1995

Civil Rights—Employer's Beware: The Supreme Court's Rejection of the Psychological Injury Requirement in Harris v. Forklift Systems, Inc., 114 S. Ct. 376 (1993), Makes It Easier for Employees to Establish a Claim for Sexual Harassment Based on a Hostile Working Environment

Deanna Weisse Turner

Follow this and additional works at: https://lawrepository.ualr.edu/lawreview

Part of the Civil Rights and Discrimination Commons, and the Labor and Employment Law Commons

Recommended Citation


Available at: https://lawrepository.ualr.edu/lawreview/vol17/iss4/8
Civil Rights—Employer’s Beware: The Supreme Court’s Rejection of the Psychological Injury Requirement in Harris v. Forklift Systems, Inc., 114 S. Ct. 376 (1993), Makes it Easier for Employees to Establish a Claim for Sexual Harassment Based on a Hostile Working Environment

1. Introduction

In October of 1991, Americans were glued to their television sets as Professor Anita Hill revealed to the Senate Judiciary Committee her allegations that Supreme Court nominee Clarence Thomas repeatedly pressured her for dates and graphically described to her scenes from pornographic films. For many viewers, and possibly some Senators, it was the first time they were aware that a sexual harassment claim could be based on a hostile working environment. However, courts and businesses had been struggling with “hostile” or “abusive” work environment claims for years. In fact, over 90% of the Fortune 500 companies received harassment complaints costing the average large corporation approximately 6.7 million dollars a year.

Because there was no clear definition of sexual harassment, courts decided claims on a case by case basis reminiscent of the

---

2. See Anne C. Levy, The Anita Hill-Clarence Thomas Hearings, 1991 Wis. L. REV. 1106 (1991). Professor Levy severely criticized the Senate Judiciary Committee’s performance at the hearings: “Any of the hundreds of judges who have heard sexual harassment cases could have easily enlightened the Senators on a variety of issues with which the Judiciary Committee could not seem to come to terms and, which it, ultimately, was incapable of handling in an appropriate manner.” Levy, supra, at 1110.
3. Levy, supra note 2, at 1107.
5. Id. (citing research performed by Freada Klein Associates, a work place diversity consulting firm in Cambridge, Massachusetts). In addition, research by Bettina Plevan, a specialist in defending sexual harassment lawsuits, reveals that an average company spends approximately $200,000 handling each valid complaint. Id. Likewise, Richard Hafets, a specialist in labor law, estimates that sexual harassment litigation will cost American businesses over $1 billion in damages and attorneys’ fees in the next five years. Id.
6. In 1984, Nadine Strossen of the American Civil Liberties Union narrowly defined sexual harassment as “a severe pattern of conduct or expression, directed at a specific employee, that demonstrably hinders his or her job performance.” Jeffery Rosen, Reasonably Women: “Hostile Work Environment” Sexual Harassment Litigation, NEW REPUBLIC, Nov. 1, 1993, at 12.
"I'll know it, when I see it" test used by the Supreme Court in obscenity cases. Courts struggled to draw a line somewhere in the gray area between the mere utterance of an epithet and forcible rape. In an effort to more clearly define this distinction, some circuit courts of appeals created a bright line rule requiring psychological injury, while other circuits opted for a totality of the circumstances balancing approach. Finally, on November 9, 1993, a unanimous United States Supreme Court, in Harris v. Forklift Systems, Inc., resolved the conflict among the circuits by establishing a standard for conduct that constitutes sexual harassment based on a hostile working environment.

II. Facts

Teresa Harris was a Rental Manager for Forklift Systems from April 22, 1985, until October 1, 1987. During her employment, Harris was frequently the target of unwelcomed sexual innuendos from Forklift's president, Charles Hardy. On several occasions, Hardy insulted Harris in the presence of other employees by making statements such as: "You're a dumb ass woman," "You're a woman, what do you know," and "We need a man as a rental manager."

In fact, Hardy went so far as to ridicule Harris in the presence of

7. See Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). In his concurring opinion, Justice Stewart explained that the First and Fourteenth Amendments do not extend protection to what he termed "hard-core pornography." Id. Admitting that "hard-core pornography" was very difficult, if not impossible, to define, Justice Stewart stated:

I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description [of hard-core pornography]; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.

Id. (emphasis added).

8. See, e.g., Ellison v. Brady, 924 F.2d 872, 877 (9th Cir. 1991).


10. See, e.g., Burns v. McGregor Elec. Indust., 989 F.2d 959 (8th Cir. 1993); Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991); Andrews v. City of Philadelphia, 895 F.2d 1469 (3d Cir. 1990); Henson v. Dundee, 682 F.2d 897 (11th Cir. 1982).


12. Id. at 371.


14. Id. at *2.

15. Id.
a client by suggesting, "[We should] go to the Holiday Inn to negotiate [your] raise." In addition to degrading Harris, Hardy frequently insulted other female employees by asking them to retrieve objects he dropped on the floor, by making sexual innuendos regarding their clothing, and even by suggesting they retrieve coins from his front pants pocket.

Upset by Hardy's conduct, Harris dreaded going to work, cried frequently, and drank heavily. Finally, on August 18, 1987, Harris complained to Hardy about his behavior and threatened to resign. Initially, Hardy apologized for his conduct and dismissed his behavior as friendly joking. However, in early September, Hardy resumed his prior behavior by suggesting that Harris had promised sexual favors to a client in order to obtain an account. Harris resigned on October 1, 1987, and sued Forklift for gender discrimination claiming that Hardy's harassing conduct created a hostile working environment under Title VII of the Civil Rights Act of 1964.

Although the district court found Hardy's conduct offensive, the court dismissed his behavior as an adolescent annoyance and part of Forklift's joking environment. The court was influenced by several factors, including: Mr. and Mrs. Harris's social relationship with Hardy; Forklift's termination of Mr. Harris's profitable business account; and Mrs. Harris's two year delay in reporting Hardy's conduct.

16. Id. Chief District Judge Nixon commented: "At trial, plaintiff tried to get far too much mileage out of Hardy's comment that they would negotiate her raise at the Holiday Inn." Id. at *7.
19. Id.
20. Id.
21. Id. In front of other employees, Hardy asked, "What did you do, promise the guy ... some 'bugger' Saturday night?" Id.
23. Harris, 1991 WL 487444, at *5. The District Court stated: "I believe that Hardy is a vulgar man and demeans the female employees at this work place." Id.
24. Id. at *6.
25. Id. Judge Nixon wrote: "I appreciate that plaintiff, as a management employee, was more sensitive to these comments than clerical employees, who it appears were conditioned to accept denigrating treatment." Id.
26. Id. at *4. The court explained: "I am certain that Hardy's business relationship with plaintiff's husband played more of a role in the plaintiff's dissatisfaction with her job than admitted." Id. The court ignored, however, Forklift's canceling of the account on October 7, 1987, some six days after Harris quit her job with Forklift. See id. at *3-*4.
27. Id. at *7.
The district court acknowledged that Hardy’s behavior offended Harris and also would have offended a “reasonable woman manager” under similar circumstances. However, the court was not convinced that Hardy’s conduct was so severe as to seriously affect Harris’s psychological well-being, regardless of her testimony to the contrary. Because Harris could not demonstrate psychological injury, the district court dismissed her claims and the United States Court of Appeals for the Sixth Circuit affirmed. The Supreme Court granted certiorari to resolve a conflict among the circuit courts of appeal as to whether psychological injury was required for a hostile environment harassment claim to be actionable.

III. BACKGROUND

In order to appreciate the significance of the Harris decision, it is important to understand the evolution of the legal action known as sexual harassment based on a hostile working environment. First, Congress passed the Civil Rights Act of 1964 which prohibited discrimination based on race, religion, national origin, or gender. Second, the definition of discrimination was expanded to include an indirect form of discrimination known as the “abusive or hostile working environment.” Third, sexual harassment was recognized as a type of hostile environment discrimination. Fourth, the Equal Employment Opportunity Commission promulgated guidelines which established the five elements of sexual harassment based on a hostile working environment claim. Finally, the lower courts struggled to define what behavior rises to the level of harassing conduct, which eventually led to the Supreme Court’s holding in Harris.
A. The Civil Rights Act of 1964

The summer of 1963 was the turbulent time of President Kennedy's Report to the American People on Civil Rights and the civil rights march on Washington, highlighted by Martin Luther King's famous "I Have a Dream" speech. A significant victory in the battle to end racial discrimination came almost one year later when the Civil Rights Act was proposed. Specifically, Title VII of the Act made discrimination against employees in the "terms, conditions, or privileges" of employment an unlawful employment practice.

Although this prohibition originally applied to discrimination based upon an individual's race, religion, or national origin, the proposed bill was silent as to gender discrimination. Drafters justified the exclusion by referring to a letter from the President's Commission on the Status of Women which suggested that gender discrimination was such a significantly different issue as to require separate legislation. In a calculated effort to defeat the proposed Act, Representative Howard W. Smith of Virginia introduced an amendment to add the word "sex" to the proposed Act. Opponents

41. Title VII of the Civil Rights Act of 1964 states:
(a) It shall be an unlawful employment practice for an employer—
(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
(2) to limit, segregate, or classify employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.
42. S. 1732, 88th Cong., 2d Sess. (1964); see also Elizabeth Roth, Legislative History Shows Sex Bias Law Seems to Have Started as a Joke, CHI. DAILY L. BULL., Mar. 16, 1992, at 5.
43. 110 CONG. REC. 2547, 2577 (1964).
44. Id.; see also Roth, supra note 42, at 5. Representative Smith's introduction included a mock protest of sincerity as he read from a constituent's letter ordering Congress to stop sending American men to war so that the spinsters of America could find husbands and raise families. Roth, supra note 42, at 5.
of the bill joined Smith in a chivalrous protest, stating that the amendment was necessary in order to afford white women the same employment opportunities granted to other "minority" groups.

Representative Smith's efforts were successful; the amendment was added to the proposed Civil Rights Act. However, much to Representative Smith's and his supporters' dismay, the amendment did not ensure the Act's defeat. The Civil Rights Act, including the amendment against gender discrimination, passed both the House and the Senate and was signed by President Johnson on August 2, 1964.

B. A Hostile Working Environment is a Type of Discrimination

Under Title VII of the Civil Rights Act, it is an unlawful employment practice to discriminate in the "terms, conditions, or privileges" of employment. Although the plain language of Title VII obviously would support actions alleging direct discrimination such as unfair treatment in wages, working hours, or available positions, in Rogers v. Equal Employment Opportunity Commission, the United States Court of Appeals for the Fifth Circuit recognized a more subtle or indirect form of discrimination based on an "environment heavily charged with ethnic or racial discrimination."

---

45. See Roth, supra note 42, at 5. During the debate, Representative J. Russell Tuten of Georgia proclaimed: "Some men in some areas of the country might support legislation which would discriminate against women, but never let it be said that a southern gentleman would vote for such legislation." Roth, supra note 42, at 5.

46. Roth, supra note 42, at 5. Representative Bolton, one of the few female representatives, corrected Smith's categorization of women as a minority group, citing the 1960 U.S. Census which revealed that there were 90,991,681 women and only 88,331,494 men in the United States. Roth, supra note 42, at 5.

47. Roth, supra note 42, at 5. Their true motivations and fears were revealed in statements such as Representative Mendel Rivers' assertion that the amendment "would make it possible for the white Christian woman to receive the same consideration for employment as the colored women," and Representative J. George William Andrews' comment that "[u]nless this amendment is adopted, the white women of this country would be drastically discriminated against in favor of the Negro woman." Roth, supra note 42, at 5.

48. 110 Cong. Rec. 2547, 2584 (1964). The amendment passed by a vote of 168 to 133. Id.


51. 454 F.2d 234 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972).

52. Id. at 238. ("Section 703 is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination.")
In *Rogers*, doctors in an optometry clinic segregated and separately treated patients based on their national origin. A Hispanic nurse working for the clinic filed a Title VII action, alleging that the clinic's discrimination toward the patients was an unlawful employment practice under the Civil Rights Act. Although the district court agreed that the segregation was unlawful, the court noted that the discriminatory conduct was directed toward the patients, not the employee. Therefore, the plaintiff was not an aggrieved party under the protection of the Act, and her complaint was dismissed.

On appeal, the United States Court of Appeals for the Fifth Circuit relied on a more liberal interpretation of the Act's prohibition against discrimination. The court interpreted the phrase "terms, conditions, or privileges of employment" to extend far beyond direct discrimination in such matters as wages and hours. In addition to economic benefits, the Act also protects an employee's psychological well-being. The court concluded that forcing employees to work in an environment heavily charged with hostility directed at them was a more "sophisticated" and indirect form of discrimination also prohibited by the Civil Rights Act. By so ruling, the Fifth Circuit recognized a new form of discrimination based on a hostile working environment. As a result, employees such as the plaintiff gained a cause of action under Title VII of the Act.

The court refrained from defining the degree of behavior necessary to constitute a sufficiently hostile environment. Instead, the court merely stated that the requisite behavior fell somewhere between a mere ethnic or racial slur and a "working environment so heavily polluted with discrimination as to destroy completely the emotional

53. *Id.* at 237.
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.* at 238 ("We must be acutely conscious of the fact that Title VII of the Civil Rights Act of 1964 should be accorded a liberal interpretation in order to effectuate the purpose of Congress to eliminate the inconvenience, unfairness, and humiliation of ethnic discrimination.").
58. 42 U.S.C. § 2000e-2(a)(1); see supra note 41 for the full text of Title VII of the Civil Rights Act.
59. *Rogers*, 454 F.2d at 238 ("Recognizing the importance of these [intangible] benefits, we should neither ignore their need for protection, nor blind ourselves to their potential misuse.").
60. *Id.*
61. *Id.* at 238-39.
62. *Id.* at 239.
63. *Id.*
64. *Id.*
and psychological stability of the minority group workers." In future cases this quote served as a source of great debate and confusion among the circuit courts.

C. Sexual Harassment Creates a Type of Hostile Working Environment

After Rogers, courts applied the newly created claim of discrimination based on a hostile working environment to cases involving race, religion, and national origin. It was not until eleven years later, however, that a court applied this action to gender discrimination.

In Henson v. City of Dundee, a female police dispatcher claimed that the chief of police frequently inquired about her sex life, directed sexual vulgarities towards her, and requested she have sex with him. The district court stated that although the dispatcher had a valid state action for sexual harassment, gender discrimination under Title VII of the Civil Rights Act was an entirely different cause of action.

65. Id. at 238. While explaining that a hostile and discriminatory environment could constitute an unlawful employment practice under the Act, the court stated: "One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers, and I think Section 703 of Title VII was aimed at the eradication of such noxious practices." Id.

66. See infra notes 87-88 and accompanying text.


69. See, e.g., Cariddi v. Kansas City Chiefs Football Club, Inc., 568 F.2d 87 (8th Cir. 1977).

70. In the history of civil rights legislation, women's rights have been obtained significantly later than those of racial minorities. For example, African Americans were given the vote in 1870 by the Fifteenth Amendment, while women did not obtain that same right until fifty years later with passage of the Nineteenth Amendment in 1920. See U.S. CONST. amends. XV, XIX. Likewise, the Supreme Court declared race a suspect classification for equal protection purposes in Korematsu v. United States, 323 U.S. 214, 216-17 (1944), while the Court declared gender a semi-suspect classification some twenty-nine years later in Frontiero v. Richardson, 411 U.S. 677, 688 (1973).

71. Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982).

72. Id. at 899.

73. Id. at 900. During the opening statement, the court explained to the plaintiff's attorney:

In other words a discrimination case is one thing, do you understand? It is based on being a female and [being] treated differently from the males. That is a clear proposition, no question about it, but when you mix up the other [sexual harassment] with it then you are in an area that is
Disregarding the prohibition against indirect discrimination, better known as hostile working environment discrimination, the district court dismissed the dispatcher's case due to her failure to demonstrate any tangible or direct discrimination based on her gender.\textsuperscript{74} 

Citing the Rogers opinion, the United States Court of Appeals for the Eleventh Circuit reminded the district court that, as with the claims of racial discrimination, Title VII also applies to a hostile working environment based on an employee's gender.\textsuperscript{75} The court proceeded to reconcile sexual harassment and gender discrimination claims, explaining that a pattern of harassing behavior toward members of one sex is a type of unlawful, disparate treatment clearly within the scope of Title VII.\textsuperscript{76} Because the district court failed to consider sexual harassment as a type of hostile working environment discrimination prohibited by Title VII, the Eleventh Circuit remanded the case.\textsuperscript{77} 

Four years later the Supreme Court supported the Henson ruling in Meritor Savings Bank v. Vinson.\textsuperscript{78} In Meritor, a bank teller alleged she agreed to have sex with her supervisor fearing she would otherwise lose her job.\textsuperscript{79} During the next three years of her employment, the plaintiff alleged the supervisor made repeated demands for sex, fondled her in the presence of other employees, followed her into the restroom, and exposed himself to her.\textsuperscript{80} The plaintiff conceded uncertain. So, we will have to hear it, but the Court doesn't think too much of it. If she quit that job because of sexual harassment that is a State case. That is a State proposition. She can sue someone in the County of the State of Florida, but not in the Federal court. I think that is the law on the subject. We will hear your case, but that is what you are up against. Go ahead.

\textit{Id.} at 900 n.2.

\textsuperscript{74} \textit{Id.} at 900-01.

\textsuperscript{75} \textit{Id.} at 902. The court stated: Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the work place that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.

\textit{Id.}

\textsuperscript{76} \textit{Id.} at 902 (citing Bundy v. Jackson, 641 F.2d 934, 943-46 (D.C. Cir. 1981)).

\textsuperscript{77} \textit{Id.} at 905.

\textsuperscript{78} 477 U.S. 57 (1986).

\textsuperscript{79} \textit{Id.} at 60. This is an example of quid pro quo sexual harassment in which an employer threatens retaliation if the employee refuses to engage in sexual relations. See \textit{infra} note 95 and accompanying text.

\textsuperscript{80} \textit{Id.} After the initial date, the supervisor did not promise employment benefits or threaten retaliation. \textit{Id.} Therefore, instead of quid pro quo harassment the supervisor's actions became hostile environment sexual harassment. See \textit{infra} note 97 and accompanying text.
she had intercourse with her supervisor forty to fifty times during this period, that she did not report the behavior or utilize her employer's grievance procedure, and that the alleged harassment ceased when she started dating a new boyfriend.\textsuperscript{81}

Based on the teller's admissions, the district court found the relationship to be voluntary and thus dismissed the bank teller's harassment claim.\textsuperscript{82} The United States Court of Appeals for the District of Columbia Circuit remanded the case because the lower court failed to consider either hostile environment harassment or quid pro quo harassment.\textsuperscript{83} Upon denial of a request for rehearing en banc,\textsuperscript{84} the Supreme Court granted certiorari.\textsuperscript{85}

As had the Fifth Circuit in Rogers, the Supreme Court acknowledged that the intent of Title VII was to remove all discriminatory barriers including a hostile working environment.\textsuperscript{86} While explaining that Title VII's protections extend beyond the economic aspects of employment, the Court quoted the language from Rogers that described the hypothetical working environment as being "so heavily polluted with discrimination" that it destroyed the workers' psychological stability.\textsuperscript{87} This quotation created a division among the circuit courts as some circuits cited this language for the proposition that psychological injury was required in order to bring an action for sexual harassment based on a hostile working environment, while others did not.\textsuperscript{88}

In Meritor, the Supreme Court recognized that sexual harassment is a type of discrimination because it deprives the victim of the right to participate in the workplace on equal footing with others who are similarly situated.\textsuperscript{89} In addition, the Third Circuit acknowledged

\begin{footnotes}
\item 81. Meritor, 477 U.S. at 60.
\item 87. Meritor, 477 U.S. at 65-66 (citing Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972). In Rogers, the Fifth Circuit stated that "[o]ne can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of the minority group workers, and I think Section 703 of Title VII was aimed at eradication of such noxious practices." Rogers, 454 F.2d at 238.
\item 88. See infra notes 127-64 and accompanying text.
\item 89. Meritor, 477 U.S. at 66-67.
\end{footnotes}
that sexual harassment deters women from accepting or continuing certain jobs and thus is the very type of obstacle that the Act was designed to remove.\textsuperscript{90}

Similar to the Eleventh Circuit’s opinion in \textit{Henson}, the Supreme Court in \textit{Meritor} refused to set the parameters for behavior that constituted sexual harassment. Instead, the Court merely stated that to be actionable, the sexual harassment must be “sufficiently severe or pervasive ‘to alter the conditions of the victim’s employment and create an abusive working environment.’”\textsuperscript{91} This standard proved to be more vague than helpful as lower courts continued to struggle with sexual harassment cases.

D. Equal Employment Opportunity Commission Guidelines

In response to the confusion created by \textit{Meritor}, the Equal Employment Opportunity Commission promulgated guidelines on sexual harassment.\textsuperscript{92} The guidelines define sexual harassment as “\textit{unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature ... [when] such conduct has the purpose or effect of ... creating an intimidating, hostile, or offensive working environment.}”\textsuperscript{93}

There are three types of sexual harassment claims: quid pro quo, reverse quid pro quo, and hostile working environment.\textsuperscript{94} Similar to the contract term meaning “bargained for exchange,” a “quid pro quo” claim involves the exchange of employment benefits for sexual favors.\textsuperscript{95} A “reverse quid pro quo” claim asserts that an

\textsuperscript{90} Andrews v. City of Philadelphia, 895 F.2d 1469, 1483 (3d Cir. 1990).

\textsuperscript{91} Meritor, 477 U.S. at 67 (quoting Henson v. Dundee, 682 F.2d 897, 904 (11th Cir. 1982)). The Court added that the plaintiff’s allegations included “not only pervasive harassment but also criminal conduct of the most serious nature.” \textit{Id.} Therefore, the Court affirmed the decision of the court of appeals and remanded the case for consideration of the plaintiff’s claim of gender discrimination based on a hostile working environment. \textit{Id.} at 73.

\textsuperscript{92} See 29 C.F.R. § 1604.11 (1994). However, it should be noted that these guidelines are only persuasive, and are not mandatory authority. General Elec. Co. v. Gilbert, 429 U.S. 125, 141-42 (1976).

\textsuperscript{93} 29 C.F.R. § 1604.11(a).

\textsuperscript{94} Arthur Larson & Lex K. Larson, \textit{Employment Discrimination} § 41A.42 (2d ed. 1993); see also 29 C.F.R. § 1604.11 (differentiating the three types of discrimination without using the same terms).

\textsuperscript{95} The E.E.O.C. guidelines recognize this type of sexual harassment, stating: Unwelcome sexual advances, request for sexual favors, and other verbal or physical conduct of a sexual nature constitute harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual’s employment, [or] (2) submission to or rejection of such conduct by an individual is used as the basis for em-
employer denied the plaintiff benefits that the employer offered to the harassed employee. In this situation, an employer may be liable for two separate causes of action based on one supervisor's misconduct. Finally, hostile working environment is harassment that creates an uncomfortable working environment.

E. Elements of the Sexual Harassment Based on a Hostile Working Environment Claim

In addition to the E.E.O.C. guidelines, the courts clarified the hostile working environment claim by establishing the following five elements of a prima facie cases: (1) the employee belonged to a protected class, (2) the employee was the subject of unwelcome sexual conduct, (3) the harassment was based on sex, (4) the employer was liable, and (5) the harassment created a hostile environment.

---

29 C.F.R. § 1604.11(a)(1), (2). For example it would constitute quid pro quo harassment if a supervisor promised a promotion to a worker if she slept with him, or conversely, threatened to fire her if she refused. For a more elaborate discussion of quid pro quo sexual harassment, see Barbara Lindeman & David D. Kadue, Sexual Harassment in Employment Law 129-156 (BNA Books 1992); Larson & Larson, supra note 94, § 41A.42. For an Eighth Circuit decision concerning quid pro quo sexual harassment, see Hall v. Gus Constr. Co., 842 F.2d 1010 (8th Cir. 1988).

96. The E.E.O.C. guidelines recognize reverse quid pro quo discrimination, stating:

Where employment opportunities or benefits are granted because of an individual's submission to the employer's sexual advances or requests for sexual favors, the employer may be held liable for unlawful sex discrimination against other persons who were qualified for but denied the employment opportunity or benefit.

29 C.F.R. § 1604.11(g). For example, reverse quid pro quo discrimination would occur if a co-worker was more qualified for the position than another worker who was promoted because she was having an affair with the supervisor.

97. The E.E.O.C. guidelines recognize hostile environment sexual harassment, stating:

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute harassment when (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

29 C.F.R. § 1604.11(a)(3).

98. In order to defeat a plaintiff's prima facie case, the defendant must prove either that the events did not occur, the occurrences were too trivial to constitute a violation, or the existence of a legitimate nondiscriminatory reason for the conduct. See Jana Howard Carey & Sandra Saltzman Fink, Overview of Sexual Harassment in the Workplace, in Sexual Harassment Litig. 1993, (Practicing Law Insitute 1993).

First, plaintiffs must first prove they belong to a protected class. This is the least contested element in sex discrimination cases because gender is automatically a protected classification. However, a sexual discrimination action is not limited to female plaintiffs. To the contrary, males as well as females may bring a claim for sexual harassment.

Second, a plaintiff must establish that the alleged harassing behavior was unwelcome. This element is difficult to prove. Often, the cases are reduced to a swearing match between the two parties, and what actually occurs in some cases may simply rest upon a difference in perception between the individuals involved.

The general definition of unwelcome conduct is unsolicited or unencouraged behavior that a plaintiff regards as uninvited or offensive. The most difficult situations arise when a plaintiff voluntarily enters the relationship and later wishes it to end. This was the situation in *Meritor* where the bank teller engaged in a sexual relationship with her supervisor for three years. Importantly, the Supreme Court stressed that the defendant may not use the plaintiff's initial voluntary participation as a defense to a sexual harassment charge. Instead, the Supreme Court stated a court must determine whether the plaintiff indicated by her conduct that the alleged sexual advances were no longer welcome.

According to the E.E.O.C. guidelines, the jury is to consider the totality of the circumstances including the victim's speech, dress, and conduct. One commentator has argued that an analysis

---

100. Moylan v. Maries County, 792 F.2d 746, 749 (8th Cir. 1986) (stating that it is not usually disputed whether the plaintiff is a member of a protected class).
101. Heubschen v. Department of Health & Social Serv., 716 F.2d 1167 (7th Cir. 1983).
102. *Meritor*, 477 U.S. at 68 ("The gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome.'").
103. See *infra* notes 165-66.
105. See *Meritor*, 477 U.S. at 60. See also supra notes 78-81 and accompanying text.
107. *Id*.
108. See 29 C.F.R. § 1604.11(b).
109. *Meritor*, 477 U.S. at 69. In *Meritor*, the Supreme Court held that the district court could admit evidence of the bank teller's sexually provocative dress and publicly expressed sexual fantasies in order to decide the element of unwelcome
of a plaintiff’s behavior may divert attention from a defendant’s conduct, which should be the heart of the sexual harassment claim.\textsuperscript{110}

Third, the alleged harassment must be based on sex. This does not require that the conduct be of a sexual nature, rather that one gender be treated differently than the other. In other words, but for the victim’s gender, he or she would not have been harassed.\textsuperscript{111}

It is important to note that if the offender harasses both men and women employees, creating an uncomfortable working environment for everyone, there is no discrimination and therefore no Title VII action.\textsuperscript{112} In addition, the harasser may be the same gender as the victim.\textsuperscript{113}

Fourth, the plaintiff must establish employer liability.\textsuperscript{114} The E.E.O.C. suggested that employers should be held strictly liable for their employees’ wrongful actions.\textsuperscript{115} In Meritor, the Supreme Court rejected the E.E.O.C.’s suggestion, but declined to create a definite rule on employer liability.\textsuperscript{116} Instead, the majority instructed lower


\textsuperscript{111} Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982); see also Hall v. Gus Constr. Co., 842 F.2d 1010, 1014 (8th Cir. 1988).

\textsuperscript{112} Henson, 682 F.2d at 904.


\textsuperscript{114} This note provides only limited coverage of employer liability, which is a detailed area of the law. For more elaborate coverage of employer liability in sexual harassment cases, see LINDEMAN & KANDEU, supra note 95. See also Peter M. Panken et al., Sexual Harassment in the Workplace: Employer Liability for the Sins of the Wicked, C874 ALI-ABA 385 (1993) (suggesting procedures employers should implement in order to avoid liability for sexual harassment cases).

\textsuperscript{115} The guidelines state that an employer “is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence.” 29 C.F.R. § 1604.11(c).

\textsuperscript{116} Meritor, 477 U.S. at 72. Rehnquist, writing for five Justices and concurred with by Justice Stevens, suggested that courts look to agency law. Id. Justices Marshall, Brennan, and Blackmun stated there should be strict liability when the harasser is a supervisor with authority over the plaintiff. Id. at 74-77 (Marshall, J., concurring).
courts to follow principles of agency law.\textsuperscript{117} Subsequently, courts have ruled that employers are liable only if they knew or had reason to know of the alleged harassment but failed to take remedial action.\textsuperscript{118} A plaintiff can show the employer had actual knowledge of the harassment by proving that she complained to a supervisor or filed a grievance form.\textsuperscript{119} If a plaintiff fails to do either of these things, then she may establish the employer had constructive knowledge of the harassment due to its pervasiveness.\textsuperscript{120}

F. Definition of Conduct that Constitutes Sexual Harassment

Finally, the fifth and most controversial element of a hostile environment claim is that the alleged conduct must rise to the level of sexual harassment. A hostile working environment action under Title VII requires the courts to apply both an objective and subjective standard.\textsuperscript{121} A plaintiff must prove that a reasonable person, as well as the particular plaintiff, would consider the alleged conduct to be "sufficiently severe or pervasive . . . to alter the conditions of . . . employment and create an abusive working environment."\textsuperscript{122} The objective standard protects employers from hypersensitive employees, while the subjective standard ensures that the particular plaintiff suffered injury.\textsuperscript{123}

Even with the aid of the subjective and objective standards, separating actionable from unactionable claims proved to be an arduous task. Subtle differences in factual situations produced different outcomes. This resulted in unpredictable decisions that had little precedential value. For example, courts could not broadly rule that touching a coworker's hair always constituted sexual harassment. What if a supervisor stroked a subordinate's hair during a department meeting? Or, what if the supervisor touched the employee's hair in response to her question about the appropriateness of her hair style for work?\textsuperscript{124} In an effort to resolve ambiguous cases, several circuit cases have attempted to define the boundaries of permissible conduct.

\textsuperscript{117} Meritor, 477 U.S. at 72.
\textsuperscript{118} See, e.g., Steel v. Offshore Shipbuilding, Inc., 867 F.2d 1311, 1316 (11th Cir. 1989); Hall v. Gus Constr. Co., 842 F.2d 1010, 1015-16 (8th Cir. 1988); Henson v. City of Dundee, 682 F.2d 897, 905 (11th Cir. 1982).
\textsuperscript{119} Henson, 682 F.2d at 905.
\textsuperscript{120} Id.
\textsuperscript{121} Andrews v. City of Philadelphia, 895 F.2d 1469, 1483 (3d Cir. 1990).
\textsuperscript{123} Andrews, 895 F.2d at 1483.
\textsuperscript{124} See Downes v. Federal Aviation Admin., 775 F.2d 288 (Fed.Cir. 1985) (holding that similar behavior did not constitute harassment).
courts developed a bright line rule requiring psychological injury,\textsuperscript{125} while other courts utilized a reasonable woman standard.\textsuperscript{126}

1. \textit{The Psychological Injury Requirement}

Citing \textit{Meritor's} language regarding the "emotional and psychological stability"\textsuperscript{127} of the workers, several circuit courts created a bright line rule requiring proof that the alleged harassment resulted in psychological injury to the plaintiff.\textsuperscript{128} Although this additional requirement provided predictability and precedential value, it also produced unfair results by focusing on a plaintiff's reactions instead of a defendant's behavior.\textsuperscript{129}

First, requiring a plaintiff to demonstrate psychological injury sometimes caused unfair results. For example, in \textit{Rabidue v. Osceola Refining Co.}, a computer department supervisor\textsuperscript{130} frequently made extremely vulgar and obscene remarks about women\textsuperscript{131} in general, as well as crude statements to the office manager in particular.\textsuperscript{132} Furthermore, other male coworkers displayed pornographic pictures of women in the common work areas.\textsuperscript{133} Although the plaintiff and other female employees complained, the company only slightly admonished the supervisor, and the behavior continued.\textsuperscript{134} Because the plaintiff was unable to demonstrate psychological injury,\textsuperscript{135} the

\textsuperscript{125}See infra notes 127-62 and accompanying text.
\textsuperscript{126}See infra notes 163-83 and accompanying text.
\textsuperscript{129}See Werner, supra note 110.
\textsuperscript{130}Rabidue, 805 F.2d at 615. Note that neither employee was in a supervisory capacity over the other. \textit{Id.}
\textsuperscript{131}Id. The supervisor frequently referred to women as "whores," "cunts," "pussy," and "tits." \textit{Id.} at 623 (Keith, J., dissenting).
\textsuperscript{132}Rabidue, 805 F.2d at 624. The supervisor remarked: "All that bitch needs is a good lay." \textit{Id.} In addition, he called the plaintiff a "fat ass." \textit{Id.}
\textsuperscript{133}Id. at 615. In dissent, Judge Keith described a poster placed in the common area: "[O]ne poster, which remained on the wall for eight years, showed a prone woman who had a golf ball on her breasts with a man standing over her, golf club in hand, yelling 'Fore.'" \textit{Id.} at 624.
\textsuperscript{134}Id. at 624.
\textsuperscript{135}Id. at 622. The court concluded that "Henry's obscenities, although annoying, were not so startling as to have affected seriously the psyches of the plaintiff or other female employees." \textit{Id.} In addition, the court dismissed the pornographic posters as a "de minimis effect on the plaintiff's work environment." \textit{Id.}
United States Court of Appeals for the Sixth Circuit affirmed the district court’s judgment for the defendant.\textsuperscript{136}

A comparison of \textit{Rabidue} with \textit{Brooms v. Regal Tube Co.}\textsuperscript{137} demonstrates how the psychological injury requirement produced unfair results. In \textit{Brooms}, the company’s human resource manager frequently made sexual remarks and advances toward an industrial nurse.\textsuperscript{138} During an out-of-town conference, the manager asked the nurse to have sex with him.\textsuperscript{139} The nurse became so upset by this request that she suffered physical illness and required medical treatment.\textsuperscript{140} Only a few months later the manager grabbed the plaintiff and showed her pornographic pictures depicting sodomy and bestiality; the nurse ran away screaming and fell down a flight of stairs.\textsuperscript{141} After this incident, the plaintiff quit and entered psychiatric therapy for debilitating depression.\textsuperscript{142}

Because the plaintiff in \textit{Brooms} was able to demonstrate psychological injury, she was successful in her sexual harassment claim against her employer.\textsuperscript{143} Arguably, the employee in \textit{Rabidue} worked in an equally hostile environment,\textsuperscript{144} but she lost her case because she was unable to demonstrate a psychological injury.\textsuperscript{145}

Instead of using the bright line rule of psychological injury, several circuit courts balanced the totality of the circumstances.\textsuperscript{146}

\textsuperscript{136} \textit{Id.} at 622-23.
\textsuperscript{137} 881 F.2d 412 (7th Cir. 1989).
\textsuperscript{138} \textit{Id.} at 416.
\textsuperscript{139} \textit{Id.} at 416 n.1.
\textsuperscript{140} \textit{Id.} The nurse told her immediate supervisor about the human resource manager’s behavior. \textit{Id.} The supervisor’s only advice was to “tell [the manager] that her husband [had given] her herpes and to tape-record her conversations with [him].” \textit{Id.}
\textsuperscript{141} \textit{Id.} at 417.
\textsuperscript{142} \textit{Id.}
\textsuperscript{143} \textit{Id.}
\textsuperscript{144} \textit{See supra} notes 130-34 and accompanying text.
\textsuperscript{146} Instead of considering the facts as a whole, some district courts carved the allegations into separate incidents which rarely constituted harassment when analyzed alone. \textit{See}, e.g., \textit{Burns v. McGregor Elec. Indus.}, 807 F. Supp. 506 (N.D. Iowa 1992), \textit{rev’d}, 989 F.2d 959 (8th Cir. 1993). Upon appeal the Eighth Circuit in \textit{Burns} reminded the district court it must consider the cumulative effect of the alleged conduct, stating that “each successive episode has its predecessors, that the impact of the separate incidents may accumulate, and that the work environment created may exceed the sum of the individual episodes.” \textit{Burns v. McGregor Elec. Indus.}, 955 F.2d 559, 564 (8th Cir. 1992), \textit{on remand}, 807 F. Supp. 506 (N.D. Iowa 1992), \textit{rev’d}, 989 F.2d 959 (8th Cir. 1993) (quoting \textit{Robinson v. Jacksonville Shipyards, Inc.}, 760 F. Supp. 1486, 1524 (M.D. Fla. 1991)). \textit{But see} \textit{Vance v. Southern Bell Tel. & Tel. Co.}, 863 F.2d 1503, 1510-11 (11th Cir. 1989) (holding
For example, in *Ellison v. Brady*, a male employee developed a relentless crush on a female coworker. In reaction to her refusal to go on dates with him, the male employee began to engage in bizarre behavior such as wearing inappropriately formal attire to work, demanding conversations with the plaintiff, and even sending her disturbing letters professing his admiration. Upon receipt of these letters, the plaintiff filed both a request to transfer to another company and a sexual harassment complaint.

Pointing to *Meritor's* quotation of *Rogers*, the United States Court of Appeals for the Ninth Circuit explained that a hostile environment may result in, but does not require, the complete destruction of a worker's psychological stability. Noting that the protection of Title VII comes into play before the plaintiff requires psychiatric assistance, the Ninth Circuit rejected the other circuits' search for plaintiffs suffering from "anxiety and debilitation."

Second, requiring the plaintiff to demonstrate psychological injury forced courts to focus on the plaintiff's behavior instead of the defendant's conduct. For example, the court in *Rabidue* belabored the plaintiff's aggressive and cantankerous personality while seeming to ignore the severity of the defendant's conduct. In her dissent,

that an isolated incident of hanging a noose over a black employee's desk was sufficiently severe by itself to amount to harassment).

147. 924 F.2d 872 (9th Cir. 1991).
148. *Id.* at 874. The defendant sent the plaintiff a written message stating "I cried over you last night and I'm totally drained today. I have never been in such constant term oil [sic]. Thank you for talking with me. I could not stand to feel your hatred for another day." *Id.* While the plaintiff was attending a training seminar, the defendant sent her a card with a three page letter, proclaiming:

I know that you are worth knowing with or without sex .... Leaving aside the hassles and disasters of recent weeks [sic]. I have enjoyed you so much over these past few months. Watching you [sic]. Experiencing you from O so far away [sic]. Admiring your style and clan [sic] .... Don't you think it odd that two people who have never even talked together, alone, are striking off such intense sparks ... I will [write] another letter in the near future.

*Id.*

149. *Id.*
150. *Id.* at 878 n.8.
151. *Id.* at 878.
152. *Id.* at 877 (citing Scott v. Sears Roebuck & Co., 798 F.2d 210, 213 (7th Cir. 1986)).
153. Rabidue v. Osceola Ref. Co., 805 F.2d 611, 615 (6th Cir. 1986), *cert.* denied, 481 U.S. 1041 (1987). The court "unfavorably" characterized the plaintiff as "a capable, independent, ambitious, aggressive, intractable, and opinionated individual." *Id.* It is arguable that these characteristics would not have been so offensive to the court if they had been attributed to a male officer manager.
154. *Id.*
Judge Keith emphasized that a plaintiff’s negative personality traits do not justify harassment.  

In contrast to Rabidue, the Eighth Circuit, in Burns v. McGregor Electric Industries, recognized that a detailed examination of the plaintiff’s behavior may overshadow the significance of the defendant’s conduct. Prior to working for the defendant, the plaintiff in Burns posed nude for Easyrider and In the Wind magazines. Upon discovery of the photographs, the owner of the company repeatedly asked the female employee to pose nude, watch pornographic movies, and engage in sex. In addition, coworkers began calling the plaintiff vulgar names, and one worker even threatened to rape her on the assembly line. Although the district court ruled that a reasonable person would have found this behavior sufficiently severe or pervasive to create an abusive working environment, the court dismissed the complaint explaining that anyone who could pose nude in such a fashion could not have possibly been personally offended.

The Eighth Circuit criticized the lower court, stating that a plaintiff’s private life, regardless of how offensive, does not give permission to a coworker to sexually harass her. The court explained that this rationale would allow employers and coworkers to kiss or sexually touch a female coworker simply because she allowed her boyfriend or husband to do so at home.

2. The Reasonable Woman Standard

In addition to undertaking a subjective analysis, the factfinder must determine whether a reasonable person would find the behavior sufficiently severe or pervasive to constitute sexual harassment based

155. Id. at 625 (Keith, J., dissenting). In the dissent, Judge Keith reprimanded the majority for being distracted from the severity of the defendant’s conduct by stating: “The record established plaintiff possessed negative personal traits. These traits did not, however, justify the sex-based disparate treatment recounted above. Whatever undesirable behavior plaintiff exhibited, it was clearly no worse than Henry’s.” Id.

156. 989 F.2d 959 (8th Cir. 1993).

157. Id. at 963-64.


159. Id.

160. Id. at 562.

161. Burns, 989 F.2d at 962-63.

162. Id. at 963; see also Swentek v. USAIR, Inc., 830 F.2d 552, 557 (4th Cir. 1987) (holding that a plaintiff’s use of foul language or sexual innuendo outside of work did not waive her legal protection against harassment under Title VII).

163. Burns, 989 F.2d at 963.
on a hostile working environment. However, an analysis based on the genderless reasonable person may fail to account for the wide divergence between men’s and women’s views of appropriate sexual behavior.\textsuperscript{164} For example, women may be more likely to interpret a verbal or physical sexual encounter as coercive or harassing, while men are more likely to consider the same behavior as flattering or desirable.\textsuperscript{165}

In recognition of this difference, several circuit courts have adopted a "reasonable woman" or "reasonable victim" standard in hostile environment cases,\textsuperscript{166} as was first suggested in Judge Keith’s vehement dissent in \textit{Rabidue}.\textsuperscript{167} The majority in \textit{Rabidue} concentrated upon the working environment prior to the plaintiff’s arrival.\textsuperscript{168} The court described how some work environments are more vulgar than others,\textsuperscript{169} thereby alluding to an assumption of risk theory that women

\begin{itemize}
\item \textsuperscript{164} See Larson \& Larson, supra note 94, § 44A.44(e); Comment, \textit{Sexual Harassment Claims of Abusive Work Environment Under Title VII}, 97 Harv. L. Rev. 1449, 1451 (1984).
\item \textsuperscript{165} Kathryn Abrams, \textit{Gender Discrimination and the Transformation of Workplace Norms}, 42 Vand. L. Rev. 1183, 1206 (1989). Abrams also notes that today's woman lives in a society where sexual violence has reached an all time high, and a vast pornography industry perpetuates images of sexual coercion, violence, and objectification. \textit{Id.} at 1205.
\item \textsuperscript{166} See, e.g., Burns, 989 F.2d at 965; Ellison v. Brady, 924 F.2d 872, 878 (9th Cir. 1991); Andrews v. City of Philadelphia, 895 F.2d 1469, 1482 (3d Cir. 1990); Yates v. Avco Corp., 819 F.2d 630, 636-37 (6th Cir. 1987).
\item \textsuperscript{167} \textit{Rabidue} v. Osceola Ref. Co., 805 F.2d 611, 623-28 (Keith, J., dissenting). Judge Keith stated: I would have courts adopt the perspective of the reasonable victim which simultaneously allows the courts to consider salient sociological differences as well as shield employers from the neurotic complainant. Moreover, unless the outlook of the reasonable woman is adopted, the defendants as well as the courts are permitted to sustain ingrained notions of reasonable behavior fashioned by the offenders, in this case, men. \textit{Id.} at 626. Although Judge Keith was the first to suggest the "reasonable woman" standard, it was not adopted until a year later. \textit{Yates}, 819 F.2d at 636-37.
\item \textsuperscript{168} \textit{Rabidue}, 805 F.2d at 620. The court considered "the lexicon of obscenity that pervaded the environment of the work place both before and after the plaintiff’s introduction into its environs, coupled with the reasonable expectation of the plaintiff upon voluntarily entering that environment." \textit{Id.}
\item \textsuperscript{169} \textit{Id.} The Sixth Circuit cited with approval Judge Newblatt’s statement; “Indeed, it cannot seriously be disputed that in some work environments, humor and language are rough hewn and vulgar. Sexual jokes, sexual conversations, and girlie magazines may abound. Title VII was not meant to—or can—change this." \textit{Id.} at 620-21 (citing \textit{Rabidue} v. Osceola Ref. Co., 584 F. Supp. 419, 430 (E.D. Mich. 1984)); see also Katz v. Dole, 709 F.2d 251, 256 (4th Cir. 1983) ("Title VII is not a clean language act, and it does not require employers to extirpate all signs of centuries-old prejudices.").
\end{itemize}
should not accept jobs in potentially offensive environments. In dissent, Judge Keith explained that the majority's analysis defeated the purpose of Title VII by perpetuating working environments hostile to women instead of bringing about social change and equality in the workplace. In addition, Judge Keith questioned whether the majority would have been so eager to justify the prevailing environment if the case had involved an anti-semitic or a racially hostile environment.

Inspired by Judge Keith's dissent in *Rabidue*, the Ninth Circuit adopted the reasonable woman standard in *Ellison v. Brady*. Writing for the majority, Judge Beezer explained that men are rarely the victims of sexual assault, thereby making it difficult for men to appreciate that a woman might perceive an unexpected sexual comment or touch as an underlying threat of violence or coercion. In addition, the court concluded that the reasonable woman standard was an essential tool for defeating ingrained sexist stereotypes and prejudices.

Although theoretically attractive, the reasonable woman standard may create several procedural problems. For example, male jurors would be forced to hypothesize what a reasonable woman would feel. It has been suggested that perhaps expert witnesses on the female psyche will be required to educate the jury on this standard. Furthermore, application of the reasonable woman standard could

---

170. *Rabidue*, 805 F.2d at 626 (Keith, J., dissenting).
171. *Id.*
172. *Id.* Judge Keith stated in her dissent:
   To condone the majority’s notion of the “prevailing work place” I would also have to agree that if an employer maintains an anti-semitic work force and tolerates a work place in which “kike” jokes, displays of nazi literature and anti-Jewish conversation “may abound,” as Jewish employee assumes the risk of working there, and a court must consider such a work environment as “prevailing,” I cannot.
   *Id.*
173. *Id.* at 627 (Keith, J., dissenting). Judge Keith reminded the majority that “the relevant inquiry at hand is what the reasonable woman would find offensive, not society, which at one point also condoned slavery.” *Id.* (Keith, J., dissenting).
174. 924 F.2d 872, 878-90 (9th Cir. 1991).
175. *Id.* at 879.
176. *Id.* at 881. For an article that more fully discusses the advantages of the reasonable woman standard, see Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177 (1990).
178. *Id.*
produce an unwarranted focus on the victim instead of the perpetrator, as does the psychological injury requirement. By the time *Harris v. Forklift Systems, Inc.* reached the Supreme Court in early October of 1993, it was clear from *Henson* and *Meritor* that sexual harassment based on a hostile working environment was a type of discrimination prohibited by the Civil Rights Act of 1964. However, what behavior constituted actionable harassment remained unclear. Several circuits relied on the bright line rule requiring psychological injury which was derived from the quotation in *Meritor*, while other circuits utilized a reasonable woman standard. *Harris* provided the Supreme Court with the opportunity to resolve several important issues surrounding the claim of sexual harassment based on a hostile working environment.

IV. Reasoning

By its unanimous and very brief decision in *Harris v. Forklift Systems, Inc.*, the Supreme Court resolved the division among the circuit courts regarding the necessity of psychological injury in hostile working environment cases. Justice O'Connor began the opinion by explaining that Title VII's prohibition against discrimination in the "terms, conditions, or privileges of employment" was not limited to tangible or economic discrimination but also included working in a hostile environment. Reasserting the standard created in *Meritor*, Justice O'Connor explained that a work environment becomes hostile when it is "sufficiently severe or pervasive to alter the conditions of the victim's employment." Contrary to the holding in *Rabidue*, the Supreme Court clarified that a hostile environment may alter the conditions of employment long before the plaintiff suffers psy-

179. See Ellison v. Brady, 924 F.2d 872, 884-85 (9th Cir. 1991) (Stephens, J., dissenting).
181. 682 F.2d 897 (11th Cir. 1982); see supra notes 71-77 and accompanying text.
182. 477 U.S. 57 (1986); see supra notes 78-93 and accompanying text.
183. 42 U.S.C. § 2000e-2; see supra notes 40-49 and accompanying text.
185. 114 S. Ct. 367 (1993). The majority opinion in *Harris* is only two and one half pages long. *Id.* at 369-71.
186. *Id.* at 370.
187. *Id.* at 370 (citing Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67 (1986)).
A discriminatorily hostile environment may sufficiently alter the conditions of employment by detracting from an employee's work performance, discouraging employees from remaining with the company, or preventing employees from advancing their careers. The Court explained that the frequently cited language in *Meritor* regarding an environment so "heavily polluted with discrimination as to destroy completely the psychological stability of minority workers" was merely an especially egregious example of, and not the boundary for, sexual harassment.

Once it had rejected the psychological injury requirement, the Supreme Court instructed courts to consider the following factors in order to determine whether the harassment is sufficiently hostile to alter the conditions of employment: The frequency and severity of the conduct, whether the conduct is physically threatening or merely psychologically offensive, whether it unreasonably interferes with the employee's performance, and the effect if any on the employee's psychological well-being.

The court emphasized that psychological harm is not required, rather it is merely a factor to be weighed equally with the rest. Admitting that the newly created standard was imprecise, the Court concluded that it was a satisfactory compromise between making any offensive conduct actionable and requiring a psychological injury. Thus, the Court reversed the Sixth Circuit and remanded the case for consideration using the newly created standard.

Affirming its decision in *Meritor*, the Supreme Court held that a plaintiff must meet both the subjective and objective standards to establish a viable claim. Although the United States District

---

189. *Harris*, 114 S. Ct. at 370. Justice O'Connor acknowledged that "Title VII comes into play before the harassing conduct leads to a nervous breakdown." *Id.*

190. *Id.* at 370-71.

191. *Id.* at 371.

192. *Id.*

193. *Id.* Justice O'Connor clarified: "The effect on the employee's psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive. But while psychological harm, like any other relevant factor, may be taken into account, no single factor is required." *Id.*

194. *Id.* The majority conceded that "[t]his is not, and by its nature cannot be, a mathematically precise test." *Id.*

195. *Id.* at 370. Affirming the Supreme Court's earlier decision in *Meritor*, Justice O'Connor stated that "[t]his standard, which we reaffirm today, takes a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury." *Id.*

196. *Id.* at 371.

197. *Id.* at 370. The majority explained:

Conduct that is not severe or pervasive enough to create an objectively
Court for the Middle District of Tennessee appeared to have applied the reasonable woman standard, Justice O'Connor repeated the traditional reasonable person standard. Justice O'Connor did not, however, address a specific choice of terms or whether the reasonable woman standard was legitimate.

In a concurring opinion, Justice Scalia acknowledged that the multifactored analysis provided little guidance to jurors because the factors were not ranked according to significance. Recognizing that the newly created test mimicked the negligence standard, Justice Scalia noted that while injury is a required element of negligence, the majority's standard attempts to determine whether an injury has indeed occurred. Reminiscent of the bright line rule of psychological injury, Justice Scalia suggested that interference with work performance should be the most heavily weighed factor. Justice Scalia cautioned that "interference with work performance" should not be limited to tangible work impairment but should be broadly construed to include any alteration in working conditions.

Justice Ginsburg concluded the Court's review of Harris with her brief concurring opinion. The essential question for Justice

hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.

Id.

198. Harris v. Forklift Sys., Inc., No. 3-89-0557, 1991 WL 487444, at *7 (M.D. Tenn. 1991). The district court ruled that, "[a] reasonable woman manager under like circumstances would have been offended by Hardy. . . ." Id. (emphasis added).

199. Harris, 114 S. Ct. at 370-71. Justice O'Connor used language indicating the traditional reasonable person standard: "Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive . . . [and] Title VII bars conduct that would seriously affect a reasonable person's psychological well-being . . . ." Id. (emphasis added).

200. Id. at 372 (Scalia, J., concurring). Justice Scalia criticized the majority opinion, stating:

Today's opinion elaborates that the challenged conduct must be severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive. "Abusive" . . . does not seem to me a very clear standard—and I do not think that clarity is at all increased by adding the adverb "objectively" or by applying to a "reasonable person's" notion of what the vague word means.

Id.

201. Id.

202. Id.

203. Id.

204. Id. (Ginsburg, J., concurring).
Ginsburg was whether members of one sex are exposed to a hostile environment, while the members of the opposite sex are not. In addition, Justice Ginsburg reminded Justice Scalia that a tangible decrease in productivity is not a required element under any of the Court's standards.

V. SIGNIFICANCE

In *Harris*, the Supreme Court abandoned the certainty provided by the psychological injury requirement in an effort to increase fair results in sexual harassment cases based on a hostile working environment. In addition, *Harris* represents a significant victory for a potential plaintiff because she or he will no longer have to suffer a psychological injury to state a viable claim. *Harris* therefore brings an end to the confusion created by the Court's previous quotation of *Rogers* in *Meritor*, and mends the rift between the circuit courts.

The Court's broad definition of a hostile environment may be seen as a triumph for women in the workplace. Instead of demanding that women "face the heat or get out of the kitchen" as *Rabidue* arguably implied, *Harris* forces employers to promote more acceptable workplace behavior toward all of their employees. Finally, dispensing with the psychological injury requirement returns the focus to the defendant's conduct.

The admittedly less than precise *Harris* standard sacrifices the certainty and predictability afforded by the bright line rule of psychological injury. Moreover, as mentioned in Justice Scalia's concurrence, it is possible that the imprecise standard will leave jurors "virtually unguided," deciding cases solely based on their personal experiences and prejudices. As a result, parties may be encouraged

---

205. *Id.* at 372-73.
206. *Id.* Justice Ginsburg clarified that "to show such interference, the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment." *Id.* (citing Davis v. Monsanto Chem. Co., 858 F.2d 345, 349 (6th Cir. 1988), *cert. denied*, 490 U.S. 1110 (1989)).
208. *Id.*
209. *See supra* notes 87-88 and accompanying text.
212. *See infra* notes 152-162 and accompanying text.
214. *Id.* at 372 (Scalia, J., concurring).
to resolve their conflicts out of court instead of turning their cases over to unpredictable juries.\textsuperscript{215} Moreover, the number of sexual harassment claims is likely to increase because of the less restrictive standard created by \textit{Harris}. To shield themselves from liability, employers should carefully document and thoroughly investigate every allegation of harassment. Unfortunately, this could prove to be a very expensive undertaking.\textsuperscript{216}

As mentioned by Justice Scalia, \textit{Harris} leaves many issues unresolved, such as how frequent or pervasive the conduct must be, and what evidence is required to demonstrate a work interference.\textsuperscript{217} In addition, the Court did not address the reasonable woman standard. Although Justice O'Connor couched her opinion in terms of a reasonable person, it is impossible to determine whether she rejected the reasonable woman standard or merely declined to address its use.\textsuperscript{218}

\textbf{VI. CONCLUSION}

In \textit{Harris}, the Supreme Court rejected the psychological injury requirement that several circuits derived from the troublesome quotation in \textit{Meritor}.\textsuperscript{219} The Court replaced the bright line psychological injury requirement with a balancing approach that weighs factors such as the severity, frequency, and offensiveness of the conduct.\textsuperscript{220} While tangible factors such as psychological injury or work interference may be considered, they must not be determinative.\textsuperscript{221} Only time will tell if \textit{Harris}'s less precise standard will be helpful in deciding sexual harassment cases based on a hostile working environment.

\textit{Deanna Weisse Turner}

\textsuperscript{217} \textit{Harris}, 114 S. Ct. at 372 (Scalia, J., concurring). Justice Scalia observed that "[r]es as a practical matter, today's holding lets virtually unguided juries decide whether sex-related conduct engaged in (or permitted by) an employer is egregious enough to warrant an award of damages." \textit{Id.}
\textsuperscript{218} See generally Carvey, supra note 216.
\textsuperscript{219} \textit{Harris}, 114 S. Ct. at 370-71; see supra notes 87-88 and accompanying text.
\textsuperscript{220} \textit{Harris}, 114 S. Ct. at 371.
\textsuperscript{221} \textit{Id.}