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Leah R. McCaslin

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HARRIS v. FORKLIFT SYSTEMS, INC.: DEFINING THE PLAINTIFF'S BURDEN IN HOSTILE ENVIRONMENT SEXUAL HARASSMENT CLAIMS

I. INTRODUCTION

> Sexual harassment, the experience, is becoming "sexual harassment," the legal claim. As the pain and stifled anger have become focused into dissatisfaction, gripes have crystallized into a grievance, and women's inner protest is becoming a cause of action. But this is not a direct process of transliteration. Life becoming law and back again is a process of transformation. Legitimized and sanctioned, the legal concept of sexual harassment reenters the society to participate in shaping the social definitions of what may be resisted or complained about, said aloud, or even felt.[1]

In 1979, Catharine A. MacKinnon wrote about the increasing frequency of sexual harassment in the workplace and its emergence as a legal claim.[2] In the fifteen years since, the claim of sexual harassment has received considerable recognition both in society and the law. All courts today recognize that sexual harassment is a form of sexual discrimination in violation of Title VII of the Civil Rights Act of 1964.[3] Furthermore, all courts uniformly acknowledge that sexual harassment is not just the conditioning of an employment position or employment benefits on sex but also the creation of a hostile environment that detrimentally affects a worker's employment.[4] Consequently, sexual harassment, the experience, *has become* sexual harassment, the legal claim.

Although sexual harassment is now an established cause of action, the law regarding sexual harassment is still rapidly evolving for two basic reasons. First, sexual harassment claims are highly fact-intensive, so many relevant issues are determinable only on a case-by-

1. CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 57 (1979).
2. *Id.*
3. 42 U.S.C. §§ 2000e to 2000e-17 (1988 & Supp. 1992). *See infra* note 18 and accompanying text.
4. Two forms of sexual harassment have been recognized by American courts: *quid pro quo* (conditional) and hostile environment sexual harassment. *See infra* notes 21-27 and accompanying text.

case basis. Second, several fundamental issues were left unresolved by the Supreme Court in its 1986 ruling in *Meritor Savings Bank, FSB v. Vinson*,[5] where the Court recognized the claim of sexual harassment for the first time. Fortunately, however, the Court recently resolved two major issues relating to the plaintiff's burden in a sexual harassment case.[6] First, the Court concluded that the proper standard to be applied by courts in hostile environment sexual harassment cases is one encompassing both objective and subjective perspectives. Thus, courts must consider the viewpoints of both the reasonable person and the particular victim.[7] The Court also concluded that a plaintiff need not prove that the alleged conduct seriously affected his or her psychological well-being in order to recover under Title VII.[8] By resolving the issues as it did, the Supreme Court further advanced the position of those unfortunate persons who have been subjected to sexual harassment.[9]

II. THE DEVELOPMENT OF THE SEXUAL HARASSMENT CAUSE OF ACTION

A. *The Recognition of the Claim*

Title VII of the Civil Rights Act of 1964 provides that 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 his 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.[10]

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5. 477 U.S. 57 (1986).
6. Harris v. Forklift Systems, Inc., 114 S. Ct. 367 (1993).
7. *Id.* at 370.
8. *Id.* at 370-71.
9. Sexual harassment has been defined as "the unwanted imposition of sexual requirements in the context of a relationship of unequal power." MACKINNON, *supra* note 1, at 1. This definition can encompass the harassment of women by men, men by women, or the harassment of men or women by members of the same sex. This note, however uses the term "sexual harassment" to describe harassment of women by men, unless otherwise noted, because the historically inferior position of women in the male-dominated work force has resulted in the disproportionate exposure of women to sexual harassment by men. *See* BARBARA ALLEN BABCOCK, ET AL., SEX DISCRIMINATION AND THE LAW 192, 195-99 (1975). *See also* Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV. L. REV. 1449 (1984).
10. 42 U.S.C. § 2000e-2(a) (1988).

The prohibition against discrimination based upon gender was added to Title VII at the last minute on the floor of the House of Representatives.[11] Consequently, there is little legislative history with which to interpret the full ambit and intended reach of the prohibition of sex discrimination in employment.[12]

Although the 1964 Civil Rights Act incorporated sex as a basis for an employment discrimination claim, four of the first five federal courts that considered sexual harassment claims in the workplace held that there was no cause of action under Title VII.[13] These courts provided several rationales for their conclusions. First, sexual harassment was deemed to be merely a personal matter.[14] Second, treating sexual harassment as a claim of sexual discrimination under Title VII would cause a great increase in the amount of litigation.[15]

These concerns, however, were ultimately rejected as impediments in the way of sexual harassment claims;[16] appellate courts reversed each of the four federal court decisions refusing to recognize sexual harassment as sexual discrimination within the protection of Title VII.[17] "Since 1977, all federal courts faced with the issue, have held that sexual harassment in the workplace may violate Title VII under certain circumstances."[18] Following these decisions, however,

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11. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 63 (1986) (citing 110 CONG. REC. 2577-84 (1964)).

12. *Id.* at 64. The principal argument in opposition to the inclusion of sex as a characteristic in the bill was that sex discrimination was "sufficiently different from other types of discrimination that it ought to receive separate legislative treatment." *Id.* at 63-64. This argument in opposition to the amendment was defeated, and the amended bill quickly passed. *Id.* at 64. *See also* Leo Kanowitz, *Sex-Based Discrimination in American Law III: Title VII of the 1964 Civil Rights Act and The Equal Pay Act of 1963,* 20 HASTINGS L.J. 305, 310-13 (1968-69).

13. RALPH H. BAXTER, JR. & LYNNE C. HERMLE, SEXUAL HARASSMENT IN THE WORKPLACE 5 (3d ed. 1989). The four cases in which sexual harassment was rejected as a form of sexual discrimination were: Tomkins v. Public Serv. Elec. & Gas Co., 422 F. Supp. 553 (D.N.J. 1976), *rev'd,* 568 F.2d 1044 (3d Cir. 1977); Miller v. Bank of America, 418 F. Supp. 233 (N.D. Cal. 1976), *rev'd,* 600 F.2d 211 (9th Cir. 1979); Corne v. Bausch and Lomb, Inc., 390 F. Supp. 161 (D. Ariz. 1975), *vacated,* 562 F.2d 55 (9th Cir. 1977); Barnes v. Train, 13 F.E.P. Cases 123 (D.D.C. 1974). The one early case to hold otherwise was Williams v. Saxbe, 413 F. Supp. 654 (D.D.C. 1976), *rev'd* in part and *vacated* in part, 587 F.2d 1240 (1978).

14. BAXTER & HERMLE, *supra* note 13, at 6.

15. *Id.*

16. "That sexual harassment does occur to a large and diverse population of women supports an analysis that it occurs *because* of their group characteristic, that is, sex. Such a showing supports an analysis of the abuse as structural, and as such, worth legal attention as sex discrimination, not just as unfairness between two individuals, which might better be approached through private law." MACKINNON, *supra* note 1, at 27.

17. BAXTER & HERMLE, *supra* note 13, at 8.

18. *Id. See, e.g.,* Joyner v. AAA Cooper Transp., 597 F. Supp. 537 (M.D. Ala. 1983), *aff'd,* 749 F.2d 732 (11th Cir. 1984); Seep v. Commercial Motor Freight, Inc., 575 F. Supp. 1097 (S.D. Ohio 1983); Burns v. Terre Haute Regional Hosp., 581 F. Supp. 1301 (S.D. Ind. 1983); Ferguson

questions remained regarding the type of conduct that constituted actionable sexual harassment.

In 1980, in an effort to aid courts confronted with sexual harassment claims, the Equal Employment Opportunity Commission (EEOC) issued guidelines defining sexual harassment and establishing parameters for behavior in the workplace.[19] The EEOC determined that:

> Harassment on the basis of sex is a violation of Sec. 703 of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.[20]

The EEOC recognizes two distinct classes of sexual harassment. The first and most recognizable is termed *quid pro quo* harassment and occurs when an employee must agree to the harasser's sexual demands or forfeit a benefit of or the fact of employment.[21] Under the *quid pro quo* type of harassment there must be evidence of retaliation on the part of the employer or supervisor, either beneficial or detrimental, as a response to an acceptance or denial of the sexual demand by the employee.[22]

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v. E. I. duPont de Nemours and Co., 560 F. Supp. 1172 (D. Del. 1983); Hayden v. Atlanta Newspapers, 534 F. Supp. 1166 (N.D. Ga. 1982); Coley v. Consolidated Rail Corp., 561 F. Supp. 645 (E.D. Mich. 1982); Robson v. Eva's Super Mkt., Inc., 538 F. Supp. 857 (N.D. Ohio 1982); Reichman v. Bureau of Affirmative Action, 536 F. Supp. 1149 (M.D. Pa. 1982); Davis v. Bristol Labs., 26 F.E.P. Cases 1351 (W.D. Okla. 1981); Morgan v. Hertz Corp., 542 F. Supp. 123 (W.D. Tenn. 1981), *aff'd*, 725 F.2d 1070 (6th Cir. 1984).

19. Equal Employment Opportunity Commission Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11 (1993). Within these guidelines, the EEOC advised that

> [p]revention is the best tool for the elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned.

Id. § 1604.11(f). Although EEOC guidelines are not binding upon courts, many have deferred to these guidelines in their efforts to resolve issues in sexual harassment cases. SUSAN M. OMILIAN, SEXUAL HARASSMENT IN EMPLOYMENT 18-19 (1987).

20. 29 C.F.R. § 1604.11(a) (1993).

21. *Id.*

22. Although *quid pro quo* sexual harassment appears to be the more easily identifiable of the two types recognized by the EEOC, there are certainly questions regarding the determination of this type of harassment. Three specific situations have been recognized under the *quid pro quo* prong of sexual harassment: (1) an employee declines the advances of an employer/

The second type of recognized sexual harassment is termed "abusive" or "hostile environment" harassment and is actionable when harassing conduct occurs that is sufficiently severe or pervasive to alter the employee's work performance or create an abusive working environment.[23] In concluding that hostile environment sexual harassment violates Title VII, the EEOC drew upon a substantial body of judicial decisions holding that Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult.[24] "The employment-related detriment that results from such an environment may be less obvious than the injury caused by *quid pro quo* harassment, but it is not necessarily less serious."[25] In fact, because a hostile environment frequently produces a sense of degradation that often reduces an employee's productivity, this form of sexual discrimination may reinforce precisely the harmful stereotypes that Congress designed Title VII to eliminate.[26] The EEOC advised that determinations of sexual harassment should be made on a case by case basis and only after viewing the record as a whole and after looking at the totality of the circumstances, "such as the nature of the sexual advances and the context in which the alleged incidents occurred."[27]

B. *The Supreme Court's Recognition of the Claim:* Meritor *and Its Progeny*

In 1986, the United States Supreme Court addressed the issue of sexual harassment in *Meritor Sav. Bank, FSB v. Vinson.*[28] The plaintiff in *Meritor* filed an action against her employer and her supervisor, alleging that she had been constantly subjected to sexual harassment

supervisor and forfeits an employment opportunity; (2) an employee complies with the sexual advance and does not receive an employment benefit; and (3) an employee complies and receives an employment benefit. MACKINNON, *supra* note 1, at 32-40.

23. 29 C.F.R. § 1604.11(a) (1993).

24. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986).

25. Note, *supra* note 9, at 1455.

26. *Id.*

27. 29 C.F.R. § 1604.11(b) (1993). *See also* Vance v. Southern Bell Tel. & Tel. Co., 863 F.2d 1503, 1511 (11th Cir. 1989) (holding that the totality of the circumstances necessarily includes the severity, as well as the number, of incidents of harassment).

28. 477 U.S. 57 (1986). *Meritor* was the first case in which the U.S Supreme Court recognized such a claim. Suzanne Egan, Note, Meritor Savings Bank v. Vinson: *Title VII Liability for Sexual Harassment,* 17 GOLDEN GATE U. L. REV. 379 (1987).

by her supervisor during her tenure at the bank.[29] The plaintiff testified that shortly after her initial training period, her supervisor suggested that they engage in sexual relations at a motel and that, although she initially refused, she eventually agreed to have sex with him and did so between 40 to 50 times out of fear of losing her job.[30] She also alleged that her supervisor fondled her in front of other employees, exposed himself to her in the women's restroom, and forcibly raped her on several occasions.[31] She stated that she never reported his conduct because she was afraid of him.[32] In making its ruling, the Supreme Court discussed the EEOC Guidelines on sexual harassment and held that "a plaintiff may establish a violation of Title VII by proving that discrimination based upon sex has created a hostile or abusive work environment."[33]

Meritor was important not only because of this formal recognition of sexual harassment as a form of sexual discrimination, but also because the Court addressed the more subtle hostile environment prong of sexual harassment claims. In concluding that a hostile environment may violate Title VII, the Court relied on both the EEOC Guidelines and Courts of Appeals decisions.[34] The Court found that the incorporation of the hostile environment claim in the EEOC Guidelines was evidence of the developing body of sexual discrimination law.[35] The Court also adopted the holding in *Rogers v. EEOC*[36] where the Fifth Circuit held that a person may have a Title VII cause of action based upon a racially discriminatory work environment.[37] The Supreme Court analogized the hostile environment racial harassment claim with a hostile environment sexual harassment claim and concluded that "[n]othing in Title VII suggests that a hostile environment based on discriminatory *sexual* harassment should not be likewise prohibited."[38]

Not all conduct, however, which could be described as harassment necessarily affects a term, condition, or privilege of employment within the meaning of Title VII.[39] Consequently, the mere utterance

29. *Meritor*, 477 U.S. at 60.
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.* at 66.
34. Egan, *supra* note 28, at 391.
35. *Id.*
36. 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972).
37. *Meritor*, 477 U.S. at 65-66.
38. *Id.* at 66.
39. *Id.* at 67.

of a racial or sexual epithet which creates offensive feelings is not sufficient to violate Title VII.[40] Instead, "[f]or sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of (the victim's) employment and create an abusive working environment.' "[41] Each incident of harassment is unique; consequently, a determination of sexual harassment must be made in light of the record as a whole and in light of the totality of the circumstances.[42] The standard for proving harassment therefore "requires that a threshold of severity or pervasiveness be exceeded, and also that the harassment create an 'abusive' and not merely [an] 'offensive' work environment."[43]

The Court in *Meritor,* however, failed to establish several fundamental standards to aid lower courts in deciding sexual harassment cases. Specifically, it did not designate the appropriate standard to be used in judging allegedly sexually harassing conduct. For example, the opinion fails to indicate whether conduct should be evaluated by the reasonable man, reasonable woman, or reasonable person standard.[44] Similarly, the Court failed to state whether conduct should be evaluated from an objective viewpoint or from the subjective viewpoints of the victim or the harasser. Finally, the Court failed to indicate whether psychological suffering is a necessary element in a successful hostile environment sexual harassment claim.[45] Lower federal courts have struggled with these issues and have inevitably reached differing

40. *Id.*

41. *Id.*

42. *Id.* at 69. *See also supra* note 27 and accompanying text.

43. Peter M. Panken et al., *Sexual Harassment in the Workplace: Employer Liability for the Sins of the Wicked,* 588 ALI-ABA 201, 215 (1991).

44. For criticism of the Court's failure to establish a standard, *see, e.g.,* Egan, *supra* note 28, at 395-401; Colleen M. Davenport, Note, *Sexual Harassment Under Title VII: Equality in the Workplace or Second-Class Status?:* Meritor Savings Bank v. Vinson, 106 S. Ct. 2399 (1986), 10 HAMLINE L. REV. 193, 216 (1987); Cathleen M. Mogan, Note, *Current Hostile Environment Sexual Harassment Law: Time to Stop Defendants From Having Their Cake and Eating it Too,* 6 NOTRE DAME J.L. ETHICS AND PUB. POL'Y 543, 550 (1992).

45. Another issue that the Court failed to resolve was that of employer liability for alleged acts of sexual harassment by either co-workers or supervisors of employees. Although the Court discussed the concept and potential extent of employer liability, it concluded that "the Court of Appeals erred in concluding that employers are always automatically liable for sexual harassment by their supervisors." *Meritor,* 477 U.S. at 72. Strict liability is often applied by lower federal courts to employers in *quid pro quo* sexual harassment cases based on the principles of agency and because of the nature of the supervisor's relationship to the victim (as someone with authority to condition benefits or the fact of employment). Davenport, *supra* note 44, at 216. Lower federal courts are divided regarding whether strict liability should be applied in hostile environment sexual harassment cases or whether knowledge of the supervisor's conduct on the part of the employer must be shown by the victim in order to recover from the employer. Egan, *supra* note 28, at 396 n.149.

conclusions.[46] The *Harris* case arose in this unsettled legal environment.

III. *HARRIS V. FORKLIFT SYSTEMS:* MOVING TOWARD REFINEMENT

A. *Statement of the Case*

From April 1985 until October 1987, Teresa Harris worked as a manager at Forklift Systems, Inc. under the direction of Charles Hardy, Forklift's president.[47] Of the six managers employed by Forklift during the period of Harris' employment, four were men and two were women; the other female manager besides Harris was Hardy's daughter.[48] Throughout Harris' employment at Forklift, Hardy often insulted her and frequently made her the target of unwanted sexual innuendos.[49] On several occasions, for example, Hardy directed Harris and other female employees to retrieve coins from his front pants pocket,[50] or to pick up objects that he had deliberately thrown to the ground, thereafter making comments suggesting how the women should dress to expose their breasts.[51] Hardy made sexual innuendos about Harris' and other women's clothing.[52] On several occasions, Hardy told Harris "you're a woman, what do you know" and "we need a man as the rental manager."[53] Hardy also told Harris on at least one occasion that she was a "dumb ass woman."[54] Hardy additionally announced on several occasions that Harris had a "racehorse ass" and told her that "she could not wear a bikini because [her] ass is so big, if [she] did there would be an eclipse and nobody could get any sun."[55] He also suggested that he and Harris "go to the Holiday Inn to negotiate Harris' raise."[56] Each of these comments and suggestions was made in the presence of others.[57]

Although Hardy's conduct toward Harris escalated in frequency, tone, and severity over the course of her employment, Harris initially

46. Mogan, *supra* note 44, at 550.
47. Brief for Petitioner at 3, Harris v. Forklift Sys., Inc., 114 S. Ct. 367 (1993) (No. 92-1168).
48. *Id.*
49. *Id.* at 3-4.
50. *Id.* at 4-5.
51. *Id.* at 5.
52. *Id.*
53. *Id.* at 4.
54. *Id.*
55. *Id.* at 5.
56. *Id.*
57. *Id.*

attempted to ignore Hardy by not talking to him.[58] When the situation became so unbearable that Harris began experiencing extreme anxiety, frequent crying, and heavy drinking, she resolved to resign from Forklift.[59] Thus, in mid-August 1987, Harris complained to Hardy about his continuing comments and conduct and told him of her intention to resign.[60] After stating that he was only joking when he made the comments and gestures and claiming that he was surprised that Harris was offended, Hardy apologized and promised that he would refrain from such conduct in the future.[61] Based on this assurance, she stayed on the job.[62]

A few weeks later, however, Hardy began anew.[63] While Harris was arranging a deal with one of Forklift's customers, Hardy asked her, again in front of other employees, "[w]hat did you do, Teresa, promise the guy . . . (sex) Saturday night."[64] On October 1, Harris terminated her employment with Forklift.[65] Harris subsequently sued Forklift, claiming that Hardy's conduct created an abusive work environment for her because of her gender[66] in violation of Title VII of the Civil Rights Act of 1964.[67]

B. *The Lower Courts' Actions*

A magistrate judge for the United States District Court for the Middle District of Tennessee found Harris' allegations to be a "close case."[68] The magistrate found that some of Hardy's comments "offended Harris and would offend the reasonable woman," but concluded that the comments were not so severe as to be expected to seriously affect her psychological well-being or to cause her to suffer injury.[69] Harris' objections to the magistrate's findings were rejected, and the court held that Hardy's conduct did not create an abusive

58. *Id.* at 6.
59. *Id.* at 7.
60. *Id.*
61. *Id.* at 8.
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.* at 2-3.
67. 42 U.S.C. § 2000e-(1)(a) (1988).
68. Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 369 (1993).
69. *Id.* at 369-70.

environment under Title VII.[70] The Sixth Circuit Court of Appeals affirmed the district court's decision in an unpublished disposition.[71]

C. *The Supreme Court's Decision*

The United States Supreme Court granted *certiorari* to resolve the conflict among the circuits on whether conduct, to be actionable as abusive work environment harassment, must seriously affect an employee's psychological well-being or lead the employee to suffer injury.[72]

The Court reversed the prior rulings against Harris and held that Title VII does not require concrete psychological harm.[73] Instead, the Court held that the plaintiff's burden is met so long as: (1) a reasonable person would perceive the environment to be hostile or abusive, and (2) the particular plaintiff actually perceives the environment to be hostile or abusive.[74] By focusing on what could be perceived by a reasonable person and what is actually perceived by the employee, the Court adopted a dual objective/subjective standard for hostile environment sexual harassment cases.[75] The "very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion, or national origin offends Title VII's broad rule of workplace equality."[76]

In determining whether an environment is hostile or abusive, and thus in violation of Title VII, the Court restated that the fact finder must consider the totality of the circumstances.[77] Factors in the determination include: (1) the frequency of the conduct; (2) the severity of

70. *Id.* at 369.
71. *Id.* at 370.
72. *Id.* The Court resolved a conflict among six circuits. Three circuits (the Sixth, Seventh, and Eleventh) required a showing by the plaintiff in a hostile environment sexual harassment case that she suffered psychological injury as a result of the allegedly offensive conduct. *See* Rabidue v. Osceola Ref. Co., 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987); Scott v. Sears Roebuck & Co., 798 F.2d 210 (7th Cir. 1986); Brooms v. Regal Tube, 830 F.2d 1554 (11th Cir. 1987). Three other circuits (Third, Eighth, and Ninth) concluded that a plaintiff need only show that she has been offended by the defendant's conduct and that a reasonable person would have been offended by the complained of conduct. *See* Andrews v. City of Philadelphia, 895 F.2d 1469 (3d Cir. 1990); Burns v. MacGregor Elec. Indus., Inc., 955 F.2d 559 (8th Cir. 1992); Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991). Petition for Writ of *Certiorari*, Harris v. Forklift Sys., Inc., 114 S. Ct. 367 (1993) (No. 92-1168).
73. Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 371 (1993).
74. *Id.* at 370.
75. *Id.*
76. *Id.* at 371.
77. *Id.*

the conduct; (3) whether the conduct is physically threatening or humiliating, or a mere offensive utterance; and (4) whether the conduct unreasonably interferes with an employee's work performance.[78] However, the Court reaffirmed prior language from *Meritor*[79] stating that the " 'mere utterance of an . . . epithet which engenders offensive feelings in a[n] employee' does not sufficiently affect the conditions of employment to implicate Title VII."[80] On the other hand, the Court also asserted that "Title VII comes into play before the harassing conduct leads to a nervous breakdown."[81]

IV. ANALYSIS OF *HARRIS V. FORKLIFT SYS., INC.*

The Supreme Court's decision in *Harris* is significant because it resolved two central issues left unsettled by *Meritor*.[82] First, the Court settled the law regarding the appropriate standard or perspective to be applied in judging alleged sexual harassment. The Court adopted a dual standard that incorporates both objective and subjective perspectives.[83] Second, the Court settled a conflict among the Courts of Appeals by holding that a sexual harassment victim is not required to prove that she suffered psychological injury as a result of the alleged sexually harassing conduct.[84] The Court's ruling was proper regarding both issues.

A. *The Reasonableness Standard*

The test adopted by the Court is a modified reasonable person standard which requires proof that the defendant's sexually harassing conduct created a work environment that would be perceived as hostile both by a reasonable person and by the *particular* plaintiff. Justice Scalia states in his concurring opinion in *Harris* that although the standards adopted by the Court appear to be vague and unclear, there was "no alternative to the course the Court . . . has taken."[85] Actually, the Court's adoption of this dual test was by no means automatic and did

78. *Id.*
79. 477 U.S. 57 (1986).
80. Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 370 (1993) (citing *Meritor*, 477 U.S. at 67).
81. *Id.*
82. The major issue from *Meritor* left unresolved by *Harris* was the issue of respondeat superior employer liability. The Court did not have the opportunity to resolve or even address the issue of whether an employer is responsible for the actions of its employees in hostile environment sexual harassment cases in *Harris*, as the president of the company himself was the harasser. *See supra* note 45 and accompanying text.
83. *Harris*, 114 S. Ct. at 370.
84. *Id.* at 371.
85. *Id.* at 372.

not represent a consensus of the Courts of Appeals. In addition to the modified reasonable person standard adopted by the Court, other possible standards include the reasonable man, reasonable person, and the reasonable woman standards. A comparison of these possible standards indicates that the standard chosen by the Court is the most well-suited to sexual harassment claims.

The reasonable person standard replaced the traditional, albeit outdated, reasonable man standard. The reasonable man standard, as its name suggests, required that conduct be evaluated from the perspective of a reasonable male person. Over the past two decades, due to its gender-bias, the reasonable man standard has been cast aside in favor of the reasonable person standard, thereby incorporating feminine as well as masculine perspectives.[86] Incorporation of the feminine as well as masculine perspectives into legal inquiries forces the trier of fact to consciously consider the circumstances from the vantage point of both genders and lessens the likelihood of gender bias. Many courts apply the reasonable person standard in evaluating allegedly culpable conduct in contexts such as negligence claims.[87] Some courts also applied the reasonable person standard to sexual harassment claims.[88]

Due to concerns that there are differences in the experiences and perceptions of men and women regarding sexual harassment, some courts adopted the reasonable woman standard. These courts intimated that the reasonable person standard is not really gender-neutral. For example, the Ninth Circuit reasoned that "a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women."[89] The court justified

86. Robert S. Adler & Ellen R. Pierce, *The Legal, Ethical, & Social Implications of the "Reasonable Woman" Standard in Sexual Harassment Cases,* 61 FORDHAM L. REV. 773, 775 n.11 (1993).

87. *Id.* at 775.

88. *See, e.g.*, Hirschfield v. N.M. Corrections Dept. 916 F.2d 572, 580 (10th Cir. 1990); Morgan v. Mass. Gen. Hosp., 901 F.2d 186, 193 (1st Cir. 1990); Rabidue v. Osceola Ref. Co., 805 F.2d 611, 620 (6th Cir. 1986).

89. Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991). The court noted, however, "where male employees allege that co-workers engage in conduct which creates a hostile environment, the appropriate . . . perspective would be that of a reasonable man." *Id.* at 879 n.11. Likewise the Sixth Circuit recently held that a claim exists under Title VII if "working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes" would be offended. Yates v. Avco Corp., 819 F.2d 630, 636 (6th Cir. 1987). The court followed with:

> 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.

its adoption of the reasonable woman standard by concluding that, although many women share differing viewpoints, they also share common concerns that are not necessarily shared by the majority of the male population.[90]

Despite the strong fairness arguments advanced by some courts and commentators[91] urging adoption of the reasonable woman standard,[92] applying such a test raises numerous legal, ethical, and social questions.[93] Probably the most perplexing issue is whether it is fair to impose liability on men for "well-intentioned behavior that they do not realize is illegal or offensive."[94] As noted by one commentator it is possible that "some men who engage in . . . harassing behavior do so with neither conscious hostility towards women nor an awareness of the effect of their conduct . . . . [These] men would feel personally wronged by judgments declaring their conduct harassment."[95] As a result of such concerns, some courts have refused to adopt the reasonable woman standard, reasoning that this standard applies the same

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Id. at 637. Interestingly in *Yates*, the Sixth Circuit explicitly followed the dissenting opinion in Rabidue v. Osceola Ref. Co. 805 F.2d 611 (6th Cir. 1986). *See supra* note 72. The court did not overrule *Rabidue* but distinguished it as a case alleging misconduct by a co-worker, rather than by a supervisor as in *Yates*. Eric J. Wallach & Alyse L. Jacobson, *"Reasonable Woman" Test Catches On*, NAT'L L.J., July 6, 1992, at 21.

90. The Ninth Circuit asserted that:

> many women share common concerns which men do not necessarily 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.

Ellison, 924 F.2d at 879. The Ninth Circuit concluded that the "reasonable woman standard does not establish a higher level of protection for women than men." *Id.*

However the court did recognize that under the reasonable woman standard, conduct will be classified as unlawful sexual harassment even when a harasser does not realize that his conduct creates a hostile working environment. *Id.* at 880. The court justified this possibility by stating that "Title VII is aimed at the consequences or effects of an employment practice and not at the . . . motivation of co-workers or employers." *Id.* (quoting Rogers v. EEOC, 454 F.2d 234, 239 (5th Cir. 1972)).

91. One commentator has concluded that "[f]or the most part, there is no practical difference between [the] subjective/ objective approach and the 'reasonable woman' approach. In both cases, the victim must establish both that she was offended and that a reasonable woman [person] would be offended." Adler & Pierce, *supra* note 86, at 776 n.21.

92. *See supra* notes 89-90 and accompanying text.

93. Adler & Pierce, *supra* note 86, at 802.

94. *Id.*

95. Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177, 1194 (1990).

burden to men as was once inflicted upon women when the reasonable man standard was prevalent.[96]

Finally, the concerns regarding both the reasonable person and reasonable woman standards have led some courts to turn to a third standard, termed either the modified reasonable person standard[97] or the dual objective/subjective test.[98] Such a test requires a consideration of both the perspectives of the particular victim and of a reasonable person.[99] The *Harris* court adopted this dual standard.

Thus, after *Harris*, in order prove that Title VII was violated because of hostile environment sexual harassment, the employee's environment must be such that a reasonable person would find it hostile or abusive *and* the particular victim must perceive the working environment as hostile or abusive.[100] As Justice O'Connor stated:

> 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—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.[101]

One possible criticism of the modified reasonable person standard is that it might stifle legitimate claims by requiring plaintiffs to jump through "double hoops."[102] The plaintiff must now prove not only that the work environment was hostile to a reasonable person but also to herself. In practice, the test is, however, not more difficult, and each element serves an important function.

First, the objective factor is significant because "it is here that the finder of fact must actually determine whether the work environment is sexually hostile."[103] This objective element protects the employer

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96. *See supra* note 88 and accompanying text.

97. Adler & Pierce, *supra* note 86, at 776.

98. Mogan, *supra* note 44, at 565.

99. Adler & Pierce, *supra* note 86, at 776. *See also* Brooms v. Regal Tube Co., 881 F.2d 412, 419 (7th Cir. 1989) (holding that only if the court concludes that the conduct would adversely affect the work performance and the well-being of both a reasonable person and the particular plaintiff bringing the action may it find that the defendant has violated the plaintiff's rights under Title VII).

100. Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 370 (1993).

101. *Id.*

102. Mogan, *supra* note 44, at 565.

103. Andrews v. City of Philadelphia, 895 F.2d 1469, 1483 (3d Cir. 1990).

against allegations of the "hypersensitive" employee.[104] Thus, the objective factor places an important limitation on sexual harassment claims.

The subjective element of the test properly accounts for the perceptions of the particular victim. The "subjective factor is crucial because it demonstrates that the alleged conduct injured this particular plaintiff giving her a claim for judicial relief."[105] Thus, the subjective factor legitimizes the plaintiff's claim.

The subjective element of the test also aids the plaintiff by causing persuasive evidence to become more directly relevant. Under an unmodified reasonable person standard, the particular plaintiff's feelings are not necessarily relevant. Only the perceptions of a reasonable person are of consequence. Under the subjective prong of the modified reasonable person standard, however, the plaintiff may introduce evidence about her feelings, reactions, injuries, and other relevant personal evidence.

Furthermore, a sexual harassment plaintiff will not be hard-pressed to prove that she personally found the advances unwelcome or the atmosphere hostile.[106] After all, the plaintiff herself is well-suited to testify as to her own thoughts and feelings regarding the allegedly offensive conduct. The defendant could probably dispute this testimony only if the employee previously stated either that she was not offended or that her work environment was not negatively affected by the defendant's conduct.

Furthermore, the trial will typically not be bifurcated as to the two standards, thereby allowing the plaintiff to introduce evidence concerning each standard during the same trial and to the same jury.[107] As a result, all of the evidence may merge in the jury members' minds. The likely effect is that evidence which shows that the

104. *Id.*

105. *Id.*

106. The Court has held that "the fact that sex-related conduct was 'voluntary,' in the sense that the complainant was not forced to participate against her will, is not a defense to a sexual harassment suit brought under Title VII." Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 68 (1986). The Court added that the "gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome'." *Id.* Similarly, the Court rejected the view "that the mere existence of a grievance procedure and a policy against discrimination, coupled with [the plaintiff's] failure to invoke that procedure, must insulate [the defendant] from liability." *Id.* at 72. The Court reasoned that when the alleged perpetrator is the plaintiff's supervisor (as in *Meritor* and in *Harris*), "it is not . . . surprising that [the plaintiff] failed to invoke the procedure and report her grievance to him." *Id.* at 73.

107. Under 42 U.S.C. § 1981a(c) (Supp. 1992) it is possible that the trier of fact may be a judge (where equitable relief only is sought or a jury right is waived) or a jury.

particular plaintiff was offended will positively affect the jury's determination of whether both the reasonable person would be offended and the particular plaintiff was offended.

Consequently, the subjective element of the test is not, in practice, an added burden that the plaintiff must overcome in order to recover under Title VII. The converse is true, since the subjective test specifically gives the plaintiff an opportunity to illustrate the specific, personal effects of the harasser's conduct. This evidence, in turn, may also affect the jury's determination of what is objectively reasonable.

Finally, in adopting the modified reasonable person standard, the Court wisely refused to be influenced by the advocates of the reasonable woman standard. Although there is merit to the argument that because women are the likely victims of sexual harassment their perceptions should be considered in evaluating alleged harassing conduct, the reasonable woman standard puts too great a burden on the male population. Instead of solving the problem of sexual harassment, the reasonable woman standard would put men in the same unfortunate position that women were in when the reasonable man standard was prevalent in the law. Many men would be forced to evaluate their own behavior from the perspective of a reasonable woman, which, by definition, may be impossible. As one commentator has stated, the reasonable woman standard creates the trap of "discriminating to avoid discrimination."[108] Instead, the modified reasonable person standard strikes a proper balance by furthering the goal of a gender-neutral legal system[109] yet still recognizing the personal injuries of sexual harassment victims.

B. *Proof of Psychological Suffering*

The second conflict resolved in *Harris* regards the issue of whether a sexual harassment plaintiff must prove concrete psychological harm.[110] The Court concluded that "[s]o long as the environment would reasonably be perceived, and is perceived, as hostile or abusive, . . . there is no need for it also to be psychologically injurious."[111] Justice O'Connor stated that "[c]ertainly Title VII bars conduct that would seriously affect a reasonable person's psychological well-being, but the statute is not limited to such conduct."[112]

108. Mogan, *supra* note 44, at 566.
109. *Id.*
110. Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 370-71 (1993).
111. *Id.* at 371.
112. *Id.*

In making this ruling, the Court expressly rejected the conclusions of several Courts of Appeals, adopting instead the reasoning advanced by the Ninth Circuit in *Ellison v. Brady*.[113] In *Ellison* the court held that the requirement that a plaintiff's psychological well-being be seriously affected does not follow directly from *Meritor*.[114] Courts that had required a showing of psychological impairment had misinterpreted the Supreme Court's prior reference to the possible serious effects of sexual harassment on the psychological stability of employees.[115] Psychological impairment is a possible result of harassment, but it is not a required element in proving that harassment occurred. In *Harris*, the Supreme Court adopted the same explanation for the other circuits' waywardness.[116]

In holding that a sexual harassment plaintiff need not prove impairment of her psychological well-being, the Supreme Court continued its practice of looking to and following the EEOC Guidelines.[117] Under these Guidelines, a plaintiff in a hostile environment sexual harassment case is not required to prove injury to her psychological health.[118] Instead, the employee suffers unlawful discrimination under Title VII when she demonstrates objectionable sex-based conduct that is sufficiently severe or pervasive to interfere with a reasonable person's job performance in relation to other employees who are subjected to such offensive conduct.[119]

The Court's resolution of the psychological suffering issue is proper because the purpose of discrimination statutes should be to eliminate sexually harassing conduct. In a situation where discriminatory conduct has profoundly affected the conditions of the victim's employment, Title VII's relief should not be withheld merely because the victim is emotionally capable of withstanding patently offensive behavior. Once the plaintiff has established that the environment is both subjectively and objectively hostile, requiring additional proof of

113. *Harris*, 114 S. Ct. at 370 (citing Ellison v. Brady, 924 F.2d 872, 878 (9th Cir. 1991)).

114. *Ellison*, 924 F.2d at 878.

115. *Id.* at 878 n.8.

116. The Supreme Court stated that "the reference in [*Meritor*] to environments 'so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers', . . . merely present[s] some especially egregious examples of harassment. [It does] not mark the boundary of what is actionable." *Harris*, 114 S. Ct. at 371.

117. *See* Brief for the United States and EEOC at 9-22, Harris v. Forklift Sys., Inc. 114 S. Ct. 367 (1993) (No. 90-1168).

118. *Id.* at 14-15.

119. *Id.* at 20. "A sexually demeaning work environment can interfere with a reasonable [person's] work performance — regardless of [her] psychological injury-if the environment hampers her opportunity to succeed vis-a-vis her male peers or denies her credit for her achievements." *Id.* at 25.

psychological suffering places too much focus on the employee's reaction to discrimination rather that on the wrongful actions of the employer.

Requiring proof of psychological injury confuses the question of liability with the measurement of damages. Proof of the extent of injury is a prerequisite to a determination of damages in discrimination cases, but it should not be a prerequisite to finding liability.[120] Although the existence of psychological impairment is relevant to the subjective prong of the modified reasonable person standard,[121] its primary relevance is in a determination of damages *after* liability has already established. The practical effect of the Court's resolution of the psychological suffering issue is to properly reshift this focus.

V. CONCLUSION

Taken together, the Court's separate holdings in *Harris* create what can be called a "middle path"[122] between traditional and novel ideas regarding the plaintiff's burden in a sexual harassment case. The Court's decision is indeed a compromise between the extremes of (1) allowing overly sensitive employees to recover under Title VII and (2) prohibiting thick-skinned employees from recovering even when they have faced patently offensive conduct in the workplace. The Court's decision requires proof of harm yet does not require proof of psychological destruction.

The consequences resulting from the emergence of women in the workforce cannot be ignored. Decisions that address the struggles faced by working women are timely and necessary. Although the law regarding sexual discrimination will likely never be completely settled, the Supreme Court has clarified the law considerably in recent years. The specific ramifications of the *Meritor* and *Harris* decisions cannot yet be known. What is clear, however, is that by confronting the issue

120. Brief for the NOW Legal Defense and Education Fund, *et al.* as *amici curiae* at 11, Harris v. Forklift Sys., Inc., 114 S. Ct. 367 (1993) (No. 92-1168).

121. The Supreme Court stated that "[t]he 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." *Harris*, 114 S. Ct. at 371.

122. *Id.*

of sexual harassment and by establishing a workable system for recovery, the Supreme Court has advanced the position of women in the workplace.

Leah R. McCaslin