EVIDENCE OF A SEXUALLY HOSTILE WORKPLACE: WHAT IS IT AND HOW SHOULD IT BE ASSESSED AFTER *HARRIS v. FORKLIFT SYSTEMS, INC.*?*

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* 114 S. Ct. 367 (1993).

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INTRODUCTION

In the October 1993 Term, the Supreme Court of the United States decided *Harris v. Forklift Systems, Inc.*,[1] its second major opportunity to define sexual harassment law. This article addresses *Harris*' effect on the standard of proof required to establish a sexually hostile work environment and discusses its answers to other disputes in the law.

1. Harris v. Forklift Systems, Inc., 114 S. Ct. 367 (1993). The Court first addressed the issue in Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986).

Harris resolved a conflict between the circuits on the standards required to prove a hostile work environment under Title VII of the Civil Rights Act of 1964.[2] Some circuits had adopted more lenient evidentiary standards, in keeping with Title VII's remedial purpose. Others imposed stricter standards of proof. As this article will explain, while these stricter standards were usually adopted because of their purported neutrality, close examination showed that they masked historic bias, trivialized discrimination, or underestimated the plaintiff's injury by evaluating offensive conduct out of the context in which it occurred.

Prior to *Harris*, three general themes characterized the circuits' debate about the diverging law. The first concerned the threshold of harm from sex-based conduct. Some courts set a high threshold that permitted substantial sexual conduct in the workplace.[3] One version of this test ignored the volume of sexual conduct unless it resulted in actual psychological injury to the plaintiff.[4] Another maintained that a reasonable person would expect *some* sexual conduct in the workplace, particularly if the conduct was tolerated in larger society or if the workplace had been historically accustomed to the behavior.[5] Other courts proposed a competing test that simply looked to the frequency and severity of the conduct, regardless of societal standards or the nature of the plaintiff's injury.[6]

A second theme centered on the perspective from which conduct was to be evaluated. How much weight should be given to the victim's subjective impression? Should the jury assess hostile sexual conduct from the perspective of a reasonable man, a reasonable woman, or a hypothetical gender-neutral person—and how would a jury determine the view of a gender-neutral person? Should the jury view the conduct in context or in the abstract?

A third theme dealt with the First Amendment. Hostile conduct often involves symbolic content that might be protected from government control. Since the harm may be gauged as much by the victim's reaction as by any other means, many questioned whether resting a finding of hostile environment on a victim's interpretation of speech violates the First Amendment. In addition, even if Title VII may address hostile environment for liability, the question remains whether a court can order a remedy.

This article addresses these themes when discussing *Harris*' impact on the selection and administration of evidence allowed to prove the existence of a sexually hostile work environment. An explanation of the appropriate, post-*Harris* judicial response to problems of proof in future hostile environment cases demands a thorough review of the caselaw and doctrine.

2. 42 U.S.C. § 2000e (1988).
3. *See infra* part I.D.2.
4. *See infra* part I.D.2.a, b. *See also infra* part II.A.
5. *See infra* part I.D.2.a.
6. *See infra* part I.D.2.c.i.

Part I of this article examines the foundations and history of the hostile work environment claim. Part II illuminates the issues, facts, and holdings in *Harris* and the public policy considerations bearing on the Court's decision, in order to survey issues that *Harris* resolved and left unresolved. Finally, Part III analyzes the kind of evidence available in hostile environment claims and proposes new ways to weigh this evidence to illustrate the appropriate standards.

I draw several conclusions. *Harris*, although basically a correct reading of Title VII, resolved only the narrow question of whether the plaintiff had to prove psychological injury in order to prevail. It provided only general guidance as to the remaining proof required and failed to address other evidentiary obstacles to the plaintiff. As a result, the remaining proof requirements that hinder the plaintiff remain largely unrecognized and unchallenged in the judicial analysis. This article seeks to identify these burdensome requirements, discuss why they are inappropriate, and offer suggestions to eliminate them. The discussion addresses the supposed differences in perspective of men and women and the intersection of hostile work environment claims and First Amendment symbolic-speech doctrine and why these concerns do not justify the use of burdensome requirements of proof for the plaintiff. In conclusion, this article returns to outline the general evidentiary issues for proof of a hostile work environment and how these may be met post-*Harris*.

I
BACKGROUND: THE CONCEPT OF THE HOSTILE WORK ENVIRONMENT CLAIM

To understand the questions resolved by *Harris* and the resulting standards of proof established for hostile work environment cases, one must be familiar with the origins of the hostile work environment claim.

Hostile work environment and sexual harassment doctrine developed through judicial interpretation of Title VII. In the early years of Title VII enforcement, the courts made clear that Title VII prohibited employment policies or procedures that were *explicitly* based on certain categories, including race and sex.[7] Recognizing that whether employer conduct that adversely affected[8] an individual in a protected group might be discriminatory even though the discrimination might not be facially apparent, the

7. For example, in 1971, the Supreme Court forbade employers to exclude from employment women who had preschool-aged children, unless the employer could show that being male was a "bona fide occupational qualification." Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971). "Bona fide occupational qualification" (BFOQ) is a statutory exemption to Title VII's prohibition to the use of sex or religion in hiring decisions. A BFOQ exception is not available under Title VII to justify any use of race.

8. An employer's adverse actions include employment decisions such as refusals to hire or promote and decisions to fire or pay less compensation.

courts also applied circumstantial proof strategies, known as *disparate treatment* and *disparate impact. Disparate treatment* "is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin."[9] Without a legitimate reason for the different treatment, "[p]roof of discriminatory motive . . . can . . . be inferred from the mere fact of differences in treatment."[10] *Disparate impact* claims "involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity."[11] Most Title VII cases employ these circumstantial proof strategies to determine whether an adverse action was discriminatory.

The federal courts subsequently concluded that adverse job action in retaliation for refusing an employer's sexual demands was discriminatory.[12] Quid pro quo sexual harassment, as it is now called, became discrimination only after the courts struggled over the question of whether sexual demands were sex-based conduct within the meaning of Title VII.[13]

Courts subsequently resolved that Title VII prohibited discriminatory conduct that had no tangible work consequence.[14] Although one might

9. Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

10. *Id. See also* United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 715 (1983) (discussing disparate treatment test); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253-54 (1981) (setting forth each party's burden of proof in Title VII cases); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (same). *But cf.* St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2756 (1993) (holding that failure to allege a legitimate non-discriminatory reason does not compel a finding of discrimination).

In a mixed motive sex discrimination case, while plaintiff has proved that sex was *a* factor in the employer's actions, she may lose if the employer can show it had separate, legitimate nondiscriminatory reasons for its actions. In Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989), the Supreme Court ruled that where "gender played a motivating part in an employment decision," the defendant must prove by a preponderance of the evidence that it would have done the same thing absent the discriminatory motive. Because this standard permitted an employer to escape liability for proven discrimination, Congress amended Title VII to allow a plaintiff who proves that discrimination was at least *a* "motivating factor" to establish employer liability and thus to recover attorney's fees. If the employer proves that it would have taken the same action irrespective of the discriminatory motive, it escapes only remedies that it otherwise legitimately could have declined to offer its employee. 42 U.S.C. §§ 2000e-2, 2000e-5(g) (1988 & Supp. III 1991).

11. *Teamsters*, 431 U.S. at 335-36 n.15. The current controlling disparate impact proof model appears in Section 105 of the Civil Rights Act of 1991. 42 U.S.C. § 2000e-2 (1988 & Supp. III 1991). This provision reinstated the standards of proof established in Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

12. *See* CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 57-99 (1979) (critiquing early sexual harassment cases).

13. *See, e.g.*, Barnes v. Costle, 561 F.2d 983, 989-90 (D.C. Cir. 1977) (concluding that Title VII offered redress to a female employee whose job was abolished because she refused the sexual advances of her male supervisor).

14. The tangible/intangible distinction is not to be confused with significant/insignificant. The terminology arose as a result of Title VII's provision of equitable relief, but not compensatory damages. Under this rubric, a tangible result, such as the refusal to hire or

think that emotional distress and any resulting medical or psychological treatment would constitute tangible harm, Title VII originally permitted no such recovery. Prior to the passage of the Civil Rights Act of 1991,[15] Title VII provided only equitable relief, not compensatory or punitive damages.[16] Sex-based (or race-based) abuse is now known to impose physical and mental stress that may cause diagnosable psychological conditions,[17] sometimes requiring medical or psychiatric treatment. For years, however, Title VII provided no damages for this type of harm. In response to this anomaly—a statute that provided a right but no remedy—the federal courts created the concept of the hostile work environment.

This concept, finding express gender-based conditions to violate Title VII even when the victim suffered no economic loss, was first articulated in race discrimination cases[18] and expanded into sex discrimination cases.[19] The hostile work environment concept became a part of sexual harassment law, however, only after the federal courts concluded that quid pro quo sexual harassment was sex discrimination. Thus, courts confronted with harassment below the level of a quid pro quo demand had to address key questions about discrimination. Could hostile working conditions, not linked to hiring, firing, promotion, or pay, be recognized as discrimination

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promote, had a clear equitable remedy. Intangible results encompassed other injuries, compensable at law but not in equity, including medical or psychological injuries or mental anguish, which Title VII failed to remedy until the Civil Rights Act Amendments of 1991 added compensatory damages.

15. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 42 U.S.C.).

16. Civil Rights Act of 1964, § 706, 42 U.S.C. § 2000e-5(g) (1988). *See, e.g.*, Slack v. Havens, 522 F.2d 1091 (9th Cir. 1975).

17. These conditions include "stress, depression, anger, fear, anxiety, irritability, loss of self-esteem, humiliation, alienation, helplessness, tearfulness, and vulnerability" and may lead to a diagnosis of post-traumatic stress disorder. Jane L. Dolkart, *Hostile Environment Harassment: Equality, Objectivity, and the Shaping of Legal Standards*, 43 EMORY L.J. 151, 227 (1994). Dolkart adds that psychological injury often causes related physical effects, such as "headaches, backaches, loss of appetite, nausea and vomiting, inability to sleep and weight loss." *Id.* She points out that the American Psychiatric Association considers sexual harassment "a potentially severe occupational stressor," *id.* at 226, and cites studies documenting that the psychological effects of sexual harassment hinder work performance by eroding the victims' job satisfaction, concentration, and ambition and may lead to negative performance appraisals, *id.* at 227. For more particularized discussion of the psychological harm of sexual harassment, *see id.* at 223-44 and the sources cited therein.

18. *See infra* part I.A.

19. *See infra* part I.B. Prior to the development of hostile work environment doctrine, at least two circuit courts considered whether job conditions specifically imposed as a condition of work upon female, but not male, employees constituted discrimination. *See* Carroll v. Talman Fed. Sav. & Loan Ass'n, 604 F.2d 1028, 1029 (7th Cir. 1979) (holding that a business uniform required only of female employees amounted to gender-based discrimination), *cert. denied*, 445 U.S. 929 (1980); Harrington v. Vandalia-Butler Bd. of Educ., 585 F.2d 192, 193, 197 (6th Cir. 1978) (finding Title VII, gender-based discrimination in the provision of inferior facilities to a female, as compared to a male, employee), *cert. denied*, 441 U.S. 932 (1979).

under Title VII? What kind of conduct was properly considered when analyzing the working environment? Finally, how much conduct transformed a work environment's hostility into unlawful discrimination?

A. *Initial Developments Under Race Discrimination Law*

Rogers v. EEOC[20] was the first Title VII case to articulate the hostile work environment concept. The employer, an optometry business, challenged the demand of the Equal Employment Opportunity Commission (EEOC) to produce patient records by arguing that these records were not relevant to the issue of employment discrimination. The EEOC countered that the records constituted evidence of the claim that the employer segregated its Hispanic patients.[21] The trial court found that segregation of Hispanic patients, while possibly offensive to an Hispanic employee, did not give the employee standing to sue under Title VII and thus could not justify the EEOC's demand to produce records. In response, Judge Goldberg of the Fifth Circuit said:

> [I]t is my belief that employees' psychological as well as economic fringes are statutorily entitled to protection from employer abuse, and that the phrase 'terms, conditions, or privileges of employment' in [Title VII] is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination. I do not wish to be interpreted as holding that an employer's mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee falls within the proscription of Section 703. But by the same token I am simply not willing to hold that a discriminatory atmosphere could under no set of circumstances ever constitute an unlawful employment practice. One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers . . . .[22]

Petitioners had argued that the segregation of patients was irrelevant to the EEOC charge because it affected patients, not employees.[23] The majority rejected this reasoning on two grounds: that *Griggs v. Duke Power Co.*[24] permitted consequences or effects of an employment practice

20. 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972).
21. *Id.* at 236.
22. *Id.* at 238.
23. *Id.*
24. 401 U.S. 424 (1971).

to establish a claim under Title VII, and that the "employers' patient discrimination may constitute a subtle scheme designed to create a work environment imbued with discrimination and directed ultimately at minority group employees."[25]

Courts expanded *Rogers'* concept of a racially hostile work environment in race, national origin, and religion discrimination claims under Title VII,[26] as well as 42 U.S.C § 1981. While courts first used Title VII to establish a cause of action for hostile work environment claims with respect to race, ethnicity, and national origin, plaintiffs have pursued hostile work environment charges based on race and ethnicity under 42 U.S.C. § 1981 in addition to or instead of Title VII.[27] Plaintiffs preferred Section 1981 because it could be used to obtain money damages for workplace discrimination, a remedy then not available under Title VII.[28] That practice halted temporarily when the Supreme Court ruled that 42 U.S.C. § 1981 did not support a claim of hostile work environment.[29] With the Civil Rights Act

25. *Rogers*, 454 F.2d at 239.

26. Firefighters Inst. for Racial Equality v. City of St. Louis, 549 F.2d 506, 514-15 (8th Cir.), *cert. denied*, 434 U.S. 819 (1977) (holding that an employer's informal acceptance of segregated employee eating clubs created a racially hostile work environment); Gray v. Greyhound Lines, East, 545 F.2d 169, 176 (D.C. Cir. 1976) (holding that discriminatory hiring practices violated an employee's right to a nondiscriminatory environment); Swint v. Pullman-Standard, 539 F.2d 77, 89-90 (5th Cir. 1976) (holding that discriminatory job assignments, even absent salary discrimination or economic harm, violated Title VII); United States v. City of Buffalo, 457 F. Supp. 612, 631-35 (W.D.N.Y. 1978) (holding that black employees were entitled to a work environment free of racial abuse and insult); Compston v. Borden, Inc., 424 F. Supp. 157, 160-61 (S.D. Ohio 1976) (holding that supervisor's demeaning religious slurs violated Title VII); Steadman v. Hundley, 421 F. Supp. 53, 57 (N.D. Ill. 1976) (holding that supervisor's racial slurs and unfairly adverse recommendations may lead to Title VII violation).

27. *See, e.g.*, Vance v. Southern Bell Tel. & Tel. Co., 863 F.2d 1503 (11th Cir. 1989).

28. The federal courts employed Section 1981 to redress public and private employment discrimination in Runyon v. McCrary, 427 U.S. 160, 172-74 (1976). Johnson v. Ry. Express Agency, Inc., 421 U.S. 454, 460-61 (1975), and subsequent cases afforded compensatory and punitive damages under Section 1981. Mister v. Illinois Cent. Gulf Ry Co., 790 F. Supp. 1411 (S.D. Ill. 1992); Hayden v. Atlanta Newspapers, 534 F. Supp. 1166 (D.C. Ga. 1982); Harris v. Richard Mgf. Co., 511 F. Supp. 1193 (D.C. Tenn. 1981).

29. Patterson v. McLean Credit Union, 491 U.S. 164 (1989). Here, the Court preserved *Runyon*'s application of Section 1981 to private action. *Id.* at 171-72. However, the Court constricted Section 1981 to reach only the formation or enforcement of contracts, not their performance—the source of Patterson's hostile environment claim, according to the court. *Id.* at 176-77, 179. Faced with a severely narrowed statute, federal courts dismissed hundreds of cases at the rate of one a day. *The Civil Rights Act of 1990: Hearing on S. 2104 Before the Senate Comm. on Labor and Human Resources*, 101st Cong., 1st Sess. at 155, 156 (1990) (statement of Eleanor Holmes Norton, Professor of Law, Georgetown University) (citing NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., THE IMPACT OF *PATTERSON V. MCLEAN CREDIT UNION* (Nov. 20, 1989)). Claims relying on both Title VII and Section 1981 survived, but could seek only Title VII's limited equitable relief. The wholesale dismissal of cases and cutoff of remedies inspired Congress to pass the Civil Rights Act of 1991.

of 1991,[30] Congress explicitly amended Section 1981 to prohibit discrimination, including the creation of a hostile environment, in performance of contracts and to provide compensatory damages for Title VII claims.[31]

B. *Developments Under Sex Discrimination Law*

The EEOC, the federal agency charged with providing guidance concerning Title VII, published Guidelines on Sexual Harassment in November of 1980.[32] The Guidelines defined sexual harassment as follows:

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when
> (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment,
> (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.*[33]

Virtually all major cases on the subject have cited this hostile work environment language with approval as authority.[34]

Bundy v. Jackson was the first case in which a circuit court applied the *Rogers v. EEOC* hostile work environment concept to sexual harassment.[35] In *Bundy*, the District of Columbia Circuit applied the EEOC guidelines[36] and held that sexual comments and overtures by a male supervisor to female subordinates, whether or not in jest, constituted sex-based conduct that created a sexually hostile work environment and violated Title VII. Although the *Bundy* court decided that the supervisor's conduct was sex-

30. Civil Rights Act of 1991, Pub. L. No. 102-166, § 101, 105 Stat. 1071, 1072 (codified at 42 U.S.C. § 1981(b) (Supp. 1993)).

31. The right to compensatory damages implicates the right to a jury trial. It is important to remember that, unlike racial harassment cases (which included a jury trial under Section 1981), sex harassment decisions under federal law prior to the 1991 Act arose solely from bench trials, unless a federal court permitted trial of pendent state claims involving compensatory damages recovery and, thus, a jury trial right. *See* Landgraf v. USI Film Products, 114 S. Ct. 1483 (1994) (refusing to remand Title VII sexual harassment case for jury trial under the Civil Rights Act of 1991, passed while the case was on appeal); Zowayyed v. Lowen Company, 735 F. Supp. 1497, 1502 (D. Kan. 1990) (holding that there is no constitutional right to a jury trial under Title VII).

32. Sexual Harassment, 29 C.F.R. § 1604.11(a)-(g) (1993).

33. 29 C.F.R. § 1604.11(a) (1993) (emphasis added).

34. *See, e.g.*, cases cited *infra* at notes 35, 39, 48, 55, 57. *But see, e.g.*, cases cited *infra* at note 98, 141 (approving the EEOC Guidelines but misquoting them).

35. Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981).

36. *Id.* at 946-47.

based within the meaning of Title VII,[37] the court did not need to determine the minimum standard for liability, because the conduct had been so frequent as to become a "normal condition of employment."[38]

In *Henson v. City of Dundee*,[39] the Eleventh Circuit reviewed a female police dispatcher's claim of sexual harassment and constructive discharge. The trial court had rejected the plaintiff's claim of a sexually hostile work environment, expressing doubt about the viability of such a claim in the absence of any "tangible job detriment."[40] It also excluded evidence of harassment of another woman offered to support the plaintiff's claim.[41] The trial court found, first, that the defendant's denial of a training opportunity was not quid pro quo sexual harassment and second, that the plaintiff had not resigned due to sexual harassment or the allegedly hostile work environment.[42] On appeal, the Eleventh Circuit concluded that *Rogers*' principle of a racially hostile work environment applied equally to sexual hostility. The court defined hostility thus:

> For sexual harassment to state a claim under Title VII, it must be sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment. Whether sexual harassment at the workplace is sufficiently severe and persistent to affect seriously the psychological well-being of employees is a question to be determined with regard to the totality of the circumstances.[43]

The Eleventh Circuit also laid the foundation for systematic analysis of hostile environment claims by outlining the following elements of proof:

> (1) The employee belongs to a protected group . . .
> (2) The employee was subject to unwelcome sexual harassment . . .
> (3) The harassment complained of was based upon sex . . .
> (4) The harassment complained of affected a *"term, condition, or privilege"*[44] *of employment* . . .
> (5) Respondeat superior . . . the employer knew or should have known of the harassment in question and failed to take prompt remedial action.[45]

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37. *Id.* at 942-43.
38. *Id.* at 939.
39. 682 F.2d 897 (11th Cir. 1982).
40. *Id.* at 900-01.
41. *Id.* at 899.
42. *Id.* at 901.
43. *Id.* at 904 (citing 29 C.F.R. § 1604.11(b) (1981)).
44. Civil Rights Act of 1964, § 703(a)(1) (codified at 42 U.S.C.A. § 2000e-2(a)(1) (1988)).
45. *Henson*, 682 F.2d at 903-05 (emphasis omitted).

The Eleventh Circuit concluded that the trial court had erred in dismissing the Title VII hostile work environment claim,[46] and remanded the case for further proceedings.[47]

The Fourth Circuit took up the question in *Katz v. Dole*.[48] In *Katz*, a female air traffic controller complained that the "workplace was pervaded with sexual slur, insult and innuendo," and that she was made "the object of verbal sexual harassment by her fellow controllers."[49] According to the testimony of an employer's witness, such experiences were "common" for women at the agency.[50] The employer's supervisors did nothing to stop the sexual conduct and indeed took part in it.[51] *Katz*, building upon prior caselaw, articulated the standard of proof as follows:

> [O]nce the plaintiff in such a case proves that harassment took place, the most difficult legal question typically will concern the responsibility of the employer for that harassment. . . . Thus, we posit a two step analysis. First, the plaintiff must make a *prima facie* showing that sexually harassing actions took place, and if this is done, the employer may rebut the showing either directly, by proving that the events did not take place, or indirectly, by showing that they were isolated or genuinely trivial. Second, the plaintiff must show that the employer knew or should have known of the harassment, and took no effectual action to correct the situation. This showing can also be rebutted by the employer directly, or by pointing to prompt remedial action reasonably calculated to end the harassment.[52]

Katz noted that the employer had an "especially heavy" burden to rebut the plaintiff's proof of harassment because "the employer's supervisory personnel manifested unmistakable acquiescence in or approval of the harassment."[53] The Fourth Circuit ruled that the plaintiff had met her burdens of proof, reversing the trial court's decision for the defendant.[54]

The U.S. District Court for the Eastern District of Wisconsin similarly grappled with the question of which standard to apply in *Zabkowicz v. West Bend Co.*[55] Plaintiff's coworkers abused her for four years with sexual comments and drawings, some of which specifically targeted her. She complained repeatedly to supervisors, who advised male employees that their conduct was inappropriate but took no disciplinary action when the

46. *Id.* at 901.
47. *Id.* at 913.
48. 709 F.2d 251 (4th Cir. 1983).
49. *Id.* at 254.
50. *Id.*
51. *Id.*
52. *Id.* at 255-56 (citations and footnote omitted).
53. *Id.* at 256.
54. *Id.*
55. 589 F. Supp. 780 (E.D. Wis. 1984).

conduct recurred. The court concluded that the abuse directed against the plaintiff caused her significant harm and that the company's failure to effectively remedy the sexual abuse justified holding it liable.[56]

C. *The Supreme Court's Decision in* Meritor Savings Bank v. Vinson

The United States Supreme Court first reviewed a Title VII sex harassment case in *Meritor Savings Bank v. Vinson.*[57] The Court found a hostile work environment claim to be a valid cause of action under Title VII, even though the statute allowed the plaintiff no recovery for monetary losses associated with the harassment. The *Meritor* trial court failed to consider whether the conduct made the environmental conditions "hostile," and instead found no loss that could be compensated (such as loss of pay or promotion). The record showed that Ms. Vinson suffered classic physiological and psychological symptoms of severe stress which she attributed to the harassment.[58] The Court drew upon various circuits' reasoning to find that the *"terms, conditions, or privileges of employment"*[59] provisions of Title VII encompassed workplace conditions likely to affect the psychological well-being of an employee in a protected category (in this case, sex).[60] Accordingly, the Supreme Court concluded that "the language of Title VII is not limited to 'economic' or 'tangible' discrimination" and thus permitted hostile work environment claims.[61]

The Supreme Court in *Meritor* summarized its test for a sexually hostile work environment as follows:

> Of course, as the courts in both *Rogers* and *Henson* recognized, not all workplace conduct that may be described as "harassment" affects a "term, condition, or privilege" of employment within the meaning of Title VII .... For 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." Respondent's allegations in this case—which include not only pervasive harassment but also criminal conduct of the most serious nature—are plainly sufficient to state a claim for "hostile environment" sexual harassment.[62]

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56. *Id.* at 785.

57. 477 U.S. 57 (1986).

58. *Id.* at 67-68.

59. *Id.* at 66-67 (citing Section 703(a)(1) of Title VII, 42 U.S.C. § 2000e-2(a)(1) (1988 & Supp. IV 1992) (emphasis added)).

60. *Meritor*, 477 U.S. at 66-67. *See e.g.,* Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981); Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982); Katz v. Dole, 709 F.2d 251 (4th Cir. 1983); Zabkowicz v. West Bend Co., 589 F. Supp. 780 (E.D. Wisc. 1984). *See also supra* notes 35-38, 39-43, 44-47, 48-54, 55-56 and accompanying text.

61. *Meritor*, 477 U.S. at 64.

62. *Id.* at 67 (quoting *Henson*, 682 F.2d at 904) (citation omitted).

Together with the definition in the EEOC Guidelines, the phrase "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment' " became the basic judicial test for a hostile work environment.

Meritor also defined harassment by the "unwelcomeness" of the initial conduct, ruling that the trial court's factual finding of voluntariness was legally irrelevant.[63] The Supreme Court did conclude that evidence of the plaintiff's clothing and workplace discourse would be admissible, in the trial court's discretion, to address welcomeness.[64] The Court made no definitive ruling on an employer's liability for its supervisor's conduct, but rejected strict liability in favor of agency principles.[65]

Meritor also confronted and rejected distinctions between sexual and racial discrimination. The Court noted that the EEOC had defined sexual harassment by drawing from cases involving race, religion, and national origin.[66] The Court concluded that " 'sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality.' "[67]

D. *Diverging Standards for Proving Hostile Work Environment Prior to* Harris v. Forklift Systems, Inc.

Meritor instructed courts to determine a sexually hostile work environment by asking:
(1) whether the employee belongs to a protected group;
(2) whether the sexual or sex-based conduct was unwelcome to the employee ("unwelcomeness");
(3) whether the conduct complained of was based upon the employee's sex ("sex-based");
(4) whether the conduct complained of affected a term, condition or privilege of employment ("term, condition, or privilege" or "harm" element); and
(5) whether the employer directly engaged in the conduct or was legally responsible for the actions of someone who engaged in the conduct ("employer liability").[68]

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63. *Id.* at 68.
64. *Id.* at 68-69. The Court noted the EEOC Guidelines' emphasis on evaluating sexual harassment in light of "the totality of the circumstances." *Id.* at 69 (citing 29 C.F.R. § 1604.11(b) (1985)).
65. *Id.* at 72.
66. *Id.* at 65-66.
67. *Id.* at 66-67 (quoting *Henson*, 682 F.2d at 902). The Supreme Court later noted that *Meritor* had "implicitly . . . approved" the cause of action for racial harassment under Title VII. Patterson v. McLean Credit Union, 491 U.S. 164, 180 (1988) (dicta).
68. *Meritor*, 477 U.S. at 70-73. This formulation paraphrases the elements set forth in *Henson*, 682 F.2d at 903-05.

This article focuses on the controversy surrounding the proof necessary to satisfy the fourth element concerning altering a term, condition, or privilege of employment, which is the required showing of harm. The pronounced circuit split over this standard prompted the Supreme Court to review *Harris v. Forklift Systems, Inc.*.

To evaluate the accomplishments of *Harris* we must first examine the circuit split. Most circuits inquired whether sexual or sex-based conduct altered the terms, conditions, or privileges of the plaintiff's employment. They answered this question by examining the facts of the conduct in the work context and the conduct's effect upon the plaintiff and members of her protected group.[69] Most circuits considered use of the EEOC's definition of hostile work environment to be essentially equivalent to asking the general question of whether the conduct altered a term, condition, or privilege of work. Under the EEOC test, truly isolated or sporadic sexual comments that involved no threats did not make a workplace hostile.[70] These circuits assessed the full range of sexual and nonsexual (but sex-based) conduct,[71] directed either at the plaintiff or at others of her sex.[72]

A minority of circuits narrowed and restricted the standard of proof. The Sixth Circuit in *Rabidue v. Osceola Refining Co.* required the plaintiff to prove not only that she was actually offended but that a "hypothetical reasonable individual" would have been offended by the conduct.[73] The Sixth Circuit's minority standard treated each clause of the EEOC Guidelines hostile work environment test as a separate element of proof required of the plaintiff and further toughened the standard with what it characterized as an objective test of reasonableness. This test remedied only extreme or unusual conduct and established a threshold below which the court viewed the behavior as lawful.[74] Courts applying the minority test separately examined each act under the objective/subjective inquiry, eliminating any conduct that, considered in isolation, was not serious enough.[75]

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69. *See infra* part I.D.1.

70. *See infra* part I.D.1.

71. *See infra* part III.B.1.a.(i), (ii), (v).

72. *See infra* part III.B.2.

73. 805 F.2d 611, 620 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987) (stating that "proper assessment" invites assessment of "objective" and "subjective" factors). *See also* Brooms v. Regal Tube Co., 881 F.2d 412, 418-19 (7th Cir. 1989) (noting and agreeing with Rabidue's use of an "objective" and "subjective" test for harm of sexual conduct).

74. *See infra* notes 99-104 and accompanying text.

75. It is unclear whether courts applying the minority test expressly approved evaluating conduct out of its context or simply made such evaluation without reflecting on the propriety of doing so. At least one court in the Sixth Circuit acknowledged that "[a]busive environments consist of multiple, even though perhaps individually nonactionable, incidents of unwelcome sexual harassment." Vermett v. Hough, 627 F. Supp. 587, 606 (W.D. Mich. 1986) (stating that "more than one isolated incident of sexually offensive conduct" is ordinarily required to demonstrate that a sexually abusive environment existed).

1. The Majority Circuits

The presence of a hostile work environment has been more a question of fact than of law.[76] The majority test finds hostile conditions when sexual conduct is sufficiently severe or pervasive to alter the victim's working conditions and create an abusive environment; or to have the purpose or effect of unreasonably interfering with the victim's work performance or of creating an intimidating, hostile, or offensive working environment.[77] For the most part, inquiry into harm by the majority of courts has centered on the conduct's severity, pervasiveness, or both.

The EEOC's test provides that unwelcome sexual conduct with the "purpose *or* effect of unreasonably interfering with the [plaintiff's] work performance *or* creating an intimidating, hostile or offensive working environment"[78] is unlawful. Many jurisdictions employed the EEOC Guidelines' test as equivalent to *Meritor*'s standard, although none explicitly stated that the tests were identical. *Meritor* recites the Guidelines' standard, the *Rogers* formulation, and the *Henson* formulation as if they are interchangeable.[79]

The pre-*Harris* majority and minority also differed about the requirement of psychological harm. The majority of circuits required only that the sex-based conduct alter working conditions. Two of the majority circuits required the court to assess the conduct's effect (or potential effect) on the well-being of the plaintiff or similarly situated employees.[80] In other words, a jury could find discrimination based on estimates, rather than certainties, concerning the conduct's effect; the employee would not need to wait to bring suit until the harassment *had actually affected* her psychological well-being.[81]

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76. One circuit has held that the ultimate determination of the hostility of the workplace is reviewable as a conclusion of law. EEOC v. Hacienda Hotel, 881 F.2d 1504, 1514 (9th Cir. 1989) (citing Jordan v. Clark, 847 F.2d 1368, 1375 n.7 (9th Cir. 1988), *cert. denied*, 488 U.S. 1006 (1989)).

77. *See, e.g., Meritor*, 477 U.S. 57 (1986); *Zabkowicz v. West Bend Co.*, 589 F. Supp. 780 (E.D. Wisc. 1984); *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982); *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981). *See also supra* part I.C., notes 35-43 and 55-56, and text accompanying notes 20-25.

78. 29 C.F.R. § 1604.11(a)(3) (1993) (emphasis added).

79. 477 U.S. at 65-67 (1986).

80. Phillips v. Smalley Maintenance Servs., 711 F.2d (11th Cir. 1983); Keenan v. American Cast Iron Pipe Co., 707 F.2d 1274 (11th Cir. 1983); Belt v. Johnson Motor Lines, 458 F.2d 443 (5th Cir. 1972).

81. The courts' language justifies this interpretation. The phrases "to alter" *Meritor*, 477 U.S. at 67, and "to affect," *Henson*, 682 F.2d at 904, are present infinitives, used "to express action occurring at the same time as, or later than, that of the main verb." HARBRACE COLLEGE HANDBOOK 81 (10th ed. 1986). The courts would have used the present perfect infinitive phrases "to have affected" and "to have altered" for antecedent action if these courts had meant to restrict claims to past harm. The Sixth Circuit, and arguably the Seventh Circuit, read "to alter" in *Meritor* as if it meant "to have altered," thus requiring that the plaintiff show she had already suffered severe psychological injury.

What kind of harm is contemplated by the terms affect and psychological well-being?[82] *Rogers*, *Henson*, and *Meritor* apparently adopted a common-sense notion of psychological well-being.[83] The plaintiff's credible testimony of her experiences and feelings, as supported by circumstantial evidence, would suffice to claim an effect on psychological well-being, just as it would support a claim of compensatory damages for mental anguish[84] in a discrimination case. While a diagnosable psychological or medical condition attributable to hostile working conditions would be evidence of harm, its absence would neither bar nor defeat the claim.

Under the majority test, courts evaluated workplace hostility and abusiveness in the "totality of the circumstances." The *Meritor* totality specifically relied upon the EEOC Guidelines, which considered the nature and context of the sexual advances.[85]

The majority of jurisdictions, including the District of Columbia,[86] First,[87] Second,[88] Fourth,[89] Fifth,[90] Eighth,[91] Ninth,[92] Tenth,[93] Eleventh,[94]

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82. *Henson*, 682 F.2d at 904.

83. This standard, as well as the prospective nature of the Eleventh Circuit inquiry, may explain why the Eleventh Circuit sustained findings of hostile work environment in cases which would likely not have been sustained in the Sixth Circuit, even though *Harris* identified both circuits as imposing a "psychological injury" requirement. Harris v. Forklift Systems, Inc., 114 S. Ct. 367, 370 (1993). *See infra* note 244.

84. Proof of damages for mental anguish requires neither the existence of a medical or psychological condition nor expert testimony but is "customarily proved by showing the nature and circumstances of the wrong and its effect on the plaintiff." Carey v. Piphus, 435 U.S. 247, 264 n.20 (1978). The injury may also be "evidenced by one's conduct and observed by others." *Id.* at 264. A number of discrimination cases endorse this common-sense assessment. *See, e.g.*, Carrero v. New York City Housing Auth., 890 F.2d 569, 581 (2d Cir. 1989) (holding that plaintiff's testimony about her feelings, corroborated by testimony of coworkers who saw plaintiff crying, in part supported pain and suffering award in sexual harassment suit); Chalmers v. City of Los Angeles, 762 F.2d 753, 761 (9th Cir. 1985) (holding that plaintiff's testimony about her feelings supported damage award); Carter v. Duncan-Huggins, Ltd., 727 F.2d 1225, 1238 (D.C. Cir. 1984) (concluding that racial harassment plaintiff was entitled to damages based solely on her testimony). Minority jurisdictions acknowledged that this approach was appropriate in racial harassment cases. *See, e.g.*, Hunter v. Allis-Chalmers Corp., Engine Div., 797 F.2d 1417, 1425 (7th Cir. 1986) (holding award supported by the testimony of plaintiff and his wife concerning the "very ugly and wounding" conduct to which he was subjected).

85. *Meritor*, 477 U.S. at 69 (quoting EEOC Guidelines, 29 C.F.R. § 1604.11(b) (1985)); *Henson*, 682 F.2d at 904. *See also* Andrews v. City of Philadelphia, 895 F.2d 1469, 1484 (3d Cir. 1990).

86. Bundy v. Jackson, 641 F.2d 934, 947 (D.C. Cir. 1981).

87. Lipsett v. Univ. of P.R., 864 F.2d 881, 897-98 (1st Cir. 1988). *But see* Morgan v. Mass. Gen. Hosp., 712 F. Supp. 242, 257-58 (D. Mass. 1989), *aff'd*, 901 F.2d 186, 193 (1st Cir. 1990).

88. *See Carrero*, 890 F.2d at 577 (citing relevant passages of *Meritor* and *Henson*, including references to 29 C.F.R. § 1604.11(a)(3) (1985)).

89. Katz v. Dole, 709 F.2d 251, 254 (4th Cir. 1983) (discussing general principles without quoting specific language). *But see* Paroline v. Unisys Corp., 879 F.2d 100, 105 (4th Cir. 1989), *vacated in part on reh'g*, 900 F.2d 27 (1990) (discussing application of *Rabidue* standard without noting its conflict with the prevailing rule).

90. Waltman v. Int'l Paper Co., 875 F.2d 468, 477 (5th Cir. 1989).

91. Hall v. Gus Constr. Co., 842 F.2d 1010, 1013 (8th Cir. 1988).

and Federal[95] Circuits adopted standards following *Meritor*'s basic formulation. In some instances, majority circuit opinions cited decisions from the Sixth and Seventh Circuits that deviated from or modified the standards articulated in *Meritor* and in the EEOC Guidelines as if those minority decisions were in harmony with the prevailing rule.[96] But as discussed below, the Sixth and Seventh Circuits substantially narrowed the test.[97]

2. *The Minority Circuits*

Almost immediately after the Supreme Court decided *Meritor* in 1986, a minority formulation of the hostile work environment proof requirement emerged in *Rabidue v. Osceola Refining Co.*[98]

a. *The Sixth Circuit Hostile Work Environment Standard*

In *Rabidue*, the Sixth Circuit required a plaintiff hoping to show the existence of a hostile work environment to establish that "the charged sexual harassment had the effect of unreasonably interfering with the plaintiff's work performance *and* creating an intimidating, hostile, or offensive working environment *that affected seriously the psycho logical [sic] well-being of the plaintiff.*"[99] The Sixth Circuit drew from *Meritor* and the EEOC Guidelines, but created a standard more difficult for plaintiffs to meet, most notably by changing the either-or test to one requiring that *all* elements be proved. Under *Rabidue*, the plaintiff had to prove that the conduct caused both job interference *and* hostile atmosphere effects,[100] which eliminated many claims.[101]

92. *See* Ellison v. Brady, 924 F.2d 872, 875-76 (9th Cir. 1991) (citing Jordan v. Clark, 847 F.2d 1368, 1373 (9th Cir. 1988), *cert. denied sub nom.* Jordan v. Hodel, 488 U.S. 1006 (1989)).

93. Hicks v. Gates Rubber Co., 833 F.2d 1406, 1413 (10th Cir. 1987).

94. *See* Sparks v. Pilot Freight Carriers, 830 F.2d 1554, 1561 (11th Cir. 1987) (citing Henson, 682 F.2d at 904).

95. Downes v. F.A.A., 775 F.2d 288, 292-93 (Fed. Cir. 1985) (applying test in review of government agency demotion and reassignment of supervisor on grounds of sexual harassment).

96. *See, e.g.*, Paroline v. Unisys Corp., 879 F.2d 100, 105 (4th Cir. 1989) (reversing summary judgment); Morgan v. Mass. Gen. Hosp., 712 F. Supp. 242, 257-58 (D. Mass. 1989), *aff'd*, 901 F.2d at 186 (1st Cir. 1990).

97. The Third Circuit's rule differs from both majority and minority standards. Andrews v. City of Philadelphia, 895 F.2d 1469 (3d Cir. 1990). The *Andrews* court stated five components of hostile environment claims: the employee(s) suffered intentional discrimination because of their sex; the discrimination was pervasive and regular; the discrimination detrimentally affected the plaintiff(s); the discrimination would detrimentally affect a reasonable person of the same sex in that position; and respondeat superior liability was shown. *Id.* at 1482-83. The second, third, and fourth components are all designed to address the alteration of a term, condition, or privilege of employment, the test at issue in this discussion.

98. 805 F.2d 611, 619 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987).

99. *Id.* at 619 (emphasis added). *See supra* notes 73-75 and accompanying text.

100. *See infra* note 137 and accompanying text.

101. 805 F.2d at 619.

The Sixth Circuit also required that harm be completed, rather than prospective, in contrast to the language in *Meritor*, *Henson*, and *Rogers*. Victims with symptoms could state a claim under the minority test; victims better able to endure the hostility of their surroundings could not.[102]

In addition to changing the verbal formulation of the hostile work environment test, the Sixth Circuit also made the test purportedly objective—that is, from the "perspective of a reasonable person's reaction to a similar environment under essentially like or similar circumstances."[103] The *Rabidue* trial court had read the EEOC Guidelines to impose a "reasonableness" requirement on the plaintiff,[104] and in finding against her, concluded that the average American cannot be "*legally* offended by sexually explicit posters."[105] The appellate court endorsed the objective standard of proof[106] described above, implicitly positing a hypothetical reasonable person, who would not be offended by sexually explicit posters. The appellate court also adopted the trial court's reasoning that tolerated sexually offensive working conditions if the conditions existed before the female worker entered the workplace.[107] Accordingly, in the appellate court's reasoning,

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102. Title VII protects "any individual" from discrimination based upon membership in a protected category. Civil Rights Act of 1964 § 703, 42 U.S.C. § 20003-2 (1994). Accordingly, the distinction between apparently suffering and symptomless victims appears to contradict the language of the statute.

103. *Rabidue*, 805 F.2d at 620.

104. *Rabidue*, 584 F. Supp. at 430. The trial court focused on the EEOC Guidelines' definition of conduct as that which "unreasonably interfer[es] with an individual's work performance . . . ." 29 C.F.R. § 1604.11(a)(3) (1993).

> In the Court's viewpoint the word "unreasonably" opens the door to an important conceptual development of the sex harassment theory, entitling the judiciary to consider the nature of the employment environment in which the given plaintiff suffered the alleged harassment. This in turn authorizes courts to consider such factors as the educational background of the plaintiff's coworkers and supervisors, the physical make up of the plaintiff's work area, and the reasonable expectation of the plaintiff with respect to the kind of conduct that constitutes sex harassment. Thus, under the approach sketched above, the standard for determining sex harassment would be different depending upon the work environment. Indeed, it cannot be seriously disputed that in some work environments, humor and language are rough hewn and vulgar.

Rabidue, 805 F.2d at 430. Nothing in the EEOC Guidelines suggests that the same conduct should be judged to have different effects based on the backgrounds of coworkers and supervisors or that the expectation that some environments would be rough hewn and vulgar should nullify a woman's right to a nondiscriminatory workplace. Indeed, to interpret "unreasonably" as allowing the court to legalize reasonable discrimination by coworkers is to abrogate the purpose of Title VII.

105. *Id.* (emphasis in original). The *Rabidue* trial court noted, "For better or worse, modern America features open displays of written and pictorial erotica. Shopping centers, candy stores and prime time television regularly display pictures of naked bodies and erotic real or simulated sex acts. Living in this milieu, the average American should not be *legally* offended by sexually explicit posters." *Id.* at 433. That court then found the sexual material had a de minimis effect "on plaintiff's work environment." *Id.*

106. 805 F.2d at 619-20.

107. *Id.*

a female worker who "assumed the risk" of "voluntarily entering that environment" should be willing to tolerate abuse.[108] In this connection, the *Rabidue* appellate panel set out some objective and subjective factors for consideration:

> the nature of the alleged harassment, the background and experience of the plaintiff, her coworkers, and supervisors, the totality of the physical environment of the plaintiff's work area, the lexicon of obscenity that pervaded the environment of the workplace both before and after the plaintiff's introduction into its environs, coupled with the reasonable expectation of the plaintiff upon voluntarily entering that environment. Thus, the presence of actionable sexual harassment would be different depending upon the personality of the plaintiff and the prevailing work environment and must be considered and evaluated upon an ad hoc basis.[109]

Judge Damon J. Keith dissented, partially on the grounds that the test applied by the *Rabidue* majority led the court to treat obviously sexually harassing conditions as inconsequential.[110] Judge Keith summarized the sexually harassing conditions that the plaintiff had endured over many years. One poster, "on the wall for eight years, showed a prone woman who had a golf ball on her breasts with a man standing over her, golf club in hand, yelling 'Fore.' "[111] Another supervisor with whom the plaintiff had to work routinely had referred to women as " 'whores,' 'cunt,' 'pussy' and 'tits,' " despite repeated complaints from the plaintiff and other female employees.[112] The plaintiff had also been denied the ordinary business entertainment privileges of her male peers, apparently because the employer thought it would not look good for a divorced female to take a married man out to dinner.[113] That the majority found she was "too timid to collect delinquent accounts" but "so abrasive and aggressive" as to deserve firing, Judge Keith considered "an enigma."[114]

Judge Keith disagreed with the *Rabidue* majority's holding that a court considering hostile environment claims should adopt the perspective of the reasonable person's reaction to a similar environment.[115] He proposed instead that the court should

> adopt the perspective of the reasonable victim which simultaneously allows courts to consider salient sociological differences as

108. *Id.*
109. *Id.*
110. *Id.* at 623-28.
111. *Id.* at 624.
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.* at 626.

> well as shield employers from the neurotic complainant. Moreover, unless the outlook of the reasonable woman is adopted, the defendants as well as the courts are permitted to sustain ingrained notions of reasonable behavior, fashioned by the offenders, in this case, men.[116]

The *Rabidue* majority's extreme reasoning inspired other Sixth Circuit panels to find creative, often conflicting ways to mitigate its harshness. For example, in *Davis v. Monsanto Chem. Co.*,[117] a hostile work environment case alleging racial harassment, the Sixth Circuit carefully distinguished *Rabidue*. *Davis* embraced the standard set forth earlier in *Erebia v. Chrysler Plastic Products Corp.*[118] as appropriate for race cases.[119] The *Erebia* standard paralleled the sexual harassment standard in the majority circuits. The *Davis* panel's decision to ignore *Rabidue* in cases involving allegations of racial discrimination clearly contradicted *Meritor*, which expressly equated sexual and racial harassment.[120]

Davis revealed the problems posed by the *Rabidue* standard in a case involving a form of discriminatory harassment that the judges were not prepared to condone. In *Davis*, the Sixth Circuit analyzed how the lower court had inappropriately limited the reach of Title VII by applying the *Rabidue* standard of offensiveness to a race claim:

> In its discussion of this instance of alleged harassment the district court may have misunderstood the true impact of Title VII. Citing *Howard v. National Cash Register Co.*, 388 F. Supp. 603 (S.D. Ohio 1975), the district court stated that, "the elimination of 'Archie Bunker' types from the factory environment carries Title VII too far." . . . Unfortunately, this confusion may be the product of a statement included in this court's opinion in *Rabidue v. Osceola Refining Co.*, . . . In *Rabidue*, this court quoted with approval a passage from the district court's opinion. This court stated that " 'Title VII [was] not designed to bring about a magical transformation in the social mores of American workers.' " *Id.*, 805 F.2d at 621 (*quoting Rabidue v. Osceola Refining Co.*, 584 F. Supp. 419, 430 (E.D. Mich. 1984)).
>
> In reading this passage, however, one should place emphasis on the word "magical," not the word "transformation." Title VII was not intended to eliminate immediately all private prejudices and biases. . . . In essence, while Title VII does not require an employer to fire all "Archie Bunkers" in its employ, the law does require that an employer take prompt action to prevent bigots

116. *Id.*
117. 858 F.2d 345 (6th Cir. 1988), *cert. denied*, 490 U.S. 1110 (1989).
118. 772 F.2d 1250 (6th Cir. 1985), *cert. denied*, 475 U.S. 1015 (1986).
119. *Davis*, 858 F.2d at 348.
120. *Meritor*, 477 U.S. at 67.

> from expressing their opinions in a way that abuses or offends their co-workers. By informing people that the expression of racist or sexist attitudes in public is unacceptable, people may eventually learn that such views are undesirable in private as well. Thus, Title VII may advance the goal of eliminating prejudices and biases in our society.[121]

In affirming that *Erebia*, not *Rabidue*, controlled racially hostile work environment claims, the *Davis* court required the plaintiff in a racial harassment claim to

> [s]how that the alleged racial harassment constituted an unreasonably abusive or offensive work-related environment *or* adversely affected the reasonable employee's ability to perform the tasks required by the employer. In establishing the requisite adverse effect on work performance, however, the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment. The employee need only show that the harassment made it more difficult to do the job .... [T]he plaintiff need not prove that the instances of alleged harassment were related in either time or type.[122]

The Sixth Circuit did not offer the same generous formulation in sex discrimination cases.

In a subsequent Sixth Circuit case,[123] Judge Robert B. Krupansky, the author of the *Rabidue* majority opinion, reaffirmed *Rabidue*. The *Risinger* court criticized *Davis* on the grounds that Title VII mandated the same standard for race and sex claims and rejected the *Davis* standard for race cases, holding these subject to the *Rabidue* standard.[124] In *Boutros v. Canton Regional Transit Authority*,[125] the Sixth Circuit held that *Risinger* (and, by incorporation, *Rabidue*) controlled Title VII claims of hostile work environment based on sex, race, religion, or national origin. The *Boutros* opinion (authored by Judge Keith, the dissenter in *Rabidue*) did not acknowledge *Davis* or the split in the Sixth Circuit, asserting unequivocally that *Risinger*, *Meritor*, and the EEOC Guidelines compelled identical standards of proof for race, sex, religion, and national origin claims.[126] The dissent, however, noted the *Davis/Risinger* conflict,[127] found that *Risinger* should control (and hence that the *Rabidue* rather than the *Davis* test for hostile work environment should apply), but argued that the plaintiff had

121. *Davis*, 858 F.2d at 350.
122. *Id.* at 349 (emphasis added).
123. Risinger v. Ohio Bureau of Workers' Compensation, 883 F.2d 475 (6th Cir. 1989).
124. *Id.* at 484-85.
125. 997 F.2d 198, 203 (6th Cir. 1993).
126. *Id.* at 202-03.
127. *Id.* at 206-07 (Batchelder, J., dissenting).

failed to meet the requirements of a hostile work environment claim under either test.[128]

Prior to *Harris*, the Sixth Circuit also began to revise the *Rabidue* test. In *Yates v. Avco Corp.*, the court noted that "because the harassment was sufficiently persistent and severe to affect the psychological well-being of the plaintiffs it affected a 'term, condition or privilege of employment.' "[129] This appears to ignore *Rabidue*'s directives to individually assess each element of the test and to find specific psychological injury. *Yates* distinguished *Rabidue* in that *Yates* involved supervisor harassment whereas *Rabidue* involved peer harassment.[130] The court upheld the finding of liability because the employer knew or should have known of the supervisor's conduct and should have taken remedial action.[131] The court reversed and remanded one plaintiff's award of lost pay because the harassment did not constitute a constructive discharge.[132] Reviewing *de novo* the finding of constructive discharge of the second plaintiff,[133] the Sixth Circuit panel in *Yates* noted that constructive discharge occurred "if 'working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign.' "[134] The court reasoned:

> In a sexual harassment case involving a male supervisor's harassment of a female subordinate, it seems only reasonable that the person standing in the shoes of the employee should be the 'reasonable woman' since the plaintiff in this type of case is required to be a member of a protected class and is by definition female.[135]

Nonetheless, the court in *Yates* overturned the finding of constructive discharge because the plaintiff's final encounter with the harasser at work revealed "neither discriminatory intent nor foreseeable negative impact on

128. *Id.* at 207. Since *Boutros*, no Sixth Circuit decisions have addressed the split between *Risinger* and *Davis* in the proof standards of hostile environment claims. Of the district court hostile work environment cases decided since *Boutros*, one has followed *Davis*, Carr v. TRW, No. 92-CV-537, 1993 U.S. Dist. LEXIS 15854 (W.D. Mich. Oct. 14, 1993), and another has followed *Risinger*, Coleman v. State of Tennessee, 846 F. Supp. 582 (1993). Neither opinion acknowledges the split. In *Coleman*, the court cited *Risinger* for the proposition that the standards for race- and sex-based hostile work environment are the same, and applied a *Risinger\Rabidue* analysis. *Coleman*, 846 F. Supp. at 589. The court mentioned neither *Davis* nor *Boutros*. Somewhat more oddly, the *Carr* court was clearly aware of both *Davis* and *Risinger*, having cited them both, but failed to acknowledge a controversy. *Risinger*'s proof formulation was simply elided from the discussion.

129. 819 F.2d 630, 633 (6th Cir. 1987) (holding that these factual findings of sexual harassment were not in dispute).

130. *Id.* at 636 n.1.

131. *Id.* at 636. *See also* Barcume v. Flint, 819 F. Supp. 631, 657 (E.D. Mich. 1993).

132. 819 F.2d at 638.

133. *Id.* at 636.

134. *Id.* at 636-37 (citing, inter alia, Held v. Gulf Oil Co., 684 F.2d 427, 432 (6th Cir. 1982)).

135. *Id.* at 637 (citing the dissent of Judge Keith in *Rabidue*, 805 F.2d at 626).

her by Avco."[136] However, in reviewing this finding, the panel considered only Avco's role in the immediate circumstance, not the preceding periods of harassment, the resulting cumulative harm, or whether the plaintiff's resignation was reasonably foreseeable.

The *Rabidue* test has blocked many claims of a hostile work environment.[137] *Rabidue* has also been relied upon by courts which found valid claims of hostile work environment.[138] The opinions provide no clear explanation why some facts satisfy *Rabidue* and others do not. Regardless which analysis is used, however, *Rabidue*'s standards discourage a finding of hostile work environment.

b. The Seventh Circuit Hostile Work Environment Standard

The Seventh Circuit's standards initially required the plaintiff to show that "demeaning conduct and sexual stereotyping cause[d] such anxiety and debilitation to the plaintiff that working conditions were 'poisoned'."[139] Despite its similarity to the *Meritor* test, this standard demanded that the plaintiff show considerable hostility and resulting disability in order to prevail. The Seventh Circuit subsequently modified its standards to approximate *Rabidue*, although it applied its standard less stringently, permitting the plaintiff to show an unreasonable interference with work by demonstrating an effect upon her psychological well-being.[140]

In *Brooms v. Regal Tube Co.*, the Seventh Circuit endorsed *Rabidue*'s obligatory subjective and objective analysis.[141] The court also adopted *Rabidue*'s holding that hostility must be considered in light of the type of

136. *Id.*

137. *E.g.*, Swanson v. Elmhurst Chrysler Plymouth, 882 F.2d 1235, 1238 (7th Cir. 1989), *cert. denied*, 493 U.S. 1036 (1990); Highlander v. K.F.C. Nat'l Management Co., 805 F.2d 644, 650 (6th Cir. 1986); Caleshu v. Merrill Lynch, 737 F. Supp. 1070, 1082-83 (E.D. Mo. 1990), *aff'd without opinion*, 985 F.2d 564 (8th Cir. 1991), *cert. denied*, 112 S. Ct. 1963 (1992); Kirkland v. Brinias, 741 F. Supp. 692, 694-95 (E.D. Tenn. 1989), *aff'd*, 944 F.2d 905 (6th Cir. 1991); Morgan v. Massachusetts Gen. Hosp., 712 F. Supp. 242, 257-58 (D. Mass. 1989), *aff'd*, 901 F.2d 186, 193 (1st Cir. 1990); Perkins v. General Motors Corp., 709 F. Supp. 1487, 1500-01 (W.D. Mo. 1989), *aff'd in part, rev'd in part, on other grounds*, 911 F.2d 22 (8th Cir. 1990), *cert. denied*, 499 U.S. 920 (1991); Koster v. Chase Manhattan Bank, 687 F. Supp. 848, 862 (S.D.N.Y. 1988); Miller v. Aluminum Co. of Am., 679 F. Supp. 495, 501 (W.D. Pa. 1988), *aff'd*, 856 F.2d 184 (3d Cir. 1988); Hollis v. Fleetguard, Inc., 668 F. Supp. 631, 636-37 (M.D. Tenn. 1987), *aff'd without opinion*, 848 F.2d 191 (6th Cir. 1988).

138. *E.g.*, Risinger v. Ohio Bureau of Workers' Compensation, 883 F.2d 475, 483-84 (6th Cir. 1989), *reh'g denied*, No. 88-3387, 1990 U.S. App. LEXIS 4860 (1990); Taylor v. National Group of Cos., 729 F. Supp. 575, 577 (N.D. Ohio 1989); Shrout v. Black Clawson Co., 689 F. Supp. 774, 780-81 (S.D. Ohio 1988); Pease v. Alford Photo Indus., 667 F. Supp. 1188, 1201-02 (W.D. Tenn. 1987).

139. Scott v. Sears, Roebuck & Co., 798 F.2d 210, 212-13 (7th Cir. 1986) (citing Bundy v. Jackson, 641 F.2d 934, 944 (D.C. Cir. 1981)).

140. Swanson v. Elmhurst Chrysler Plymouth, 882 F.2d 1235, 1238-39 (7th Cir. 1989), *cert. denied*, 493 U.S. 1036 (1990).

141. 881 F.2d 412, 418-19 (7th Cir. 1989).

workplace and employees. The panel produced a mixed objective and subjective test, assessing the "likely effect of a defendant's conduct upon a reasonable person's ability to perform his or her work and upon his or her well-being" and "the actual effect upon the particular plaintiff bringing the claim."[142] The Seventh Circuit reaffirmed this test in *Dockter v. Rudolph Wolff Futures, Inc.*[143]

c. *Critical Reactions to* Rabidue*'s Reasonable Person Test and Related Formulations*

Rabidue's "reasonable person" test inspired a wide variety of responses. Several prominent courts,[144] scholarly commentators,[145] and the EEOC[146] have criticized, discussed and/or rejected the *Rabidue* reasonable person standard.

i. Judicial Responses

In *Ellison v. Brady*, the Ninth Circuit rejected both *Rabidue* and its Seventh Circuit counterpart.[147] *Ellison* criticized the Sixth and Seventh Circuit cases for selecting the viewpoint of a reasonable person, rather than

142. *Id.* at 419.

143. 913 F.2d 456 (7th Cir. 1990).

144. *See infra* part I.D.2.c.i. *See also, e.g.*, Lipsett v. University of P.R., 864 F.2d 881 (1st Cir. 1988) (rejecting *Rabidue*); Bennett v. New York City Dep't of Corrections, 705 F. Supp. 979, 984 (S.D.N.Y. 1989) (adopting *Meritor* and rejecting *Rabidue*); Barbetta v. Chemlawn Serv. Corp., 669 F. Supp. 569, 573 (W.D.N.Y. 1987) (rejecting *Rabidue*).

145. *See infra* part I.D.2.c.ii. *See also, e.g.*, Lucinda M. Finley, *A Break in the Silence: Including Women's Issues in a Torts Course*, 1 YALE J.L. & FEMINISM 41, 60-62 (1989) (analyzing gender bias of reasonable person standard); Mary Jo Shaney, *Perceptions of Harm: The Consent Defense in Sexual Harassment Cases*, 71 IOWA L. REV. 1109, 1123 (1986) (discussing *Rabidue* court's shift of responsibility from employer to employee).

146. *See infra* part I.D.2.c.iii.

147. 924 F.2d 872 (9th Cir. 1991).

a reasonable woman,[148] and for requiring evidence of completed injury due to the hostile conditions.[149] In addition, the Ninth Circuit asserted:

> Neither *Scott*'s search for "anxiety and debilitation" sufficient to "poison" a working environment nor *Rabidue*'s requirement that a plaintiff's psychological well-being be "seriously affected" follows directly from language in *Meritor*. It is the harasser's conduct which must be pervasive or severe, not the alteration in the conditions of employment. Surely, employees need not endure sexual harassment until their psychological well-being is seriously affected to the extent that they suffer anxiety and debilitation.[150]

The *Ellison* court then suggested guidelines: that the required showing of severity vary inversely with pervasiveness and that in determining these elements the court should focus on the perspective of the victim. The *Ellison* court concluded "that a female plaintiff states a prima facie case of hostile environment sexual harassment when she alleges conduct which a reasonable woman would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment."[151] The Ninth Circuit also criticized *Rabidue* for assuming that a reasonable person should expect, and thereby assume the risk of, sexual mistreatment in the workplace. The court found the appropriate standard to be whether the harassment would detrimentally affect a reasonable woman.[152]

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148. The *Ellison* majority declined to specify whether the reasonable woman standard is a special standard for women or whether it simply required the trier of fact to consider the sexual conduct from the perspective of a reasonable person in the position of the plaintiff, taking into account that sexual conduct may affect women to a greater degree than men, given the difference on average of women's experiences with respect to sexual abuse.

The test immediately drew criticism. Judge Stephens' dissent found the term "reasonable woman" ambiguous and therefore inadequate, *Ellison*, 924 F.2d at 880; disagreed that men and women necessarily had different sensibilities; and noted that men might also be victims of sexual harassment, *id.* at 884. Stephens demanded more inclusive terminology. *Id.* at 174. For additional views, *see, e.g.*, Robert S. Adler & Ellen R. Peirce, *The Legal, Ethical, and Social Implications of the "Reasonable Woman" Standard in Sexual Harassment Cases*, 61 FORDHAM L. REV. 773 (1993) (stating classic arguments against special treatment); Maureen O'Connor & Barbara A. Gutek, *A Psychological Analysis of the Reasonable Woman Standard in Sexual Harassment Cases*, — J. SOC. ISSUES — (forthcoming 1995) (empirical study discussing equal treatment and special reasonable woman); Brief *Amici Curiae* of The Women's Legal Defense Fund in Support of Petitioner at 17-19, Harris v. Forklift Systems, 114 S. Ct. 367 (1993) (No. 92-1168) (arguing that the reasonable person standard perpetuates past discrimination and that the reasonable woman standard can create or perpetuate stereotypes). Additionally, at least one article proposed a reasonable victim standard in order to avoid gender stereotypes. Jolynn Childers, *Is There Place for a Reasonable Woman in the Law? A Discussion of Recent Developments in Hostile Environment Sexual Harassment*, 42 DUKE L.J. 854, 857 (1993).

149. *Ellison*, 924 F.2d at 877.

150. *Id.* at 877-78.

151. *Id.* at 879.

152. *Id.*

The Eighth Circuit adopted a "reasonable woman or victim" standard without criticizing the reasonable person standard and without offering elaborate justification for the choice.[153] The case came up on appeal for a second time after the district court on remand again held for the employer. In the first appeal,[154] the court had instructed the district court to determine whether Burns, who had complained continually to different supervisors, "was at least as affected as the reasonable person under like circumstances. On remand, the district court was to determine whether Burns was as affected as that hypothetical 'reasonable person.' "[155] In the second appeal,[156] the court found the district court's ruling unsupported in law,[157] but declined to remand the case a third time because "[i]t [was] undisputed that the trial court [had] determined that the respondent's conduct was . . . such that a hypothetical reasonable woman would consider the conduct sufficiently severe or pervasive to alter the conditions of employment and create an abusive work environment."[158] The Court of Appeals cited no authority for its use of the reasonable woman standard and explained only that "[w]e must view the harassment from the victim's perspective, and in this case the victim is a woman. *Ellison*, 924 F.2d at 878; *Yates v. Avco Corp.*, 819 F.2d 630, 637 n.2 (6th Cir. 1987) . . . ."[159]

It is unclear whether the Eighth Circuit in *Burns* found the logic of *Ellison* and *Yates* to be self-evident or whether it simply considered the reasonable woman or victim standard to be equivalent to the "reasonable person under like circumstances" standard articulated in its first opinion. That court's failure to recognize any conflict or change suggests the latter. In adopting the reasonable woman standard, the court expressly rejected *Rabidue*'s view of verbal abuse:

> [I]t makes no difference that the language in question may be unobjectionable to some groups of men. . . . As the Third Circuit said in *Andrews*: "Obscene language and pornography quite possibly could be regarded as 'highly offensive to a woman who seeks to deal with her fellow employees and clients with professional dignity and without the barrier of sexual differentiation and abuse.' Although men may find these actions harmless and innocent, it is highly possible that women may feel otherwise."[160]

153. Burns v. McGregor Electronic Industries, Inc., 989 F.2d 959 (8th Cir. 1993), *reh'g and reh'g en banc denied*, 1993 U.S. App. LEXIS 10003 (8th Cir. Apr. 29, 1993).

154. Burns v. McGregor Electronic Industries, Inc., 955 F.2d 559, 566 (8th Cir. 1992).

155. *Id.* at 566.

156. *Burns*, 989 F.2d 959.

157. *Id.* at 963.

158. *Id.* at 964.

159. *Id.* at 965.

160. *Id.* (quoting Andrews v. Philadelphia, 895 F.2d 1469 (3d Cir. 1990)) (citations omitted).

The Third Circuit in *Andrews v. Philadelphia* held the reasonableness standard to be that of a reasonable person of the same sex as the plaintiff,[161] characterizing this standard as objective.[162] That court also ignored the reasonableness controversy, preferring to ground its holding in the legislative intent of Title VII:

> Congress designed Title VII to prevent the perpetuation of stereotypes and a sense of degradation which serve to close or discourage employment opportunities for women. . . . Congress expected that Title VII would result in the 'removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.'. . . Such an objective can only be achieved if women are allowed to work without being harassed.[163]

Unlike the *Rabidue* court, the *Andrews* court viewed the "pervasive use of derogatory and insulting terms relating to women generally and addressed to female employees personally" and the "posting of pornographic pictures in common areas and in the plaintiffs' personal work spaces"[164] as examples of the type of conduct Title VII was designed to prohibit. *Andrews* also held that a supervisor's tolerance of harassment showed the employer's liability rather than the plaintiff's assumption of risk.[165]

ii. Scholarly Responses

Professor Nancy Ehrenreich has criticized all reasonableness standards as necessarily biased and therefore inappropriate for discrimination law.[166] For example, the *Rabidue* court's reasonable person standard weighed male employees' interest in engaging in sexual talk and pictorial display against the female employees' interest in avoiding demeaning conduct. This standard allowed the panel to cast the harm as private, experienced uniquely by an abrasive and oversensitive plaintiff, and thus to downgrade all female employees' interests. The court also emphasized that the plaintiff exercised a private "voluntary" choice to enter the workplace. This approach, Ehrenreich argued, effectively isolated the plaintiff by implying that women as a group would not normally enter such a workplace, thereby allowing the court to view the case as an individualized dispute rather than a gender conflict.[167] The *Rabidue* majority portrayed itself as protector of

161. 895 F.2d at 1482.
162. *Id.* at 1483.
163. *Id.*
164. *Id.* at 1485 (citations omitted).
165. *Id.* at 1479.
166. *See* Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177 (1990).
167. *Id.* at 1198-1201.

minority viewpoints, specifically of the "rough hewn and vulgar" sexual culture it attributed to the working class.[168] Further,

> Judge Krupansky seemed to view *Rabidue*'s objections as unreasonable on the grounds that the prevailing consensus in American society is that conduct like [the supervisor's] is not offensive. As with the voluntary entry argument, the question was treated as one of fact: either society accepts behavior such as [this] or it does not.[169]

In Ehrenreich's view, the social-consensus theory of offensiveness marginalized the plaintiff's perspective and characterized discrimination as the product of an individual bad act, rather than of structural inequality.[170] Ehrenreich noted that social inequality belies any assumption that the dominant culture's standards were accepted by consensus.[171] Ehrenreich likely would favor a reasonable woman standard over a reasonable person standard, because the former comes closer to acknowledging these structural inequalities,[172] but she did not propose an alternative standard.

Another commentator, Professor Kathryn Abrams, noted that courts have applied various tests in discrimination cases.[173] She criticized these approaches:

> Adopting the perspective of the hypothetical reasonable person assumes that there is some view of sexual harassment that we are all likely to share, once we set aside the overreaction of the victim. It is a stark denial of a range of social facts that make sexual harassment a distinctly different experience for women than it would be for men. Even a reasonable woman standard when it is not carefully elaborated by a discussion of these differences between men and women, may reflect less an effort to see beyond the male perspective, than an attempt to evoke a woman who is, in Henry Higgins's words, 'more like a man'.[174]

Abrams argued that courts must examine the sexual conduct's offensiveness from the perspective of women, considering the nature and frequency

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168. *Id.* at 1201-03.

169. *Id.* at 1203.

170. *Id.* at 1204-05.

171. *Id.* at 1206-07.

172. Interestingly, although rejecting the use of the reasonableness standard, Professor Ehrenreich accepts reasonableness as the traditional standard for anti-discrimination law, *id.* at 1212-17, even though anti-discrimination plaintiffs, prior to the cases discussed in this article, had been held to a reasonableness standard only in limited cases. *See infra* note 302 and accompanying text.

173. Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1202 (1989).

174. *Id.*

of the conduct, the extent to which the abuse targets the plaintiff, and, in cases of verbal abuse, the precise language used.[175]

The *Ellison* majority cited Abrams' analysis when adopting a reasonable woman test.[176] Abrams thereafter qualified her approach, partly in reaction to *Ellison*.[177] Abrams approved the *Ellison* court's approach but argued that male factfinders' lack of experience and intuition might limit the standard. Male factfinders might also resist expert testimony.[178] Even if they did not, use of the standard could perpetuate damaging stereotypes, given the tendency to treat perceived differences between men and women as biological reality rather than social construction.[179] Abrams also criticized the reasonable woman standard she originally proposed for its false essentialism.[180] By falsely universalizing women's experiences, the standard ignored variations in women's views (particularly the views of the least privileged groups) about sexual conduct in the workplace.[181] Abrams proposed modifying the reasonable woman standard by linking it to "full accounts of whatever highly contingent social construction tends to generate . . . differences [between men and women]."[182] She also recommended that empirical research continue in order to increase information about differences among women and thereby the likelihood that courts would accept expert testimony on the subject.[183]

Elizabeth Glidden, a law student, joined several courts and commentators to promote a reasonable woman standard.[184] Glidden proposed adoption of the reasonable woman standard because of its ability to educate employers on how to identify and rectify sexual harassment problems.[185] Use of the standard, according to Glidden, would raise male consciousness of sexual harassment by permitting a suit for conduct previously thought harmless and by making employees ultimately responsible.[186] Use of the reasonable person standard, on the other hand, would permit sexual harassment to continue precisely because such common behavior would be unreasonable to oppose.[187]

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175. *Id.* at 1209-15.

176. Ellison v. Brady, 924 F.2d 872, 878-79 (9th Cir. 1991).

177. *See* Kathryn Abrams, *Social Construction, Roving Biologism, and Reasonable Women: A Response to Professor Epstein*, 41 DEPAUL L. REV. 1021, 1033 (1992).

178. *Id.* at 1034.

179. *Id.*

180. *Id.* at 1035.

181. *Id.* at 1036.

182. *Id.* at 1038.

183. *Id.*

184. Elizabeth A. Glidden, *The Emergence of the Reasonable Woman in Combating Hostile Environment Sexual Harassment*, 77 IOWA L. REV. 1825 (1992).

185. *Id.* at 1829.

186. *Id.* at 1849-50.

187. *Id.* at 1849 n.170 (citing Howard A. Simon, *Ellison v. Brady: A "Reasonable Woman" Standard for Sexual Harassment*, 17 EMPLOYMENT REL. L.J. 71, 75 (1991)).

Cathleen Mogan, tracing the development of hostile work environment law, preferred a reasonable victim or 'new improved' reasonable person standard to the reasonable woman standard.[188] Mogan, assessing the *Ellison* court's use of the reasonable woman standard, found Judge Stephens' dissent to be the more persuasive argument.[189] While Stephens voiced several objections to the reasonable woman standard,[190] the critique that appeared to resonate with Mogan was his concern that the *Ellison* majority's use of the reasonable woman standard had inappropriately and detrimentally shifted the scope of the inquiry from the harasser to the victim.[191] Mogan preferred the reasonable victim standard because it "avoid[ed] the 'reasonable woman' trap (of discriminating to avoid discrimination)."[192] In addition, it could not be manipulated to embrace female stereotypes[193] — a potential recognized by critics and proponents of the standard alike. Mogan envisioned two future scenarios if a reasonable victim or improved reasonable person standard were to be adopted. Either the reasonable person standard would be fragmented into more precise categories (e.g., reasonable black woman)[194] or the reasonable person standard would expand to embrace the perceptions of emerging groups.[195] Mogan favored expansion because it would prevent the dominant culture from using the standard to discriminate[196] according to stereotype.

Professor Martha Chamallas argued for a modified victim's perspective that defined reasonableness from the viewpoint of a subordinated group (or subgroup).[197] She saw this perspective as having great potential to overcome oppression because it challenged the dominant group's authority to define events.[198] The resulting account of discrimination would "place[ ] importance on the social construction of difference and on the

188. Cathleen M. Mogan, *Current Hostile Environment Sexual Harassment Law: Time to Stop Defendants From Having Their Cake and Eating It Too*, 6 NOTRE DAME J.L. ETHICS & PUB. POL'Y 543, 566 (1992).

189. *Id.* at 565.

190. *Id. See also supra* note 148.

191. *Id.* at 565.

192. *Id.* at 566.

193. *Id.* (citing Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 813, 815 (1991)).

194. *Id.* at 567. *But see* Kim Lane Scheppele, *The Reasonable Woman*, THE RESPONSIVE COMMUNITY, Fall 1991, at 36, 40.

> [A]s tort doctrine has evolved, the unitary "reasonable man" has multiplied into the reasonably prudent doctor, the reasonable pilot, and the ordinarily careful horse trainer, among other characters recognizable in law. . . . But the law only incompletely recognizes that special knowledge is acquired not only in occupations but also of other sociological categories that give rise to different ways of seeing the world. The few cases that do mention a "reasonable woman" in tort law only do so for grammatical consistency because one of the parties happens to be a woman, not because anything different results from noticing the gender of the parties.

195. Mogan, *supra* note 188, at 567.

196. *Id.*

197. *See* Martha Chamallas, *Feminist Constructions of Objectivity: Multiple Perspectives in Sexual and Racial Harassment Litigation*, 1 TEX. J. WOMEN & L. 95 (1992).

198. *Id.* at 122-23.

socially specific experience of the subordinated group," avoiding "the false universality problem that promoted reconsideration of the reasonable person standard in the first place."[199] Chamallas identified three problems: the tendency to see gender differences as biological, the difficulty of redefining reasonableness, and the need to respond to diversity within traditionally subordinated groups. First, Chamallas' reasonable woman standard would represent not an expression of biological determinism, but rather "a rhetorical strategy for attacking a gender ideology that finds its expression" in sexual harassment.[200] The "reasonable victim perspective" would remedy discrimination only while it could flexibly adopt the perspective of groups that have experienced oppression; its value would disappear when it became shorthand for the views of a particular gender group.[201]

The second problem involved reshaping the concept of reasonableness,[202] given that any reasonableness standard would risk stereotyping and prejudice against unsuccessful plaintiffs. Chamallas dismissed the idea that women's views must be unanimous on any position in order to make the viewpoint authentically that of a "reasonable woman."[203] She had more difficulty dismissing the "majoritarian construction of reasonableness,"[204] which equated the reasonable woman to the average, or typical, or majority of, women.[205] According to Chamallas, this construction has influenced all courts choosing between varying conceptions of the reasonable woman.[206] She approved the choice applied by the trial court in *Robinson v. Jacksonville Shipyards, Inc.*[207] as one that "might reasonably be taken by women consciously interested in improving their status in the workplace."[208] Under this construction, the reasonable woman would be "the woman who is able to offer a reasoned account of how the sexual conduct challenged in the lawsuit functions to deprive women of employment opportunities."[209]

Finally, Chamallas identified a need for legal standards that respond to diversity within traditionally subordinated groups.[210] She questioned

199. *Id.*

200. *Id.* at 129. This way the standard could apply to male plaintiffs. Recognition of sex and difference as social constructs would acknowledge that sexism, usually directed at women, can be displaced onto men.

201. *Id.*

202. *Id.* at 123, 130.

203. *Id.* at 131.

204. *Id.* at 133.

205. *Id.* at 132.

206. *Id.* at 133.

207. Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486 (M.D. Fla. 1991), *cross-appeals dismissed* (11th Cir. Mar. 14, 1995).

208. *Id.* at 135.

209. *Id.*

210. *Id.* at 123.

whether the courts would be able to endorse multiple versions of the standard,[211] and admitted that modifications only would begin "to address the problem of how law should respond to the existence of multiple oppression and interlocking discrimination."[212] Though Chamallas recognized that modification of the reasonable person standard might encourage stereotyping,[213] she remained hopeful that the standard could be modified in a way that recognized differences as socially constructed rather than biological, that challenged conventional notions of reasonableness, and that addressed diversity within subordinated groups.[214]

Robert Unikel[215] proposed to modify the reasonable person standard to incorporate the views and norms of minority groups. While acknowledging the intuitive appeal of the reasonable woman standard,[216] Unikel argued that it undermined the effort to establish the legal and moral irrelevance of gender.[217] According to Unikel, the standard contradicted the principle of formal equality, institutionalized gender hierarchy, and could not be fairly used by male judges and jurors.[218] Unikel argued that the reasonable woman standard would oppose formal equality because it would be by definition non-neutral;[219] by excluding the male perspective, it would privilege the female norm over the male.[220] In addition, the standard would neglect each woman's right to be treated as autonomous and equal because it would focus on the woman as group member.[221] Finally, the standard's focus on gender would reinforce the hierarchy, suggesting that women were not (and could not be) similarly situated to men.[222] Unikel also believed that gender-specific language perpetuated this sort of male bias.[223] Since society has made comparisons against the reference of men, legal categories recognizing male/female difference implicitly made the female inferior. Unikel further argued that the reasonable woman standard could not work because its effectiveness would depend on the male factfinder's ability to identify and apply female norms in a specific

211. *Id.* at 138.

212. *Id.* at 139.

213. *Id.* at 142.

214. *Id.*

215. Robert Unikel, *"Reasonable" Doubts: A Critique of the Reasonable Woman Standard in American Jurisprudence*, 87 Nw. U. L. Rev. 326 (1992).

216. *Id.* at 358.

217. *Id.* at 340.

218. *Id.* at 340.

219. *Id.* at 349. Unikel argued that formal equality adopted the principles of individualism by demanding equal treatment for all persons. In contrast, since the reasonable woman standard would rely on female norms, it would differentiate on the basis of group affiliation rather than individual qualifications. *Id.*

220. *Id.* at 357.

221. *Id.* at 351.

222. *Id.* at 359.

223. *Id.* at 352, 369.

context.[224] Absent an accurate determination of female norms, the standard might be just as biased as the reasonable person standard.[225] Unikel believed that male judges and jurors would be inherently unable to "appreciate the unique female perspective,"[226] preventing true incorporation of female norms—and that any "unique female perspective" these men recognize would likely arise from, and reinforce, gender stereotypes.[227]

Unikel maintained that a reasonable person standard would strike a better balance between group and individual interests if it was gender-neutral and adequately incorporated female norms into the judicial decision-making process.[228] Unikel would create this standard by modifying the reasonable person standard along the lines suggested in the Model Penal Code, commanding the factfinder to evaluate the reasonableness of an individual's conduct and/or perceptions in light of that individual's vital beliefs, ideals and physical attributes.[229] Unikel argued that where a woman's conduct or perceptions were at issue, jury instructions had to acknowledge and reflect the female perspective.[230]

iii. The EEOC's Responses

The EEOC largely rejected *Rabidue*'s reasonableness requirement in its Policy Manual[231] with the following discussion:

> The reasonable person standard should consider the victim's perspective and not stereotyped notions of acceptable behavior. For example, the Commission believes that a workplace in which sexual slurs, displays of "girlie" pictures, and other offensive conduct can constitute a hostile work environment even if many people deem it to be harmless or insignificant. *Cf. Rabidue v. Osceola Refining Co.* . . .[232]

In addition, the EEOC explicitly rejected *Rabidue*'s assumption of risk rationale, maintaining that the factors the Sixth Circuit weighted so heavily (e.g., the prevalence of pornography in society, the pervasiveness of the obscenity in plaintiff's workplace before and after she worked there, and

224. *Id.* at 356.
225. *Id.* at 366.
226. *Id.* at 367.
227. *Id.* at 369. Unikel rejected the use of expert testimony on female norms. *Id.*
228. *Id.* at 370.
229. *Id.* at 371.
230. Since the standard would use jury instructions to highlight the plaintiff's relevant circumstances, the standard would apply equally well to other types of discrimination. *Id.* at 370 n.282.
231. Policy Guidance on Current Issues on Sexual Harassment, EEOC Compl. Man. (BNA) 401:6081 (October 1988). The EEOC has retained the same language and position in its most recent compliance manual, *EEOC: Guidance on Sexual Harassment*, 8 Fair Empl. Prac. Cas. (BNA) 405:6681 (March 1990).
232. *EEOC: Guidance on Sexual Harassment*, *supra* note 231, at 405:6690.

her voluntary entry into that work place) are largely irrelevant.[233] Contrary to *Rabidue*, the EEOC took the position that Title VII's purpose is "to prevent such behavior and attitudes from poisoning the work environment,"[234] and agreed with a district court which had held that "the proliferation of pornography and demeaning comments, if sufficiently continuous and pervasive, may be found to create an atmosphere in which women are viewed as men's sexual playthings rather than as their equal coworkers."[235]

In 1993, the EEOC proposed to use the standard of whether a "reasonable person in the same or similar circumstances would find the challenged conduct intimidating, hostile or abusive. The 'reasonable person' standard includes considerations of the perspective of persons of the alleged victim's race, color, religion, gender, national origin, age, or disability."[236]

II

THE MEANING OF THE SUPREME COURT'S DECISION IN *HARRIS V. FORKLIFT SYSTEMS, INC.*

In *Harris*, plaintiff Teresa Harris claimed that her employer had constructively discharged her in violation of Title VII of the Civil Rights Act of 1964. She claimed that the President and Chief Executive Officer of Forklift Systems, Inc., Charles Hardy, had created and condoned a sexually offensive hostile work environment for female employees, which caused plaintiff's physical illness, anxiety, and need for medical care. The magistrate who considered the evidence in the case concluded that Hardy "is a vulgar man [who] demeans the female employees at his workplace"[237] and that he had subjected Harris to "a continuing pattern of sex-based derogatory conduct,"[238] which ranged from the "inane and adolescent" to the "truly gross and offensive."[239] This conduct was unquestionably sex-based and demeaning to female employees. The conduct targeted the plaintiff or

233. *Id.* at 405:6692.

234. *Id.* (quoting *Rabidue*, 805 F.2d at 626 (Keith, J., dissenting in part and concurring in part)).

235. *Id.* (citation omitted). The district court denied the employer's summary judgment motion, holding that a hostile environment could be established by (1) the presence of pornographic magazines in the workplace and vulgar employee comments concerning them, (2) offensive sexual comments made to and about plaintiff and other female employees by her supervisor, (3) sexually-oriented pictures in a company-sponsored movie and slide presentation, (4) sexually-oriented pictures and calendars in the workplace, and (5) offensive touching of plaintiff by a coworker. *Barbetta v. Chemlawn Services Corp.*, 669 F. Supp. 569, 572-73 (W.D.N.Y. 1987).

236. 58 Fed. Reg. 51266-01 (1993) (proposed 29 CFR § 1609.1(c)). But see discussion at note 310, *infra*.

237. Harris v. Forklift Systems, Inc., No. 3-89-0557, 1990 U.S. Dist. LEXIS 20115, at *11 (M.D. Tenn. Feb. 4, 1991) (order entering the report and recommendation of the magistrate judge).

238. *Id.* at *5.

239. *Id.* at *16-17.

other female employees, never male employees.[240] The magistrate concluded that "some of" Hardy's conduct offended the plaintiff and would offend the "reasonable woman," but that the conduct was "[not] so severe as to be expected to affect plaintiff's psychological well-being" and that it had "not risen to the level of interfering with [her] work performance."[241] Accordingly, the magistrate recommended a finding of no hostile work environment, no sexual harassment, and, therefore, no constructive discharge. The trial court adopted the recommendation[242] and the Sixth Circuit affirmed.[243] The Supreme Court undertook to review *Harris* because of the circuit split concerning the standard of proof needed to support a hostile work environment claim.[244]

A. *The Question Presented to the Court in* Harris v. Forklift Systems, Inc.

Harris v. Forklift Systems forced the court to resolve the circuits' interpretation of psychological effect. "Is the plaintiff in a sexual harassment case required to prove not only that the defendant's conduct offended her and would have offended a reasonable victim in the position of the plaintiff, but that the conduct also caused her to suffer severe psychological injury?"[245] The trial court in *Harris v. Forklift Systems, Inc.*[246] found that sexual conduct occurred, that the plaintiff found it offensive, and that a reasonable woman would have done likewise. However, the trial court

240. *Id.* at *5, *15-16. The behavior included such comments as, "You're a woman, what do you know," "Let's go to the Holiday Inn to negotiate your raise," and various sexual innuendos and gestures. The defendants did not deny the conduct but contended that it was only meant as a joke. *Id.* at *4-5. Hardy and a male former employee acknowledged that they would not like men to talk to their wives and daughters in such a manner. Joint Appendix at 98, 233, Harris v. Forklift Systems, Inc., No. 91-5301/5871/5822, 1992 U.S. App. LEXIS 23779 (6th Cir. Sept. 17, 1992) (per curiam) (not recommended for publication), *cert. granted*, 61 U.S.L.W. 3600 (U.S. March 1, 1993).

241. Harris v. Forklift Systems, Inc., No. 3-89-0557, 1990 U.S. Dist. LEXIS 20115, at *17-18 (M.D. Tenn. Feb. 4, 1991) (order entering the report and recommendation of the magistrate judge).

242. Harris v. Forklift Systems, Inc., No. 3-89-0557, 1991 U.S. Dist. LEXIS 20940 (M.D. Tenn. Feb. 4, 1991).

243. Harris v. Forklift Systems, Inc., No. 91-5301/5871/5822, 1992 U.S. App. LEXIS 23779 (6th Cir. Sept. 17, 1992) (per curiam) (not recommended for publication), *cert. granted*, 61 U.S.L.W. 3600 (U.S. Mar. 1, 1993).

244. *Harris*, 114 S. Ct. 367, 370 (1993). The court compared the various treatments of psychological effect seen in Rabidue v. Osceola Refining Co., 805 F.2d 611, 620 (6th Cir. 1986); Vance v. Southern Bell Telephone & Telegraph Co., 863 F.2d 1503, 1510 (11th Cir. 1989); Downes v. FAA, 775 F.2d 288, 292 (Fed. Cir. 1985); and Ellison v. Brady, 924 F.2d 872, 877-78 (9th Cir. 1991).

245. Harris v. Forklift Systems, Inc., 114 S. Ct. 367 (1993), *cert. granted*, 61 U.S.L.W. 3600 (Mar. 1, 1993) (No. 92-1168).

246. No. 3-89-0557, 1991 U.S. Dist. LEXIS 20940 (M.D. Tenn. Feb. 4, 1991).

found no Title VII liability because the conduct had not caused severe psychological harm. The Sixth Circuit affirmed[247] because *Rabidue* required the plaintiff to show that the conduct caused severe psychological harm.[248] The Supreme Court reversed and remanded, holding that Title VII required no showing of "tangible psychological injury," reasoning that an abusive work environment may cause significant harm short of serious psychological injury.[249] The Court concluded that a "workplace . . . permeated with discriminatory intimidation, ridicule, and insult" might violate Title VII.[250]

Harris prescribed a two-part, objective/subjective test to assess the hostility of the alleged abusive conduct.

> Conduct that is not severe or pervasive enough to create an objectively hostile or abusive working environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment . . . .[251]

With this approach, the Court took what it characterized as "a middle path between making actionable any conduct that is merely offensive and requiring conduct to cause tangible psychological injury."[252] The Court directed lower courts to consider all of the following circumstances:

> 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.[253]

The court acknowledged the imprecision of its test and declined to resolve the debate between proponents of the reasonable person and reasonable woman tests by ignoring it. The Court described its objective test as a generic reasonable person examination and left the lower courts and the EEOC to fine-tune methods of factoring the plaintiff's membership in a protected category into the inquiry.

247. No. 91-5301\5871\5822, 1992 U.S. App. LEXIS 23779 (6th Cir. Sept. 17, 1992) (per curiam) (not recommended for publication), *cert. granted*, 61 U.S.L.W. 3600 (U.S. Mar. 1, 1993) (*citing Rabidue*, 805 F.2d 611, 620 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987)).

248. *Harris*, 114 S. Ct. at 370.

249. *Id.* at 371.

250. *Id.* at 370 (citations omitted).

251. *Id.* at 370.

252. *Id.*

253. *Id.* at 371.

B. *Initial Responses to* Harris *in Caselaw and Legal Commentary*

The Court's decision in *Harris* inspired immediate reaction in caselaw and legal commentary. It appears that the *Harris* decision had impressed upon the courts the need to get at the entire spectrum of discrimination by considering the harm of the alleged discriminatory conduct in light of the totality of the circumstances, rather than through a conduct-by-conduct analysis. The courts have not read consistent guidance from the Court concerning the reasonable person debate. The *Harris* decision prompted some legal commentators to criticize further the reasonableness test and to debate whether *Harris* resolves any questions regarding the test.

1. *Early Case Decisions Applying* Harris

Harris has had uncertain impact on the debate concerning the reasonableness standard. Courts employing reasonableness analyses have been largely unaffected by the *Harris* decision, and some circuits altogether disregard the reasonableness issue in their evaluation of hostile work environment claims.[254] In a recent opinion, the Federal Circuit, noting that the *Harris* court "touched on the subject of reasonableness, reflecting the analysis which requires both an objective reasonableness standard . . . and also considers the subjective perception of the victim," cited several critiques of the reasonableness analysis before declining to enter the debate.[255] The court suggested that *Harris* shed no light on the ongoing debate.[256] The Sixth Circuit, by contrast, has cited both *Harris* and *Rabidue* to support its continued use of the objective/subjective standard applied in *Rabidue*,[257] ignoring that *Harris* did not cite *Rabidue* with approval. That Circuit has yet to acknowledge that the Supreme Court's adoption of the objective/subjective approach neither expressly nor implicitly accepts the *Rabidue* method for reasonable person analyses. The Seventh Circuit has also cited *Harris* to support its coupling of a subjective test and an objective reasonableness standard.[258] The Ninth Circuit cited *Ellison* (but not *Harris*) in applying a reasonable woman standard when evaluating a plaintiff's claim,[259] without discussing the reasonableness controversy. These cases suggest that *Harris* has failed to resolve the circuits' conflict as to the applicable reasonableness standard. It is clear, however, that courts need not and do

254. *See* Stacks v. Southwestern Bell Yellow Pages, 27 F.3d 1316 (8th Cir. 1994) (making no mention of reasonableness in its opinion); Cosgrove v. Sears, Roebuck & Co., 9 F.3d 1033, 1042 (2d Cir. 1993) (omitting reasonableness in its evaluation of plaintiff's hostile work environment claim).

255. King v. Hillen and Merit Sys. Protection Bd., 21 F.3d 1572, 1582 (Fed. Cir. 1994).

256. *Id.*

257. Anderson v. Kelley, 12 F.3d 211 (6th Cir. 1993) (table), *available in* 1993 WL 524235.

258. Saxton v. American Telephone & Telegraph Co., 10 F.3d 526, 533 (7th Cir. 1993).

259. Steiner v. Showboat Operating Co., 25 F.3d 1459, 1464 (9th Cir. 1994) ("*Ellison* unequivocally directs us to consider what is offensive and hostile to a reasonable woman.").

not credit *Rabidue*'s assumption-of-risk factor when applying their reasonableness test to hostile work environment claims. The Federal Circuit, in *King v. Hillen and Merit Sys. Protection Bd.*, for example, said:

> [N]o principled argument supports the view that sex-based offensive behavior in the workplace is immune from remedy simply because it may be culturally tolerated outside of the workplace. The purpose of Title VII is not to import into the workplace the prejudices of the community, but through law to liberate the workplace from the demeaning influence of discrimination . . . .[260]

The court's analysis in *Hillen* derives directly from *Meritor* and *Harris* (which reaffirmed the same principle): "The reasonableness of sex-based conduct is determined from the perspective of eliminating 'the entire spectrum of disparate treatment of men and women' in employment."[261] *Hillen* indicates that a post-*Harris* court may use both certain language and the subjective/objective approach of *Rabidue* while rejecting its substantive logic and method of evaluating evidence.

Although *Harris* did not directly ease the reasonableness standard, it may have achieved the same effect for plaintiffs by eliminating the psychological injury requirement and by broadening the scope of actionable conduct. Several courts have cited *Harris* when reversing summary judgment decisions favoring the defendant, suggesting that *Harris* may allow claims of less extreme sex harassment to survive a summary judgment motion. The Eighth Circuit, for example, has applied *Harris* by stating that the "key issue" in analyzing a hostile work environment claim "is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."[262]

Several other circuits have also applied *Harris* to reverse decisions for defendants. In *Steiner v. Showboat Operating Co.*,[263] the court cited *Harris* for the proposition that humiliating sexual or gender-based conduct may violate Title VII. The court interpreted "sufficiently severe or pervasive to alter the conditions of employment" to encompass conduct that "pollutes the victim's workplace, making it more difficult for her to do her job, to

260. 21 F.3d 1572, 1582 (Fed. Cir. 1994).

261. *Id.* (citation omitted).

262. Kopp v. Samaritan Health Sys., Inc., 13 F.3d 264, 269 (8th Cir. 1993) (quoting Justice Ginsburg's concurring opinion in *Harris*, 114 S. Ct. 367, 372 (1993). *See also* Stacks v. Southwestern Bell Yellow Pages, Inc., 27 F.3d 1316, 1326 (8th Cir. 1994) (holding that evidence of discriminatory treatment and sexually-oriented activities at company parties established harassment based on hostile work environment). *But see* Kidwai v. McDonald's Corp., No. 93-1720, 1994 WL 136971, at *3 (4th Cir. Feb. 9, 1994) (finding that the supervisor's conduct, though offensive, was not severe or pervasive enough to create a work environment that a reasonable person would find abusive).

263. 25 F.3d 1459, 1463 (9th Cir. 1994).

take pride in her work, and to desire to stay on in her position."[264] The *Hillen* court cited *Harris* for the proposition that it is necessary to look at all the circumstances to determine whether a work environment is hostile.[265] The court reversed a Merit Systems Protection Board finding that a hostile working environment had not been created because the Board had viewed "each separate incident in isolation" and thus had ignored the totality of the circumstances so that "a realistic picture of the work environment was not presented."[266] The court held that the "overall, composite effect on the terms, conditions, and privileges of employment is the focus of the law," and thus, where there are multiple incidents and victims, a court would have to consider "the cumulative effect of the offensive behavior that creates the working environment."[267]

Decisions affirming judgments for either party on harm-related grounds tell us less about *Harris*' legacy. The Second Circuit affirmed a bench trial decision for the employer, citing *Harris* for the requirement that discriminatory incidents be severe or pervasive.[268] The court affirmed because the plaintiff failed to demonstrate both respondeat superior liability and that the harassment affected a term, condition, or privilege of her employment.[269] Similarly, the Fourth Circuit affirmed a jury decision for the plaintiff that rejected the employer's contention that the supervisor and plaintiff merely had a personality conflict and found that the supervisor's conduct (gender-based verbal insults and rudeness to women in the office) was "the sort the Supreme Court . . . indicated [in *Harris*] would suffice to make out a hostile work environment claim based on sex discrimination."[270] These courts declined to disturb on appeal the factfinder's determinations of severity and pervasiveness.

2. *Legal Commentary Analyzing* Harris

Professor Jane Dolkart argues that *Harris*'s objective/subjective standard should adopt the point of view of a reasonable victim.[271] Dolkart repeats the arguments that the reasonable person standard marginalizes women[272] and proposes instead an individualized standard targeting the

264. *Id. See also* Phelps v. Sears, Roebuck & Co., No. 90-4133, 1993 WL 523202 (10th Cir. Dec. 15, 1993) (holding that sufficient evidence of sexual harassment had been presented to allow plaintiff's Title VII claim to go forward).

265. *Hillen*, 21 F.3d at 1580.

266. *Id.* at 1581. *See also* Spain v. Gallegos, 26 F.3d 439, 446 (3d. Cir. 1994) (asserting that to "determine whether an environment is 'hostile' or 'abusive' a court must look at 'all the circumstances' ") (quoting *Harris*, 114 S. Ct. at 371).

267. *Hillen*, 21 F.3d at 1581.

268. Cosgrove v. Sears, Roebuck & Co., 9 F.3d 1033, 1042 (2d Cir. 1993).

269. *Id.*

270. Shope v. Board of Supervisors of Loudon County, No. 92-2100, 1993 WL 525593 at *2 (4th Cir. Dec. 20, 1993).

271. Dolkart, *supra* note 17, at 152-53.

272. *Id.* at 153.

conduct of the alleged harasser[273] and its effect on the plaintiff's work environment.[274] Dolkart uses a gender subordination model to critique the reasonableness standard. She argues that the social category of gender permits female subordination, including workplace harassment.[275] This theory calls us to inquire whether the harassment is sexually coercive because of the victim's subordinate position or whether it demeans the victim as a worker.[276]

Dolkart criticizes the Court for analogizing harassment to a personal injury in tort, "as involving isolated instances of specific harm, inflicted by aberrant, socially maladjusted harassers," rather than viewing harassment as part of women's structural inequality.[277] The tort analogy in *Harris* is inapt, she argues, because tort law deals with risk allocation and compensation of individuals, whereas Title VII serves broader goals of equal employment opportunity.[278] Indeed, Dolkart argues, given the remedial purpose of Title VII, any reasonableness requirement is inappropriate since it hurts women's claims.[279] Moreover, as has been noted, the reasonable person standard privileges the perspective of the dominant (white, male) group at the expense of women and other subordinated groups and "rejects the evaluation of sexual harassment in the context of a structure of gender subordination."[280] Neither is the reasonable woman standard an answer, for it too fails to address the social context of sexual harassment,[281] stereotypes women, and suggests that reasonable women are different (and inferior) to reasonable men. Finally, reasonableness itself, long the cornerstone of tort law's system of risk allocation, is inherently problematic because it gains meaning only from its interpreters' experiences and prejudices. In Dolkart's view, a reasonableness standard *per se* reinforces the status quo.

In order to blunt the negative effect of a reasonableness inquiry, Dolkart proposes that the courts evaluate harassment from a reasonable victim's perspective in the context of social subordination.[282] The reasonableness requirement would become an affirmative defense, giving the plaintiff a presumption of reasonableness and the defendant the burden to

273. Dolkart recognizes that *Harris* forecloses use of such a standard. *Id.* at 188.

274. *Id.* at 152.

275. *Id.* at 177, 182-83. The social construction of gender applies to persons of either sex who are harassed because of their gender role. *Id.* at 203.

276. *Id.* at 203.

277. *Id.* at 189.

278. *Id.* at 191.

279. *Id.* at 192-93, 198.

280. *Id.* at 198. Reasonableness is based on a belief that objective standards are possible: either that the present neutral objective norms are correct or that they can be transformed to eliminate gender discrimination. Under this view, gender discrimination is either an individual failure to follow these norms or a failure to articulate the correct norms. Thus the reasonableness standard inherently fails "to address the highly contextualized nature of gender roles and subordination in the workplace." *Id.* at 203.

281. *Id.* at 200-06.

282. *Id.*

prove otherwise.[283] A presumption of reasonableness emphasizes the victim's perspective while remaining gender neutral. It permits variations on the theme of reasonableness, making it more responsive to diversity than its alternatives.[284]

Viewing *Harris* differently than Dolkart, Salime Samii[285] argues that *Harris* has no bearing on the reasonableness debate because the court granted certiorari solely on the issue of the psychological injury requirement and commented on reasonableness only in passing.[286] Indeed, Samii suggests that any discussion of reasonableness in *Harris* is "merely dicta,"[287] and points to the continuing citation by lower courts to *Rabidue*'s objective standard of reasonableness as evidence that *Harris*' is irrelevant to the debate.[288]

Samii essentially posits that the link between sexual harassment and the standard of reasonableness is the threshold of conduct required to make a claim actionable.[289] Analyzing *Rabidue* and its progeny,[290] Samii shows that the traditional objective standard "is based on a hesitancy to accept [sexual harassment as a] cause of action and a desire to protect employers,"[291] while the subjective standard, which Samii classifies as the "reasonable woman" standard,

> stems from an awareness of the seriousness of the problem in the workplace and of the marked limitations of the traditional test in measuring actual or perceived injury experienced by women as a result of alleged sexual harassment, as well as from an understanding of the difference in male and female perspectives that needs to be incorporated into the standard of assessing whether the harassment actually occurred.[292]

The differing standards of reasonableness reflect disagreements on the goals of Title VII and the conduct necessary for a violation; thus, Samii observes, "the exact same conduct alleged by two different plaintiffs could

283. Dolkart would prefer that courts evaluate conduct from the perspective of an individual victim with due regard for the coerciveness of gender-related abuse to both individual women and women as a group. *Id.* at 186-87. Since Dolkart believes *Harris* has foreclosed this standard, she urges the alternative of an affirmative defense. *Id.* at 188, 217.

284. *Id.* at 219.

285. Salime Samii, *Litigating Federal Sexual Harassment Cases: The Link Between 'Sexual Harassment' and the Standard of Reasonableness*, 13 REV. LITIG. 331 (Spring 1994).

286. *Id.* at 335-36.

287. *Id.* at 336.

288. *Id.* at 337. Samii argues that the *Harris* Court's two-prong objective/subjective test is "too close to the traditional tort test to ultimately be anything other than an objective test." *Id.* at 352 n.88.

289. *Id.* at 335, 350.

290. *Id.* at 338-50.

291. *Id.* at 350.

292. *Id.* at 350-51.

lead to markedly different outcomes" in circuits with different reasonableness standards.[293]

C. *Implications of Rejecting the Psychological Injury Requirement*

By rejecting a psychological injury requirement for hostile work environment claims, the Court in *Harris* reaffirmed the policies and purposes of the anti-discrimination laws. The Supreme Court has repeatedly given Title VII an expansive application in order to achieve the goal of equal employment opportunity.[294] Aside from two specific statutory exceptions,[295] neither the language of Title VII nor any judicial authority supports favoring any goal over equal opportunity.

Any interference with employment opportunities represents a critical harm. Where a member of a protected group suffers this harm because of group membership, the impact on both the individual and the public good is immeasurable. For this reason, *Meritor* extended Title VII's protection to noneconomic harm.[296] Plaintiffs suffering tangible, economic losses needed only to show that a job-related detriment flowed or might flow from the alleged sex-based discrimination.[297] Plaintiffs alleging intangible, noneconomic losses were often confronted by the requirement of proving psychological injury, a much tougher standard.[298] The standard effectively punished plaintiffs who evaded or overcame the effects of harassment. To remain consistent with the terms of Title VII, the conduct's potential effect, not the seriousness of the actual injury, should determine liability; the severity of the resulting injury should be relevant only on the issue of relief.[299]

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293. *Id.* at 351.

294. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64-66 (supporting the view that harassment leading to noneconomic injury can violate Title VII); Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-19 (1975) (holding that "make whole" relief provisions include back pay).

295. Title VII provides that sex-based hiring may be done where the defendant can show that sex is a bona fide occupational qualification ("BFOQ") for the job; it also specifically protects seniority systems, even where they may perpetuate the past effects of discrimination. 42 U.S.C. § 2000e-2(e)-(h) (1988).

296. *Meritor*, 477 U.S. at 64-66.

297. *Id.* at 64.

298. Now that compensatory damages are available under Title VII, recovery of mental anguish damages in hostile environment cases ought to be determined on the same basis as in cases brought under other discrimination laws that have historically afforded mental anguish damages. *See, e.g.*, cases cited *supra* at note 84.

299. *Compare* Civil Rights Act Amendments of 1991, 42 U.S.C. § 2000e-2(a)(1) (legislating that any intentional discrimination justifies a finding of liability; establishing a nondiscriminatory motive for same result may affect remedy) *with* Adler & Peirce, *supra* note 148, at 774 (suggesting that absent a strong showing of seriousness, liability does not attach).

The psychological injury standard also conflicted with Title VII's demand that the plaintiff minimize the harm resulting from harassment.[300] Requiring the plaintiff to bring her claim *after* she had suffered severe psychological injury prevented her from mitigating her noneconomic injuries, possibly precluding relief. The result was a catch-22 for the plaintiff: she had either to endure abuse on the job until she suffered severe psychological harm or quit and forfeit recovery because of her failure to mitigate damages—a particularly perverse result since psychological injury was least likely to be compensated by damages. By removing the psychological injury requirement, *Harris* corrected these anomalies in the law.

D. Interpreting the Supreme Court's Reference to a Reasonable Person Standard and Objective/Subjective Analysis

If the Supreme Court in *Harris* clarified the law on the psychological injury requirement, by adopting its dual-perspective objective/subjective test and referencing a reasonable person analysis, it raised questions that remain to be answered.[301] While the Court did not cite *Rabidue* and minority jurisdiction cases that introduced reasonable person and the objective/subjective analyses when discussing these standards, indicating that the Court did not intend to adopt these courts' analyses, the ambiguity of the standards leaves open the question of how they are to be applied in administering and evaluating evidence.

1. The Court's Failure to Acknowledge Debate Concerning Reasonableness Tests and Reasonable Person Standards

Only after the trial and appellate courts in *Rabidue* used the term reasonable did the federal courts begin to apply any kind of reasonable person test in this type of assessment.[302] Both the majority and minority courts began to use this language, which became a largely unnoticed addition to hostile work environment discrimination law.[303] It is easy to see why this change went unnoticed; characterizations like reasonableness and objective/subjective are familiar from tort and criminal law, for example, and have always been put forth as representing neutrality and fairness.[304] Courts continue to use such tests, despite extensive scholarly opposition.

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300. Civil Rights Act of 1964 § 706(g), 42 U.S.C. § 2000e-5(g), as construed in Ford Motor Co. v. EEOC, 458 U.S. 219, 231 (1982) ("An unemployed or underemployed claimant, like all other Title VII claimants, is subject to the statutory duty to minimize damages set out in § 706(g).").

301. *Harris*, 114 S. Ct. at 370-71.

302. Courts cited *Rabidue* as authority for a reasonableness standard, even where they applied a functionally different standard. *See, e.g., supra* note 96.

303. Even the commentator who rejected reasonableness as an appropriate standard for sexual harassment law had erroneously assumed that it was a prevailing requirement in discrimination case law. *See supra* note 172.

304. In personal injury and criminal cases, the reasonableness inquiry focuses upon the alleged wrongdoer's judgments and actions. Commentators feel that the reasonableness

A reasonableness standard may lead to particularly perverse results in a discrimination case. The more widespread discrimination is (and the more deserving of legal attack), the more likely a plaintiff challenging it will appear unreasonable.[305] In addition, any test for the reasonable individual's reaction to discrimination focuses attention on the victim, not on the discriminatory conduct.[306] A more appropriate description of an objective evaluation would center the evaluation by the factfinder expressly on the discriminatory conduct, not the victim. Accordingly, the factfinder should be asked to determine whether the conduct could reasonably be seen as intimidating, offensive, or hostile or whether it would unreasonably interfere with the plaintiff's work performance. Such a formulation does not assume a single possible reasonable view or that only a majority or an average view is reasonable, but rather considers whether the plaintiff's is *a* view that could reasonably be adopted by a person in like circumstances. While the *Harris* decision does not rule out such a conduct-focused approach, its resort to the familiar legal shorthand of "reasonable person" does not facilitate courts' in recognizing and resolving the problem of focusing on the victim rather than the conduct.

Harris does clearly reject atomized scrutiny, stating that the effects of discriminatory conduct must be judged "by looking at all the circumstances."[307] Thus, one perverse result of a reasonableness analysis is ruled out: the factfinder will not be able to discount the impact of a pattern of

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standard is not appropriately applied to the person wronged. *See supra* notes 166-172; Susan R. Estrich, *Rape*, 95 YALE L.J. 1087, 1105-21 (1986) ("reasonable resistance" necessary to establish rape often requires physical force that would be more characteristic for a man).

Commentators have consistently noted that reasonableness standards may be unfair to those different from the average middle class white male. *See* GUIDO CALABRESI, IDEALS, BELIEFS, ATTITUDES, AND THE LAW: PRIVATE LAW PERSPECTIVES ON A PUBLIC LAW PROBLEM 30 (1985); Naomi R. Cahn, *The Looseness of Legal Language: The Reasonable Woman Standard in Theory and in Practice*, 77 CORNELL L. REV. 1398 (1992); Ronald K. L. Collins, *Language, History and the Legal Process: A Profile of the "Reasonable Man"*, 8 RUT.-CAM. L.J. 311, 320-23 (1977); Dolores A. Donovan & Stephanie M. Wildman, *Is the Reasonable Man Obsolete? A Critical Perspective on Self-Defense and Provocation*, 14 LOY. L.A. L. REV. 435, 462-67 (1981); Finley, *supra* note 145; Elizabeth M. Schneider, *Equal Rights to Trial for Women: Sex Bias in the Law of Self-Defense*, 15 HARV. C.L.-C.R. L. REV. 623, 631-32 (1980). *But see* Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379, 388, 447 (1991) (promoting general rather than sex-specific standards).

305. The individual who first opposes discrimination has often been regarded as deviant, difficult, and unreasonable. *See, e.g.*, Kyriazi v. Western Elec. Co., 461 F. Supp. 894, 942 (D.N.J. 1978) (confronting the argument that the plaintiff was not "a paragon of virtue," "easy-going," or "possessed of a pleasing personality," the court nevertheless held that her difference in this regard did not obviate a finding of discrimination or operate as a defense to it: "[i]t often happens that progress and victories in the struggle for human rights are made by those who are strong enough to endure the struggle. A weaker, more pleasant, less demanding person than [the plaintiff] might well have capitulated some principle, and survived at [the defendant employer's workplace]. But the law does not impose such a duty on anyone.").

306. *See infra* notes 317, 320, 321, and accompanying text.

307. *Harris*, 114 S. Ct. at 371.

low-level abuse. Prior to *Harris*, where the factfinder inquired whether a reasonable person would be offended by *each* act of abuse, it might dismiss conduct which, by itself, was too minor to merit a negative reaction. The courts in *Rabidue* and the lower court in *Harris*, for example, examined each act of sexual misconduct separately and dismissed substantial portions of evidence on precisely these grounds.

2. *Reasonableness from Whose Perspective?*

The Court in *Harris* did not address the debate on the perspective of the reasonableness assessment either, holding merely that the objective inquiry was to be from the perspective of a reasonable person.[308] The Court apparently took the view that any difficulty in making the reasonable person assessment would be worked out by the lower courts with the guidance of the EEOC.[309] At that time, the EEOC had proposed construing the reasonableness inquiry as whether a "reasonable person in the same or similar circumstances would find the conduct intimidating, hostile or abusive. The 'reasonable person' standard includes considerations of the perspective of persons of the alleged victim's race, color, religion, gender, national origin, age, or disability."[310] Since the Court in *Harris* referred to the EEOC as a source of guidance, and the EEOC's proposed interpretation was pending at the time *Harris* was decided, it is not unlikely that some courts will turn to the EEOC's proposal (despite their subsequent withdrawal) for guidance as to the perspective from which to evaluate the alleged harrassment.[311]

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308. *Id.*

309. *Id.* at 371.

310. 58 Fed. Reg. 51266-69 (1993) (to be codified to 29 C.F.R. § 1609.1) (proposed Sept. 20, 1993). The proposed guidelines were published in the Federal Register on October 1, 1993 and comments were to be received by November 30, 1993. However, in May 1994, the EEOC reopened the issue and extended the comment receipt deadline to June 13, 1994 in response to an extensive letter writing campaign by conservative Christian groups concerned that proposed section 1609.1 would remove religion from the workplace. The Commission received over 100,000 comments. Telephone Interview, Office of Legal Counsel, EEOC, Washington, D.C. (July 6, 1994). In response, the EEOC withdrew the proposed guidelines. 59 Fed. Reg. 51196 (Oct. 11, 1994).

311. According to the EEOC, proposed section 1609.1(c)'s reasonableness standard "is consistent with the standard applied to sexual harassment, as set out in the Sexual Harassment Policy Guidance." 58 Fed. Reg. at 51267 n.4.

At least one analysis, however, suggested that proposed section 1609's discussion of reasonableness (and its rejection of *Rabidue*) is inapplicable to sexual harassment cases because these cases are governed by a different section, section 1604.11, which makes reference to unwelcome conduct. Arthur F. Silbergeld & Mark B. Tuvim, *Harris v. Forklift Systems: The Court Relaxes the Burden of Proving Sexual Harassment Claims*, 20 EMPLOYMENT REL. TODAY 465, 474 n.19 (1993). However, the EEOC equated section 1604.11 and proposed section 1609.1, stating that "these proposed guidelines simply state the . . . rule" of the Guidelines on Sexual Harrassment, 29 C.F.R. 1604.11, which describe only conduct of a sexual nature applied to nonsexual sex-based harassment. 58 Fed. Reg. at 51267 n.4.

3. The Meaning of Objective/Subjective Characterizations

Like the term reasonableness, the words subjective and objective have the comforting ring of order and familiarity. But when applied to the evaluation of facts in a sex discrimination trial, they may confuse the factfinder and prejudice the plaintiff's case. *Harris* equates the objective test with the reasonable person standard. By calling for an objective assessment, the Court presumably means that the factfinder should decide for itself based on all the evidence whether the conduct was offensive. Since the Court has endorsed the objective and subjective characterizations, it is important, presumably, with a lay factfinder, to make clear that the test has nothing to do with evaluating sources of evidence.

The objective test (that is, a test made by an impartial factfinder) must not be confused with so-called objective evidence (that is, evidence from sources other than the parties or nontestimonial sources). The *Harris* test is objective not because it takes into account only evidence from other sources, but because it is employed by a trier of fact which has no stake in the outcome. But that the Court directs the factfinder to make separate objective and subjective assessments may lead to an important confusion. Given the higher value that juries customarily place on so-called objective evidence, *Harris*' use of this word to describe the test itself may lead juries to discount the plaintiff's own testimony about what happened and the harm that resulted out of a misunderstanding of the law. Plaintiffs therefore would have to overcome not only the jury's scrutiny for credibility and bias, but also its unfounded skepticism imparted by the wording of the test. Defendants, by contrast, would be examined only for bias and credibility. Indeed, the court's wording might lead the jury to think that it must completely disregard the plaintiff's subjective testimony in order to make an objective assessment. This conclusion would induce the jury to ignore two perspectives critical to a fair verdict: the victim's perspective (which it is specifically commanded to examine) and that of the witness who knows the most about the situation.

This is not to say that the trier of fact should look only to the victim's testimony in assessing the harm. Under the proposed reasonable person test, neither party gains an automatic advantage. Defendants may argue that a plaintiff's strong reactions show her hypersensitivity or bias and that weak ones show that the conduct had no effect. A plaintiff may counter with evidence that her reactions, whether strong or mild, were caused by the defendant's abuse. She may cast weak reactions as the product of her deliberate coping strategies and strong ones as fruits of abuse-related stress.

While the cautions that a reasonable person test may enforce the status quo in favor of the dominant group are valid, it is also true that, in an

objective assessment, the trier of fact can find conditions or conduct discriminatory absent a consensus on harm from members of the targeted minority group. An objective, or reasonable person, test enables the trier of fact to conclude that a reasonable person in the plaintiff's situation would view the conduct as offensive, hostile, or abusive, or unreasonably interfering with her work performance, even if the conduct or harm is such that no person in the real life situation would evidence unambiguous signs of such reaction. To interpret an objective test in this manner blends well with Title VII's remedial nature. Moreover, even if the jury finds the plaintiff to be hypersensitive, it must still objectively assess whether the circumstances were sufficiently hostile to constitute discrimination. Even hypersensitive plaintiffs are entitled to a nondiscriminatory workplace. Likewise, even plaintiffs strong enough to stay on the job despite abuse are entitled to a finding of liability even if no substantial monetary damages will result.

III
PROOF STANDARDS FOR THE SEXUALLY HOSTILE WORK ENVIRONMENT CASE AFTER *HARRIS*

Harris directs the trier of fact to examine the context of sexually hostile behavior and to determine whether the conduct altered the plaintiff's work environment or affected her ability to function in the workplace. An affirmative answer to either alternative establishes that a term, condition, or privilege of employment has been altered.

The *Harris* Court neither borrowed any of the proposed reasonable person/woman/victim standards nor discussed the debate behind the proposals, perhaps because the debate identifies problems without solving them. The commentators agree that neutrality is a construct, that women and men view sexual harassment differently and may be biased thereby, and that perpetrators, victims, and bystanders have different perspectives on victimization. The commentators disagree on the importance of these points, on the policy choices that should be made, and the priorities that should be given to competing interests rather than facts and logic. Indeed, many cite the same factors to support contradictory solutions. While the commentators correctly identify many potential problems, their arguments about reasonableness standards presuppose a level of analysis both that the Supreme Court has chosen to avoid and that the trier of fact rarely understands.

The *Harris* decision solves the problem at a different level of analysis. The Court wastes no time trying to establish a universal reasonable view or fixing a singular perspective but allows the trier of fact to decide whether the plaintiff's view is a reasonable one for a person in the same circumstances. The Court directs the trier of fact to consider an array of situational factors in undertaking this assessment, thus endorsing the EEOC's case-by-case approach.

At the same time, *Harris*' inquiry differs significantly from the reasonableness inquiry introduced by the *Rabidue* courts. *Rabidue* dismissed socially-tolerated conduct as de minimis and applied an assumption of risk standard to plaintiffs entering traditionally male workplaces.[312] In a similar vein, *Rabidue* and *Brooms* argued that the background of the perpetrators and/or workplace ought to be counted when asking whether it is reasonable for a plaintiff to be offended by the alleged discrimination.[313] *Harris* rejected this reasoning[314] and any decisions turning this *Rabidue/Brooms* approach should be reversed. As a result of *Harris*, the focus of the hostile work environment inquiry should be on the alleged harassment and its effects in a specific workplace, provided the courts resist defendants' calls for a tougher standard.

A. Rejection of Two Arguments for a Stricter Standard

The two pre-*Harris* arguments for a stricter standard of proof deserve careful analysis because the pressure they create may distort developing legal standards. The first argument would extend legal protection to sexual harassers who are unaware that their conduct is offensive. The second argument would exempt much sexual harassment from regulation on First Amendment grounds.

1. The Perception Problem Argument

Some proponents of a reasonable person standard justify the standard, in part, because they consider sexual harassment to be merely a perception problem—that is, one concerning conduct on which men and women, or perpetrators and victims, have different but equally valid perspectives. They claim it is unfair to judge the harasser solely by the victim's point of view, so that a reasonable person test incorporating the perpetrator's perspective is the appropriate standard.[315]

Both the premise and the conclusion of this argument are wrong. First, the argument assumes that the law may not secure compliance of persons who discriminate if those persons believe that their conduct is not wrong. To retain any legitimacy, law by definition must reject such subjective defenses. In addition, this view has been specifically rejected in racial

312. *See supra* notes 105-09 and accompanying text.

313. *See supra* notes 109, 141-42, and accompanying text.

314. *Harris* tacitly rejected these rationales by declining to cite *Rabidue* and *Brooms* with approval when it employed the language "reasonable person." *See supra* note 301 and accompanying text. Moreover, a Sixth Circuit panel recoiled from the consequences of its reasoning in the context of racial discrimination. *See supra* notes 117-21 and accompanying text.

315. *See, e.g.*, Adler & Peirce, *supra* note 148, at 802-05 (arguing that it is unfair to impose a reasonable woman standard on defendants because, among other things, there are differences in perspective between men and women).

harassment cases.[316] Title VII seeks to compensate victims of discrimination regardless of whether the conduct is race- or sex-based; a standard which is improper for one should be equally inappropriate for the other.

It is true that on the average, men as a group and women as a group differ in their definition, recognition, and actual experience of sexual harassment.[317] However, the variation among men and among women far exceeds the average differences between the two groups and the perceptions of most men and most women significantly overlap.[318] Where differences remain, they lead us to examine our cultural narratives and their relationship to women's experience of harassment, just as we would examine the narratives that create racism. For example, we might examine the domination/submission narrative about male/female roles which influence women's subjection to and experience of sexual violence. In addition, supervisors,[319] subordinates, perpetrators, victims, bystanders,[320] insiders, and outsiders[321] differ in their recognition and experience of sexual harassment. Even accepting that different perspectives exist, sexual harassment is more than a perception problem. Often perpetrators cannot plausibly claim to be unaware that their conduct is offensive. In both *Rabidue* and *Harris*, women actually complained to both perpetrator and employer. As a result, the defendants were perfectly able to discern the women's perspective; they simply refused to credit it.

This failure to recognize or apprehend the victim's experience may be explained as the result of several well-researched tendencies. One is the observer's tendency to focus upon a person's attributes, rather than her situation, to explain her actions in and reactions to that situation. Researchers call this the actor-observer effect.[322] In other words, employers

316. *See, e.g.*, Walker v. Ford Motor Co., 684 F.2d 1355, 1359 & n.2 (11th Cir. 1982) (rejecting the defendants' claim that their use of racial epithets was not "intended to carry racial overtones" and, thus, did not create an abusive working environment).

317. *See, e.g.*, BARBARA A. GUTEK, SEX AND THE WORKPLACE 77-111 (1985); MERIT SYSTEMS PROTECTION BOARD, SEXUAL HARASSMENT IN THE FEDERAL GOVERNMENT: AN UPDATE (1988); MERIT SYSTEMS PROTECTION BOARD, SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: IS IT A PROBLEM? (1981).

318. O'Connor & Gutek, *supra* note 148. O'Connor and Gutek review and critique the social science research reporting average differences between men's and women's perceptions of sexual harassment and conclude that the average differences are much smaller than same-group variability and that the male-female overlap is considerable. In the same volume, Richard L. Weiner advocates a reasonable woman standard in the law based, in part, on the fact of average perceptual differences. Richard L. Weiner, *Social Analytic Jurisprudence in Sexual Harassment Litigation: The Role of Social Framework and Social Fact*, — J. SOC. ISSUES — (forthcoming 1995).

319. Eliza G. C. Collins & Timothy B. Blodgett, *Sexual Harassment... Some See It... Some Won't*, 59 HARV. BUS. REV. 76 (Mar./Apr. 1981) (finding little recognition of sexual harassment by upper level management).

320. *See infra* notes 322, 324, and accompanying text.

321. *See infra* note 324 and accompanying text.

322. *See generally* Edward E. Jones & Richard E. Nisbett, *The Actor and the Observer: Divergent Perceptions of the Causes of Behavior*, *in* ATTRIBUTION: PERCEIVING THE CAUSES

and alleged perpetrators will dismiss a plaintiff's complaints as being the result of an alleged defect of her personality (such as hypersensitivity or hyperaggressiveness) rather than consider them to be legitimate responses to her experiences in the context.

Another relevant tendency is that of an observer, confronted with the need to stop an abusive situation but lacking any real power to do so, to blame the victim. Research reveals that people's need to believe the world is just will move them to reconcile an apparent injustice at the victim's expense. If an observer is powerless to stop the mistreatment, she will balance her world-view by assuming that the victim deserved it.[323] Thus, if a supervisor receiving a sexual harassment claim lacks the power and authority to eliminate the harassment, she may discourage the complainant and ultimately scapegoat her, rather than seek other solutions. Mid-level supervisors' tendency to blame the victim for their own sense of powerlessness calls for a legal standard that requires the employer to evaluate the situation from the victim's perspective, to have meaningful policies to stop the harassment, and to empower its hierarchy to enforce those policies even against powerful and important persons in the organization.

Supervisors may also be reluctant to believe a complainant if they identify her as belonging to a different group than their own. This reluctance is likely to be even greater where the alleged perpetrator is a member of the same group as the supervisor. Research indicates that individuals who identify themselves as members of a group tend to allocate rewards and opportunities so as to favor other members of their own group over outsiders, even where they gain no personal advantage.[324] Where one

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OF BEHAVIOR (E. E. Jones, D. E. Kanouse, H. H. Kelley, R. E. Nisbett, S. Valins & B. Weiner eds., 1972) (showing that actors see situational factors and observers see actor attributes when explaining the actor's behavior); John B. Pryor & Jeanne D. Day, *Interpretations of Sexual Harassment: An Attributional Analysis*, 18 SEX ROLES 405 (1988) (applying actor-observer effect analysis to sexual harassment); Michael D. Storms, *Videotape and the Attribution Process*, 27 J. OF PERSONALITY & SOC. PSYCHOL. 165 (1973) (confirming research).

Apparently recognizing that "putting the victim on trial" tends to disparage the victim (and thereby discredit her claim), Brown and Germanis have suggested that an employer defending a hostile environment claim should shift attention to the victim by focusing on whether the alleged harassment affected the victim's job performance. "The interference factor is important for employers to explore because it focuses on the effect of the harassment on the victim's job performance, instead of on the harasser's conduct." Barbara B. Brown & Intra L. Germanis, *Hostile Environment Sexual Harassment: Has Harris Really Changed Things?*, 19 EMPLOYEE REL. L.J. 567, 573 (1994).

323. *See* Melvin J. Lerner & Dale T. Miller, *Just World Research and the Attribution Process: Looking Back and Ahead*, 85 PSYCHOL. BULL. 58, 59 (1978).

324. This field is known as intergroup research. *See, e.g.*, Shelley E. Taylor, *The Categorization Approach to Stereotyping*, *in* COGNITIVE PROCESSES IN STEREOTYPING AND INTERGROUP BEHAVIOR 83, 84 (David L. Hamilton ed., 1980) (citing Vernon L. Allen & David A. Wilder, *Categorization, Belief Similarity, and Intergroup Discrimination*, 32 J. PERSONALITY & SOC. PSYCHOL. 971, 975 (1975)); Michael Billig, *Normative Communication in a Minimal Intergroup Behavior*, 3 EUROPEAN J. SOC. PSYCHOL. 339, 342 (1973); Michael Billig & Henry Tajfel, *Social Categorization and Similarity in Intergroup Behavior*, 3 EUROPEAN J.

group consistently has the power to control the other, the weaker group is perpetually disadvantaged. As the relationship continues, a powerful in-group can effectively define the status quo for both in-group and out-group. Under the group principle, where gender constitutes a defining group, men favor men and women favor women. Gender, however, is not the only defining factor for intergroup behavior. It is suggested, for example, that when women enter a traditionally male workforce, the men more consciously define themselves by gender and respond to women as an out-group.[325] The women may attempt to define themselves by characteristics other than gender precisely because the skewed gender ratio exposes them to stressful scrutiny in a gender-based analysis.[326] Where powerful male employees define themselves by gender, the group effects will work to the detriment of women, regardless of the responses being made by women. Group effects not unique to gender groupings may thus cause much of the perspective gap on sexual harassment.

A fair legal analysis should account for the effects of in-group behavior on out-group members and should discourage dominant in-group identification, both for the manager in the work setting and for the trier of fact in the sexual harassment case. This is accomplished by legal requirements that encourage close attention to an array of evaluation factors, more specific than general, not based upon group membership. The factors noted in *Harris*[327] and the proposed EEOC Guidelines[328] (such as frequency, severity, and so forth) taken together with factors relating to the total circumstances (including the likely effect of the proportion of minority to majority members in a job category, their position in the hierarchy, the relative power position of the alleged harasser to the victim) are more likely to render a fair assessment of the experience of the alleged conduct in the context. Obviously, *Rabidue*'s rationales—that a woman entering a historically male workplace assumes the foreseeable risk of male abuse or that the background of male workers in certain categories should excuse conduct sexually demeaning of women—are too correlated with and predetermined

SOC. PSYCHOL. 27, 47 (1973); David L. Hamilton & Robert K. Gifford, *Illusory Correlation in Interpersonal Perception: A Cognitive Basis of Stereotypic Judgments*, 12 J. EXPERIMENTAL SOC. PSYCHOL. 392, 405 (1976); Henry Tajfel & Michael Billig, *Familiarity and Categorization in Intergroup Behavior*, 10 J. EXP. SOC. PSYCHOL. 159, 168 (1974); Henri Tajfel, Michael Billig, Robert P. Bundy & Claude Flament, *Social Categorization and Intergroup Behavior*, 1 EUROPEAN J. SOC. PSYCHOL. 149, 172 (1971); David A. Wilder, *Perceiving Persons as a Group: Categorization and Intergroup Relations*, *in* COGNITIVE PROCESSES IN STEREOTYPING AND INTERGROUP BEHAVIOR 213 (David L. Hamilton ed., 1980).

325. *See infra* note 334 and accompanying text.

326. *See infra* note 334 and accompanying text. Not only may women reject their gender identity in order to avoid ending up in the out-group, but the resulting alienation and lack of cohesion may lead them to deny that any mistreatment occurs. *See, e.g.*, ROSABETH MOSS KANTER, MEN AND WOMEN OF THE CORPORATION 206-42 (1977).

327. *See supra* note 253 and accompanying text.

328. *See supra* notes 231-35, 309-11, and accompanying text.

by their relationship to gender-based group membership to promote evaluation outside gender-dominated thinking. This does not mean that the group membership must be wholly ignored in assessing harm, but consideration of it must be cast in a balance with factors not specifically based on gender, race, or other prohibited category. A general evaluation of the victim as to whether her response was one of a reasonable *woman* or of the question how a reasonable woman would respond overemphasizes gender as an evaluating factor (just as a reasonable person standard ignores it). The EEOC's proposal to assess whether a reasonable person in the same circumstances would find the conduct abusive, with the direction that considerations of the perspective of persons of the alleged victim's group[329] more appropriately situates the victim's group membership, is one evaluative factor to be weighed in with all the other information.

While a perpetrator may also feel the impact of an actor-observer effect, the just world tendency, or the in-group dynamic, the effects rarely align against a male perpetrator in a workplace as systematically as they do against the female plaintiff. The female plaintiff typically occupies the position of lower status and power, so her complaints are judged by supervising men. Male evaluators are more likely to identify with a male harasser, particularly when women occupy token or sex-specific positions. Under such circumstances, the female plaintiff's complaints call more attention to herself than to the conduct she criticizes. All of these factors inspire employers to regard the complaint, not the misconduct, as the real problem. Good legal standards must neutralize these biased tendencies and encourage employers to approach the problem in a manner likely to promote a fairer resolution. Such a standard cannot be a stringent one for the plaintiff or adopt a perspective ignoring the specific context, including her group membership.

Research documents two circumstances in which a particular man's tendency to harass may be greatly enhanced in a way that leaves him unaware of his own motivations. Neither circumstance, however, demands stringent proof obstacles to the plaintiff for the sake of fairness. One is tokenism,[330] which occurs when a few women fill jobs traditionally and overwhelmingly held by men.[331] The other occurs when a man equates

329. *See supra* note 310 and accompanying text.

330. *See* Elina Haavio-Mannila, Kaisa Kauppinen-Toropainen & Irja Kandolin, *The Effect of Sex Composition of the Workplace on Friendship, Romance and Sex at Work*, *in* 3 WOMEN AND WORK 123 (Ann H. Stromberg, Laurie Larwood & Barbara A. Gutek eds., 1988); Edward Lafontaine & Leslie Tredeau, *The Frequency, Sources and Correlates of Sexual Harassment Among Women in Traditional Male Occupations*, 15 SEX ROLES 433 (1986).

331. *See* Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1503 (M.D. Fla. 1991), *cross-appeals dismissed* (11th Cir. Mar. 14, 1995). *See also* KAY DEAUX & JOSEPH C. ULLMAN, WOMEN OF STEEL: FEMALE BLUE COLLAR WORKERS IN THE BASIC STEEL INDUSTRY (1983).

power with sex and sexuality, such that he automatically sexualizes interactions with women over whom he has power.[332] In addition, certain men are more likely to harass when circumstances inject sex and sexuality into the environment.[333]

Circumstances in which the perpetrator is unconscious of the act of harassment are also those in which the biases of perception and inference on his part and on the part of others in the workplace are most likely to operate most unfairly against the female plaintiff. Moreover, these situations are likely to be the most stressful for her. The stress caused by the token-status effect is well established.[334] Alternatively, where a male boss equates power with sex, he believes that his power makes him sexy and that a female employee's recognition of his power makes her attracted to him. Such a man will either be insensitive to and fail to perceive, or react negatively to, the woman's rejection. The negative psychological impact of this behavior on the woman seeking to stop such unwelcome conduct is also documented.[335] In addition, that he has power relative to her diminishes her chances of getting effective intervention where she seeks it.

Even when women are reduced to tokens or when male superiors equate power with sex, the perpetrator and the employer *can* be aware that the perpetrator's conduct is sex-based and experienced by the recipient as

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332. John A. Bargh & Paula Raymond, *The Naive Misuse of Power: Nonconscious Sources of Sexual Harassment*, — J. SOCIAL ISSUES — (forthcoming 1995). *See also* Antonia Abbey, *Sex Differences in Attributions for Friendly Behavior: Do Males Misperceive Females' Friendliness?* 42 J. PERSONALITY & SOC. PSYCHOL. 830 (1982); John B. Pryor, Janet L. Giedd & Karen B. Williams, *A Social Psychological Model for Predicting Sexual Harassment*, — J. SOCIAL ISSUES — (forthcoming 1995); John B. Pryor & Lynnette M. Stoller, *Sexual Cognition Processes in Men High in the Likelihood to Sexually Harass*, 20 PERSONALITY & SOC. PSYCHOL. BULL. 163 (1994); Frank E. Saal, Catharine B. Johnson & Nancy Weber, *Friendly or Sexy? It May Depend on Whom You Ask*, 13 PSYCHOL. WOMEN Q. 263 (1989); Margaret S. Stockdale, *The Role of Sexual Misperceptions of Women's Friendliness in an Emerging Theory of Sexual Harassment*, 42 J. VOCATIONAL BEHAV. 84 (1993).

333. Donald 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) (examining the sexist behavior of males who have viewed a pornographic video); Laurie A. Rudman & Eugene Borgida, *The Afterglow of Construct Accessibility: The Behavioral Consequences of Priming Men to View Women as Sexual Objects*, — J. SOCIAL ISSUES — (forthcoming 1995).

334. *See* ROSABETH MOSS KANTER, MEN AND WOMEN OF THE CORPORATION 206-42 (1977) (concluding in field study that the underrepresentation of minority persons in majority-dominated work groups correlates with the heightened sensitivity of majority individuals to minority group members' membership and resulting isolation of and stress upon minority members); Judith Long Laws, *The Psychology of Tokenism: An Analysis*, 1 SEX ROLES 51 (1975); Eve Spangler, Marsha A. Gordon & Ronald M. Pipkin, *Token Women: An Empirical Test of Kanter's Hypothesis*, 84 AM. J. SOC. 160 (1978) (examining the effects of tokenism at two law schools and empirically testing Kanter's hypothesis).

335. *See generally* Jean A. Hamilton, Sheryle W. Alagna, Linda S. King & Camille Lloyd, *The Emotional Consequences of Gender-Based Abuse in the Workplace: New Counseling Programs for Sex Discrimination*, *in* WOMEN, POWER AND THERAPY: ISSUES FOR WOMEN (Marjorie Braude ed., 1988).

abusive. It simply requires that those in a position to control the perpetrator's conduct (the perpetrator, his superiors, and employer) regard it as sufficiently important for the perpetrator to identify and control inappropriate or unwelcome conduct.[336] Accordingly, even when the differences in perspective might make recognition of the problem more difficult for the perpetrator, the law should provide strong incentives for the employer and its agents to treat sexual harassment issues as highly important—which means employing a test that makes proof by the plaintiff easier, rather than more difficult.

Especially when women are few or male superiors sexualize power relations, the woman automatically loses if she is forced to resolve the problem by complaining. It should be no surprise, then, that many women in these circumstances hesitate to reject sexual advances or to pursue complaints. An all-too-common scenario occurs when a female employee tells a male supervisor or coworker that she perceives his behavior to be sex-based and unwelcome and he defends himself by arguing that she is wrong, crazy, or hypersensitive. Her expression of opinion on how she wishes to be treated becomes an opportunity for him to discredit her. Unless employers, managers, and coworkers understand that they must evaluate the conduct from the victim's perspective, they will tend to analyze the woman's personality in order to explain away her complaints.[337] Moreover, unless managers and investigators can effectively intervene to change the workplace behavior even of powerful males, they will disparage the complainant rather than eradicate the harassment.[338] A legal standard that requires examination of the conduct (not the complainant) in context and from the complainant's perspective will counter these biases. By removing the fear of reprisal and respecting the complainant's perceptions, an employer can resolve most problems caused by supposed differences in perspective.

Finally, to the extent that differences in perspective raise fairness questions, sexual harassment law provides a variety of safeguards to ensure fairness to the defendant. The first is Title VII itself, which puts employers on notice that workplace conduct involving references to sex or sexuality may

336. Susan T. Fiske & Steven L. Neuberg, *A Continuum of Impression Formation, From Category-Based to Individuating Processes: Influences of Information and Motivation on Attention and Interpretation, in* 23 ADVANCES IN EXPERIMENTAL SOC. PSYCHOL. 1, 60-61 (1990) (asserting that, "motivating agents . . . that evoke a goal of impression accuracy will lead to relatively individuating impression formation"); Steven L. Neuberg & Susan T. Fiske, *Motivational Influences on Impression Formation: Outcome Dependency, Accuracy-Driven Attention, and Individuating Processes*, 53 J. PERSONALITY & SOC. PSYCHOL. 431 (1987) (concluding that "in order to overcome the inappropriate use of some particular cognitive process or strategy, a perceiver must recognize that an error or bias in judgment may occur, be motivated to avoid such an error or bias, and have the means by which to do so").

337. *See supra* notes 320-22 and accompanying text.

338. *See supra* note 323 and accompanying text.

constitute a civil violation.[339] Even if the employer fails to address abusive conduct, it receives fresh notice and opportunity to remedy the problem once an EEOC charge is filed.

The defendant is also protected by the definition of sexual harassment as "unwelcome" sexual or sex-based conduct—an element that some have argued already affords the alleged discriminator too much advantage.[340] The law adopted the unwelcomeness requirement so that employers would not have to regulate consensual sexual relations. If the conduct is not obviously unwelcome (for example because it is not apparently objectionable or because the plaintiff appears to have invited it), the court may look at the plaintiff's behavior at the time the conduct occurred when determining whether the conduct was unwelcome. If the court believes that the conduct was not in itself obviously intimidating, hostile, or offensive and the plaintiff did not communicate that it was unwelcome, the court may agree with the defendant that no unlawful sexual harassment has occurred. Of course, the unwelcomeness element does not protect the perpetrator who persists in sexual conduct after the plaintiff has indicated that the conduct is unwelcome.[341]

In situations where the employer is not the perpetrator and thus may not know of the offensive conduct, a third protection requires the plaintiff to prove that the employer had actual or constructive[342] notice. Once the employer has notice, it must take prompt and effective remedial action and in doing so may avoid liability.

Finally, where the dispute genuinely arose from a conflict of perspectives, the employer's decision not to act is protected by the trier of fact's objective assessment. If the plaintiff's perspective is truly very difficult to understand, she may be unable to persuade the trier of fact that her complaint is legitimate—just as she was unable to persuade the employer.[343]

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339. *See infra* part III.B.1.a.i-iv.

340. The unwelcomeness requirement has been criticized as unnecessarily shifting the inquiry from the conduct of the alleged perpetrator to that of the plaintiff, much as consent defenses have operated to put the victim on trial in rape cases. *See* Susan Estrich, *Sex At Work*, 43 STAN. L. REV. 813, 827-34 (1991); Ann C. Juliano, *Did She Ask for It? The "Unwelcome" Requirement in Sexual Harassment Cases*, 77 CORNELL L. REV. 1558 (1992) (asserting that the unwelcomeness requirement puts the plaintiff's behavior on trial); Shaney, *supra* note 145.

341. Research establishes that women have varied reactions to sexual harassment and employ many strategies to deal with it, including participation. *See* James E. Gruber, *How Women Handle Sexual Harassment: A Literature Review*, 74 Soc. Sci. Res. 3, 5 (1989). Under the law, even a plaintiff who participated may have found the conduct unwelcome. Meritor Savings Bank v. Vinson, 447 U.S. 57, 68 (1986).

342. The pervasiveness of the harassment can support an inference of constructive notice. Huddleston v. Roger Dean Chevrolet, 845 F.2d 900, 904 (11th Cir. 1988); Craig v. Y & Y Snacks, Inc., 721 F.2d 77, 80-81 (3rd Cir. 1983); Henson v. City of Dundee, 682 F.2d 897, 905 (11th Cir. 1982); Katz v. Dole, 709 F.2d 251, 255 (4th Cir. 1983); Spencer v. General Elec. Co., 697 F. Supp. 204, 218 (E.D. Va. 1988).

343. *See* discussion *supra* part II.D.3.

But this result is appropriate only where the employer and trier of fact evaluate the plaintiff's perspective in a manner that minimizes the biases against her.

In sum, sexual harassment law already protects the defendant and need not be further weakened because of supposed sex-based differences in perspective. The only differences in perspective that are truly sex-specific are the cultural narratives about sex roles and their influence on the experiences and perspectives of men and women. These sources of bias, like the history of subordination of African-Americans, are the legitimate target of discrimination law. That women or minorities may be quicker to identify the harmful outcomes of their own historically subordinate status and that white males may remain largely ignorant of this subordination and its current effect in their own sexually-denigrating conduct is itself an effect of past discrimination that the law seeks to undo. To that end, it is fair to direct the employer and the court to consider the perspective of a member of the group singled out by discriminatory conduct. Differences in perspective in a hostile work environment situation tend, in some circumstances overwhelmingly, to disadvantage the plaintiff, not the perpetrator or employer. The law should counteract, not reinforce, such tendencies.

Overall, the *Harris* approach moves beyond the problem of perspective by focusing the analysis to control for different perspectives and by establishing a policy that encourages communication and accommodation. *Harris* also discourages employers from squelching complaints by signalling that a jury will consider all circumstances, including the plaintiff's outgroup status. Finally, *Harris* cuts a middle path between restricting truly insignificant conduct and permitting any amount of sexual or sex-based conduct that causes no severe psychological harm.

2. *Potential First Amendment Claims*

More recently, defendants have argued that the First Amendment should bar or limit a cause of action or remedy for a hostile work environment where the claim rests on verbal or symbolic action.[344] The trial court

344. *See, e.g.*, Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481 (1991) (arguing that the broad definition of hostile work environment claim adopted by the courts in harassment cases is a restriction of expression inconsistent with modern First Amendment jurisprudence); Jules B. Gerard, *The First Amendment in a Hostile Environment: A Primer on Free Speech and Sexual Harassment*, 68 NOTRE DAME L. REV. 1003 (1993) (arguing that EEOC guidelines are applied unconstitutionally in many cases because speech that would be protected under the First Amendment is used to demonstrate a hostile environment). *See also* Adler & Peirce, *supra* note 148, at 820-22 (agreeing with Browne); Nadine Strossen, *Regulating Workplace Sexual Harassment and Upholding the First Amendment—Avoiding a Collision*, 37 VILLANOVA L. REV. 757 (1992) (cautioning against an overly broad restriction on expression in the workplace, while advocating a balance between free speech and equality concerns).

in *Rabidue* mentioned this concern but avoided deciding the issue by finding no hostile work environment.[345] The employer in *Robinson v. Jacksonville Shipyards, Inc.* argued at trial that the First Amendment precluded the court's affirmative relief.[346] On appeal before the Eleventh Circuit,[347] the employer argued that the First Amendment barred the trial court from considering evidence of sexually hostile verbal conduct not specifically directed at the plaintiff.[348]

The First Amendment should not bar or limit liability or relief in a hostile work environment claim that is based on verbal, visual, or symbolic conduct. First, a hostile environment claim is not a speech regulation. The claim focuses not upon the regulation of speech as speech but upon the employer's maintenance of a nondiscriminatory work environment. Any remedy for a hostile work environment is directed at the employer, not necessarily the speaker, and addresses no individual utterance, but all of the conditions that rendered the workplace hostile. While the employer might have to monitor and control its employees' verbal (and other) conduct in order to achieve nondiscriminatory working conditions, it is the employer's workplace, not an individual employee's speech,[349] that is the subject of a court's inquiry. Under no standard yet articulated would an isolated, nonthreatening utterance permit a finding of discrimination.

In other words, the First Amendment argument loses sight of the fact that the claim is designed to attack discriminatory *conduct*, not speech. To

345. *Rabidue*, 584 F. Supp. at 431. Obviously, one possible response to the First Amendment argument would be strictly to limit the hostile work environment claim as the Sixth Circuit did in *Rabidue*. This solution places priority on dominant group speech freedom while sacrificing equal employment opportunity and silencing nondominant employees.

346. Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1534-37 (responding to defendant's contention that the First Amendment limited the proposed affirmative relief).

347. Cross-Appellants' Brief at 20, Robinson v. Jacksonville Shipyards, 760 F. Supp. 1486 (11th Cir. 1992) (No. 91-3655) (supplemental briefing submitted Jan. 18, 1994), *cross-appeals dismissed* (11th Cir. Mar. 14, 1995).

348. *Id. See also* Brief for Cross-Appellee/Reply Brief of Appellant Lois Robinson at 27-32, Robinson v. Jacksonville Shipyards, 760 F. Supp. 1486 (11th Cir. 1992), (No. 91-3655), *cross-appeals dismissed* (11th Cir. Mar. 14, 1995).

349. One author argues that Title VII's regulation of the employer's workplace is equivalent to government regulation of speech because the law would force the employer to ban all sexually-related speech. Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791, 1810 (1992). However, this argument presumes that absolute ban is the only available strategy dictated by discrimination law, which it is not. The author assumes that the court order in *Robinson* designed, based upon specific factual circumstances, to eliminate proven past discrimination which the employer condoned and ratified, will guide or govern employers wishing to avoid liability. *See id.* at 1810 n.90, 1812 n.98, 1815-16. Courts are permitted to take steps in remedying proven discrimination that employers seeking to avoid potential discrimination need not take. *See, e.g.*, United States v. Paradise, 480 U.S. 149, 171-85 (1987) (stating that courts' broad discretion to remedy discriminatory harm included the power to take affirmative steps that are otherwise impermissible because they affect the interests of third parties).

the extent that the objection is that regulating discriminatory conduct by reference to expressions will chill expressive conduct, it is important to acknowledge that excluding speech from use at trial would virtually eliminate all discrimination claims: the statement "You're fired because you're a woman" could not be introduced or considered at trial in order to protect the employer's freedom of speech. Even if the use of expressive conduct in evaluating a hostile work environment claim applied only to excluding all evidence that happens to be expressive conduct, it fundamentally alters the context in which the discrimination is being evaluated and would defeat most hostile environment claims because much of what creates an environment is expressive conduct.[350] To admit evidence only of personalized sexual abuse, while ignoring the context of generalized hostility to women, falsely suggests that generalized hostility does not harm individual women. Excluding evidence of the expressive conduct that creates the environment would camouflage the real dynamics of discrimination operating in a workplace.

Title VII requires legal assessment not of speech as speech, but of speech as conduct that causes discriminatory harm. Several recent Supreme Court holdings delineate the distinction between speech and conduct. In *R.A.V. v. City of St. Paul*,[351] the Court struck down an ordinance criminalizing the display on public or private property of any symbol, including a cross or swastika, which the perpetrator knew or had reasonable grounds to know aroused anger, alarm, or resentment in others based on race, color, creed, religion, or gender. The Court noted that its ruling did not reach statutes such as Title VII that are designed specifically to regulate conduct (including verbal conduct) where the government interference with speech was only a secondary effect of the statute.[352] While *R.A.V.* hardly ended First Amendment controversy, *Wisconsin v. Mitchell*[353] reinforced *R.A.V.*'s reasoning that ancillary regulation of speech was constitutionally permissible where the regulation intended to target conduct causing discriminatory harms. In that case, the Court upheld a statute that enhanced sentencing for defendants who selected a victim on the basis of race or other group membership, so-called hate crimes.

350. Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486 (M.D. Fla. 1991), *cross-appeals dismissed* (11th Cir. Mar. 14, 1995), provides a powerful example of the role of generalized sexually hostile conduct in creating a workplace atmosphere which negatively affects all female workers. In *Robinson*, the trial court found that a sexually hostile work environment was created in part because of the posting of sexual pictures of women in supervisors' offices, trade shops, shanties, and other central gathering places around the shipyards. *Id.* at 1524.

351. 112 S. Ct. 2538, 2542 (1992).

352. *Id.* at 2546-47.

353. 113 S. Ct. 2194 (1993).

The free speech defense fails to acknowledge that a compelling government interest may counterbalance the First Amendment concerns.[354] The elimination of employment discrimination should be regarded as such a compelling government interest. Accordingly, even if the state *intended* to regulate workplace speech through the hostile work environment standard, its overriding interest in ending employment discrimination would allow it to do so. The Supreme Court's holding in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*[355] demonstrates that anti-discrimination concerns may trump free speech. In that case, the Pittsburgh Press ran separate male and female "help wanted" advertising columns and was charged under the local human rights ordinance with aiding and abetting unlawful employment discrimination. The newspaper challenged the constitutionality of the human rights ordinance and argued that the ordinance could not reach it, first, because the newspaper had committed no discrimination and, second, because the restriction would be an unlawful prior restraint. The Court ruled that the ordinance and its application to the newspaper violated no First Amendment rights because the ordinance addressed the overriding goal of ending illegal employment discrimination and because the newspaper became a party to this illegal act by publishing ads that aided the employer's discriminatory practices.[356] The Court concluded, without discussion, that the operation of the ordinance was not an impermissible prior restraint on speech.[357]

The First Amendment arguments ignore both the existing power differentials in the workplace that justify remedial government intervention and the strength of individual and social interests in equal employment. The Supreme Court has previously restricted an employer's speech that exploited the power differential between employer and employee at the expense of employee rights; as the Court noted, courts "must take into account the economic dependence of the employees on their employers" in ascertaining whether employer speech, taken in context, might operate coercively.[358] The Court concluded that the government may, consistent with the First Amendment, curtail employer speech where that speech might

354. *See* Frisby v. Schultz, 487 U.S. 474, 481 (1988) (citing Perry Educ. Ass'n v. Perry Local Ass'n, 460 U.S. 37, 45 (1983)) (upholding narrowly drawn content-based restrictions in the face of compelling state interest).

355. 413 U.S. 376 (1973), *reh'g denied*, 414 U.S. 881 (1973).

356. *Id.* at 386-89. The court noted that the newspaper, as an employer, was subject to nondiscrimination laws just like any other employer and that the regulation addressed the newspaper's commercial operation (namely, advertising), not its editorial policy.

357. *Id.* at 388-91.

358. NLRB v. Gissel Packing Co., 395 U.S. 575, 617 (1969). *Gissel* reads the NLRA to prohibit employers from coercing employees during a union certification campaign. By analogy, Title VII prohibits employers from discrimination in order to protect employees' rights to equal opportunity. It seems to follow that the government may restrict employer speech in order to further its interest in giving employees access to a discrimination-free environment.

restrict or threaten the government purpose of ensuring employees' freedom to associate in unions.[359] An employer who makes the work environment hostile to women by participating in or condoning abuse burdens female employees' rights to equal employment and should be similarly restricted.

In sum, the First Amendment provides no reason to restrict the hostile work environment claim, curtail its remedies, or exclude evidence of sex-based symbolic conduct, except perhaps in limited factual circumstances. It might be useful to address two examples of factual circumstances to illustrate the particularity of examination that must be made before a court can conclude whether the First Amendment curtails the hostile work environment right and remedy. In the recent decision in *Johnson v. County of Los Angeles Fire Department*,[360] a male firefighter challenged the specific section of the Fire Department's sexual harassment policy that prohibited "sexual material . . . in all work locations, including dormitories, rest rooms and lockers: . . . sexually-oriented magazines, particularly those containing nude pictures, such as Playboy, Penthouse and Playgirl."[361] The court's analysis applied First Amendment doctrine developed specifically with respect to government employment.[362] The *Johnson* court, in essence, found itself considering the balance between the government's interest in regulating discriminatory conduct and the government's intrusion on the speech and privacy interests of its employees based on the prospect (albeit likely) of discrimination, not the fact of proven discrimination being remedied. While the court noted that the display of sexually-oriented or nude material may properly be prohibited,[363] it concluded that the ban on possession went too far. The court considered a number of facts to reach this conclusion. Those that weighed heavily were that firefighters worked twenty-four-hour shifts on-call, sometimes for three days in a row, during which time they had to eat and sleep at the firehouse. Consequently, the fire station contained private quarters that functioned as both home and workplace for the employees.[364] The court concluded, in light of these facts, that the ban excessively burdened the firefighter's speech rights and that the

359. *Id.* at 617-18.

360. No. CV93-7589, 1994 U.S. Dist. LEXIS 8270 (C.D. Cal.).

361. *Id.* at 1.

362. *See, e.g.*, Rankin v. McPherson, 483 U.S. 378, 384 (1987) (holding that the determination of whether a public employer has properly discharged an employee for engaging in speech requires a balancing of interests in order "to accommodate the dual role of the public employer as a provider of public services and as a government entity operating under the constraints of the First Amendment"); Connick v. Myers, 461 U.S. 138, 140 (1983) (discussing the problem of striking a balance between the interests of the employee as a citizen in discussing matters of public concern, and the interests of the state, as an employer, in encouraging the efficiency of the public services it performs).

363. *Johnson*, 1994 U.S. Dist. LEXIS 8270, at *22.

364. *Id.* at *13.

government's interest in eliminating discriminatory conduct was adequately served by the remaining harassment regulations, which would punish any harassment arising from magazine possession.[365] The court's close analysis of the facts in order to resolve the tension between two constitutional concerns usefully illustrates the manner in which a First Amendment issue might be raised and analyzed in relationship to hostile work environment concerns.

The facts of *Johnson* contrast with the court-ordered ban on possession of sexually-oriented magazines and revealing pictures in *Robinson v. Jacksonville Shipyards, Inc.*, based on the proven facts of discrimination.[366] In the *Robinson* case, the court had found a pattern of discrimination involving sexually-oriented material, including occasions when men used magazines or pictures to harass women, sometimes in retaliation for complaints.[367] The *Robinson* court also found that the employer consistently failed to stop the harassment or to intervene meaningfully in related disputes.[368] Employees had no private lockers or quarters and worked eight-hour shifts during which they were not supposed to possess any reading material, according to the employer's policies.[369] The record showed several events when some male employees' behavior became sexual conduct in the presence of sexually-oriented material.[370] In *Robinson*, where the employer had been proven utterly unable to control sexual material's use for sex-based abuse, the need for eliminating the material, including possession, was much more compelling than in *Johnson*. A court-ordered ban on possession relieved female employees of the need to rely on the employer's ineffective dispute resolution and afforded male employees clear notice of conduct that might violate the newly-imposed policy and result in an employer-imposed work penalty. In other words, the court's ban on possession was designed to remedy specific, proven abuses.

B. Proving a Hostile Work Environment Claim: What Evidence and How Much Is Enough?

In *Meritor*,[371] the Supreme Court delineated four elements needed to prove a sexually hostile working environment: that the plaintiff is a member of a protected category; that the conduct at issue is unwelcome and sex-based; that the sex-based conduct has harmed the plaintiff; and that the defendant employer is legally responsible for that harm. The plaintiff shows harm by establishing that unwelcome sexual conduct was either quid

365. *Id.* at *14, *23.
366. 760 F. Supp. 1486 (M.D. Fla. 1991), *cross-appeals dismissed* (11th Cir. Mar. 14, 1995).
367. *Id.* at 1501.
368. *Id.* at 1510.
369. *Id.* at 1494.
370. *Id.* at 1500.
371. 474 U.S. 57 (1986).

pro quo (an implicit condition of work) or altered the working atmosphere or interfered with her work performance. *Harris v. Forklift Systems, Inc.*[372] defined the analysis used to determine when unwelcome sex-based conduct alters working conditions sufficiently to render them hostile. This section elaborates the interrelationship of the sex-based conduct requirement and the harm element in proof of a hostile work environment claim.

At the outset, it must be noted that the stereotyping inherent in sex-based conduct can be harmful in itself. Coworkers' infliction of feminine stereotypes on a particular woman impede her ability to define herself and her role in the workplace consistent with the demands of her job. For the group imposing the stereotype, it is an act of power which defines both the dominant group and the powerless woman. Women in these circumstances can suffer overwhelming negative effects.[373] Sex stereotyping in the workplace particularly harms women because stereotypes about gender give the impression that men will be more successful than women. Researchers have identified two clusters of traits in which men and women are thought to be different.[374] The first, known as the competence cluster, ranges from competence (independence, competitiveness, objectivity, dominance, activity, logic, ambition, self-confidence) to incompetence (dependence, noncompetitiveness). People valuing these traits would find men more competent than women. A second spectrum of traits measures interpersonal characteristics. Women score near the high end of the scale for warmth and expressiveness (tact, gentleness, awareness of the feelings of others, ability to express tender feelings) while men are perceived to be the opposite (blunt, rough, unaware of others' feelings, unable to express feelings). People in the United States have historically valued competency traits more highly than interpersonal ones.[375] The sex-based distribution of the clusters means that employers, thinking sterotypically, expect men to perform and will evaluate men as performing better than women at work even, though women perform equally well by objective measures.[376] Moreover, men are more likely to receive credit for their good perform-

372. 113 S. Ct. 211 (1993).

373. Extensive research documents that stereotypes guide both the holder's and the object's expectations, perceptions, and memories and lead the holder to biased assignment of rewards and opportunities. *See supra* part III.A.1.

374. Inge K. Broverman, Susan R. Vogel, Donald M. Broverman, Frank E. Clarkson & Paul S. Rosenkrantz, *Sex-Role Stereotypes: A Current Appraisal*, 28(2) J. SOC. ISSUES 59 (1972); Paul S. Rosenkrantz, Susan R. Vogel, Helen Bee, Inge K. Broverman & Donald M. Broverman, *Sex-role Stereotypes and Self-Concepts in College Students*, 32 J. CONSULTING & CLINICAL PSYCHOL. 287 (1968).

375. John P. McKee & Alex C. Sherriffs, *The Differential Evaluation of Males and Females*, 25(3) J. PERSONALITY 356-71 (1957); C. T. MacBrayer, *Differences in Perceptions of the Opposite by Males and Females*, 52(2) J. SOC. PSYCHOL. 309-314 (1960).

376. Kay Deaux, *Sex: A Perspective on the Attribution Process in* NEW DIRECTIONS IN ATTRIBUTION RESEARCH 335, 339 (John H. Harvey, William J. Ickes & Robert F. Kidd eds., 1987).

ance.[377] These tendencies will be further exacerbated in the historically male professions.[378] Where women are few, they are identified solely by gender and are more likely to be stereotyped or cast as part of an outgroup.[379] Similarly, where men are bosses and women are subordinates, men will begin to act out the competence traits that will get rewarded and women will be forced to accommodate these traits by emulating stereotypical female warmth and expressiveness.[380] The role-prescriptive nature of sex stereotypes and power differences between men and women tend to create a normative pressure on women to conform to sex-roles and discourage women's resistance to the enforcement of any group-based stereotypes.[381] These factors pressure women to accept sexual harassment and stereotyping.

With this background, it is useful to survey the law on sex-based harm that *Harris* left untouched.

1. What Kind of Hostile Conduct?

The sine qua non of a Title VII sex discrimination case is that the treatment at issue occurred "because of . . . sex."[382] The plaintiff must show that the defendant's conduct was based upon her sex; the defendant must then try to prove that it took that action for some other, nondiscriminatory reason.

The sex-based element is an important qualification for several reasons. It prevents courts from imposing federal penalties for merely unfair employer action and thereby deters employee claims that equate all unfairness with discrimination. The sex-based element also provides a fair and systematic basis upon which the court may examine the overall impact of seemingly isolated incidents of conduct. This connecting principle recognizes that, for the employee whose work life is marred by sexually hostile acts, the sex-based linkage shows cumulative abuse. Indeed, to force a more rational connection between the acts would be to ignore the fundamentally irrational and disorderly nature of discriminatory conduct.

Courts applying the majority rule have recognized a variety of factual patterns that demonstrate sex-based conduct. The subsections outline the

377. *See generally* Kay Deaux & Tim Emswiller, *Explanations of Successful Performance on Sex-linked Tasks: What is Skill for the Male is Luck for the Female*, 29 J. PERSONALITY & SOC. PSYCHOL. 80 (1974).

378. *See generally* Madeline E. Heilman, *Sex Bias in Work Settings: The Lack of Fit Model*, 5 RES. ORGANIZATIONAL BEHAV. 269 (1983). *See also* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

379. *See supra* notes 324-25 and accompanying text.

380. *See supra* notes 370-76 and accompanying text.

381. Susan T. Fiske & Laura E. Stevens, *What's So Special About Sex? Gender Stereotyping and Discrimination*, *in* GENDER ISSUES IN CONTEMPORARY SOCIETY: APPLIED SOCIAL PSYCHOLOGY ANNUAL 173, 179, 182-84 (Stuart Oskamp & Mark Costanzo eds., 1993).

382. 42 U.S.C. § 2000e-2(a) (1981 & 1993 Supp.).

types of sex-based conduct that have been considered in assessing whether a workplace has been made sexually hostile.

a. Disparate Treatment Evidence of Hostile Conduct

Federal courts have identified five types of sex-based conduct that constitute disparate treatment[383] and thus prove sex-based intent.[384] The first type is sexual harassment in which verbal or physical sexual conduct alters a condition of work.[385] The second is nonsexual gender-specific harassment, for example, calling a woman names such as grandma.[386] The third is the creation of explicit sex-based conditions at work, such as the requirement that women, but not men, wear uniforms.[387] The fourth is quid pro quo sexual harassment in which employment opportunities are conditioned on sexual favors or sexual relationships.[388] The fifth is facially neutral harassment imposed on the basis of sex as shown by the fact that the conduct (such as urinating in the water bottle or gas tank) is visited only upon female employees.[389] With the exception of this last type, all conduct is explicitly sex-based. As to this apparently neutral harassment, the courts apply a disparate treatment analysis, which must show that female, but not male, employees are subjected to the harassment. Examples of all five types of sexual harassment arise from and implicate gender stereotypes.

i. Conduct of a Sexual Nature

According to the EEOC Guidelines, "sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment."[390] Courts have typically looked to this definition when identifying "conduct of a sexual nature" and have construed the provision broadly to include not only physical touching and sexual invitation but also many verbal acts of abuse. Indeed, courts have not distinguished verbal acts from other types of sexually abusive conduct.[391]

383. A sixth type of conduct, neutral conduct having a disparate impact upon women, has been considered infrequently in the assessment of a hostile work environment claim. *See infra* part III.B.1.b.

384. Note that intent must be proved in order to win compensatory damages under the Civil Rights Act of 1991. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified at 42 U.S.C. § 1981a (a)(1)).

385. *See infra* part III.B.1.a.i.

386. *See infra* part III.B.1.a.ii.

387. *See* Carroll v. Talman Fed. Sav. & Loan Ass'n of Chicago, 604 F.2d 1028, 1032-33 (7th Cir. 1979), *cert. denied*, 445 U.S. 929 (1980). *See infra* part III.B.1.a.iii.

388. *See infra* part III.B.1.a.iv.

389. *See infra* part III.B.1.a.v.

390. 29 C.F.R. § 1604.11(a) (1993).

391. *See* Katz v. Dole, 709 F.2d 251, 254-55 (4th Cir. 1983); Arnold v. City of Seminole, 614 F. Supp. 853, 858 (E.D. Okla. 1985); Zabkowicz v. West Bend Co., 589 F. Supp. 780, 782-84 (E.D. Wis. 1984); Brown v. City of Guthrie, 22 Fair Empl. Prac. Cas. (BNA) 1627, 1631 (W.D. Okla. 1980).

Defendants have argued that sexual language and pornographic pictures were not sex-based or, in the alternative, that their presence in the workplace harmed men and women equally. In *Zabkowicz v. West Bend Co.*,[392] the court rejected the defendants' argument that the display of pornographic drawings of women and the use of sexual slurs such as "slut," "bitch," and "fucking cunt" were not sex-based conduct.[393] The *Zabkowicz* court concluded that such behavior denigrated the female sex and imposed greater harm on women[394] by virtue of their group membership:

> [T]he sexually offensive conduct and language used would have been almost irrelevant and would have failed entirely in its crude purpose had the plaintiff been a man. I do not hesitate to find that but for her sex, the plaintiff would not have been subjected to the harassment that she suffered.[395]

Similarly, in *Katz*, the court explained why the defendant's words were deemed sexually harassing:

> The words used were ones widely recognized as not only improper but as intensely degrading, deriving their power to wound not only from their meaning but also from "the disgust and violence they express phonetically."[396]

Thus, courts have varied less on *whether*—and more on *how*—sexual conduct or pictures directed at women generally should be viewed in terms of creating sex-based intent. Male employees who make comments sexually demeaning to women or post sexual pictures of women might not as readily make comments sexually demeaning to men[397] or post (or accept female employees' posting of) naked or sexual pictures of men in the workplace. Male employees choose their words and pictures because they involve women; the meaning is often degrading and typically limits the woman to a

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392. 589 F. Supp. at 780, 782 (E.D. Wis. 1984).

393. *See also* Bennett v. Corroon & Black Corp., 845 F.2d 104, 106 (5th Cir. 1988), *cert. denied*, 489 U.S. 1020 (reversing summary judgment for employer on grounds that posting of obscene cartoons bearing plaintiff's name in public men's room was clearly sex-based); Walker v. Ford Motor Co., 684 F.2d 1355, 1359 (11th Cir. 1982) (rejecting arguments that racist language is not race-based).

394. One author, however, has argued that, even with facially sexual conduct, a finding of disparate treatment is required to make sexual conduct sex-based. Lynn McLain, *The EEOC Sexual Harassment Guidelines: Welcome Advances Under Title VII?*, 10 U. BALT. L. REV. 275, 292 (1981).

395. *Zabkowicz*, 589 F. Supp. at 784.

396. Katz v. Dole, 709 F.2d at 254 (4th Cir. 1993) (quoting CASEY MILLER & KATE SWIFT, WORDS AND WOMEN 109 (1977)).

397. Indeed, query whether sexual epithets are sexually demeaning to men on account of sex. I would argue that most such epithets do not demean men as a group, but only demean the recipient by implying that, although he is male, he is not properly a member or that his ancestry is otherwise questionable. While a subset of epithets demean individual women as not measuring up appropriate standards of femininity ("dyke"), a wide range of expressions also demean women or the female gender as a group.

role subordinate to the author and other males and inappropriate for the work environment.

Disparaging persons of the plaintiff's gender is hostile conduct based on gender. To hold that conduct denigrating all women is not based on a female employee's sex unless specifically and individually targeting her,[398] denies the group-based nature of the harmful conduct. Nonetheless, courts have addressed the question of individualized harassment often enough to justify further analysis. Where a word or picture targets a specific woman, the courts have easily found the conduct to be based upon the targeted employee's sex.[399] Where more generalized conduct is at stake, defendants have, in effect, argued that female employees should not take the behavior so personally.[400] At least one court has hesitated to find that sexual words and pictures not targeted to the plaintiff were based upon the plaintiff's sex, reasoning instead that the conduct had a disparate impact on female employees.[401] The problem with the disparate impact approach to sexual conduct is that the disparate impact test is designed to test facially neutral conduct. Application of such test in this context ignores the explicit sex-based content as well as the fact that the plaintiff is affected, regardless of the impact on male employees, because she is a member of the targeted group. Sexual explicitness should transform the conduct into facial discrimination. Tests designed for neutral conduct, such as disparate impact, while applicable to sex-based behavior, are designed for situations in which sex-based causation proof is weaker; thus, disparate impact proof is not necessary in this situation.

ii. Nonsexual but Sex-Based Conduct

Not all sex-based harassing conduct is sexual in nature. For example, a comment that women belong in the kitchen, or that female employees should make the office coffee, would be sex-based but not sexual.[402] Several courts[403] using the majority rules have recognized that nonsexual sex-based conduct can create a hostile work environment.[404] As long as the

398. A better analysis would consider whether targeting increases the intensity of the harm. While absence of targeting will not always diminish the harm, it might do so in some cases.

399. *See* Bennett v. Corroon & Black Corp., 845 F.2d 104, 106 (5th Cir. 1988).

400. *See, e.g.*, Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486 (M.D. Fla. 1991), *cross-appeals dismissed* (11th Cir. Mar. 14, 1995).

401. *Id.* at 1522-23. *See also infra* part III.B.1.b.

402. For a comprehensive discussion of these sex-based effects, *see* Nadine Taub, *Keeping Women in Their Place: Stereotyping Per Se as a Form of Employment Discrimination*, 21 B.C. L. REV. 345 (1980).

403. *See, e.g.*, Lipsett v. University of P.R. 864 F.2d 881 (1st Cir. 1988).

404. Because the EEOC guidelines define sexual harassment as "conduct of a sexual nature," 29 C.F.R. § 1604.11(a) (1993), courts may reject claims of unwelcome sex-based, but not sexual, conduct. *See, e.g.*, Andrews v. City of Philadelphia, 895 F.2d 1469, 1485 n.6 (3d Cir. 1990) (explaining problem); McLain, *supra* note 394, at 290-91 (arguing EEOC sexual harassment guidelines are underinclusive by failing to address sexist but nonsexual

plaintiff can show some legally cognizable harm, the case of discrimination based on sex-based nonsexual conduct can be established.[405]

iii. Explicit Sex-Based Work Conditions

A work rule or practice that is explicitly sex-based can contribute to the hostility of a work environment just as sexist words can. Two sex discrimination cases provide classic examples. In *Carroll v. Talman Fed. Sav. & Loan Ass'n of Chi.*,[406] an employer who required women to wear uniforms, but allowed men to wear business suits, was found to be a demeaning discriminatory work condition. Similarly, in *Harrington v. Vandalia-Butler Bd. of Educ.*,[407] an employer's provision of inferior locker facilities and working hours for a female physical education instructor was judged discriminatory.[408]

iv. Quid pro quo Sexual Harassment and Sexual Conduct with Others

Quid pro quo sexual harassment provides a separate cause of action for the person subjected to the sexual demand, but it may also be considered part of the general work place hostility for the same plaintiff[409] and for others affected by the conduct. Additionally, sexual conduct need not be quid pro quo in order to make the workplace hostile. In *Broderick v. Ruder*,[410] the trial court found that the flagrant sexual relationship between

harassment). Since Title VII focuses broadly upon sex-based discrimination, the better rule is to equate all gender-based harassment (whether sexual or not) when evaluating proof of discrimination. The proposed EEOC Guidelines, *see supra* note 310, would clarify that non-sexual sex-based conduct is actionable under Title VII. The guidelines acknowledge the prior confusion under 29 C.F.R. § 1604.11 as reason for mentioning non-sexual sex-based conduct in 29 C.F.R. § 1609.

405. Compston v. Borden, Inc., 424 F. Supp. 157, 161 (S.D. Ohio 1976) (determining that supervisor's anti-Semitic language was discriminatory); Murry v. American Standard, Inc., 373 F. Supp. 716, 717 (E.D. La. 1973), *aff'd*, 488 F.2d 529 (5th Cir. 1973) (determining that calling a black employee "boy" was discriminatory).

406. 604 F.2d 1028, 1032-33 (7th Cir. 1979), *cert. denied*, 445 U.S. 929 (1980).

407. 418 F. Supp. 603, 606 (S.D. Ohio 1976), *rev'd on other grounds*, 585 F.2d 192 (6th Cir. 1988), *cert. denied*, 441 U.S. 932 (1979).

408. These cases were preceded by racial discrimination cases recognizing the same principle. *Cf.* Johnson v. Shreveport Garment Co., 422 F. Supp. 526, 543 (W.D. La. 1976), *aff'd*, 577 F.2d 1132 (5th Cir. 1978) (holding maintenance of segregated restrooms constituted an unlawful employment practice); Johnson v. Lillie Rubin Affiliates, 5 Empl. Prac. Dec. (CCH) ¶ 8542 (M.D. Tenn. March 15, 1972) (declaring a policy requiring references to white employees as "Miss" or "Mrs." and black employees by their first name was discriminatory).

409. *E.g.*, Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981) (reversing judgment for defendant on the ground that alleged quid pro quo conduct created a hostile working environment with instructions to consider whether the employer could show that the discriminatory conditions did not result in non-promotion for the plaintiff).

410. 685 F. Supp. 1269 (D.D.C. 1988), joint order filed with court, 46 Empl. Prac. Dec. (CCH) ¶ 38,042 (D.D.C. June 6, 1988).

a male supervisor and a female subordinate, combined with other sexual conduct, rendered the workplace hostile for the plaintiff and other women.

v. Other Disparate Treatment Evidence of Hostile Conduct

In a number of majority jurisdiction cases, courts have found harassment imposed on the basis of sex to be sufficient evidence for a hostile work environment claim.[411]

In *Bell v. Crackin' Good Bakers*,[412] the plaintiff alleged that she was consistently harassed by the defendants with innuendoes and belittling insults and that as a result she was no longer able to function well as an employee or as a wife and mother. Because the plaintiff's complaint had not alleged *sexual* harassment, the trial court granted the defendants' motion for summary judgment. The Court of Appeals reversed on the grounds that the plaintiff "was under no obligation to adduce proof of 'sexual advances, requests for sexual favors . . . [or] other verbal or physical conduct of a sexual nature' " and reasoned that Title VII prohibited "threatening, bellicose, demeaning, hostile or offensive conduct by a supervisor in the workplace because of the sex of the victim" because the conduct constituted a "condition" of employment based upon the victim's sex.[413]

In *McKinney v. Dole*,[414] the District of Columbia Circuit held that a physical assault by a supervisor, although not sexual in nature, might be sexual harassment if based on the victim's sex. The court found the assault to be sex-based because it occurred in response to the victim's previous rejections of her supervisor's sexual advances. The circuit court explained:

> We have never held that sexual harassment or other unequal treatment of an employee or group of employees that occurs because of the sex of the employee must, to be illegal under Title VII, take the form of sexual advances or of other incidents with clearly sexual overtones. And we decline to do so now. Rather, we hold that any harassment or other unequal treatment of an employee or group of employees that would not occur but for the sex of the employee or employees may, if sufficiently patterned or pervasive, comprise an illegal condition of employment under Title VII.[415]

Delgado v. Lehman,[416] which followed this reasoning, looked to evidence of both physical touching and sexually derogatory comments, and of

411. *See* Lipsett v. University of P.R., 864 F.2d 881, 905 (1st Cir. 1988) (discussing hostile work environment for sex-based nonsexual harassment).

412. 777 F.2d 1497 (11th Cir. 1985).

413. *Id.* at 1503.

414. 765 F.2d 1129 (D.C. Cir. 1985).

415. *Id.* at 1138 (footnotes omitted).

416. 665 F. Supp. 460, 468 (E.D. Va. 1987).

abusive, nonsexual, disparate treatment in finding a hostile work environment.

In *Hall v. Gus Constr. Co.*,[417] the Eighth Circuit followed *McKinney* and held that evidence of nonsexual offensive conduct imposed on the basis of sex is admissible to prove sexual harassment in a hostile work environment case. The court reconciled its conflict with the EEOC Guidelines by noting that the guidelines did not preclude consideration of other types of harassment relevant to the plaintiff's subgroup membership as a female of color.[418] The offensive conduct included a range of verbal sexual abuse (such as male colleagues calling one woman "Herpes"); unwanted physical touching; and nonsexual harassment including urinating into a female employee's water bottle, urinating into the gas tank of a truck driven by a woman, refusing to respond to a woman's concerns about a truck cab leaking carbon monoxide, and denial of transportation to a restroom facility, which forced female employees to relieve themselves in a roadside ditch while male employees looked on.[419] No male workers were subject to such mistreatment.

The Tenth Circuit adopted the *McKinney* court's analysis in *Hicks v. Gates Rubber Co.*[420] *Hicks* involved race and sex discrimination charges by an African-American woman. The trial court found neither quid pro quo sexual harassment nor a racially hostile working environment. While the Court of Appeals found no clear error with respect to these conclusions, it remanded the case, noting that the trial court had failed to make a finding on the question of a sexually hostile working environment. The court directed the trial court to consider evidence of both overt sexual conduct directed at the plaintiff and of sexual conduct directed at other female employees; acts not overtly sexual that represented sex-based harassment (citing *McKinney*); and incidents of racial harassment that, combined with sexually harassing conduct, might prove pervasive harassment.[421]

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417. 842 F.2d 1010, 1014 (8th Cir. 1988).

418. *Id.* at 1014.

419. *Id.* at 1012.

420. 833 F.2d 1406, 1414-15 (10th Cir. 1987).

421. *Id.* at 1414-15. The *Hicks* decision highlights the difficulty of proving multiple status discrimination claims. *See* Jefferies v. Harris County Community Action Ass'n, 615 F.2d 1025, 1032-35 (5th Cir. 1980) (holding that district court erred in failing to consider as a claim the combined effect of race and sex discrimination on an African-American female). *See also, e.g.*, Madeline Morris, *Stereotypic Alchemy: Transformative Stereotypes and Antidiscrimination Law*, 7 YALE L. & POL'Y REV. 251 (1989) (discussing the constitutional significance of subtypes, including women of color); Judy Scales-Trent, *Black Women and the Constitution: Finding Our Place, Asserting Our Rights*, 24 HARV. C.R.-C.L. L. REV. 9 (1989) (discussing problem of black women as a subgroup for the purposes of analysis under the equal protection clause); Judith A. Winston, *Mirror, Mirror on the Wall: Title VII, Section 1981, and the Intersection of Race and Gender in the Civil Rights Act of 1990*, 79 CAL. L. REV. 775 (1991) (discussing implications of race and sex for black women under the civil rights laws).

b. Disparate Impact Evidence of Hostile Conduct

Though seldom used in hostile work environment cases, disparate impact analysis can also be applied to demonstrate that sex-based conduct is discriminatory.[422] While disparate treatment allows the court to infer intent (and thus to allow money damages),[423] disparate impact focuses on effect. Disparate impact is used to reach facially neutral conduct that affects one group more significantly but might not rise to the level of disparate treatment.[424] It is possible but should not be necessary to use a disparate impact test in cases of explicitly sex-based conduct, where the nature of the action is evident on its face.

Most sexual harassment cases provide the more dramatically obvious facial discrimination or disparate treatment evidence. Nevertheless, in *Lynch v. Freeman*,[425] the Sixth Circuit upheld sex discrimination absent a finding of disparate treatment, because facially neutral conditions had a disparate impact on women. The employer's policy of barring access to indoor sanitary bathrooms and at the same time penalizing construction workers who refused to use unsanitary portable toilets had a disparate impact on female employees, who were more susceptible than males to diseases caused by unsanitary conditions.[426] *Lynch* arose from a minority jurisdiction before *Harris* was decided, suggesting that this analysis may be applied in both minority and majority jurisdictions.

Courts may find various ways to import the disparate impact doctrine into hostile work environment cases in which facial proof is also available. In *Robinson v. Jacksonville Shipyards, Inc.*,[427] in addition to finding facial and disparate treatment proof in the case, the trial court held that displaying sexual pictures of women had the effect, if not the purpose, of harming women more than men. To determine if this conduct was sex-based, the court divided the evidence into three categories: harassing behavior lacking explicitly sexual content, but directed at women and motivated by animus against women; sexual behavior directed only at women, suggesting that it is gender based; and generalized, nondirected behavior that was disproportionately more offensive or demeaning to one sex. Using this scheme, the court assessed the evidence in the case as follows:

> [The plaintiff] suffered nonsexual harassing behavior from coworkers . . ., who verbally abused or abused her because she is a

422. *See infra* notes 424-29 and accompanying text.

423. Under the Civil Rights Act Amendments of 1991, discrimination found solely upon disparate impact proof lacks the requisite intent to support a claim for money damages. Civil Rights Act of 1991, Pub. L. No. 102-166, § 1977A, 105 Stat. 1071, 1072 (codified at 42 U.S.C. § 1981a (a)(1) (1991)).

424. *See, e.g.*, Lynch v. Freeman, 817 F.2d 380 (6th Cir. 1987).

425. 817 F.2d 380, 387-89 (6th Cir. 1987).

426. *Id.* at 388.

427. 760 F. Supp. 1486, 1522-23 (M.D. Fla. 1991).

> female. The "Men Only" sign also illustrates this type of harassment. She suffered incidents of directed sexual behavior both before and after she lodged her complaints about the pictures of nude and partially nude women. The pictures themselves fall into the third category, behavior that did not originate with the intent of offending women in the workplace (because no women worked in the jobs when the behavior began) but clearly has a disproportionately demeaning impact on the women now working at [Jacksonville Shipyards].[428]

Using a disparate impact test on conduct that was not facially neutral, but explicitly sexual, was not necessary, however. The obvious sexual content of this behavior should have signalled employer and employees alike that the conduct was based on the sex of the dominant gender group to the exclusion of the minority gender group.[429]

2. *Must the Conduct be Specifically Directed at the Plaintiff?*

The majority rule in hostile environment cases is that evidence of sexually or racially hostile harassment against other members of the plaintiff's protected group may and indeed should be considered in determining the existence of a hostile environment.[430] For courts using the majority rule, a plaintiff need not show harassment directed specifically at her, provided she can show that enough sex-based conduct affected her.[431] Even if individual acts do not rise to the level of harassment, the *Harris* rule appears to

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428. *Id.*

429. The court may have been overly cautious about inferring discriminatory intent because some sexual pictures were posted before the employer hired any women and, as the employer argued, they could not have been intended to harm female employees. This standard is too strict. Whatever the initial reasons for an employment practice, if it continued past the effective date of law proscribing sex discrimination, the fact that it is based on sex and harms female employees satisfies a disparate treatment analysis. Under Title VII, the sex-based conduct need not be undertaken with the specific purpose of harming women. *See* City of L.A. Dep't of Water and Power v. Manhart, 435 U.S. 702, 707 n.13 (1978).

430. *See* Vinson v. Taylor, 753 F.2d 141, 146 (D.C. Cir. 1985), *aff'd sub nom.* Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986) (noting relevance of testimony of other female employees); Walker v. Ford Motor Co., 684 F.2d 1355 (11th Cir. 1982) (affirming trial court's holding that racially demeaning slurs created a hostile work environment). *See also* Hall v. Gus Constr. Co., 842 F.2d 1010, 1015 (8th Cir. 1988) (discussing relevance of testimony of other female employees to showing of hostile environment); Hicks v. Gates Rubber Co., 833 F.2d 1406, 1415 (10th Cir. 1987) (same); Shrout v. Black Clawson Co., 689 F. Supp. 774, 776 (S.D. Ohio 1988) (same); Broderick v. Ruder, 685 F. Supp. 1269, 1277 (D.D.C. 1988) (same); EEOC v. Gurnee Inn Corp., 48 Fair Empl. Prac. Cas. (BNA) 871 (N.D. Ill. 1988), *aff'd*, 914 F.2d 815 (7th Cir. 1990) (same); Delgado v. Lehman, 665 F. Supp. 460, 468 (E.D. Va. 1987) (same); Fisher v. San Pedro Peninsula Hosp., 262 Cal. Rptr. 842, 853 (1989) (holding that employee who witnessed harassment could claim abusive environment). *But see* Jones v. Flagship Int'l, 793 F.2d 714, 721 n.7 (5th Cir. 1986) (reports of harassment suffered by other women relevant only to the extent that incidents affected plaintiff's psychological well-being).

431. Evidence of generalized conduct is relevant not only for the conduct's cumulative effect on the hostility of the workplace, but also to corroborate the plaintiff's report, to

contemplate that their cumulative effect, and the effect of sexual conduct generally present or affecting other women, renders the work environment hostile.

Some courts, however, have failed to consider such evidence. Pre-*Harris* minority jurisdictions appear to have excluded or minimized the importance of such evidence. But even courts in pre-*Harris* majority jurisdictions have overlooked such evidence in assessing the existence of a hostile work environment. For example, in *Ross v. Double Diamond, Inc.*,[432] the harassment of Beverly Ross began immediately upon employment. On her first day at Double Diamond, Ross was asked if she "fooled around," she was asked to pull her dress above her knees for a photograph, she was asked by a manager to "pant heavily" over the phone, and she was subjected to a coworker's taking a photograph beneath her dress. On her second day, Ross' manager pulled her onto his lap and later trapped her in his office after he asked her to bend over and clean mustard off the wall.[433] The court found these events sufficient to support a finding of a hostile work environment even though the plaintiff was at the workplace only two days.

However, the court found that Sheila Stoudenmire, Ross' sister, coworker, and co-plaintiff, did not suffer from the discriminatory work environment.[434] The court did not consider the sexual harassment of Ross to be relevant to Stoudenmire's claim, even though Stoudenmire clearly knew about Ross' mistreatment (which occurred at the same time and in the same place where Stoudenmire worked) and had actively helped her sister to address her sexual harassment problems.[435] *Ross* demonstrates that limiting the evidence to incidents directed specifically at the plaintiff dramatically excludes significant abuse from consideration.[436]

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prove the perpetrator's state of mind, intent, or awareness of unwelcomeness, and to show a pattern and practice of sexual harassment. *See* Linda J. Krieger & Cindi Fox, *Evidentiary Issues in Sexual Harassment Litigation*, 1 BERKELEY WOMEN'S L.J. 115 (1985). *See, e.g.*, Pease v. Alford Photo Indus., 667 F. Supp. 1188, 1201-02 (W.D. Tenn. 1987) (discussing alleged harasser's conduct with other women to show intent).

432. 672 F. Supp. 261 (N.D. Tex. 1987) (relying on *Rabidue* standard).

433. *Id.* at 264-65.

434. According to the court, Stoudenmire's claim was based upon only: being denied the right to take her books home (which males were not denied); being subjected to three days of segregation from male employees in training; her manager's speculations that she liked to wear black boots and carry a whip in the bedroom; and threats by the vice president. *Ross*, 672 F. Supp. at 273.

435. Stoudenmire did not appeal the court's decision denying her sexual harassment claim; the court's finding in her favor on the claim of retaliation afforded her similar relief to that she would have received under the sexual harassment claim. *Id.* at 276-77.

436. The subjective leg of the *Harris* test can best be explained as a limit on the indirect effects standard. Where the plaintiff cannot show that she was affected by conduct, it cannot be said to have altered her environment. Accordingly, the court might exclude evidence of harassment that did not affect the plaintiff because she was unaware of it, *see* Brown & Germanis, *supra* note 322, unless of course, she has an alternative theory concerning the admissibility of such evidence, *see* Krieger & Fox, *supra* note 431.

3. How Pervasive or Severe is the Hostile Conduct?

Harris defined the essential question in a hostile work environment claim to be whether the sex-based conduct was severe and pervasive enough to create an objectively hostile or abusive working environment and whether it did alter the working conditions for the plaintiff. In *Vance v. Southern Bell Tel. & Tel. Co.*,[437] the Eleventh Circuit determined that sufficient evidence existed to uphold a jury verdict of racial harassment under Section 1981.[438] Citing *Davis v. Monsanto Chem. Co.*,[439] the court explained,

> [A]ll that the victim of racial harassment need show is that the alleged conduct constituted an unreasonably abusive or offensive work-related environment or adversely affected the reasonable employee's ability to do his or her job.[440]

Two prominent sexual harassment decisions echoed these themes. The Ninth Circuit noted "that the required showing of severity or seriousness of the harassing conduct varies inversely with the pervasiveness or frequency of the conduct."[441] The Third Circuit also reasoned that the conduct need only be pervasive and concluded that evaluation based on "the totality of the circumstances" precluded examination "incident by incident" as the trial court had done.[442]

Robinson v. Jacksonville Shipyards, Inc.[443] more thoroughly explained the relationship of severity and pervasiveness and contextual evaluation of the conduct's harm. The court considered the testimony of the plaintiff and of other current and former female employees who claimed to have experienced sexual conduct at the workplace. Considering such factors as the extent, frequency, and seriousness of the sexual conduct, the location and circumstances of its occurrence, the proportion of male to female workers, and the message of the sexual conduct in that workplace, the trial court

437. 863 F.2d 1503 (11th Cir. 1989), *rev'd on other grounds*, 983 F.2d 1573 (11th Cir. 1993).

438. 42 U.S.C. § 1981. *See supra* notes 29-30 and accompanying text. For purposes of its analysis, the Eleventh Circuit concluded that Section 1981 and Title VII would apply in the same manner, *see Vance*, 863 F.2d at 1509 n.3, and treated case analyses pertaining to racial and sexual harassment as the same, *id.* at 1510-15.

439. 858 F.2d at 345, 349 (6th Cir. 1988).

440. 863 F.2d at 1510. Notably, *Vance* is one of the first occasions in which the term reasonable employee appears in a race case or in any hostile work environment case. Tracing the language in *Vance* through its origin in *Davis* illustrates that the terminology originated in the *Rabidue* opinion. Rabidue v. Osceola Refining Co., 805 F.2d 611, 620 (6th Cir. 1986).

441. Ellison v. Brady, 924 F.2d 872, 878 (9th Cir. 1991).

442. Andrews v. Philadelphia, 895 F.2d 1469, 1484 (3rd Cir. 1990).

443. 760 F. Supp. 1486 (M.D. Fla. 1991), *cross-appeals dismissed* (11th Cir. Mar. 14, 1995).

concluded that the conduct had sexualized the workplace to the detriment of female employees generally and the plaintiff in particular.[444]

CONCLUSION

Overall, *Harris v. Forklift Systems, Inc.* has guided courts consistently with Title VII's language and goals. The Court eliminated the requirement that the plaintiff show past severe psychological injury because it was inconsistent with Title VII. The Court focused first on whether the workplace conditions were altered by the conduct. The Court then suggested a means to make that assessment, but left details open to further consideration. While the objective branch of the Court's mixed test inquired whether a reasonable person would have found the circumstances hostile, the Court did not try to resolve the perspective debate. Based upon social science evidence, the perspective debate should lead to legal standards that impose a stringent duty on employers to motivate and remedy sexual harassment. The proposed EEOC Guidelines pending at the time *Harris* was decided, although not adopted, offer the soundest guidance yet articulated to the trier of fact on how to evaluate sexual harassment with appreciation and consistent with the Court's decision in *Harris*: the court should ask whether a "reasonable person in the same or similar circumstances would find the conduct intimidating, hostile or abusive. The 'reasonable person' standard includes considerations of the perspective of persons of the alleged victim's . . . gender . . . ."[445]

Potential pitfalls remain. Problems will arise through use of shorthand labels to describe the process appropriate for a fact-based analysis. Any label like reasonable, unless properly qualified and contextualized, is easily misconstrued. It might appear to require the jury to assess the reasonableness of the plaintiff's reaction to each separate act of abuse. This would unfairly diminish the seriousness of the behavior and make it too difficult for plaintiffs to prove harassment. A reasonable person test might seem to authorize the jury to find for the plaintiff only if they find her a reasonable person, or her reactions reasonable. In fact, the plaintiff deserves the benefits of an objective test, which include a favorable finding where a reasonable person would find the alleged conduct hostile and full recompense for her proven injury, whether or not the plaintiff or her reactions personally fit the jury's profile of a reasonable person or response.

Labels like objective and subjective may also be misconstrued to require the sorting of evidence into objective or subjective categories. For example, in making the objective analysis, the jury may inappropriately devalue or ignore the testimony of the plaintiff because it is subjective. The plaintiff's testimony already faces the natural barriers to credibility that a

444. *Id.* at 1524-25.

445. 58 Fed. Reg. 51266-01, 51269 (1993) (proposed C.F.R. § 1609.1(c)) (withdrawn 59 Fed. Reg. 51196 (1994)).

jury will be more skeptical of a party's own testimony and that the employee will have more difficulty mustering witnesses than the employer who most likely pays the wages of most of the witnesses. She should not face such additional burdens under the legal standard, the administration of evidence, or the weighing of evidence at trial.

It is important that courts administer the *Harris* standard so that a jury will not attempt to determine whether the plaintiff is a reasonable person. The objective assessment may best be understood by being described not as a reasonable person test, but as an inquiry into whether, based on all circumstances, the allegedly discriminatory conduct in the workplace context reasonably could be seen as intimidating, hostile, or offensive, or as unreasonably interfering with the plaintiff's work performance, or both. The jury should be instructed to employ the perspective of someone in the victim's actual situation, and must evaluate the situation considering the role of the plaintiff's gender in the experience.

A jury instruction is only one of several ways to safeguard fair administration of the test. A court can also keep the test balanced by ruling on the admissibility of evidence with two things in mind. First, the claim is not about bad words. A hostile work environment arises from generations of cultural perceptions implying that certain groups have second-class status; these perceptions serve to assign and to reinforce women's subordinate status in the workplace. Second, powerful situational factors reinforce these cultural perceptions of gender. Any jury undertaking the case-based reasoning required to assess the workplace harm must hear fully about both the cultural narratives and the related situational factors that tend to denigrate and subordinate the woman because of her gender.

In sum, *Harris* generally serves the policies and purposes of Title VII, although important questions remain and *Harris*' effectiveness could be vitiated by lower courts' interpretation and application. The law should set out a high standard for employers in preventing sexual harassment. Fairness concerns or First Amendment principles fail to justify placing an additional burden on the plaintiff and are satisfied by *Harris*' more liberal test. The propriety of the *Harris* test, however, cannot finally be judged until the courts, through the admission of evidence and instruction of juries, apply it in a way that counteracts the tendencies of bias against the plaintiff.