES, Oct. 1, 1997, at A20; Del Jones, *Hooters to Pay $3.75 Million in Sex Suit*, USA TODAY, Oct. 1, 1997, at 1A (quoting Mike McNeil, "To have female sex appeal, you have to be female.").

123. There are women in nude dance clubs who serve as waitresses and who do not undress as part of their job. *See*, e.g, SNOWDEN, *supra* note 1, at 192 (describing the rivalry between dancers and "carnivorous waitresses").

124. This suit became well-known because of its exposure on the television news magazine Dateline NBC (NBC television broadcast, March 15, 1994). Previously Peterson had brought a lawsuit against the Stroh's Brewing Company, arguing that its advertisements using the "Swedish Bikini Team" helped to create a hostile work environment at the company. That suit also received national attention.

occurred at the restaurant, including by non-employees, primarily customers.[125] Having argued that the women who work at Hooters face sexual harassment, Peterson then addressed the issue of employer liability.[126]

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125. Females were subjected to a workplace consisting of women's bodies used as commodities for the sexual entertainment of men, including, but not limited to:

(a) Defendants' choice of 'Hooters' (a slang-term for women's breasts) as the name for their restaurants;

(b) Defendants explained the name choice by putting the following on their Hooters menu: 'Now the dilemma. . . what to name the place. Simple—what else brings a gleam to men's eyes everywhere besides beer and chicken wings and an occasional winning football season. Hence, the name Hooters;'

. . . .

(e) Women employees were forced to wear sexually-provocative uniforms;

(f) Waitresses, including Plaintiff, were required to hula-hoop in sexually-provocative clothing at the request of customers;

. . . .

(j) Waitresses, including Plaintiff, were sent to professional office buildings and other public places in sexually-provocative attire to distribute Hooters coupons;

(o) A manager required waitresses to sing sexual songs to customers. Complaint at 8-9, Felepe v. Bloomington Hooters Inc. (on file with the *N.Y.U. Review of Law & Social Change*).

126.

22. Defendant Hooters, through its managers, established a working environment wherein customers of Defendant Hooters felt free to and were both tacitly and overtly encouraged to make unwelcome sexual comments and advances to female waitresses because of their sex:

(a) The restaurant is named 'Hooters' (after a slang-term name for women's breasts);

(b) Waitresses were referred to as 'Hooter Girls';

(c) Waitresses were directed by management to smile at the hoots and leers of male customers;

(d) Defendants required female employees to display themselves in sexually-provocative uniforms;

(e) Defendants displayed sexist menus, pictures, calendars, magazines, and signs on the work premises in full view of customers . . . .

23. Defendant Hooters'[s] tolerance, acquiescence, and encouragement of sexual communications and the requirement of a sexually revealing uniform for female employees, caused Plaintiff to be subjected to unwelcome communications of a sexual nature by customers, including, but not limited to:

(a) Customers asked Plaintiff, when she asked for their menu selections, 'I want to order your hooters';

(b) Customers told Plaintiff, when she asked them for their menu selection, 'You're not on the menu,' and 'Can I box you up and take you home?';

(c) Customers asked waitresses, including Plaintiff, to 'show me your hooters';

(d) A customer requested that Plaintiff sit on his lap;

(e) Customers requested sexual intercourse and touching;

(f) Customers made comments about women's breasts;

(g) Customers made comments about women's buttocks;

(h) Customers asked waitresses if they were wearing underwear;

(i) Customers stared at and made passes at waitresses;

(j) Customers made sexual comments to waitresses about their uniforms;

(k) A customer confronted Plaintiff about not exposing her body, saying, 'Why isn't your stomach showing?';

(l) A customer looked down Plaintiff's T-shirt at her chest and said, 'Boy, it's nice to be tall';

Hooters' response to this suit was strong. Vice President McNeil tried two different arguments. Sometimes he played dumb, using the owl argument and saying that he was aware only that "in some regions of the country, ['Hooters' is an] innocuous slang expression for a portion of the female anatomy."[127] Other times, he admitted that his company sold sexual titillation:

> When you think of the image of the all-American cheerleader,. . .a surfer girl,. . .the girl next door, it certainly connotes an image of physical attractiveness; it also connotes an image of effervescent, bubbly personality. You know, yes, there is definitely a strong element of female sex appeal involved in that as well.[128]

Some commentators ridiculed the plaintiffs. For example, Dave Ross of CBS Radio said, "[T]hese are women who deliberately sought out and accepted employment at a place called Hooters. Did they really think it was about owls?. . .I mean, as a man, if I were to interview at a place called 'The Burgers and Buns,' and noticed that all the waiters were men dressed in tight underwear, it'd be a tip off, right?"[129] It is easy to imagine how similar arguments would be made against a nude dancer who sues under the sexual harassment laws.

B. The Precedential Value of Hooters to This Inquiry

Hooters settled with the plaintiffs in May 1994, but the terms of the settlement were confidential.[130] Since that suit, Hooters has become even more careful to protect itself. McNeil claims, "[W]e have a clear written policy that prevents sexual harassment in any form."[131] In 1995, it even allowed excepts from its Employee Handbook to be printed in a trade publication, Restaurants & Institutions. It includes, "I hereby acknowledge and affirm. . .that I should immediately notify company officials of any sexual harassment complaints that I might have."[132] Other parts of the Handbook include the following:

(m) Customers and employees made comments about waitresses' bra sizes . . .

26. Plaintiff was subjected to physical assaults by customers and employees" Id. at 12-13.

127. Cesar G. Soriano, *Hooter Girls Get Attention*, WASH. TIMES, Apr. 16, 1994, at B1.

128. Morning Edition (NPR radio broadcast, Aug. 4, 1993).

129. The Dave Ross Show (CBS radio broadcast, July 12, 1993). This is a form of the "assumption of risk" argument. *See* discussion infra Part III.C.

130. *See Sexual Harassment Suits at Hooters Are Settled*, MINN. STAR TRIB., May 11, 1994, at 1B.

131. Vicki Vaughan, *Backlog Creates Flood of Lawsuits*, ORLANDO SENTINEL, July 11, 1994, at 17.

132. Chaudry, *supra* note 121, at 132 (quoting HOOTERS EMPLOYEE HANDBOOK, at 30).

> It is a requirement at Hooters to have fun with our customers. . . .[133]

And,

> I hereby acknowledge and affirm. . .that the Hooters concept is based on female sex appeal and that the work environment is one in which joking and innuendo based on female sex appeal is commonplace. I also expressly acknowledge and affirm that I do not find my job duties, uniform requirements, or work environment to be offensive, intimidating, hostile, or unwelcomed. . . .[134]

A "profile" of a "Hooters Girl" in the company's official magazine even used this tack. It quoted Lani Nolan of Niles, Ohio, "Not only are the girls fun to work with, but the managers are great and the customers are laid back and friendly, too. It's such an easy-going atmosphere, it hardly feels like work at all."[135]

Hooters is not a strip club, even if there may be similar reactions among both establishments' customers to the sexually-provocative actions and presentations of the workers. While it may be an intermediate step from cocktail waitresses to nude dance clubs, unfortunately there is no judicial precedent to guide us because the company settled the lawsuit brought against it. This inquiry is still open; for now, Hooters uses its position on the fence to its own advantage. Invoking the "dual" job responsibilities of "Hooters Girls," EEOC Chairman Gilbert Casellas says, "If they say they're some sort of sex club, then that's fine. But they're telling us they're selling entertainment, and then going into towns and telling zoning commissions around the country that they're really a family restaurant, with children's menus. . . .They can't have it both ways."[136]

III.
LITIGATION OF THE FUTURE: A STRIPPER PLAINTIFF?

The day may come soon when a nude dancer will sue the club at which she works for being subjected to hostile work environment sexual harassment by its customers. How courts will react may depend on whether they view the law from today's standpoint or from that of the 1970's. In that decade, the New York State Human Rights Appeal Board in the Playboy Bunny case noted that the dominant function of the "Bunnies" was "to titillate and entice" male customers, and the Texas district court in the Love Air case noted that Southwest Airlines was "not a business where

133. Chaudry, *supra* note 121, at 132 (quoting HOOTERS EMPLOYEE HANDBOOK, at 1).

134. Chaudry, *supra* note 121, at 132 (quoting HOOTERS EMPLOYEE HANDBOOK, at 30).

135. Lani, HOOTERS MAGAZINE, Fall 1995, at 41-42.

136. Phil Willon, *EEOC Chief Faces Long Haul: America Mired in Decade of Anger, Confusion Over Equal Rights*, RICHMOND TIMES DISPATCH, Dec. 24, 1995, at A1.

vicarious sex entertainment is the primary service provided."[137] Whether a judge today, with knowledge of two decades of sexual harassment jurisprudence and the growing equality of women, will accept that idea that even women whose primary function is to titillate male customers deserve Title VII protection is an unanswered question.

This section first will turn to the strippers themselves, to address whether such harassment occurs. Next it will trace the litigation through the plaintiff's possible arguments, and then will address at length some possible defenses. The end of this section will ask whether nude dancing, by the nature of the profession, may be inherently less protectable than more traditional jobs.

A. Is There Sexual Harassment of Nude Dancers?

There is very little case law in connection to sexual harassment of nude dancers. Some may question whether nude dancers even face sexually harassing behavior. There in no case directly on point, and only three cases even touched on the question. The best solution may be to ask the strippers themselves.

First, however, a quick look at the limited case law may be informative. In upholding a Coates, Minnesota ordinance that banned nude dancing in establishments holding liquor licenses, the Supreme Court of Minnesota in 1994 explained a possible reason for such a law. "[T]he City Council may have felt the particular combination of liquor, nudity, and sex, while it might be viewed as adult entertainment, could also be construed as a subliminal endorsement for unlawful sexual harassment."[138] The dissent noted, however, that the city never even presented the fear of sexual harassment as a governmental interest in defending its ordinance.[139] Nonetheless, in a Wisconsin case, its highest court followed Minnesota's lead in 1995, quoting the language about a "subliminal endorsement for unlawful sexual harassment."[140]

A Washington state intermediate court in 1995 addressed the case of a clothed waitress at a topless nightclub who was fired for refusing "to participate in [the club's] 'All Nude Review,' a waitress contest staged on Monday nights."[141] The court remanded in her favor. In its opinion, it said:

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137. *See* discussion *supra* Part I.D.

138. Knudtson v. City of Coates, 519 N.W.2d 166, 169 (Minn. 1994).

139. *See Id.* at 173 n.7 (Gardebring, J., dissenting) ("The city's asserted interests are: to prevent 'the public degradation and debasement of the individual performers,' 'to prevent the commercial exploitation of sex,' to prevent 'acts of rape, prostitution, and other disruptive and disorderly acts attendant thereto,' and to maintain 'the integrity of the family.'")

140. Schultz v. City of Cumberland, 195 Wis. 2d 554, 568 (Wis. 1995)(citation omitted).

141. Schonauer v. DCR Entertainment, Inc., 905 P.2d 392, 395 (Wash. App. 1995).

> Here, Schonauer was hired as a waitress, not a dancer. From the beginning, according to her, she refused DCR's requests to provide sexually explicit information and to dance on stage in a sexually provocative way. . . .
>
> . . . .
>
> . . . Weisert and Les [her manager and another employee] nonetheless pressured her, repeatedly and intentionally, to provide fantasized sexual information and to dance on stage in sexually provocative ways. Whether or not this would have created a hostile working environment for someone hired to dance nude on stage—an issue we need not address—it arguably created a hostile working environment for someone hired to wait tables . . . .[142]

Therefore this court dodged the issue of whether a nude dancer could face some kind of hostile work environment as a condition of employment.

1. The Dancers Perspective

Since those few cases do not speak to the prevalence or paucity of non-employee hostile work environment sexual harassment of nude dancers, perhaps the best tactic is to ask these women themselves. Some claim there is no problem. Devon Michaels, a topless dancer at FlashDancers in New York, says, "I find that most of the men that come into our club are very nice men. I don't get rude comments. I get more rude comments walking down the street in Manhattan with all my clothes on than I do in the topless bar."[143] Snowden concurs, "It's walking by a construction site that's a hundred times worse than disrobing in a strip joint. Men are much more cowed and intimidated in front of strippers than they are on the street."[144] She even claims,

> One thing . . . is obvious: This sure beats cocktail waitressing.
>
> . . . Men look at waitresses as servants, but a stripper is revered as a performer. Men in strip clubs prefer to believe I'm a nice girl who strips, but men in a casino are hoping to discover that I'm a slut who serves drinks. I am treated better as a stripper and I make more money. But despite the vast difference in the level and tolerance of sexual harassment, most parents would think it's okay for their daughter to work as a cocktail waitress, but not as a stripper.[145]

Others acknowledge that they face sexual harassment by their patrons regularly, but that they see it as part of their job. Through the Internet, I

142. *Id.* at 400-401 (emphasis added)(footnote omitted).
143. Sonya Live: *Topless Bars*, *supra* note 19.
144. SNOWDEN, *supra* note 1, at 186.
145. *Id.* at 202-203.

posted a request for information regarding this topic on a news group about strip clubs. Two nude dancers responded; to maintain their anonymity, call them Stripper A and Stripper B. Both faced what could be considered hostile work environment sexual harassment by customers, but were not troubled by it. Stripper A says:

> I work in an environment that invites what could be called sexual harassment from almost everyone in the workplace: customers, managers, bouncers, even, in many cases, other dancers. Obviously it would be ridiculous to accuse a customer, who pays specifically for the right to regard a dancer as a sexual object, of breaking sexual harassment codes when he does so. Other behaviors are clearly more acceptable in a strip club than in, say, a newsroom, as well; if a bouncer or DJ tells me I have a great ass I'm not likely to take offense; that ass is what I'm selling in the club. A lot of friendly sexual banter in our club helps keep the atmosphere charged and, in my opinion, helps me keep a cocky, mischievous, money-making attitude.[146]

Stripper B agrees:

> My feelings on this issue (and I can vouch for most of the girls I work with) and ESPECIALLY the articles/lawsuits etc. of the "Hooters Girls" is pretty simple. In this line of work, and to a lesser extent a place like Hooters or Showme's some minor sexual harassment is expected and tolerated BY THE PAYING CUSTOMERS!!! A stripper can hardly scream sexual harassment at a guy who yells "Nice tits" while she is standing wearing a nice pair of shoes and a smile.[147]

It seems that the more upscale nude dance clubs are very protective of their strippers, and quite willing to throw out a customer if he should become physically or verbally harassing. Lonnie Hanover, a spokesman for Scores, widely seen as the most upscale club in New York,[148] claims that it is "different from other clubs," is "not a sex club," and instead is "a business and meeting place."[149] Lila, a stripper at another club, the Blue Angel, says it is "empowering" to work there because, "We can turn down anyone who asks for a lap dance, or we don't have to lap dance at all. The owner is a woman and an ex-stripper. She totally validates us."[150]

146. E-mail from Stripper A to author (Mar. 11, 1996) (on file with the *N.Y.U. Review of Law & Social Change*). I have made minor spelling and grammatical corrections in these messages, since on the Internet, people tend to write less formally.

147. E-mail from Stripper B to author (Mar. 13, 1996) (on file with the *N.Y.U. Review of Law & Social Change*).

148. *See supra* notes 7-11 and accompanying text, and infra note 162, for more information on Scores.

149. Telephone Interview with Lonnie Hanover (May 31, 1996).

150. Bush, *supra* note 36, at 28.

A man who worked as the men's room attendant at an undisclosed but high-class club, however, presents an image of strict rules but lax enforcement:

> Management very much wanted to cultivate the image of the girl next door. There were a whole set of rules the dancers had to observe. Obvious intoxication was frowned on, foul language was forbidden, you couldn't chew gum, and touching (a.k.a. dirty dancing) was out of the question. Fraternizing with the customers after hours was supposed to result in immediate firing. . . . The rules were, for the most part, a joke. The only one I ever saw enforced with any rigor was the one pertaining to gum. . . . As for management, they could be flexible; they weren't about to make waves if some enterprising lass gave a discreet handjob to a big spender in a dark corner of the club. You'd get fired if you played the prostitution card too heavily, but it seemed to go on with some regularity; from my perch I heard that the going rate was a minimum $500 for an after-hours guest star appearance.[151]

It is fair to surmise that despite the nude dance clubs' rules discouraging sexual harassment, there occurs conduct that probably would be considered sexual harassment. Whether a particular stripper desires to sue is, of course, another story.

2. Verbal Comments vs. Physical Touching

Many hostile work environment sexual harassment claims in the more traditional work settings, such as plants, offices, and factories, involve both verbal harassment and physical touching of a sexual nature (in addition to other inappropriate conduct such as pin-ups posted in public areas). For example, in one of the EEOC decisions mentioned above, a waitress faced explicit jokes and comments, and a patron attempted to grab her breasts and slid his hand under her dress and squeezed her buttocks.[152]

The 1990 EEOC Policy Guidance on Employer Liability for Sexual Harassment states that both verbal and physical behavior are actionable. First the verbal:

> When the alleged harassment consists of verbal conduct, the investigation should ascertain the nature, frequency, context, and intended target of the remarks. Questions to be explored might include: Did the alleged harasser single out the charging party? Did the charging party participate? What was the relationship between the charging party and the alleged harasser(s)? Were the remarks hostile and derogatory?. . .In general, a woman does not

151. David Grad, *Towel Boy in a Titty Bar*, N.Y. PRESS, June 5-11, 1996, at 34.

152. *See* EEOC Dec. No. 84-3 (holding that there was reasonable cause to believe owner violated Title VII by failing to take corrective action against harasser).

> forfeit her right to be free from sexual harassment by choosing to work in an atmosphere that has traditionally included vulgar, anti-female language.[153]

Whether the existence of sexual conversation or commentary in a nude dance club could rise to the level of sexual harassment is a hard question. Certainly some of the comments that these women hear are objectively offensive. For example, "Hey! Got two nipples for a dime?";[154] "You don't even know, how fucking beautiful. . . .So fucking beautiful. So fucking beautiful";[155] and "How much for something extra back in my hotel room?"[156]

Even so, many strippers claim that comments such as these do not offend them, and that they are just part of the job. Stripper B says, "I think the term 'harassment' is too subjective. Comments from the customers, even very crude, personal references, are merely a part of the job and should be viewed as such (to me this also applies to Hooters Girls)."[157] Even very graphic comments directed especially at one individual stripper, such as a man saying what he would do with a stripper's particular body part, does not bother Stripper A. She says, "[I]f Joe in the corner tells me that he wants to tie me in barbed wire and whip me with a cat-o-nine, I have the choice to leave his table."[158] She explains that "dancers are more tolerant of potential sexual harassment because we're generally less inhibited as a whole, at least while in that environment."[159] Heidi Mattson, a Brown University graduate, stripper at the Foxy Lady in Providence, and author of Ivy League Stripper, reports that strippers would rather hear "trash talk" than a "personal, sincere, and awful" poem written by a loving customer.[160]

Even if explicit sexual comments might not bother some strippers, physical touching may. The EEOC addressed this issue in its 1990 Policy Guide:

> The Commission will presume that the unwelcome, intentional touching of a charging party's intimate body areas is sufficiently offensive to alter the conditions of her working environment and constitute a violation of Title VII. More so than in the case of

153. *See* EEOC POLICY GUIDANCE, reprinted in BAXTER & HERMLE, *supra* note 55, at 139-40 (noting the Sixth Circuit exception to the rule in the widely criticized case of Rabidue v. Osceola Refining Co., 805 F.2d 611 (6th Cir. 1986)).

154. HEIDI MATTSON, IVY LEAGUE STRIPPER 194 (1996).

155. *Id.* at 251.

156. SNOWDEN, *supra* note 1, at 208.

157. E-mail from Stripper B, *supra* note 147.

158. E-mail from Stripper A, *supra* note 146.

159. *Id.*

160. *See* MATTSON, *supra* note 154, at 249.

> verbal advances or remarks, a single unwelcome physical advance can seriously poison the victim's working environment.[161]

Although many strip clubs and many states and localities ban physical touching,[162] Stripper A reports, "In most clubs I've seen these rules, at the least, stretched, and in many cases ignored." Then she asks, "If a customer grabs a dancer's crotch (illegal) after she finishes ninety seconds of major lap grinding (also illegal, but often accepted by clubs), can she claim sexual harassment? Does she surrender her rights by giving an illegal lap dance? Hmm."[163] Other strippers may feel the same way about physical touching as Stripper A did regarding sexual comments; if they feel uncomfortable, they just move to another table or otherwise avoid the customer. Stripper A explains:

> Dancers in most clubs, mine included, are given almost total freedom to choose how close (within legal boundaries) and with whom they dance. . . .If Alfred won't tip me when there are bouncers nearby because he knows he's going to have trouble getting the dollar in my garter and his hands are going to linger dangerously high on my upper thigh for ages, then guess what? I don't have to dance for Alfred. Or I can ask a bouncer to keep a close eye on him while I'm working his table. If Mac sticks out his tongue every time a nipple brushed close to his face, I can dance two feet away from him, and if his tongue manages to land on said nipple, I can punch him in the face (well, I work in a redneck bar).[164]

Snowden echoes Stripper A's comment that nude dancers learn which customers are more likely to try to touch them, and are more cautious around them:

> While onstage, a stripper must entice her audience, but keep an eye out for the type of guy who tries to take liberties while he attempts to tuck a dollar in your G-string. Young guys prone to travelling in packs and wearing baseball caps backwards can be

161. EEOC POLICY GUIDANCE, *reprinted* in BAXTER & HERMLE, *supra* note 55, at 139.

162. Jay Bildstein, the founder of Scores, attended numerous strip clubs before founding his own in 1991. In that research, he discovered that at Rick's in Houston "with each dance the girl got a little closer. She also let [the customer] run his hand over the back of her leg and through her hair." BILDSTEIN & SCHMETTERER, *supra* note 7, at 81-82. He also was told by a dancer at the Harmony Club in New York, "Don't you love my breasts? They're small but pretty, aren't they? You are allowed to touch them. And you can kiss my nipples if you don't get saliva on them." *Id.* at 108. Yet when he started Scores, he was much more strict, and insisted on throwing out a customer who had touched a dancer. *See Id.* at 242-44.

163. E-mail from Stripper A to author (Mar. 13, 1996) (on file with the *N.Y.U. Review of Law & Social Change*).

164. *Id.*

> generous with tips, but are also the ones most likely to try and touch you. They wait motionless at the edge of the stage like tigers; when you get a little too close, they strike, choosing their moment so the bouncer doesn't see their hand swiping right up into your crotch. You eventually develop a sixth sense about this sort of guy, and learn to ignore him. Far better to lavish attention on the quiet nerd whose glasses are about to steam up. He's the type who will tip.[165]

Futterman quotes another stripper: "But if a guy just touches me, I don't care this much about a dollar bill. I'll walk out of there. I don't care what they give me. You have to make them show respect to you."[166]

Some nude dancers simply claim that touching is not a big problem. Devon Michaels says, "I don't feel degraded in the least. It's fun. It's simple entertainment. They don't touch us. We don't touch them. It's completely clean. Just clean fun."[167] Mattson notes:

> The physical contact was wonderfully non-existent, but replacing it was a greater level of interpersonal relating. Talking. More than half of my customers paid me to give them verbal attention. To listen and care. Of course, there were the others, men who just wanted to stare quietly or share a few beers with their buddies while a pretty girl danced, laughed at their jokes, or corrected their grammar. The subject of the communication was less important than the warmth. I smiled and responded, believed they were special.[168]

Even when customers touch them, some strippers seem not to be bothered; they just chalk it up to the demands of the job and see it as a lesson for the future. Mattson says matter-of-factly about one of her usual customers, "Soft-spoken and gentlemanly, only twice did he run his manicured fingers up my leg. I quickly learned how to subtly position myself out of reach."[169] One club, the Blue Angel, allows some touching during lap-dancing. "One of the Blue Angels explains lap-dancing succinctly: 'basically, it's dry-humping, like in eighth grade behind the bleachers.' The dancer sits on her client's lap and bounces around; the client can touch her breasts, but not her crotch, and is not supposed to have an orgasm."[170]

While many of these nude dancers seem not to mind a little touching, claim it is not really a problem, or say that they learn how to deal with it, remember that the EEOC requires only a single physical advance to poison a working environment.

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165. SNOWDEN, *supra* note 1, at 209-10.
166. FUTTERMAN, *supra* note 14, at 96 (quoting Debbie).
167. Sonya Live: *Topless Bars*, *supra* note 19.
168. MATTSON, *supra* note 154, at 187.
169. *Id.* at 215-16.
170. Bush, *supra* note 36, at 28.

B. A Nude Dancer Decides to Sue

While Stripper A may not be offended by the sexual banter she faces and may know how to keep her body away from unwanted hands and tongues, it is not difficult to see how another dancer facing the same situation may react differently. Should such litigation commence, the plaintiff could make use of the same legal arguments that a factory worker or secretary might: that the employer ignored a hostile work environment about which it knew or should have known. Given the unique nature of the plaintiff's profession, her attorney also would need to cite to a uniform case; the most successful comparison probably would be Sage Realty. While that case can be distinguished by the defendant in that Hasselman was in public, wore a uniform, and did not strip down to her bare breasts or to full nudity, the description of "the Bicentennial" may not be so far removed from what strippers wear before they dance and apparently did not leave much to the imagination.

Moreover, the plaintiff should argue that the nature of one's job should not dictate whether one has civil rights. She took the job stripping, she could argue, because she was less inhibited than average, was comfortable with her body, liked the good pay, and enjoyed the friendly atmosphere. None of these reasons should imply that she was welcome to graphic vulgar language or undesired touching. Perhaps an analogy to Hooters works here as well; it can be argued that women work at Hooters for many of the same reasons that our plaintiff stripped.

Even the essence of the job and BFOQ language from the hiring area may help our plaintiff. It is true that strippers are not flight attendants, and the owner of a predominantly male heterosexual nude dance club probably could discriminate in hiring only women. Yet therein lies another argument: women (and men) choose particular occupations for many different reasons, and all people should be allowed to undertake whatever work they desire without the fear that they must inherently lose certain rights because of the choices they make.

C. Defenses

Nonetheless, a stripper plaintiff probably would be a rather unsympathetic plaintiff. Just look at the tremendous ridicule the women suing Hooters faced. CBS Radio's Dave Ross argued that those plaintiffs should have known what they were getting into, a sentiment echoed by other commentators. For example, op-ed editor Stephanie Robertson wrote,

> At some point, people have to assume responsibility for their actions and use common sense. A woman should anticipate sexual remarks if she prances around with various parts of her anatomy hanging out. Especially knowing the ambiance of the place.
>
> . . . .

> No one forced these six women to go to work for this restaurant chain. Certainly they could have found other waitressing jobs .... The uniform, what little there is of it, and the restaurant's atmosphere certainly were no surprise .... These women were not forced against their will to do something they didn't want to do .... Next we'll read about topless waitresses filing harassment suits because their taped-on tassels and G-string costumes subjected them to off-color comments.[171]

Despite this sarcasm, it is true that nude dancers could make similar complaints against sexual harassment. Many commentators would take the employers' side, arguing that either the plaintiffs assumed the risk of their jobs, or welcomed the customer reactions by consenting to these kinds of jobs in the first place.

1. Cahill and Assumption of Risk

Cahill represents legal theorists who would echo the above comments. Her article about Hooters in the Vanderbilt Law Review argues for a "limited assumption of risk defense in sexual harassment law. . ., allowing individuals to choose to work in sexually charged environments and recognizing that employees can and should face the consequences of their choices."[172] In focusing on the Hooters plaintiffs, she argues that they "in all likelihood knew that sex appeal was part of the product Hooters was selling, it also seems likely that they knew there was a risk that customers would make passes at them and make sexual comments to them."[173]

She does accept one exception to her rule, when allowing employees to assume the risk of sexual harassment "is contrary to public policy, such as when the defendant has substantially greater bargaining power than the plaintiff."[174] She acknowledges that Hooters may be such a case, but nonetheless grants less credence to this public policy exception "if there are other restaurants and bars where the plaintiffs could have worked as waitresses, or if the plaintiffs made the affirmative choice to work at Hooters because of its promotion of sex appeal."[175] Thus, she subscribes to the quasi-feminist economic argument explored above, noting the "premium wage" women can earn at Hooters. She even fears that if Hooters stops selling its sexually-charged atmosphere in order to avoid liability for sexual harassment lawsuits, "women who want to market their sex appeal and their acceptance of the risk of sexual harassment in exchange for a premium wage will no longer have the freedom to do so."[176]

171. Stephanie Robertson, *Ex-Waitresses from Hooters Out to Lunch with Harassment Suit*, ARIZ. REPUBLIC, May 21, 1993, at A16.
172. Cahill, *supra* note 5, at 1121.
173. *Id.* at 1131-32.
174. *Id.* at 1133.
175. *Id.*
176. *Id.* at 1138-39.

In addressing the issue of essence of the job, she finds in Hooters a mixed essence: "the nature of the employer's business can be characterized as serving food and drink in an atmosphere promoting sex appeal." Then she adds:

> If sex appeal is a substantial part of the product or service an employer provides to its customers, then it seems logical that, in order for the employer to continue to promote sex appeal as a part of its business, employees should be able to assume the risk of sexual harassment by customers.[177]

Her argument would serve as a strong defense to a lawsuit brought by a nude dancer plaintiff.

Not all members of the legal community agree with Cahill, though. Peterson, the Minnesota attorney prominent for challenging Hooters, responds to the "assumption-of-risk" defense by asking, "So what? What if they had known?" She analogizes to a rape case: "People say, 'Didn't she ask for it? She walked in the park. Didn't she ask for it? She went out with the guy.'"[178]

Other legal commentators also disagree with Cahill's support of the assumption-of-risk argument. For example, Deborah Ellis, former legal director of the National Organization for Women Legal Defense Fund, argues, "It's like saying women construction workers assume the risk of being harassed when they take a job in construction. The premise of our nondiscrimination law is that women should not have to choose between having a job and being treated with dignity."[179]

If Cahill's argument that "Hooters Girls" assume the risk of sexual harassment based on the jobs they take and the uniforms they wear wins mainstream support, then clearly there would be little sympathy for any women who sue Hooters. To take it one step further, any nude dancer who sues her employer would be an extremely unsympathetic victim to most observers.

Another aspect of the assumption of risk defense involves the sociological literature that shows that men who are presented with sexual imagery will react sexually. More specifically, "men who are likely to sexually harass have such a strong association between power and sex that when they have power in a situation, the activation of the mental representation of power automatically spreads to the representation of sexuality."[180] Another hypothesis postulates that "exposure to non-violent pornography would prime a heterosexuality subschema in gender schematic males and

177. *Id.* at 1137.

178. Eric Ringham, *What Right Do They Have To Complain? Every Right*, MINNEAPOLIS STAR TRIB., Apr. 23, 1993, at 19A.

179. Soriano, *supra* note 127.

180. Bargh & Raymond, *supra* note 27, at 88.

thus lead these males to view and treat a woman as a sexual object."[181] In lay terms, this means that although some men may react sexually, and perhaps inappropriately, when primed by sexual situations, an employer could argue that it is not liable for knowing how other men would react to seeing a woman dancing nude, and that, moreover, these women assumed the risk of that male behavior.

There is no legitimate reason, however, to distinguish nude dancers from more traditional occupations in this context; even if men are more likely to have their power and sex antennae stand up by watching women strip than by encountering women in other workplaces, this reason is not enough to vitiate the general legal standard of employer liability. Perhaps the problem lies within male biology and socialization, and not within the jobs that women take. In fact, it even could be argued that male biology creates a demand for jobs such as nude dancers. It would be unfair to say that women who met this economic demand by taking positions in these professions assumed the risk of being treated as sexual objects, and that they should lose their rights because of it. Even if strippers are treated as sexual objects as part of their jobs, they still can claim Title VII protection. It is the employers who profit from the fact that male customers may react in a certain way who must assume the risk of that misbehavior.

2. *Welcomeness and Consent*

Cahill's argument is a broadening of another sexual harassment defense, the idea of welcomeness, though she notes that she is not arguing that these women objectively consent to a particular occurrence of harassing conduct. Rather, she believes that they should be able to decide whether or not to take the job, knowing the risk of sexual harassment.[182]

The EEOC Guidelines create the welcomeness defense in the first word of its definition of sexual harassment: "Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct. . ."[183] While different people naturally would have different definitions of "unwelcome," the Supreme Court focuses on the individual plaintiff's conduct. In Meritor, Justice Rehnquist wrote, "The gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome.' . . . The correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome."[184] Under this rule, evidence of the plaintiff's "sexually provocative speech or dress [is] obviously relevant."[185] Even if the mandatory nature of the Hooters dress code might

181. Doug McKenzie-Mohr & Mark P. Zanna, *Treating Women as Sexual Objects: Look to the (Gender Schematic) Male Who Has Viewed Pornography*, 16 PERSONALITY & SOC. PSYCHOL. BULL. 296 (1990).

182. *See* Cahill, *supra* note 5, at 1150.

183. 29 C.F.R. § 1604.11 (1995).

184. *Meritor*, 477 U.S. 57, 68.

185. *Id.* at 69.

change Rehnquist's opinion in a lawsuit against the restaurant chain, it is fair to argue that he probably would have less sympathy for a nude dancer, who under Meritor more easily could be said to welcome sexual advances.

In a law review article reflecting on Meritor after it was decided by the District of Columbia Circuit[186] but before the Supreme Court issued its decision, Mary Jo Shaney argues for:

> a consent standard that would require courts to focus on whether the victim overtly consented to the sexual conduct rather than on whether the victim resisted a harasser's behavior. Under this standard, consent must be manifested by objective indicia—the words of the victim or her behavior—that clearly indicate that she freely consented.[187]

Even this standard, though, might not be enough to protect "Hooters Girls" and nude dancers.

Following Meritor and Harris, two authors proposed a new standard for the welcomeness defense that may serve women plaintiffs better than Rehnquist and Shaney's standards by shifting the burden of proof. Mary F. Radford suggests that the burden of proving welcomeness should be shifted from the plaintiff to the defendant, and that the scope of inquiry should be narrowed to just those interactions between the plaintiff and the defendant.[188] Miranda Oshige proposes that we move away from the requirement that plaintiffs prove the sexual harassment was both pervasive and unwelcome, and also would shift the burden of proof, reconfiguring welcomeness as an affirmative defense.[189] For now, though, the welcomeness test as constructed in Meritor is still one that courts will use, and it may tend to hurt plaintiffs in these situations.

3. Aalberts & Seidman and Risk Assessment

A variation on the welcomeness defense is the theory promulgated by Aalberts and Seidman. In addressing employer liability for non-employee sexual harassment, they argue for a sliding-scale approach to the question of how much a plaintiff can be said to have welcomed certain behavior. They posit that in terms of the possibility of the occurrence of sexual harassment, jobs should be classified as high risk, mid-level risk or low risk, and that lawsuits should be based on the reasonable expectations of the plaintiff. In each category, differing levels of sexually harassing conduct

186. Vinson v. Taylor, 753 F.2d 141 (D.C. Cir. 1985), *reh'g denied*, 245 U.S. App. D.C. (D.C. Cir. 1985), *aff'd sub nom.* Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986).

187. Mary Jo Shaney, *Perceptions of Harm: The Consent Defense in Sexual Harassment Cases*, 71 IOWA L. REV. 1109, 1112 (1986) (footnote omitted).

188. *See* Mary F. Radford, *By Invitation Only: The Proof of Welcomeness in Sexual Harassment Cases*, 72 N.C. L. Rev. 499, 522-33 (1994).

189. *See* Miranda Oshige, *What's Sex Got to Do With It?*, 47 Stan. L. Rev. 565 (1995).

would be necessary to be considered actionable.[190] The applicability of this approach to Hooters and nude dancers would be similar to Cahill's: there would be less protection for some women based on what work they did.

In some ways, the "essence of the job" test appears implicitly in the Aalberts & Seidman risk assessment language. The Playboy court found that the job of the women in the clubs was to act sexually and titillate the male customers. Under the risk assessment test, these authors would argue that Playboy Bunnies and nude dancers took jobs with a high risk of sexual harassment. The essence of working in a strip club, they presumably would argue, is such that a nude dancer has a much greater chance of facing sexual harassment than, for example, the lower-risk position of a flight attendant.

D. Is Nude Dancing Inherently Less Protectable?

Futterman explains that strippers:

> dance a role created by the circumstances of their lives. Like modern Salomes, they are dancers on the lowest rung of the entertainment ladder. . . . Strippers work in a sex world where sex usually never happens. In the clubs that employ them, men seek out a fantasy for a dollar with no threat of real intimacy.[191]

How nude dancers fit into this "entertainment ladder" is a question that forces us to re-visit the Playboy Clubs and Hooters restaurants. In discussing jobs in the "entertainment industry" that require sex appeal, Michael Sirota cites as examples "striptease and topless dancers."[192] Given that the essence of these jobs may be only sexual titillation and sexual fantasy, are they perhaps just unprotectable against sexual harassment under Title VII?

In her article on Hooters, Cahill says that "topless dancers, for example, may also be allowed to assume the risk of sexual harassment by customers."[193] She adds, "It is obvious that women are objectified in strip clubs; the objectification of women is the sole reason why such establishments exist."[194]

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190. *See* Aalberts & Seidman, *supra* note 6, at 470-72.

191. FUTTERMAN, *supra* note 14, at 13.

192. Michael L. Sirota, *Sex Discrimination: Title VII and the Bona Fide Occupational Qualification*, 55 TEX. L. REV. 1025, 1066 (1977).

193. Cahill, *supra* note 5, at 1138 n.159.

194. *Id.* at 1144 n.193. Yet ironically she notes that nude dance clubs may do less harm to the status of women than places such as Hooters. "Because Hooters' objectification of women is more subtle than those occurring in businesses with vicarious sexual recreation as their essence, and because places like Hooters are viewed as more socially acceptable than the latter businesses (families with young children go to Hooters), Hooters may do more to reinforce traditional stereotypes about the role of women in society." *Id.*

Despite their admission that, "Indeed, a striptease dancer can be sexually harassed by a customer,"[195] Aalberts & Seidman's sliding-scale structure based on the risk involved in the job serves to take the protection of sexual harassment law away from nude dancers. Later in their article, in explaining how their model test may be applied, they admit that:

> a court would likely conclude that a topless female dancer would reasonably expect stares [and comments], but not physical contact, from her audience. . . .A cocktail waitress in a conventional lounge would [reasonably expect] [s]ome degree of sexual aggression. . . .[A] female employee in a conventional bookstore [would reasonably expect] little or no risk of sexual harassment.[196]

In her article, Bartlett says, summarizing the BFOQ exception, "The rule of thumb at the end of the day is simple: sex bars may subordinate women, but airlines and restaurants may not."[197] Then she adds in a footnote,

> Some sexually revealing dress requirements, insofar as they encourage sexually harassing conduct by customers or other employees, might also support a charge of sexual harassment. Because a charge of sexual harassment requires a showing that the conduct is 'unwelcome,' however, courts have tended to entertain such claims only in types of employment not otherwise considered sexual in nature.[198]

These quotes from Cahill, Aalberts & Seidman, and Bartlett could imply that nude dancers may be outside the scope of Title VII protection against at least some degree of sexual harassment because of the type of job involved. This is unfortunate and incorrect.

IV.
NUDE DANCERS DESERVE THE PROTECTION OF HOSTILE WORK ENVIRONMENT SEXUAL HARASSMENT LAW

A. Where Do Nude Dancers Fit into the Law?

Nude dancers should be treated as other workers, and should not be denied the Title VII protection against sexual harassment. One even writes, "When I go out there, it's just like putting on a business suit and going downtown to work."[199] A nude dancer's claim could be analogized to the uniform or provocative dress cases, and it should be possible for

195. Aalberts & Seidman, *supra* note 6, at 460-61.
196. *Id.* at 470-71.
197. Bartlett, *supra* note 117, at 2579.
198. *Id.* at 2579 n.178.
199. Rev. Kellie Everts, *Triple Treat*, in SEX WORK, *supra* note 25, at 38.

employers to be held liable as in Sage Realty and the waitress cases.[200] While being a woman would be accepted as a BFOQ for the job of nude dancer at a strip club for male customers,[201] and the essence of that job may include some degree of sexual attraction,[202] that does not mean that women accepted into those positions must face sexual harassment as a job requirement.

Presumably Cahill would argue that strippers, as workers who are further down the line from "Hooters Girls," assume the risk of sexual harassment because of the job they take. Yet her argument is flawed. How could we say that any woman may be required to face a hostile work environment as punishment for getting paid well? From a public policy perspective, that is a worrisome concept.

Aalberts & Seidman's sliding-scale approach is at least more honest than Cahill's, as they admit that they are creating the presumption that women who take "high risk" jobs must lose some rights. Yet their argument similarly is flawed.

As for the welcomeness defense, the argument that women in the sex industry might welcome sexual advances is based on a myth about the sexes, and only serves to continue to force male sexuality on unwilling women victims. Again, the question must be asked: Why must any woman, particularly one in a weaker bargaining position in society, face a hostile work environment as punishment for getting paid well?

B. Comparison to More Typical Work Environments

Should such litigation occur, the trial court called upon to decide the validity of the plaintiff's claim would have to attempt to analogize to other sexual harassment cases in the past. Yet there are obvious differences between the environment of a plant or office, and a strip club.

Staring at a nude dancer in such a club presumably would not lead to a successful claim for sexual harassment, while it may in other work environments. For example, one of Las Vegas blackjack dealer Powell's complaints was that customers were staring at her for long periods of time and in suggestive ways. Certainly constant staring at a woman in a law office or on the construction site could be considered harassment. Staring in a strip club, however, would probably be considered acceptable behavior, given that nude dancers are paid to show off their bodies to customers. Perhaps a

200. This article will not address whether plaintiffs would have a claim against customers, although if the analogy to the provocative dress cases holds, presumably only the employer would be responsible. Note, though, that this is an untested area of the law.

201. This assumes a work setting based on heterosexuality, which is the most likely scenario for future lawsuits. Of course, clubs for gays and lesbians would have different hiring practices and BFOQ defenses.

202. A woman turned down by a club for employment due to her physical appearance probably would have little protection under the current law, as Title VII does not cover that characteristic.

strip club can be analogized to a Broadway show or baseball game; it never would be suggested that the audiences in those situations should be barred from watching the show. Even the chief judge of a federal district court compared a nude dance show with mainstream theatrical productions, in overturning a ban on strip clubs in Schenectady:

> Consequently, it is necessary to ascertain the distinctions between the seven establishments where nudity is illegal and, for example, the theatre (where Oh Calcutta might be performed) or the opera (where Richard Strauss's Dance of the Seven Veils might be performed) where nudity is permitted. Each establishment requires a stage, music, dancing, an audience, and, of course, nudity. Is a cabaret different from the theatre or opera, to such a degree as to justify disparate treatment by the City of Schenectady in its role as protector of order and morality, merely because the audience is "less cultured"? Because the music originates from a stereo speaker rather than an orchestra? Because a cabaret dancer performs to Elvis rather than Tchaikovsky? Because the costumes in a theatre or opera are more elaborate? Because cabaret dancers earn tips? Perhaps the establishments are distinguishable because the dances in a cabaret are not formally choreographed. Perhaps the City of Schenectady finds the performances in cabarets more objectionable because the audience is mostly men who prefer to drink Budweiser while they view the naked form engaged in dance, rather than the couples at the opera who prefer Dom Perignon with their falsetto.[203]

Even so, a cabaret naturally is different from other places of work. It must be asked how the possible existence of sexual conversation and physical touching in a strip club may compare to the same event occurring in a more traditional setting, and how this could affect a potential plaintiff's claim.

Given the obvious differences between a strip club and other workplaces, perhaps there may be a different law for nude dancers than construction workers or as attorneys in law firms. But even if courts in their case-by-case inquiries must take these differences into account, they should not determine ad hoc that nude dancers inherently have fewer legal rights. Nude dancers should have the same amount of legal protection against sexual harassment as office or mill workers; courts must learn to change their assumptions.

203. Nakatoni Investments, Inc. v. City of Schenectady, N.Y. L.J., Jan. 21, 1997, at 28 (N.D.N.Y. McAvoy, C.J. Jan. 3, 1997).

C. Remedies Aside from Sexual Harassment Law

Despite the claims by Stripper A and Stripper B that they did not mind the possibly sexually-harassing conduct that they faced, it is likely that another nude dancer soon may decide to test Title VII or her state's anti-discrimination law with litigation.

Should courts rule, however, that nude dancers are not protected by Title VII's prohibition on sexual harassment, or should those nude dancers who face sexual harassment decide not to sue, there may be remedies available outside the sexual harassment law. One is increased protection by the management of the nude dance clubs. This would include throwing any patron out of a club, if he gets too rowdy, touchy or drunk, and even calling the police if necessary. This is a common rule among the more upscale establishments, although lax enforcement may mitigate its effectiveness.

Another remedy may be greater government regulation. Although many in the industry may be opposed to this, the presence of the state could serve the dancers' interests well. Such a development would not establish a new precedent anyway; the government is already present in the forms of taxes, police, laws regulating liquor licenses and sales, amount of nudity allowed (e.g., required pasties, topless, or full nudity), a minimum on how close to each other the dancers and patrons may be, and what type of activity is allowed (e.g., lap dancing, table dancing, oil wrestling, touching).[204]

A third remedy may be a push by nude dancers toward unionizing the industry. This could increase the amount of protection against sexual harassment, and could help gain better pay, health benefits, and job security. In 1993, Local 30 of the Hotel and Restaurant Employees Union tried to organize the workers at Pacer's, "one of San Diego's oldest strip joints," who complained of "sexual harassment and overcharging for stockings and garter belts they were required to buy there."[205] The vote failed, 60-28. Two years later, though, the union-organizing campaign succeeded.[206] "However, Pacer's union, Hotel Management, Employee Management, Local 30, negotiated an open clause in its contract. Open shop means that there's no requirement that employees join the union, so the club recruited workers and discouraged them from joining the union and were able to decertify the union."[207]

Unionization of strippers may not be so unusual. A second nude dance club, the Lusty Lady in San Francisco, has been unionized.[208] In

204. *See, e.g.*, Brooke, *supra* note 8 (discussing ordinances restricting sex-oriented businesses, establishing a three-foot line between dancers and customers, and banning direct tipping, i.e. placing currency into G-strings).

205. *Topless Dance Club Employees Vote Against Unionizing*, REUTERS, June 5, 1993.

206. *See* TV Nation (FOX television broadcast, Sept. 1, 1995).

207. Siobhan Brooks, *Organizing from Behind the Glass*, Z MAG., Jan. 1997, at 13.

208. *See Id.* at 11-14 (explaining that the main issues in the organizing campaign were the dearth of jobs for African-Americans and the use of one-way mirrors through which

addition, recent years have seen union organizing campaigns in other non-traditional areas such as rodeo cowboys, the Buffalo Bills Cheerleaders, home health care aides, and models.[209]

CONCLUSION

All women (and men) should feel free to do their jobs as well as they can without facing the fear of being harassed for any reason. Women who strip are no exception. While it is obvious they work in a sexually-charged atmosphere and in a sense are "selling" their sexuality, and may even expect to be treated as objects, there comes a point when repeated comments of a graphic nature to one individual or offensive touching may cross the line. Of course, only women who are bothered by this may think of filing sexual harassment law suits, and perhaps Stripper A is correct that nude dancers are less inhibited and thus less likely to be bothered by such comments. Nonetheless, those who are bothered should have the right to recover from their employers who fail to keep the customers in line. Instead of accepting the arguments from Cahill and Aalberts & Seidman, which give up on the fight for women's economic equality, our society should focus on giving women more choices in employment and assuring that their earnings become comparable to those of men. The answer is not to punish those women who take certain sexually-exploitative, albeit often well-paying, jobs, by denying them their Title VII rights against sexual harassment.

customers could videotape the dancers). See also *Nude Dancers Join Union*, NEWSDAY, Sept. 1, 1996, at A26. The following year, the union succeeded in negotiating its first contract. *California's Unionized Nude Dancers Ratify Contract*, REUTERS, April 10, 1997. For more information about the Lusty Lady particularly and the sex-worker unionization movement generally, visit the web site of the Exotic Dancers Alliance (last modified Aug. 3, 1998) <http://www.bayswan.org/EDAindex.html>.

209. *See Rodeo Cowboys May Unionize*, PITT. POST-GAZETTE, Dec. 24, 1995, at E-1; *Look for the Prada Label*, N.Y. MAG., Dec. 4, 1995, at 33; Peter T. Kilborn, *Strategies Changing for Union: Home Care Aides Are Fresh Target*, N.Y. TIMES, Nov. 21, 1995, at A10; Steven Greenhouse, *Models Join Together to Make Unionism a Thing of Beauty*, N.Y. TIMES, Nov. 20, 1995, at B1.