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SEXUAL HARASSMENT OF WOMEN IN THE WORKPLACE: HE SAID, SHE SAID

Throughout the history of our nation, ingrained notions of inequality based on sex have persisted in many forms.¹ Nowhere is

¹ See The Declaration of Independence para. 1 (U.S. 1776). Early confirmation of women's inequality can be seen in the gender-biased terminology of The Declaration of Independence, which states:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness . . . that to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed

Id. Many of the Framers of the Declaration, including Thomas Jefferson, strongly believed that men and women were, and should be, on unequal footing. See WILLIAM F. PEPPER & FLORYANCE R. KENNEDY, *SEX DISCRIMINATION IN EMPLOYMENT* 2 (1981). Thomas Jefferson contended that it was imperative to exclude women from the activities and obligations of men " 'to prevent depravation of morals and ambiguity of issues . . . ' which would result if they joined in the deliberations of men." *Id.*; see also EDMUND S. MORGAN, *THE MEANING OF INDEPENDENCE* 61 (1976). When asked whether women should be allowed to hold public office, President Jefferson replied that neither he nor society was ready for such an imaginative concept. *Id.*; CALEB P. PATTERSON, *THE CONSTITUTIONAL PRINCIPLES OF THOMAS JEFFERSON* 3 (1953) (Jefferson's view on legal education excluded women). See generally Sarah E. Burns, Note, *Apologia for the Status Quo: Gender Justice*, 74 GEO. L.J. 1791, 1814-15 (1986) (commenting that phrase "all men are created equal" intimates that every white male was equal to exclusion of women); Patricia A. Cain, Note, *Feminism and the Limits of Equality*, 24 GA. L. REV. 803, 816-17 (1990) (while *Declaration of Independence* set forth notion of equality, society still considered women subordinate to men); Christine A. Littleton, Note, *Equality and Feminist Legal Theory*, 48 U. PITT. L. REV. 1043, 1050 (1987) (noting that terminology used in *Declaration of Independence* excluded women).

In addition, up until the early twentieth century, the law essentially endorsed such inequality by equating women to chattels. See, e.g., LEMUEL H. FOSTER, *THE LEGAL RIGHTS OF WOMEN* 29-30 (1986) (stipulating that husband had action in trespass against another who committed adultery with his wife); Catherine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1286-87 (1991) [hereinafter *Reflections*] (laws were founded at time when women were denied opportunity to read, write, and vote, as they were considered property); David Bryden, Note, *Between Two Constitutions: Feminism and Pornography*, 2 CONST. COMMENT. 147, 152-53 (1985) (society's tolerance of wife-beating and rape reflects its equating women to mere possessions); Regina Cahan, Comment, *Home is No Heaven: An Analysis of Sexual Harassment in Housing*, 1987 WIS. L. REV. 1061, 1081-83 (1987) (describing case where woman found to have been treated as sexual chattel by landlord); Neal Devins, Note, *Gender Justice and its Critics*, 76 CAL. L. REV. 1377, 1402 (1988) ("Under the common law, where divorce was impossible, the wife was always her husband's chattel." (citing John D. Johnston Jr., *Sex and Property: The Common Law Tradition*, 47 N.Y.U. L. REV. (1972))); see JAMES CASNER & W. BARTON LEACH, *CASES AND TEXT ON PROPERTY* 219-22 (3d. ed. 1984) (noting that women were equated to chattel); KATHLEEN W. PERATIS & EVE CARY, *WOMEN & THE LAW* 1 (1977) (same). But see Carl Tobias, *Interspousal Tort Immunity in America*, 23 GA. L. REV. 359, 471-72 (1989) (women in 1920s were no longer considered chattels and need not plead protection from court).

Not all women accepted being treated as possessions, as evidenced by Abigail Adams's

this discrimination more evident than in the workplace,² where women are silent witnesses to subtle and destructive acts of sexual harassment.³ Although Title VII of the 1964 Civil Rights Act⁴

letters to her husband. See PERITIS & CAREY, *supra*, at 1-2. Abigail Adams expressed to John Adams that "in the new code of laws which I suppose it will be necessary for you to make, I desire you would remember the ladies and be more generous and favorable to them than your ancestors." *Id.* at 1. Additionally, Abigail Adams warned that if women did not receive such recognition under the new code of laws, they would rise up in protest. *Id.* at 1-2. This opposition was later espoused by the first feminist movement in 1848. *Id.* at 7-8. The female participants adopted what is known as the *Seneca Falls Declaration*, which in pertinent part, reads:

When in the course of human events, it becomes necessary for one portion of the family of man to assume among the people of the earth a position different from that which they have hitherto occupied, but one to which the laws of nature and of nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes that impel them to such a course.

We hold these truths to be self-evident: that all men and women are created equal

Id. at 9.

² See Fran Sepler, Comment, *Sexual Harassment: From Protective Response to Proactive Prevention*, 11 *HAMLIN J. PUB. L. & POL'Y* 61, 61 (1990). There was rarely a distinction made between women who sold their bodies for labor and those who sold them for sex. *Id.* The Sepler article states that "[w]orking women were forced to endure manifestations of the prevailing societal attitude; that 'the distinction between women who sold their labor and women who sold their bodies was not often made.'" *Id.* (quoting Jill Goodman, *Sexual Harassment: Some Observations on the Distance Travelled and the Distance Yet to Go*, 10 *CAP. U. L. REV.* 445, 449 (1981)); see also Eleanor K. Bratton, *The Eye of the Beholder: an Interdisciplinary Examination of Law and Social Research on Sexual Harassment*, 17 *N.M. L. REV.* 91, 91 n.2 (1987) (same); Nancy Brown, *Meritor Savings Bank v. Vinson: Clarifying The Standards Of Hostile Working Environment Sexual Harassment*, 25 *HOUS. L. REV.* 441, 441 (1988) (same).

Devaluing women's role in the workplace has been viewed as a way to keep women in their place. See *Reflections*, *supra* note 1, at 1281. Power has often been viewed as an integral part of sexual harassment. *Id.*; see also Susan M. Mathews, *Title VII and Sexual Harassment: Beyond Damages Control*, 3 *YALE J.L. & FEMINISM* 299, 308 (1991) (noting that curing sexual harassment would entail altering power dynamic in workplace); Deborah L. Rhode, *The "No-Problem" Problem: Feminist Challenges and Cultural Change*, 100 *YALE L.J.* 1731, 1732 (1991) (discussing how women are universally underpaid in comparison to men); Daniel Goleman, *Sexual Harassment: It's About Power, Not Lust*, *N.Y. TIMES*, Oct. 22, 1991, at C1 (in wake of Clarence Thomas's controversial confirmation proceedings "researchers found that [sexual harassment] has less to do with sex than with power"). See generally *Dothard v. Rawlinson*, 433 U.S. 321, 335 (1977). In *Dothard*, the Supreme Court concluded that a female security guard would be unable to maintain order due to the physical and emotional attributes of her sex, thereby acquiescing to the stereotype that women are the "weaker sex." *Id.*

Additionally, sexual harassment left women powerless in the workplace. See *Reflections*, *supra* note 1, at 1281 (women were precluded from participating in fashioning legal institutions that governed both men and women because women were powerless); Rhode, *supra*, at 1755 (females in subordinate positions who feel powerless to alter their situation convince themselves that gender inequality is not unjust); Sepler, *supra*, at 61 ("[W]omen spend much of their work life at the mercy of and subject to the decisions of men in supervisory positions.").

³ See Goleman, *supra* note 2, at C1. Most women do not speak out on sexual harassment

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was enacted in an attempt to alleviate all forms of discrimination in the workplace,⁵ it failed to include sexual harassment within its definition of sex discrimination.⁶ As a result, courts initially refused to recognize sexual harassment as a form of sex discrimination.⁷

for fear that their complaints would only create more problems and result in their being labeled troublemakers. *Id.* Furthermore, women tend to keep silent in order to maintain a friendly working environment. *Id.* Studies have shown that a di minimus percentage of sexually harassed women make formal complaints. *Id.*; see also Marion G. Crain, *Feminizing Unions: Challenging the Gender Structure of Wage Labor*, 89 MICH. L. REV. 1155, 1163 n.312 (1991) ("Masculine discourse dominates the conversational space, thus generating male social constructs that in turn further women's silence." (quoting Robin West, *Feminism, Critical Social Theory and Law*, 1989 U. CHI. LEGAL F. 59, 72)); Rita H. Jensen & Rorie Sherman, *Thomas Confirmed: Sex Harassment in Focus*, 14 NAT'L. L.J. 13, 13 (1991) ("Many female attorneys who believe they are suffering sexual harassment at their workplace simply move on and keep quiet . . ."). But see Paul Brest & Ann Vandenberg, *Politics, Feminism, and the Constitution: The Anti-Pornography Movement in Minneapolis*, 39 STAN. L. REV. 607, 620-38 (1987) (women subjected to sexual abuse openly discuss their mistreatment).

⁴ 42 U.S.C. § 2000e-2 (1982).

⁵ *Id.* § 2000e-2(a)(1). Title VII prohibits employers from discriminating "against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin." *Id.*: see *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971). The Supreme Court concluded that the purpose of Title VII was to promote equal employment opportunities and to eliminate barriers to equality in the workplace. *Id.*; see also *Horn v. Duke Homes*, 755 F.2d 599, 603 (7th Cir. 1985) (concluding employers are prohibited by Title VII from "imposing sexual consideration as a condition of employment"); *Henson v. City of Dundee*, 682 F.2d 897, 902 (11th Cir. 1982) (stating that "[s]exual harassment . . . is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality").

⁶ See Sharon M. Easley, Note, *Employers and Employees: Meritor Savings Bank v. Vinson: Needed Ammunition for the Fight Against Sexual Harassment in the Workplace*, 40 OKLA. L. REV. 305, 307 (1987) (noting that sexual harassment is not depicted as actionable Title VII claim); Suzanne Egan, Note, *Meritor Savings Bank v. Vinson: Title VII Liability for Sexual Harassment*, 17 GOLDEN GATE U. L. REV. 379, 380 (1987) (discussing how courts have construed Title VII to prohibit employer discrimination which serves to deny employment); Barbara L. Zalucki, Comment, *Discrimination Law—Defining the Hostile Work Environment Claim of Sexual Harassment Under Title VII*, 11 W. NEW ENG. L. REV. 143, 144-45 (1989) (indicating that E.E.O.C. has recognized sexual harassment as viable Title VII claim, even though Congress has never expressly prohibited sexual harassment); see also *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 63-64 (1986). In *Meritor*, Justice Rehnquist noted that "[t]he prohibition against discrimination based on sex was added to Title VII at the last minute on the floor of the House of Representatives[,] . . . [T]he bill quickly passed as amended, [thereby leaving] little legislative history to guide [the courts] in interpreting the Act's prohibitions against discrimination based on 'sex.'" *Id.*; *Ellison v. Brady*, 924 F.2d 872, 875 (9th Cir. 1991) ("Congress added the word 'sex' to Title VII of the Civil Rights Act of 1964 at the last minute on the floor of the House of Representatives."); *Barnes v. Costle*, 561 F.2d 983, 986-87 (D.C. Cir. 1977) (amendment aimed at prohibiting sex discrimination passed despite opponents' attempts to block bill (citing 110 CONG. REC. 2577 (1964) (remarks of Representative Smith))).

⁷ See, e.g., *Munford v. James T. Barnes & Co.*, 441 F. Supp. 459, 461 (E.D. Mich. 1977). The *Munford* court, in examining the purpose of Title VII, decided that for employment

In response to this resistance, the Equal Employment Opportu-

practices as constituting sex discrimination they must evolve from a company policy that aims at depriving women of employment opportunities. *Id.* The court, therefore, concluded that Title VII did not regard sexual harassment by co-workers as constituting sex discrimination. *Id.*; see *Miller v. Bank of America*, 418 F. Supp. 233, 235 (N.D. Cal. 1976) (maintaining that Title VII did not cover sexual harassment among co-workers, with liability attaching only when conduct constituted unlawful employment practice), *rev'd*, 600 F.2d 211 (9th Cir. 1979); *Corne v. Bausch & Lomb*, 390 F. Supp. 161, 163 (1975) ("[T]here is nothing in the [EEOC] Act which could reasonably be construed to have it apply to 'verbal and physical sexual advances' by another employee."), *vacated*, 562 F.2d 55 (9th Cir. 1977); see also *McDonald v. Sante Fe Train Trans. Co.*, 427 U.S. 273, 279-80 (1976) (limiting Title VII to racial discrimination only). Title VII intended to "cover white men and white women and all Americans." 110 CONG. REC. 2578 (1964) (remarks of Representative Celler). It created "an obligation not to discriminate against whites." *Id.* (memorandum of Senator Clark); cf. *Griggs*, 401 U.S. at 434 (citing E.E.O.C.'s narrow interpretation of Title VII at 29 C.F.R. §1604.2(a)). See generally ALBA CONTE, *SEXUAL HARASSMENT IN THE WORKPLACE: LAW AND PRACTICE* 29-30 (1990) (initially courts were hesitant to extend standards used to afford recovery for racially hostile work environment to sexual harassment cases because sexual harassment was found to be normal condition of employment); Brown, *supra* note 2, at 442 (initial efforts to persuade courts to recognize sexual harassment as proper Title VII claim were fruitless); Christine O. Merriman & Cora G. Yang, Note, *Employer Liability for Co-worker Sexual Harassment Under Title VII*, 13 N.Y.U. REV. L. & SOC. CHANGE 83, 85 (1984) (federal courts rejected sexual harassment claims under Title VII for ten years and then limited early claims to "quid pro quo").

However, courts slowly began to recognize sexual harassment within the meaning of Title VII. See *Bundy v. Jackson*, 641 F.2d 934, 943 (D.C. Cir. 1981). The *Bundy* Court was the first court to recognize both forms of sexual harassment. *Id.* In *Bundy*, plaintiff asserted that the sexually stereotyped insults and demeaning propositions she was subjected to resulted in a "condition of employment" actionable as a Title VII discrimination claim. *Id.* at 943-44. The court accepted plaintiff's argument and held that regardless of whether plaintiff lost any tangible job benefit, sexual harassment was actionable due to the existing, abusive working environment. *Id.* at 945-46; see also *Mitchell v. OsAir, Inc.*, 629 F. Supp. 636, 643 (N.D. Ohio 1986) (noting that *Bundy* was first court to acknowledge "viability of sexual harassment claims under Title VII"); Michelle Ridgeway Pierce, *Sexual Harassment and Title VII—A Better Solution*, 30 B.C. L. REV. 1071, 1082 (1989) (D.C. Circuit was among first to recognize hostile environment sexual harassment claim); John T. Shapiro, *The Call for Campus Conduct Policies: Censorship Or Constitutionally Permissible Limitations on Speech*, 75 MINN. L. REV. 201, 223 n.101 (1990) (environmental sexual harassment analysis was first recognized by D.C. Circuit in *Bundy*); Marlisa Vinciguerra, *The Aftermath of Meritor: A Search For Standards in the Law of Sexual Harassment*, 98 YALE L.J. 1717, 1725-26 (1989) (indicating that D.C. Circuit was first to identify hostile environment sexual harassment as proper Title VII claim); Zalucki, *supra* note 6, at 149 (same).

Due to the highly publicized confirmation proceedings of Justice Clarence Thomas, women, in addition to the courts, have become more outraged with, and aware of, sexual harassment in the workplace. See Priscilla Painton, *Woman Power*, TIME, Oct. 28, 1991, at 24. Since the Thomas hearings, women have threatened retaliation: "We will no longer beg for our rights from men in power. We will replace them and take power ourselves." *Id.* (quoting Patricia Ireland, Executive Vice President of the National Organization for Women); see also Marcia Chambers, *Defining the Social Labels We Live By*, NAT'L. L.J., Oct. 28, 1991, at 15 (as women have become potent force in all spheres of society, they have demanded "the right to work unmolested" (quoting Anna Quindlen, *Public and Private; Listen to Us*, N.Y. TIMES, Oct. 9, 1991, at 25)).

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nity Commission ("E.E.O.C."), promulgated guidelines to assist courts on issues concerning sexual harassment.⁸ These guidelines described two forms of sexual harassment.⁹ The first form, known as quid pro quo, is found where tangible job benefits are conditioned upon the submission to sexual advances.¹⁰ Quid pro quo

⁸ 29 C.F.R. § 1604.11(a) (1985). The E.E.O.C. guidelines provide in relevant part:

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

Id.

Although the courts are not required to follow the guidelines set forth by the E.E.O.C., they have found them to be beneficial. See *Meritor*, 477 U.S. at 65; *Gutierrez v. Municipal Court of Southeast Judicial Dist.*, 838 F.2d 1031, 1048 (9th Cir. 1988) (although guidelines not binding on courts, they "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance"); *Nance v. Union Carbide Corp.*, 540 F.2d 718, 728 (4th Cir. 1976) (interpretation of Civil Rights Act by E.E.O.C. not binding, but entitled to great deference by courts (explaining *Griggs*, 401 U.S. at 433-34)); *Vulcan Soc'y City of New York Fire Dep't, Inc. v. Civil Serv. Comm'n of City of New York*, 490 F.2d 387, 400 (2d Cir. 1973) (courts not obligated to follow E.E.O.C. guidelines, but they have been used as "helpful summary of professional testing standards in . . . Title VII cases"); *Morgan v. Massachusetts Gen. Hosp.*, 712 F. Supp. 242, 256 (Mass. Dist. Ct. 1989) (although courts not bound by E.E.O.C. guidelines, they have used them for guidance in judicial decision making). But see *Wade v. Mississippi Cooperative Extension Serv.*, 528 F.2d 508, 518 (5th Cir. 1976) (rejecting wholesale use of E.E.O.C. guidelines in Title VII cases). See generally ARTHUR LAKSON & LI LARSON, *EMPLOYMENT DISCRIMINATION* § 41.62 (1987) (sexual harassment universally recognized as violation of Title VII).

⁹ See *Hirschfeld v. New Mexico Corrections Dep't*, 916 F.2d 572, 575 (10th Cir. 1990) (courts have interpreted Title VII to prohibit both quid pro quo and hostile environment sexual harassment); *Chamberlin v. 101 Realty, Inc.*, 915 F.2d 777, 782 (1st Cir. 1990) (recognizing quid pro quo and hostile environment sexual harassment as proper Title VII claims); *Baker v. Weyerhaeuser Co.*, 903 F.2d 1342, 1344 (10th Cir. 1990) (noting quid pro quo and hostile environment as two distinct forms of sexual harassment); *Steele v. Offshore Shipbuilding Inc.*, 867 F.2d 1311, 1315 (11th Cir. 1989) (same); *Montgomery County Comm'n v. Montgomery County Sheriff's Dep't*, 766 F. Supp. 1052, 1067 (M.D. Ala. 1990) (same); see also Kevin T. Kramer, *Relief for Health-Related Injury in Sexual Harassment Cases*, 6 J. CONTEMP. HEALTH L. & POL'Y 171, 174 (1990) (E.E.O.C. guidelines acknowledge quid pro quo and hostile environment as two forms of sexual harassment actionable under Title VII); Catherine A. O'Neill, *Sexual Harassment Cases and the Law of Evidence*, 1989 U. CHI. LEGAL F. 218, 219 (1989) (guidelines published by E.E.O.C. specifically accept quid pro quo and hostile environment as two types of sexual harassment claims); Susan R. Klein, Comment, *A Survey of Evidence and Discovery Rules in Civil Sexual Harassment Suits with Special Emphasis on California Law*, 11 INDUS. REL. L.J. 540, 561-62 (1989) (quid pro quo and hostile environment sexual harassment are two basic forms of sexual harassment).

¹⁰ See 29 C.F.R. §1604.11(a)(2) (1988). Quid pro quo sexual harassment occurs when "submission to or rejection on such conduct . . . is used as the basis for employment deci-

sexual harassment is an issue that has largely been settled, since job benefits are either contingent upon sexual favors or not.¹¹

The second form, hostile environment sexual harassment, exists when an employee's work environment is disrupted by sexual conduct which adversely affects the employee's performance or mental health.¹² It is asserted that hostile environment sexual har-

sion[s]" *Id.*: *Meritor*, 477 U.S. at 65 (describing quid pro quo as exchange of economic benefit for sexual favors); *see also* *Perkins v. Silverstein*, 939 F.2d 463, 467 (7th Cir. 1991) (recognizing quid pro quo as appropriate workplace discrimination claim under Title VII); *Collins v. Baptist Memorial Geriatric Ctr.*, 937 F.2d 190, 196 (5th Cir. 1991) (quid pro quo theory "involves job benefits conditioned on the acceptance of the [sexual] harassment"), *cert. denied*, 112 S. Ct. 968 (1992); *Hicks v. Gates Rubber Co.*, 928 F.2d 966, 968 (10th Cir. 1991) (finding that female security guard not subject to quid pro quo sexual harassment because she was "not required to submit to sexual conduct or harassment to keep her job"); *Dockter v. Rudolf Wolff Futures Inc.*, 913 F.2d 456, 461 (7th Cir. 1990) (sexual harassment "describes situations in which submission to sexual demands is made a condition of tangible employment benefits"); *Henson v. City of Dundee*, 682 F.2d 879, 908-09 (11th Cir. 1982) (same); Kimberly A. Mango, *Students Versus Professors: Combatting Sexual Harassment Under Title IX of the Education Amendments of 1972*, 23 CONN. L. REV. 355, 356 (1991) (quid pro quo "targets the conditioning of benefits on the submission to sexual demands"). *See generally* Mathews, *supra* note 2, at 319 (some courts feel that quid pro quo sexual harassment is more serious problem than hostile environment sexual harassment); BLACK'S LAW DICTIONARY 1123 (5th ed. 1979) (defining quid pro quo as "giving one valuable thing for another").

¹¹ *See supra* note 10; *infra* notes 73-76 and accompanying text (discussing quid pro quo sexual harassment).

¹² *See* 29 C.F.R. § 1604.11(a). The E.E.O.C. asserts that environmental sexual harassment is established when alleged misconduct "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." *Id.*; *see also Meritor*, 477 U.S. at 66 (environmental sexual harassment exists as form of sex discrimination when "hostile or abusive work environment" has been created); *Morris v. American Nat'l Can Corp.*, 941 F.2d 710, 713-14 (8th Cir. 1991) (acknowledging hostile environment form of sexual harassment); *Wilson v. Zapata Off-Shore Co.*, 939 F.2d 260, 273 (5th Cir. 1991) (environmental sexual harassment exists when working atmosphere becomes abusive to women); *Cindy A. Rowe, Standards For Sexual Harassment in a Hostile Environment*: Brooms v. Regal Tube Company, 32 B.C. L. REV. 263, 264 (1990) (noting Supreme Court "recognized that sexual harassment constitutes illegal sex discrimination in the workplace"); *Martha Sperry, Hostile Environment Sexual Harassment and the Imposition of Liability Without Notice: A Progressive Approach to Traditional Gender Roles and Power Based Relationships*, 24 NEW ENG. L. REV. 917, 920-21 (1991) (hostile environment sexual harassment is generated by existence of abusive work environment); *Andrea B. Wapner, Sexual Harassment in the Law Firm*, 16 LAW PRAC. MGMT. 42, 43-44 (1990). "Hostile environment occurs when pervasive unwelcome sexual conduct or sex-based ridicule unreasonably interferes with an individual's job performance or creates an intimidating, hostile or offensive working environment, even if it leads to no tangible or economic job consequences." *Id.*; *cf. Patterson v. McLean Credit Union*, 491 U.S. 164, 221 (1989) (hostile environment is form of racial harassment actionable under Title VII); *White v. Federal Express Corp.*, 939 F.2d 157, 160 (4th Cir. 1991) (plaintiff's allegations of racially hostile environment established prima facie case under Title VII); *Woods v. Graphic Communications*, 925 F.2d 1195, 1200-03 (9th Cir. 1991) (holding that unions

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assment is not as straightforward as *quid pro quo* sexual harassment. To ascertain if a hostile environment sexual harassment claim exists, not only must a uniform definition of sexual harassment be developed, but also a particular legal perspective must be utilized to determine whether the conduct constitutes such harassment.¹³

This Note will examine the levels of conduct which constitute hostile environment sexual harassment. It will discuss whether the standards adopted by the courts properly evaluate conduct in light of the purpose of Title VII and will recommend that the proper viewpoint to use in ascertaining misconduct is the reasonable victim perspective. Furthermore, this Note will propose that in order to comply with the ambit of Title VII, the misconduct should be evaluated in an abuse-free environment and not according to the amount of harassment that exists in the particular workplace. In addition, it will analyze employers' liability with respect to *quid pro quo* and hostile environment sexual harassment. Finally, this Note will suggest that in hostile environment claims, a bifurcated approach should be taken toward employer liability: employers would be strictly liable for a supervisor's misconduct and liable in negligence for the misconduct of its other employees.

I. CONDUCT AND PERSPECTIVES IN HOSTILE ENVIRONMENT SEXUAL HARASSMENT CLAIMS

A. *Conduct*

In formulating a standard of proof to determine the viability of

could be liable under Title VII for intentionally declining to file certain individual's complaints based on racially hostile working environment); *Rogers v. Equal Employment Opportunity Commission*, 454 F.2d 234, 238, 241 (5th Cir. 1971) (hostile environment claims recognized under title VII in context of race discrimination); Ellen E. Lange, *Racist Speech on Campus: A Title VII Solution to a First Amendment Problem*, 64 S. CAL. REV. 105, 122 (1990) (racial insults and other physical conduct relating to individual's national origin constitute environmental racial harassment when such conduct creates hostile working atmosphere).

¹³ See LIN FARLEY, *SEXUAL SHAKEDOWN: THE SEXUAL HARASSMENT OF WOMEN ON THE JOB* 15 (1978) (sexual harassment may include "staring at, commenting upon, or touching a woman's body; requests for acquiescence in sexual behavior; repeated nonreciprocated propositions for dates; demands for sexual intercourse; and rape"); CATHERINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN I* (1979) [hereinafter *WORKING WOMEN*] (sexual harassment "refers to the unwanted imposition of sexual requirements in the context of a relationship of unequal power").

a hostile environment sexual harassment claim, courts have utilized Title VII's prohibitions which require the misconduct to affect a "term, condition, or privilege" of employment.¹⁴ The fundamental issue that arises is what amount of harassment is necessary to affect a "term, condition, or privilege" of employment.¹⁵ This issue first reached the United States Supreme Court in 1986, in *Meritor Savings Bank, FSB v. Vinson*,¹⁶ in which the Supreme Court set forth various standards for determining when hostile environment sexual harassment exists.¹⁷

In *Meritor*, respondent Mechelle Vinson brought an action against her manager, Sidney Taylor, and her employer, Meritor Savings Bank, alleging that Taylor had sexually harassed her.¹⁸ Vinson testified that over a three-year period Taylor made repeated demands for sexual favors during and after working hours, fondled her in front of other employees, followed her into the

¹⁴ See, e.g., *Henson*, 682 F.2d at 903-05. The standards of proof developed by the courts require that the plaintiff allege and prove that: "(a) the employee belongs to a protected group . . . (b) the employee was subject to unwelcome sexual harassment . . . (c) the harassment complained of was based upon sex . . . (d) the harassment complained of affected a 'term, condition, or privilege' of employment . . . (e) Respondent Superior. . ." *Id.*; see also *Moylan v. Maries County*, 792 F.2d 746, 749-50 (8th Cir. 1986). To determine whether a hostile environment sexual harassment claim existed, the *Moylan* court looked to such standards as whether the employee was a member of a protected group; whether the employee was subject to unwelcome sexual harassment; whether the harassment was based upon sex; whether the harassment affected a "term, condition or privilege" of employment; and "whether the employer knew or should have known of the harassment . . . and failed to take proper remedial action." *Id.*; *Halasi-Schmick v. City of Shawnee, Kan.*, 759 F. Supp. 747, 751 (D. Kan. 1991) (same); *Volk v. Coler*, 638 F. Supp. 1555, 1557-58 (C.D. Ill. 1986) (same), *rev'd*, 845 F.2d 1422 (7th Cir. 1988).

¹⁵ See *Howard v. Dep't of the Air Force*, 877 F.2d 952, 956 (Fed. Cir. 1989) (conduct which rises to level of sexual harassment must affect term, condition, or privilege of employment); *Poe v. Haydon*, 853 F.2d 418, 428 (6th Cir. 1988) (noting that Title VII rendered discriminatory those practices which affect employee's term, condition, or privilege of employment); *Huddleston v. Roger Dean Chevrolet, Inc.*, 845 F.2d 900, 905 (11th Cir. 1988) (after satisfying *Henson* elements, plaintiff must also prove that "pattern of sexual harassment subject[ed] her to disparate treatment with respect to terms, conditions, or privileges of employment"); *Scott v. Sears, Roebuck & Co.*, 798 F.2d 210, 214 (7th Cir. 1986) (plaintiff failed to establish prima facie case of sexual harassment as alleged conduct was not "so intimidating, offensive, or hostile that it affected the 'terms, conditions, or privileges' of her employment"). See generally P.J. Murray, *Beware of 'Hostile Environment' Sexual Harassment*, 26 DUQ. L. REV. 461, 464 (1988) ("threshold question" is what conduct is grave enough to affect "term, condition, or privilege" of employment).

¹⁶ 477 U.S. 57 (1986).

¹⁷ See *infra* notes 26-30 and accompanying text (outlining standards advanced by majority for determining actionable misconduct).

¹⁸ See *Meritor*, 477 U.S. at 60.

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women's restroom where he exposed himself to her, and even forcibly raped her on several occasions.¹⁹ The district court denied relief, finding the relationship between Vinson and Taylor was voluntary and that the alleged harassment had little to do with Vinson's employment or advancement in the bank.²⁰ The court of appeals reversed and remanded, concluding that a violation of Title VII could be based on either quid pro quo or hostile environment sexual harassment.²¹ The court further held that a remand was necessary because the district court failed to consider whether hostile environment sexual harassment existed.²² The Supreme Court affirmed and remanded.²³

The Supreme Court, after confirming that hostile environment sexual harassment is a form of sex discrimination actionable under Title VII,²⁴ advanced several tests to determine whether an ac-

¹⁹ *Id.* at 60-61. Vinson admitted that she willingly engaged in sexual intercourse with Taylor; however, she claimed that she did so out of fear of losing her job. *Id.* at 60. Vinson also testified that she did not report the sexual harassment or use the bank's complaint procedure because she was afraid of Taylor. *Id.* at 61.

²⁰ *Id.* at 61. Although the district court found that Vinson failed to prove her claim of sexual harassment, the court nevertheless addressed the bank's liability. *Id.* at 62. After recognizing that the bank had an express policy against discrimination and that this was the first complaint recorded against Taylor, the court concluded that "the bank was without notice and cannot be held liable for the alleged actions of Taylor." *Id.*

²¹ *Id.* at 62.

²² *Id.* The court of appeals held that if the evidence demonstrated that Vinson's toleration of sexual harassment was a condition of her employment, her "voluntariness" was immaterial with respect to her sexual harassment claim. *Id.* The court of appeals further held that "an employer is absolutely liable for sexual harassment practiced by its supervisory personnel, whether or not the employer knew or should have known about the misconduct." *Id.* at 63.

²³ See *Meritor*, 477 U.S. at 58. The Supreme Court held that "a claim of 'hostile environment' sexual harassment is a form of sex discrimination that is actionable under Title VII," and that "[t]he District Court's findings were insufficient to dispose of respondent's 'hostile environment' claim." *Id.* at 58-59. The Court further held that the district court's determination that evidence of respondent's "sexually provocative speech and dress" was admissible in determining whether the misconduct was unwelcome. *Id.* at 58. The Court additionally held that the court of appeals erred in its conclusion that employers are automatically liable for the sexual harassment practiced by their supervisors, as Congress intended that there be limits on the acts of employees for which employers will be held liable. *Id.*

²⁴ *Meritor*, 477 U.S. at 73. For cases prior to *Meritor* that held sexual harassment may constitute employment discrimination, see *Katz v. Dole*, 709 F.2d 251, 254 (4th Cir. 1983) ("when [sexual] harassment pervades the workplace, or is condoned or carried out by supervisory personnel, it becomes an illegal and discriminatory condition of employment that poisons the work environment."); *Henson v. City of Dundee*, 682 F.2d 897, 908 (11th Cir. 1982) ("employer may not require sexual consideration from an employee as a quid pro quo for job benefits"); *Miller v. Bank of America*, 600 F.2d 211, 213 (9th Cir. 1979) (employer liable for Title VII violations caused by employees who act in their authorized ca-

tionable hostile environment claim has been established.²⁵ The Court held that to constitute sexual harassment, the alleged misconduct must be so grievous as to adversely affect the employee's working ability and to render the employee's work environment intolerable.²⁶ The Court stipulated that the effect of the misconduct on a particular employee, as well as the employee's working atmosphere, must be assessed in determining the severity of the alleged misconduct.²⁷ Recognizing that not every reported incident would constitute an actionable Title VII claim,²⁸ the Court

capacity as supervisors); *Tomkins v. Public Serv. Elec. and Gas Co.*, 568 F.2d 1044, 1048-49 (3d Cir. 1977) (Title VII violated when employer has knowledge of supervisor's sexual advances or demands on employees); *Mandia v. ARCO Chem. Co.*, 618 F. Supp. 1248, 1250 (D.C. Pa. 1985) ("sexual harassment is a form of sex discrimination prohibited in employment by Title VII").

²⁵ *Meritor*, 477 U.S. at 67-69; see *infra* notes 26-30 and accompanying text (discussing standards advanced by *Meritor*).

²⁶ *Id.* at 67. The Court held that for a hostile environment sexual harassment claim to be actionable, the conduct in question must be "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" *Id.* (quoting *Henson*, 682 F.2d at 904); see, e.g., *Waltman v. Int'l Paper Co.*, 875 F.2d 468, 477 (5th Cir. 1989) (touching of plaintiff in sexual manner, sexual comments directed at plaintiff, and sexual graffiti pervading workplace raised issues of hostile environment sexual harassment); *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1556 (11th Cir. 1987) (rubbing plaintiff's shoulders, playing with plaintiff's hair, threats and explicit sexual comments towards plaintiff created hostile environment); *Henson*, 682 F.2d at 904 (plaintiff made prima facie case of sexual harassment by demonstrating that she was subjected to demeaning sexual inquiries and vulgarities during two years of employment with police department); *Morris v. American Nat'l Can Corp.*, 730 F. Supp. 1489, 1490-92 (E.D. Mo. 1989) (explicit sexual remarks, comments, jokes, pictures, cartoons, and unwanted touching of plaintiff's buttocks and breasts created hostile working environment), *aff'd in part, rev'd in part*, 952 F.2d 200 (8th Cir. 1991). But see *Minteer v. Auger*, 844 F.2d 569, 571 (8th Cir. 1988) (inconsiderable amount of unwelcome sexual remarks directed at plaintiff did not rise to level of actionable claim outlined in *Meritor*); *Raley v. Board of St. Mary's County Comm'rs*, 752 F. Supp. 1272, 1279 (D.C. Md. 1990) (employer may rebut plaintiff's argument by proving that harassment did not exist or was isolated or trivial).

²⁷ *Meritor*, 477 U.S. at 65. The Court concluded that conduct of a sexual nature constitutes sexual harassment when "such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." *Id.* See generally CONTE, *supra* note 7, at 28 (*Meritor* endorsed objective test encompassed in E.E.O.C. guidelines); John R. Webb, Note, *Recent Developments in the Law of Sexual Harassment*, 18 COLO. LAW. 263, 263 (1989) (*Meritor* adopted E.E.O.C.'s standard that conduct must unreasonably affect work performance of individual or create offensive work environment).

²⁸ *Meritor*, 477 U.S. at 67; see *Downes v. Federal Aviation Administration*, 775 F.2d 288, 293-94 (Fed. Cir. 1985) (four separate incidents of alleged sexual harassment, including sexual references to plaintiff, speculations as to frequency of plaintiff's sexual relationships, and touching of plaintiff's hair, did not violate Title VII); *Volk v. Coler*, 638 F. Supp. 1555, 1559-60 (C.D. Ill. 1986) (unwelcome advances, comments and obscene gestures directed at plaintiff, and references to females as "frustrated females" or "bitches" deemed

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concluded that the plaintiff's claim should be analyzed according to the circumstances surrounding the alleged misconduct.²⁹ The Court also noted that the plaintiff's conduct is a proper consideration.³⁰

"occasional" and not actionable), *rev'd*, 845 F.2d 1422 (7th Cir. 1988); *Vermett v. Hough*, 627 F. Supp. 587, 607 (W.D. Mich. 1986) (one act of co-worker shining flashlight through plaintiff's legs and other parts of her body did not constitute sexual harassment). *But see King v. Board of Regents of Univ. of Wis. Sys.*, 898 F.2d 533, 537 (7th Cir. 1990) (even though single incident of misconduct can be enough to constitute sexual harassment claim, repeated occurrences of harassment created more viable claim); *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1484 (3d Cir. 1990) (same); *Ferguson v. E.I. Dupont de Nemours & Co.*, 560 F. Supp. 1172, 1196 (D. Del. 1983) (sexual comments and derogatory remarks addressed to plaintiff and offensive touching created hostile work environment); Note, *Sexual Harassment & Title VII*, 51 N.Y.U. L. REV. 148, 164 n.76 (1976) (single incident of sufficient severity may constitute sexual harassment).

²⁹ *Meritor*, 477 U.S. at 69; *see Riley v. American Family Mutual Ins. Co.*, 881 F.2d 368, 372 (7th Cir. 1989) (in assessing whether employee's release of sexual harassment claims was valid, court made its determination from totality of circumstances); *Vance v. Southern Bell Tel. & Tel. Co.*, 863 F.2d 1503, 1506-07 (11th Cir. 1989) (court considered all circumstances surrounding misconduct, including evidence that other employees were discriminated against and supervisor's alleged refusal to provide plaintiff with necessary training); *Bohen v. City of E. Chicago, Ind.*, 799 F.2d 1180, 1186 (7th Cir. 1986) (court must determine whether conduct was offensive enough to constitute sexual harassment in light of totality of circumstances); *Christoforou v. Ryder Truck Rental, Inc.*, 668 F. Supp. 294, 301 (S.D.N.Y. 1987) (holding that in order for plaintiff to recover under Title VII on sexual harassment claim, conduct must be analyzed on case-by-case basis, including all circumstances surrounding alleged misconduct); 29 C.F.R. §1604.11(b) (1985). The E.E.O.C. guidelines state:

In determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case by case basis.

Id.

³⁰ *Meritor*, 477 U.S. at 68. The Court asserted that "[t]he gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome.'" *Id.*; *see Swentek v. U.S. Air*, 830 F.2d 552, 557 (4th Cir. 1987) (plaintiff must demonstrate that conduct was unwelcome, that it was based on sex, and that it was sufficiently severe to create abusive working environment); *Moylan v. Maries County*, 792 F.2d 746, 749 (8th Cir. 1986) (to constitute sexual harassment, conduct must be unwelcome in sense that employee did not solicit or invite such conduct); *Morris*, 730 F. Supp. at 1495 (plaintiff's own behavior may be indicative of whether or not challenged conduct was unwelcome); *see also Perkins v. Silverstein*, 939 F.2d 463, 467-68 (7th Cir. 1991) (plaintiff, in attempting to prove that she was subjected to unwelcome advances, failed to identify any specific incidents of unwelcome harassment); *Reed v. Shepard*, 939 F.2d 484, 492 (7th Cir. 1991) (plaintiff's sexual harassment claim failed as court found sexually suggestive jokes and activities were not unwelcome); *Staton v. Maries County*, 868 F.2d 996, 996 (8th Cir. 1989) (plaintiff's sexual harassment claim did not succeed as court found that alleged harassment may have been invited by plaintiff); *Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1012 (1988) (plaintiff subjected to unwelcome sexual verbal assaults, touching, and grabbing of her body), *aff'd in part, rev'd in part sub nom. Perkins v. Spivey*, 911 F.2d 22 (8th Cir. 1990); *Perkins v. General Motors*

Although *Meritor* did not expressly set forth what other factors should be considered, the authors contend that the aggressor's knowledge of the victim's susceptibilities should be a factor in determining whether the conduct constituted harassment. Since courts consider this knowledge to be an aggravating factor in the tort of intentional infliction of emotional distress,³¹ courts should also apply this factor, by analogy, to sexual harassment claims.

B. Perspectives

While the *Meritor* Court advanced several tests to determine actionable misconduct, it failed to provide an appropriate perspective from which to assess such misconduct.³² Other courts have

Corp., 709 F. Supp. 1487, 1500 (W.D. Mo. 1989) (court found that plaintiff had entered into relationship with alleged harasser and therefore "welcomed" sexual relationship), *cert. denied*, 111 S. Ct. 1309 (1991); *Koster v. Chase Manhattan Bank*, 687 F. Supp. 848, 862 (S.D.N.Y. 1988) (employee's sexual harassment claim failed because court found her affair with defendant was welcomed).

The *Meritor* Court held that evidence of "plaintiff's provocative speech and dress" may be admitted to demonstrate that the conduct was welcome and should be examined in light of "the record as a whole." 477 U.S. at 69; *see, e.g., Jones v. Wesco Invs., Inc.*, 846 F.2d 1154, 1155 n.4 (E.D. Mo. 1989) (court is required to take into account provocative speech and dress of plaintiff in assessing sexual harassment claims); *Mitchell v. Hutchings*, 116 F.R.D. 481, 484 (D. Utah 1987) (determination of plaintiff's sexually provocative speech and dress is relevant in assessing whether sexual advances were welcome). *See generally* Brown, *supra* note 2, at 442-43 (no per se bar against admitting evidence of plaintiff's sexually provocative speech or dress); Wendy Pollack, *Women's Experience vs. Legal Definitions*, 13 HARV. WOMEN'S L.J. 35, 55-56 (1990) (courts have adopted "rules of evaluation to discredit women," which include use of evidence regarding woman's sexually provocative speech and dress); Sepler, *supra* note 2, at 72 (sexually provocative speech and dress of plaintiff is relevant in court's determination of whether conduct was unwelcome).

³¹ *See* RESTATEMENT (SECOND) OF TORTS § 46 (1965) [hereinafter RESTATEMENT]. Section 46, in pertinent part, reads "[o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm." *Id.* Conduct has been held to be outrageous where the actor is found to have had knowledge that the victim was susceptible to such emotional distress and had acted upon such knowledge. *Id.* at cmt. f. Additionally, liability has only attached when the court has found the conduct to have been so "outrageous" or "extreme" as to be regarded as "intolerable in a civilized society." *Id.* at cmt. d.

³² *See* E. Clayton Hipp, Jr., *Now You See It, Now You Don't: The "Hostile Work Environment" After Meritor*, 28 AM. BUS. L.J. 339, 359 (1988) (*Meritor* left boundaries for future hostile environment cases undefined because of unique facts of case); Peter E. Millspaugh, *When Self-Organization Includes Racial Harassment: Must the NLRA Yield to Title VII?*, 2 GEO. MASON U. CIV. RTS. L.J. 1, 10 (1991) (suggesting that main problem with litigating hostile environment claims is both lack of operative definition of "hostile environment" and lack of set standard for establishing such claims); Rowe, *supra* note 12, at 265 (commentators disagree as to whether vague terminology in *Meritor* led courts to apply specific standard in ascer-

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found it necessary to evaluate misconduct from a particular viewpoint.³³ Five different perspectives have been proposed.³⁴

1. The Objective Reasonable Person Perspective

The thrust of the objective reasonable person perspective is that liability will attach under Title VII if a hypothetical reasonable person finds the alleged misconduct offensive.³⁵ In addition to receiving considerable judicial support,³⁶ the objective reasonable

taining existence of environmental sexual harassment).

³³ See *Ellison v. Brady*, 924 F.2d 872, 878 (9th Cir. 1991) (advancing perspective of victim); *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1482 (3d Cir. 1990) (adopting reasonable person of same sex standard with subjective requirement that plaintiff prove injury); *Yates v. Avco*, 819 F.2d 630, 637 (6th Cir. 1987) (advancing reasonable woman standard); *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 620 (6th Cir. 1986) (proposing two-prong standard incorporating both objective reasonable person standard and subjective viewpoint of plaintiff), *cert. denied*, 481 U.S. 1041 (1987); *Danna v. New York Tel. & Tel. Co.*, 752 F. Supp. 594, 610 (S.D.N.Y. 1990) (proposing reasonable person standard).

Commentators have differed as to the more appropriate standard. See *Rowe*, *supra* note 12, at 265 (commentators have expressed much disagreement over appropriate standard to be used); see also *Murray*, *supra* note 15, at 464 (questioning whether conduct should be assessed from viewpoint of reasonable employer, reasonable woman or reasonable victim, or subjectively from position of harasser or victim); Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV. L. REV. 1449, 1458 (1984) [hereinafter *Abusive Work*] (court could either adopt objective view of reasonable defendant, objective perspective of reasonable plaintiff, subjective viewpoint of specific defendant or subjective opinion of particular victim).

³⁴ See *supra* note 33 (outlining different standards adopted by courts).

³⁵ See cases cited *infra* note 36 (discussing objective standard).

³⁶ See *Wyerick v. Bayou Steel Corp.*, 887 F.2d 1271, 1274 (5th Cir. 1989) (conduct must be equally offensive to both men and women); *Danna*, 752 F. Supp. at 611 (where evidence leads reasonable person in similar situation to find environment hostile, liability should follow under Title VII (citing *Bennett v. New York City Dep't of Corrections*, 705 F. Supp. 979, 984 (S.D.N.Y. 1989))); *Tunis v. Corning Glass Works*, 747 F. Supp. 951, 958 (S.D.N.Y.) (conduct must be pervasive and of such nature as to interfere with work performance and well-being of reasonable person), *aff'd*, 930 F.2d 910 (2d Cir. 1990); *Caleshu v. Merrill Lynch, Pierce, Fenner & Smith*, 737 F. Supp. 1070, 1082-83 (E.D. Mo. 1990) (court applied perspective of reasonable person in similar circumstances in determining that conduct did not constitute sexual harassment); *Babcock v. Frank*, 729 F. Supp. 279, 288 (S.D.N.Y. 1990) (workplace pervaded with offensive conduct that affects work performance or well-being of reasonable person in similar circumstances is hostile); *Watts v. New York City Police Dept.*, 724 F. Supp. 99, 104 (S.D.N.Y. 1989) (if reasonable person in similar circumstances would find working environment hostile enough to adversely affect his or her well-being, cause of action has accrued); *Perkins v. General Motors Corp.*, 709 F. Supp. 1481, 1501 (W.D. Mo. 1989) (using objective reasonable person standard to show that conduct unreasonably interfered with plaintiff's work performance and created abusive work environment affecting plaintiff's well-being), *aff'd in part, rev'd in part*, 911 F.2d 22 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 1309 (1991); *Hollis v. Fleetguard, Inc.*, 668 F. Supp. 631, 636-37 (M.D. Tenn. 1987) (reasonable person's perspective in similar environment under like circumstances must be adopted by court to effectively protect plaintiff and

person perspective has been endorsed by the E.E.O.C.³⁷ The E.E.O.C. proposed that courts should uniformly adopt the viewpoint of a "reasonable person's reaction to a similar environment" when evaluating misconduct.³⁸

defendant (citing *Rabidue*, 805 F.2d at 620)), *aff'd*, 848 F.2d 191 (6th Cir. 1988); *Scott v. Sears, Roebuck & Co.*, 605 F. Supp. 1047, 1056 (N.D. Ill. 1985) (sexual harassment determined from objective point of view with focus on conduct and not plaintiff's reaction to such conduct), *aff'd*, 798 F.2d 210 (7th Cir. 1986). See generally Murray, *supra* note 15, at 478 (Title VII cause of action exists when reasonably prudent person would be so offended by conduct that person would find work conditions had changed from abuse-free to hostile).

Courts have also applied the reasonable person standard in evaluating constructive discharge claims, where the employer allegedly made the employee's work environment so intolerable that the employee was forced into an involuntary resignation. See *Cuevas v. Monroe St. City Club Inc.*, 752 F. Supp. 1405, 1413 (N.D. Ill. 1990); see also *Brooms v. Regal Tube Co.*, 881 F.2d 412, 423 (7th Cir. 1989) (affirming use of reasonable person standard by district court); *Levendos v. Stern Entertainment*, 860 F.2d 1227, 1230 (3d Cir. 1988) (focusing on impact of employer's conduct on reasonable employee), *rev'd*, 909 F.2d 747 (3d Cir. 1990); *Williams v. Caterpillar Tractor*, 770 F.2d 47, 50 (6th Cir. 1985) (reasonableness measured from perspective of reasonable person in employee's position at time of constructive discharge); *Johnson v. Bunny Bread Co.*, 646 F.2d 1250, 1256 (8th Cir. 1981) (employee's subjective view does not govern in constructive discharge claim); *Phaup v. Pepsi-Cola Gen. Bottlers, Inc.*, 761 F. Supp. 555, 570 (N.D. Ill. 1991) (employees may not be overly sensitive to working atmosphere); *Meyers v. City of Cincinnati*, 728 F. Supp. 477, 481 (S.D. Ohio 1990) (since employee's perception of situation is judged objectively, employee may not be unreasonably sensitive to working environment), *aff'd in part, rev'd in part*, 934 F.2d 726 (6th Cir. 1991); *Ross v. Twenty-four Collection Inc.*, 681 F. Supp. 1547, 1552 (S.D. Fla. 1988) (noting that objective perspective must be applied in constructive discharge claim), *aff'd*, 875 F.2d 873 (11th Cir. 1989); *Marley v. United Parcel Serv. Inc.*, 665 F. Supp. 119, 129 (D.R.I. 1987) (inquiry focused on reasonable state of mind of plaintiff).

In constructive discharge cases, the objective standard requires an employee to show that the conduct complained of created working conditions that were so burdensome that a reasonable person in the employee's position would have been compelled to resign. See *Dornhecker v. Malibu Grand Prix*, 828 F.2d 307, 310 (5th Cir. 1987); see also *Schafer v. Board of Educ.*, 903 F.2d 243, 250 (3d Cir. 1990) (applying objective standard to constructive discharge claim of male plaintiff who was denied one year paternity leave); *Calhoun v. Acme Cleveland Corp.*, 798 F.2d 559, 561 (1st Cir. 1986). The *Calhoun* Court found that the plaintiff's demotion from the position he held for fourteen years, exclusion from training seminars, and threats of drastic increases in working hours created constructive discharge. *Id.* (citing *Alicea Rosado v. Garcia Santiago*, 562 F.2d 114, 119 (1st Cir. 1977)).

³⁷ E.E.O.C. Policy Guidance On Current Issues Of Sexual Harassment, § C(1) (1985) [hereinafter Policy Guidance].

³⁸ *Id.* For cases supporting the E.E.O.C. standard, see *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986) ("For sexual harassment to be actionable, it must be sufficiently severe or pervasive to 'alter the conditions of [the victim's] employment and create an abusive working environment.'") (quoting *Henson v. Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)); see also *Hirschfield v. New Mexico Dep't Corrections*, 916 F.2d 572, 575 (10th Cir. 1990) (same); *Carrero v. New York City Hous. Auth.*, 890 F.2d 569, 578 (2d Cir. 1989) (same). For specific examples of what type of conduct constitutes hostile environment sexual harassment, see *Halasi-Schmick v. City of Shawnee*, 759 F. Supp. 747, 751-52

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One of the primary goals of Title VII was to eliminate disparate treatment in the workplace.³⁹ It is submitted that on the surface, the objective reasonable person perspective appears to promote this goal by taking into account the viewpoint of both sexes through the use of a hypothetical person. It is suggested, however, that this perspective does not further Title VII's purpose, because the objective reasonable person perspective, in a male-dominated society, is no more than a guise for a reasonable man's perspective. In reality, the objective reasonable person perspective espouses what men consider acceptable behavior, while overshadowing, if not totally excluding, the perspective of women.⁴⁰

(D. Kan. 1991) (three incidents of alleged offensive verbal conduct directed towards plaintiff did not create hostile working environment), *reconsideration denied*, No. 90-4045-S, 1991 WL 49736 (D. Kan. Mar. 29, 1991); *Cline v. General Elec. Credit Auto Lease*, 748 F. Supp. 650, 655 (N.D. Ill. 1990) (occasional sexual remarks would not unreasonably interfere with work performance of average employee); *Loftin-Boggs v. City of Meridian*, 633 F. Supp. 1323, 1326 (S.D. Miss. 1986) (vulgar language, sexual jokes, and discussions about sex did not create hostile environment since plaintiff welcomed such conduct), *aff'd*, 824 F.2d 971 (5th Cir. 1987), *cert. denied*, 484 U.S. 1063 (1988). *But see Broderick v. Ruder*, 685 F. Supp. 1269, 1278 (D.D.C. 1988) (sexual harassment existing in workplace was so pervasive that hostile environment was created); *Zabkowicz v. West Bend Co.*, 589 F. Supp. 780, 784 (E.D. Wis. 1984) (plaintiff subjected to offensive language and abusive drawings constituted sexual harassment).

³⁹ See 42 U.S.C. § 2000e-2(a)(2). In aiming to control inequality in the workplace, § 2000e-2(a)(2) prohibits the following:

It shall be unlawful . . . for an employer . . . to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of his race, color, religion, sex, or national origin

Id.: *Meritor*, 477 U.S. at 64. The Supreme Court rejected the view that Title VII was limited to "economic" or "tangible" discrimination. *Id.* Instead, the Court held that the language of Title VII "evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment." *Id.*; see also *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir.) ("Congress intended to strike at entire spectrum of disparate treatment of men and women resulting from sex stereotypes."), *cert. denied*, 404 U.S. 991 (1971); *Tunis*, 747 F. Supp. at 958 (same); cf. *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1483 (3d Cir. 1990) ("Congress designed Title VII to prevent the perpetuation of stereotypes and a sense of degradation which serve to close or discourage employment opportunities for women.")

⁴⁰ See, e.g., *Robinson v. Lindsay*, 598 P.2d 392, 393 (Wash. 1979). Initially, courts assessed conduct according to what a "reasonable man of ordinary prudence" would consider unreasonable. *Id.*: see *Osborn v. Montgomery*, 234 N.W. 372, 377 (Wis. 1931) (reasonable and intelligent man must find risk unreasonable); *Freeman v. Adams*, 218 P. 600, 603-04 (Cal. Ct. App. 1923) (utilizing "reasonable and prudent man of the law" standard); see also *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 626 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987) (Keith, J., dissenting). Judge Keith warned that if the reasonable woman standard was not adopted, conduct would continue to be measured against what men considered to

2. Objective-Subjective Perspective

A second perspective courts have followed is an objective-subjective perspective promulgated by the Sixth Circuit in *Rabidue v. Osceola Refining Co.*⁴¹ In *Rabidue*, a female employee brought an action after her discharge, alleging sex discrimination and sexual harassment in violation of Title VII, the Equal Pay Act, and the Elliot-Larsen Act under Michigan state law.⁴² In analyzing the alleged misconduct, the court incorporated an objective and subjective perspective into a two-tier test, requiring the plaintiff to prove that a reasonable person would have been affected by the conduct, and that the plaintiff was actually offended by the conduct and sustained some degree of injury therefrom.⁴³ In formulating this two-tier test, the *Rabidue* court reasoned that the objec-

constitute sexual harassment. *Id.*: RESTATEMENT, *supra* note 31, § 291. Section 291 provides: "where an act is one which a reasonable man could recognize as invoking a risk of harm to another, the risk is unreasonable . . ." *Id.* But see W. PROSSER, J. WADE, & V. SCHWARTZ, CASES AND MATERIALS ON TORTS 150 n.3 (1988) (masculine form of reasonable person is outdated, and proper test to be used is "reasonable, prudent person").

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

⁴² *Id.* at 611-12.

⁴³ *Id.* at 620; *see, e.g.*, King v. Board of Regents of Univ. of Wis., 898 F.2d 533, 537 (7th Cir. 1990) (harassment assessed from both objective and subjective viewpoint of plaintiff); *see* Brooms v. Regal Tube Co., 881 F.2d 412, 412 (7th Cir. 1989) (subjecting plaintiff to offensive racial and sexual remarks, as well as photographs displaying acts of interracial sodomy, would detrimentally affect reasonable person in similar circumstances); Paroline v. Unysis Corp., 879 F.2d 100, 105 (1989) (unwanted touching and sexual innuendos culminating in sexual battery met both objective and subjective requirements of *Rabidue*), *vacated in part*, 900 F.2d 27 (4th Cir. 1990); Guiden v. South Eastern Pub. Serv. Auth. of Va., 760 F. Supp. 1171, 1178 (E.D. Va. 1991) (court concluded that four separate sexual comments made by defendant to plaintiff presented colorable environmental sexual harassment claim); Wall v. AT & T Tech., 754 F. Supp. 1084, 1095 (M.D.N.C. 1990) (lewd gestures, comments made about plaintiff's breasts, and invitations to engage in sexual relations created material question of fact whether Title VII was violated), *appeal dismissed*, 931 F.2d 888 (4th Cir. 1991); Spencer v. General Elec. Co., 697 F. Supp. 204, 218-19 (E.D. Va. 1988) (unwanted sexual advances, propositions, and derogatory and degrading comments made about women established hostile work environment claim), *aff'd*, 894 F.2d 651 (4th Cir. 1990); Ross v. Double Diamond, Inc., 672 F. Supp. 261, 271 (N.D. Tex. 1987) (supervisor's asking plaintiff to lift up her dress, asking if she "fooled around", and asking her to "pant heavily" on phone established pattern of sexual harassment sufficient to create hostile environment). But *see* Morgan v. Massachusetts Gen. Hosp., 901 F.2d 186, 192-93 (1st Cir. 1990) (co-worker intentionally bumping into plaintiff, "peeping" at plaintiff while in restroom, and asking plaintiff to dance at hospital party would not affect reasonable person's psychological well-being); *see also* Lisa Rhode, *The Sixth Circuit's Double Standard in Hostile Work Environment Claims*: Davis v. Monsanto Chem. Co., 858 F.2d 345 (6th Cir. 1988), 58 U. CIN. L. REV. 779, 789 (1989) (once plaintiff proved that reasonable person would be adversely affected by misconduct, plaintiff had additional burden of proving she was offended and suffered injury).

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tive-subjective perspective affords protection to both plaintiff and defendant.⁴⁴ Theoretically, the plaintiff is sheltered from decisions based on stereotypical notions of sexual harassment, since the specific claim is evaluated according to the plaintiff's personality and current work environment.⁴⁵ Likewise, the defendant is safeguarded against the hypersensitive plaintiff, since the plaintiff is required to prove that the conduct would have interfered with a reasonable person's working ability and well-being.⁴⁶

The authors contend that the objective-subjective perspective, like the objective reasonable person perspective, fails to promote Title VII's goal of regulating sex discrimination because it assesses misconduct according to what a reasonable person in a male-dominated society would consider unacceptable, thereby preserving the status quo. The authors further contend that this perspective fails due to its requirement that plaintiff prove injury to recover. By requiring proof of injury, a plaintiff who has been sexually harassed, but has not suffered a tangible injury, will have to endure the abusive work environment until a constructive discharge, retaliatory discharge, or physical injury occurs. In contrast to the

⁴⁴ *Rabidue*, 805 F.2d at 620; see *Perkins v. General Motors Corp.*, 709 F. Supp. 1487, 1500-01 (W.D. Mo. 1989) (adopting viewpoint of reasonable person enables court to provide protection to plaintiffs and defendants); *Blesedell v. Mobil Oil Co.*, 708 F. Supp. 1408, 1418 (S.D.N.Y. 1989) (same); *Hollis v. Fleetguard, Inc.*, 668 F. Supp. 631, 637 (M.D. Ten. 1987) (same), *aff'd*, 848 F.2d 191 (6th Cir. 1988). See generally *Rowe*, *supra* note 12, at 263 (use of both objective and subjective standards supports both parties).

⁴⁵ *Rabidue*, 805 F.2d at 620. The court asserted that "the presence of an actionable sexual harassment claim would be different depending upon the personality of the plaintiff and the prevailing work environment, and must be considered and evaluated upon an ad-hoc basis." *Id.*; see also *Morgan*, 712 F. Supp. at 257 (presence of actionable sexual harassment claim depends upon plaintiff's personality and current work atmosphere and must be considered on case by case basis); Policy Guidance, *supra* note 37, § C(1) (reasonable person standard should embrace perspective of victim and not stereotypical beliefs as to what constitutes acceptable behavior). See generally *Roland Turner, Employer Liability Under Title VII for Hostile Environment Sexual Harassment By Supervisory Personnel: The Impact and Aftermath of Meritor Savings Bank*, 33 *How. L.J.* 1, 14 (1990) (hostile environment sexual harassment must be assessed on ad hoc basis and requires examination of plaintiff's disposition and general work environment).

⁴⁶ See *Rabidue*, 805 F.2d at 620; see also *Daniels v. Essex Group, Inc.*, 937 F.2d 1264, 1271 (7th Cir. 1991) (reasonable person standard places "check on claims for relief by the supersensitive 'eggshell' plaintiff"); *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1483 (3d Cir. 1990) (objective standard serves to protect employer against overly sensitive plaintiff); *Zabkowitz v. West Bend Co.*, 589 F. Supp. 780, 784 (E.D. Wis. 1984). The *Zabkowitz* court noted the requirement that the alleged harassment be unreasonable ensures that Title VII will not serve as a means for hypersensitive plaintiffs to litigate every insult. *Id.*

Sixth Circuit in *Rabidue*, several courts have held that neither economic nor physical injury is required to establish a hostile environment sexual harassment claim.⁴⁷ The requirement of injury, therefore, defeats Title VII's objective: creating a working environment free from sexual discrimination.⁴⁸

3. The Objective Reasonable Woman Perspective

The third viewpoint that courts have adopted is the objective reasonable woman perspective proposed by Judge Keith in his dissenting opinion in *Rabidue*.⁴⁹ Judge Keith's main concern with the

⁴⁷ See *Meritor Savings Bank, FSB, v. Vinson*, 477 U.S. 57, 65 (1986). The *Meritor* Court held that under Title VII, a plaintiff is not required to demonstrate economic injury in order to establish a hostile environment sexual harassment claim. *Id.* The Court further held that for a claim to be actionable, the conduct must be "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" *Id.* at 67 (quoting *Henson v. Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)); see also *Ellison v. Brady*, 924 F.2d 872, 878 (9th Cir. 1991) (employees need not tolerate sexual harassment until they suffer "anxiety or debilitation"); *Wall*, 754 F. Supp. at 1095 (when employee is forced to endure hostile environment or leave employment, Title VII claim has been established); *Double Diamond*, 672 F. Supp. at 271 (suggesting that it would be inconsistent to maintain that individual does not have Title VII claim if harassment had not occurred for specified amount of time). *But see Rabidue*, 805 F.2d at 620. In *Rabidue*, the majority stated that absent "conduct which would . . . affect seriously the psychological well-being of [a] reasonable person . . . a plaintiff may not prevail on asserted charges of sexual harassment anchored in an alleged hostile and/or abusive work environment regardless of whether the plaintiff was actually offended by defendant's conduct."

⁴⁸ See Policy Guidance, *supra* note 37, § C(3). One of Title VII's purposes is to prevent sexual harassment from contaminating the work environment of those classes of individuals protected under the Civil Rights Act. *Id.*; see also *Meritor*, 477 U.S. at 65 (holding that "Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult"); *Reed v. Shepard*, 939 F.2d 484, 491 (7th Cir. 1991) (Title VII protects employee's right to work in atmosphere free from sexual harassment); *Newsday, Inc., v. Long Island Typographical Union no. 915*, 915 F.2d 840, 844 (2d Cir. 1990) (same), *cert. denied*, 111 S. Ct. 1314 (1991); *Volk v. Coler*, 845 F.2d 1422, 1437 (7th Cir. 1988) (same). *But see Rabidue*, 805 F.2d at 620 (Title VII not meant to change work environments where "sexual jokes, sexual conversations and girlie magazines may abound," nor was it designed to produce "magical transformation in the social mores of American workers"); *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1525 (M.D. Fla. 1991) (same).

⁴⁹ 805 F.2d at 626 (Keith, J., dissenting). Judge Keith concluded that the relevant inquiry with respect to hostile environment sexual harassment claims was whether the alleged misconduct was offensive to a reasonable woman. *Id.* at 627. Judge Keith further asserted that "unless the outlook of a reasonable woman is adopted, the defendants as well as the courts are permitted to sustain ingrained notions of reasonable behavior fashioned by offenders . . ." *Id.* at 626. Judge Keith stated that "I would have courts adopt the perspective of the reasonable victim . . ." *Id.* (citing *Abusive Work*, *supra* note 33, at 1459). The reasonable victim standard is equivalent to the objective reasonable woman standard, since the "[c]oncern for the dignity of women would require courts to determine the

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objective-subjective perspective applied by the majority was that it incorporated an objective reasonable person perspective which failed to consider the difference between what men and women perceive to be acceptable behavior.⁵⁰ Conduct that men might consider normal, good-natured socializing might be seen as entirely offensive and intolerable by women.⁵¹ The objective reasonable woman standard acknowledges this disparity by allowing courts to consider these differences while concurrently shielding employers from unfounded claims made by a hypersensitive employee.⁵² By assessing conduct according to what a reasonable woman would consider objectionable, it is suggested that the objective reasonable woman perspective attempts to ensure that a woman's perspective on what constitutes sexual harassment would be incorporated into the law. The authors further suggest, how-

wrongfulness of conduct from the standpoint of the victim." *Id.*: see also *Yates v. Avco Corp.*, 819 F.2d 630, 637 (6th Cir. 1987) (perspective of reasonable woman should be used since standard requires plaintiff to be member of protected class, and by definition women are protected class); *Austen v. State of Hawaii*, 759 F. Supp 612, 628 (D. Haw. 1991) (reasonable woman would find defendant's references to plaintiff typical of male who considers females inferior); *Lipsett v. Rive-Mora*, 669 F. Supp. 1188, 1199 (D.P.R. 1987) (conduct assessed according to objective standard of what reasonable woman's reaction to similar environment would be, not on what particular plaintiff finds offensive), *rev'd*, 864 F.2d 881 (1st Cir. 1988); *Barbetta v. Chemlawn Servs. Corp.*, 669 F. Supp. 569, 572 (W.D.N.Y. 1987) (concluding that conduct was such that reasonable woman in plaintiff's position would have found it intolerable).

⁵⁰ *Rabidue*, 805 F.2d at 626 (Keith, J., dissenting). Judge Keith indicated that "the reasonable person standard fails to account for the wide divergence between most women's views of appropriate sexual conduct and those of men." *Id.*

⁵¹ See, e.g., *Ellison v. Brady*, 924 F.2d 872, 878 (9th Cir. 1991) (conduct men consider unobjectionable may affront women); *Yates*, 819 F.2d at 637 n.2 (acknowledging that men and women are offended by different types of behavior); see also *Lipsett v. University of P.R.*, 864 F.2d 881, 898 (1st Cir. 1988) (male supervisor may consider his comments to female subordinate about her figure or body unoffensive). See generally Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 *YALE L.J.* 1177, 1207 (1990) (men view sexual harassment as "harmless social interaction to which only overly-sensitive women would object"); Matthews, *supra* note 2, at 313 (conduct objectionable to plaintiff may be permissible behavior to defendant); Shannon Murphy, Note, *Meritor Savings Bank v. Vinson: What Makes a Work Environment "Hostile?"*, 40 *ARK. L. REV.* 857, 867-68 (1987) (conduct offensive to women considered harmless or innocent by men).

⁵² See *Rabidue*, 805 F.2d at 626 (Keith, J., dissenting) (commenting that courts should employ "perspective of reasonable victim, which simultaneously allows courts to consider salient sociological differences as well as shield employers from the neurotic complainant" (citing *Abusive Work*, *supra* note 33, at 1459)); see also Ehrenreich, *supra* note 51, at 1217 (Judge Keith suggested that "[t]he doctrinal construct itself will determine whether a particular woman's complaint is legitimate").

ever, that as the objective reasonable person perspective and the objective-subjective perspective tip the scale in favor of men when a woman alleges harassment, the objective reasonable woman perspective reverses this imbalance against men, when sexual harassment claims are brought by men.

4. Reasonable Person of Plaintiff's Sex Perspective

A fourth viewpoint advanced by the courts is the reasonable person of the plaintiff's sex perspective.⁵³ Under this perspective, courts analyze conduct according to what a reasonable person of the plaintiff's sex would perceive as abusive, and whether plaintiff was "as affected" as a reasonable person in a similar environment.⁵⁴ The authors submit that this perspective eliminates the imbalance created by both the objective reasonable person and the objective reasonable woman perspectives by assessing conduct according to what a reasonable person of plaintiff's sex would consider unacceptable. It is asserted, however, that because this perspective, as utilized by the courts, requires the plaintiff to demonstrate actual injury, it fails to promote Title VII's goal of allowing a complainant to recover without having to prove injury.

5. Reasonable Victim Perspective

A fifth viewpoint, known as the reasonable victim perspective,

⁵³ See, e.g., *Drinkwater v. Union Carbide Corp.*, 904 F.2d 853, 862 (3d Cir. 1990) (supporting reasonable person of same sex perspective); *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1482 (3d Cir. 1990) (same); *Garvey v. Dickinson College*, 761 F. Supp. 1175, 1184 (same), *modified*, 763 F. Supp. 796 (M.D. Pa. 1991); *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1524 (M.D. Fla. 1991) (same).

⁵⁴ See *Andrews*, 895 F.2d at 1482. The *Andrews* court held that plaintiff, to establish a hostile environment sexual harassment claim under Title VII, had to demonstrate that "the discrimination would detrimentally affect a reasonable person of the same sex in that position." *Id.*; see also *Drinkwater*, 904 F.2d at 862 (plaintiff must prove alleged misconduct created "sexually charged environment and that she suffered discrimination because of environment"); *Garvey*, 761 F. Supp. at 1185 (discrimination must adversely affect reasonable person of same sex in like environment); *Robinson*, 760 F. Supp. at 1524 (under reasonable person of same sex perspective, hostile environment sexual harassment claim is assessed objectively and subjectively); cf. *Daniels v. Essex*, 937 F.2d 1264, 1271-72 (7th Cir. 1991). The *Daniels* Court noted that an objective and subjective perspective must be applied when evaluating racial or sexual harassment claims, including the effect of misconduct on a reasonable person's working ability and well-being and the personal effect on plaintiff. *Id.* (citing *Brooms v. Regal Tube Co.*, 881 F.2d 412, 419 (9th Cir. 1989)).

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was proposed by the Ninth Circuit in *Ellison v. Brady*.⁶⁵ Under this perspective, the court assessed conduct according to what a reasonable victim would consider offensive.⁶⁶ In rejecting a subjective element, the *Ellison* court concluded that a proper hostile environment sexual harassment claim could be made without proving actual injury.⁶⁷ It is suggested that this viewpoint properly evaluates conduct in light of Title VII because it not only analyzes conduct from the perspective of the victim, but also allows the victim to

⁶⁵ 924 F.2d 872 (9th Cir. 1991). In support of the reasonable victim perspective, the *Ellison* court stated that by "not trivializing the effects of sexual harassment on reasonable women, courts can work towards ensuring that neither men nor women will have to 'run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living.'" *Id.* at 879-80 (quoting *Henson v. City of Dundee*, 682 F.2d 897, 902 (11th Cir. 1982)).

⁶⁶ See *Ellison*, 924 F.2d at 879. The court held that a female victim establishes a prima facie hostile environment sexual harassment claim "when she alleges conduct which a reasonable woman would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment." *Id.* Conversely, the court stipulated that "the appropriate victim's perspective would be that of a reasonable man" when a male employee alleges hostile environment sexual harassment. *Id.* at 879 n.11; see also *Drinkwater*, 904 F.2d at 861 n.15 (hostile environmental sexual harassment cases based on theory that "[w]omen's sexuality largely defines women as women in this society, so violations of it are abuses of women as women" (quoting *WORKING WOMEN*, *supra* note 13, at 174)); *Yates v. Avco Corp.*, 819 F.2d 630, 637 n.2 (6th Cir. 1987) (if sexual harassment claim is brought by male employee, "reasonable male standard" would be employed).

⁶⁷ See *Ellison*, 924 F.2d at 879. The *Ellison* court asserted that the *Meritor* Court's implicit adoption of the E.E.O.C.'s reasonableness test confirms that conduct may constitute sexual harassment without causing debilitation or seriously affecting an employee's psychological well-being, as long as the conduct was unreasonable. *Id.* at 878. This is further evidenced by the accepted notion that an environmental sexual harassment claim may be brought by a plaintiff who was not personally subjected to the alleged harassment. *Id.*; *Vinson v. Taylor*, 753 F.2d 141, 146 (D.C. Cir. 1985) (women who had never been target of sexually disparaging conduct, but were forced to work in atmosphere impregnated with such conduct, may have proper Title VII claim), *aff'd in part, rev'd in part sub nom. Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986); see also *Drinkwater*, 904 F.2d at 862 (evidence of sufficiently oppressive environment could create inference that intentional discrimination existed in environment); *Waltman v. International Paper Co.*, 875 F.2d 468, 477 (5th Cir. 1989) (sexually explicit graffiti on walls, in elevator and bathrooms, relevant to plaintiff's Title VII claim even though not directed at plaintiff); *Sims v. Montgomery County Comm'n.*, 766 F. Supp. 1052, 1074 (M.D. Ala. 1990) (harassment existing in plaintiff's workplace was offensive not only to women it was directed at, but also to all female employees in department); *Spencer v. General Elec. Co.*, 697 F. Supp. 204, 219 (E.D. Va. 1988) ("sexual horseplay, standing alone, is sufficient to establish a hostile [working] environment"), *aff'd*, 894 F.2d 651 (4th Cir. 1990); *Broderick v. Ruder*, 685 F. Supp. 1269, 1278 (D.D.C. 1988) (plaintiff forced to work in environment where managers harassed all female employees); cf. *Kishaba v. Hilton Hotels Corp.*, 737 F. Supp. 549, 554 (D. Haw. 1990) ("Even if plaintiff herself was never the object of racial harassment, she might nonetheless have a Title VII claim if she were forced to work in an atmosphere in which such harassment was pervasive."), *aff'd*, 936 F.2d 578 (9th Cir. 1991).

recover without proving injury.

The authors submit that the first four perspectives outlined above fail to properly evaluate conduct in light of Title VII's aim to eliminate sex discrimination in the workplace. It is further submitted that these perspectives fail because they either do not account for existing differences between the sexes or they include a subjective element of injury that erects an improper barrier to establishing proper Title VII claims, or both. The objective reasonable person perspective, for example, has been criticized for failing to reflect the differences between male and female views on acceptable behavior.⁶⁸ The subjective requirement that plaintiff demonstrate injury, incorporated by the objective reasonable person perspective, objective-subjective perspective and the reasonable person of plaintiff's sex perspective, thwarts the purpose of Title VII, which was to allow claims of harassment without demonstrating injury.⁶⁹ It is suggested that the reasonable victim perspective, which not only accounts for the differences existing between men and women, but also excludes the requirement of injury, should be used in evaluating conduct. It is further suggested that courts, in utilizing this perspective, would be able to ascertain what reasonable women consider objectionable and what reasonable men deem offensive, and apply the appropriate perspective according to the sex of the victim.

C. Evaluating Perspectives in an Abuse-Free Environment

Notwithstanding which perspective is employed, courts evaluate

⁶⁸ See *supra* notes 49 & 50 and accompanying text (addressing why *Rabidue* dissent rejected objective reasonable person perspective, and proposing that men and women do not interpret conduct in same way); see also *Ellison*, 924 F.2d at 879. The *Ellison* court stated that if it were only to examine the alleged misconduct from an objective viewpoint, it would "run the risk of reinforcing the prevailing level of discrimination." *Id.* at 878. The court commented that its reason for adopting the objective reasonable woman perspective was because the "sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women." *Id.* at 879; Matthews, *supra* note 2, at 313 (reasonable person standard does not acknowledge that sexual harassment may be "carried out through behavior widely perceived as socially acceptable"); Rowe, *supra* note 12, at 271 (standards embracing objective elements create "steep hurdle" for plaintiffs to overcome in establishing sexual harassment claims).

⁶⁹ See *supra* notes 47 & 48 and accompanying text (addressing the problem in making injury a requisite in establishing hostile environment sexual harassment claim).

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conduct according to the amount of offensive conduct that already exists in the workplace.⁶⁰ The courts, in line with *Meritor's* requirement of grievousness,⁶¹ have considered a certain amount of sexual harassment acceptable in ascertaining whether the conduct was severe enough to be singled out as abnormal for that environment.⁶² Title VII, however, aspired to evaluate conduct in an abuse-free atmosphere, not in an environment pervaded with the very discrimination it intended to eliminate.⁶³ It is submitted that the most effective way for courts to regulate sexual harassment is to analyze conduct not only from the perspective of the reasonable victim, but also against a backdrop that is free of sexual harassment. It is further submitted that courts would be able to uniformly ascertain what constitutes sexual harassment according to what the reasonable victim considers unacceptable under the respective circumstances. Although this perspective may label conduct not intended to be offensive as unlawful sexual harassment, the alleged harasser's intent is not a defense in Title VII

⁶⁰ See *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 620 (6th Cir. 1986) (trier of fact must adopt "perspective of a reasonable person's reaction to a similar environment under essentially like or similar circumstances" in ascertaining whether conduct rises to level of actionable Title VII claim); *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1524 (M.D. Fla. 1991) (plaintiff must prove she was "at least as affected as the reasonable person under like circumstances"); *Danna v. New York Tel. Co.*, 752 F. Supp. 594, 610 (S.D.N.Y. 1990) (where "evidence leads a reasonable person in a similar situation to find the environment offensive, then liability should attach under Title VII" (citing *Bennett v. New York City Dep't of Corrections*, 705 F. Supp. 979, 984 (S.D.N.Y. 1989)); *Lipsett v. Rive-Mora*, 669 F. Supp. 1188, 1199 (D.P.R. 1987) (conduct must be objectively assessed according to standard of what "reasonable woman's reaction to a similar environment would be"); see also Policy Guidance, *supra* note 37 (standard should employ reasonable person's reaction to similar environment).

⁶¹ See *supra* note 26 and accompanying text (discussing *Meritor* Court's grievousness standard).

⁶² See *Rabidue*, 805 F.2d at 620. To determine whether the environment gave rise to a sexual harassment claim, the court found it necessary to consider the "lexicon of obscenity that pervaded the environment of the workplace both before and after the plaintiff's introduction into its environs, . . ." *Id.*; see also *Daniels v. Essex Group, Inc.*, 937 F.2d 1264, 1274 (7th Cir. 1991) (same); *Robinson*, 760 F. Supp. at 1525 (same); *Sanchez v. City of Miami Beach*, 720 F. Supp. 974, 978 (S.D. Fla. 1989) (police officers' display of pictures, posters and pinups "indicates the lexicon of sexual discrimination currently pervading City of Miami Beach Police Department"). But see *Barbetta v. Chemlawn Servs. Corp.*, 669 F. Supp. 569, 572 (W.D.N.Y. 1987) (casual comments and accidental or sporadic conversations insufficient to prove sexual harassment).

⁶³ See generally *Rowe*, *supra* note 12, at 272. "[The] court should have adopted the perspective of the individual working in the environment that Title VII aspires to create; an environment in which there is no discrimination based on gender." *Id.*

cases.⁶⁴

The authors assert that regardless of the perspective adopted, whenever a hypothetical perspective is used by the courts a problem of implementation arises. For example, how does a jury composed of both men and women apply a reasonable woman perspective or a reasonable man perspective? How does a male judge set aside his own perceptions, as a male, over a case where a reasonable woman standard is applied, or vice versa? It is suggested that implementation would require the use of concrete evidence such as statistical polls of the general public and experts to ascertain what a reasonable woman or reasonable man would consider sexual harassment. Although this Note sets forth what perspective should be utilized, it is up to the courts to implement it.⁶⁵ Further, once sexual harassment is found to exist, several issues exist regarding an employer's liability for the acts of its employees.⁶⁶

II. EMPLOYER LIABILITY AND THE NOTICE REQUIREMENT

Before the E.E.O.C. was created, an employer had to be on notice of a supervisor's sexual harassment in order for liability to attach.⁶⁷ Most courts, however, allowed recovery even if the em-

⁶⁴ See *Ellison v. Brady*, 924 F.2d 872, 880 (9th Cir. 1991). The *Ellison* court maintained that the reasonable victim standard classifies conduct as unlawful sexual harassment even if the harasser did not understand that his or her behavior was offensive. *Id.* The court further stated that although certain comments may not be intentionally abusive, motive is irrelevant since "Title VII is not a fault-based tort scheme." *Id.*; see also *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971) (lack of discriminatory intent does not justify unlawful employment practices); *Rogers v. EEOC*, 454 F.2d 234, 239 (5th Cir. 1971) ("[T]he thrust of Title VII's proscriptions is aimed at the consequences or effects of an employment practice and not at the employer's motivation."), *cert. denied*, 406 U.S. 957 (1972). See generally CLARE S. THOMAS, *SEX DISCRIMINATION IN A NUTSHELL* 240 (2d ed. 1991) (under Title VII, conduct may constitute environmental sexual harassment even though harassers do not realize that their conduct is offensive).

⁶⁵ See, e.g., New York Pattern Jury Instructions—Civil 1 (1973) (sample jury charges, including instructions on how to use evidence). The judge implements the reasonable person standard of care in negligence cases. *Id.* §2:10.

⁶⁶ See *infra* notes 67-99 and accompanying text (discussing employers' liability).

⁶⁷ See *Tomkins v. Public Serv. Elec. & Gas Co.*, 568 F.2d 1044, 1048-49 (3d Cir. 1977). The *Tomkins* court held that "Title VII is violated when a supervisor, with the actual or constructive knowledge of the employer, makes sexual advances or demands toward a subordinate employee and conditions that employee's job . . . on a favorable response to those advances or demands." *Id.* However, liability would not be imposed if the employer took "prompt and appropriate remedial action after acquiring such knowledge." *Id.*; see also *Garber v. Saxon Business Prods. Inc.*, 552 F.2d 1032, 1032 (4th Cir. 1977) (same); RESTATEMENT (SECOND) OF AGENCY § 218 (1958) [hereinafter AGENCY]. Section 218 reads:

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ployer only had constructive knowledge of the abusive conduct.⁶⁸ Additionally, the employer was deemed to have constructive knowledge if the sexual harassment was persistent.⁶⁹

The E.E.O.C. has interpreted Title VII as holding employers strictly liable for the acts of their supervisors,⁷⁰ and has stated that an employer is liable for a supervisor's sexual harassment regardless of knowledge.⁷¹ While courts have applied strict liability in

"Upon ratification, a purported master or other principal becomes subject to liability for injuries caused by the tortious act of one acting or purporting to act as his agent as if the act had been authorized, if there has been no loss of capacity by the principal." *Id.*

⁶⁸ See, e.g., *Katz v. Dole*, 709 F.2d 251, 255 (4th Cir. 1983) (must show employer had actual or constructive knowledge of existence of sexually hostile working environment and took no prompt remedial action); *Henson v. Dundee*, 682 F.2d 897, 905 (11th Cir. 1982) (must be shown that employer knew or should have known of harassment); *Bundy v. Jackson* 641 F.2d 934, 943 (D.C. Cir. 1981) (lack of notice relieves employer of liability, but if employer's agent has knowledge, it is imputed under agency principles). *But see* *Bohen v. City of East Chicago*, 799 F.2d 1180, 1182 (7th Cir. 1986) (refusing to follow *Katz* decision).

⁶⁹ See *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417, 1422 (7th Cir. 1986). The *Hunter* court held that an employer "is unlikely to know or have reason to know of casual, isolated, and infrequent slurs; it is only when they are so egregious, numerous, and concentrated as to add up to a campaign of harassment that the employer will be culpable for failing to . . . take remedial steps." *Id.*; see also *Henson*, 682 F.2d at 905 (pervasive harassment gives rise to constructive knowledge); *Taylor v. Jones*, 653 F.2d 1193, 1199 (8th Cir. 1981) (pervasive harassment inferred employer's knowledge).

⁷⁰ See 29 C.F.R. § 1604.11(c) (1987). The E.E.O.C. guidelines state as follows:

Applying general Title VII principles, an employer, employment agency, joint apprenticeship committee or labor organization [hereinafter referred to as "employer"] is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence. The Commission will examine the circumstances of the particular employment relationship and the job functions performed by the individual in determining whether an individual acts in either a supervisory or agency capacity.

Id.

Some courts have interpreted the E.E.O.C.'s guidelines to suggest strict liability in sexual harassment cases. See, e.g., *Horn v. Duke Homes, Inc.*, 755 F.2d 599, 604 (7th Cir. 1985) (strict liability imposed upon employers for sexual harassment by supervisors under E.E.O.C.'s rules); *Ross v. Double Diamond*, 672 F. Supp. 261, 274 (N.D. Tx. 1987) (same). *But see* *Marshall v. Nelson Elec.*, 766 F. Supp. 1018, 1039 (N.D. Okla. 1991) (liability not imputed upon employer for harassment by foreman).

⁷¹ See *infra* note 98 and accompanying text (illustrating E.E.O.C. Guidelines); see also *Meritor*, 477 U.S. at 74 (Marshall, J., concurring). Justice Marshall stated:

"[A]n employer . . . is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence."

Id. For other courts which have adopted this statement, see *Collins v. City of San Diego*, 841 F.2d 337, 340 (9th Cir. 1988); *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554,

quid pro quo cases, they have been reluctant to do so in hostile environment cases.⁷²

A. *Quid Pro Quo Sexual Harassment and Employer Liability*

In quid pro quo sexual harassment, employer liability has been imposed when an employer, or an agent of the employer, makes a job benefit contingent on the sexual favors of an employee.⁷³ The employer is responsible for his supervisor's conduct because the supervisor acts on behalf of the employer.⁷⁴ Most courts, however, allow the employer to avoid liability if remedial action is promptly taken to alleviate the harassment.⁷⁵ Interestingly, it would seem impossible for a co-employee to create a quid pro quo working environment, since he does not have the power to change the con-

1560 (11th Cir. 1987); *Horn*, 755 F.2d at 604.

⁷² See, e.g., *Steele v. Offshore Shipbuilding Inc.*, 867 F.2d 1131, 1316 (11th Cir. 1989) ("Strict liability is illogical in a pure hostile environment setting."); *Hicks v. Gates Rubber Co.* 833 F.2d 1406, 1417 (1987) (finding strict liability inappropriate in hostile environment case), *aff'd*, 928 F.2d 966 (10th Cir. 1991).

⁷³ See, e.g., *Steele*, 867 F.2d at 1316 (supervisor acts as company in quid pro quo sexual harassment cases, thereby creating employer liability); *Volck v. Coler*, 845 F.2d 1422, 1436 (7th Cir. 1988) (strict liability is imposed for sexual harassment by supervisory personnel with authority to fire and hire). *But see Hirschfield v. New Mexico Corrections Dep't*, 916 F.2d 572, 576 (10th Cir. 1990). The *Hirschfield* court found that sexual harassment is not within the scope of employment since it "simply is not within the job description of any supervisor or any other worker in any reputable business." *Id.* Thus, one must look to other areas of agency law to impose liability. *Id.*

⁷⁴ See *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417, 1422 (7th Cir. 1986). The *Hunter* court held that when "someone at the decision-making level in the corporate hierarchy has committed [a] wrong the deliberate act of such a person is the corporation's deliberate act . . . This is true regardless of his superiors' knowledge." *Id.*

⁷⁵ See *Waltman v. International Paper Co.*, 875 F.2d 468, 479 (5th Cir. 1989) (employer may escape liability by taking remedial action unless "the plaintiff can establish that the employer's response was not reasonably calculated to halt the harassment"); *Yates v. Avco Corp.*, 819 F.2d 630, 635 (6th Cir. 1987) (finding that employer may escape liability through remedial action, but nonfunctional policy against sexual harassment will not shield employer); *Miller v. Bank of America*, 600 F.2d 211, 213 (9th Cir. 1979) (employer liable for quid pro quo sexual harassment unless he took remedial action); *Tomkins v. Public Serv. Elect. & Gas Co.*, 568 F.2d 1044, 1048 (3d Cir. 1977) (employer may escape liability if prompt appropriate remedial action is taken after acquiring knowledge of sexual harassment); *But see Henson v. City of Dundee*, 682 F.2d 897, 910 n.19 (11th Cir. 1982). The *Henson* court rejected the argument advanced in *Tomkins* allowing an employer to escape responsibility for sexual harassment by taking later remedial action. *Id.* The court further found that remedial action may mitigate damages, but does not effect employer liability. *Id.*; see also *Spencer v. General Elec. Co.*, 894 F.2d 651, 658-59 (4th Cir. 1990). The court held that to prove a prima face case of quid pro quo sexual harassment, a plaintiff must show that the employer knew of the sexual harassment and failed to take remedial measures. *Id.*

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ditions of the victim's employment.⁷⁶

B. Hostile Environment Sexual Harassment and Employer Liability

In a hostile environment sexual harassment claim, a supervisor acts without the actual or apparent authority of his employer, thereby making it difficult to hold the employer strictly liable.⁷⁷ The Supreme Court, in *Meritor Savings Bank, FSB v. Vinson*, addressed the problem of hostile environment employer liability.⁷⁸ Justice Rehnquist, writing for the Court, did not furnish a definitive rule regarding employer liability for a supervisor's hostile environment harassment, but maintained that such a rule should be drawn from common law agency principles.⁷⁹ The Court, however, rejected automatic employer liability, as well as the lower court's assertion that lack of notice would shield the employer in all cases.⁸⁰ In addition, the Court dismissed the idea that the existence of a company policy against discrimination alone could insulate the employer from liability.⁸¹ Justice Marshall, in his concur-

⁷⁶ See *Henson*, 682 F.2d at 909. The *Henson* court held that the power of changing a condition of employment, such as the authority to fire, when misused, attaches employer liability. *Id.*; Janet Hugie Smith & Curt A. Hawes, *Update: Sexual Harassment in the Workplace*, in ALI-ABA RESOURCE MATERIALS: LABOR & EMPLOYMENT LAW 825-34 (5th ed. 1990 & Supp. 1991) (quid pro quo sexual harassment exists when "[the] submission to or rejection of [sexual advances] by an individual is used as a basis for employment decisions").

⁷⁷ See, e.g., *Steele v. Offshore Shipbuilding Inc.*, 867 F.2d 1311, 1316 (11th Cir. 1989) (strict liability inappropriate in pure hostile environment setting); *Marshall v. Nelson Elec.*, 766 F. Supp. 1018, 1039 (N.D. Okla. 1991) (interpreting *Meritor's* rejection of strict liability in hostile environment claim); *Juarez v. Ameritech Mobile Communications*, 746 F. Supp. 798, 802 (N.D. Ill. 1990) (same), *aff'd*, 957 F.2d 317 (7th Cir. 1992). See generally BARBARA SCHLEI & PAUL GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW*, 423-24 (2d ed. 1983) (trend against strict liability in hostile environment sexual harassment cases through 1983).

⁷⁸ 477 U.S. 57 (1986). See generally *supra*, notes 17-22 and accompanying text (discussing *Meritor*).

⁷⁹ *Meritor*, 477 U.S. at 70. Justice Rehnquist stated that the Court "agree[d] with the E.F.O.C. that Congress wanted courts to look to agency principles for guidance in this area." *Id.* He noted that "such common-law principles may not be transferable in all their particulars to Title VII" but found that Congress had decided to define employer to include any agent of an employer within 42 U.S.C. § 2000(b). *Id.* See generally RESTATEMENT, *supra* note 31, §§ 219-237 (defining employer so as to include agents).

⁸⁰ *Meritor*, 477 U.S. at 72. The *Meritor* Court noted that Congress had "intend[ed] to place some limits on the acts of employees for which employers under Title VII are to be held responsible." *Id.*

⁸¹ *Id.* The Court held that policies against sexual harassment were clearly relevant, but not essentially dispositive. *Id.* This holding was based on the fact that the employer's policy against harassment did not function properly. *Id.*

rence, stated that an employer would be liable for sexual harassment committed by employees if the employer or his agents knew or should have known about the harassment and failed to take appropriate corrective action.⁸²

Following *Meritor*, circuit courts were divided over the issue of notice as a requirement of employer liability in a hostile environment claim.⁸³ It is suggested that a bifurcated approach would best resolve the notice requirement in a hostile environment claim: the first level would deal with liability for a supervisor's sexual harassment, and the second level would concentrate on co-employee sexual harassment.

At the first level, where the perpetrator is a supervisor, liability should be directly imputed to the employer regardless of actual knowledge, because a supervisor, through the grant of authority, is able to act for, and in place of, the employer-principal.⁸⁴ How-

⁸² *Id.* at 2409 (Marshall, J., concurring). The guidelines state that "with respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment . . . where the employer knows [of it] . . . unless it can show it took immediate . . . action." *Id.* (quoting 29 C.F.R. § 1604.11(c) & (d) (1985)).

⁸³ See, e.g., *Steele v. Offshore Shipbuilding, Inc.* 867 F.2d 1311, 1317 (11th Cir. 1989) (employer knew of supervisor engaged in sexually oriented joking with employees, but was not found liable because prompt remedial action was taken); *Yates v. Avco Corp.*, 819 F.2d 630, 631 (6th Cir. 1987) (employer liability found when female employees were sexually harassed by supervisor, because conduct was foreseeable, regardless of actual notice); *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417, 1421 (7th Cir. 1986) (when upper level employee acts, it is as if employer itself acts; therefore knowledge is irrelevant and strict liability imposed).

⁸⁴ *Meritor*, 477 U.S. at 75 (Marshall, J., concurring). Justice Marshall stated that "an employer is liable if a supervisor or an agent violates Title VII, regardless of knowledge or any other mitigating factor." *Id.*; see, e.g., *Hirschfield v. New Mexico Corrections Dep't*, 916 F.2d 572, 577-78 (10th Cir. 1990). An employer will be liable under agency principles for a supervisor's act within the scope of employment or a supervisor's act outside the scope of employment if there is reasonable reliance on apparent authority or the employer is negligent in hiring. *Id.*; *Volk v. Coler*, 845 F.2d 1422, 1436 (7th Cir. 1988) (strict liability imposed on employer for sexual harassment by supervisory personnel who have power to hire, fire or promote); *Huddleston v. Roger Dean Chevrolet, Inc.*, 845 F.2d 900, 904 (11th Cir. 1988) (employer found to be directly liable for sexual harassment by supervisor through agency principles); *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1558 (11th Cir. 1987) (conduct of supervisor who acts as agent is deemed to be conduct of his employer). *But see Steele*, 867 F.2d at 1316 (holdings in *Sparks* and *Huddleston* applied only to cases of hostile environment coupled with quid pro quo sexual harassment); see also *Ellison v. Nicholas*, 924 F.2d 872, 872 (9th Cir. 1991). The *Ellison* court held that liability will be imposed on the employer if a manager had knowledge of the tort. *Id.* Since supervisor is always aware of his own misbehavior, the employer will be responsible for administrators' exploits. *Id.*; cf. *Hicks v. Gates Rubber Co.*, 928 F.2d 966, 968 (10th Cir. 1991) (knowledge of sexual misconduct of supervisor personnel is imputed to employer); *Huddleston*, 845

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ever, this standard applies only when the supervisor acts within the scope of his employment.⁸⁵ Although some courts have found that sexual harassment is never within the scope of employment, supervisors, by virtue of their positions of power, are able to intimidate employees and force them to endure offensive conduct.⁸⁶

F.2d at 904 (constructive knowledge does not have to be proven for supervisor who had actual and apparent authority to alter plaintiff's employment status); *Yates*, 819 F.2d at 636 (knowledge of sexual wrongdoing by supervisor is imputed to employer when employee acts within scope of employment); *Hunter*, 797 F.2d at 1421 (upper level employees act as employer, therefore knowledge requirements become irrelevant and strict liability is imposed); *Shrout v. The Black Clawson Co.*, 689 F. Supp. 774, 781 (S.D. Oh. 1988) (same); AGENCY, *supra* note 67, § 219. Section 219 states:

- (1) A master is subject to liability for the torts of his servants committed while acting in the scope of their employment.
- (2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:
 - (a) the master intended the conduct or the consequences, or
 - (b) the master was negligent or reckless, or
 - (c) the conduct violated a non-delegable duty of the master, or
 - (d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

Id.

⁸⁵ See, e.g., *Hirschfeld v. New Mexico Corrections Dep't*, 916 F.2d 572, 577 (10th Cir. 1990) (liability is found through negligence when sexual harassment is outside scope of employment); *Steele*, 867 F.2d at 1315 (employer not liable for supervisor's conduct because acts were outside scope of employment, absent reliance on actual or apparent authority); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1417-18 (1987) (sexual mistreatment is never within scope of employment unless employer allowed supervisor to sexually assault employee or supervisor had apparent authority which aided tort), *aff'd*, 928 F.2d 966 (10th Cir. 1991); *Turner*, *supra* note 45, at 45 (tort within scope of employment when completed through supervisory authority and therefore liability should be levied upon employer).

The *Restatement (Second) of Agency* defines the scope of employment as follows:

- (1) Conduct of a servant is within the scope of employment if, but only if:
 - (a) it is of the kind he is employed to perform;
 - (b) it occurs substantially within the authorized time and space limits;
 - (c) it is actuated, at least in part, by a purpose to serve the master; and
 - (d) if force is intentionally used by the servant against another, the use of force is not unexpected by the master.
- (2) Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master.

Id. § 218.

⁸⁶ See, e.g., *Steele*, 867 F.2d at 1315. The *Steele* court held that the creation of a hostile environment is not within the scope of a supervisor's employment. *Id.* Since sexual harassment is never within any job description, the courts may find an employer liable if he was either negligent or reckless. *Id.*; see *Hicks*, 833 F.2d at 1417. Liability may also be imposed if the supervisor purported to act on behalf of the employer and there was reliance on the apparent authority, which in turn aids the tort. *Id.* The *Hicks* court found that "confining 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

A broad interpretation of a supervisor's scope of employment is not only necessary to hold the employer liable for sexual harassment perpetrated by a supervisor,⁸⁷ but also to abolish attitudes which result in the degradation of women in the workplace.⁸⁸ Implementing automatic liability is fair because it is foreseeable that if the employer is not careful in the hiring of supervisors, sexual harassment may occur.⁸⁹ It is suggested that there should be an

they explicitly require or consciously allow their supervisors to molest women employees." *Id.* (quoting *Vinson v. Taylor*, 753 F.2d 141, 151 (D.C. Cir. 1985), *aff'd in part, rev'd in part sub nom. Meritor v. Vinson*, 477 U.S. 57 (1986)). *But see* Anne C. Levy, *The Change in Employer Liability for Supervisor Sexual Harassment After Meritor: Much Ado About Nothing*, 42 ARK. L. REV. 795, 806 (1989) (supervisor creates employer liability not only from ability to hire and fire but through capacity to make personnel decisions and power to pressure and frighten employees).

The intimidation of losing a job or benefit occurs whether or not the particular victim is outwardly threatened with losing a particular job benefit. *See* *Lipsett v. University of P.R.*, 864 F.2d 881, 900 (1st Cir. 1988). The employer will be liable absent notice because "when a supervisor sexually harasses a subordinate, that supervisor is almost always aided in accomplishing the tort by the existence of the agency relation. . . . whether or not he or she expressly threatens that subordinate by referring to the authority delegated." *Id.*; *see also* *Scott v. Sears Roebuck & Co.*, 605 F. Supp. 1047, 1054-55 (N.D. Ill. 1985), *aff'd*, 798 F.2d 210 (7th Cir. 1986) (supervisor's mere ability to take job benefit from employee generates liability rather than actual exercise of that power).

⁸⁷ *See* *Shager v. Upjohn Co.*, 913 F.2d 398, 404 (7th Cir. 1990). The *Shager* court held that torts of a supervisor with the power to hire and fire are within the scope of employment and will create employer liability. *Id.*; *see also* *Lipsett*, 864 F.2d at 900 (supervisors influence over low-level workers produces employer liability); *Yates v. Avco Corp.*, 819 F.2d 630, 636 (6th Cir. 1987) (employer is responsible for supervisor's sexual misbehavior toward employee due to foreseeability of its occurrence); *Turner*, *supra* note 45, at 9 (hostile environment created by supervisor will give rise to employer liability).

⁸⁸ *See* Robert Lewis, *Equity Eludes Women*, AARP BULLETIN, Nov. 10, 1991, at 1. The author recognized an unequal treatment of men and women, and found that "the earnings gap between the sexes [has] narrowed during the 1980s, but . . . [w]omen of all ages are paid about 72 cents for every dollar that men earn." *Id.* At the end of the 1950s, women assumed the role of mother and homemaker, but today women are moving into higher paying nontraditional jobs and devoting less time to the family. *Id.* Sociologist Barbara Reskin of Ohio State University states that "[g]enerally the more men in the occupation, the higher the pay." *Id.* Furthermore "[t]here is disturbing evidence that as women make significant inroads into formerly male-dominated jobs, those jobs are at risk of becoming female dominated, with corresponding wage loss or stagnation." *Id.* Since sexual harassment has more to do with power than gender, nonsexist promotion of women into powerful positions will help alleviate the problem; *see also* *Sepler*, *supra* note 2, at 69 (analyzing ways to prevent sexual harassment); *Goleman*, *supra* note 2, at C11 (finding power to be main impetus behind sexual harassment).

⁸⁹ *See* *Yates*, 819 F.2d at 636. The *Yates* court found that the basic question when using agency principles is whether the act complained of occurred within the scope of the agent's employment. *Id.* To resolve this issue, it is necessary to review such factors as where and when the act took place, and whether it was foreseeable. *Id.*; *see also* *AGENCY*, *supra* note 67, § 230. Section 230 specifically provides that "[a]n act, although forbidden, or done in a forbidden manner, may be within the scope of employment." *Id.* If the harassment oc-

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exception to strict liability when employers impose and enforce strict anti-harassment policies, because a supervisor will no longer be acting under any color of authority. In that event, liability should only be imposed by proving an employer acted negligently.⁹⁰ Negligence could be shown when the employer, with actual or constructive knowledge of the harassment, fails to take reasonable action to remedy the harassment,⁹¹ or when the employer does not take reasonable care in his selection of supervisors.⁹²

curring at the place of business, during working hours, and was carried out by someone with the authority to hire, fire, promote, and discipline the plaintiff, it would be considered foreseeable and the employer will be liable. *Yates*, 819 F.2d at 636 (quoting *AGENCY*, *supra* note 67, § 230). See generally *Turner*, *supra* note 45, at 45 (*Yates* holding equivalent to strict liability directly rejected in *Meritor*).

⁹⁰ See *Carrero v. New York City Hous. Auth.*, 890 F.2d 569, 572 (2d Cir. 1989). Employment policies against sexual harassment make it clear that such practices are not within the range of the supervisor's responsibilities. *Id.* Liability will be imposed on the employer for a hostile environment if he is negligent. *Id.*; *Dristin D. Sanko, Employer Liability and Sexual Harassment Under Section 1983: A Comment on Starrett v. Wadley*, 67 *DENV. U. L. REV.* 571, 583 (1990). More liberal positions advancing employer liability would compel safeguards against sexual harassment and easily eliminate sex bias. *Id.* See generally *Sperry*, *supra* note 12, at 918 (if employer has implemented policy to deal with sexual harassment and employee fails to take advantage of such policy, liability will not be imposed absent knowledge).

⁹¹ See *Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311, 1314 (11th Cir. 1989). The *Steele* court held that when an employee does not act as an agent, liability will attach only if the employer knew or should have known of the abusive condition and he failed to take prompt remedial action. *Id.*; see also *Ellison v. Brady*, 924 F.2d 872, 873 (9th Cir. 1991) (following "knowledge-no reasonable action" theory to impose liability on employer who constructively knew of harassment through his agent); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1417 (1987) (employer liable for negligently or recklessly allowing sexually antagonistic work atmosphere), *aff'd*, 928 F.2d 966 (10th Cir. 1991).

Such corrective action must be reasonably calculated to prevent the hostile environment from continuing. See *Paroline v. Unisys Corp.*, 879 F.2d 100, 108 (4th Cir. 1989) (employer may be liable even if he took remedial action if that action was not rationally calculated to halt harassment); *Waltman v. International Paper Co.*, 875 F.2d 468, 479 (5th Cir. 1989) (action of employer in sexual harassment case must be appropriate); *Dwyer v. Smith*, 867 F.2d 184, 187 (4th Cir. 1989) (employer liability may be rebutted if remedial action was reasonably determined to end harassment); *Barrett v. Omaha Nat'l Bank*, 726 F.2d 424, 427 (8th Cir. 1984) (same); *Katz v. Dole*, 709 F.2d 251, 256 (4th Cir. 1983) (same); *Elisa Kircher Cole, Recent Legal Developments in Sexual Harassment*, 13 *J.C. & U.L.* 267, 273 (1986) (same); *William Martucci, Sexual Harassment in the Workplace: A Legal Overview*, 3 *LAB. LAW.* 125, 135 (1987) (remedial action must be suitable to correct problem); *Egan*, *supra* note 6, at 386 (reasonably calculated entails more than merely showing that blanket policy against sexual harassment existed).

⁹² See *Perkins v. Spivey*, 911 F.2d 22, 30 (1990) (employer would be liable for injuries caused by negligently selected employees); *Paroline*, 879 F.2d at 112 (cause of action can arise from employer's negligent hiring of employees who cause injury); *Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1012 (8th Cir. 1988) (employer will be liable for act of negligent

Many courts have shown a willingness to impose liability when an employer had actual or constructive knowledge of the abusive environment and failed to take prompt remedial action reasonably calculated to stop the harassment.⁹³ Constructive knowledge is found where the sexual harassment is so pervasive that the employer should have known that the conduct existed.⁹⁴ This approach to supervisory sexual harassment will force the employer to eradicate abusive working environments, while protecting those employers that take appropriate measures against it.⁹⁵

The second level of the bifurcation, which deals with a co-em-

hiring); Jill Fedje, *Liability for Sexual Abuse: The Anomalous Immunity of Churches*, 9 LAW & INEQ. J. 133, 148 (1990) (recognizing employers direct liability for negligent hiring); Mary Robb, *Bad Samaritans Make Dangerous Precedent: The Perils of Holding an Employer Liable for an Employee's Sexual Misconduct*, 8 ALASKA L. REV. 181, 187 (1991) (same).

⁹³ See, e.g., *Daniels v. Essex Group, Inc.*, 937 F.2d 1264, 1270 (7th Cir. 1991). The *Daniels* court found that in order for a hostile environment claim to be valid under Title VII, the plaintiff must prove that the employer had knowledge of the harassment and did not take timely corrective action. *Id.*; *YMCA of the Pikes Peak Region v. NLRB*, 914 F.2d 1442, 1458 (10th Cir. 1990) (once employer learns of sexual mistreatment, duty arises to take immediate action to remedy situation); *Guess v. Bethlehem Steel Corp.*, 913 F.2d 463, 464 (7th Cir. 1990) (same); *EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1015 (8th Cir. 1989) (liability arises when upper level employee knew or should have known of harassment and no remedial procedures were invoked); *Hall*, 842 F.2d at 1015 (adopted "knowledge-no action" approach to find employer liable for discrimination when supervisors sexually harassed plaintiff); Jules I. Crystal, *Developments in Sex Discrimination Law 1989-1990*, in EMPLOYMENT LITIGATION 1990, at 571, 574 (PLI Litig. & Admin. Practice Course Handbook Series No. 397, 1990) (knowledge and failure to rectify situation quickly are needed elements to establish prima facie case of hostile environment sexual harassment).

⁹⁴ See *Ellison*, 924 F.2d at 878 (finding employer aware of co-employee's sexual harassment due to pervasiveness); *Hacienda Hotel*, 881 F.2d at 1515-16 (employer deemed to have constructive knowledge when harassment persistent or when agent of employer had knowledge); *Waltman*, 875 F.2d at 485 (finding liability to apply only when harassment pervasive); *Katz*, 709 F.2d at 256 (knowledge, even though not actual, is established when sexual abuse is so extensive that employer should have known of conduct); *Henson v. City of Dundee*, 682 F.2d 897, 905 (11th Cir. 1982) (plaintiff must show actual or constructive knowledge and failure to cure for employer liability); *Spencer v. General Elec. Co.*, 697 F. Supp. 204, 219 (E.D. Va. 1988) (employer should have known of employee's harassment because it was pervasive, and is responsible for supervisor's harassment because knowledge is imputed), *aff'd*, 894 F.2d 651 (4th Cir. 1990). The circuit court on appeal added that "of course, . . . where the sexual harassment is committed by one of the employer's supervisors, this element [of knowledge] is automatically met because . . . knowledge of the harassment is imputed to the employer through its agent-supervisor." *Id.*; Merriman & Yang, *supra* note 7, at 99 (employer liability exists when employer knew or had constructive knowledge of misconduct and failed to remedy it).

⁹⁵ See *Volk v. Coler*, 845 F.2d 1422, 1436 (7th Cir. 1988). The *Volk* court stated that the best way to eradicate sex discrimination is "by enforcing a strict liability rule that ensures compensation for victims and creates an incentive for the employer to take the strongest possible affirmative measures to prevent the hiring and retention of sexist supervisors." *Id.* (quoting *Horn v. Duke Homes, Inc.*, 755 F.2d 599, 605 (7th Cir. 1985)).

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ployee's sexual harassment, would apply the doctrine of respondeat superior.⁹⁶ However, since the co-employee has no authority, the conduct would not be within the scope of employment,⁹⁷ and employer negligence must be shown.⁹⁸ The negligence approach would encourage a harassment-free workplace, as envisioned by Title VII, by compelling the employer to act in furtherance of preventing or remedying sexually abusive work environments.⁹⁹

CONCLUSION

Sexual harassment has recently catapulted to the forefront of national awareness. As a result, many women have become determined to break the barrier of sexual harassment that has continued to compound their feelings of powerlessness in the workplace.

⁹⁶ See generally *Fruit v. Schreiner*, 502 P.2d 133, 135 (Ala. 1972) (respondeat superior imposes liability when employee commits tort during the scope of employment); *Hardy v. Brantley*, 471 So. 2d 358, 371 (Miss. 1985) (same); *Murell v. Goertz*, 597 P.2d 1223, (Okla. Ct. App. 1979) (same).

⁹⁷ See *Dias v. Sky Chefs, Inc.*, 919 F.2d 1370, 1375 (9th Cir. 1990). In *Dias*, the court held that an employer is liable for a co-employees' acts under respondeat superior doctrine when acting within the scope of employment. *Id.*; see also *Yates v. Avco Corp.*, 819 F.2d 630, 211 (6th Cir. 1987) (respondeat superior not applicable when tortious act not in furtherance of employer's purpose).

⁹⁸ See 29 C.F.R. § 1604.11 (d) (1990). This statute states in pertinent part: "With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action." *Id.*; *Hirschfeld v. New Mexico Corrections Dept.*, 916 F.2d 572, 577 (10th Cir. 1990) (since sexual harassment is not within scope of co-employee's employment, liability found when employer knows or should have known of conduct and failed to take immediate corrective action); *Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311, 1316 (11th Cir. 1989) (liability requires knowledge of employees tortious act and failure to remedy); *Lipsett v. University of P.R.*, 864 F.2d 881, 901 (1st Cir. 1988) (embraced "knowledge-no reasonable action" standard when tortious act was committed by lower level employees). For courts which have mislabeled this negligence standard as respondeat superior, see *Hirschfeld*, 916 F.2d at 572 and *Vance v. Southern Bell Tel. & Tel. Co.*, 863 F.2d 1503, 1512 (11th Cir. 1989); cf. *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417, 1421 (7th Cir. 1986) (respondeat superior supplies derivative liability whereas negligence and recklessness provide direct liability); *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1557 n.1 (11th Cir. 1987) (through operation of respondeat superior doctrine, employer may be liable to employee for working environment sexual harassment of nonemployees (citing *Henson v. City of Dundee*, 682 F.2d 897, 902, 905 n.9 (11th Cir. 1982))).

⁹⁹ See *Sepler*, *supra* note 2, at 74. *Sepler* found that the best tool against sexual harassment is prevention. *Id.* The author advised employees to: "(1) adopt a policy against sexual harassment; (2) adopt a complaint procedure; (3) educate supervisors; (4) investigate complaints; (5) take appropriate action once the investigation is complete." *Id.*; see also 137 CONG REC. H1662-01 (daily ed. March 12, 1991) (noting Title VII is tool "for combatting discrimination").

Those who have been victimized have resorted to the courts in increasing numbers to combat the abuse which is often trivialized by society. This increase in litigation has spurred the need for uniform standards to determine when conduct is actionable and when liability will be imposed. The reasonable victim standard offers the most viable approach to accomplishing this goal.

To extinguish sexual harassment in the workplace, the business community must educate employees as to what constitutes unacceptable behavior, and adopt and enforce strict policies against such behavior. Although some steps have been initiated, sexual harassment will not be eliminated unless businesses strictly enforce such policies against the harassers. To ensure the implementation of these practices, courts should hold employers strictly liable when they have failed to provide adequate protection to employees victimized by supervisors and negligently liable for co-employee's harassment. Without adopting and enforcing such policies, sexual harassment will persist, and ingrained notions of inequality based on sex will continue to perpetuate discrimination in the workplace.

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