Harris v. Forklift Systems, Inc.: Victory or Defeat?*

I. INTRODUCTION

In November of 1993, the United States Supreme Court unanimously decided *Harris v. Forklift Systems, Inc.*[1] With this decision, the Court promulgated a framework for analysis of "hostile environment" sexual harassment claims, which arise under Title VII of the Civil Rights Act of 1964.[2] Although the *Harris* decision resolved an important split among the circuits regarding the hostile environment sexual harassment cause of action, important questions still remain regarding the significance and effect of the decision.

Title VII is the most important legislation designed to eliminate gender based discrimination in employment. Using the broad reach of its commerce power, Congress explicitly prohibited employers from "discriminat[ing] 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 . . . ."[3] The ideology upon which Title VII is based is that people must be evaluated as individuals, rather than as members of a class.

The fulfillment of that philosophy has been slow in coming in the context of sexual harassment, a significant category of sex discrimination. Early cases treated sexual harassment of employees by employers as outside the scope of Title VII's protection.[4] However, since its

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1. 114 S. Ct. 367 (1993).
2. 42 U.S.C. § 2000e to e-17 (1988).
3. 42 U.S.C. § 2000e-2(a)(1) (1988). For a detailed explanation of the reach of Title VII, see CLAIRE S. THOMAS, SEX DISCRIMINATION IN A NUTSHELL § 15.03 (2d ed. 1991).
4. Corne v. Bausch & Lombe, Inc., 390 F. Supp 161, 163 (D. Ariz. 1975).

adoption in 1964, the Supreme Court slowly, albeit steadily, broadened the statute's reach. In 1978, the Court broadly interpreted Title VII's phrase "terms, conditions, or privileges of employment" to evince a congressional intent "to strike at the entire spectrum of disparate treatment of men and women" in employment.[5] Accordingly, courts soon recognized that sexual harassment constituted a major source of disparate treatment of men and women in employment and that sexual harassment affected an employee's conditions of employment.

Thus, the law came to recognize and proscribe two types of sexual harassment under Title VII. The first type of sexual harassment, which does not engender substantial controversy, is called *quid pro quo* sexual harassment. This category of sexual harassment encompasses hiring, continued employment, or promotion explicitly conditioned on sexual favors.[6] The second type is hostile environment sexual harassment, where the workplace is so tainted with unwelcome sexual conduct that it affects the employee's ability to do her job.[7] It is this second type of harassment which attracts criticism and debate because, unlike *quid pro quo* harassment, it is often difficult to identify. Illegality of the conduct

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5. Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978) (quoting Sprogis v. United Airlines, Inc., 444 F.2d 1194, 1198 (7th Cir. 1971)). Actually, legislative history regarding Congressional intent for the inclusion of sex as a protected class is virtually nonexistent because sex was added to the list of protected classes in a failed effort to defeat passage of Title VII:

> Efforts to add sex as a protected class to earlier titles in the Civil Rights Act of 1964 were consistently defeated. The amendment adding sex was introduced just two days before approval of Title VII by Representative Howard Smith of Virginia. Smith had vigorously opposed passage of the Civil Rights Act, and was accused by some of wishing to sabotage its passage by proposing an amendment adding sex as a protected class, which the House had previously and consistently rejected.

THOMAS, *supra* note 3, at 217. Thus, the noble intent credited to Congress by the Supreme Court was not found in the legislative history of the statute.

6. *See, e.g.*, Hirschfield v. New Mexico Corrections Dep't, 916 F.2d 572, 575 (10th Cir. 1990) ("Quid pro quo sexual harassment involves the conditioning of tangible employment benefits upon the submission to sexual conduct."); Hicks v. Gate Rubber Co., 833 F.2d 1406, 1413 (10th Cir. 1987) ("*Quid pro quo* harassment occurs when submission to sexual conduct is made a condition of concrete employment benefits."); Kotcher v. Rosa & Sullivan Appliance Ctr., Inc., 957 F.2d 59, 62 (2d Cir. 1992); Kariban v. Columbia Univ., 14 F.3d 773, 777 (2d Cir. 1994); Highlander v. K.F.C. Nat'l Management Co., 805 F.2d 644, 648 (6th Cir. 1986); Henson v. City of Dundee, 682 F.2d 897, 909 (11th Cir. 1982).

7. Female pronouns will be used generically throughout this Casenote to refer to a harassed plaintiff. Although "she" is the chosen pronoun, females are not exclusive victims of sexual harassment. Title VII protects both genders from discrimination because of sex. However, the female generic has been chosen because the majority of plaintiffs in hostile environment cases are women. In addition, the focus of much of this Casenote is on the uniqueness of the female perception of sexual conduct, and the potential effects of *Harris* on prospective female plaintiffs in the Ninth Circuit.

in question is inherently a matter of degree. Since the first case establishing hostile environment sexual harassment as a cause of action in 1986,[8] courts have struggled with defining the contours of this cause of action. In a society permeated with sexual stereotypes and conditioned roles,[9] the difficulty lies in distinguishing between "merely offensive"[10] conduct and conduct that contravenes Title VII's guarantee against sexual discrimination.

With its decision in *Harris v. Forklift Systems, Inc.*,[11] the Court created a framework for analysis of "hostile environment"[12] sexual harassment cases. In one important respect, the *Harris* Court definitively resolved a split of authority in the circuits by holding that no psychological harm to the plaintiff is required for a Title VII "hostile environment" cause of action.[13] In addition, the *Harris* Court adopted subjective and objective standards to determine whether the alleged conduct at issue rose to the level of illegal sexual harassment.[14] Although the *Harris* decision cleared up much of the previous ambiguity surrounding the "hostile environment" sexual harassment cause of action, many important questions still remain regarding the significance and effect of the decision.

This Casenote will analyze the significance and potential effects of the decision in *Harris v. Forklift Systems, Inc.* Part II sets forth the historical backdrop of this case while Part III summarizes the facts and holdings in *Harris*. Part IV explores and compares the effect of the *Harris* decision in general with the decision's effect in the Ninth Circuit

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8. Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986).

9. *See generally* FREDERICK WILLIAMS ET AL., CHILDREN, TELEVISION, AND SEX-ROLE STEREOTYPING (1981); LEA P. STEWART ET AL., COMMUNICATION BETWEEN THE SEXES: SEX DIFFERENCES AND SEX-ROLE STEREOTYPES (1986).

10. Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 370 (1993); *Meritor*, 477 U.S. at 67 ("[N]ot all workplace conduct that may be described as 'harassment' affects a 'term, condition, or privilege' of employment within the meaning of Title VII."); Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971) (deciding "mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee" would not sufficiently affect conditions of employment to violate Title VII), *cert. denied*, 406 U.S. 957 (1972).

11. 114 S. Ct. 367 (1993).

12. "Hostile work environment" sexual harassment and "abusive work environment" sexual harassment are used interchangeably by the Supreme Court and are presumably synonymous terms. *See Harris*, 114 S. Ct. at 369, 372 (Scalia, J., concurring); *Meritor*, 477 U.S. at 66.

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

14. *Id.*

in particular. Finally, this Casenote concludes that, although *Harris* allows more women to bring hostile environment cases in many jurisdictions, it potentially reduces their chances of winning in the Ninth Circuit. Thus, this Casenote will recommend an interpretation of *Harris* which universally furthers the purposes of Title VII.

II. BACKGROUND TO *HARRIS*

Prior to 1976, lower courts had completely rejected sexual harassment claims as outside the scope of Title VII because such harassment was a manifestation of the "personal proclivity" or "personal urge" of the harasser rather than a form of sex discrimination.[15] In subsequent cases, recovery was allowed only where the plaintiff proved that the harassment was intentional and that she suffered some tangible financial loss, such as non-promotion or discharge.[16]

In the 1986 landmark case *Meritor Savings Bank v. Vinson*,[17] the Supreme Court unanimously established a cause of action for sexual harassment which creates a "hostile or abusive work environment."[18]

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15. Corne v. Bausch & Lombe, Inc., 390 F. Supp. 161, 163 (D. Ariz. 1975); *see also* Tomkins v. Public Serv. Elec. & Gas Co., 422 F. Supp. 553 (D.N.J. 1976). As the *Tomkins* court reasoned:

> Title VII was enacted in order to remove those artificial barriers to full employment which are based upon unjust and long-encrusted prejudice. Its aim is to make careers open to talents irrespective of race or sex. It is not intended to provide a federal tort remedy for what amounts to a physical attack motivated by sexual desire on the part of a supervisor and which happened to occur in a corporate corridor rather than a back alley.

Tomkins, 422 F. Supp. at 556.

16. *See, e.g.*, Vuyanich v. Republic Nat'l Bank of Dallas, 409 F. Supp. 1083 (N.D. Tex. 1976); Munford v. Barnes, 441 F. Supp. 459 (E.D. Mich. 1977); Heelan v. Johns-Manville Corp., 451 F. Supp. 1382 (D. Colo. 1978); Walter v. KFGO Radio, 518 F. Supp. 1309 (D. N.D. 1981); Reichman v. Bureau of Affirmative Action, 536 F. Supp. 1149 (M.D. Pa. 1982); *see also* CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN (1979); Note, *Sexual Harassment and Title VII: The Foundation for the Elimination of Sexual Cooperation as an Employment Condition*, 76 MICH. L. REV. 1007 (1978).

17. 477 U.S. 57 (1986).

18. *Id.* at 66. The first case which recognized a cause of action based on a discriminatory work environment was Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972). In *Rogers*, the discrimination was not gender based; rather, the discrimination was racially motivated. The court held that a Hispanic employee could establish a Title VII violation by showing that her employer created "a working environment heavily charged with ethnic or racial discrimination." *Id.* at 238. In Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982), the Eleventh Circuit Court of Appeals applied the *Rogers* interpretation of Title VII in a sexual harassment context. The court said:

> [The harassment] must be sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment. Whether sexual harassment at the workplace is sufficiently severe and persistent to affect

Under this cause of action, there is no requirement of financial injury to the claimant as a result of the discrimination.[19] However, the Court noted that "not all workplace conduct that may be described as 'harassment' affects a 'term, condition, or privilege' of employment within the meaning of Title VII . . . . For sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"[20] Furthermore, "[t]he gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome.'"[21] An employee's voluntary acquiescence to sex-related conduct is not a defense when the employee fears dismissal if she does not comply. Hence, a prima facie claim of hostile environment sexual harassment requires a complaint of unwelcome sexual advancements which are severe or pervasive.

The circuits disagreed as to the interpretation of the newly enunciated "severe or pervasive" standard. The Sixth Circuit held that conduct was not sufficiently severe or pervasive to create a hostile working environment unless "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 well-being of the plaintiff."[22] Therefore, in order for a plaintiff have prevailed in a hostile environment sexual harassment case in the Sixth Circuit, the plaintiff had to prove that the offending conduct in question was so severe or pervasive that it inflicted

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seriously the psychological well being of employees is a question to be determined with regard to the totality of the circumstances.

Id. at 904. The Supreme Court later cited *Henson* with approval in *Meritor*. *Meritor*, 477 U.S. at 66-67.

19. *Meritor*, 477 U.S. at 68.

20. *Id.* at 67 (quoting Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).

21. *Id.* at 68 (citing 29 C.F.R. § 1604.11(a) (1985)).

22. Rabidue v. Osceola Ref. Co., 805 F.2d 611, 619 (6th Cir. 1986); *see also* Vance v. Southern Bell Tel. & Tel. Co., 863 F.2d 1503 (11th Cir. 1989) (requiring plaintiff in Title VII racial discrimination case to show severe emotional harm to satisfy pervasiveness standard); Vaughn v. Pool Offshore Co., 683 F.2d 922, 924 (5th Cir. 1982) (deciding plaintiff in a racial discrimination case can establish a violation of Title VII by showing that the work environment is "so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers" (quoting Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied,* 406 U.S. 957 (1972))); Downes v. FAA, 775 F.2d 288, 292 (Fed. Cir. 1985).

serious psychological harm on her. Although this approach created a possibly efficient bright-line rule, it forced the victim of workplace abuse to patiently endure outrageous conditions without relief unless and until she suffered a mental collapse.[23] Furthermore, the Sixth Circuit held that "when judging the totality of the circumstances impacting upon the asserted abusive and hostile environment . . . , [the trier of fact] must adopt the perspective of a reasonable person's reaction to a similar environment under essentially like or similar circumstances."[24] The gender neutral standard was adopted "[t]o accord appropriate protection to both plaintiffs and defendants in a hostile and/or abusive work environment . . . ."[25] In other words, the harassing conduct in question must have been objectively severe and pervasive from the perspective of both a reasonable victim (usually female) and from the perspective of the reasonable person engaged in the allegedly harassing conduct (usually male).

The Ninth Circuit rejected the Sixth Circuit's serious psychological damage standard and promulgated an entirely different approach in *Ellison v. Brady*.[26] The court reasoned that a woman should not have to suffer severe psychological harm before she can bring a Title VII hostile environment action. Rather, the court reasoned, the law should step in precisely to prevent such harm.[27] "It is the harasser's conduct which must be pervasive or severe, not the alteration in the conditions of employment."[28] Thus, the court held that the hostile environment cause of action was actionable without a showing of psychological harm to the plaintiff.

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23. For example, in *Rabidue*, in which the court held the defendant's conduct did not create a hostile environment, the workplace contained posters of naked women, and one of the defendant's male employees "routinely referred to women as 'whores,' 'cunt,' 'pussy' and 'tits.'" Rabidue v. Osceola Ref. Co., 805 F.2d 611, 624 (6th Cir. 1986) (Keith, J., concurring and dissenting). Furthermore, the employee "specifically remarked 'All that bitch needs is a good lay' and called her 'fat ass.'" *Id.* However, without a showing of psychological harm, the female plaintiff was not legally entitled to relief from such persistent abuse in the workplace, which spanned plaintiff's seven years of employment. *Id.* at 622. This illustrates the dilemma a harm requirement places on prospective plaintiffs in hostile environment cases: they must either quit their jobs to avoid the abuse (and thus suffer the burden) or endure an abusive workplace until they suffer a nervous breakdown.

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

25. *Id.*

26. 924 F.2d 872 (9th Cir. 1991).

27. *Id.* at 878; *see* Smolsky v. Consolidated Rail Corp., 780 F. Supp. 283, 294 (E.D. Pa. 1991); Intlekofer v. Turnage, 973 F.2d 773 (9th Cir. 1992); Canada v. Boyd Group, Inc., 809 F. Supp. 771, 776 (D. Nev. 1992). For a case in which this rationale was followed in the context of race discrimination, see Harris v. International Paper Co., 765 F. Supp. 1509, 1515 (D. Me. 1991).

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

In addition, the *Ellison* court held that the conduct in question should be viewed from the perspective of the victim to determine whether it constituted a violation of Title VII.[29] Thus, "a female plaintiff states a prima facie case of hostile environment sexual harassment when she alleges conduct which a reasonable *woman* would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment."[30] The court reasoned that "because women are disproportionately victims of rape and sexual assault, women have a stronger incentive to be concerned with sexual behavior."[31] Furthermore, "a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women."[32] The court cautioned that "[t]he reasonable woman standard does not establish a higher level of protection for women than men. Instead, a gender-conscious examination of sexual harassment enables women to participate in the workplace on an equal footing with men."[33]

As the *Ellison* court recognized, women have a unique wariness of threatening sexual conduct because they are more vulnerable than men to becoming victims of sex crimes:

> 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.[34]

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29. *Id.*; *see also* Burns v. McGregor Elec. Indus., 989 F.2d 959, 965 (8th Cir. 1993) ("We must view the harrassment from the victim's perspective, and in this case the victim is a woman."); Harris v. International Paper Co., 765 F. Supp. 1509, 1515 (D. Me. 1991); Carrillo v. Ward, 770 F. Supp. 815, 822 (S.D.N.Y. 1991); Smolsky v. Consolidated Rail Corp., 780 F. Supp. 283, 294 (E.D. Pa. 1991).

30. *Ellison*, 924 F.2d at 879 (emphasis added) (footnote omitted).

31. *Id.*

32. *Id.* "If we only examined whether a reasonable person would engage in allegedly harassing conduct, we would run the risk of reinforcing the prevailing level of discrimination. Harassers could continue to harass merely because a particular discriminatory practice was common, and victims of harassment would have no remedy." *Id.* at 878.

33. *Id.* at 879 (citation omitted). Furthermore, the reasonable woman standard evinces the average female perception of sexually offensive conduct in the workplace, and not the "idiosyncratic concerns of the rare hyper-sensitive employee." *Id.*

34. *Id.*; *see* Yates v. Avco Corp., 819 F.2d 630, 637 n.2 (6th Cir. 1987) ("[M]en and women are vulnerable in different ways and offended by different behavior."); Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1203 (1989) (explaining that the "characteristically 'male' view" of sexual harassment is that it is mere entertainment and harmless); Nancy S.

Thus, a woman's nagging concern for safety may lead her to perceive sexual conduct as harassment, even when a male harasser does not realize that his conduct creates a hostile working environment. A "gender neutral" standard fails to capture this particular female perspective.

III. *HARRIS V. FORKLIFT SYSTEMS, INC.*

In 1993, the Supreme Court granted certiorari in *Harris* to resolve expressly 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 plaintiff to 'suffe[r] injury.'"[35] Plaintiff Teresa Harris worked as a manager at an equipment rental company called Forklift Systems, Inc. from April 1985 to October 1987. Charles Hardy was Forklift's president. Throughout the time that Harris worked for Forklift, Hardy "often insulted her because of her gender and often made her the target of unwanted sexual innuendos."[36] For instance, the Magistrate found that in the presence of other employees, Hardy had called Harris a "'dumb ass woman.'"[37] Hardy had similarly commented to Harris, "'You're a woman, what do you know,'"[38] and "'We need a man as the rental manager.'"[39] Also in "front of others, he suggested that the two of them 'go to the Holiday Inn to negotiate [Harris'] raise.'"[40] In addition, "Hardy occasionally asked Harris and other female employees to get coins from his front pants pocket. He threw objects on the ground in front of Harris and other women, and asked them to pick the objects up. He made sexual innuendos about Harris' and other women's clothing."[41]

After Harris complained to Hardy in August 1987 about his behavior, Hardy claimed he was only joking, apologized, and promised he would stop. Harris remained an employee based on the assurance that Hardy would cease such offensive conduct. However, in early September,

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Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177, 1207-08 (1990) (noting that men often view some harassing conduct as "harmless social interactions to which only overly-sensitive women would object.").

35. Harris v. Forklift Sys., Inc., 114 S. Ct. at 370 (quoting writ of certiorari, 113 S. Ct. 1382 (1993)) (alterations in original).

36. *Id.* at 369.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

while Harris was arranging a deal with one of Forklift's customers, Hardy commented in front of other employees, "What did you do, promise the guy. . .some [sex] Saturday night?"[42] Then, on October 1, Harris "collected her paycheck and quit."[43]

Harris then commenced suit against Forklift, claiming that Hardy's harassing conduct constituted abusive work environment sexual harassment in violation of Title VII. The United States District Court for the Middle District of Tennessee found this to be a "close case,"[44] yet held that although some of Hardy's comments "would [have] offend[ed] the reasonable woman,"[45] they were not "so severe as to be expected to seriously affect [Harris'] psychological well being. A reasonable woman manager under like circumstances would have been offended by Hardy, but his conduct would not have risen to the level of interfering with that person's work performance."[46] The United States Court of Appeals for the Sixth Circuit affirmed in an unpublished opinion.[47]

The Supreme Court granted certiorari to resolve the conflict among the circuits as to whether proof of severe psychological harm is a prerequisite to establish a viable Title VII action.[48] First, the Court reaffirmed the "severe or pervasive" standard established in *Meritor Savings Bank v. Vinson*.[49] "When the workplace is permeated with 'discriminatory intimidation, ridicule, and insult'. . .that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment,'. . .Title VII is violated."[50] Under this standard, conduct which is "merely offensive,"[51] such as the "'mere utterance. . .of an. . .epithet which engenders offensive feelings in a [sic] employee'" is beyond the reach of Title VII.[52] On the other hand, "Title VII comes into play before the harassing conduct leads to

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42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.* at 370.
46. *Id.*
47. *Id.* (citing Harris v. Forklift Sys., Inc., 976 F.2d 733 (6th Cir. 1992)).
48. *Id.* Justice O'Connor delivered the opinion of a unanimous court. *Id.* at 369.
49. 477 U.S. 57, 67 (1986).
50. *Harris*, 114 S. Ct. at 370 (quoting Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65, 67 (1986)).
51. *Id.*
52. *Id.* (quoting Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67 (1986)).

a nervous breakdown."[53] Thus, the Court held 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."[54]

From the holding in *Harris*, one is able to construct the basic framework for future analysis of hostile environment sexual harassment cases. First, the Court created a two-pronged standard to determine whether the conduct in question created a hostile or abusive working environment—an objective prong, and a subjective prong.[55] As a preliminary matter, a court would ask whether a reasonable person would objectively think the offensive conduct created a hostile environment. Next, a court would ask whether the person bringing the action subjectively found the environment hostile or abusive, regardless of the reasonableness of the claimant's perception. A court would consider whether the plaintiff found the offensive conduct "unwelcome." Second, as long as an objective person would have found the environment abusive, and the plaintiff found it so, the plaintiff would not need to show that she suffered any psychological harm.[56]

Furthermore, the Court noted that it would be impossible to construct a "mathematically precise test"[57] to determine whether an environment is "hostile" or "abusive." This factual determination can be made "only by looking at all the circumstances."[58] Therefore, the Court offered some relevant factors for determining whether conduct constitutes hostile environment sexual harassment:

> These [factors] 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 of 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.[59]

Because the Court found that the district court had reached its judgment for Forklift "only after finding that [Forklift's] conduct was not 'so severe as to be expected to seriously affect plaintiff's psychological well-being'. . .and that Harris was not 'subjectively so offended that she

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53. *Id.*
54. *Id.* at 371 (citation omitted).
55. *Id.* at 370-71.
56. *Id.*
57. *Id.* at 371.
58. *Id.*
59. *Id.*

suffered injury,'"[60] the judgment was reversed and the case was remanded for proceedings consistent with the Court's new standard.

IV. EFFECT OF *HARRIS*

A. Psychological Harm

As most commentators agree, the *Harris* decision significantly heightens nationwide harassment protection in the workplace.[61] By dispensing with a requirement of psychological harm, *Harris* unquestionably expands actionability, and arguably recovery, in hostile environment cases in general.[62] After *Harris,* although a showing of harm is certainly probative evidence that the work environment was indeed hostile, a plaintiff need not present such evidence to assert her claim. Therefore, the abandonment of the harm requirement avails the claim to plaintiffs who previously would have been unable to make a prima facie case in many jurisdictions. In addition, the decision will most likely

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60. *Id.*

61. *See, e.g.*, Jan Hoffman, *Plaintiff's Lawyers Applaud Decision*, N.Y. TIMES, Nov. 10, 1993, at A22; Jorge Aquino, *Both Sides Applaud Justices' Ruling on Sexual Harassment; Opinion Unlikely To Change State Law Here, However*, RECORDER, Nov. 10, 1993, at 1; Richard Carelli, *Harassment Protection Bolstered; Damages OK Without Harm*, LEGAL INTELLIGENCER, Nov. 10, 1993, at 1; Joan Biskupic, *Sexual Harassment Protections Bolstered; Unanimous High Court Rules Plaintiff Need Not Prove Psychological Injury,* WASH. POST, Nov. 10, 1993, at A1; Daniel Wise, *"Harm" Criteria Out in Harassment Suits,* 210 N.Y. L.J. 92, Nov. 10, 1993, at 1; Ana Puga, *Justices Ease Proof of Sexual Harassing; Case Needn't Show Psychological Hurt*, BOSTON GLOBE, Nov. 10, 1993, at 1; *A Legal Victory Against Workplace Harassers*, SEATTLE TIMES, Nov. 11, 1993, at B4; Linda Greenhouse, *Supreme Court; Justices Make It Easier to Win Sex Harassment Suits*, N.Y. TIMES, Nov. 14, 1993, § 4, at 2; *Supreme Court Expands Recovery for Sexual Harassment*, LIABILITY WK., Nov. 15, 1993, No. 44, Vol. 8; Ruth Walker, *Fresh Air From High Court*, CHRISTIAN SCI. MONITOR, Nov. 17, 1993, at 22.

62. Although the issue is beyond the scope of this Casenote, it is interesting to note that one commentator, Kingsley R. Browne, argues that Title VII, and the interpretation of it in *Harris*, violates the First Amendment. For commentary on this argument, see Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment and the First Amendment*, 52 OHIO ST. L.J. 481 (1991); Kingsley R. Browne, *Muzzling Sexually Hostile Speech*, LEGAL TIMES, Nov. 22, 1993, at 26; Kingsley R. Browne, *A Silenced Workplace*, RECORDER, Nov. 24, 1993, at 8; Kingsley R. Browne, *Stifling Sexually Hostile Speech*, CONN. L. TRIB., Nov. 29, 1993, at 19. Kingsley R. Browne is an associate professor of law at Wayne State University Law School in Detroit, specializing in employment discrimination.

expand recovery because plaintiffs will have less to prove.[63] The Court's retreat from the psychological harm requirement secures a uniform and humane approach to sexual harassment in every jurisdiction. Therefore, *Harris* constitutes a resounding national victory.

However, the Court's rejection of the psychological harm requirement will have no practical effect in the Ninth Circuit and jurisdictions which followed the Ninth Circuit's lead. By the time of the *Harris* decision, the Ninth Circuit had already dispensed with the psychological harm standard in 1991 in *Ellison v. Brady*,[64] finding it contrary to the rationale of Title VII.[65] Although the Supreme Court's holding is a step forward in many jurisdictions, the Ninth Circuit had already taken that important step. Therefore, the abandonment of a psychological harm requirement is of no practical significance in many jurisdictions,[66] such as the Ninth Circuit.

However, the *Harris* Court's sustainment of the reasonable person standard (as opposed to a reasonable woman standard) could have an effect in the Ninth Circuit. In addition to abandoning the harm requirement, the Ninth Circuit in *Ellison* had adopted the reasonable woman standard in place of the traditional, "male-biased,"[67] reasonable person standard.[68] This gender specific standard not only enables more women to *bring* claims, it enables more women to *win*. What is the effect of *Harris* on the Ninth Circuit's gender conscious approach? Even though *Harris* lowers the floor of actionability of hostile environment claims nationally by abandoning the psychological harm requirement, does it simultaneously lower the ceiling of victory in the Ninth Circuit by adopting the reasonable person standard?

B. Subjective Standard

The *Harris* Court promulgated a hostile environment standard, under which the plaintiff subjectively must have found the environment hostile

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63. *See* Linda Greenhouse, *Supreme Court: Justices Make it Easier to Win Sex Harassment Suits*, *supra* note 61, at 2; *Supreme Court Expands Recovery for Sexual Harassment*, *supra* note 61.

64. 924 F.2d 872 (9th Cir. 1991).

65. *Id.* at 879. For a discussion of *Ellison*, see *supra* notes 26-34 and accompanying text.

66. *See supra* note 29.

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

68. Of course, where a male plaintiff alleges that co-workers engaged in conduct that created a hostile working environment, the appropriate victim's perspective would be the "reasonable man" perspective. *Id.* at 879 n.11; *see also* Yates v. Avco Corp., 819 F.2d 630, 637 n.2 (6th Cir. 1987).

and the working environment must have been objectively hostile.[69] At first glance, the subjective prong might appear inconsequential in practical effect. Presumably, a plaintiff would not have brought a hostile environment action unless she indeed perceived that unwelcome offensive conduct had rendered her workplace hostile. However, the subjective prong is significant because it could provide a defendant with a defense even if his conduct was objectively unreasonable. A defendant could argue that although his conduct might have been objectively unreasonable, the plaintiff welcomed the conduct. In that case, a hostile environment claim would fail. Accordingly, the subjective prong could enable a defendant to shift the focus from his unreasonable conduct to the plaintiff. A defendant might attempt to assassinate a plaintiff's character or suggestive wardrobe in an effort to prove that the plaintiff welcomed the defendant's conduct.[70] However, the Court may have intended that the subjective prong merely provide a safeguard against frivolous or malicious claims. Depending on whether courts view the subjective standard as a narrow safeguard or as an expansive defense, the requirement could substantially effect the outcome of hostile environment actions. However, the discussion of this Casenote focuses on the objectively hostile prong enunciated in *Harris* and its affect in the Ninth Circuit.

C. Objectively Hostile Standard

The Court's adoption of an objective "reasonable *person* standard," as it pertains to the objectively hostile prong, is of potentially dramatic consequence. Does this language implicitly abrogate the reasonable woman standard adopted in the Ninth Circuit, or could the gender neutral language leave the reasonable woman standard intact?

The *Harris* decision has three possible interpretations. First, *Harris* could be interpreted as an implicit rejection of the gender specific approach. The Supreme Court was fully aware of the Ninth Circuit's reasonable woman approach because the Court cited *Ellison v. Brady*, the source of the gender specific approach.[71] Furthermore, the district

69. Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 371 (1993).
70. *See, e.g.*, Meritor Sav. Bank v. Vinson, 477 U.S. 57, 69 (1986) (holding that evidence of a complainant's sexually provocative speech or dress is relevant to determining whether he or she found sexual advances unwelcome).
71. *Harris*, 114 S. Ct. at 370.

court in the same case had used a gender specific standard when it noted that some of Hardy's comments "would [have] offend[ed] the *reasonable woman*,"[72] and that a "*reasonable woman* manager under like circumstances would have been offended by Hardy."[73] Nevertheless, the *Harris* opinion conspicuously fails to mention or even vaguely to refer to the gender specific approach. Arguably, this silence signifies that the Court implicitly rejected the reasonable woman standard and replaced it with a uniform reasonable person standard.

Assuming that *Harris* implicitly rejects the reasonable woman standard, some commentators have argued that the gender of the victim would still influence the fact-finder's assessment of the facts, even when instructed on the reasonable person standard. As the National Women's Law Center (NWLC) urges, "[T]he use of the term 'reasonable person' does not in any way diminish the need to evaluate reasonableness from the perspective of a person in the same or similar circumstances as the alleged victim, including consideration of the alleged victim's gender."[74] The NWLC "discourage[s] courts and litigants from reading unintended significance into the choice of the term reasonable person."[75] According to this argument, the "reasonable person standard [does not authorize] . . . judges, jurors or other fact-finders to substitute their own reactions to the conduct and their beliefs about what they would have done in that situation for the reactions of a reasonable person in the same or similar circumstances as the victim."[76] Rather, the reasonable person standard requires the fact finder to put him or herself in the victim's place to consider the totality of the circumstances. Thus, according to the NWLC, the "reasonable person" language the Court used would still allow the fact finder to view the facts from the unique perspective of the complainant, taking the gender of the complainant into consideration. Therefore, although courts perhaps

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72. *Id.* (emphasis added).

73. *Id.* (emphasis added). In fact, the district court appears to have been departing from its circuit's precedent by using the reasonable woman standard. *See* Rabidue v. Osceola Ref. Co., 805 F.2d 611, 620 (6th Cir. 1986).

74. DAILY LAB. REP., Jan. 13, 1994, at 9 (quoting comments by the National Women's Law Center regarding the Equal Employment Opportunity Commission's proposed guidelines on harassment based on race, color, religion, gender, national origin, age, or disability). The Equal Employment Opportunity Commission (E.E.O.C.) proposed guidelines aggregate, make consistent, and expound upon the definitions of harassment under various anti-discrimination statutes. *Id.* These proposed guidelines were published in the Federal Register one month prior to the Supreme Court's decision in *Harris* on October 1, 1993. *Id.* In response, various groups, including the National Women's Law Center, commented upon the guidelines in general and in light of *Harris*.

75. *Id.*

76. *Id.*

would be barred from using a reasonable woman standard *per se*, the goal of the approach (recognition of the unique female perspective of certain sexual conduct) would still be furthered through a gender conscious interpretation of an express reasonable person standard.

However, the very use of the "reasonable person" language fails to sufficiently emphasize the central role of gender in sexual harassment claims.[77] The gender of the complainant would only sneak into the fact finder's mental reasoning process as but one of many circumstantial factors. Although such an approach is, of course, preferable to a completely gender-neutral one, it ignores the rationale upon which the reasonable woman standard relies: that a female's perception of sexual conduct may differ from a male's perspective because women are uniquely vulnerable to sexual attack.[78] Even if jurors could find a way to imprecisely consider gender as a relevant factor, such reasoning would inevitably lack the potency of an express, judicially sanctioned "reasonable woman" instruction.[79]

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77. Same-sex hostile environment claims are actionable and do indeed exist. *See, e.g.*, EEOC v. Hacienda Hotel, 881 F.2d 1504 (9th Cir. 1989) (holding that female supervisor's practice of laughing at female inferiors, making vulgar comments, and encouraging another male supervisor's harassing conduct, constituted sexual harassment of female employees). However, the vast majority of hostile environment claims, and sex discrimination claims in general, are filed by women against men. For example, over 40% of female federal employees reported incidents of sexual harassment involving males in 1987. 1988 U.S. MERIT SYS. PROTECTION BD., REPORT ON SEXUAL HARASSMENT IN THE FEDERAL GOVERNMENT: AN UPDATE 11.

78. As one commentator explains:

> While many women hold positive attitudes about uncoerced sex, their greater physical and social vulnerability to sexual coercion can make women wary of sexual encounters. Moreover, American women have been raised in a society where rape and sex-related violence have reached unprecedented levels, and a vast pornography industry creates continuous images of sexual coercion, objectification and violence. Finally, women as a group tend to hold more restrictive views of both the situation and type of relationship in which sexual conduct is appropriate. Because of the inequality and coercion with which it is so frequently associated in the minds of women, the appearance of sexuality in an unexpected context or a setting of ostensible equality can be an anguishing experience.

Abrams, *supra* note 34, at 1205.

79. Congress amended Title VII in 1991 to allow plaintiffs the option of a jury trial. Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1071, 1073 (1992) (codified as amended at 42 U.S.C. § 1981a(c) (Supp. IV 1992)). Even so, many Title VII actions are tried by a judge. However, a reasonable woman standard would be equally potent to a judge as to a jury.

Second, as an alternative to the first interpretation, one could interpret *Harris* such that the reasonable woman standard survived the decision completely. If the Court meant to reject the reasonable woman approach, why not do so explicitly? A mere sentence would have sufficed to reject the reasonable woman standard unequivocally, yet the opinion makes no reference to the reasonable woman standard at all. Just as the Court's presumed knowledge of the reasonable woman approach arguably supports an implied rejection of it, it is equally probable that the very same silence constitutes implied approval.

The most plausible interpretation of this silence is that the Court purposefully left the question open for another day. The district court ruled in favor of the defendant on the grounds that Hardy's comments "were not 'so severe as to be expected to seriously affect [Harris'] psychological well-being.'"[80] In addition, according to its own formulation of the issue, the Supreme Court "granted certiorari. . .to resolve a 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 plaintiff to 'suffe[r] injury.'"[81] Thus, the prompting issue for review was whether a plaintiff must sustain psychological harm as a result of the defendant's harassment. The *Harris* Court found that, because the district court had reached its judgment for Forklift "only after finding that [Forklift's] conduct was not 'so severe as to be expected to seriously affect plaintiff's psychological well-being'. . .and that Harris was not 'subjectively so offended that she suffered injury,'"[82] the case needed to be remanded for proceedings consistent with the abandonment of a harm requirement. Arguably, the resolution of the case turned solely on whether the plaintiff had to show that the defendant's conduct caused her psychological harm. Hence, the rejection of a harm requirement was the *Harris* Court's only binding holding. Under this literal reading of the case, the "reasonable person" language is dicta. Therefore, because the Court did not explicitly rule on the issue and never actually rejected the reasonable woman standard, the gender conscious approach remains viable.[83]

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80. Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 370 (1993) (alteration in original).
81. *Id.* (alterations in original).
82. *Id.* at 371.
83. The District Court for the Northern District of New York interpreted *Harris* to leave open the question whether the reasonable woman standard applies in hostile environment cases. *See* Currie v. Kowalewski, 842 F. Supp. 57, 63 (N.D.N.Y. 1994) ("Although the *Harris* case did not explicitly decide whether a reasonable person or reasonable woman (or victim) standard applies, certainly any reasonable woman or person would have found the defendant's behavior to be offensive and repulsive.").

This interpretation gains support when one considers the unanimity of the *Harris* decision. Did all the justices agree in the decision because proper resolution of the issue was so indisputable that it pierced through political and jurisprudential differences? If one examines the concurrences in *Harris*, the justices do not appear to equally support the expansion of Title VII. Justice Scalia's concurrence reflects a wariness that the *Harris* decision could open the floodgates on hostile environment claims.[84] On the other hand, Justice Ginsburg's concurrence reflects staunch support for even greater protection for women against sex discrimination.[85] Perhaps Justice Ginsburg and the more liberal

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84. Justice Scalia expressed concern that

> [a]s 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. One might say that what constitutes "negligence" (a traditional jury question) is not much more clear and certain than what constitutes "abusiveness." Perhaps so. But the class of plaintiffs seeking to recover for negligence is limited to those who have suffered harm, whereas under this statute "abusiveness" is to be the test of whether legal harm has been suffered, opening more expansive vistas of litigation.

Harris, 114 S. Ct. at 372 (Scalia, J., concurring).

85. In her concurrence, Justice Ginsburg first characterized the majority's opinion as a reaffirmance of the holding of *Meritor Savings Bank v. Vinson*, which created the hostile environment cause of action under Title VII. *Harris*, 114 S. Ct. at 372 (Ginsburg, J., concurring). Next, Justice Ginsburg explained how the Court's holding dispensed with a psychological harm requirement:

> The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed . . . . [T]he adjudicator's inquiry should center, dominantly, on whether the discriminatory conduct has unreasonably interfered with the plaintiff's work performance. To show such interference, . . . [i]t suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to "ma[k]e it more difficult to do the job."

Id. (quoting Davis v. Monsanto Chem. Co., 858 F.2d 345, 349 (6th Cir. 1988)). Thus, Justice Ginsburg de-emphasized the "reasonable person" language in the majority opinion. Instead, Justice Ginsburg narrowly emphasized *Harris*' reaffirmation of *Meritor* and its abandonment of a psychological harm requirement. Next, Justice Ginsburg appeared to lay the foundation of a future agenda by placing sex discrimination on an equal footing with racial discrimination: "*Davis* concerned race-based discrimination, but that difference does not alter the analysis; . . . Title VII declares discriminatory practices based on race, gender, religion, or national origin equally unlawful." *Id.* at 372-73.

In a footnote, Justice Ginsburg discussed the Court's equal protection jurisprudence. This footnote possibly reveals Justice Ginsburg's interpretation of *Harris*: "Indeed, even under the Court's equal protection jurisprudence. . .it remains an open question whether

members of the Court joined in the opinion because it abandons the psychological harm requirement. These members might patiently foresee advancement one step at a time. Thus, one could comfortably join in *Harris* today and wait to take the next step toward a gender specific standard another day. In this scenario, needless debate over the reasonable woman standard would only sabotage the issue at hand. Conversely, Justice Scalia and other conservative members of the Court might have joined in the decision because it takes a concededly necessary step to further Congress' intent behind Title VII; however, the decision comfortably goes no further.

Third, even if the "reasonable person" standard promulgated by the *Harris* Court constitutes binding law, courts could still opt to use the reasonable woman standard. Under this approach to *Harris*, the objective reasonable person standard establishes a protective floor in hostile environment cases, but it does not establish a ceiling. In other words, a court would not be precluded from providing a plaintiff with even greater protection than the decision requires. *Harris* only requires that "the environment would reasonably be perceived, and is perceived, as hostile or abusive."[86] Thus, at a bare minimum, a court must find the conduct in question objectively and subjectively unreasonable to find that it created a hostile environment. However, nothing in *Harris* precludes a court from adhering to a reasonableness formulation that affords plaintiffs heightened protection against sexual harassment. Such an approach would be consistent with *Harris*, even though it affords plaintiffs greater protection against sexual harassment than that provided in *Harris* itself.

'classifications based on gender are inherently suspect.'" *Id.* at 373 n.* (citing Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982)). Following the footnote, Justice Ginsburg wrote, "The Court's opinion, which I join, seems to me in harmony with the view expressed in this concurring statement." *Id.* at 373. Thus, according to Justice Ginsburg, "it remains an open question" whether women are a suspect class for equal protection purposes. *Id.* at 373 n.*. However, in Craig v. Boren, 429 U.S. 190 (1976), the Supreme Court held that women are a quasi-suspect class. Although classifications burdening gender merit intermediate scrutiny for equal protection purposes, such classifications do not receive strict scrutiny. However, under Justice Ginsburg's interpretation, the question remains open because *Craig* sets a protective floor without creating a ceiling.

Justice Ginsburg's equal protection approach could extend easily to Title VII analysis. Accordingly, unless the Court explicitly creates a ceiling on Title VII protection, the question remains open. Therefore, the reasonable woman standard remains viable after *Harris*. Using Ginsburg's equal protection reasoning, just as women deserve heightened protection against sex discrimination under the federal constitution, they should also deserve heightened protection against sex discrimination under a federal statute which safeguards the same interest.

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

An express reasonable woman standard substantially furthers the important goals of Title VII. Title VII was enacted to put women on equal footing with men in the workplace. "Congress did not enact Title VII to codify prevailing sexist prejudices. To the contrary, 'Congress designed Title VII to prevent the perpetuation of stereotypes and a sense of degradation which serve to close or discourage employment opportunities for women.'"[87] Clearly, although discrimination of either sex is, of course, contrary to the mandate of Title VII, the statute was indisputably enacted for the protection of women in the workplace. "It must never be forgotten that Title VII is the federal court mainstay in the struggle for equal employment opportunity for the female workers of America."[88] Contrary to this objective, the reasonable person standard "tends to be male-biased and tends to systematically ignore the experiences of women."[89] As Judge Keith of the Sixth Circuit commented in a dissent:

> [I do not agree] that a court considering hostile environment claims should adopt the perspective of the reasonable person's reaction to a similar environment . . . . In my view, the reasonable person perspective fails to account for the wide divergence between most women's views of the appropriate sexual conduct and those of men . . . . I would have courts adopt the perspective of the reasonable victim which simultaneously allows courts to consider salient sociological differences as well as shield employers from the neurotic complainant.[90]

Because the reasonable woman standard emphasizes the unique female perception of harassing conduct, it offers greater protection for women than a reasonable person standard. Thus, it would be consistent with *Harris* for district courts and circuit courts to choose to offer more protection to Title VII complainants by using the reasonable woman standard rather than the reasonable person standard enunciated in the Court's decision. In this way, *Harris* constitutes a threshold under which

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87. Ellison v. Brady, 924 F.2d 872, 881 (9th Cir. 1991) (quoting Andrews v. City of Philadelphia, 895 F.2d 1469, 1483 (3d Cir. 1990)).

88. Rabidue v. Osceola Ref. Co., 805 F.2d 611, 621 (6th Cir. 1986).

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

90. *Rabidue*, 805 F.2d at 626 (Keith, J., concurring and dissenting); *see also* Johnson v. Transportation Agency, 480 U.S. 616 (1987) (holding that county agency did not violate Title VII by taking female employee's sex into account and promoting her over male employee with higher test score because the promotion decision was made in an effort to remedy the underrepresentation of women and minorities in traditionally male jobs, a policy which furthers Title VII).

courts may not venture, but neither should the decision debilitate courts from furthering Title VII's guarantee to women against harassment in the workplace. Therefore, courts may opt to use the reasonable woman standard without affronting the *Harris* decision.

In sum, there are many possible interpretations of the "reasonable person" standard enunciated in *Harris*. First, one could argue that the language is an implicit rejection of the reasonable woman standard followed in the Ninth Circuit. Following this interpretation, the fact-finder would weigh all the relevant factors of the allegedly hostile environment from the perspective of the reasonable person similarly situated; in that case, gender would be a relevant factor. On the other hand, perhaps the *Harris* Court remained silent regarding the reasonable woman standard because it left the question open. Finally, the reasonable person approach could have established a protective floor without limiting the protections that a court may opt to afford its complainants in Title VII actions. Under this interpretation, because the reasonable woman standard offers women heightened protection in hostile environment cases, courts could still opt to utilize the gender specific approach consistent with *Harris*.

V. CONCLUSION

This Casenote has argued that the reasonable woman standard survived the recent Supreme Court decision in *Harris v. Forklift Systems, Inc.* When the Supreme Court unanimously decided *Harris* in 1993, the Court definitively rejected a psychological harm requirement for hostile environment claims. In jurisdictions that had previously required the plaintiff to prove that severe psychological harm resulted from the defendant's abusive conduct, the Court's holding clearly expanded the actionability of hostile environment claims, and it might have expanded recovery as well. The *Harris* decision put the national level of Title VII's protection against sexual harassment on a par with the Ninth Circuit, which had already rejected a harm requirement in 1991. Therefore, the *Harris* decision was a clear victory for sexual harassment complainants across the nation.

The Court also decided that the offensive conduct should be viewed from the perspective of a reasonable person to determine whether the conduct amounted to sexual harassment. It would be unjust not to give the *Harris* decision a construction which would enable it to cure the evil targeted by Title VII and to accomplish the purpose for which it was enacted. An interpretation of *Harris* that expands actionability and recovery for sexual harassment in all jurisdictions is the interpretation most consistent with the purpose of Title VII. Because a gender

conscious standard substantially furthers the important goals of Title VII, courts should retain the option of availing complainants of this potent weapon of recovery.

A different interpretation would render the decision internally inconsistent. If *Harris* were to abolish completely the reasonable woman standard, the decision would result in a giant step backward in the Ninth Circuit for the goals of Title VII. Clearly, the Court intended *Harris* to expand the actionability of hostile environment claims across the nation. Arguably, the Court also intended to expand recovery in hostile environment claims as well. At any rate, the Court obviously meant to provide a national expansion of the hostile environment cause of action. The Court's intent would be frustrated if, in a substantial number of jurisdictions, plaintiffs were stripped of the most effective means of recovery in hostile environment actions as a result of *Harris*. If the reasonable woman standard were no longer an option for courts, *Harris* would inconsistently be a relative victory for women nationally, but a loss for women in the Ninth Circuit and many jurisdictions.[91] Instead, *Harris* should be interpreted to leave the reasonable woman standard intact, in order to best effectuate the purposes of Title VII.

"[U]nless the outlook of the reasonable woman is adopted, the defendants as well as the courts are permitted to sustain ingrained notions of reasonable behavior fashioned by the offenders, in this case, men."[92] Thus, courts should use the reasonable woman standard in hostile environment cases.

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91. *See supra* text accompanying notes 64-66.