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TOWARD A NEW STANDARD: HOPE FOR GREATER UNIFORMITY IN THE TREATMENT OF HOSTILE WORK ENVIRONMENT CLAIMS

INTRODUCTION

[A]ll acts by any one group (or individual) [can adversely affect] others. One side's freedom can always be seen as the other side's loss of security, one side's equal treatment can seem like the other's unequal treatment, one group's pursuit of its own interest can always be called intolerance of any other group that is affected by that pursuit.¹

Inequality in the treatment of the sexes and incidents of sexual harassment have long been a problem in the workplace. The question is asked: can equality between men and women in the workplace ever be achieved? Are Americans destined to view equality as a tug-of-war game at which one sex must win and the other sex must lose?² Surveys and studies show that incidents of sexual harassment are severely under reported and, therefore, more prevalent than immediately apparent.³ Reasons for an individual's failure to report sexual harassment include: fear of losing one's job, need for a future job reference, assumption that reporting harassment would not change anything, fear of being accused of inviting the harassment, fear that reporting harassment would draw public attention to one's private life, and aversion to the emotional stress that filing a lawsuit would bring.⁴

Title VII of the Civil Rights Act of 1964,⁵ through its phrase "terms, conditions, or privileges of employment," attempted to fight the dispa-

1. Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177, 1221 (1990) (citations omitted).

2. The majority of this Comment concentrates on sexual harassment of women, because this is more commonplace than sexual harassment of men. The concepts in this Comment, however, are also meant to apply to heterosexual men and to homosexual people as victims of sexual harassment, since these groups are increasingly becoming the victims of sexual harassment.

3. See Stephen M. Crow & Clifford M. Koen, *Sexual Harassment: New Challenge for Labor Arbitrators?*, ARB. J., June 1992, at 9 (revealing through statistics the disparity between people who have experienced sexual harassment and those who have reported sexual harassment); Donald J. Petersen & Douglas P. Massengill, *Sexual Harassment Cases Five Years after Meritor Savings Bank v. Vinson*, 18 EMPLOYEE REL. L.J. 489, 489 (1992-93) (citing surveys which show that the number of people who report sexual harassment is much lower than the number exposed to sexual harassment).

4. Petersen & Massengill, *supra* note 3, at 489.

5. 42 U.S.C. § 2000e-2 (1988). This Act states in relevant part:

rate and discriminatory treatment of men and women in the workplace.⁶ The problem, however, has been that the Equal Employment Opportunity Commission (EEOC) and the courts have approached hostile work environment sexual harassment claims environment in an "ad hoc" manner; thereby inadequately addressing the concerns of both potential plaintiffs and defendants in these Title VII claims.⁷

This Comment develops a new standard that courts may use to evaluate hostile work environment sexual harassment claims. "Quid pro quo" sexual harassment and hostile work environment harassment are two widely recognized theories under which a sexual harassment claim can be brought. A claim of quid pro quo harassment occurs whenever "a supervisor conditions the granting of an economic or other job benefit upon the receipt of sexual favors from a subordinate, or punishes that subordinate for refusing to comply."⁸ This Comment does not address quid pro quo sexual harassment, but instead addresses only hostile work environment sexual harassment. Part I provides a brief summary of the development of hostile work environment sexual harassment claims. Part II describes the conflicts which have arisen over the current standards used to evaluate hostile work environment claims. Part III outlines the new standard proposed by this Comment, and part IV articulates the standard in detail and analyzes the five elements of this new standard.

I. THE DEVELOPMENT OF THE HOSTILE WORK ENVIRONMENT SEXUAL HARASSMENT CLAIM

Womens' fight for equality in the workplace began when women accidentally obtained coverage under Title VII of the Civil Rights Act of 1964.⁹ In 1963, while senators debated the passage of this Act, one debater added the term "sex" to the wording of the Act in an effort to make the coverage of the Act so broad that it would be defeated. Much

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- (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

Id.

6. *Id.*

7. Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV. L. REV. 1449, 1458 (1984).

8. *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 897 (1st Cir. 1988).

9. CHARLES & BARBARA WHALEN, *THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT* 233-34 (1985).

to the proponent's surprise, the addition of "sex" resulted in a large new group of constituents who rallied behind the Civil Rights Act of 1964.¹⁰ Despite what appeared to be a victory for women, it was almost two decades before the EEOC developed guidelines for defining a claim of hostile work environment sexual harassment under Title VII.¹¹

The federal courts first recognized a hostile work environment cause of action in *Bundy v. Jackson*.¹² The *Bundy* court borrowed its reasoning from cases in which racial harassment was found to create a hostile work environment in violation of Title VII.¹³ Therefore, the District of Columbia Circuit Court of Appeals paved the way for the sexual harassment hostile work environment claim. The *Bundy* court recognized that sexual hostility in a workplace could charge the atmosphere with an animus which interfered with "terms, conditions, or privileges of employment," regardless of whether the employee actually lost any tangible job benefits.¹⁴

10. *Id.* at 234.

11. The EEOC guidelines have been codified in the Code of Federal Regulations, and they state:

(a) Harassment on the basis of sex is a violation of section 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.

Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a) (1993). Subsection (a)(1) and (a)(2) refer to quid pro quo sexual harassment claims. *Id.* But this Comment concentrates on hostile work environment sexual harassment claims, which have arisen under subsection (a)(3) of that Code. *Id.*

12. 641 F.2d 934, 943-44 (D.C. Cir. 1981).

13. *Id.* at 945. In *Bundy*, the court explained the similarity between the creation of a racially hostile work environment and a sexually hostile work environment:

The relevance of these "discriminatory environment" cases to sexual harassment is beyond serious dispute. Racial or ethnic discrimination against the company's minority clients may reflect no intent to discriminate directly against a company's minority employees, but in poisoning the atmosphere of employment it violates Title VII. Sexual stereotyping . . . may be benign in intent, and may offend women only in a general, atmospheric manner, yet it violates Title VII. Racial slurs, though intentional and directed at individuals, may still be just verbal insults, yet they too create Title VII liability. How then can sexual harassment, which injects the most demeaning sexual stereotypes into the general work environment and which always represents an intentional assault on an individual's innermost privacy, not be illegal?

Id.

14. *Id.* at 943-44.

Following the EEOC guidelines and the precedent established in *Bundy*, the Eleventh Circuit went one step further and established elements that constitute a hostile work environment in *Henson v. City of Dundee*.¹⁵ It was necessary to specify the elements because the court determined that not all instances of sexual harassment would establish a Title VII violation. The Eleventh Circuit set forth the following elements: "(1) The employee belongs to a protected group. . . . (2) The employee was subject to unwelcome sexual harassment. . . . (3) The harassment complained of was based upon sex. . . . (4) The harassment complained of affected a 'term, condition, or privilege' of employment. . . . [and] (5) Respondeat superior."¹⁶

In 1986, the Supreme Court recognized hostile work environment sexual harassment as a claim under Title VII in *Meritor Savings Bank v. Vinson*.¹⁷ The Court acknowledged that Title VII not only governs instances in which there exists " 'economic' or 'tangible' discrimination," but also hostile environment claims.¹⁸ The Court held that "[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.' "¹⁹ Other than opening the door to claims of hostile work environment sexual harassment, this decision did not provide the lower courts with many guidelines for deciding these cases. The Court simply stated that the alleged sexual harassment must be "unwelcome"²⁰ and that employers will not always be liable for the actions of

15. 682 F.2d 897 (11th Cir. 1982).

16. *Id.* at 903-05.

17. 477 U.S. 57 (1986). In *Meritor*, Mechelle Vinson applied for a job at which time she met Sidney Taylor, the vice president of Meritor Bank. Ms. Vinson received a job as a teller. Initially, Ms. Vinson said that Taylor treated her in a fatherly way, but then he began to make repeated demands upon her for sexual favors. At first she refused, but then she gave in to his advances and began a sexual relationship with him. Over the course of the next several years, Ms. Vinson said she had intercourse with Mr. Taylor forty to fifty times. Ms. Vinson said that Taylor also fondled her while in front of other employees, exposed himself to her, and even forcibly raped her a number of times. *Id.* at 59-60.

18. *Id.* at 64. The Court stated that "[t]he phrase 'terms, conditions, or privileges of employment' evinces a congressional intent "'to strike at the entire spectrum of disparate treatment of men and women"' in employment." *Id.* (quoting *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971)).

19. *Id.* at 67 (quoting *Henson*, 682 F.2d at 904). This holding has been interpreted by lower courts to require an objective determination of whether a work environment is hostile. This objective determination has been a point of significant contention among lower courts. Some courts have adopted a "reasonable person" standard, and other courts adopted a "reasonable woman" standard, since sexual harassment is so inherently gender biased. *See infra* part II.A.

20. *Meritor*, 477 U.S. at 68-69.

their employees.²¹ At best, the objective "reasonable person" standard has resulted in different circuits adopting their own guidelines for what constitutes a hostile work environment. At worst, *Meritor* has resulted in different judgments on sexual harassment cases amongst the circuits.²²

The Supreme Court most recently addressed claims of hostile work environment sexual harassment in *Harris v. Forklift Systems, Inc.*²³ There, the Court upheld the *Meritor* standard, requiring conduct "severe or pervasive enough to create an objectively hostile or abusive work environment — an environment that a reasonable person would find hostile or abusive."²⁴ The Court also held that the victim must subjectively perceive the environment as abusive, or there could be no Title VII claim.²⁵ The principal holding of *Harris*, however, was that psychological injury is not necessary to make a claim under Title VII.²⁶ The Court stated:

[W]hether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. The effect on the employee's psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive. But while psychological harm, like any other relevant factor, may be taken into account, no single factor is required.²⁷

Aside from this narrow holding, the Court again refused to establish any definitive guidelines for what constitutes a hostile environment, leaving the lower courts once again in a position of uncertainty.

21. *Id.* at 72. The Court refused to adopt a bright line rule for when an employer is liable for the sexually harassing activities of its employees. However, the Court stated that lower courts should look to agency principles for guidance, but should also consider that Congress desired at least some limits on the types of employee activities for which employers would be held liable under Title VII. *Id.*

22. The different interpretations of federal circuit courts of what constitutes a claim of hostile work environment sexual harassment claim will be discussed later in this Comment. See *infra* part II.B.

23. 114 S. Ct. 367 (1993).

24. *Id.* at 370.

25. *Id.*

26. *Id.* at 371.

27. *Id.*

II. CONFLICTS OVER HOW TO IDENTIFY A HOSTILE WORK ENVIRONMENT

The Supreme Court's "ad hoc" approach to determining what constitutes hostile work environment sexual harassment has left lower courts confused as to how to analyze these Title VII claims. Justice Scalia identified the problem when he stated:

"Abusive" (or "hostile," which in this context I take to mean the same thing) does not seem to me a very clear standard — and I do not think clarity is at all increased by adding the adverb "objectively" or by appealing to a "reasonable person's" notion of what the vague word means. Today's opinion does list a number of factors that contribute to abusiveness, . . . but since it neither says how much of each is necessary (an impossible task) nor identifies any single factor as determinative, it thereby adds little certitude. 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.²⁸

The problems Justice Scalia identified are evident in the debate between the circuits concerning what standard of evaluation should be used. They are also evident in the efforts of the circuit courts to clarify the vague Supreme Court standard through development of their own hostile work environment criteria.

A. *The Reasonable Person Versus the Reasonable Woman*

One major point of confusion has been the standard used to evaluate the severity of a hostile work environment. The circuit courts have used a number of different standards, including: the reasonable person stan-

28. *Id.* at 372 (Scalia, J., concurring).

dard,²⁹ an objective/subjective standard,³⁰ and the "reasonable woman" standard.³¹

The reasonable person standard has been criticized for a number of reasons. First, it has been argued that "a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women."³² Also, the reasonable person standard suggests that there is some view of sexual harassment which all people share.³³ Since men and woman view sexual harassment differently, one might wonder whether there can be one objective viewpoint by which to analyze all hostile environment cases.³⁴ The problem is not that there are no

29. *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 898 (1st Cir. 1988) (stating that the trier of fact should consider the perspective of the woman and the man when judging a hostile environment claim); *Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 620 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987) (stating that the trier of fact should adopt the perspective of a reasonable person when judging a hostile work environment claim).

30. *Harris*, 114 S. Ct. at 370 (stating that a work environment alleged to be hostile should be viewed from a reasonable person perspective and from the victim's subjective perspective); *Dockter v. Rudolf Wolff Futures, Inc.*, 913 F.2d 456, 459 (7th Cir. 1990) ("district court should employ both an objective and subjective analysis"); *Paroline v. Unisys Corp.*, 879 F.2d 100, 105 (4th Cir. 1989) (evaluating hostile environment from an "objective perspective and from the point of view of the victim").

31. *Ellison v. Brady*, 924 F.2d 872, 878-79 (9th Cir. 1991) (adopting a reasonable woman standard); *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1482 (3d Cir. 1990) (stating that sexual harassment must affect a reasonable person of the same sex as the victim). See generally Robert S. Adler & Ellen R. Peirce, *The Legal, Ethical, and Social Implications of the "Reasonable Woman" Standard in Sexual Harassment Cases*, 61 FORDHAM L. REV. 773 (1993); Sally A. Piefer, Comment, *Sexual Harassment from a Victim's Perspective: The Need for the Seventh Circuit to Adopt the Reasonable Woman Standard*, 77 MARQ. L. REV. 85 (1993); Note, *The Reasonableness of the "Reasonable Woman" Standard: An Evaluation of Its Use in Hostile Environment Sexual Harassment Claims Under Title VII of the Civil Rights Act*, 21 HOFSTRA L. REV. 483 (1992).

32. *Ellison*, 924 F.2d at 879.

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

34. In *Lipsett v. University of Puerto Rico*, 864 F.2d 881 (1st Cir. 1988), the First Circuit observed that such comments as "great figure" or "nice legs," can be viewed very differently by men and women. *Id.* at 898. A male supervisor might find these comments harmless and even legitimate, whereas a female employee might find these comments offensive. *Id.* See Collins & Blodgett, *Sexual Harassment . . . Some See It . . . Some Won't*, HARV. BUS. REV., Mar.-Apr. 1981, at 78-80, 92-93 (stating that sexual harassment has been characterized as harmless joking, but that is not how it feels to women; the article also reported that looking a woman up and down is three times as acceptable to men as to women); Ehrenreich, *supra* note 1, at 1208 n.115 (stating that many men believe that women could avoid sexual harassment if they dressed properly and if they behaved properly); Stephanie B. Goldberg, *Hostile Environments*, A.B.A. J., Dec. 1991, at 90 (reaffirming that men and women see things differently); A. ASTRACHAN, *HOW MEN FEEL: THEIR RESPONSE TO WOMEN'S DEMANDS FOR EQUALITY AND POWER* 88 (1988) (reporting that many men feel it is just a joke when they sexually proposition a woman).

factors which can be used to establish a hostile environment, but rather that the objective standard allows too much discretion in defining what constitutes a hostile work environment.³⁵

Not only is there a vast difference between the experiences of men and women, there is also a broad range in perspectives among women.³⁶ For that reason, circuit courts have adopted a reasonable woman standard because they do not believe that a reasonable person standard could adequately take into consideration the unique experiences of women.³⁷ Although there is a broad range of perspectives even among women, there are still common experiences women share that men do not. These experiences make women more conscious of sexual harassment. Women have been "disproportionately victims of rape and sexual assault," and thus have a greater incentive to be concerned with abusive sexual behavior.³⁸ On the other hand, since men have rarely been the victims of sexual assault, they may not appreciate "the underlying threat of violence that a woman may perceive."³⁹ Another difference between men and women is the attitudes women have about their role in the workplace.⁴⁰ Since women are relative newcomers to the workplace, they must deal with many difficulties, which can include: finding mentors, overcoming stereotypical views of women, and proving their competence.⁴¹ Consequently, sexual harassment in the workplace only undermines women who are working towards equality.

B. The Excessive Variation in Outcome and Analysis from Circuit to Circuit

The ad hoc approach taken towards claims of hostile work environment sexual harassment has led to great variance from circuit to circuit. Cases with similar factual situations have resulted in opposite court holdings. For example, circuit courts have taken opposing viewpoints on

35. This Comment advocates the establishment of factors to analyze what constitutes a hostile work environment. Common factors would give both the plaintiff and the defendant warning as to what behavior is inappropriate and what would constitute a hostile environment. The current standard, however, allows too much discretion and gives no real guidance since the reasonable person is an amorphous concept that is impossible to define. See *infra* Part IV (discussing the proposed standard).

36. Abrams, *supra* note 33, at 1202.

37. See *supra* note 31 (citing cases that adopted a reasonable woman standard).

38. Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991); see also Abrams, *supra* note 33, at 1205-06 (discussing the different views that men and women hold towards sex).

39. Ellison, 924 F.2d at 879.

40. Abrams, *supra* note 33, at 1204.

41. *Id.* at 1204-05.

whether psychological harm is necessary to prove a hostile environment; some courts find psychological harm necessary to prove harassment, while others have found it completely unnecessary.⁴² Also, courts have taken opposing positions on whether displaying pornography throughout an office creates a hostile environment.⁴³ These are only a few examples, but the point is that such diversity among the circuit courts leaves a sexual harassment victim at the mercy of a particular circuit court's attitude towards sexual harassment. Not knowing whether a claim will constitute sexual harassment means that a victim may be put through an arduous trial, only to discover afterwards that a particular circuit will not recognize sexual harassment in the particular circumstance. A clearer and more defined standard would allow plaintiffs to know what factually constitutes a hostile environment so that they can assess the parameters of their case before expending time, money, and energy on a trial. Also, a defined standard would put potential defendants on notice of what behavior to avoid.

Furthermore, circuits differ not only in judicial results, but also in the different factors considered important to sexual harassment cases.⁴⁴

42. Compare *Ellison*, 924 F.2d at 877-78 with *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 620 (6th Cir. 1986), cert. denied, 841 U.S. 1041 (1987) (taking opposite views on the necessity of psychological harm).

43. Compare *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1485 (3d Cir. 1990) with *Rabidue*, 805 F.2d at 622 (differing on whether the display of pornography creates a hostile work environment).

44. *Burns v. McGregor Elec. Indus., Inc.*, 989 F.2d 959, 964 (8th Cir. 1993) (stating that the following elements must be proven in a hostile environment claim: "(1) she belongs to a protected group; (2) she was subject to unwelcome sexual harassment; (3) the harassment was based on sex; (4) the harassment affected a term, condition, or privilege of employment; and (5) [the employer] knew or should have known of the harassment and failed to take proper remedial action."); *Ellison*, 924 F.2d at 875-76 (explaining "that a hostile environment exists when an employee can show (1) that he or she was subjected to sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature, (2) that this conduct was unwelcome, and (3) that the conduct was sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."); *Andrews*, 895 F.2d at 1482 (holding that five factors must be considered to prove a hostile environment: "(1) the employees suffered intentional discrimination because of their sex; (2) the discrimination was pervasive and regular; (3) the discrimination detrimentally affected the plaintiff; (4) the discrimination would detrimentally affect a reasonable person of the same sex in that position; and (5) the existence of respondeat superior liability."); *Dockter v. Rudolf Wolff Futures, Inc.*, 913 F.2d 456, 459 (7th Cir. 1990) (stating that "[f]or . . . sexual conduct to be actionable, 'it must be sufficiently severe or pervasive 'to alter the terms or conditions of [the victim's] employment and create an abusive working environment'" (quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)); *Paroline v. Unisys. Corp.*, 879 F.2d 100, 105 (4th Cir. 1989) (stating that "the plaintiff must show (1) that the conduct in question was unwelcome, (2) that the harassment was based on sex, (3) that the harassment was sufficiently pervasive or severe to create an abusive working environment, and (4) that some basis exists

Again, such differences in determining factors means that particular claimants will succeed or fail in their claims not because of the merits of their case, but because of the geographical location of their claim.

III. A PROPOSAL

The standard proposed by this Comment would eliminate the dispute over the proper manner by which to evaluate hostile work environment claims. It would also minimize the differences among the circuit courts, because it contemplates a given set of factors by which to evaluate a hostile work environment.⁴⁵ These factors have been developed by examining the opinions of many circuit court cases in an effort to distill common themes into one set of factors. As the Supreme Court has required, these factors take into consideration the totality of the circumstances.⁴⁶ They are also designed to operate through a defined methodology. For example, the burden of proof for each of the factors begins with the plaintiff, but if the victim of harassment introduces evidence regarding a particular factor, then a rebuttable presumption would arise as to that factor. The burden of proof would then shift to the defendant, who would have to produce evidence to counter the presumption. It would then be up to the trier of fact to weigh the evidence and reach a decision.

This new standard would provide clarity and specificity as to what constitutes a hostile work environment, thus remedying the deficiencies of the current standard.⁴⁷ This clarity and specificity also would further the goal of Title VII in eliminating discrimination from the workplace.⁴⁸ Moreover, clarity would warm the chill between the sexes which might

for imputing liability to the employer"); *Rabidue*, 805 F.2d at 619-20 (stating that the "plaintiff, to prevail in a Title VII offensive work environment sexual harassment action, must assert and prove that: (1) the employee was a member of a protected class; (2) the employee was subjected to unwelcomed sexual harassment in the form of sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature; (3) the harassment complained of was based upon sex; (4) the charged sexual harassment had the effect of unreasonably interfering with the plaintiff's work performance and creating an intimidating, hostile, or offensive working environment that affected seriously the psychological [sic] well-being of the plaintiff; and (5) the existence of respondeat superior liability").

45. *Harris v. Forklift Sys., Inc.*, 114 S. Ct. 367, 370 (1993) (stating that conduct must be "severe and pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive").

46. *Id.* at 371.

47. See *supra* Part II; see also Note, *supra* note 7, at 1458.

48. Note, *supra* note 7, at 1458.

occur when men and women are uncertain about what is and what is not appropriate behavior.⁴⁹

In addition, this new standard would be easy for circuit courts to apply since it is a natural extension of what they are already doing. The majority of circuit courts have already developed factors by which to analyze hostile work environment sexual harassment.⁵⁰ This new standard, however, would provide one set of factors by which all hostile work environment cases could be analyzed, thereby adding consistency to current analysis.

IV. A NEW STANDARD FOR HOSTILE WORK ENVIRONMENT SEXUAL HARASSMENT

This proposed standard is composed of five factors. They are: (1) sexual harassment is directed at the individual employee, or sexual harassment is so overwhelming as to permeate the general work environment; (2) employer's reaction to the existence of sexually harassing behavior in the workplace is inadequate; (3) employee regards the conduct as undesirable, offensive, or unwelcome; (4) employee subjectively perceives the situation to be harassing;⁵¹ and (5) harassing behavior interferes with the employee's well-being or ability to perform the job.

To bring a claim of sexual harassment, an employee would characterize the specific harassment as fitting under these identified factors. The employee should not be required to introduce evidence to support all of the factors; rather, the individual should bring forth evidence supporting as many factors as possible. If there is evidence introduced at trial that is sufficient to establish the factor, then a presumption arises that the employer created a hostile environment as contemplated by the specific factor. The burden thereafter shifts to the employer to rebut the existence of the factor.⁵²

49. *Id.*

50. See *supra* note 44 (listing circuit courts that have already adopted factors by which to evaluate hostile environment sexual harassment claims).

51. Factor 3 and factor 4 differ in that factor 3 is an objective determination of whether the situation is undesirable, offensive, or unwelcome, and factor 4 is a subjective determination of whether a particular employee considers a situation to constitute harassment.

52. Under the law of evidence, a presumption is defined as follows:

[A] genuine presumption is raised by a basic fact or facts that, when accepted as true by the trier, give rise to a mandatory inference, properly called a presumed fact. Once the basic facts are believed, the resulting presumed fact must be accepted by the trier unless it is rebutted by contravening evidence.

GRAHAM C. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE 56 (2d ed. 1987) (emphasis omitted). Technically, each of the factors presented in this article are basic facts which,

The trier of fact should be instructed on all of the factors. It is then the job of the trier of fact to examine the factors in the aggregate and determine whether the factors weigh more heavily in favor of the plaintiff or the defendant. Some factors carry more weight than others, as explained below. The trier of fact should be instructed as to which factors are more determinative than others. Those factors which determine a sexual harassment claim are articulated in the following discussion.

A. Sexual Harassment Is Directed at the Individual Employee, or Sexual Harassment Is So Overwhelming as to Permeate the General Work Atmosphere

Sexually harassing conduct, as contemplated by this factor, can be in the form of visual, verbal, or physical harassment. This has been the trend recognized by many of the circuit courts. The use of derogatory language or name calling,⁵³ the posting of pornography in the work place,⁵⁴ and the physical touching of a co-worker⁵⁵ have all been found to create a hostile environment. The EEOC guidelines also recognize this spectrum of activity.⁵⁶ Thus, under this factor courts should continue to consider all of these activities as sexually harassing conduct that might constitute a hostile work environment. Furthermore, courts should follow the lead of the Second Circuit in finding physical touching of an employee more determinative of a hostile work environment.⁵⁷

when accepted, give rise to the mandatory inference that the employee was sexually harassed in the way contemplated by that specific factor. Under the theory presented in this article, once all the evidence has been introduced, the jury must then balance all five factors and determine, looking at the totality of the circumstances, if a hostile environment has been created. The effect of the presumption may be avoided by the employer "by proving the nonexistence of the basic facts that support the presumed fact." *See id.* at 59.

53. *See Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1498-1501 (M.D. Fla. 1991) (finding that language such as "pussy", "cunt", and "lick me" contributed to the creation of a hostile work environment).

54. *See Andrews*, 895 F.2d 1469 (holding that the placing of pornographic pictures in common areas and the showing of pornographic pictures during work hours constituted a hostile work environment).

55. *See Carrero v. New York City Hous. Auth.*, 890 F.2d 569 (2d Cir. 1989) (holding that supervisor's touching of employee on her knee, kissing of employee's neck, and attempting to kiss employee on her mouth created a hostile work environment).

56. Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a) (1993) (stating that "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment . . .").

57. *Newsday, Inc. v. Long Island Typ. Union*, 915 F.2d 840, 842 (2d Cir. 1990), *cert. denied*, 449 U.S. 922 (1991) (holding that brushing against a coworker's lower back and buttocks and slamming against her back was considered to be physical contact that would constitute a hostile work environment); *see supra* note 55 and accompanying text.

Physical touching, because of its intrusiveness, should be ascribed greater weight than verbal or visual harassment.

Second, it should not matter in developing a claim of hostile work environment whether sexually harassing conduct is targeted at one specific individual or whether the conduct permeates the whole environment and is directed at all individuals of a particular class. Each of these situations is equally offensive, and both scenarios should constitute a sexually hostile work environment under this factor. If one person is targeted with sexual insults, inquiries, or acts, a court could determine that the individual has been singled out and viewed in a primarily sexual way, which might constitute sexual harassment.⁵⁸ A hostile work environment, however, should still be found in those cases where the insults, activities, and actions permeate the entire work environment and target a whole class of people rather than just one individual. A primary example of sexual harassment that permeates the environment is the constant display of pornographic pictures of women in common areas of the workplace. Such far-reaching activity should be found to create a sexually hostile work environment, since it would affect all women that work in that environment.⁵⁹

Third, the frequency of the sexually harassing conduct must be considered. The Supreme Court has explicitly stated that a "mere offensive utterance" is not enough to constitute a hostile work environment.⁶⁰ Nonetheless, this statement should not be interpreted, to mean that one act will, in all circumstances, be insufficient to create a hostile work environment. Rather, some activities are so offensive that one act should constitute a hostile work environment.⁶¹ The majority of the circuit

58. Abrams, *supra* note 33, at 1212-13.

59. For example, in *Andrews v. City of Philadelphia*, 895 F.2d 1469 (3d Cir. 1990), and *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611 (6th Cir. 1986), two different circuit courts came to opposite conclusions on the issue of whether posting pictures of nude or partially nude women in common areas would be grounds for a sexually harassing environment. In *Andrews*, the court recognized that pornography could be viewed as highly offensive to women employees, even though the male employees might find these actions to be harmless. 895 F.2d at 1485-86. In *Rabidue*, the court found that the nude posters had a "de minimis effect on the plaintiff's work environment when considered in the context of a society that condones and publicly" displays sexually explicit material at the newsstands. 805 F.2d at 622.

60. *Harris v. Forklift Sys., Inc.*, 114 S. Ct. 367, 371 (1993).

61. Although courts have traditionally required more than one act in order to find a hostile environment, one commentator shows that frequency is not always necessary. Abrams, *supra* note 33, at 1212. Ms. Abrams argues that a single act should at times be determinative of a hostile work environment:

A second factor that courts should consider is the frequency of the conduct. . . . Courts have erred in implying such a requirement in some cases involving sexual demands.

courts, however, hold that increased incidents of sexual harassment will create a stronger hostile work environment claim.⁶² Employees who are exposed to repeated instances of sexual insults, for example, would find it increasingly difficult to maintain their professional self-image and the respect of others.⁶³

Regarding where the sexual harassment occurs, the majority of cases concern harassment that occurs at the place of work. A claim of hostile work environment, however, may also arise away from the workplace, such as on a business trip⁶⁴ or during business related engagements, if the sexually harassing incident occurred in a work-related context.

B. An Employer's Reaction to the Existence of Sexually Harassing Behavior in the Workplace is Inadequate

The Supreme Court has refused to adopt a bright-line principle that employers are liable for all of the actions of their employees.⁶⁵ The

Some behavior—such as an unambiguous sexual request from a supervisor—is so inherently coercive, or so powerful in its ability to sexualize, that a single incident may be sufficient to poison the atmosphere for a woman employee. Nonetheless, frequency may be more helpful in assessing verbally based harassment claims.

Id.

62. *King v. Board of Regents*, 898 F.2d 533, 537 (7th Cir. 1990) (stating that the strength of the claim depends upon the number of incidents and the intensity of the incidents); *Andrews*, 895 F.2d at 1484 (noting that harassment is more pervasive when incidents occur with regularity); *Rabidue*, 805 F.2d at 620 (stating that “sexually hostile or intimidating environments are characterized by multiple and varied combinations and frequencies of offensive exposures”).

63. *Abrams*, *supra* note 33, at 1212-13.

64. *See Anderson v. Kelley*, No. 92-6663, 1993 U.S. App. LEXIS 32963, at *33-34 (6th Cir. Dec. 15, 1993) (*per curiam*) (stating that it did not matter that alleged harassing behavior took place during a business trip).

65. The Supreme Court has stated:

We therefore decline the parties' invitation to issue a definitive rule on employer liability, but we do agree with the EEOC that Congress wanted Courts to look to agency principles for guidance in this area. While some common-law principles may not be transferable in all their particulars to Title VII, Congress' decision to define “employer” to include any “agent” of an employer, 42 U.S.C. § 2000e(b), surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible. For this reason, we hold that the Court of Appeals erred in concluding that employers are always automatically liable for sexual harassment by their supervisors.

Meritor Savings Bank v. Vinson, 477 U.S. 57, 72 (1986); *compare id. with 29 C.F.R. § 1604.11(c)* (1993) (advancing a principle holding employers strictly liable for the actions of their employees).

Many circuit courts have used the principle of respondeat superior to hold employers liable for their employee's harassing activities. *See Andrews*, 895 F.2d at 1482; *Rabidue*, 805 F.2d at 619-20. Respondeat superior is a theory of imputed negligence whereby an employer is

more widely advanced principle being adopted by this factor is that employers should be held liable for the actions of their employees when employers knew or should have known that sexual harassment was occurring, but failed to take action.⁶⁶ Under this factor, an employee could prove "that the employer knew or should have known of the harassment . . . by showing that she complained to higher management of the harassment . . . or by showing the pervasiveness of the harassment, which gives rise to the inference of knowledge or constructive knowledge."⁶⁷ Also, the employer's knowledge of an employee's prior harassing activities should prove highly relevant in finding that the employer constructively knew of subsequent harassing activity by the employee.⁶⁸

If an employee complains of sexually harassing behavior, the employer must respond with prompt, effective remedial measures, or the courts should find that a hostile environment exists as contemplated by this factor.⁶⁹ In determining whether an employer took appropriate actions, the trier of fact should look at whether the actions taken were "reasonably calculated to prevent further harassment under the particular facts and circumstances of the case at the time the allegation [was] made."⁷⁰ In assessing this factor, the process that was developed by the

held strictly liable if an employee commits a tort while acting within the scope of employment. As stated above, however, the Supreme Court did not adopt this theory as controlling where an employer should be held liable for a hostile environment claim. See *Meritor*, 477 U.S. at 72.

66. *Anderson*, No. 92-6663, 1993 U.S. App. LEXIS 32963, at *34; *Brooms v. Regal Tube Co.*, 881 F.2d 412, 421 (7th Cir. 1989); *Paroline v. Unisys Corp.*, 879 F.2d 100, 107 (4th Cir. 1989); *Henson v. City of Dundee*, 682 F.2d 897, 905 (11th Cir. 1982).

67. *Henson*, 682 F.2d at 905.

68. *Paroline*, 879 F.2d at 107.

69. In *Nash v. Electrospace Sys., Inc.*, 9 F.3d 401 (5th Cir. 1993), the court found an adequate response by the employer where the company had an investigation underway within one week of receiving complaints of sexual harassment, and the company transferred the complainant to a new department without loss of pay or benefits so that she would be insulated from the harassing conduct. *Id.* at 404. The actions by the employers in *Nash* were seen to effectively shield the employee from the harassment. *Id.* The company also reissued their policy against sexual harassment to all new employees, which was seen as an adequate response to a complaint of sexual harassment. *Id.* In *Anderson*, the court found that an employer's actions of physically relocating the plaintiff to a different area, which ended the harassing conduct, was an adequate action to prevent a hostile work environment. No. 92-6663, 1993 U.S. App. LEXIS 32963, at *34-35. In *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991), the court found a hostile work environment where the employer often took no action or took action after considerable delay when an employee complained of sexually harassing behavior. *Id.* at 1531.

70. *Brooms v. Regal Tube Co.*, 881 F.2d 412, 421 (7th Cir. 1989). In *Brooms*, the plaintiff complained to management of the explicit racial and sexual remarks which Gustafson, a co-worker, had made to her. The manager spoke with Gustafson and had him apologize to Broom, and told Gustafson that his salary increase would be postponed and that he would be fired if he did this again. *Id.* at 416. For a few weeks the abusive behavior subsided, but it

Fifth Circuit is most effective. The Fifth Circuit maintains that a prima facie case of hostile work environment sexual harassment is made if an employer does not take prompt remedial steps reasonably calculated to end harassment in response to an employee's complaint.⁷¹

Furthermore, courts should look more favorably upon employers who take preventive measures. The EEOC guidelines on hostile work environment emphasize the importance of preventing the sexual harassment before it ever occurs, stating:

Prevention 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.⁷²

The Supreme Court has attempted to reward employers by stating that if an employer has an expressed policy against sexual harassment which is designed to respond to sexual harassment claims, then employers should be protected from liability if employees do not take advantage of the procedure and if the employers do not have knowledge of the harassment.⁷³ Retaining this policy would serve as an incentive for all employers to take preventive measures to discourage a hostile work environment. Preventive measures would also benefit courts since this would reduce the number of victims and result in fewer court cases.

C. An Employee Regards the Conduct as Undesirable, Offensive, or Unwelcome

The Supreme Court,⁷⁴ lower courts,⁷⁵ and the EEOC⁷⁶ have found it critical that the employee regard the sexually harassing conduct as un-

later began again. *Id.* at 416-17. The court in *Brooms* found that a reasonable employer would have responded differently, and therefore the Title VII claim was upheld. *Id.* at 427. In *Waltman v. International Paper Co.*, 875 F.2d 468 (5th Cir. 1989), when an employee complained of sexual harassment by coworkers, the employer told her that "he would take care of it." However, the harassment continued. The court held that the employer would be held liable if the remedial steps taken by the employer were not reasonably calculated to end the harassment. *Id.* at 479. The actions of the employer in *Waltman* were not seen as steps reasonably calculated to end the harassment. *Id.*

71. Petersen & Massengill, *supra* note 3, at 499.

72. Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(f) (1993).

73. Meritor Savings Bank v. Vinson, 477 U.S. 57, 72 (1986).

74. *Id.* at 68.

75. *Burns v. McGregor Elec. Indus., Inc.*, 989 F.2d 959, 964 (8th Cir. 1993) (holding that a victim must prove that "she was subject to unwelcome sexual harassment"); *Ellison v. Brady*,

welcome. Similarly, this factor requires the presence of unwelcome conduct in order to bring a claim of sexual harassment. In *Meritor*, the Supreme Court stated that “[t]he gravamen of any sexual harassment claim is that the alleged sexual advances were ‘unwelcome.’”⁷⁷ The Court stated that “[t]he correct inquiry is whether [an employee] by her conduct indicated that the alleged sexual advances were unwelcome,” rather than whether the employee voluntarily participated in the harassment.⁷⁸ Courts have considered conduct harassing and unwelcome when “the employee did not solicit or incite” the conduct, and when “the employee regarded the conduct as undesirable or offensive.”⁷⁹

Courts must be careful when considering the element of unwelcome conduct, because in the past, this factor has been improperly discounted in certain circumstances. For example, in *Burns v. McGregor Electronic Industries, Inc.*,⁸⁰ the appellate court found that the trial court improperly held that since an employee had posed nude in a magazine, she would not have considered the sexual advances of her co-workers as unwelcome or offensive.⁸¹ Under this factor, an employee’s conduct in a non-work-related environment should not be determinative of that em-

924 F.2d 872, 875-76 (9th Cir. 1991) (stating “that a hostile environment exists when an employee can show . . . that this conduct was unwelcome”); *Paroline v. Unisys Corp.*, 879 F.2d 100, 105 (4th Cir. 1989) (stating that “the plaintiff must show that the conduct in question was unwelcome”); *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 619 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987) (stating that “to prevail in a Title VII offensive work environment sexual harassment action, [a plaintiff] must assert and prove that . . . [she] was subjected to unwelcomed harassment in the form of sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature”); *Henson v. City of Dundee*, 682 F.2d 897, 903 (11th Cir. 1982) (holding that the employee must show that she “was subject to unwelcome sexual harassment”).

76. 29 C.F.R. § 1604.11(a) (1993) (stating that “[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment.”).

77. 477 U.S. at 68.

78. *Id.*; see *supra* note 17 (giving a brief summary of the facts of *Meritor*). Vinson brought a Title VII claim against Meritor Savings Bank and the respondent attempted to get the charges dropped by stating that Vinson voluntarily had sexual relations with Taylor. It was to this claim that the Court stated that the proper consideration is not whether the petitioner’s participation was voluntary, but whether the sexual advances were welcome. *Id.* at 68. The Court was distinguishing between voluntary and unwelcome; a victim of harassment could voluntarily give in to sexual advances, although the advances were unwelcome. Thus, it should be the unwelcomeness of the encounter that is considered. *Id.* The Court found that the sexual advances of the supervisor were not welcomed by the Petitioner in that case. *Id.* at 73.

79. *Henson*, 682 F.2d at 903.

80. 989 F.2d 959 (8th Cir. 1993).

81. *Id.* at 962-63. The appellate court reversed the decision of the lower court and found that the reasoning of the lower court was clearly in error. *Id.* at 963. The court stated:

ployee's work-related conduct.⁸² Also, other courts have improperly found that since a claimant was used to an environment that was disgusting and degrading, she would not find harassing behavior unwelcome.⁸³ This element of the standard stipulates that if an employee finds an atmosphere disgusting and degrading, the harassing behavior would be unwelcome regardless of past experiences.

Manner of dress and behavior of a female employee has also been considered by some courts when determining whether harassing behavior is unwelcome. Whether this is appropriate is a difficult issue because men and women differ on the role that dress and behavior plays in the workplace.⁸⁴ Regardless, courts appear to concentrate on behavior when determining if advances were considered unwelcome. Examples of questioned behavior include where the female employee tells sexual stories or engages in sexual gestures at work, or where the employee initiates sexual conversation or seeks out sexual encounters with coworkers.⁸⁵ Under this factor, behavior should be considered when determining if advances are unwelcome. However, the issue of behavior must be approached with an open mind, avoiding the potential for stereotypes to cloud objectivity. It is important that the issue of behavior be approached without any preconceived stereotypes.

Under this factor, the most determinative indicator of unwelcome behavior of an alleged harasser should be the verbal responses of the

We hold that the such a view is unsupported in law. If the court intended this as a standard or rationale for a standard, it is clearly in error. This rationale would allow a complete stranger to pursue sexual behavior at work that a female worker would accept from her husband or boyfriend. This standard would allow a male employee to kiss or fondle a female worker at the workplace.

Id.

82. *Id.* This statement contemplates the reasoning of the appellate court in *Burns*, and it draws the conclusion that non-work-related activity should never be used as an excuse for the harassment of an employee.

83. In *Sauers v. Salt Lake County*, 1 F.3d 1122 (10th Cir. 1993), an employee in the Salt Lake County Attorney's Office filed a sexual harassment claim when the conduct of a supervisor was seen to turn from "coarse" to sexually harassing. *Id.* at 1126. The behavior of the superior included: grabbing another female employee's breast, making comments about the plaintiff's breasts, asking the plaintiff to "swap spit," and rubbing his groin against another employee's shoulder. *Id.* at 1126-27. Since the plaintiff stated that she was used to working with cops and being in a rough atmosphere, the court made the determination that the plaintiff merely considered the behavior "disgusting and degrading" instead of unwelcome. *Id.* at 1127. This standard would propose that being "used to" certain actions does not necessarily mean those actions are welcome.

84. Ms. Ehrenreich claims that many men believe that women could avoid harassment if they "behaved properly." Ehrenreich, *supra* note 1, at 1208. This reasoning makes it seem as though the victim of harassment is in some way to blame for the harassment.

85. *Burns v. McGregor Elec. Indus., Inc.*, 989 F.2d 959, 963 (8th Cir. 1993).

harassed employee. If the harassed employee conveys that she does not welcome the harassing behavior, or if the employee goes to a supervisor and complains of the harasser's behavior, it should carry significant weight.⁸⁶ Looking to the spoken words of the employee as an indication of unwelcomeness would, to some extent, eliminate the dispute over what men and women consider dress or behavior that invites sexual conduct. If a verbal expression of unwelcomeness is made, these words should be interpreted as unequivocal. Lack of a verbal protestation, however, should not preclude a finding of unwelcomeness. This factor may still be established by looking at other nonverbal communications made by the employee that convey unwelcomeness.

D. An Employee Subjectively Perceives the Situation to Be Harassing

This factor attempts to recognize that not all men or women perceive a situation in the same manner, and this difference should be taken into consideration.⁸⁷ Most recently, in *Harris v. Forklift Systems, Inc.*,⁸⁸ the Supreme Court recognized that the victim's subjective perception that the work environment is hostile must be considered.⁸⁹ "The subjective factor is crucial because it demonstrates that the alleged conduct injured [a] particular plaintiff giving her a claim for judicial relief."⁹⁰

This subjective consideration, however, could be used in an improper manner and could work to the disadvantage of the plaintiff, if care is not

86. In *Trautvetter v. Quick*, 916 F.2d 1140 (7th Cir. 1990), the principal of the school started to make sexual advances towards one of the teachers. *Id.* at 1142. The court decided that since this teacher never actually indicated that the advances of the principal were unwelcome, but instead either laughed off the advances or just said no and then finally began a sexual relationship with this man, she did not properly convey the message that the advances were unwelcome. *Id.* at 1149.

87. In *Rabidue v. Osceola Ref. Co.*, the court explained why it is important to take into consideration the subjective perspective of the victim:

[A] proper assessment or evaluation of an employment environment that gives rise to a sexual harassment claim would invite consideration of such objective and subjective factors as the nature of the alleged harassment, the background and experience of the plaintiff, her coworkers, and supervisors, the totality of the physical environment of the plaintiff's work area, the lexicon of obscenity that pervaded the environment of the workplace both before and after the plaintiff's introduction into its environs, coupled with the reasonable expectation of the plaintiff upon voluntarily entering that environment. Thus, the presence of actionable sexual harassment would be different depending upon the personality of the plaintiff and the prevailing work environment and must be considered and evaluated upon an ad hoc basis.

805 F.2d 611, 620 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987).

88. 114 S. Ct. 367 (1993).

89. *Id.* at 370.

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

taken. For example, as recounted earlier, the trial court in *Burns v. McGregor Electronic Industries, Inc.*⁹¹ improperly found that a plaintiff would not have been offended by the sexual advances of her coworkers, because she had posed nude in a magazine.⁹² The trial court reasoned that a woman who would pose nude in a magazine would not find sexual remarks from coworkers offensive. The appellate court found this reasoning “unsupported in law.”⁹³

Another concern with this factor is that of the overly sensitive victim. It appears that courts have avoided this problem by placing greater emphasis on other factors.⁹⁴ Similarly, the scheme established by this new standard combats the problem of the hypersensitive victim by establishing a number of factors which must be weighed; only by tipping the balance in favor of the victim can a claim of hostile work environment be proven. Therefore, hypersensitive victims could not prove that a hostile work environment existed without proving other factors as well which would tip the balance in their favor.

E. Harassing Behavior Interferes with the Employee's Well-Being or Ability to Perform the Job

If a plaintiff suffers either psychological harm or suffers other injuries due to sexual harassment in the workplace, this should constitute a hostile environment. The psychological effect upon the victim of sexual harassment was one factor which many circuit courts found dispositive in determining whether a hostile environment was created.⁹⁵ The Supreme Court decided *Harris v. Forklift Systems, Inc.*⁹⁶ in order to resolve the conflicts between the circuit courts on whether psychological harm was necessary to prove a hostile environment.⁹⁷ The Court stated:

91. 989 F.2d 959 (8th Cir. 1993).

92. *Id.* at 963.

93. *Id.*

94. *Saxton v. American Tel. & Tel. Co.*, 10 F.3d 526, 534 (7th Cir. 1993) (placing more emphasis on objective inquiry, rather than subjective inquiry); *Paroline v. Unisys Corp.*, 879 F.2d 100, 105 (4th Cir. 1989) (citation omitted) (declining “to focus solely on the plaintiff’s subjective reaction, because ‘[a]n employee may not be unreasonably sensitive to his [or her] working environment’ ”).

95. *Ellison v. Brady*, 924 F.2d 872, 877-78 (9th Cir. 1991) (expressly rejecting *Rabidue’s* requirement that the employee’s psychological well-being must be seriously affected); *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 620 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987) (requiring a serious effect on the employee’s psychological well-being in order to prove a hostile work environment).

96. 114 S. Ct. 367 (1993).

97. *Id.* at 370.

Title VII comes into play before the harassing conduct leads to a nervous breakdown. A discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers. . . . The appalling conduct alleged in *Meritor*, and the reference in that case to environments "so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers," . . . merely present some especially egregious examples of harassment. They do not mark the boundary of what is actionable.⁹⁸

Therefore, it is not necessary to prove that psychological harm occurred, but it will help to bolster the employee's claim of hostile work environment.⁹⁹

Other injuries, such as interference with one's ability to perform the job, should also be seen as determinative of a hostile environment.¹⁰⁰ Courts have found interference where an employee fears coming to work because of harassment by a supervisor, or where employees cannot concentrate on their work because of sexually harassing conduct.¹⁰¹ Interference also has been found where an employee resigned from the job due to sexually harassing conduct.¹⁰² It is not necessary, however, to prove that "tangible productivity has declined as a result of the harassment."¹⁰³ Rather, it can simply be shown that the sexually harassing conduct has made it difficult for employees to perform their job.¹⁰⁴ This distinction is critical, although often overlooked, as evidenced by the differences among courts, even within the same circuit.¹⁰⁵

98. *Harris*, 114 S. Ct. at 370-71 (quoting *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972)).

99. *Id.* at 371.

100. See Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a)(3) (1993) (stating that sexual harassment occurs when "conduct has the purpose or effect of unreasonably interfering with an individual's work performance").

101. See *Paroline*, 879 F.2d at 105.

102. See *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1484 (3d Cir. 1990).

103. *Harris*, 114 S. Ct. at 372 (Ginsburg, J., concurring) (quoting *Davis v. Monsanto Chem. Co.*, 858 F.2d 345, 349 (6th Cir. 1988)).

104. *Id.*

105. *Compare King v. Board of Regents*, 898 F.2d 533, 537 (7th Cir. 1990) (stating that a loss of tangible job benefits is not necessary to prove a hostile environment) with *Dockter v. Rudolf Wolff Futures, Inc.*, 913 F.2d 456, 460 (7th Cir. 1990) (finding that there was no hostile environment because the employee failed to prove any injury due to the sexually harassing conduct).

CONCLUSION

The proposed standard attempts to establish one set of factors to evaluate what constitutes a claim of hostile work environment sexual harassment. Technically, this standard is not new since it is an effort to consolidate what the Supreme Court, the lower courts, and the EEOC have already found to constitute a hostile work environment. However, the Supreme Court has refused to establish guidelines for what constitutes a hostile work environment sexual harassment claim under Title VII. Thus, the trend in sexual harassment cases has been "ad hoc." With so little direction, courts have been forced to make their own determinations of what constitutes a hostile work environment.

This Comment has attempted to develop a uniform standard for hostile work environment that all courts can follow. The new standard developed here revolves around the following factors to analyze a hostile work environment claim: (1) sexual harassment is directed at the individual employee, or sexual harassment is so overwhelming as to permeate the general work environment; (2) employer's reaction to the existence of sexually harassing behavior in the workplace is inadequate; (3) employee regards the conduct as undesirable, offensive, or unwelcome; (4) employee subjectively perceives the situation as harassing; and (5) harassing behavior interferes with the employee's well-being or ability to perform a job.

Furthermore, this standard constitutes an attempt to inform both employees and employers of what activity will be viewed as sexual harassment in the workplace. Thus, notice is provided to all parties. Furthermore, the parties will better understand how sexual harassment can be kept out of the workplace, and how they can strive towards greater workplace equality—the ultimate goal of Title VII of the Civil Rights Act.

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