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## STUDENT NOTE

### CURRENT HOSTILE ENVIRONMENT SEXUAL HARASSMENT LAW: TIME TO STOP DEFENDANTS FROM HAVING THEIR CAKE AND EATING IT TOO

CATHLEEN MARIE MOGAN\*

*A standard that supposedly treats men and women the same begs the question: "the same as whom?"*<sup>1</sup>

*We acknowledge that men and women are vulnerable in different ways and offended by different behavior.*<sup>2</sup>

*For the first few weeks, James, as he occasionally did with other female employees at the office, made sexual overtures to—in the vernacular of the modern generation, "came on to"—her. Although Plaintiff rejected these efforts, her initial rejections were neither unpleasant nor unambiguous, and gave James no reason to believe his moves were unwelcome.*"<sup>3</sup>

As evidenced by the recent confirmation hearings of Justice Thomas of the United States Supreme Court, sexual harassment in the workplace is an issue which is generating growing concern. To date, sexual harassment has been dealt with in a patchwork fashion—plaintiffs bring claims through private company complaint procedures, through the Equal Employment Opportunity Commission's (EEOC) complaint procedures, through federal courts under the auspices of Title VII of the Civil Rights Act of 1964, and through the state courts under more general torts such as extreme and outrageous behavior and severe and emotional distress. None of

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1. CATHARINE MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 174 (1979).

2. *Yates v. Avco Corp.*, 819 F.2d 630, 637 n.2 (6th Cir. 1987).

3. *Dockter v. Rudolf Wolff Futures, Inc.*, 913 F.2d 456, 459 (7th Cir. 1990).

these remedies have proven satisfactory—in particular, the record of Title VII claims in the federal courts has been disappointing. The time has come to confront the problem head on. The ultimate solution may be a federal statute, tailored to address specifically the issue of sexual harassment. In the absence of such a federal statute, this paper proposes both reforming and unifying Title VII claims, and developing a state law tort of sexual harassment. Part I of this paper will trace the development of the Title VII sexual harassment claim of hostile work environment. Part II will propose ways to resolve questions remaining open in hostile work environment claims. Part III will discuss the larger issues—the tensions between free expression rights and equality rights, between federal and state law, and between competing policies of equality and compensation. Part IV will conclude that reforming and unifying the elements of Title VII claims, as well as developing a separate tort for sexual harassment in the state courts, will provide a remedy for both the plaintiff who only wants to go back to work in an environment cleared of sexual harassment, and the plaintiff who has been seriously harmed and wants compensatory and punitive damages.

# I. DEVELOPMENT OF THE SEXUAL HARASSMENT CLAIM OF HOSTILE WORK ENVIRONMENT IN THE CIRCUIT COURTS

Title VII of the Civil Rights Act of 1964 provides that no employer shall “discharge any individual, or otherwise to discriminate against any individual with respect to his [or her] compensation, terms, conditions or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”<sup>4</sup> Under Title VII, sexual harassment claims are brought in federal courts as a type of sex discrimination. The federal courts have divided sexual harassment claims into two types: “quid pro quo” and “hostile work environment.”<sup>5</sup> Quid pro quo harassment occurs when a victim loses tangible job benefits for rejecting sexual advances. Hostile work environment harassment occurs when a victim is sexually harassed so that her working conditions become offensive and unbear-

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4. 42 U.S.C. § 2000e-2(a) (1988).

5. In practice, “[h]ostile environment and *quid pro quo* harassment causes of action are not always clearly distinct and separate. The discrimination which gives rise to them is not neatly compartmentalized but . . . the two types of claims may be complementary to one another.” Carrero v. New York City Hous. Auth., 890 F.2d 569, 579 (2d Cir. 1989).

able, but she is not necessarily denied any tangible job benefits. This paper is concerned primarily with hostile work environment sexual harassment.

The Eleventh Circuit laid out what is required to establish a prima facie case for hostile work environment sexual harassment under Title VII in 1982 in *Henson v. City of Dundee*.<sup>6</sup> In *Dundee*, two female police dispatchers alleged sexual harassment by the chief of the police department.<sup>7</sup> The harassment included "numerous harangues of demeaning sexual inquiries and vulgarities," and repeated requests for sexual relations.<sup>8</sup> The court adopted this prima facie case:

The plaintiff must prove that 1) she belongs to a protected group; 2) she was subject to unwelcome sexual harassment; 3) the harassment was based on sex; 4) the harassment affected a term, condition, or privilege of employment; and 5) the employer knew or should have known of the harassment in question and failed to take prompt remedial action.<sup>9</sup>

The court held that determining whether sexual harassment is sufficiently severe and persistent to affect a condition of employment "is a question to be determined with regard to the totality of the circumstances."<sup>10</sup> With respect to the first element, the court noted that the plaintiff need only prove that he or she is a man or a woman.<sup>11</sup> Regarding the second element, that the plaintiff was subject to unwelcome sexual harassment, the court meant unwelcome "in the sense that the employee did not solicit or incite it, and in the sense that the employee regarded the conduct as undesirable or offensive . . . [which is] an evidentiary question well within the courts' ability to resolve."<sup>12</sup> In the third element, that the harassment was based on sex, the court noted that in most cases, it will be easy for a female to prove that but for her sex, she would not have been

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6. 682 F.2d 897 (11th Cir. 1982).

7. *Id.* at 899.

8. *Id.* While I realize that a detailed review of the particular facts of these cases may well be offensive to some readers, an appreciation of what has actually been said and done in these work environments is indispensable to a realistic understanding of the issues in sexual harassment cases. Consequently, throughout this essay I review the factual bases for the sexual harassment claims.

9. *Id.* at 903-05.

10. *Id.* at 904 (citing 29 C.F.R. § 1604.11(b)(1981)).

11. *Id.* at 903.

12. *Id.*

harassed by her male supervisor. However, the court further noted that

there may be cases in which a supervisor makes sexual overtures to workers of both sexes or where the conduct complained of is equally offensive to male and female workers. . . . In such cases, the sexual harassment would not be based upon sex because men and women are accorded like treatment. Although the plaintiff might have a remedy under state law, . . . the plaintiff would have no remedy under Title VII.<sup>13</sup>

In *Dundee*, although the court found that the plaintiff had established a prima facie case of hostile work environment, it concluded that she was not entitled to an injunction to stop the harassment as she no longer worked for the defendants, and also that she could not be awarded "damages for mental suffering or emotional distress under Title VII." She could, however, "recover nominal damages if she prevails in a new trial and thereby becomes eligible for an award of attorneys fees."<sup>14</sup> The *Dundee* test was later adopted either completely or as a starting point for building a prima facie case in many of the other circuits.

It was not until four years later, in 1986, that another watershed case in hostile work environment sexual harassment was decided: the Sixth Circuit's *Rabidue v. Osceola Refining Co.*<sup>15</sup> In *Rabidue*, the court considered, in its analysis, the fact that the plaintiff was "a capable, independent, ambitious, aggressive, intractable, and opinionated individual"—a woman who moved up from executive secretary to administrative assistant to credit manager to office manager, who was, according to the record, thought of as "an abrasive, rude, antagonistic, extremely willful, uncooperative and irascible personality."<sup>16</sup> In short, according to the court, "plaintiff was a troublesome employee."<sup>17</sup> The defendant was an "extremely vulgar and crude individual who customarily made obscene comments about women generally, and, on occasion, directed such obscenities to the plaintiff."<sup>18</sup> Management was aware of this. In addition, other males in the office displayed pictures of nude or scantily clad women which plaintiff and other women were

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13. *Id.* at 904.

14. *Id.* at 905.

15. 805 F.2d 611 (6th Cir. 1986).

16. *Id.* at 615.

17. *Id.*

18. *Id.*

exposed to.<sup>19</sup> The court set out the standard that many circuits have followed since:

[A] plaintiff, to prevail in a Title VII offensive work environment sexual harassment action, must assert and prove that: (1) the employee was a member of a protected class; (2) the employee was subjected to unwelcomed sexual harassment in the form of sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature; (3) the harassment complained of was based upon sex; (4) 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; and (5) the existence of respondeat superior liability.<sup>20</sup>

To begin with, as in *Dundee*, the court held that the "plaintiff must demonstrate that she would not have been the object of harassment but for her sex."<sup>21</sup> In addition, instances of complained of sexual harassment that prove equally offensive to male and female workers would not support a Title VII sexual harassment charge because both men and women were accorded like treatment.<sup>22</sup> The court held:

sexually hostile or intimidating environments are characterized by multiple and varied combinations and frequencies of offensive exposures. . . . To accord appropriate protection to both plaintiffs and defendants in a hostile and/or abusive work environment sexual harassment case, the trier of fact, when judging the totality of the circumstances impacting upon the asserted abusive and hostile environment . . . must adopt the perspective of a reasonable person's reaction to a similar environment under essentially like or similar circumstances. . . .<sup>23</sup>

The particular plaintiff would then:

also be required to demonstrate that she was actually offended by the defendant's conduct and that she suffered some degree of injury as a result of the abusive and hostile work environment. Accordingly, a proper assess-

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19. See *id.*

20. *Id.* at 619-20.

21. *Id.* at 620 (citing *Hensen v. City of Dundee*, 682 F.2d 897 (11th Cir., 1982)).

22. See *id.*

23. *Id.*

ment . . . would invite consideration of such objective and subjective factors as 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.<sup>24</sup>

Under this analysis, the court concluded that the findings in each case "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."<sup>25</sup> The court noted approvingly the district judge's opinion that "[s]exual jokes, sexual conversations, and girlie magazines may abound. Title VII was not meant to—or can—change this."<sup>26</sup> Finally, the court dismissed plaintiff's claim on the basis that the defendant's "obscenities, although annoying, were not so startling as to have affected seriously the psyches of the plaintiff or other female employees," and that:

the sexually oriented poster displays had a de minimis effect on the plaintiff's work environment when considered in the context of a society that condones and publicly features and commercially exploits open displays of written and pictorial erotica at the newsstands, on prime-time television, at the cinema, and in other public places.<sup>27</sup>

*Rabidue* is remarkable, however, not for the majority opinion, but for the dissent of Judge Keith. Judge Keith's dissent changed the course of sexual harassment law in that it encouraged courts to be more sensitive to the perspective and perceptions of women.

Judge Keith, in his oft-cited opinion, dissented and found that "[t]he overall circumstances of plaintiff's workplace evince an anti-female environment."<sup>28</sup> In Judge Keith's view, "the

24. *Id.*

25. *Id.*

26. *Id.* at 620-21.

27. *Id.* at 622.

28. *Id.* at 623. Judge Keith also noted some of the details from the record, such as the longtime poster which "showed a prone woman who had a golf ball on her breasts with a man standing over her, golf club in hand, yelling "Fore" and the defendant's constant referral to women as "whores," "cunt," "pussy" and "tits," as well as his comment in reference to plaintiff,

reasonable person perspective fails to account for the wide divergence between most women's views of appropriate sexual conduct and those of men."<sup>29</sup> Instead, he

would have courts adopt the perspective of the reasonable victim which simultaneously allows courts to consider salient sociological differences as well as shield employers from the neurotic complainant . . . 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.<sup>30</sup>

Judge Keith found fault with the majority's position on the plaintiff's 'assumption of the risk' factor, saying, "Title VII's precise purpose is to prevent such behavior and attitudes from poisoning the work environment of classes protected under the Act."<sup>31</sup> He also disagreed with the majority's consideration of the defendants' backgrounds, analogizing, "[n]o court analyzes the background and experience of a supervisor who refuses to promote black employees before finding actionable race discrimination."<sup>32</sup> More generally, he found "these subjective factors create an unworkable standard by requiring the courts to balance a morass of perspectives."<sup>33</sup> He believed that the "society" touted by the majority,

must primarily refer to the unenlightened; I hardly believe reasonable women condone the pervasive degradation and exploitation of female sexuality perpetrated in American culture. . . . The presence of pin-ups and misogynous language in the workplace can only evoke and confirm the debilitating norms by which women are primarily and contemptuously valued as objects of male sexual fantasy. That some men would condone and wish to perpetrate such behavior is not surprising. . . . [T]he relevant inquiry at hand is what the reasonable woman would find offensive, not society, which at one point also condoned slavery.<sup>34</sup>

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"All that bitch needs is a good lay." *Id.* at 624. He also noted the inconsistencies in the record involving the plaintiff's alleged "abrasiveness" and "aggressiveness." *Id.*

29. *Id.* at 626.

30. *Id.* (citations omitted).

31. *Id.*

32. *Id.* at 627.

33. *Id.*

34. *Id.*



Judge Keith concluded that sexual posters and anti-female language could affect both the work performance and the psychological well-being of women, and that "the hostile environment standard set forth in the majority opinion shields and condones behavior Title VII would have the courts redress."<sup>35</sup>

The hostile work environment sexual harassment issue reached the U.S. Supreme Court in the same year that *Rabidue* was decided. In *Meritor Savings Bank v. Vinson*,<sup>36</sup> the Court divided up sexual harassment cases into "hostile work environment" and "quid pro quo" claims, and held that unless a victim is claiming "quid pro quo" harassment, the victim must show that the harassment created a "hostile" or "offensive" work environment.<sup>37</sup> The Court also determined that a victim of sexual harassment who has engaged in sexual activities with a supervisor need not show that her participation was "involuntary," but merely that the sexual advances were "unwelcome."<sup>38</sup> The *Rabidue* and *Vinson* cases greatly expanded societal awareness of the legal existence of hostile work environment sexual harassment, and the federal circuit courts began to resolve some of the questions left open by these two cases.

## II. RESOLVING THE QUESTIONS LEFT OPEN IN HOSTILE WORK ENVIRONMENT SEXUAL HARASSMENT CLAIMS

Although the area of hostile environment sexual harassment has developed rapidly in recent years, the federal courts have yet to devise uniform standards. One commentator claims that there are two questions left open by both the EEOC and the courts: when is harassment pervasive enough to constitute a violation, and through whose viewpoint (that of a reasonable plaintiff, a subjective plaintiff, a reasonable defendant,

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35. *Id.* at 627-28. A year later, in *Yates v. Avco Corp.*, 819 F.2d 630 (6th Cir. 1987), the Sixth Circuit reversed itself and agreed with Judge Keith: 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.

*Id.* at 637. In a footnote, the court cited Judge Keith's dissent and added, "Were this a sexual harassment case involving a male subordinate, the 'reasonable man' standard should be applied. We acknowledge that men and women are vulnerable in different ways and offended by different behavior." *Id.* at 637 n.2.

36. 477 U.S. 57 (1986).

37. *Id.* at 65-68.

38. *Id.* at 68-69.

or a subjective defendant) are we to judge "pervasive?"<sup>39</sup> In the wake of *Vinson*, I would add a third question—how is "welcomeness" to be determined?

### A. Pervasiveness

In the federal circuits, there is currently a wide variety of perspectives on the degree of "pervasiveness" of harassment required to establish a hostile work environment claim. Judicial opinions may vary greatly, even within a circuit. For example, in *Waltman v. International Paper Co.*,<sup>40</sup> the plaintiff brought charges of hostile environment sexual harassment against her employer, the International Paper Company (IPCO). The harassment had begun when a co-worker broadcast obscenities about Waltman over the mill powerhouse public address system. Other employees began to make suggestive comments to Waltman. When Waltman complained to her supervisor, he told the employees to stop, but no one was punished or written up in the files, and Waltman was transferred to another unit. Waltman's new supervisor, Garrett, urged her to have sex with a co-worker, and himself touched Waltman in offensive ways—such as pinching her buttocks with pliers and trying to put his hands in her back pockets. Waltman received over thirty pornographic notes in her locker, and other employees continued to make suggestive comments to and proposition her. The powerhouse and restroom walls, as well as the elevator, were covered with sexually explicit pictures, graffiti, and drawings of naked men and women.<sup>41</sup> Waltman reported all of this to a manager who allegedly told her that she "should expect this type of behavior working with men."<sup>42</sup> This supervisor did not discipline anyone or investigate Waltman's claims—instead, he transferred Waltman. An IPCO employee told a truck driver from another company which did business with IPCO that Waltman was a "whore" and would get hurt if she did not keep her mouth shut. Another IPCO employee told Waltman that "he would cut off her left breast and shove it down her throat"

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39. Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV. L. REV. 1449, 1459 (1984).

40. 875 F.2d 468 (5th Cir. 1989).

41. *Id.* at 471. In a footnote, the court noted that etched in paint in eight inch letters on the elevator was the inscription, "Sue [Waltman] is a whore." On the walls there were the inscriptions, "Sue sucks everybody's dick," "I am going to eat Sue's pussy," and "Sue has a nice pussy." *Id.* at 471 n.2. In addition, co-workers hung used tampons from their lockers. *Id.* at 471.

42. *Id.*

and later "dangled Waltman over a stairwell, more than thirty feet from the floor."<sup>43</sup> In addition to the continuing and constant lewd and suggestive comments to Waltman, there were two further incidents. One employee pinched her breasts, and another grabbed her thigh. At this point, Waltman left work when she suffered a psychological illness, allegedly due to the harassment. She reported this to her supervisor, who reported this to his supervisors, who then met with Waltman.<sup>44</sup>

IPCO did not reprimand Garrett or any of the others who had harassed Waltman, nor did IPCO further investigate any of Waltman's claims. After the meeting, IPCO sent Waltman a letter saying that in order to investigate, they had to identify her. The letter stated that if she pursued the investigation, it would "hurt her chances of a promotion and make it impossible for her to work at the mill."<sup>45</sup> Waltman never did invoke the formal grievance procedure at the mill. The only apparent action taken by IPCO was to wash the graffiti off the walls occasionally, and to require plant supervisors to read the plant policy on sexual harassment out loud at a shift meeting. During this reading, however, several workers laughed and commented that "women provoke sexual harassment by wearing tight jeans."<sup>46</sup> Waltman returned to work. A "few days after this shift meeting, an IPCO employee grabbed Waltman's breasts and directed a high pressure hose at her crotch."<sup>47</sup> At this point, Waltman quit and brought charges.

The district court granted a motion for summary judgment for the defendants. It held that most of Waltman's claims were time-barred<sup>48</sup> under Title VII and under state law, as they "did not constitute a continuing violation."<sup>49</sup> In addition, the district court found no sexual harassment under Title VII because IPCO "did not know and should not have known" of the alleged harassment and that when IPCO learned of the harassment, it took prompt remedial action.<sup>50</sup> Waltman appealed, and the EEOC filed an amicus brief urging reversal of the district court. The Fifth Circuit did so.<sup>51</sup>

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43. *Id.*

44. *Id.* at 472.

45. *Id.*

46. *Id.*

47. *Id.*

48. The district court held that all of Waltman's claims were time-barred, except for the incident involving the high pressure air hose, which occurred at the end of her employment. *Id.* at 473.

49. *Id.*

50. *Id.*

51. *Id.* at 482.

IPCO argued that Waltman had not produced sufficient facts to raise an issue regarding whether the incidents of sexual harassment are "recurring and not isolated." They claimed that there was:

(1) no evidence to demonstrate that the people harassing Waltman were acting in concert; (2) there was not a management level policy encouraging such behavior; (3) it was not the same person harassing Waltman and some people only harassed her on one occasion; and (4) too much time elapsed between specific incidents of harassment.<sup>52</sup>

The court responded:

This court has never suggested that a plaintiff bringing a claim of sexual harassment must show a conspiracy among the harassers to prove a continuous violation. . . . The fact that not all the incidents of harassment involved the same people does not show a lack of recurrence or frequency. . . . [G]aps between the specific incidents to which Waltman testified do not demonstrate a lack of continuity.<sup>53</sup>

Indeed, the court suggested that, under *Vinson*, "a hostile environment claim usually involves a continuing violation . . . an individual feels constantly threatened even in the absence of constant harassment."<sup>54</sup> It determined that in looking at the frequency of harassment:

the focus should not be a mechanical calculation. Rather, in light of *Meritor Savings Bank [Vinson]*, the court should review the pattern and frequency of the harassment and determine whether a reasonable person would feel that the environment was hostile throughout the period that formed the basis of the plaintiff's claim. Waltman's evidence of incidents of harassment coupled with the evidence of sexual graffiti throughout the powerhouse could support a finding that the acts of harassment were sufficiently recurrent to create a continuously hostile environment.<sup>55</sup>

Pattern and frequency, as well as severity, have become the standard elements in determining whether harassment is pervasive enough to be actionable.

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52. *Id.* at 475.

53. *Id.* at 475-76.

54. *Id.* at 476.

55. *Id.*

While the district court had found that Waltman did not produce sufficient evidence of the existence of a hostile environment, IPCO's knowledge of the harassment or IPCO's failure to adequately remedy the situation, the appellate court disagreed. It found that Waltman needed to prove her *prima facie* case at trial, but only needed to show a genuine issue of material fact regarding each element to survive summary judgment. The court defined "unwelcome" as "sexual advances, requests for sexual favors, and other verbal and physical conduct of a sexual nature that is unwelcome in the sense that it is unsolicited or unincited and is undesirable or offensive to the employee."<sup>56</sup> The court concluded that Waltman's claims were "sufficiently severe or *pervasive* to alter the conditions of [the victim's] employment and create an abusive working environment,"<sup>57</sup> that IPCO potentially had both actual and constructive notice, and remanded for a full trial on the merits.<sup>58</sup>

Judge Edith H. Jones dissented vigorously. She found that the sexual harassment which took place over a period of two and one half years, "consists of several isolated incidents of unwanted physical contact, an obscene statement made over the plant public address system, plus several remarks addressed to her."<sup>59</sup> The dissonance between Judge Jones' dissent and the majority opinion regarding the same trial record highlights the differences found in perceptions of "pervasiveness." Judge Jones thought "several factors counsel against allowing a hostile environment to proceed in this case." These factors included the fact that "only co-workers and non-employees [in general not supervisors]" were harassing the plaintiff, that "only one man was involved in more than one physical incident," and that the "incidents were spaced well apart chronologically."<sup>60</sup> In effect, Judge Jones argued that the incidents of harassment were not "frequent" enough. Judge Jones noted that IPCO had taken action, and that Waltman had "never resorted to the company grievance procedure."<sup>61</sup> She found that *Vinson* cannot be reconciled with the majority's position that "even a woman who was never herself the object of harassment might have a Title VII claim if she were forced to

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56. *Id.* at 477. This issue of "welcomeness" is more thoroughly addressed *infra* part II B.

57. *Id.* (quoting *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986)) (emphasis added).

58. *Id.* at 478, 482.

59. *Id.* at 483.

60. *Id.*

61. *Id.* at 484.

work in an atmosphere in which such harassment was pervasive.”<sup>62</sup> She went further and suggested that the “unwelcomeness” standard in *Vinson* “lends a subjective component to the definition.”<sup>63</sup> Moreover, she found that the *Vinson* ‘severe and pervasive’ qualifications,

are intended to set an objective floor on allegations of sexual harassment. Such language does not, for instance, suggest that whenever a victim *feels* abused, she has a cause of action under Title VII. . . . We have so little social consensus in sexual mores nowadays that, short of incidents involving unwanted physical contact, it is impossible generally to categorize unacceptable sexual etiquette. It is likewise impossible to eradicate sexual conduct from the workplace—without unthinkable intrusiveness.<sup>64</sup>

Judge Jones complained that the majority “creates the unpalatable possibility that a woman might sue her employer for consensual conduct that others undertook among themselves.”<sup>65</sup> She concluded, “Surely, such invasions of privacy cannot have been the object of banning sexual harassment in the workplace.”<sup>66</sup> While I strongly disagree with Judge Jones’ conclusions based on the record, she does point out one of the most serious problems with the developing law of standards in sexual harassment cases: how does one balance the individual protections granted by the First Amendment to the defendant against the injustice of some of the crude, harassing and offensive verbal attacks made by them to plaintiffs in the workplace?<sup>67</sup>

Other circuits have adopted tests for pervasiveness similar to *Waltman*. For instance, in a Second Circuit case, *Carrero v. New York City Housing Authority*,<sup>68</sup> a plaintiff appealed “from a judgment that found her subjected to a hostile working envi-

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62. *Id.* (quoting *Vinson v. Taylor*, 753 F.2d 141, 146 (D.C. Cir. 1985)). Judge Jones also noted that as for lewd language or graffiti, the “EEOC guidelines explicitly exempt incidental uses of offensive language” and do not refer to graffiti at all. These factors “suggest” to Judge Jones that “these matters may not be so severe or pervasive as to constitute actionable sexual harassment.” *Id.* at 484 n.5.

63. *Id.* at 484.

64. *Id.*

65. *Id.* Plaintiffs in other circuits have done just that.

66. *Id.*

67. These first amendment concerns are more fully addressed *infra* part III.

68. 890 F.2d 569 (2d Cir. 1989).

ronment on account of her sex."<sup>69</sup> While working for the City Housing Authority, the plaintiff was transferred after she was "subjected to insulting and demeaning conduct by co-workers, one of whom dropped his pants in front of her."<sup>70</sup> She persevered, and was eventually made assistant superintendent. Her supervisor, Peterson, who was known to be "flirtatious," was at first friendly and cooperative. However, he later began to make sexual advances to plaintiff, touching her knee and kissing her neck. Even after she made it "crystal clear . . . that she wanted him to stop touching her," he continuously attempted to touch and kiss her.<sup>71</sup> At one point, after threatening to fail her on a probationary report, he again stroked her arm and tried to kiss her—at which plaintiff struck him across the nose with a ruler, knocking his eye glasses off. Soon after, he publicly criticized her work performance, reducing her to tears.<sup>72</sup>

The defendants in *Carrero* argued that:

Peterson's conduct, though not a paradigm of modern inter-gender workplace relations, was not pervasive enough to trigger relief under Title VII, and federal law does not punish "trivial behavior" consisting of only "two kisses, three arm strokes," several degrading epithets and other objectionable—but ultimately harmless—conduct.<sup>73</sup>

Although the court quoted an earlier Second Circuit case, *Lopez v. S.B. Thomas, Inc.*,<sup>74</sup> which said that incidents must be more than episodic—they must be sufficiently continuous and concerted in order to be deemed pervasive<sup>75</sup>—it disagreed with the defendants:

We emphatically reject this argument. A female employee need not subject herself to an extended period of demeaning and degrading provocation before being entitled to seek the remedies provided under Title VII. It is not how long the sexual innuendos, slurs, verbal assaults, or obnoxious course of conduct lasts. The offensiveness of the individual actions complained of is also a factor to be considered in determining whether

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69. She appealed because, other than ordering reinstatement, her claims for compensatory damages were denied, and the amount for attorney's fees granted was less than she had requested. *See id.* at 572.

70. *Id.*

71. *Id.* at 573.

72. *See id.*

73. *Carrero*, 890 F.2d at 578.

74. 831 F.2d 1184 (2d Cir. 1987).

75. *See id.* at 1189.

such actions are pervasive. A complaining employee is required to prove that such conduct was unwelcome, that the conduct was prompted simply because of the employee's gender, and that the conduct was sufficiently pervasive to create an offensive environment antithetical to the priority of merit—not sex or some other prohibited criterion—in the workplace.<sup>76</sup>

Thus, the court believed that “offensiveness” of conduct is a factor in pervasiveness, as well as the duration of the harassment. Note, however, that the court did not factor in “frequency.” *Carrero* concluded, “The facts here plainly demonstrate that Peterson’s conduct was unsolicited and unwelcome and that Carrero’s working environment was pervasively altered by his advances.”<sup>77</sup> Furthermore, Peterson’s position as Carrero’s immediate superior and chief evaluator gave him “a position of power over her that, in combination with his unwelcome sexual advances, was tantamount to coercion,” and “created for appellant a hostile working environment in violation of Title VII.”<sup>78</sup>

The Eighth Circuit has yet another test which takes into account acts of harassment directed at other employees in addition to those directed at the plaintiff in determining pervasiveness. In *Hall v. Gus Construction Co.*,<sup>79</sup> the court affirmed a magistrate’s ruling in favor of three plaintiffs who brought hostile work environment claims. The women, all single mothers in their thirties, were hired as traffic controllers by Munsdorf. The women were subjected to nonstop sexual abuse by male members of the construction crew—incessantly referred to as “fucking flag girls.”<sup>80</sup> The term was even used by their supervisor Munsdorf on one occasion. Crew members wrote “Cavern Cunt” and “Blond Bitch” on one plaintiff’s car, and plaintiffs were repeatedly asked if they “wanted to fuck.”<sup>81</sup> Munsdorf talked to crew members, but verbal abuse soon resumed and the women later quit. In addition to the verbal assault, there was offensive unwelcomed physical touching. The men would corner plaintiffs between two trucks, reach out the windows and rub their hands down the womens’ thighs. One man picked up one of the plaintiffs and held her up to a cab window so other men could touch her. Munsdorf observed

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76. *Carrero*, 890 F.2d at 578.

77. *Id.*

78. *Id.*

79. 842 F.2d 1010 (8th Cir. 1988).

80. *Id.* at 1012.

81. *Id.*



this incident and did nothing.<sup>82</sup> The men also pulled their pants down and mooned the women, flashed obscene pictures of naked couples engaged in oral intercourse, and urinated in the plaintiffs' water bottles.<sup>83</sup>

On appeal, the defendants argued that "the district court erred in not distinguishing between conduct of a sexual nature and other forms of harassment," and that "the harassment . . . was not sufficiently severe or pervasive to affect a condition of employment."<sup>84</sup> In addition, the defendants, who had taken to calling one of the plaintiffs "Herpes" after she experienced a severe sun allergy, argued that this was not sexual, but instead "analogous to 'Scarface,' a nickname Al Capone wore proudly but which might bother a more sensitive person."<sup>85</sup> In response to a charge that they had urinated in plaintiff's gas tank, the defendants retorted that this "was a practical joke . . . not conduct of a sexual nature."<sup>86</sup> The court responded that a claim, "need not be clearly sexual in nature. . . . Intimidation and hostility toward women because they are women can obviously result from conduct other than explicit sexual advances."<sup>87</sup>

In addition, the court found that the work conditions were indeed "sufficiently severe or pervasive," commenting, "each of the women was subjected to a plethora of offensive incidents."<sup>88</sup> More important, the court broke from some of the other circuits, holding that "evidence . . . directed at employees other than the plaintiff is relevant to show a hostile work environment."<sup>89</sup> The court concluded:

[W]e note that the conduct and language complained of went far beyond that which even the least sensitive of persons is expected to tolerate in this era of generally impoverished discourse. In this day when certain so-called comedians command millions for spewing forth on film language of the drill field, perhaps each of us, consciously or not, has become inured to that which even two short decades ago might have been considered beyond the pale of colloquial speech. Title VII does not mandate an employment environment worthy of a Victo-

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82. *Id.*

83. *Id.*

84. *Id.* at 1013.

85. *Id.* at 1013 n.4.

86. *Id.* at 1014.

87. *Id.*

88. *Id.* at 1015.

89. *Id.*

rian salon. Nor do we expect that our holding today will displace all ribaldry on the roadway. . . . [I]n the heat and dust of the construction site language of the barracks will always predominate over that of the ballroom. What occurred in this case, however, went well beyond the bounds of what any person should have to tolerate. [The plaintiffs themselves expected and used profanity.] They did not expect, however, the unrelenting pattern of verbal, physical, and psychic abuse to which they were ultimately subjected.<sup>90</sup>

The court attempted to draw the line as to where office give-and-take becomes abuse — a line which is being addressed more often as society begins to re-examine what behavior is appropriate in the workplace.

The following two cases reflect the extremes in “pervasiveness” questions—where one incident is enough to find a sufficiently pervasive hostile environment, and where one incident is not enough. In *Bohen v. City of East Chicago*,<sup>91</sup> the Seventh Circuit held that a single act can be enough to constitute hostile work environment sexual harassment.<sup>92</sup> In *Bohen*, the sexual harassment consisted of pelvic contact, profane and lewd language by immediate supervisor, and descriptions of sexual fantasies by male employees targeting Bohen.<sup>93</sup> According to the court, “Forcing women and not men to work in an environment of sexual harassment is no different than forcing women to work in a dirtier or more hazardous environment than men simply because they are women.”<sup>94</sup>

In contrast, the Fourth Circuit held that a specific single incident was not pervasive enough to be helpful in drawing lines between acceptable and unacceptable workplace behavior. In *Cobbins v. School Board of Lynchburg*,<sup>95</sup> the court affirmed a summary judgment for the defendants on a sexual harassment claim because the plaintiff was not able to make out a prima facie case. The plaintiff, a teacher, claimed sexual advances and disparate treatment, but the only evidence the court found was that the defendant, the principal at the school, had once

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90. *Id.* at 1017-18.

91. 799 F.2d 1180 (7th Cir. 1986).

92. *See id.* at 1186-87.

93. *See id.* at 1182-83.

94. *Id.* at 1185-86. On the other hand, although the court found hostile work environment and sexual harassment, it noted that no damages could be awarded under Title VII, and that only Congress can amend Title VII to grant damages. *See id.* at 1184.

95. No. 90-1754, 1991 U.S. App. LEXIS 526 (4th Cir. Jan. 23, 1991).

asked her out for a glass of wine and had reprimanded her on another occasion for refusing to perform certain tasks that she saw as secretarial.<sup>96</sup> Both the district and appellate court agreed that the totality of the circumstances did not amount to "the creation of a pervasively hostile work environment due to her gender."<sup>97</sup> The supervisor's request was not harassment because 1) he did not attempt to pressure her into accepting the offer, 2) he did not attach the offer to any job-related incentive, and 3) he did not ask again after Cobbins refused the offer.<sup>98</sup> The court noted that the EEOC has also deemed a single request okay. The court concluded, "a one-time request—absent coercive elements and demands—is not sufficient to have 'altered the conditions' of Cobbins' workplace."<sup>99</sup>

The development in the circuit courts of a test which considers both severity and frequency of harassment is encouraging. Under the severity/frequency test, a single incident may be considered pervasive if it is severe, but less offensive behavior must be more frequent to rise to the level of pervasiveness. The Ninth Circuit seems to have revolutionized not only this concept of pervasiveness, but other aspects of the hostile work environment claim as well. In a ground-breaking decision, *Ellison v. Brady*,<sup>100</sup> the Ninth Circuit developed a new test to determine when "conduct is sufficiently severe or pervasive to alter the conditions of employment and create a hostile working environment."<sup>101</sup> In *Ellison*, an IRS agent filed charges of sexual harassment when one of her fellow employees began hanging around her desk, "pestering" her, and writing her strange and sexual notes and letters. Initially, the IRS attempted to address the problem. They transferred the co-worker, but eventually allowed him to return to the plaintiff's office. The plaintiff then filed charges with the IRS and obtained a temporary transfer to another office. The co-worker sought joint counseling and wrote the plaintiff "another letter which still sought to maintain the idea that he and Ellison had some type of relationship."<sup>102</sup> The IRS agreed that the conduct constituted sexual harassment, but did not find "a pattern or practice" as required by the EEOC guidelines.<sup>103</sup> When the EEOC

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96. *Id.* at \*2.

97. *Id.* at \*7.

98. *Id.*

99. *Id.* at \*8.

100. 924 F.2d 872 (9th Cir. 1991).

101. *Id.* at 873.

102. *Id.* at 874-75.

103. *Id.* at 875.

affirmed the steps taken by the IRS, the plaintiff took her case to a district court which in turn affirmed the EEOC's ruling.<sup>104</sup>

The Ninth Circuit reversed, recognizing "that sexual harassment is a rapidly expanding area of the law."<sup>105</sup> The court reaffirmed a test set forth in *Jordan v. Clark*,<sup>106</sup> a Ninth circuit decision which held that in order to prove hostile work environment sexual harassment, a plaintiff must show that:

- 1) she was subjected to sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature; 2) that the conduct was unwelcome; and
- 3) that the conduct was sufficiently severe or pervasive to alter the conditions of her employment and create an abusive working environment.<sup>107</sup>

In response to the government's argument in *Ellison* that its employee's conduct toward the plaintiff was not of a sexual nature, the court replied, "the three page letter . . . makes several references to sex and constitutes verbal conduct of a sexual nature."<sup>108</sup> The court made a de novo review as to whether the conduct was "sufficiently severe or pervasive," and disagreed with the district court that the conduct was "isolated and genuinely trivial."<sup>109</sup> It found that the Supreme Court in *Vinson* had "implicitly adopted the EEOC's position that sexual harassment which unreasonably interferes with work performance violates Title VII. . . . Conduct which unreasonably interferes with work performance can alter a condition of employment and create an abusive working environment."<sup>110</sup> Commenting that the employee's conduct "falls somewhere between forcible rape and the mere utterance of an epithet," as well as being less "pervasive" than the sexual comments and advances in other previous Ninth Circuit cases,<sup>111</sup> the court declined to follow the standards in the *Rabidue*<sup>112</sup> decision. It rejected both a

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104. *Id.*

105. *Id.* at 875 n.4.

106. 847 F.2d 1368 (9th Cir. 1988).

107. *Ellison*, 924 F.2d at 875-76 (quoting *Jordan*, 847 F.2d at 1373).

108. *Id.* at 875 n.5.

109. *Id.* at 876.

110. *Id.* at 877.

111. *Id.*

112. 805 F.2d 611 (6th Cir. 1986). The court also noted that the Sixth Circuit has "called *Rabidue* into question in at least two subsequent decisions." *Ellison*, 924 F.2d at 877 n.6. See *Yates v. Avco Corp.*, 819 F.2d 630, 637 (6th Cir. 1987) (adopting the holding that sexual harassment should be viewed from the victim's perspective); *Davis v. Monsanto Chemical Co.*, 858 F.2d 345, 350 (6th Cir. 1988), *cert. denied*, 490 U.S. 1110 (1989) (criticizing the *Rabidue* decision and its limited reading of Title VII).

"search for 'anxiety and debilitation' sufficient to 'poison' a working environment"<sup>113</sup> and *Rabidue's* "requirement that a plaintiff's psychological well-being be 'seriously affected.'" <sup>114</sup> Instead, the court decided:

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. . . . Although an isolated epithet by itself fails to support a cause of action for a hostile environment, Title VII's protection of employees from sex discrimination comes into play long before the point where victims of sexual harassment require psychiatric assistance.<sup>115</sup>

Finding that the coworker's conduct was "sufficiently severe and pervasive," the court noted that "the required showing of severity or seriousness of the harassing conduct varies inversely with the pervasiveness or frequency of the conduct."<sup>116</sup>

The court went on to make several unprecedented statements in a sexual harassment case. First, the court said:

We note that the reasonable victim standard we adopt today classifies conduct as unlawful sexual harassment even when harassers do not realize that their conduct creates a hostile working environment. Well-intentioned compliments by co-workers or supervisors can form the basis of sexual harassment. . . . This is because Title VII is not a fault-based tort scheme. "Title VII is aimed at the consequences or effects of an employment practice and not at the . . . motivation" of coworkers or employers.<sup>117</sup>

Second, the court explained that "in some cases the mere presence of an employee who has engaged in particularly severe or pervasive harassment can create a hostile working environment."<sup>118</sup> Under this standard, employers may have to remove employees from the workplace if their mere presence would render the working environment hostile in the eyes of a reasonable victim, may have to dismiss employees who harass other

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113. *Ellison*, 924 F.2d at 877-78.

114. *Id.* at 878.

115. *Id.*

116. *Id.*

117. *Id.* at 880 (quoting *Rogers v. EEOC*, 454 F.2d 234, 239 (5th Cir. 1971)).

118. *Id.* at 883.

employees when there is no way to schedule them at different places or times, and, at a minimum, must educate and sensitize their workforce. The court got around notice problems by saying that "only in very, very few cases will harassers be unaware that their conduct is unlawful when that conduct is so serious that a reasonable victim would thereafter consider the harasser's mere presence sexual harassment."<sup>119</sup> Explaining why it is the harasser who must be "rescheduled," the court stated, "[w]e strongly believe that the victim should not be punished for the conduct of the harasser," i.e. "should not have to work in a less desirable location as a result of an employer's remedy for sexual harassment."<sup>120</sup> Finally, the court reversed, remanded, and supported its holding with statistics concerning the prevalence of sexual harassment in the workplace in general, and the enormous cost (\$267 million) to taxpayers of sexual harassment among federal employees.<sup>121</sup>

### B. *Perspective*

*Ellison* provides a nice transition to the issue of whose perspective to adopt in finding that a work environment is hostile. *Ellison* adopted the "reasonable woman" perspective in an attempt to be progressive and empathetic to the perceptions of women. In determining whose perspective should be used to resolve whether conduct is harassment, the court decided to focus on the perspective of the victim—in this case, that of the reasonable woman:

If we only examined whether a reasonable person would engage in allegedly harassing conduct, we would run the risk of reinforcing the prevailing level of discrimination. Harassers could continue to harass merely because a particular discriminatory practice was common, and victims of harassment would have no remedy.<sup>122</sup>

This focus requires "an analysis of the different perspectives of men and women. Conduct that many men consider unobjectionable may offend many women."<sup>123</sup> The court further justified its standard:

We realize that there is a broad range of viewpoints among women as a group, but we believe that many women share common concerns which men do not neces-

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119. *Id.* at 883 n.19.

120. *Id.* at 882.

121. *Id.* at 880 n.15.

122. *Id.* at 878.

123. *Id.*

sarily share. For example, because women are disproportionately victims of rape and sexual assault, women have a stronger incentive to be concerned with sexual behavior. Women who are victims of mild forms of sexual harassment may understandably worry whether a harasser's conduct is merely a prelude to violent sexual assault. Men, who are rarely victims of sexual assault, may view sexual conduct in a vacuum without a full appreciation of the social setting or the underlying threat of violence that a woman may perceive.<sup>124</sup>

Thus, the court held 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."<sup>125</sup> By the same token, in the case of a male plaintiff, "the appropriate victim's perspective would be that of a reasonable man."<sup>126</sup> Recognizing that the reasonable woman standard will shield conduct that many women today would find offensive, the court apologized, "[f]ortunately, the reasonableness inquiry which we adopt today is not static. As the views of reasonable women change, so too does the Title VII standard of acceptable behavior."<sup>127</sup>

Another reason the court gave for adopting the reasonable woman standard was that "a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women."<sup>128</sup> The court assured that the

reasonable woman standard does not establish a higher level of protection for women than men. Instead a gender-conscious examination of sexual harassment enables women to participate in the workplace on an equal footing with men. . . . [and allows courts to] work towards ensuring that neither men nor women will have to 'run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living.' "<sup>129</sup>

The court found that under the facts of this case, although the alleged harasser could be portrayed as "a modern-day Cyrano

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124. *Id.* at 879.

125. *Id.*

126. *Id.* at 879 n.11.

127. *Id.* at 879 n.12.

128. *Id.* at 879.

129. *Id.* at 879-80 (quoting *Henson v. City of Dundee*, 682 F.2d 897, 902 (11th Cir. 1982)).

de Bergerac wishing no more than to woo Ellison with his words" who "harbored no ill will toward" her, a reasonable woman might well have considered the conduct "sufficiently severe or pervasive to alter a condition of employment and create an abusive working environment."<sup>130</sup> Thus, the court concluded that a "reasonable woman" standard would be most appropriate in determining whether conduct is harassment.

In a thoughtful dissent, however, Judge Stephens found the term "reasonable woman" to be "ambiguous and therefore inadequate."<sup>131</sup> He noted that women are not the only "targets" of sexual harassment and disputed the assumption that men do not have the same sensibilities as women. He then suggested alternatives "more in line with a gender neutral approach" such as "'victim,' 'target' or 'person.'"<sup>132</sup> He pointed out that Title VII was created to eliminate differential treatment of men and women; not to spawn it.<sup>133</sup> He also believed that the majority was misguided in focusing on the victim's perspective and conduct, rather than on that of the harasser, as this focus has been abused in other fields such as rape law: "Modern feminists have pointed out that concentration by the defense upon evidence concerning the background, appearance and conduct of women claiming to have been raped must be carefully controlled by the court to avoid effectively shifting the burden of proof to the victim."<sup>134</sup> Judge Stephens' analysis is persuasive.

To determine whose viewpoint or perception should be used to decide whether harassment is sufficiently hostile and pervasive to meet the elements of a hostile environment claim, most of the circuits seem to have adopted the dual (objective/subjective) test—first determining whether a reasonable plaintiff would have been affected, and then determining whether this particular plaintiff was affected. This, in a sense, puts the plaintiff through double hoops: the plaintiff must prove both that a reasonable plaintiff would have been affected, and that she herself was affected. Whether or not this more difficult test is appropriate will depend on what becomes of Title VII.<sup>135</sup> In addition, the courts vary on whether to employ a reasonable woman, a reasonable victim, or a reasonable person test. The

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130. *Id.* at 880.

131. *Id.* at 884.

132. *Id.*

133. *See id.*

134. *Id.*

135. *See infra* Part III for discussion on possible additions or amendments to Title VII.



reasonable victim standard is preferable as it avoids the "reasonable woman" trap (of discriminating to avoid discrimination) which may become increasingly problematic as the legal system becomes more *truly* gender neutral<sup>136</sup>—if indeed this is the case, and we are not instead moving backward toward disparate legal treatment of the sexes. In addition, the reasonable woman standard disallows the same sensitivity on the part of men. Even if men and women "view similar behavior differently," this is not a phenomenon which should be encouraged. Going further, one commentator recently asked, "Why, despite scholarship revealing that judicial definitions of reasonableness often reflect the values and assumptions of a narrow elite, is the 'objective test' seen as an accurate reflection of societal norms at all?"<sup>137</sup> Although another commentator argued that we do not need to worry about male victims who feel like the more "sensitive" "reasonable woman" as males are not a protected class under Title VII,<sup>138</sup> this argument not only side-steps the issue of how to treat men and women equally without denying their different perceptions of behavior, but also flies in the face of many federal circuit holdings that males are a protected class under Title VII.<sup>139</sup> Finally, as Susan Estrich has argued recently, in another context,

The male domain . . . [i]s protected by manipulating these doctrines to embrace female stereotypes which real women cannot meet. It is protected by a definition of reasonableness that pits this woman against that ideal, that pits one woman against the rest. It is protected by punishing women who are weak for their weakness, and women who are exceptional for their strength. It is protected, in short, by the operation of sexism in law.<sup>140</sup>

Based on these rationales, the most effective and just standard to adopt may be the "reasonable victim" standard, or in the larger sense, a 'new improved' reasonable person. As our society becomes increasingly diverse, one of two scenarios may

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136. "Truly gender neutral" does not envision the present system in which the male-dominated society has used a supposed "neutral" approach to disguise its male bias.

137. Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177, 1178 (1990).

138. Martha Sperry, Comment, *Hostile Environment Sexual Harassment and the Imposition of Liability Without Notice: A Progressive Approach to Traditional Gender Roles and Power Based Relationships*, 24 NEW ENG. L. REV. 917 (1990).

139. See *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982) (holding, as early as 1982, that males are a protected class under Title VII).

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

result. First, we may break the reasonable person down into more and more precise categories: reasonable woman, reasonable black woman, reasonable Catholic black woman, etcetera.<sup>141</sup> Although a Catholic black woman will have a unique perspective, it is simplistic to assume that her experience may be projected onto all Catholic black women. Another problem with this approach is that it may encourage different standards of conduct for different groups of people, thereby becoming a potential tool in the hands of the currently dominant group.<sup>142</sup> The better solution is to expand our legalistic "reasonable person" to embrace the perceptions of emerging groups. Although with this approach, the actions of the "reasonable person" would be less predictable, certain minimum standards of behavior could probably be agreed upon. This would encourage dominant groups to make room for emerging groups as they find their social, economic, and political voices.

### C. Unwelcomeness

Regardless of which perspective is adopted, this only leads to the third question of "unwelcomeness." In actual trials, determining whether sexual advances and comments were "welcome" is going to be a tricky issue. The First Circuit addressed "welcomeness" as well as other elements of hostile work environment sexual harassment in *Lipsett v. University of Puerto Rico*.<sup>143</sup> In *Lipsett*, a female university medical student made out prima facie cases of both hostile work environment and quid pro quo sexual harassment. The court held that to make out a prima facie case of hostile environment sexual harassment, the "plaintiff must show that he or she was subjected to unwelcome sexual advances so 'severe or pervasive' that it altered his or her working or educational environment."<sup>144</sup> The defendant may then show that the events did not take place or were "isolated or genuinely trivial."<sup>145</sup> Under this type of hostile environment sexual harassment, the conduct

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141. See *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1416 (10th Cir. 1987), for the proposition that "discrimination against black females [could] exist even in the absence of discrimination against black men or white women."

142. Again, see *Hicks v. Gates Rubber Co.*, 833 F.2d 1406 (10th Cir. 1987), where Judge Seth missed the point and pointed out in his dissent that as no general "racial hostility" was found by the district court, it is difficult to see what the sexual hostility would be aggregated with.

143. 864 F.2d 881 (1st Cir. 1988).

144. *Id.* at 898 (quoting *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 68 (1986)).

145. *Id.*

"must be sufficiently severe or pervasive 'to . . . create an abusive working environment.'"<sup>146</sup> To determine whether such an environment existed, the court looked to "the record as a whole and the totality of the circumstances."<sup>147</sup>

In addressing the issue of whose perspective should be used in assessing unwelcomeness, the court admitted the importance of the question because "often a determination of sexual harassment turns on whether it is found that the plaintiff misconstrued or overreacted to what the defendant claims were innocent or invited overtures."<sup>148</sup> The court gave an example of a supervisor who might mistakenly believe that it is "legitimate for him to tell a female subordinate that she has a 'great figure' or 'nice legs' " while the female subordinate finds these comments offensive but is afraid to criticize him.<sup>149</sup> It concluded,

both parties must make an effort to overcome this dilemma. The man must be sensitive to signals from the woman that his comments are unwelcome, and the woman, conversely, must take responsibility for making those signals clear. In some instances, a woman may have the responsibility for telling the man directly that his comments or conduct is unwelcome. In other instances, however, a woman's consistent failure to respond to suggestive comments or gestures may be sufficient to communicate that the man's conduct is unwelcome.<sup>150</sup>

Citing a study which found that fifty percent of working women and fifteen percent of working men are sexually harassed on the job, as well as the by then well-known dissent of Judge Keith in *Rabidue*,<sup>151</sup> the court noted that "[u]nless the fact finder keeps both the man's and the woman's perspective in mind, 'defendants as well as the courts [will be] permitted to sustain ingrained notions of reasonable behavior fashioned by the offenders . . . .'"<sup>152</sup>

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146. *Id.* at 897-98 (quoting *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 67 (1986)).

147. *Id.* at 898 (quoting *Meritor Saving Bank v. Vinson*, 477 U.S. 57, 69 (1986)).

148. *Id.*

149. *Id.*

150. *Id.*

151. 805 F.2d 611, 623 (6th Cir. 1986) (Keith, J. dissenting).

152. *Lipsett*, 864 F.2d at 898 (quoting *Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 626 (6th Cir. 1986)).

Although the alleged sexual harassment consisted of nick names, hand-drawn pin-ups of the plaintiff and others, unwelcome sexual advances, experiences of other women in this environment, ratio of men to women in the university program, threats to drive the plaintiff out, and anti-female commentary toward the plaintiff and other women who had been driven out of the program, the district court accepted the defendants' claims that they were unaware of this treatment and issued summary judgment in their favor.<sup>153</sup> The circuit court responded, saying "[b]y accepting defendants' assertions in their entirety, the district court turned the summary judgment proceeding into a trial, and acted as a fact finder."<sup>154</sup> The court held that the plaintiff had made her *prima facie* case of hostile environment sexual harassment merely by "specific allegations that Drs. Rivera and Morales subjected her to repeated and unwelcome sexual advances;"<sup>155</sup> showings which were buttressed by the other alleged facts. The court also intimated that the plaintiff could prove hostile environment sexual harassment by showing that male residents

subjected the plaintiff and other female residents to a constant verbal attack, one which challenged their capacity as women to be surgeons, and questioned the legitimacy of their being in the program at all. This attack, although not explicitly *sexual*, was nonetheless charged with anti-female animus, and therefore could be found to have contributed significantly to the hostile environment.<sup>156</sup>

In response to one of the defendant's contentions that the remarks were "more in jest than in reality," the court remarked, "Dr. Gonzalez' dismissal of these anti-female remarks as mere 'jest' may demonstrate his insensitivity to them. Belittling comments about a person's ability to perform, on the basis of that person's sex, are not funny."<sup>157</sup> The court saw this situation as one of the clashes of perspective that it had previously described, and admonished, "It *could* be that Dr. Gonzalez *thought* that the comments in question were mere 'jest,' but his reaction may reveal more about his role in allowing the hostile environment to continue rather than about

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153. *See id.* at 903-04.

154. *Id.* at 904.

155. *Id.* at 905.

156. *Id.*

157. *Id.* at 906.

whether the comments were 'objectively innocuous.'"<sup>158</sup> The court concluded by reassigning the case to a different trier on remand.<sup>159</sup>

While *Lipsett* looked to the perspective of the plaintiff in solving the question of whether the harassment was "unwelcome," the *Vinson* Court looked to the perspective of the defendant. The *Vinson* Court seemed to suggest that it is the obligation of the harasser to let the harasser know that his (or her) attentions are unwelcome. Although the *Vinson* holding may tend to "blame the victim," using the plaintiff's perspective is also problematic. The modern focus on the plaintiff's perspective is bound to lead to attempts by defendants to show that the plaintiff's perspective of welcomeness was not reasonable. One commentator, arguing an evidentiary analogy between rape and sexual harassment cases in regard to the admissibility of the plaintiff's past sexual history, observed that defendants are likely to seek

to introduce evidence of the plaintiff's sexual experience to show that, given her history, she is less likely to have been offended by the defendant's conduct and its effect on the work environment, or, if a particular individual is not alleged to be the cause of the hostile environment, by the general atmosphere at work. Alternatively, the defendant might seek to introduce evidence of the plaintiff's lack of sexual experience to demonstrate that, in light of the plaintiff's virginal or prudish history, she is more likely to have been oversensitive and unduly offended by what is actually "harmless" conduct or an unoffensive environment.<sup>160</sup>

In this case, the plaintiff loses either way. We might learn from the unjust treatment of plaintiffs found in the history of rape case law.<sup>161</sup> In a refreshing solution to this problem, another commentator has found a clever way out of the dilemma: suggesting that the defendant be required to prove that the plaintiff welcomed *his* specific advances. This rules out evidence of the plaintiff's dress and past personal life in most of the cases, and avoids "forcing women to dress or act in a subdued manner lest someone misconstrue their behavior as a sign of wel-

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158. *Id.* (quoting *Lipsett v. University of Puerto Rico*, 637 F. Supp. 789 (D.P.R. 1986)).

159. The court noted that this was mere custom, and was no reflection on the district judge. *Lipsett*, 864 F.2d at 915.

160. Catherine A. O'Neill, *Sexual Harassment Cases and the Law of Evidence: A Proposed Rule*, 1989 U. CHI. LEGAL F. 219, 236.

161. See generally *id.*

coming sexual activity.”<sup>162</sup> Although determining “welcomeness” may become more important as the standards regarding whose perspective to utilize are clarified and unified, Estrich is correct in stating that

A hostile environment, the courts have consistently held, must be based on objective criteria, evaluated from an “objective” viewpoint. The fact that a particular woman found the environment totally debilitating is beside the point; the question is what other persons, often mythic, would think. . . . [The] welcomeness serves as a means to keep the focus on the woman rather than the supervisor; on what she, rather than he, has done wrong; and on whether *she* deserves to be treated with human decency, rather than whether *he* violated the standards of decency and humanity.<sup>163</sup>

Perhaps the best solution is to determine welcomeness using the plaintiff’s perspective, but imposing an objective requirement on the plaintiff to let the defendant know that his or her conduct is unwelcome. This requirement has usually been met by the time a sexual harassment case has reached the courts. Allowing welcomeness to be determined by the perspective of a reasonable victim will ensure two things. First, defendants will not be permitted to subject plaintiffs to discriminating work environments which they (the defendants) see as fair. Second, defendants will not be subjected to standards of welcomeness that are so subjective as to be unreasonable.

### III. THE LARGER TENSIONS WITHIN SEXUAL HARASSMENT LAW

In determining which standards are most appropriate to adopt, it is useful to explore the context in which they will be utilized. There are several contradictions which must be addressed by a potential hostile work environment sexual harassment test—that between the rights of individuals who are harassed and the rights of free expression of the harassers; that between federal Title VII and state tort law; and that between competing policies of equality and compensation.

In the modern legal community, there is an ever increasing tension between the rights of historically disadvantaged groups to be treated by the community with equality and respect, and

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162. Christopher P. Barton, Note, *Between the Boss and a Hard Place: A Consideration of Meritor Savings Bank, FSB v. Vinson and the Law of Sexual Harassment*, 76 B.U. L. REV. 445, 473 (1987).

163. Estrich, *supra* note 140, at 833.

the rights of individuals to express freely their particular prejudices, stereotyping, and antipathy toward these groups. On the one hand, we wish to protect the freedom of expression granted by the federal Constitution. On the other, we increasingly recognize the rights of women and minorities such as blacks to be included as fully privileged, empowered, and equal members of the community. It is only now, in the late twentieth century, that the protections of both types of rights have been extended so far as to bring them into grinding tension with one another.<sup>164</sup>

This tension is heating up in the rapidly expanding law of sexual harassment. Women, in order to continue their infiltration of the male-dominated economic world, must have the right to be treated as equal members of that world, as well as respect and freedom from rampant hostility and abuse which often follows from that equality. This surely includes the banishment of unwelcome physical touching and unwelcome sexual overtures, and that of office pornography and obscenity. Opponents argue that "name-calling" is not actionable and should not be. Proponents respond that the rules have changed—that women need some new empowerment in order to stop the "name-calling." At one point, some names were "fighting words"—words which are so insulting or "offensive" as to have the effect of force, or at the least, to provoke violence in the listener.<sup>165</sup> Accordingly, as a society becomes more civilized, law steps in and provides alternatives to raw escalative violence. Ironically, as the larger society has become "liberalized," and what were once deemed "fighting words" are now constitutionally protected, individuals are much less protected from the filthiest epithets and vilest names. One is barred from fighting physically, but also left with little legal recourse. Perhaps one might fight back with words, but the voice of one individual is often drowned by the sea of voices arising from the majority, particularly in workplaces where minorities and women are frequently under-represented and outnumbered. Are we left to stolidly accept harassment from our fellow citizens?

By contrast, many are loathe to undercut the all-important freedom of expression which has been so painstakingly built up

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164. See, e.g., *Doe v. University of Michigan*, 721 F. Supp. 852 (E.D. Mich. 1989) (involving statutes banning racial and sexual "hate speech" on campuses, and pornographic calendars and obscene speech in the workplace found to be sexual harassment).

165. See *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942); *Near v. Minnesota*, 283 U.S. 697 (1931).

in our legal system. In this nation, we have long accepted the necessity of allowing obnoxious people to express obnoxious views in order to preserve the sanctity of free speech.<sup>166</sup> Indeed, the very minorities who are demanding the end of this freedom of expression which allows them to be reviled might well be the first to experience the backlash of such a move. For it is this very freedom of expression—the flow of ideas, the use of speech to educate the community—which has allowed minority groups to bring about important changes in the laws affecting them and to end unjustified stereotypical societal thinking. Some of the people most insistent on bringing about societal change are those most nervous about curtailing free speech—and members of both conservative and liberal camps find themselves confused about where the lines should be drawn in balancing these issues. This confusion is particularly relevant, at present, with the recent controversy surrounding campus discrimination policies which penalize verbal harassment.<sup>167</sup> The same confusion has spilt over into the sexual harassment field in recent cases which hold that obscene and offensive office “calendars,” and pictures can automatically create a sexually hostile work environment.

In the case of workplace sexual harassment, however, the issue should be less controversial. Female plaintiff/employees in the workplace are more closely analogized to a captive audience.<sup>168</sup> Under this sort of analysis, “time, place, and manner” restrictions might also apply as harassers are free to express themselves off the job site. In addition, as the cases are primarily being brought by women, they have federal anti-discrimination law as a potent weapon. The federal government has regulated various aspects of employment—wages, health, and discrimination—throughout this century. Why not sexual harassment and abuse? On the other hand, as Title VII has become increasingly protective, for example through punishing mere expression, First Amendment concerns become more problematic.

Which leads to the next question: Should Title VII be the weapon of choice in the battle against sexual harassment in the workplace? There are problems with both the purposes and remedies of Title VII. The purpose of Title VII seems to be to

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166. See *e.g.*, *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942); *Near v. Minnesota*, 283 U.S. 697 (1931); *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978).

167. See, *e.g.*, *Doe v. University of Michigan*, 721 F. Supp. 852 (E.D. Mich. 1989).

168. See generally *Estrich*, *supra* note 140.



provide equality in the workplace for all employees, regardless of race, sex, etcetera. Today, it is being used in sexual harassment hostile environment cases to potentially undercut that goal of equality. We want to free women in the work environment from its male-dominated hostility and abuse. However, given the "workplace" situation as it stands today, in a sense, the more equal we make women, the less equal we make men. As we move closer to varying standards for actionable hostile work environment claims for male and female plaintiffs (reasonable women v. reasonable men), we also come closer to discriminating against the "sensitive male" that feminists have spent the last thirty years trying to create—in effect, breathing new life into the old objectionable stereotypes. Courts love to bring up the legal puzzle of the bisexual harasser, arguing that if the harasser harasses both men and women, his conduct is not actionable under Title VII as men and women are "accorded like treatment."<sup>169</sup> This analysis fails to acknowledge that "like treatment" does not equal "good treatment." In addition, courts are already acknowledging that if a harasser makes unwelcome sexual advances to a woman because she is a woman and he finds her attractive, this is actionable. Thus, one might argue that if a bisexual harasser harasses men because they are men, and women because they are women, the harassment is still actionable in both cases. If we want to end legalized harassment, we must either modify Title VII or find another medium through which to bring these suits. Several of the circuit courts have created a "reasonable plaintiff" or "victim" standard where a plaintiff will be subjected to a "reasonable woman" standard if she is a woman, and to a "reasonable man" standard (a standard under which it is more difficult to recover) if he is a man. This not only perpetuates the negative stereotypes mentioned above, but does not necessarily benefit women either, as more attention becomes focused on the conduct of the victim rather than on that of the harasser.

Another problem with Title VII is that it purports to rectify conditions in a given workplace—not to compensate an employee who has been harmed physically or economically. Title VII is most often utilized by employees who have already been harmed. In recent cases, employees are bringing horrific (evidencing incredibly offensive office practices) *prima facie* hostile environment cases, spending a great deal of money and years in court, and being awarded nominal damages of \$1.00 and potentially, attorneys fees. For example, in *Spencer v. Gen-*

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169. See *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982).

*eral Electric Co.*,<sup>170</sup> a plaintiff brought Title VII hostile environment and quid pro quo sexual harassment claims, as well as several state law claims. The quid pro quo claim was dismissed for failure to prove one element, and the state law claims were also dismissed. The hostile work environment consisted of derogatory and degrading comments about women in general, sexual comments and rampant horseplay, dirty jokes and stories.<sup>171</sup> The plaintiff's department was isolated from the rest of the company, and her supervisor would sit on his subordinate's laps, putting his hands between their legs and down their blouses, insisting that they call his pipe his 'little banger' and throwing pennies down their blouses. The supervisor had had consensual sexual relations with at least two of his female subordinates during plaintiff's tenure. Plaintiff alleged that the situation was culminated by his assaulting and raping her.<sup>172</sup> The Fourth Circuit agreed with the district court that "[a]lthough Spencer has shown that she was forced to work in a hostile environment, she has not demonstrated that she suffered any tangible loss as a result of Neal's conduct."<sup>173</sup> The district court found her economic claims "speculative," and although "the Graphics Office was a workplace at odds with good manners, good taste, professionalism and most importantly, Title VII," it awarded the plaintiff only \$1.00 in damages.<sup>174</sup> The Fourth Circuit affirmed.<sup>175</sup>

Over the last few years, the Seventh Circuit has devised an interesting way around this common problem of no compensatory, nominal or punitive damages for sexual harassment under Title VII: using the Equal Protection Clause of the Fourteenth Amendment. For example, in *Volk v. Coler*,<sup>176</sup> the court held that sexual harassment amounts to sex discrimination under the Equal Protection clause. The court further developed its sexual harassment jurisprudence in *King v. Board of Regents of*

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170. 894 F.2d 651 (4th Cir. 1990).

171. *Spencer v. General Elec. Co.*, 697 F. Supp. 204, 219 (E.D. Va. 1988).

172. *Id.* at 214.

173. *Id.* at 219.

174. *Id.* Although the supervisor had been shown to be lying several times during his testimony through impeachment, both the district and appellate court chose to believe him instead of the plaintiff in several key discrepancies. This was noted in the Fourth Circuit opinion, in a dissent by Judge Murnaghan. *Spencer v. General Elec. Co.*, 894 F.2d 651, 664 (4th Cir. 1990).

175. *Spencer*, 894 F.2d 651.

176. 845 F.2d 1422 (7th Cir. 1988).

*University of Wisconsin System*,<sup>177</sup> In *King*, the plaintiff, an assistant professor, became concerned when Sonstein, the assistant dean, began making suggestive innuendos toward her as well as leering at her in a sexually suggestive fashion.<sup>178</sup> He became "progressively more bold and offensive" in his sexual behavior toward King—he would "touch her, rub up against her, place objects between her legs, make suggestive remarks and comment upon various parts of her body."<sup>179</sup> Other faculty members noticed and commented upon this behavior. Things came to a head when Sonstein followed King into a bathroom at the yearly Christmas party and told her he "had to have her" and that "he would have her."<sup>180</sup> King protested, but Sonstein "forcibly kissed and fondled her."<sup>181</sup> Sonstein relented when King's boyfriend entered the bathroom. He also tried this on other women once King left the party, despite repeated requests that he stop.<sup>182</sup> After this incident, King and Sonstein discussed the situation, and Sonstein refrained from harassing King for the next year and three months.<sup>183</sup>

The court decided that under environmental sexual harassment, "a loss of tangible job benefit is not necessary since the harassment itself affects terms or conditions of employment."<sup>184</sup> It must, however, "deny the plaintiff 'the right to participate in the work place on equal footing with others similarly situated.'"<sup>185</sup> Although affirming the fact that a single incident may constitute a hostile environment, the court stated that "generally, repeated incidents create a stronger claim of hostile environment, with the strength of the claim depending on the number of incidents and the intensity of each incident."<sup>186</sup> Upholding the plaintiff's hostile work environment claim, the court noted that under Title VII she could only seek reinstatement, back pay, and attorney's fees [and not compensatory, nominal or punitive damages].<sup>187</sup> Even recovery of back pay (after plaintiffs are driven to quit and/or bring law

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177. 898 F.2d 533 (7th Cir. 1990).

178. *Id.* at 534.

179. *Id.* at 534-35.

180. *Id.* at 535.

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.* at 537.

185. *Id.* (quoting *Scott v. Sears, Roebuck & Co.*, 798 F.2d 210 (7th Cir. 1986)).

186. *Id.*

187. *Id.*

suits) is extremely limited under sexual harassment claims as there is often no loss of tangible job benefits.

Consequently, instead of treating the case as a Title VII violation, the Seventh Circuit applied an equal protection analysis to the claim. The court maintained that although "the precise parameters of this cause of action have not been well defined," the plaintiff must prove the defendant had intent to harass the plaintiff.<sup>188</sup> The court upheld King's claim under the equal protection clause, rejecting Sonstein's assertion "that his actions were merely the result of his desire for King as an individual and, therefore, were not sex-based harassment."<sup>189</sup> The court noted that in this new cause of action, "[n]o hatred, no animus, and no dislike is required."<sup>190</sup> It rejected Sonstein's claim that "it was King as an individual to whom he was attracted, not King as a woman."<sup>191</sup> Instead, the court found: "Sonstein's sexual desire does not negate his intent; rather it affirmatively establishes . . . [that h]is actions were based on her gender and motivated by his libido."<sup>192</sup> Using the Equal Protection clause to analyze sexual harassment claims is an interesting and attractive option for courts and plaintiffs in the fast developing field of hostile work environment sexual harassment.

The Eighth Circuit has also suggested a new proposal for dealing with harassers under Title VII. In *Jones v. Wesco Investments, Inc.*,<sup>193</sup> Rose, the president of Wesco, sexually harassed

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188. *Id.* In a Title VII action, on the other hand, the inquiry is supposedly solely from the plaintiff's perspective. *Id.* at 537-38. Some courts seem not to recognize this.

189. *Id.* at 538.

190. *Id.* at 539.

191. *Id.*

192. *Id.* Judge Manion dissented. He disagreed with the majority's "conclusion that Steven Sonstein violated the Equal Protection Clause of the Fourteenth Amendment when he sexually harassed Catherine [sic] King." *Id.* at 542. Judge Manion found the pivotal question to be "whether the apparent hostile atmosphere resulted from Sonstein's discriminatory treatment of King based on her membership in a class—female . . . or whether it was confined to a "group" of persons (King) with whom Sonstein had sought to have a romantic affair." *Id.* Judge Manion concluded that Sonstein "harassed King because he was physically attracted to her albeit because she was, in his mind, an attractive woman. . . . [He] put King in a class by herself as his romantic target." *Id.* Judge Manion felt that as "Sonstein harassed Katherine King because she was Katherine King, not because she was female," King failed to meet the standard of the Equal Protection Clause which is tougher than that of Title VII: "[s]uch activity may be actionable, but not as a violation of the U.S. Constitution." *Id.*

193. 846 F.2d 1154 (8th Cir. 1988).

the plaintiff Jones with repeated sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature.<sup>194</sup> Rose would come up behind Jones and rub his hands up and down the sides of her body, touching her breasts. Once, he put his hand up her dress on her outside thigh; another time he kissed her lips. He made comments such as "someday her breasts would be his," and that "he could see her nipples much better in cool temperature."<sup>195</sup> Jones continually stated that she wanted a business relationship, pushed Rose away, and removed herself from the room. In a footnote, the court stated that a "court must consider any provocative speech or dress of the plaintiff in a sexual harassment case . . . [g]iving *Meritor [Vinson]* due consideration, we observe from the record that Ms. Jones wore non-provocative clothing."<sup>196</sup>

The Eighth Circuit affirmed the district court's finding of a hostile work environment in which it not only gave Jones back pay, interest, and attorney's fees, but also required Wesco to post a specifically worded notice advising Wesco employees that their employer does not tolerate sexual harassment, and required Rose to post the same notice at every business he presently or in the future owns.<sup>197</sup> The Eighth Circuit noted that, "Indeed, any other result would have been a miscarriage of justice."<sup>198</sup> Additionally, the court voiced its disgust at the defendants' argument that since not all sexual harassers are married, if we do not allow romance in the office, there will be no more workplace dating blossoming into love and eventually into marriage.<sup>199</sup> The defendants had argued that "[i]f civil liability is implanted on an employer for its employees' natural interaction between the genders, either the collapse of our commercial system or the end of the human race can be foreseen."<sup>200</sup> The court found this argument unpersuasive and also noted that both plaintiff and defendant were married.

Although the Seventh and Eighth Circuits have created interesting solutions to some of the problems plaintiffs encounter while bringing sexual harassment claims under Title VII, the other circuits have not followed suit, and plaintiffs are still suffering for the lack of adequate remedies under Title VII. Because plaintiffs seem worse off in the end (even if the suit is

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194. *Id.* at 1155.

195. *Id.*

196. *Id.* at 1155 n.4.

197. *Id.* at 1156.

198. *Id.* at 1156-57.

199. *Id.* at 1157 n.6.

200. *Id.*

successful and hostile work environment is found, they may be left with no job, no money, and possibly a poor reference), potential plaintiffs with meritorious claims are discouraged, and employers feel no pressure to modernize their policies. A further problem has been that courts are confusing Title VII with tort law: giving plaintiffs only the limited remedy brought by Title VII but at the same time holding them to the stricter standards found in tort law.<sup>201</sup> This is perhaps the worst aspect of Title VII sexual harassment cases.<sup>202</sup>

While Title VII does not seem to be remedying harms to plaintiffs, the common law tort system is not faring any better. There is not yet a tort for sexual harassment specifically. Plaintiffs attempt to bring these claims under "extreme and outrageous behavior," and "intentional infliction of emotional distress," but courts simply respond that although the plaintiff has suffered an injustice, the behavior of the defendant does not fit under either of these causes of action. In addition, any attempts to go further with state tort law in the area of sexual harassment could potentially be pre-empted by the federal Title VII. Because Title VII, a federal statute, already addresses sexual harassment claims, Congress arguably occupies the field. This may mean that states cannot impose stricter requirements on workplace behavior if the requirements contradict those of Title VII.

The solution to remedying sexual harassment harms seems to lie with somehow modifying Title VII. At present, there are two possible alternatives. First, we might leave Title VII as it stands—not punishing or compensating, but instead loosening the standards and tests for sexual harassment, so that workplaces are cleaned up more quickly. This might entail issuing injunctions *before* plaintiffs and defendants have spent lots of money and years in court. The second option is to leave in place the more difficult-to-meet sexual harassment tests and standards, making sure that plaintiffs are bringing meritorious claims and defendants are culpable, but give Title VII some teeth. This would entail amending the act through the legislature to include potential punitive and compensatory damages.

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201. See Barton, *supra* note 162.

202. On an interesting note, the legislature tried to rectify the problem in the vetoed Civil Rights Act of 1990. In the Act, the legislature suggested supplying a punitive damages remedy for Title VII sexual harassment claims. The entire Act was vetoed by President Bush. President Bush, however, recently signed into law the Civil Rights Act of 1991, which provides for punitive damages for plaintiffs under Title VII. See Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, 1072 (1991).

Congress appears to have accepted the second option. Congress has found that "additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace,"<sup>203</sup> and in November of 1991, the Civil Rights Act of 1991 was signed into law. In a new section, the Act added punitive damages in cases of intentional discrimination including sexual harassment.<sup>204</sup> Because punitive damages were added, the tests probably should remain adequately stringent to ensure defendant culpability in order to avoid due process problems. This is especially true where a company whose upper management may or may not have had knowledge of the harassment is being fined large amounts of money for the acts of its employees.

As the law has stood until now, employers had nothing to lose by turning a deaf ear to complaints of sexual harassment. At most, plaintiffs received nominal damages, reinstatement, and possibly attorneys fees. Attaching larger penalties to Title VII violations will raise the consciousness of employers, who may, in turn, take more steps to deter potential harassers. After surveying many of the recent cases at the circuit level, Congress' adoption of the second option was for the best. Allowing punitive and compensatory remedies gives plaintiffs with meritorious claims a well-deserved chance to collect damages for their harms. At the same time, if the present standards are maintained in cases involving punitive and compensatory damages, it gives greater assurance that some of the more frivolous claims will not be allowed.

#### IV. CONCLUSION

It is apparent that although the circuit courts have progressed a great deal in interpreting hostile work environment sexual harassment actions, neither Title VII nor state law adequately addresses the problem. Either the new buttressing of Title VII by the legislature must be carried out in the federal circuit courts, or courts must lower the burden of proof standards for Title VII and state law plaintiffs who are not asking for punitive or compensatory damages. The latter will be less prejudicial to defendants' rights as the relief is injunctive (reinstatement of position, etc.), and the purpose is equalization of

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203. *Id.* at 105 Stat. 1071.

204. To 42 U.S.C. § 1981, the Act adds § 1977A, which allows for punitive and compensatory damages in cases of intentional discrimination. Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1071 (1991). *Id.* at 1071, 1072-74.

the workforce, not punishment. The problem with arming Title VII with punitive damages for sexual harassment is that this may defeat the policy underlying the statute—the policy of rectifying discriminating work situations, rather than punishing offenders. In addition, now that Title VII is armed with punitive damages, plaintiffs are even less likely to get lesser burden of proof standards rather than only injunctive relief. In many cases, the remedies previously provided by Title VII were both appropriate and sufficient. I would have maintained the milder injunctive relief and lesser burden of proof requirements under Title VII, but also have encouraged the state courts to develop a common (or statutory) civil tort for sexual harassment. This would eliminate over-burdening plaintiffs who merely want injunctive relief, while allowing for justice (in the form of compensation damages for victims and punitive damages against culpable defendants) in some of the more appalling cases. Of course, the quickest solution would be a federal statute which prohibits sexual harassment, and allows for private claims—plaintiffs could then bring claims in both state and federal court. After Congress' bumbling treatment of the Thomas confirmation hearings and the heightened public awareness of the issue of sexual harassment that has flowed from it, going beyond its perhaps token modification of Title VII and drafting a federal statute at this point might be just the way for Congress to redeem itself.



