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The Present State of Sexual Harassment Law: Perpetuating Post Traumatic Stress Disorder in Sexually Harassed Women

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**THE PRESENT STATE OF SEXUAL HARASSMENT LAW:
PERPETUATING POST TRAUMATIC STRESS DISORDER IN
SEXUALLY HARASSED WOMEN**

- I. INTRODUCTION 303
- II. PRESENT STATE OF SEXUAL HARASSMENT LAW 307
 - A. *Title VII of the Civil Rights Act of 1964* 307
 - 1. Legislative History of Title VII 307
 - 2. Early Court Interpretation of Title VII 308
 - B. *Meritor Savings Bank, FSB v. Vinson* 310
 - 1. Factual Background 310
 - 2. Lower Court History 311
 - 3. The Supreme Court Holding 312
- III. EMOTIONAL HARMS OF SEXUAL HARASSMENT—POST
TRAUMATIC STRESS DISORDER 315
 - A. *Post Traumatic Stress Disorder Generally* 315
 - B. *Defining Post Traumatic Stress Disorder in the
Sexual Harassment Context* 318
 - 1. The Stressor 319
 - a. *The Reasonable Woman Test* 319
 - b. *The Markedly Distressing Test* 320
 - 2. Reexperiencing the Traumatic Event 322
 - 3. Numbing of Responsiveness 324
 - 4. Increased Arousal 325
- IV. PERPETUATING POST TRAUMATIC STRESS DISORDER IN
SEXUALLY HARASSED WOMEN 327
 - A. *Legal Burdens Placed on Victims of Sexual
Harassment* 327
 - 1. The Notice Requirement 327
 - 2. Inappropriate Standards of Proof 329
 - 3. Admissibility of Evidence Regarding the
Victim’s Sexual History 329
 - B. *Inadequacies of Title VII Remedies* 330
 - 1. Injunctive and Affirmative Relief 331
 - 2. Recovery of Back Pay 333
 - 3. Equitable Relief 334
- V. CONCLUSION 337

In 1980, Victoria Hansel was hired by the Comanche Power Plant in Pueblo, Colorado.¹ She was hired as an auxiliary tender, a position only one other woman held at that time.² On Victoria's first day of work, the plant manager told her, "I can't begin to prepare you for what you're in for."³

Soon thereafter, Victoria became the victim of what was described as a "continuous and concerted campaign of sexual harassment and discrimination."⁴ She was continually grabbed and fondled by her male co-workers, who laughed at her when she told them to stop. On more than one occasion, Victoria was held down by a co-worker as the others sexually assaulted her.⁵ One co-worker even followed her into the ladies' restroom with a hangman's noose, and told Victoria it would be better if she just killed herself.⁶

When Victoria told her supervisor she was being sexually harassed, he told her to "work on your peer relations" and try to "fit in better."⁷ Another supervisor later suggested that Victoria carry a knife for protection.⁸

Not surprisingly, the sexual harassment continued.

Victoria again approached her supervisor regarding these incidents. The constant harassment began to seriously affect her work and personal life.⁹ She felt continually fearful and threatened at work, which made it hard for her to concentrate on her tasks. Victoria even considered suicide during this period.¹⁰ As she was describing to her doctor the vicious physical and mental harassment she had suffered, she became hysterical, and was hospitalized later that day for a nervous breakdown. Victoria returned to work a month later, only to be called a "mental case"¹¹ and face further ridicule and harassment.

When formal sexual harassment charges were filed against the plant, the harassment became worse. Sexually explicit graffiti and cartoons, much of them directed at Victoria by name, were plastered all over the plant.¹² One sign, posted in a control room, said: "SEXUAL HARASSMENT IN THIS

¹The facts of this narrative are taken from *Hansel v. Public Serv. Co.*, 778 F. Supp. 1126, 1128-31 (D. Colo. 1991).

²This was also the highest position held by a woman at the plant. *Id.* at 1128.

³*Id.*

⁴*Id.*

⁵*Hansel*, 778 F. Supp. at 1128-29.

⁶*Id.* at 1129.

⁷*Id.*

⁸*Id.* at 1130.

⁹*Hansel*, 778 F. Supp. at 1129.

¹⁰*Id.* at 1129.

¹¹*Id.*

¹²*Id.* at 1130.

AREA WILL NOT BE REPORTED HOWEVER, IT WILL BE GRADED."¹³

I. INTRODUCTION

The result of this disturbing narrative? The Comanche Power Plant was found liable by a federal district court for allowing such sexually harassing behavior to permeate the working environment.¹⁴ The more important, yet often ignored question: how was Victoria affected by this "severe physical and psychological abuse?"¹⁵ She was diagnosed by two psychologists as suffering from Post Traumatic Stress Disorder,¹⁶ a stress response syndrome found in patients who have suffered a severe trauma.¹⁷

Unfortunately, Post Traumatic Stress Disorder is a common result in women who have suffered sexual harassment in the workplace.¹⁸ Even more unfortunate is the fact that sexual harassment is not universally recognized as an emotionally, physically, and psychologically damaging experience that can cause severe trauma in its victims.

Women have been the victims of sexual discrimination in the workplace since the day they entered the workforce.¹⁹ This discrimination has taken the form of unequal pay,²⁰ allocation of work of lesser importance than men,²¹ and systematic sexual harassment.²² While some forms of sex discrimination in the

¹³*Hansel*, 778 F. Supp. at 1130.

¹⁴*Id.* at 1132.

¹⁵*Id.* at 1133.

¹⁶*Id.* at 1131.

¹⁷See discussion *infra* part III.

¹⁸See, e.g., *Kauffmann v. Allied Signal, Inc.*, 970 F.2d 178, 181 (6th Cir. 1992); *Campbell v. Ingersoll Milling Machine Co.*, 893 F.2d 925, 928 (7th Cir. 1990); *Broderick v. Ruder*, 685 F. Supp. 1269, 1273 (D.D.C. 1988); *Arnold v. City of Seminole*, 614 F.Supp 853, 866-67 (E.D.Okla. 1985); *Buddle v. Heublein, Inc.*, 613 F. Supp. 491, 497 (S.D.N.Y. 1985); *Daum v. Lorick Enterprises, Inc.*, 413 S.E.2d 559, 560 (N.C. 1992); see also discussion *infra* part III.

¹⁹LIN FARLEY, *SEXUAL SHAKEDOWN: THE SEXUAL HARASSMENT OF WOMEN ON THE JOB* 12, 28-44 (1978); see also KATHLEEN NEVILLE, *CORPORATE ATTRACTIONS* 166 (1990).

²⁰"Despite the many gains women and minorities have made in the workplace since the enactment of Title VII, they still earn only about *two-thirds* of what white males earn." H.R. REP. NO. 40(I), 102d Cong., 1st Sess. 20 (1991), reprinted in 1991 U.S.C.A.N. 549, 558.

²¹As of 1988, women only held 39.3% of all executive level positions, while they held 80.1% of administrative support positions. H.R. REP. NO. 40(I), 102d Cong., 1st Sess. 20 (1991), reprinted in 1991 U.S.C.A.N. 549, 553; see also *Barnes v. Costle*, 561 F.2d 983, 987 (1977) (acknowledging studies that show women are placed in less challenging, less responsible and less remunerative positions based solely on gender).

²²CATHERINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF STATE* 244 (1989). MacKinnon is a prominent advocate that sexual harassment is a form of sex

workplace have been specifically addressed by Congress,²³ sexual harassment of women²⁴ by their employers²⁵ remains one of the most pervasive problems confronting society today.²⁶ Over 38,500 sexual harassment cases have been filed with the Equal Employment Opportunity Commission²⁷ since 1980,²⁸ which indicates a 200% rise from the previous decade.²⁹ Until the legislature,

discrimination, and has published numerous studies and books documenting the problem.

²³See, e.g., The Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (current version at 29 U.S.C. § 206(d) (1988)) (requiring employers to pay their employees the same wages for "equal work" regardless of sex).

²⁴Since commonly the perpetrators of sexual harassment are male and the victims are female, this Note will address a complainant as female. See NANCY DODD MCCANN & THOMAS A. MCGINN, *HARASSED: 100 WOMEN DEFINE INAPPROPRIATE BEHAVIOR IN THE WORKPLACE* 73 (1992) (stating that 85-90% of reported sexual harassment is directed toward women); MARCIA M. BOUMIL & STEPHEN C. HICKS, *WOMEN AND THE LAW* 453 (1992) (stating that the victims of sexual harassment are usually women); CATHERINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 28 (1979) (stating that women are disproportionately the victims of sexual harassment); Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 821, 822 nn. 26-28 (1991).

²⁵Workplace sexual harassment may also be practiced by coworkers, customers and clients. However, this Note will address harassment by an employee in a supervisory position, commonly referred to as the "employer."

²⁶Numerous studies and surveys have documented the pervasiveness of sexual harassment in the workplace. One of the first surveys, published by REDBOOK magazine in 1976, reported that of 9,000 respondents, 92% listed sexual harassment as a serious problem, and nine out of ten reported a personal experience with sexual harassment in the workplace. FARLEY, *supra* note 19, at 20.

A 1987 survey reported that 42% of women and 14% of men employed by the federal government said they experienced some form of sexual harassment. U.S. MERIT SYSTEMS PROTECTION BOARD, *SEXUAL HARASSMENT IN THE FEDERAL GOVERNMENT: AN UPDATE* 11 (1988). Sexual harassment cost the Federal Government \$267 million from May 1985-1987 due to the costs of replacing employees, paying for sick leave and reduced work productivity. *Id.* at 4.

A 1988 survey of Fortune 500 companies conducted by WORKING WOMAN magazine stated that almost 90% of the respondents reported receiving complaints of sexual harassment from employees. ELLEN BRAVO & ELLEN CASSEDY, *THE 9 TO 5 GUIDE TO COMBATING SEXUAL HARASSMENT* 5 (1992). Sexual harassment costs a typical Fortune 500 company \$7 million a year due to absenteeism, lower productivity and employee turnover. *Id.* at 49. This figure does not include the cost of defending lawsuits. *Id.*

A more recently published survey found that 45% of women and 19% of men said they have been sexually harassed at work. SAMUEL JANUS & CYNTHIA JANUS, *JANUS REPORT ON SEXUAL BEHAVIOR* 14 (1992).

²⁷Hereinafter "EEOC." The EEOC was established to guide the implementation of Title VII of the Civil Rights Act of 1964. See 42 U.S.C. §§ 2000e-4 & 5 (1988).

²⁸H.R. REP. NO. 40(I), 102d Cong., 1st Sess. 20 (1991), reprinted in 1991 U.S.C.C.A.N. 549, 602.

²⁹SUSAN FALUDI, *BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN* 368 (1991). Faludi adds that despite this rise, the EEOC decreased the number of suits it pursued by more than 300% during this period. *Id.* at 369.

courts and society acknowledge sexual harassment as a major form of abuse, more and more women will be subjected to this form of sex discrimination.³⁰

Sexual harassment has been broadly defined as "the unwanted imposition of sexual requirements in the context of a relationship of unequal power."³¹ The EEOC has developed two theories of sexual harassment actionable under Title VII of the Civil Rights Act of 1964:³² "quid pro quo" and "hostile environment" harassment.³³ Quid pro quo harassment occurs when submission to sexual conduct is made a term or condition of an individual's employment, or is used as the basis for employment decisions affecting the individual.³⁴ Hostile environment harassment occurs when sexually harassing behavior unreasonably interferes with an individual's work performance or creates an intimidating, hostile, or offensive working environment.³⁵

Sexual harassment in the workplace often has devastating effects on a woman's economic³⁶ and employment opportunities.³⁷ However, sexual

³⁰It has been estimated that 81% of all marriages will be dual career by 1995, which suggests that many more women will enter the workforce in the near future. MCCANN & MCGINN, *supra* note 24, at 65.

³¹See MACKINNON, *supra* note 24, at 1.

³²42 U.S.C. §§ 2000e-2000e-17 (Supp. IV 1992) [hereinafter Title VII]. The Supreme Court acknowledged these forms of sexual harassment are actionable under Title VII in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 63-69 (1986).

Victims of sexual harassment may also bring a federal cause of action against their employer under 42 U.S.C. § 1983 (Supp. IV 1992). However, these claims are only applicable where a state is the employer, since the harassment must occur "under color of state law." *See, e.g., Starrett v. Wadley*, 876 F.2d 808, 814 (10th Cir. 1989); *Bohen v. City of East Chicago*, 799 F.2d 1180, 1185 (7th Cir. 1986).

Sexual harassment is also actionable under the Fourteenth Amendment's Equal Protection Clause, 42 U.S.C. §§ 1981 & 1985, RICO, and various tort theories. *See generally* Jana Howard Carey & Sandra Saltzman Fink, *Overview of Sexual Harassment in the Workplace*, (in SEXUAL HARASSMENT LITIGATION 1993 (PLI Litg. & Admin. Practice Course Handbook Series No. H4-5160, 1993) Available in WESTLAW, 463 PLI/Lit 7 (discussing each cause of action).

³³Equal Employment Opportunity Commission's Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a) (1993) [hereinafter EEOC Guidelines].

³⁴EEOC Guidelines, *supra* note 33, § 1604.11(a)(1) and (2). Only employees in a supervisory position are deemed capable of committing quid pro quo sexual harassment, because it involves the use of one's status or power to threaten another person's employment. *Id.*

³⁵EEOC Guidelines, *supra* note 33, § 1604.11(a)(3).

³⁶See MACKINNON, *supra* note 24, at 216-17 ("Sexual harassment on the job reinforces the economic subordination of women workers because it undercuts a woman's autonomy outside the home.")

³⁷See *id.* at 51 ("Women's confidence in their job performance is often totally shattered by [sexual] harassment."); *see also* Mary P. Koss, *Changed Lives: The Psychological Impact of Sexual Harassment*, in IVORY POWER: SEXUAL HARASSMENT ON CAMPUS 77-78 (Michele A. Paludi ed., 1987) (finding that 16% of sexually harassed federal employees reported adverse employment effects in the form of poor working conditions or diminished

harassment tends to be equally disastrous to a woman's physical health³⁸ and psychological well-being.³⁹ Although sexual harassment in the workplace has been identified as a serious employment problem, the trauma sexual harassment causes in its victims⁴⁰ has received little recognition in our society.⁴¹ This has subsequently hindered the realization by the legislature and judiciary that sexual harassment can cause severe emotional, psychological, and physical damage in the victim.⁴² Sexual harassment must be acknowledged as a significantly distressing experience that may cause severe post traumatic stress reactions in its victims.⁴³

This Note will argue that current federal legislation was developed, and has subsequently been interpreted by the courts, with little or no consideration for a victimized woman. Instead of addressing the causes and effects of sexual harassment head-on, the legislature has largely ignored the realities of sexual harassment as a traumatizing experience faced by thousands of working women each year. Part II of this Note will address the development and current state of sexual harassment law, as well as the Supreme Court's ruling in *Meritor Savings Bank, FSB v. Vinson*.⁴⁴ Part III will discuss Post Traumatic Stress Disorder⁴⁵ as a frequent, yet unrecognized, repercussion of sexual harassment in the workplace. The last Part of this Note will discuss how the current state

opportunities for advancement, and 9% reported changing jobs as a direct result of the harassment).

³⁸See PEGGY CRULL, *THE IMPACT OF SEXUAL HARASSMENT ON THE JOB: A PROFILE OF THE EXPERIENCES OF 92 WOMEN 4* (Working Women's Institute Research Series, Report No. 3 (1979)) [hereinafter *WWI Report*] (presenting evidence showing that physical effects of sexual harassment include headaches, backaches, nausea, loss of appetite, weight change, insomnia and fatigue).

Substance abuse has also been documented as a direct result of sexual harassment. See MACKINNON, *supra* note 24, at 47; *Harris v. Forklift Systems, Inc.*, No. 3-89-0557, 1991 WL 487444 (M.D. Tenn. Feb. 4, 1991), at *3, *aff'd mem.*, 976 F.2d 733 (6th Cir. 1992), *rev'd*, 114 S. Ct. 367 (1993).

³⁹See CRULL, *supra* note 38, at 8 (stating that 96% of harassment victims showed psychological symptoms such as fear, nervousness, anger, and feelings of powerlessness).

⁴⁰The Supreme Court in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986), adopted the term "victim" as referring to a woman who has been sexually harassed at work.

⁴¹BRAVO & CASSEDY, *supra* note 26, at 42.

⁴²The courts have been slow and inconsistent in recognizing the significant emotional effects of sexual harassment in the workplace. See discussion *infra* part II.A.2. Congress did not acknowledge that sexual harassment may cause emotional injury until passage of the Civil Rights Act of 1991. 42 U.S.C. § 1981a (1988 & Supp. IV 1992).

⁴³See discussion *infra* parts III, IV.

⁴⁴477 U.S. 57 (1986).

⁴⁵See discussion *infra* parts III, IV.

of sexual harassment law perpetuates Post Traumatic Stress Disorder in sexually harassed women, both before and after a victim enters a courthouse.

II. PRESENT STATE OF SEXUAL HARASSMENT LAW

A. Title VII of the Civil Rights Act of 1964

In a society where 85% of working women will be sexually harassed on the job at some point in their working lives,⁴⁶ it is incredible that there is no express federal statutory prohibition concerning sexual harassment. Working women are only impliedly protected against sexual harassment through Title VII,⁴⁷ which makes it an unlawful employment practice for an employer to "discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin."⁴⁸ The Supreme Court did not grant this limited protection to women until 1986, when the Court recognized sexual harassment as a form of sex discrimination in violation of Title VII.⁴⁹

1. Legislative History of Title VII

The Supreme Court's unfortunate delay in allowing women to assert a sexual harassment claim under Title VII is somewhat understandable, considering the enigmatic legislative history regarding Title VII's intended impact on the rights of working women.⁵⁰ The addition of the word "sex" to Title VII was proposed only one day before the bill's passage,⁵¹ and its inclusion is made quite suspect from statements made during House debate.⁵² Consid-

⁴⁶MACKINNON, *supra* note 24, at 277 n.2; *see also supra* note 26 (providing additional statistics).

⁴⁷42 U.S.C. §§ 2000e-2000e-17 (1988 & Supp. IV 1992).

⁴⁸42 U.S.C. § 2000e-2(a)(1) (1988). However, only an employer with fifteen or more employees that is "engaged in an industry affecting commerce" is regulated by Title VII. 42 U.S.C. § 2000e-(b) (1988).

⁴⁹Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 63-69 (1986). *See discussion infra* part II.B.

⁵⁰*See Miller v. Bank of America*, 418 F. Supp. 233, 235 (N.D. Cal. 1976), *rev'd*, 600 F.2d 211 (9th Cir. 1979) (stating that "the Congressional Record fails to reveal any specific discussions as to the amendment's intended scope or impact").

⁵¹110 CONG. REC. 2577-84 (1964).

⁵²It appears that including women within Title VII was merely an attempt to impede passage of Title VII altogether. Representative Smith, who proposed the amendment, half-heartedly stated, "I do not think it can do any harm to this legislation . . . I think it will do some good for the minority sex." 110 CONG. REC. 2577 (1964). Representative Celler declared the amendment "illogical, ill-timed, ill-placed and improper," and asked Congress to wait until "mature studies" have been made before amending Title VII to protect women. 110 CONG. REC. 2578 (1964).

ering that the amendment's primary supporter voted against its passage,⁵³ most of the arguments to include women within Title VII prove hypocritical at best.⁵⁴ One court has suggested that the legislative history of Title VII makes it clear that the term "sex" was only added as a prohibited classification as "a last minute attempt by opponents to block passage of the Civil Rights Bill" altogether.⁵⁵

While this legislative history may appear inconsequential in light of Title VII's passage, the history illustrates the tenuous ground on which women's rights in the workplace are based.⁵⁶ If Congress placed so little emphasis on including women within the protection of Title VII, it may be surmised that Congress did not address the damaging emotional effects that sexually harassing behavior has on its victims. Congress did not mention or consider sexual harassment when Title VII was passed.⁵⁷ Amazingly, however, Title VII remains the only source of federal sexual harassment law available to working women who have been victimized by such conduct.⁵⁸

2. Early Court Interpretation of Title VII

This less than instructive legislative history led to quite limited applications of Title VII,⁵⁹ especially in workplace sexual harassment claims. Not surprisingly, four of the first five federal courts to consider sexual harassment in the workplace found no Title VII violations.⁶⁰ Characterizing sexually

⁵³See 110 CONG. REC. 2804 (1964), for Representative Smith's negative vote on the amendment.

⁵⁴See, e.g., 110 CONG. REC. 2584 (1964) ("Many of the people who are most ardent in support of [the amendment] were among those who . . . were the strongest in their opposition to a very simple bill to provide equal pay for equal work for women." (remarks of Representative Green)).

⁵⁵*Wilson v. Southwest Airlines Co.*, 517 F. Supp. 292, 297 n.12 (N.D. Tex. 1981).

⁵⁶One commentator has suggested that extending Title VII to prohibit sexual harassment is improper because the legislative history does not show Congress intended to regulate sexual activity in the workplace. Michelle R. Pierce, *Sexual Harassment and Title VII--A Better Solution*, 30 B.C. L. REV. 1071, 1092-99 (1989).

⁵⁷See Theodore F. Claypoole, *Inadequacies in Civil Rights Law: The Need for Sexual Harassment Legislation*, 48 OHIO ST. L.J. 1151, 1152 (1987) (Title VII's "sparse legislative history" shows that Congress made no attempt to address or resolve sexual harassment issues currently being debated).

⁵⁸See *infra* part IV.B.3, for discussion of the Civil Rights Act of 1991, which significantly amended Title VII.

⁵⁹*But see McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973) ("What is required by Congress [under Title VII] is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.") (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 430-31 (1971)).

⁶⁰*Tomkins v. Public Serv. Elec. & Gas Co.*, 422 F. Supp. 553, 556 (D.N.J. 1976) (sexual harassment is not discrimination under Title VII), *rev'd*, 568 F.2d 1044 (3d Cir. 1977);

harassing behavior as "nothing more than a personal proclivity, peculiarity or mannerism"⁶¹ and merely a "subtlet[y] of an inharmonious personal relationship,"⁶² these courts relinquished a woman's position in the workplace to that of nothing more than a sexual commodity. As one concurring judge so callously stated, "sexual advances may not be intrinsically offensive, and no policy can be derived from the equal employment opportunity laws to discourage them. . . . [They are] social patterns that to some extent are normal and expectable."⁶³

It was not until the late 1970's that a federal district court held that sexual harassment in the workplace violates Title VII. The court in *Williams v. Saxbe*⁶⁴ explicitly disagreed with the defendant's proposition that sexual harassment in the workplace is an "isolated personal incident which should not be the concern of the courts,"⁶⁵ and found the employer liable for a supervisor's sexual harassment of a female employee.⁶⁶ This case proved to be a catalyst for the federal district courts' reinterpretation of Title VII.⁶⁷ Since the *Williams* decision, all federal courts have recognized that sexual harassment in the workplace may violate Title VII under certain circumstances.⁶⁸

Although Title VII may be considered a coup for working women in some respects, the reality is that a woman's "right to work in an environment free from discriminatory intimidation, ridicule and insult"⁶⁹ is only *inferred* from Title VII. While Title VII does grant women a cause of action for workplace

Miller v. Bank of Am., 418 F. Supp. 233, 235-36 (N.D. Cal. 1976) (court would not recognize a Title VII claim where plaintiff did not use department established by employer to investigate such claims), *rev'd*, 600 F.2d 211 (9th Cir. 1979); Corne v. Bausch & Lomb, Inc., 390 F. Supp. 161, 163 (D. Ariz. 1975) (woman subjected to verbal and physical sexual advances failed to state a claim under Title VII), *vacated mem.*, 562 F.2d 55 (9th Cir. 1977); Barnes v. Train, 13 Fair Empl. Prac. Cas. (BNA) 123, 124-25 (D.D.C. 1974) (plaintiff fired for refusing her male superior's sexual advances failed to state a claim under Title VII), *rev'd sub nom.* Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977).

⁶¹*Corne*, 390 F. Supp. at 163.

⁶²*Barnes*, 561 F.2d at 986 (quoting Barnes v. Train, 13 Fair Empl. Prac. Cas. (BNA) 123 (D.D.C. 1974)).

⁶³*Barnes*, 561 F.2d at 1001 (MacKinnon, J. concurring).

⁶⁴413 F. Supp. 654, 656 (D.D.C. 1976) (holding that retaliatory actions of a male supervisor taken after a female employee refused his sexual advances created an "artificial barrier to employment" that constituted sex discrimination in violation of Title VII), *rev'd in part and vacated in part sub nom.* Williams v. Bell, 587 F.2d 1240 (1978).

⁶⁵*Id.* at 660.

⁶⁶*Id.*

⁶⁷For example, the four federal district court cases listed *supra* note 60 were reversed on appeal directly following the decision in *Williams*.

⁶⁸See RALPH H. BAXTER, JR. & LYNNE C. HERMLE, SEXUAL HARASSMENT IN THE WORKPLACE 8 n.2 (1989).

⁶⁹Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986).

sexual harassment, Title VII does nothing to ameliorate the emotional obstacles a victim is required to overcome before asserting such a claim.⁷⁰ Subsequent applications of Title VII reinforce the fact that current sexual harassment laws do not consider a woman's experience when determining how and when to hold an employer liable for such forms of sexual discrimination.

B. *Meritor Savings Bank, FSB v. Vinson*

Meritor Savings Bank, FSB v. Vinson,⁷¹ decided in 1986, was the first Title VII sexual harassment case to reach the Supreme Court. This case remained the Court's sole ruling on the issue until fairly recently.⁷² The Court in *Meritor* established that sexual harassment in the workplace constitutes sex discrimination in violation of Title VII.⁷³

However, the Court failed to resolve many important issues regarding sexual harassment, which has led to varied and inconsistent interpretations of Title VII by lower courts. The lack of uniformly applied legal boundaries to sexual harassment cases has hampered any substantive developments aimed at eradicating sexual harassment from the workplace. The history of the *Meritor* decision illustrates how the Court has perpetuated the emotional trauma a sexually harassed woman endures when attempting to hold her employer responsible for such conduct.

1. Factual Background

Mechelle Vinson brought an action against Meritor Savings Bank and her supervisor, Sidney Taylor, claiming that during her four years at the bank she had "constantly been subjected to sexual harassment" in violation of Title VII.⁷⁴ Vinson alleged that she was forced to submit to Taylor's sexual advances forty to fifty times over several years, and that Taylor often assaulted or forcibly raped her.⁷⁵ Vinson further stated that because she was afraid of Taylor, she did not report the harassment to any of his supervisors or attempt to use the bank's internal complaint procedures.⁷⁶

⁷⁰See discussion *infra* IV.A.

⁷¹477 U.S. 57 (1986).

⁷²See *Harris v. Forklift Systems, Inc.*, 114 S. Ct. 367, 371 (1993) (holding that to be actionable as abusive work environment harassment, conduct need not seriously affect an employee's psychological well-being or lead the plaintiff to suffer injury), *rev'g*, 976 F.2d 733 (6th Cir. 1992).

⁷³477 U.S. at 73.

⁷⁴*Id.* at 60.

⁷⁵Vinson also claimed "that Taylor fondled her in front of other employees, followed her into the women's restroom when she went there alone, and exposed himself to her. . . ." *Id.* at 60.

⁷⁶*Id.* at 61. Taylor denied Vinson's accusations of sexual activity and contended that Vinson aired them in retaliation for a business-related dispute. "The bank also denied

2. Lower Court History

The district court found that Vinson was not the victim of sexual harassment or sex discrimination.⁷⁷ The court stated that if Vinson and Taylor did engage in an intimate or sexual relationship,⁷⁸ it was "a voluntary one having nothing to do with [Vinson's] continued employment or her advancement" at the bank.⁷⁹ The district court also ruled that because the bank had an express policy against discrimination and that neither Vinson nor any other employee lodged a complaint of sexual harassment against Taylor, "the bank was without notice and cannot be held liable for the alleged actions of Taylor."⁸⁰

In light of new developments in sexual harassment law,⁸¹ the court of appeals reversed the district court's decision.⁸² Relying primarily on the "hostile environment" theory of sexual harassment recognized in *Bundy v. Jackson*,⁸³ the *Vinson* court remanded the case to the district court so that it could determine whether Vinson was subjected to sexual harassment that "illegally poisoned the psychological and emotional work environment."⁸⁴ The most significant holding in the court of appeal's decision was that the bank was held strictly liable⁸⁵ under Title VII for sexual harassment by a supervisory employee, even though the bank lacked knowledge of Taylor's harassing behavior.⁸⁶ The *Vinson* court explained that "[c]onfining liability . . . to situations in which a supervisor acted within the scope of his authority conceivably could lead to the ludicrous result that employers would become accountable only if they explicitly require or consciously allow their supervisors to molest women employees."⁸⁷

the allegations and asserted that any sexual harassment by Taylor was unknown to the bank and engaged in without its consent or approval." *Id.*

⁷⁷*Vinson v. Taylor*, 23 Fair Empl. Prac. Cas. (BNA) 37, 43 (D.D.C. 1980).

⁷⁸The district court did not resolve the conflicting testimony regarding the existence of a sexual relationship between Vinson and Taylor. *Meritor*, 477 U.S. at 61.

⁷⁹*Id.*

⁸⁰*Vinson*, 23 Fair Empl. Prac. Cas. (BNA) at 42.

⁸¹Hostile environment sexual harassment was not recognized as a Title VII violation until after the district court's decision. See EEOC Guidelines, *supra* note 33, § 1604.11(a)(3).

⁸²*Vinson v. Taylor*, 753 F.2d 141, 152 (1985).

⁸³641 F.2d 934, 943-44 (D.C. Cir. 1981) (holding that a violation of Title VII may be predicated on either quid pro quo harassment or harassment that creates a hostile environment).

⁸⁴*Vinson*, 753 F.2d at 145 (quoting *Bundy*, 641 F.2d at 944).

⁸⁵*Id.* at 146-152.

⁸⁶*Id.* at 147.

⁸⁷Citing to EEOC Guideline § 1604.11(f), the court added:
[i]nstead of providing a reason for employers to remain oblivious to

3. The Supreme Court Holding

The Supreme Court unanimously agreed that an employer may be liable where sexual harassment by a supervisor creates a hostile working environment, regardless of whether a plaintiff submitted to sexual advances.⁸⁸ However, the Court declined to issue a definitive rule on the appropriate standard to apply in determining an employer's liability.⁸⁹ This hesitant decision has resulted in the lower courts applying divergent standards of liability.⁹⁰

The *Meritor* Court explicitly disagreed with the court of appeal's application of a strict liability standard for a supervisor's sexual harassment.⁹¹ However, the Court stated that it agreed with the EEOC that Congress wanted the courts to look at agency principles for guidance.⁹² In suggesting the use of agency liability theories for hostile environment sexual harassment claims, the Supreme Court adopted the definition found in the Restatement of Agency Second that "a master is subject to liability for the torts of his servants committed while acting in the scope of their employment,"⁹³ and in instances where the actor relies upon the apparent authority of the employer.⁹⁴ Conversely, liability for quid pro quo harassment may be determined using strict liability principles,⁹⁵ because it is premised entirely on the use of one's authority to threaten the victim's employment status.

Using these bifurcated standards of liability in workplace sexual harassment claims proves problematic in practice and difficult to justify in theory. A better

conditions in the workplace, we think the enlightened purpose of Title VII calls for an interpretation cultivating an incentive for employers to take a more active role in warranting to each employee that he or she will enjoy a working environment free from illegal sex discrimination.

Id. at 151.

⁸⁸*Meritor*, 477 U.S. at 68, 72.

⁸⁹*Id.* at 72.

⁹⁰Some courts have held employers strictly liable for supervisory sexual harassment. See *Horn v. Duke Homes*, 755 F.2d 599, 605-06 (7th Cir. 1985); *Mitchell v. OsAir, Inc.*, 629 F. Supp. 636, 643-44 (N.D. Ohio 1986); *Ambrose v. United States Steel Corp.*, 39 Fair Empl. Prac. Cas. (BNA) 30, 35 (N.D. Cal. 1985). Other courts have required the plaintiff to establish employer knowledge of the harassing conduct as a requisite to liability. See *Katz v. Dole*, 709 F.2d 251, 255-56 (4th Cir. 1983); *Henson v. Dundee*, 682 F.2d 897, 905 (11th Cir. 1982).

⁹¹The Supreme Court also failed to adopt the bank's proposed theory of a "notice standard," which would insulate an employer from liability unless they had actual or constructive knowledge of the harassment. *Meritor*, 477 U.S. at 73.

⁹²*Id.*; see also EEOC Guidelines, *supra* note 33, § 1604.11(c).

⁹³RESTATEMENT (SECOND) OF AGENCY § 219(1) (1958).

⁹⁴*Id.* § 219(2)(d).

⁹⁵See, e.g., *Horn v. Duke Homes, Inc.*, 755 F.2d 599, 603-05 (7th Cir. 1985).

approach would be to hold an employer vicariously liable⁹⁶ for both quid pro quo and hostile environment sexual harassment. A supervisor uses the authority delegated by the employer over the employee in both forms of sexual harassment; therefore, the employer should be held liable for both forms of this abuse of power.

Holding employers to a less stringent liability standard for hostile environment harassment suggests that the Court believes a victim is less traumatized from exposure to an offensive environment than when her position is explicitly threatened through quid pro quo harassment.⁹⁷ Requiring that hostile environment harassment be carried out within a supervisor's scope of employment is ineffective because "discrimination is rarely carried out pursuant to a formal vote of a corporation's board of directors."⁹⁸ An employer can often avoid liability simply by drafting a policy against employment discrimination, thereby making any sexually harassing behavior purely personal, and thus, not within the scope of employment.⁹⁹

The EEOC Guidelines suggest applying strict liability to both forms of sexual harassment,¹⁰⁰ stating that an employer should be liable for such harassment "regardless of whether the employer knew or should have known of their occurrence."¹⁰¹ While the EEOC Guidelines do not have the force and effect of law,¹⁰² the Supreme Court in *Meritor*, citing *General Electric Co. v. Gilbert*,¹⁰³ acknowledged that they "do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."¹⁰⁴

The *Meritor* Court's suggestion of agency principles in determining liability for hostile environment sexual harassment in the workplace is also inconsistent because employers are held strictly liable for discrimination based on race, religion and national origin under Title VII.¹⁰⁵ Applying a less stringent

⁹⁶Vicarious liability imposes liability on a person for the actionable conduct of another based solely on a relationship between the two persons. BLACK'S LAW DICTIONARY 1566 (6th ed. 1990).

⁹⁷See *Meritor*, 477 U.S. at 76 (Marshall, J., concurring) (expressing disagreement with the EEOC's brief suggesting that a different rule of liability should be utilized where the supervisor's harassment "merely" causes a discriminatory environment).

⁹⁸*Id.* at 75.

⁹⁹See, e.g., *Corne v. Bausch & Lomb, Inc.*, 390 F.Supp 161, 163 (D. Ariz. 1975), *vacated and remanded*, 562 F.2d 55 (9th Cir. 1977).

¹⁰⁰EEOC Guidelines, *supra* note 33, § 1604.11(c).

¹⁰¹*Id.*; see discussion *infra* part IV.A.1.

¹⁰²*Ferguson v. E.I. duPont de Nemours and Co.*, 560 F. Supp 1172, 1198 (D. Del. 1983).

¹⁰³429 U.S. 125, 141-42 (1976).

¹⁰⁴*Meritor*, 477 U.S. at 65 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

¹⁰⁵42 U.S.C. § 2000e-2(a) (Supp. IV 1992). See, e.g., *Flowers v. Crouch-Walker Corp.*, 552 F.2d 1277, 1282 (7th Cir. 1977) (race discrimination); *Young v. Southwestern Sa. & Loan Ass'n*, 509 F.2d 140, 144 (5th Cir. 1975) (religious discrimination); *EEOC v.*

liability standard in determining liability for sexual discrimination violations suggests that prohibiting sexual harassment in the workplace is a less important Title VII objective than preventing other forms of employment discrimination. As the Eleventh Circuit argued, "[s]exual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality."¹⁰⁶ Because the effects of racial, religious, national origin, and sex discrimination are equally offensive and debilitating to one's psyche and career, there is no plausible reason why an employer should not be held equally liable.

The *Meritor* Court further held that sexually harassing behavior must be "sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment"¹⁰⁷ to be actionable under Title VII. The majority of lower courts look to whether a "reasonable person" would find the sexual harassment severe or pervasive, rather than determining how a "reasonable woman" would perceive the harassment.¹⁰⁸ This leaves many women who have been sexually harassed without a cause of action for hostile environment harassment.¹⁰⁹ Moreover, requiring a woman to wait until the offensive conduct becomes so pervasive that it destroys her ability to work will likely cause the woman to suffer significant emotional trauma as well.

Another intriguing aspect of *Meritor* is the Supreme Court's instruction that the lower courts look to whether the sexual advances were "unwelcome," rather than whether participation in them was voluntary.¹¹⁰ However, the Court failed to define what constitutes "unwelcome" sexual conduct, leaving the lower courts free reign to determine this term's meaning.¹¹¹ The unfortunate

University of New Mexico, 504 F.2d 1296, 1302 (10th Cir. 1974) (national origin discrimination).

¹⁰⁶*Henson v. Dundee*, 682 F.2d 897, 902 (11th Cir. 1982).

¹⁰⁷*Meritor*, 477 U.S. at 67 (quoting *Henson*, 682 F.2d at 904).

¹⁰⁸*But see* discussion *infra* part III.B.1.a.

¹⁰⁹*See, e.g., Scott v. Sears, Roebuck & Co.*, 798 F.2d 210, 213-14 (7th Cir. 1986) (finding no hostile environment where plaintiff was repeatedly sexually harassed and propositioned by her supervisor); *Christoforou v. Ryder Truck Rental, Inc.*, 668 F. Supp. 294, 301 (S.D. N.Y. 1987) (finding supervisor's repeated verbal and physical sexual harassment of the plaintiff ungentlemanly but not severe enough to create an abusive working environment).

¹¹⁰Therefore, the fact that sex-related conduct was voluntary is not a defense to a sexual harassment suit under Title VII. *Meritor*, 477 U.S. at 68.

¹¹¹One circuit court broadly defined "unwelcome" conduct as unsolicited, uninvited, undesirable or offensive. *Moylan v. Maries County*, 792 F.2d 746, 749 (8th Cir. 1986). Other circuits have issued similarly vague definitions of what constitutes unwelcome sexual conduct. *See, e.g., Henson v. Dundee*, 682 F.2d 897, 903 (11th Cir. 1982) (stating that conduct is unwelcome if the employee did not solicit or incite it, and it is undesirable or offensive).

result of the vagueness in determining "unwelcomeness" has led to the evaluation of the *victim's* conduct, rather than evaluation of the harasser's conduct.¹¹² This form of evidence suggests the Supreme Court's interpretation of Title VII is essentially justifying sexually harassing conduct by shifting the onus on the woman. The result is the obliteration of the Court's intended holding, because the question of whether such conduct was unwelcome *to the victim* has essentially become whether the harasser is somehow justified in assuming that a woman's appearance or demeanor means she is asking to be sexually harassed or assaulted.¹¹³

It is apparent from even a cursory examination that the *Meritor* decision is not an adequate response to the myriad of problems caused by sexual harassment. Forcing a sexually harassed woman to justify her conduct further traumatizes the victim. The ignorance of the emotional harms of sexual harassment in the workplace reinforces the need for further examination of a victim's reactions to sexual harassment.

III. EMOTIONAL HARMS OF SEXUAL HARASSMENT: POST TRAUMATIC STRESS DISORDER

A. Post Traumatic Stress Disorder Generally

Although the Supreme Court has recognized that employment discrimination resulting in "[e]ven a temporary layoff" may have adverse psychological effects on an employee,¹¹⁴ the Court has not fully addressed the emotional injuries caused by sexual harassment in the workplace.¹¹⁵ A woman's response to sexual harassment in the workplace certainly varies with each victim. Typically, however, women who are sexually harassed feel helpless, ashamed, degraded, and angry.¹¹⁶

Furthermore, victims of sexual harassment may suffer a wide variety of behavioral and psychological reactions, ranging from depression, nervousness and diminished self-esteem¹¹⁷ to a complete emotional breakdown.¹¹⁸ While

¹¹²As Justice Rehnquist stated, resolving "whether particular conduct was indeed unwelcome presents difficult problems of proof and turns largely on credibility determinations committed to the trier of fact. . . ." *Meritor*, 477 U.S. at 68.

¹¹³See discussion *infra* part IV.A.3.

¹¹⁴*Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 283 (1986) (plurality opinion).

¹¹⁵*But see Harris v. Forklift Systems, Inc.*, 114 S. Ct. 367, 371 (1993) (holding that sexually harassing behavior need not seriously affect a plaintiff's psychological well-being or lead plaintiff to suffer injury in order to be actionable as "abusive work environment" harassment).

¹¹⁶See WILLIAM M. GREEN, M.D., *RAPE: THE EVIDENTIAL EXAMINATION AND MANAGEMENT OF THE ADULT FEMALE VICTIM* 69 (1988).

¹¹⁷See CRULL, *supra* note 40; see also BOUMIL & HICKS, *supra* note 24, at 454 (stating that sexually harassed women usually suffer a loss of confidence, suspiciousness, disruptive

the extent of these responses may also depend on the severity of the harassing behavior, it has been found that 90-95% of sexually harassed women experience some form of debilitating stress reaction.¹¹⁹

The documented psychological and emotional responses of sexually harassed women greatly resemble those of a victim suffering from Post Traumatic Stress Disorder (hereinafter PTSD). PTSD examines the various "human responses to extraordinarily stressful societal and life events"¹²⁰ manifested in both physical and psychological injuries. In the past decade, PTSD has emerged as an important concept in our legal system and has been utilized in a variety of criminal and civil contexts.¹²¹

Post Traumatic Stress Disorder is caused by a traumatic event, or "stressor," that is so severe that it is likely to inflict psychological trauma in most normal persons.¹²² PTSD was first associated with World War I veterans suffering from a post-war stress reaction.¹²³ Today, Post Traumatic Stress Disorders have been found in victims of rape, violent assault, incest, and natural or man-made disasters.¹²⁴

It has been found that "[a]ny traumatic incident challenges a victim's belief that the world is safe and predictable, attacks the victim's former sense of personal invulnerability, and disrupts the victim's basic sense of self-trust and

anxiety, depression, sleep disturbance, loss of appetite, dysfunctional interpersonal relationships, and the development of phobias).

¹¹⁸See, e.g., *Kauffmann v. Allied Signal*, 970 F.2d 178 (6th Cir. 1992) (plaintiff suffered nervous breakdown during second medical leave from work as result of supervisor's sexual harassment); *Hansel v. Public Service Co. of Colorado*, 778 F. Supp. 1126, 1131 (D. Colo. 1991) (plaintiff suffered a nervous breakdown as a result of nearly eight years of sexual harassment); *Gates v. Brockway Glass Co.*, 93 L.R.R.M. 2367 (C.D. Cal. 1976) (harassed female worker unable to work because of emotional breakdown).

¹¹⁹See Peggy Crull, *The Stress Effects of Sexual Harassment on the Job*, in *ACADEMIC AND WORKPLACE SEXUAL HARASSMENT: A RESOURCE MANUAL* 133, 138 (Michele A. Paludi & Richard B. Barickman eds., 1991).

¹²⁰JOHN P. WILSON, *TRAUMA, TRANSFORMATION AND HEALING* xii (1989). The American Psychiatric Association defines PTSD as the development of characteristic symptoms following a psychologically distressing event that is outside the range of usual human experience. *AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 247 (3d ed. 1987) [hereinafter *DSM-III-R*].

¹²¹Evidence of PTSD is most frequently used as a defense to criminal conduct of veterans of the Vietnam War. See generally Michael J. Davidson, *Post Traumatic Stress Disorder: A Controversial Defense for Veterans of a Controversial War*, 29 WM. & MARY L. REV. 415 (1988), for further explanation of PTSD in this context.

Evidence of a PTSD diagnosis has also been used to disprove consent in rape cases, in the filing of disability claims and in domestic relations court involving custody disputes or marital relations. WILSON, *supra* note 120, at 218.

¹²²Nancy C. Andreasen, *Post Traumatic Stress Disorder*, in *COMPREHENSIVE TEXTBOOK OF PSYCHIATRY* III 1519 (H.I. Kaplan et al. eds., 1980).

¹²³*Id.* at 1517.

¹²⁴*Id.* at 1519.

trust in the environment."¹²⁵ Although sexual harassment clearly fits this definition of a traumatic event, sexual harassment has not been universally considered one of the stressors that causes PTSD.¹²⁶

However, recent analyses of the after-effects of sexual harassment have recognized that sexual harassment does indeed cause severe trauma.¹²⁷ One researcher has even labeled the effects of sexual harassment on the physical, emotional, interpersonal, and career aspects of a woman's life "Sexual Harassment Stress Disorder."¹²⁸

Many victims' reactions to sexual harassment resemble those of a victim of rape or incest, in that its victims display characteristics of intense terror, reexperiencing the event, hypervigilance, increased arousal, eating disorders, avoidance of stimuli associated with the event and numbing of general responsiveness.¹²⁹ Regardless of this research, the post traumatic stress reactions suffered by victims of sexual harassment remain largely ignored by the legislature, judiciary, and society.¹³⁰

The pervasiveness of women who suffer from Post Traumatic Stress Disorder as a result of sexual harassment at work necessitates the recognition that some forms of sexual harassment do in fact cause PTSD.¹³¹ This, in turn, may prompt lawmakers to reinterpret the burdens placed on a victimized woman in asserting a Title VII sexual harassment claim. The Civil Rights Act of 1991¹³² amended Title VII to allow claimants to recover damages for the emotional

¹²⁵Billie Lawson, *Work-Related Post Traumatic Stress Reactions: The Hidden Dimension*, 12 HEALTH & SOC. WORK 250, 252 (1987) (citing Janice L. Krupnick & Mardi J. Horowitz, *Stress Response Syndromes: Recurrent Themes*, 38 ARCHIVES OF GENERAL PSYCHIATRY 428, 429 (1981)).

¹²⁶DSM-III-R, *supra* note 120, at 247-48.

¹²⁷*See, e.g.,* Kathryn Quina, *The Victimization of Women*, in IVORY POWER: SEXUAL HARASSMENT ON CAMPUS 97-98 (Michele A. Paludi, ed., 1990) (finding that sexual harassment is an experience that women find (1) causes severe trauma; (2) violates trust, especially when the harasser is in a position of authority, for example, an employer; and (3) causes secondary social losses (such as being demoted or fired)).

¹²⁸*See* MICHELE PALUDI & RICHARD BARICKMAN, *ACADEMIC AND WORKPLACE SEXUAL HARASSMENT: A RESOURCE MANUAL* 27 (1991).

¹²⁹ROSEMARIE TONG, *WOMEN, SEX AND THE LAW* 89 (1984); *see also* JUDITH LEWIS HERMAN, *TRAUMA AND RECOVERY* 32 (1992) (arguing that rape victims experience symptoms similar to the post traumatic stress disorders found in war veterans).

¹³⁰*But see* KIRTLAND C. PETERSON ET AL., *POST TRAUMATIC STRESS DISORDER: A CLINICIAN'S GUIDE* 9 (1991) (stating that "as PTSD becomes a more accepted diagnosis, it is probable that it will be used more often in legal battles").

¹³¹*See supra* note 18.

¹³²42 U.S.C. § 1981a (Supp. IV 1992).

harms¹³³ of sexual harassment. Therefore, women should be able to litigate and recover damages for the post traumatic stress that often results from sexual harassment in the workplace.

B. Defining Post Traumatic Stress Disorder in the Sexual Harassment Context

Applying each element of Post Traumatic Stress Disorder to the realities of workplace sexual harassment delineates the devastating effects sexual harassment typically attaches to a woman's psyche. This further illustrates that in many instances, sexual harassment is a traumatic experience that may cause PTSD in its victims.

There are five diagnostic criteria required for a finding of PTSD:

1. experiencing a traumatic event;
2. reexperiencing the traumatic event;
3. avoidance of stimuli associated with the event;
4. symptoms of increased arousal; and,
5. duration of the disturbance for at least one month.¹³⁴

Each element can be identified in certain women who have been victims of sexual harassment. Research on the psychological impact of sexual harassment has revealed that most victims suffer "immediate postvictimization generalized stress responses characterized as a state of psychological shock."¹³⁵ These responses include emotional numbing, constriction of affect, repeated reexperiencing of the trauma by intrusive waking images or dreams, anxiety, and depression.¹³⁶ These responses tend to develop into chronic symptoms that persist for a considerable length of time.¹³⁷

These physical, cognitive, and behavioral responses are consistent with the diagnostic criteria for Post Traumatic Stress Disorder.¹³⁸ A detailed look at each of the elements of PTSD, in conjunction with a victim's typical response to sexual harassment, illustrates why sexual harassment should be considered an emotionally harmful experience which may cause Post Traumatic Stress Disorder in its victims.

¹³³Section 1981a(a)(1) allows recovery of compensatory and punitive damages against an employer proven to have engaged in unlawful, intentional discrimination under *Id.*

¹³⁴DSM-III-R, *supra* note 120, at 250. The last element of PTSD, which is self-explanatory, will not be discussed in this Note.

¹³⁵Koss, *supra* note 37, at 79.

¹³⁶*Id.*; see also PALUDI & BARICKMAN, *supra* note 128, at 29-30 (listing additional symptoms frequently found in sexually harassed women).

¹³⁷BOUMIL & HICKS, *supra* note 24, at 455.

¹³⁸DSM-III-R, *supra* note 120, at 250.

1. The Stressor

The most crucial element of a PTSD diagnosis requires that the victim suffer a traumatic experience which would be significantly distressing to almost anyone.¹³⁹ To more effectively illustrate why sexual harassment should be considered a stressor causing PTSD, the author has divided this definition into two tests: was the victim subjected to sexual harassment that (a) almost any woman¹⁴⁰ (b) would find markedly distressing?

a. The Reasonable Woman Test

Requiring that the experience would be distressing to "almost anyone" is accurate in other contexts of PTSD, since the emotional response to many recognized stressors is gender-neutral.¹⁴¹ However, since sexual harassment in the workplace victimizes women more often than men,¹⁴² replacing the word "anyone" with "reasonable woman" more effectively demonstrates the emotional effects of sexual harassment. As adopted by some federal circuits in hostile environment sexual harassment claims,¹⁴³ the reasonable woman standard examines the female victim's responses to sexually harassing conduct and determines whether "almost any woman" would find the behavior markedly distressing.

This standard is necessary based on the sexual mores of our society, which tend to impose an aggressive sexual role on men and a passive role on women.¹⁴⁴ Women's vulnerability to male power in our patriarchal society has

¹³⁹*Id.* at 247.

¹⁴⁰This note labels this the "reasonable woman" test. However, if the victim of sexually harassing behavior is a man, the standard of reasonableness must be altered to those actions that detrimentally affect a reasonable man. *See, e.g., Andrews v. City of Philadelphia*, 895 F.2d 1469, 1482 (3d Cir. 1990) (holding that the sexually harassing behavior must detrimentally affect a reasonable person of the same sex as the victim in order to find a Title VII violation), *cert. denied*, 113 S. Ct. 3038 (1993).

¹⁴¹For example, male and female Californians, who suffered through devastating fires in late 1993 and an earthquake in early 1994, are likely to have similar responses to the trauma of such man-made and natural disasters.

¹⁴²*See supra* note 24 and accompanying text.

¹⁴³*See Burns v. McGregor Electronic Industries, Inc.*, 989 F.2d 959, 962 n.3 (1993) (stating its accord with other federal circuits that have adopted the reasonable woman standard); *Ellison v. Brady*, 924 F.2d 872, 878-82 (9th Cir. 1991) (holding that a female employee states a prima facie case of hostile environment sexual harassment when she alleges conduct which a reasonable woman considers sufficiently severe or pervasive to alter conditions of employment and create an abusive working environment); *Yates v. Avco Corp.*, 819 F.2d 630, 637 (6th Cir. 1987) (adopting a reasonable woman standard for Title VII hostile environment claims).

¹⁴⁴*See Alfred B. Heilbrun, Measurement of Masculine and Feminine Sex Role Identities as Independent Dimensions*, 44 J. CONSULTING & CLINICAL PSYCHOL. 183, 183-190 (1976) (stating that normative behavior by women is often described as "submissive, passive,

long been recognized,¹⁴⁵ and is especially apparent in the workplace environment. Research has found that "sex-role beliefs will dictate how a woman who has been sexually harassed is going to feel about the incident."¹⁴⁶ Since "ordinary women probably find offensive sexual contact and proposals that ordinary men find trivial or sexually stimulating coming from women,"¹⁴⁷ the effects of sexual harassment clearly depend upon the victim's gender.

Women react to sexually harassing behavior differently than men. Women tend to internalize the offensive conduct through feelings of fear, insecurity, diminished self esteem, confusion, shame, and guilt.¹⁴⁸ While men may also be the victims of sexual harassment, it has been found that men are more likely to "interpret relatively innocuous behavior as invitations to sexual contact," rather than conduct that threatens their physical integrity.¹⁴⁹ Men's societal and workplace status gives them little reason to feel fearful or defenseless from sexual conduct at work, whereas women remain in a vulnerable position.

Therefore, when evaluating whether a sexually harassing experience was traumatic enough to bring about Post Traumatic Stress Disorder in the victim, the experience must be viewed in light of a reasonable woman's response to such events.

b. *The Markedly Distressing Test*

Most forms of sexually harassing behavior in the workplace meet the "markedly distressing" test, since women are not typically flattered by such conduct.¹⁵⁰ Rather, women find it demeaning, debilitating, and frightening. Post Traumatic Stress Disorder is widely accepted as the result of traumas ranging from rape¹⁵¹ to divorce.¹⁵² But sexual harassment, which in many

not aggressive and fearful," while male behavior is frequently described as "dominant, aggressive, adventurous, opportunistic, and proud of sexual ability").

¹⁴⁵See, e.g., Robert F. Conte & David L. Gregory, *Sexual Harassment in Employment--Some Proposals Toward More Realistic Standards of Liability*, 32 *DRAKE L. REV.* 407, 418 (1982-83) ("Sexual harassment in employment is but one of many means that male elites have used to exercise and reinforce their historic dominance over women in the work environment.").

¹⁴⁶Inger W. Jensen & Barbara A. Gutek, *Attributions and Assignment of Responsibility in Sexual Harassment*, 38 *J. SOCIAL ISSUES* 134 (1982).

¹⁴⁷MACKINNON, *supra* note 24, at 171.

¹⁴⁸See PALUDI & BARICKMAN, *supra* note 128, at 29.

¹⁴⁹*Id.* at 60.

¹⁵⁰See MACKINNON, *supra* note 24, at 47-8.

¹⁵¹See PALUDI & BARICKMAN, *supra* note 128, at 34.

¹⁵²John P. Wilson et al., *A Comparative Analysis of Post-Traumatic Stress Syndrome Among Individuals Exposed to Different Stressor Events*, 11 *J. SOC. & SOC. WELFARE* 793, 808 (1984).

instances causes the same degree of trauma, has not yet received such recognition.¹⁵³

A traumatic experience likely to cause PTSD commonly includes a serious threat to one's physical integrity or life.¹⁵⁴ Sexual harassment in the workplace can be one of the most blatant threats to a woman's physical integrity, such as when she is physically violated through an offensive fondling, confinement to a chair,¹⁵⁵ forcible rape,¹⁵⁶ or physical compulsion to perform oral sex.¹⁵⁷ Similarly, sexual harassment diminishes a woman's personal integrity by making her feel denigrated as a woman, or by reducing her to an object subject to sexual insults, ridicule, or other epithets from her employer.

However, just as not all sexual comments¹⁵⁸ and conduct of a sexual nature occurring in the employment setting are actionable under Title VII,¹⁵⁹ not every form of sexual harassment may be considered traumatic enough to cause PTSD.¹⁶⁰ Harassing remarks alone, absent a threat of intended physical contact¹⁶¹ or an offensive touching, may not universally cause the significant emotional distress necessary for a proper PTSD diagnosis.¹⁶² It appears that a

¹⁵³*Id.*

¹⁵⁴Other characteristics of traumatic events include a serious threat to one's close relatives or friends, the sudden destruction of one's home or community, and witnessing another person who has recently been or is in the process of being seriously injured or killed as the result of an accident or physical violence. DSM-III-R, *supra* note 120, at 247-48.

¹⁵⁵*See* *Stockett v. Tolin*, 791 F. Supp. 1536, 1557-61 (S.D. Fla. 1992) (granting plaintiff \$1 million in punitive damages from former employers for outrageous quid pro quo and hostile environment harassment in violation of Title VII).

¹⁵⁶*See* *Meritor Sav. Bank, FSB v. Vison*, 477 U.S. 57, 60 (1986).

¹⁵⁷*See* *Snider v. Consolidation Coal Co.*, 973 F.2d 555, 561 (7th Cir. 1992) (finding that "no reasonable employee would have continued working for employer under these circumstances"), *cert. denied*, 113 S. Ct. 981 (1993).

¹⁵⁸As one court stated, "Title VII is not a clean language act." *Katz v. Dole*, 709 F.2d 251, 256 (4th Cir. 1983); *see also* *Ellison v. Brady*, 924 F.2d 872, 878 (9th Cir. 1991) (stating that "an isolated epithet by itself fails to support a cause of action for . . . hostile environment" harassment under Title VII); *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir.), *cert. denied*, 406 U.S. 987 (1972) (noting that an employer's "mere utterance" of a remark which offends an employee does not fall within the proscription of Title VII).

¹⁵⁹*See* *Ferguson v. E.I. du Pont de Nemours and Co.*, 560 F. Supp. 1172, 1197-98 (D. Del. 1983) (stating that "not every sexual innuendo or flirtation gives rise to an actionable wrong").

¹⁶⁰However, even sexually harassing behavior that is not physically violent may cause strong fear reactions in the victim, such as feeling a loss of control and a disruption of her life. *See* *Quina*, *supra* note 127, at 97.

¹⁶¹A stressor usually involves a physical factor, but it always involves a psychological component that produces significant emotional trauma. *Andreasen*, *supra* note 122, at 1519.

¹⁶²*See* *WILSON*, *supra* note 120, at 5 (recognizing that "individual difference variables, such as personality traits, cognitive style, gender, and intelligence, affect the way in

threat to one's "physical" integrity implies the need for either intended or actual physical contact in order to be deemed a traumatic experience causing PTSD.¹⁶³ Of course, for a traumatic experience to be legally recognized as causing PTSD in the sexual harassment context, the intensity and circumstances surrounding the sexual conduct must be evaluated in light of each woman's response.

Sexual harassment in the workplace may also include a serious threat to the victim's life,¹⁶⁴ especially where the victim refuses to consent to the suggested sexual acts or threatens to expose her supervisor's conduct.¹⁶⁵ Such malevolent behavior is certain to cause significant fear and emotional distress in the ordinary person. This is especially true for a reasonable woman who feels defenseless and trapped in a hostile work environment.

It is not difficult to recognize why sexual harassment, in certain forms, can be distressing enough to cause Post Traumatic Stress Disorder in its victims. Nevertheless, in sexual harassment cases, courts have been reluctant to allow expert testimony regarding the PTSD of a sexually harassed victim,¹⁶⁶ which signifies the courts' refusal to acknowledge the effects such experiences actually have on many women.

2. Reexperiencing the Traumatic Event

The second criteria necessary for a Post Traumatic Stress Disorder diagnosis involves the victim reliving the stressful event through at least one of the following manners: (1) recurrent recollections of the event,¹⁶⁷ (2) recurrent

which stressful events are perceived, appraised and processed"). *But see* Mari Matsuda, *Public Responses to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2336 n. 84 (1989) (describing the physiological and psychological effects of racial harassment, which include difficulty breathing, hypertension, alcoholism, social withdrawal, chronic depression, and anxiety neuroses).

¹⁶³For example, although repeatedly hanging a noose over a minority employee's desk doesn't involve physical contact, the implied threat should be deemed traumatic enough to cause PTSD. *See* *Vance v. Southern Bell Tel. & Tel. Co.*, 863 F.2d 1503, 1510 (11th Cir. 1989) (finding the above incident sufficiently severe to constitute a jury question regarding a racially hostile environment).

¹⁶⁴DSM-III-R, *supra* note 120, at 247-48.

¹⁶⁵*See* *Brooms v. Regal Tube Co.*, 881 F.2d 412, 417, 426-27 (7th Cir. 1989) (dismissing the victim's claim of emotional distress where her supervisor threatened to kill her for refusing his egregious sexual advances).

¹⁶⁶*See, e.g.,* *Perkins v. General Motors Corp.*, 709 F. Supp. 1487, 1495 (1989) (stating that the plaintiff's doctors had not persuaded the court that plaintiff suffered from PTSD, because it seemed like the "current diagnosis of choice," and the harassment did not constitute "a credible stressor"), *cert. denied*, 499 U.S. 920 (1991); *Broderick v. Ruder*, 685 F. Supp. 1269, 1273 n.3 (D.D.C. 1988) (declining to accept a doctor's diagnosis that the plaintiff suffered from PTSD, because his analogies relating other traumatizing events to a sexually hostile work environment were "not convincing").

¹⁶⁷Recurrent recollections of the event involve thoughts, feelings, images and memories of the event that emerge into the conscious awareness and disturb the victim. PETERSON, *supra* note 130, at 16.

distressing dreams, or (3) suddenly acting or feeling as if the traumatic event were occurring again, in response to some triggering stimuli.¹⁶⁸ While only one of the above mentioned symptoms need be found for a proper diagnosis of PTSD,¹⁶⁹ sexually harassed women are frequently traumatized by all of them.

Commonly, victims of PTSD are traumatized by recurring intrusive thoughts of the disturbing experience. These recollections tend to persist in spite of attempts to forget the traumatic incident and focus attention and energy on other aspects of life.¹⁷⁰ These thoughts may include discomfort over discovered personal vulnerability, guilt over responsibility for motivating or failing to prevent the event, and fear of the event's repetition.¹⁷¹ Sexually harassed women are made to feel vulnerable in a workplace where their physical or personal integrity is threatened.¹⁷² Once a supervisor or other employee discovers this increased vulnerability in a victim, the sexually harassing behavior may become more intense and frequent.¹⁷³

Furthermore, victims of sexual harassment tend to feel that the harassment was their fault, or that they did not do enough to stop it.¹⁷⁴ Some researchers have labeled this "behavioral self-blame," which describes the process in which a victim internalizes the blame and tries to find something in her behavior to which she can attribute the incident.¹⁷⁵ These feelings of guilt are an escape mechanism many victims of sexual harassment use to prevent the realization that they are appreciated at work merely because of their gender.¹⁷⁶

Moreover, sexually harassed women fear that the harassing incidents will continue. Unfortunately, this is more of a reality than a fear, since women rarely incur only one incident of harassing behavior.¹⁷⁷

¹⁶⁸DSM-III-R, *supra* note 120, at 250. This includes reliving the experience through flashback episodes or hallucinations. *Id.*

¹⁶⁹*Id.*

¹⁷⁰Andreasen, *supra* note 122, at 1519.

¹⁷¹See Janice L. Krupnick & Mardi J. Horowitz, *Stress Response Syndromes: Recurrent Themes*, 38 ARCHIVES OF GENERAL PSYCHIATRY 428, 431 (1981).

¹⁷²CRULL, *supra* note 38, at 7.

¹⁷³*Id.*

¹⁷⁴See MACKINNON, *supra* note 24, at 48.

¹⁷⁵Jensen & Gutek, *supra* note 146, at 128.

¹⁷⁶*Id.* at 125.

¹⁷⁷See CRULL, *supra* note 38, at 11 (indicating that 22% of the women polled stated that they were sexually harassed from one to six months and 28% stated that the sexual harassment lasted more than six months); see also U.S. MERIT SYSTEMS PROTECTION BOARD, SEXUAL HARASSMENT IN THE FEDERAL GOVERNMENT: AN UPDATE 21 (1988) (stating that 75% of sexual harassment victims who experienced verbal harassment and 54% of those pressured for sexual favors reported that they were harassed more than once).

Recurrent distressing dreams and nightmares are other forms of reexperiencing a traumatic event, which occur in over half of the patients diagnosed with PTSD.¹⁷⁸ As with other traumatic events, sexual harassment may pervade a woman's psyche to the extent that normal physiological functions, such as sleeping, are significantly impaired.¹⁷⁹

Sexually harassing behavior in the workplace also causes intense psychological distress from exposure to events that resemble aspects of the experience. Frequently, sexually harassed women find that their fears are intensified once they return to the hostile work environment.¹⁸⁰ In fact, many women who return to the workplace after taking a leave of absence realize that they cannot function under such circumstances, and are forced to leave permanently.¹⁸¹

3. Numbing of Responsiveness

The third symptom of PTSD involves a victim's avoidance of the stimuli associated with the event, or a numbing of general responsiveness not present before the trauma.¹⁸² If a victim displays at least three of the following symptoms, this element of PTSD is satisfied:

- avoiding thoughts or feelings associated with the trauma;
- avoiding activities or situations that arouse recollections of the event;
- feelings of detachment or estrangement from others;
- restricted range of affect; and/or
- sense of a foreshortened future.¹⁸³

The first two avoidance tactics are present in almost every situation of sexual harassment, because women who bring such claims are frequently forced to leave their job, or are instructed by their doctors not to return to such an environment.¹⁸⁴

Feelings of detachment or estrangement from loved ones or co-workers commonly seize victims of sexual harassment, in that they find themselves unable to feel love or trust for others.¹⁸⁵ Victims suffering PTSD also develop a restricted range of affect, meaning that their ability to feel emotions, especially

¹⁷⁸See MARDI HOROWITZ ET AL., SIGNS AND SYMPTOMS OF POST TRAUMATIC STRESS DISORDER 37 (1980).

¹⁷⁹*Id.*

¹⁸⁰MCCANN & MCGINN, *supra* note 24, at 105.

¹⁸¹See, e.g., Kauffmann v. Allied Signal, Inc., 970 F.2d 178, 181 (6th Cir. 1992).

¹⁸²This response has also been labeled as "psychic numbing" or "emotional anesthesia," which resembles a typical withdrawal response from much of her everyday life. DSM-III-R, *supra* note 120, at 248.

¹⁸³DSM-III-R, *supra* note 120, at 250.

¹⁸⁴See, e.g., Snider v. Consolidation Coal Co., 973 F.2d 555, 557 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 981 (1993).

¹⁸⁵DSM-III-R, *supra* note 120, at 250.

those associated with intimacy, tenderness and sexuality, is markedly decreased.¹⁸⁶

A PTSD victim may also feel that her future is foreshortened. For example, she may lose all hope of having a career, family or children.¹⁸⁷ Most often, a sexually harassed woman feels her career has been cut short. This stems from a belief that her job is either made explicitly contingent on her submission to a supervisor's sexual advances, or because the hostile environment causes the victim to leave her job, since her performance is significantly hindered.¹⁸⁸

Sexually harassed women frequently develop a general mistrust of men.¹⁸⁹ This mistrust may significantly affect a current relationship, or detract from the victim's desire to seek out a relationship.¹⁹⁰ Hence, the victim sees her chances of having a family or children decrease. Similarly, victims who already have families find that it becomes more difficult to love and relate to family members.¹⁹¹

4. Increased Arousal

Symptoms of increased arousal are indicated if at least two of the following are present in the victim:

- difficulty falling or staying asleep;
- irritability or outbursts of anger;
- difficulty concentrating;
- hypervigilance/exaggerated startle response; and/or,
- physiologic reactivity upon exposure to events that symbolize or resemble an aspect of the traumatic event.¹⁹²

Sleep disturbances in the PTSD victim are commonly referred to as the "hallmark of reaction to traumatic experience."¹⁹³ As discussed earlier,¹⁹⁴ victims of sexual harassment frequently experience sleep disorders of varying

¹⁸⁶*Id.* at 248.

¹⁸⁷*Id.* at 250.

¹⁸⁸The WWI Report reported that 66% of the women who responded quit or lost their jobs as a direct result of sexual harassment. See Christine O. Merriman & Cora E. Yang, *Employer Liability for Coworker Sexual Harassment Under Title VII*, 13 N.Y.U. REV. L. & SOC. CHANGE 83, 84 n.6 (1984-85).

¹⁸⁹See BOUMIL & HICKS, *supra* note 24, at 454.

¹⁹⁰*Id.* (stating that one symptom found in most sexually harassed women is that they become dysfunctional in interpersonal relationships).

¹⁹¹See, e.g., *Harris v. Forklift Systems, Inc.*, No. 3-89-0557, 1991 WL 487444, at *3, (M.D. Tenn. Feb. 4, 1991) (stating that plaintiff's relationship with her children became "strained" as a result of being sexually harassed at work), *aff'd*, 976 F.2d 733 (6th Cir. 1992), *rev'd*, 114 S. Ct. 367 (1993).

¹⁹²DSM-III-R, *supra* note 120, at 250.

¹⁹³PETERSON, *supra* note 130, at 27 (quoting V.J. DeFazio, *Dynamic Perspectives on the Nature and Effects of Combat Stress, in STRESS DISORDERS AMONG VIETNAM VETERANS: THEORY, RESEARCH AND PRACTICE* (Charles R. Figley ed., 1978)).

degrees.¹⁹⁵ The second element of increased arousal, irritability or outbursts of anger, are also common themes in PTSD victims.¹⁹⁶ One researcher found that "rage at the source of the trauma" was a typical response in those suffering PTSD.¹⁹⁷ This rage is also felt by many victims of sexual harassment, who are made to feel powerless, and fear that their harasser has ultimate control over their well-being and employment opportunities.¹⁹⁸

Difficulty concentrating, the third element of increased arousal, was found to be a problem in over 75% of patients with stress response syndromes.¹⁹⁹ In one federal case, a sexually harassed plaintiff stated that she found it "hard to concentrate on her tasks," because she feared further harassment.²⁰⁰ These patients also reported difficulty making decisions, and had trouble remembering things.²⁰¹ It has also been found that during periods of high stress, such as working in a sexually harassing environment, "even the brightest individuals and most dynamic [employees] find themselves unable to function normally or make even simple decisions."²⁰²

The fourth element of increased arousal is defined as "hyperarousal, hyperalertness, and increased autonomic arousal."²⁰³ These symptoms are displayed in sexually harassed women almost universally, in that they act nervous and jumpy, are easily startled or frightened, and become oversensitive to typical daily events.²⁰⁴

The final symptom of the increased arousal element of PTSD is defined as the "exacerbation of symptoms on exposure to situations that resemble the traumatic event."²⁰⁵ This occurs when a traumatized victim re-enters the environment that caused her to suffer the post traumatic stress reactions.²⁰⁶ In a recent federal district court case, the court found that the sexually harassed plaintiff "may not ever be able to work in a factory again due to flashback-like

¹⁹⁴See *supra* notes 175-78 and accompanying text.

¹⁹⁵See, e.g., *Arnold v. City of Seminole*, 614 F. Supp. 853, 867 (E.D. Okla. 1985) (stating that the plaintiff's sleep patterns have been and continue to be disturbed due to the severe sexual harassment she suffered at work).

¹⁹⁶PETERSON, *supra* note 130, at 29.

¹⁹⁷*Id.*

¹⁹⁸See MCCANN & MCGINN, *supra* note 24, at 90-91.

¹⁹⁹PETERSON, *supra* note 130, at 28.

²⁰⁰*Hansel v. Public Serv. Co.*, 778 F. Supp. 1126, 1129 (D.Colo. 1991).

²⁰¹*Id.*

²⁰²MCCANN & MCGINN, *supra* note 24, at 89-90.

²⁰³DSM-III-R, *supra* note 120, at 250.

²⁰⁴Lawson, *supra* note 125, at 252.

²⁰⁵Andreassen, *supra* note 122, at 1521.

²⁰⁶DSM-III-R, *supra* note 120, at 250.

reactions to any exposure to surroundings similar to those where the sexual harassment occurred."²⁰⁷

In essence, an individual may experience Post Traumatic Stress Disorder as a result of any traumatic incident that erodes her faith in her world's safety and in her own invulnerability.²⁰⁸ Sexual harassment is a significant invasion of a woman's physical and mental privacy that affects more than pecuniary or tangible aspects of employment. Sexual harassment may traumatize women to the extent that they are physically and emotionally paralyzed. Therefore, sexually harassing behavior must be recognized as conduct that has debilitating emotional and physiological effects in its victims, much to the same extent as other stressors that cause PTSD responses.²⁰⁹

IV. PERPETUATING POST TRAUMATIC STRESS DISORDER IN SEXUALLY HARASSED WOMEN

A. *Legal Burdens Placed on Victims of Sexual Harassment*

Suffering a sexually harassing experience is traumatic in itself, but women are secondarily traumatized when they attempt to hold their employers liable for the harassment they endured. Courts impose substantial obstacles on victims of sexual harassment, such as requiring them to give their employers notice of the harassing conduct, subjecting them to inappropriate burdens of proof, and making them defend their past sexual behavior.

These three inequities are not explicitly provided in the language of Title VII. The fact is, the judiciary has imposed these additional requirements on sexual harassment victims. Unfortunately, these added burdens can have devastating effects on a woman suffering from Post Traumatic Stress Disorder as a result of being sexually harassed.

1. The Notice Requirement

One of the many issues a court must face in determining an employer's liability for sexual harassment of a supervisor turns on whether the victim notified the employer of the unlawful behavior. While an employer is held strictly liable for quid pro quo harassment,²¹⁰ many courts have insisted on a

²⁰⁷Hansel v. Public Serv. Co., 778 F. Supp. 1126, 1131 (D. Colo. 1991).

²⁰⁸See *supra* note 125.

²⁰⁹See WILSON, *supra* note 120, at 11 (stating that "societal and political attitudes toward traumatized persons are important aspects of the recovery environment because they determine how resources will be allocated to provide the services that are needed for the victim").

²¹⁰Courts originally required knowledge to hold an employer liable for a supervisor's quid pro quo sexual harassment, but gradually broadened their interpretation of agency to find employers strictly liable for their supervisor's quid pro quo harassment. See Claudia L. Cerutti, *Differing Standards of Employer Liability for Sexual Harassment of Working Women*, 27 ARIZ. L. REV. 155, 161-63 (1985).

"notice requirement" for hostile environment sexual harassment.²¹¹ Although the Supreme Court in *Meritor* stated that the "absence of notice to an employer does not necessarily insulate that employer from liability,"²¹² the Court further suggested that it may in some circumstances.²¹³ Courts have attempted to justify this bifurcated liability scheme by stating that a supervisor does not directly invoke the employer's authority in hostile environment harassment, as they do with quid pro quo harassment.²¹⁴

Requiring that an employer has "notice" of hostile environment harassment before being held liable places the burden of reporting the incident on the victim, rather than placing the burden of prevention on the employer. Women who develop Post Traumatic Stress Disorder from exposure to sexually harassing behavior are further traumatized by recounting and reliving the experience. Over 95% of the victims of sexual harassment do not complain or report the problem due to fear of retaliation and a loss of privacy.²¹⁵ Women who do report incidents of sexual harassment to company officials are frequently laughed at, called slanderous liars,²¹⁶ or considered "fair game" for all male employees.²¹⁷

Requiring the victim to comply with notice procedures ignores the humiliation a sexual harassment victim suffers. It also gives an employer one more method of insulating themselves from liability. Furthermore, this notice requirement perpetuates Post Traumatic Stress Disorder in sexually harassed women by making them relive the experience, usually in the face of a supervisor who doubts the victim's allegations.

²¹¹See, e.g., *Katz v. Dole*, 709 F.2d 251, 255 (4th Cir. 1983) (actual or constructive knowledge necessary for offensive work environment claim); *Tomkins v. Public Serv. Elec. & Gas Co.*, 568 F.2d 1044, 1048 (3d Cir. 1977) (actual or constructive knowledge required); *Garber v. Saxon Business Prods., Inc.*, 552 F.2d 1032, 1032 (4th Cir. 1977) (ratification of harassment implied by employer knowledge). Courts requiring notice have not provided a convincing rationale for why this standard is used in sexual harassment cases and not in other areas of Title VII discrimination law.

²¹²*Meritor*, 477 U.S. at 72.

²¹³*Id.* at 73 (stating that the plaintiff's failure to notify the employer may have insulated it from liability had their grievance procedure addressed sexual harassment specifically).

²¹⁴*But see id.* at 76-77 (Marshall, J. concurring) ("In both cases it is the authority vested in the supervisor by the employer that enables him to commit the wrong . . . there is therefore no justification for a special [notice] rule, to be applied *only* in hostile environment cases.").

²¹⁵See NEVILLE, *supra* note 19, at 141 (quoting a statistic found in Ronnie Sandroff, "Sexual Harassment in the Fortune 500," *WORKING WOMAN* (Dec. 1988)); *Snider v. Consolidation Coal Co.*, 973 F.2d 555, 558 (7th Cir. 1992).

²¹⁶See *Cortes v. Maxus Exploration Co.*, 977 F.2d 195, 198 (5th Cir. 1992).

²¹⁷See *Bundy v. Jackson*, 641 F.2d 934, 940 (D.C. Cir. 1981) (manager notified by victim of her supervisor's harassing behavior told victim that "any man in his right mind would want to rape you" and proceeded to ask victim to begin a sexual relationship with him).

2. Inappropriate Standards of Proof

A plaintiff asserting a quid pro quo sexual harassment claim sets forth a prima facie case by proving that (1) she was the victim of a pattern or practice of sexual harassment, and (2) she was denied a benefit which she had a reasonable expectation of receiving.²¹⁸ However, the employer may successfully rebut the victim's prima facie case merely by demonstrating that there was a legitimate, nondiscriminatory reason for denying the benefit to the plaintiff.²¹⁹

Women suffering from PTSD display a variety of symptoms on which the employer could base a "legitimate" reason for denying the plaintiff a benefit.²²⁰ Clearly, the burden of proof in quid pro quo causes of action falls disproportionately on the victim. In many federal circuits, the employer is not required to disprove the sexually harassing behavior alleged²²¹ and is rarely held accountable for such conduct.

A different burden of proof has been applied in hostile environment sexual harassment cases. In *Henson v. City of Dundee*,²²² the Eleventh Circuit Court set forth five elements a plaintiff must prove in order to prevail on a Title VII sexual harassment claim: (1) the plaintiff belongs to a protected class; (2) the plaintiff was subjected to unwelcome sexual harassment; (3) this 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 prompt remedial action.²²³

3. Admissibility of Evidence Regarding the Victim's Sexual History

In addition to proving each element of a Title VII sexual harassment claim, a victim is also required to defend her actions in the workplace. Title VII has no rule excluding evidence of a victim's prior sexual behavior when asserting a claim against her employer.²²⁴ The Supreme Court in *Meritor* only furthered this employer's defense by stating that such evidence is "obviously relevant" as part of the totality of the circumstances surrounding the alleged sexually

²¹⁸*Id.* at 953.

²¹⁹*Id.*

²²⁰See *supra* part III.A-B.

²²¹But see *Katz v. Dole*, 709 F.2d 251, 256 (4th Cir. 1983) (stating that employer may rebut the prima facie case by showing that the complained of conduct either did not take place or was isolated or trivial).

²²²682 F.2d 897 (11th Cir. 1982); see also *Highlander v. K.F.C. Nat'l Management Co.*, 805 F.2d 644, 648-49 (6th Cir. 1986).

²²³682 F.2d at 903-05.

²²⁴However, some states have adopted sexual harassment statutes similar to rape shield laws that limit the admissibility of evidence of a plaintiff's sexual conduct with persons other than the alleged harasser. See, e.g., CAL. CIV. PROC. CODE § 2017(d) (West 1988).

harassing incident.²²⁵ Using evidence of a woman's conduct as a defense to sexual harassment claims reinforces the perception that a harassed woman somehow asked for what she received, while granting an employer yet another method of insulating itself from liability.

These legal burdens illustrate that Title VII has been interpreted in such a manner as to legitimize, if not defend, the sexual harassment of women. Such an interpretation wholly ignores a woman's reactions to sexual harassment.²²⁶ It appears as though the only thought Congress and the courts have given sexual harassment is how to best deter victims from asserting their rights.

B. Inadequacies of Title VII Remedies

Once a woman endures the secondarily traumatizing experience of proving that she has been sexually harassed by her supervisor, the court must follow § 2000e-5(g) of Title VII²²⁷ in order to grant the victim relief. This section states that "the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include . . . reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate."²²⁸

Back pay, reinstatement, equitable relief or injunctions awarded under Title VII do not, and cannot, compensate for the psychological and emotional injuries of sexual harassment.²²⁹ Although the amount of equitable relief recoverable for a Title VII violation has been expanded by the Civil Rights Act of 1991,²³⁰ Title VII remedies remain wholly unresponsive to the post traumatic stress a sexually harassed women frequently suffers.

The inherent problem with the remedies available to a sexual harassment victim under § 2000e-5(g) is that the remedies are awarded entirely at the discretion of the court. Providing that the courts "may" enjoin the respondent from engaging in unlawful sexual harassment and "may" grant the victim some form of equitable relief is equivalent to saying that the court may not.²³¹ The fact that § 2000e-5(g) does not explicitly require the court to enjoin the employer

²²⁵Meritor, 477 U.S. at 69.

²²⁶See Wendy Pollack, *Sexual Harassment: Women's Experience vs. Legal Definitions*, 13 HARV. WOMEN'S L.J. 35, 61-62 (1990).

²²⁷42 U.S.C. § 2000e-5(g) (Supp. IV 1992).

²²⁸*Id.*

²²⁹See Sharon T. Bradford, *Relief for Hostile Work Environment Discrimination: Restoring Title VII's Remedial Powers*, 99 YALE L.J. 1611, 1616 (1990).

²³⁰42 U.S.C. § 1981a(a)(1) (Supp. IV 1992) (allowing a complaining party under 42 U.S.C. § 2000e-5 to recover compensatory and punitive damages).

²³¹See, e.g., *Swanson v. Elmhurst Chrysler Plymouth, Inc.*, 882 F.2d 1235, 1240 (7th Cir. 1989) (reversing lower court award of \$1 nominal damages and attorney's fees even where plaintiff proved that sexual harassment affected her psychological well-being), *cert. denied*, 493 U.S. 1036 (1990).

from engaging in further sexually harassing practices illustrates the lack of remedial power Title VII proffers to victims of sexual harassment, as well as the lack of any real attempt to eradicate sexual harassment from the workplace.²³²

Clearly Congress did not consider victims of sexual harassment when drafting § 2000e-5(g), nor did it adequately amend this section through § 1981a of the Civil Rights Act of 1991.²³³ Applying each remedy available under Title VII to a sexually harassed woman's emotional state illustrates how current legislation perpetuates the significant harms of sexual harassment.

1. Injunctive and Affirmative Relief

Section 2000e-5(g) states that courts may enjoin an employer from engaging in future harassing behavior.²³⁴ The court may order an employer, through an injunction, to issue a company-wide antiharassment policy, develop training and education for its employees and develop disciplinary measures to be utilized against those found to engage in sexually harassing behavior.²³⁵ The court may also reinstate a sexually harassed victim to her former position if this would be deemed an "appropriate" remedy.²³⁶

Since one of the primary goals of Title VII was to eliminate employment discrimination,²³⁷ issuing an injunction against further sexual harassment appears to be an adequate response. However, Title VII does not require that an employer use the most serious sanctions available to punish offenders,²³⁸ such as firing or relocating a harasser. This has led the courts to interpret any "good faith effort" by the employer to eradicate sexual harassment a sufficient response.²³⁹ Simply ordering an employer to eliminate what may have been "standard operating procedure"²⁴⁰ is not enough to ensure that women will be free from sexual harassment at work.

²³²Amending § 2000e-5(g) to state that the court "must" enjoin the respondent from engaging in unlawful employment practices would more effectively eradicate sexually harassing behavior at work.

²³³42 U.S.C. § 1981a (Supp. IV 1992).

²³⁴42 U.S.C. § 2000e-5(g) (Supp. IV 1992).

²³⁵See, e.g., *Robinson v. Jacksonville Shipyards*, 760 F. Supp. 1486, 1541-1546 (M.D. Fla. 1991) (attaching sample policy statements and disciplinary measures to be implemented by defendant found to have violated Title VII).

²³⁶42 U.S.C. § 2000e-5(g) (Supp. IV 1992).

²³⁷*Griggs v. Duke Power Co.*, 401 U.S. 424, 429-430 (1971).

²³⁸*Landgraf v. USI Film Products*, 968 F.2d 427, 430 (5th Cir. 1992).

²³⁹See, e.g., *Domhecker v. Malibu Grand Priz Corp.*, 828 F.2d 307 (5th Cir. 1987) (failing to hold employer liable for sexual harassment where management acted within 12 hours of victim's complaint to separate work areas of the victim and the harasser).

²⁴⁰*Bundy v. Jackson*, 641 F.2d 934, 940 (D.C. Cir. 1981).

Reinstatement is not an adequate form of relief either. It is simply unreasonable to expect that a sexually harassed woman would welcome a court's decision to reinstate her to the very environment that caused her to suffer such debilitating stress reactions.²⁴¹ Frequently, women who bring sexual harassment claims against their employers are stigmatized as "troublemakers" by both coworkers and their employers.²⁴² Women tend to fear these repercussions of complaining about sexual harassment more than the professional consequences of the harassment itself.²⁴³ This fear is justified since many male superiors treat a complaint as a joke, seeing a victim as "crazy, weird, or even worse, a loose woman."²⁴⁴

There have been situations where an employer has reinstated a victim to work directly under a harassing supervisor, despite numerous complaints of his sexual harassment.²⁴⁵ Reinstating a woman to this hostile environment facilitates verbal abuse or some other form of retaliatory action²⁴⁶ that may further traumatize a victim. Clearly, reinstatement is not an adequate remedy for many women in certain situations.

Sexually harassed women suffering PTSD usually require extensive rehabilitative therapy²⁴⁷ before recovering enough to reenter the workforce.²⁴⁸ In many cases, women remain out of the workplace for years following a

²⁴¹However, women are often punished if they refuse to be reinstated. *See, e.g., Morris v. American Nat'l Can Corp.*, 952 F.2d 200, 203 (8th Cir. 1991) (victim's refusal of reinstatement offer barred further accrual of back pay when employer "sincerely" claimed it would protect victim from further harassment), *rev'd in part and vacated in part*, 988 F.2d 50 (1993).

²⁴²*See, e.g., Snodgrass v. Brown*, No. 89-1171-K, 1990 WL 198431, at *11 (D. Kan. Nov. 26, 1990) (plaintiff acknowledged that women who assert a sexual harassment claim against their employer are typically labeled a troublemaker.)

²⁴³*See* MACKINNON, *supra* note 24, at 49.

²⁴⁴FARLEY, *supra* note 19, at 59.

²⁴⁵*See Cortes v. Maxus Exploration Co.*, 977 F.2d 195, 198 (5th Cir. 1992) (plaintiff returned to harasser's department after three reports of his harassing behavior to company officials went uninvestigated).

²⁴⁶*See* Suzanne E. Andrews, *The Legal and Economic Implications of Sexual Harassment*, 14 N.C. CENT. L.J. 113, 142 (1983) (arguing that injunctions prohibiting sexual harassment are ineffective because plaintiffs and defendants are not usually the "best of friends" after a lawsuit).

²⁴⁷*See* Andreasen, *supra* note 122, at 1524-1525 (suggesting that clinicians employ relaxation therapy, minor tranquilizers, psychotherapy and physical, social or occupational rehabilitation therapy to treat patients suffering from PTSD).

²⁴⁸*See* Stockett v. Tolin, 791 F. Supp. 1536, 1550 (S.D. Fla. 1992) (emotional damages caused by sexual harassment required the plaintiff to undergo psychotherapy for six months to a year); *see also* Valdez v. Church's Fried Chicken, Inc., 683 F. Supp. 596, 614 (W.D. Tex. 1988) (plaintiff's doctor testified that she would require psychiatric care for the rest of her life, possibly including sexual and behavioral therapy).

sexually harassing experience.²⁴⁹ Often, victims of sexual harassment who have reentered the workplace were forced to leave due to the traumatic stress reactions that surfaced as a result of being reexposed to the environment.²⁵⁰ Recovering from PTSD requires that a victim avoid situations likely to cause severe emotional stress or disturbing recollections of the traumatic event. Reinstating a sexually harassed woman to an environment that is likely to be even more harassing clearly ignores the significance of PTSD symptoms caused by sexual harassment.²⁵¹

2. Recovery of Back Pay

Back pay awards under Title VII seek to compensate a victim for the loss of wages and other economic benefits resulting from the harassment.²⁵² However, Title VII imposes a duty on a victim to mitigate economic loss by looking for other employment.²⁵³ This duty ignores the psychological obstacles a sexual harassment victim suffering from PTSD must overcome.²⁵⁴ Many sexually harassed women suffer debilitating stress reactions that greatly affect their personal and professional lives. These women are frequently unable to work in any environment for a length of time, due to their learned mistrust of men and diminished sense of personal confidence.²⁵⁵

Some federal circuit courts add further injury to a victim by deducting any unemployment compensation the plaintiff may have received while out of

²⁴⁹ See, e.g., *Brooms v. Regal Tube Co.*, 881 F.2d 412, 417 (1989) (noting that four years after bringing her sexual harassment claim, the plaintiff "now has recovered [through psychiatric therapy] to a point where she can re-enter the workplace on a more permanent basis").

²⁵⁰ See *Kauffmann v. Allied Signal, Inc.*, 970 F.2d 178, 181 (6th Cir. 1992) (plaintiff suffering PTSD is unable to return to work based on psychiatrist's recommendation).

²⁵¹ See *Arnold v. City of Seminole*, 614 F. Supp 853, 866-67 (E.D. Okla. 1985) (court reinstated sexual harassment victim even though it recognized that plaintiff would "require at a minimum several years of weekly sessions with a psychologist or psychiatrist" and accepted expert testimony that the plaintiff may never recover from PTSD symptoms).

²⁵² 42 U.S.C. § 2000e-5(g) (Supp. IV 1992).

²⁵³ "Interim earnings of amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable." *Id.*; see also *Horn v. Duke Homes, Div. of Windsor Mobile Homes, Inc.*, 755 F.2d 599, 606 (7th Cir. 1985) ("Damages are determined by measuring the difference between actual earnings for the period and those which she would have earned absent the discrimination by defendant.").

²⁵⁴ *But see Brooms*, 881 F.2d at 423-24 (plaintiff excused from duty to look for new work while completing therapy), *overruled by Saxton v. American Tel. & Tel. Co.*, 10 F.3d 526 (7th Cir. 1993).

²⁵⁵ *Stockett*, 791 F. Supp. at 1549.

work from their Title VII back pay recovery.²⁵⁶ This contravenes the remedial powers of Title VII, which does not explicitly require such a deduction. When a woman is traumatized by workplace sexual harassment to the point where she is unable to work, collecting unemployment benefits may be the only source of available income. As the Third Circuit has recognized, "unemployment benefits should not be deducted from a Title VII back pay award."²⁵⁷ Limiting a sexually harassed woman's recovery in such a "draconian"²⁵⁸ manner further victimizes a woman for pursuing her right to be free from harassment in the workplace.

3. Equitable Relief

Another specific goal of Title VII was to "make persons whole for injuries suffered on account of unlawful discrimination."²⁵⁹ Section 2000e-5(g) allows courts to grant a victim any equitable relief it deems appropriate.²⁶⁰ However, the majority of courts had interpreted the phrase "any other equitable relief" to mean that monetary relief was not available to victims of Title VII discrimination.²⁶¹ Before passage of § 1981a of the Civil Rights Act of 1991,²⁶² many women who proved they were sexually harassed in the workplace were not granted relief,²⁶³ or received only attorney's fees and a few dollars nominal damages.²⁶⁴ Therefore, harassment victims saw little reason to sue their employers under Title VII, since they typically did not wish to be reinstated to the harassing environment, could not collect monetary recovery, and knew their employers would not suffer any meaningful consequences.²⁶⁵

²⁵⁶See *Merriweather v. Hercules, Inc.*, 631 F.2d 1161, 1168 (5th Cir. 1980); *EEOC v. Enterprise Ass'n Steamfitters Local No. 638*, 542 F.2d 579, 592 (2d Cir. 1976), *cert. denied*, 430 U.S. 911 (1977); *Satty v. Nashville Gas Co.*, 522 F.2d 850, 855 (6th Cir. 1975), *aff'd in part, vacated in part on other grounds*, 434 U.S. 136 (1977); *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711, 721 (7th Cir. 1969), *aff'd in part and rev'd in part*, 489 F.2d 896 (7th Cir. 1973).

²⁵⁷*Accord* *Craig v. Y&Y Snacks, Inc.*, 721 F.2d 77, 82 (3d Cir. 1983); *Brown v. A.J. Gerrard Manufacturing Co.*, 715 F.2d 1549, 1550 (11th Cir. 1983); *Kauffman v. Sidereal Corp.*, 695 F.2d 343, 346-47 (9th Cir. 1982); *EEOC v. Ford Motor Co.*, 645 F.2d 183, 195-96 (4th Cir. 1981), *rev'd on other grounds*, 450 U.S. 219 (1982).

²⁵⁸*Horn*, 755 F.2d at 607.

²⁵⁹*Ford Motor Co. v. EEOC*, 456 U.S. 932, 945 (1982).

²⁶⁰42 U.S.C. § 2000e-5(g) (Supp. IV 1992).

²⁶¹BARBARA SCHLEI & PAUL GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 1452 & nn.153-56 (1983) (see cases cited therein).

²⁶²42 U.S.C. § 1981a(a)(1) (Supp. IV 1992).

²⁶³See, e.g., *Swanson v. Elmhurst Chrysler Plymouth, Inc.*, 882 F.2d 1235 (7th Cir. 1989) (finding hostile environment sexual harassment but awarding no relief), *cert. denied*, 493 U.S. 1036 (1990).

²⁶⁴See *Arnold v. City of Seminole*, 614 F. Supp. 853, 859-60 (E.D. Okla. 1985).

²⁶⁵BRAVO & CASSEDY, *supra* note 26, at 34.

Section 2000e-5(g) of Title VII was amended by Section 1981a of the Civil Rights Act of 1991²⁶⁶ to allow the recovery of compensatory and punitive damages for sex, race, religious, and disability discrimination. Section 1981a was a necessary modification to recoveries previously available under Title VII and affirmatively resolved the issue of whether victims of sexual harassment in the workplace may recover for nonpecuniary losses.²⁶⁷ The amendment was also a direct response to the plight of victims of intentional discrimination, who Congress realized "often endure terrible humiliation, pain and suffering while on the job."²⁶⁸

Section 1981a(1)(a) allows a Title VII claimant to sue her employer for compensatory damages for emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses.²⁶⁹ A woman suffering PTSD caused by sexual harassment usually suffers all of these emotional damages and more. However, some courts have been wary of awarding compensatory damages to a sexual harassment victim.²⁷⁰ This hesitant approach suggests that women may remain without adequate remedies for the sexually traumatic experiences they endured.²⁷¹

Section 1981a amended Title VII to include recovery of punitive damages²⁷² in order to provide employers with additional incentives to prevent discrimination in the workplace.²⁷³ A claimant may recover punitive damages under § 1981a if it is demonstrated that the employer "engaged in a discrimin-

²⁶⁶42 U.S.C. §1981a(a)(1) (Supp. IV 1992).

²⁶⁷Prior to the amendment, courts used their discretion in allowing monetary recovery for nonpecuniary harms. *See, e.g., Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 68, 72 (1986) (although the harassing conduct had inflicted no tangible or economic injury pursuant to Title VII, the employer was nonetheless held liable).

²⁶⁸H.R. REP. NO. 40(1), 102d Cong., 1st Sess., 20 *reprinted in* 1991 U.S.C.C.A.N. 549, 552. As one Judge stated prior to the amendment, "it is my belief that employees' psychological as well as economic fringes are statutorily entitled [by Title VII] to protection from employer abuse." *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971).

²⁶⁹42 U.S.C. § 1981a(b)(3) (Supp. IV 1992).

²⁷⁰*See Parton v. GTE North, Inc.*, 971 F.2d 150, 155 (8th Cir. 1992) (holding that § 1981a(a)(1) does not apply retroactively, even "assuming . . . that [it] would entitle [plaintiff] to damages on her sexual harassment claim").

²⁷¹*But see Harris v. Forklift Systems, Inc.*, 114 S. Ct. 367 (1993), *rev'g*, 976 F.2d 733 (6th Cir. 1992).

²⁷²Punitive damages are awarded for the purpose of punishing the wrongdoer, and instructing him not to repeat the same actions or conduct, and deterring others from doing the same wrongful acts. *W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS* § 2, at 9 (5th ed. 1984).

²⁷³H.R. REP. NO. 40(1), 102d Cong., 1st Sess., 20 *reprinted in* 1991 U.S.C.C.A.N. 549, 552.

atory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual."²⁷⁴

However, the unique nature of sexual harassment in the workplace makes it nearly impossible for a victim to prove that harassment was conducted maliciously or with reckless indifference. Absent giving an employer notice of the harassment, which is traumatizing in itself,²⁷⁵ a victim becomes embroiled in a "he said, she said" battle of proving malice. Usually an employer will not be liable for punitive damages unless an officer, director or managing agent of the company participated in, or ratified, the harassing conduct.²⁷⁶ Imposing these burdens on a victim may make punitive damage awards the exception rather than the rule,²⁷⁷ thereby reducing their real deterrent effect.

While Section 1981a is a significant step forward for the many victims of sexual harassment in the workplace, its effectiveness is debatable. Assuming that monetary awards are enough to "make whole" a sexually harassed woman whose emotional and physical well-being have been virtually destroyed, the amount of recovery is limited by § 1981a(b)(3).²⁷⁸ While limiting a plaintiff's recovery is a common legislative design, critics have argued that capping compensatory damages in sexual harassment cases unfairly penalizes women.²⁷⁹ The liability caps within § 1981a(b)(3) work more to protect the employer from excessive liability than to make the sexually harassed victim whole.

²⁷⁴42 U.S.C. § 1981(b)(1) (Supp. IV 1992).

²⁷⁵See *supra* part IV.A.1.

²⁷⁶See David D. Kadue, *Sexual Harassment at Work*, 742 ALI-ABA 465, 482 n.110 (1992).

²⁷⁷William L. Kandel, *Mixed Motives, Sexual Harassment, and the Civil Rights Act of 1991*, 17 EMPLOYEE REL. L.J. 635, 641-642 (1992).

²⁷⁸Section 1981a(b)(3) states:

The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party—

(A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, \$50,000;

(B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, \$100,000;

(C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, \$200,000;

(D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, \$300,000.

42 U.S.C. § 1981a(b)(3) (Supp. IV 1992).

²⁷⁹See BRAVO & CASSEDY, *supra* note 26, at 35.

V. CONCLUSION

"[N]o woman should be subjected to an environment where her sexual dignity and reasonable sensibilities are visually, verbally or physically assaulted as a matter of prevailing male prerogative. . . ."280 Similarly, women should not be traumatized at work to the extent that their psychological and emotional well-being are completely debilitated. Unfortunately, however, these are the prices many women have paid in return for the "privilege of being allowed to work and make a living."²⁸¹

It is not enough to make sexual harassment an "unlawful employment practice" under federal law. Sexual harassment must be recognized as a traumatizing experience that causes thousands of American women to suffer Post Traumatic Stress Disorder. Once PTSD is accepted both clinically and legally as a consequence of sexual harassment, the legislature and courts can begin reevaluating and modifying the present state of sexual harassment law.

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²⁸⁰*Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 626-27 (6th Cir. 1986) (Keith, J., dissenting), *cert. denied*, 481 U.S. 1041 (1987).

²⁸¹*Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986) (quoting *Henson v. City of Dundee*, 682 F.2d 897, 902 (11th Cir. 1982)).

²⁸²Ms. Vinciguerra received the Robert Kensey Memorial Award for this Note.

