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Sexists, Misogynists and the Male-Dominated Workplace: Whether Prevailing Workplace Norms Should Discredit a Hostile Work Environment in Williams v. General Motors Corp.

Maresa Torregrossa

SEXISTS, MISOGYNISTS AND THE MALE-DOMINATED WORKPLACE: WHETHER PREVAILING WORKPLACE NORMS SHOULD DISCREDIT A HOSTILE WORK ENVIRONMENT IN *WILLIAMS v. GENERAL MOTORS CORP.*

I. INTRODUCTION

Increasingly, women are entering traditionally male-dominated occupations such as construction and law enforcement.[1] Often, sexually crude language and behavior, pornography and graffiti permeate these places of employment.[2] Some commentators suggest that these sexual images are

1. *See generally* Vicki Schultz, Reconceptualizing Sexual Harassment, 107 YALE L.J. 1683, 1190-98 (1998) (discussing blue-collar, white-collar and professional women employed in male-dominated fields). Nearly thirty percent of the American work force is in blue-collar jobs, but women in the blue-collar environment have faired poorly. *See Women in Nontraditional Work: Hearing Before the Subcomm. on Civil and Comm. on the Jud. H.R.*, 100th Cong. 1 (1988) (statement of Hon. Don Edwards) (discussing the progress of women in labor force). For instance, women are increasingly entering jobs such as law enforcement. *See* Kevin Johnson, *Female Cops Survey: Women Muscled Out by Bias*, USA TODAY, Nov. 24, 1998, at 1A ("Today, women make up 13% of the force and the number is climbing."); *cf.* Kirsten Downey Grimsley et al., *Fear on the Line at Mitsubishi*, WASH. POST, Apr. 29, 1996, at A1 (discussing how women are moving into traditionally male-dominated factories).

Many workers experience emotional, physical and psychological stress, lower productivity, reduced self-confidence, loss of motivation and commitment to their work and their employer due to sexual harassment. *See* Kathryn Abrams, *The State of the Union: Civil Rights: Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183 (1989) (discussing devaluation of women who face hostile work environment sexual harassment); *see also* Teresa Godwin Phelps, *Gendered Space and the Reasonableness Standard in Sexual Harassment Cases*, 12 NOTRE DAME L. REV. 265, 267-68 (1998) (discussing effects of sexual harassment); Ellen Goodman, *Harassment Issue Larger Than Sex*, SAN ANTONIO EXPRESS-NEWS, Mar. 4, 1998, at 5 ("Harassment . . . has the form and function of denigrating women's competence for the purpose of keeping them away from male-dominated jobs or incorporating them as inferior, less capable workers."). In one extreme incident, sexual harassment was said to have caused a female police officer's suicide. *See* Margo L. Ely, *Threats, Sexism Blamed for Female Officer's Suicide*, CHI. SUN, May 8, 2000, at 8 ("A male-dominated workplace can be particularly lonely for few women who work in such a situation."). In another example, female air traffic controllers say that the stress of sexual harassment in this male-dominated work environment adds to the already tense atmosphere. *See* Chris Woodward & Donna Rosato, *Who's in Control?*, USA TODAY, July 18, 1997, at 1A ("These [air traffic] controllers are subjected to egregious acts of sexual harassment and hostile work environment solely because they were women working in a traditionally male-dominated profession.").

2. *See* Richard Wiener & Linda E. Hurt, *Interdisciplinary Approach to Understanding Social Sexual Conduct at Work*, 5 PSYCHOL. PUB. POL. & L. 556, 564 (1999) (discussing theories of social sexual conduct). Some commentators suggest that male-dominated workplaces are more sexualized, which in turn increases the probability that some of the social sexual conduct crosses over into sexual harassment. *See id.*

deterring women from entering into this type of work and have the effect of undermining women's competence and authority while on the job.[3] Sexual harassment suits are similarly on the rise.[4]

(discussing two surveys of male-dominated workplaces); *cf.* Schultz, *supra* note 1, at 1687 (articulating that sexual harassment is "designed to maintain work . . . as bastions of masculine competence and authority"). For example, the New York Police Department is male-dominated and "some say is notorious for sexually harassing female officers . . . ." Peter Noel, *Riding Gloria*, VILL. VOICE, Sept. 19, 2000, at 48.

3. *See* Eric Matusewitch, *Courts Split on 'Prevailing Workplace Norms' Defense to Sex Harassment Claims*, LEGAL INTELLIGENCER (Phila.), July 24, 2000, at 9 (describing potential detrimental effects on working women). For a discussion of the detrimental effects of sexual harassment, see *supra* note 1.

4. *See Sexual Harassment Charges EEOC & FEPA as Combined: FY 1992-FY 1999* (Jan. 12, 2000) (providing data on sexual harassment charges filed with EEOC), *available at* http://www.eeoc.gov/stats/harass.html. From 1992 to 1999, the Equal Employment Opportunity Commission's total charge receipts of sexual harassment have gone up 44.5%. *See id.* (providing data on total amount of sexual harassment charges filed with EEOC during 1992 to 1999). Whereas, the total sex-based charges have gone up 9.6%. *See id.* (Jan. 12, 2000) (complying data on sex-based charges filed with EEOC); *available at* http://www.eeoc.gov/stats/sex.html. Interestingly, the rate of merit resolution of the charges filed has only increased 6% from 1992 to 1999 despite a 44.5% increase in total receipts. *See id.* (providing data on merit resolution of total charges filed).

Sexual harassment suits against male-dominated workplaces may also be on the rise. *See, e.g.*, Ted Cilwick, *Female Paramedics Face Hostile Workplace*, SALT LAKE TRIB., Sept. 15, 1996, at C1 (discussing hostile work environment claim by female paramedics against county fire department); Tina Daunt & Anne-Marie O'Connor, *Female Deputies React with Shock to E-Mail Attacks*, L.A. TIMES, Apr. 6, 1999, at 1B (discussing outrage at e-mail messages that openly degraded female co-workers as underlying tension of male-dominated police force); Maggie Mulvihill & Ellen J. Silberman, *Trooper Sex Harassment Suit Settled for $109G in '97*, BOSTON HERALD, Oct. 8, 1999, at 4 (discussing female state trooper's claims against State); Peter Ponchna, *Jury Finds No Harassment in Navy Case*, PORTLAND PRESS HERALD, Nov. 25, 1999, at 1B (describing suit against Naval shipyard by female sheet metal worker); Mickie Valente, *Litigation in Investment in Her Future*, TAMPA TRIB., June 15, 1997, at 1 (discussing lawsuit by twenty-five female employees against Smith Barney alleging hostile work environment).

Sexual harassment of women in traditionally male careers could be a negative reaction by men to remind women that they are invading an area that society feels should not be their primary role. *See* RITA MAE KELLEY, GENDERED ECONOMY 91-92 (1991) (describing reasoning for sexual harassment in male-dominated occupations). Some surveys, however, suggest conflicting results on whether male-dominated workplaces create more sexual harassment or not. *See* Wiener & Hurt, *supra* note 2, at 563 (comparing two surveys conducted in male-dominated work groups). One such survey suggests that women in male-dominated work environments are subjected to "social sexual conduct" and tend to report sexual harassment more. *See id.* (describing results of survey of Los Angles workers). On the other hand, other surveys suggest that women in "traditional" jobs such as secretarial positions are equally exposed to sexual harassment in the workplace as those women in non-traditional occupations. *See id.* at 564-65 (describing differences between sexual harassment in traditional versus non-traditional occupations for women). Despite these results, it is important to remember that it is difficult, if not impossible, to predict "a causal link between social norms and incidents of harassment because researchers cannot directly manipulate social norms." *Id.* (illustrating impracticability of surveying work forces).

Courts are divided over whether these types of behavior, as they reflect the prevailing workplace culture or norm, should discredit the alleged misconduct in suits alleging "hostile work environment" sexual harassment under Title VII of the Civil Rights Act of 1964.[5] A hostile work environment is created by misconduct that is "sufficiently severe and pervasive to constitute sexual harassment."[6] The standard for judging whether conduct is severe and pervasive is whether the plaintiff subjectively perceived the conduct as severe and pervasive and whether that perception was objectively reasonable under a totality of the circumstances analysis.[7] Recently, in a same-sex sexual harassment case, the United States Supreme Court suggested, in dicta, that social context should be considered in the totality of the circumstances when judging a hostile work environment sexual harassment claim.[8]

In light of this recent Supreme Court dicta, there is a potential for courts to find that the "prevailing workplace norms" should factor into the totality of the circumstances analysis.[9] In *Williams v. General Motors Corp.*,[10] the United States Court of Appeals for the Sixth Circuit radically shifted its precedent by holding that the standard for sexual harassment should not vary according to the workplace and that a woman in such a workplace does not assume the risk of being sexually harassed.[11] The majority and dissenting opinions in this case illustrate the debate over what conduct violates Title VII and whether Title VII was meant to protect women in male-dominated workplaces.[12]

This Note discusses the Sixth Circuit's holding in *Williams* and addresses whether the prevailing workplace culture should be encompassed in the totality of the circumstance test for a hostile work environment claim. Part II describes the concurrent development of hostile work environment claims under Title VII and the use of the prevailing workplace

5. *See* Matusewitch, *supra* note 3, at 9 (discussing circuit split among courts). For a discussion of the differing opinions among courts, see *infra* notes 53-89 and accompanying text.

6. Harris v. Forklift Sys., Inc., 510 U.S. 17, 22 (1993).

7. *See id.*, 510 U.S. at 24 (giving standard to judge hostile work environment claims).

8. *See* Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 81 (1998) (articulating factors to consider when deciding whether conduct violates Title VII). For a further discussion of this case, see *infra* notes 73-89 and accompanying text.

9. For a discussion of the United States Supreme Court dicta regarding factors to consider in the totality of the circumstance test, see *infra* notes 72-89 and accompanying text.

10. 187 F.3d 553 (6th Cir. 1999).

11. *See Williams*, 187 F.3d at 562-64 (clarifying factors to be used in the totality of circumstances analysis). For further discussion of this Sixth Circuit case, see *infra* notes 90-153 and accompanying text.

12. For a further discussion of the majority opinion in *Williams*, see *infra* notes 90-116 and accompanying text.

norms in a totality of the circumstances analysis.[13] Part III and IV analyze the Sixth Circuit's conclusions regarding treatment of prevailing workplace norms in the totality of the circumstances test.[14] Finally, Part V focuses on the impact of the Sixth Circuit's decision and compares policy reasons for allowing this evidence into the totality of the circumstances analysis with the potential detriment on women's success in the workplace by doing so.[15]

II. BACKGROUND

A. *Overview of "Hostile Environment" Claims Under Title VII*

1. *The Guidelines*

Title VII of the Civil Rights Act of 1964 was enacted to prohibit discrimination in the workplace.[16] Sexual discrimination was a last minute addition to Title VII on the floor of the House of Representatives.[17] Today, some courts and commentators contend that the effective purpose of this addition to Title VII is to facilitate the women's movement into the American workplace.[18] At the time of enactment, however, commentators

13. For a further discussion of the development in hostile work environment claims, see *infra* notes 17-89 and accompanying text.

14. For a further discussion of *Williams*, see *infra* notes 90-153, and accompanying text.

15. For a further discussion of the impact of *Williams*, see *infra* notes 154-66 and accompanying text.

16. *See* Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (1995). Section 703(a)(1) of Title VII of the Civil Rights Act of 1964 ("Title VII") states:

> It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such an individual's race, color, religion, or national origin.

42 U.S.C. § 2000e-2(a).

Title VII "'afford[s] employees the right to work in environment free from discriminatory intimidation, ridicule, and insult'" whether based on sex, race, religion, or national origin. *See* Guidance on Current Issues of Sexual Harassment, *in* 2 EEOC COMPL. MAN. § 615 (Jan. 29, 1998) (quoting *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1986)). As the United States Courts of Appeals for the Eighth and Fifth Circuits have held, Congress' intention for Title VII was to "define discrimination in the broadest possible terms, thus, Congress chose neither to enumerate specific discriminatory practices, nor elucidate in extenso the parameter of such nefarious activities." Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971); *accord* Firefighters Inst. for Racial Equality v. City of St. Louis, 549 F.2d 506, 514 (8th Cir. 1971) (discussing scope of Title VII).

17. *See Vinson*, 477 U.S. at 63 (citing 110 CONG. REC. 2577-2584 (1964)).

18. *See* Rabidue v. Osceola Ref. Co., 805 F.2d 614, 621 (6th Cir. 1986) (articulating that Title VII is "mainstay in the struggle for equal employment opportunity for the female workers of America"); *see also* Smith v. Sheahan, 189 F.3d 529, 534-35 (7th Cir. 1999) (discussing purpose of Title VII); Abrams, *supra* note 1, at 1198 ("Title VII provides women with resources crucial to ending sexual harassment on the job."); *cf.* Andrews v. City of Philadelphia, 895 F.2d 1469, 1486 (3rd Cir. 1990) (holding that Title VII was enacted to eliminate prejudices and biases in American society).

believed that sexual discrimination should have legislation of its own and others hoped that its addition would cause the entire Act to fail.[19] Despite concern, the bill passed and as a result little legislative history exists to aid in interpretation of Title VII's prohibition of sexual discrimination.[20]

Under Title VII, not all conduct of a sexual nature in the workplace is sexual discrimination.[21] For example, sexual harassment was not part of the initial purpose of the Act.[22] In fact, the language of the statute does not mention sexual harassment.[23] Thus, the Equal Employment Opportunity Commission (EEOC) was compelled to define sexual harassment that constitutes sexual discrimination that violates Title VII.[24]

In 1980, the EEOC issued guidelines ("Guidelines") specifying what conduct in the workplace violates Title VII.[25] The EEOC declared that sexual harassment violates Title VII and established the criteria for determining a violation.[26] The Guidelines suggest that two types of sexual har-

19. *See Vinson*, 477 U.S. at 63 (citing 110 CONG. REC. at 2577, statement of Rep. Cellor quoting letter from United States Department of Labor); *see also* Jane Goodman-Delahunty, *Pragmatic Support for the Reasonable Victim Standard in Hostile Workplace Sexual Harassment Cases*, 5 PSYCHOL. PUB. POL'Y & L. 519, 521 (1999) (describing sentiment at time of enactment).

20. *See* Goodman-Delahunty, *supra* note 19, at 521 (articulating difficulty in interpreting Title VII).

21. *See* EEOC COMPL. MAN., *supra* note 16, § 615 (declaring need to define conduct that violates Title VII under Guidelines, EEOC Guidelines on Discrimination Because of Sex, Sexual Harassment, 29 C.F.R. 1604.11 (2000)).

22. *See* Goodman-Delahunty, *supra* note 19, at 519 (providing overview of sexual harassment law).

23. *See id.* at 521 (describing legislative history of Civil Rights Act).

24. *See* EEOC COMPL. MAN., *supra* note 16, § 615 (stating importance of defining sexual harassment).

25. *See* 29 C.F.R. § 1604.11 (establishing that sexual harassment violates Title VII).

26. *See id.* (declaring sexual harassment violates Title VII). The Guidelines provide that quid pro quo harassment occurs when "submission to or rejection of such conduct by an individual is used as the basis of employment decisions affecting such individual." 29 C.F.R. § 1604.11(a)(2).

Hostile work environment differs from quid pro quo claims because co-workers, subordinates or supervisors can create "a hostile atmosphere without threat of loss of tangible job benefits," and instead create a threat to the "terms, conditions, and privileges of employment." Goodman-Delhunty, *supra* note 19, at 523 (discussing differences in legal elements and doctrine of sexual harassment claims). Recently, the Supreme Court has ruled that, for purposes of employer liability, there is no distinction between quid pro quo sexual harassment and hostile work environment sexual harassment. *See generally* Burlington Industs., Inc. v. Ellerth, 524 U.S. 742, 749 (1998) (blurring distinction between types of sexual harassment actionable under Title VII).

Although theoretically quid pro quo and hostile work environment claims are distinct, they often occur together, yet should be evaluated independently. *See* EEOC COMPL. MAN., *supra* note 16, § 615. Specifically, the Guidelines define hostile work environment harassment as sexual misconduct that "unreasonably interfere[s] with an individual's work performance or creat[es] an intimidating, hostile, or offensive working environment." 29 C.F.R. § 1604.11(a)(3); *accord* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986) (quoting 29 C.F.R. § 1604.11(a)(3)). As

assment constitute a Title VII violation: "quid pro quo" and "hostile work environment."[27] The Guidelines suggest that one should "'determine whether alleged conduct constitutes sexual harassment . . . [by] look[ing] 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.'"[28] The EEOC used the Guidelines in its enforcement litigation, and many lower courts came to rely on them as well.[29] Although the Guidelines were given considerable deference by some courts, other courts refused to recognize sexual harassment claims that were not connected to tangible economic loss, creating a circuit split that needed resolution.[30]

2. *Case Law Developments of Hostile Work Environment Sexual Discrimination Claims Under Title VII*

In *Meritor Savings Banks v. Vinson*,[31] the United States Supreme Court addressed the issue of whether sexual harassment violates Title VII.[32] First, the Court adopted the Guidelines and confirmed that hostile work environment sexual harassment was an actionable claim under Title VII.[33] The Guidelines provide that sexual harassment is "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct

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the Guidelines suggest, the question of whether conduct constitutes sexual harassment is dependent upon the record as a whole and the totality of the circumstances. *See* 29 C.F.R. § 1604.11(b).

The Guidelines stated that "'while not controlling upon the courts by reason of their authority, they do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'" *Vinson*, 477 U.S. at 65 (quoting *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 141-142 (1976)).

27. *See* 29 C.F.R. § 1604.11(a)(2) (describing types of sexual harassment that are actionable under Title VII). The Guidelines also provide that a hostile work environment claim can violate Title VII regardless of whether it was linked to a quid pro quo claim. *See* EEOC COMPL. MAN., *supra* note 16, § 615 (discussing types of sexual harassment claims under Title VII).

28. EEOC COMPL. MAN., *supra* note 16, § 615. The Guidelines also recognize that the legality of each action will be determined on a case-by-case basis focusing on the facts. *See id.* (describing legality of cause of action under Act).

29. *See id.* (describing weight of authority of Guidelines).

30. *See* Goodman-Delahunty, *supra* note 19, at 523 (describing reason for circuit split).

31. 477 U.S. 57 (1986).

32. *See Vinson* 477 U.S. at 57 (articulating requirements for hostile work environment claims). The plaintiff started at the defendant's bank as a teller and was promoted to assistant branch manager under the supervision of Vice-President Taylor. *See id.* at 57 (describing facts of case). Plaintiff worked at the same branch until her discharge, at which time she brought a claim under Title VII alleging constant sexual harassment by Taylor. *See id.* (same). Plaintiff alleged that Taylor repeatedly demanded sexual favors, which she complied with out of fear of losing her job, and fondled her as well as other women employees at the branch. *See id.* (same).

33. *See id.* ("[W]e hold that a claim of 'hostile environment' sex discrimination is actionable under Title VII . . . .").

of a sexual nature."[34] The Court then added more stringent requirements than those suggested by the Guidelines, holding that the sexual harassment "must be sufficiently pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"[35] Although the Court identified a claim for hostile work environment sexual harassment, lower courts were left to specify elements of the cause of action and a legal standard by which the claim should be judged.[36]

Generally, lower courts agreed that in order for a plaintiff to prevail he/she "must prove: (1) membership in a protected class, (2) unwelcome sexual conduct that is (3) based on gender and (4) is sufficiently severe or pervasive to constitute sexual harassment."[37] While the lower courts agreed on the enumerated elements, they diverged on the standard that judged whether conduct was sufficiently severe and pervasive to constitute sexual harassment violating Title VII under *Vinson*.[38]

In *Rabidue v. Osceola Refining Co.*,[39] the United States Court of Appeals for the Sixth Circuit articulated the most controversial standard for determining whether the conduct alleged in a hostile work environment claim is sufficiently severe and pervasive to constitute a violation of Title VII.[40]

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34. EEOC Guidelines on Discrimination Because of Sex, Sexual Harassment, 29 C.F.R. § 1604.11(a) (2000) (defining sexual harassment).

35. *Vinson*, 477 U.S. at 67 (quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)).

36. *See* Jane L. Dolkart, *Hostile Environment Harassment: Equality, Objectivity, and the Shaping of the Legal Standards*, 43 EMORY L.J. 151, 161-62 (1994) (articulating elements for hostile work environment claim).

37. *Id.* (enumerating elements of hostile work environment sex discrimination claim). For the conduct to be considered unwelcome, "the correct inquiry is whether [the victim] by her conduct indicated that the alleged sexual advances were unwelcome." *Vinson*, 477 U.S. at 68; *see also* EEOC COMPL. MAN., *supra* note 16, § 615 (providing guidance on how to determine whether sexual conduct is unwelcome).

38. *See* Dolkhart, *supra* note 36, at 161-62 (describing jurisprudence after *Meritor*).

39. 805 F.2d 611 (6th Cir. 1986).

40. *See Rabidue*, 805 F.2d at 620 (determining factors used in totality of circumstances analysis). *Rabidue* was one of the most controversial decisions in the development of Title VII sexual harassment jurisprudence. *See* Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1525-27 (M.D. Fla. 1991) (criticizing objective standard used in *Rabidue*); *see also* Abrams, *supra* note 1, at 1212 n.118 (criticizing *Rabidue* decision for acceptance of displays of pornography at work); Nancy S. Ehrenreich, *Pluralist Myth and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177, 1232 (1990) (arguing that,"reasonableness in legal ideology [in *Rabidue*] is simply too closely tied to the idea of objectivity to the notion that the law can resolve legal conflict without reflecting or reinforcing any personal perspective"); Lucinda M. Finley, *A Break in the Silence: Including Women's Issues in a Torts Course*, 1 YALE J.L. & FEMINISM 41, 59 (1989) (discussing how *Rabidue* court permitted "male myths to bias their measurement of a reasonable person"); Phelps, *supra* note 1, at 275 (arguing that *Rabidue*, "'by applying the prevailing workplace factor, . . . locks the vast majority of working women into workplaces which tolerate anti-female behavior'" (quoting *Rabidue*, 805 F.2d at 627 (Keith, J., dissenting)).

In *Rabidue*, the plaintiff was the only woman in a salaried management position in the company.[41] When the plaintiff was fired, she filed a claim against her employer alleging that the company's refusal to stop the display of derogatory posters in private offices in combination with the anti-female obscenities directed at her and other women constituted sexual discrimination in violation of Title VII.[42]

The Sixth Circuit held that a plaintiff must show that: (1) a reasonable person, judging from the totality of the circumstances, would have felt that the alleged conduct interfered with his or her work performance and affected his or her psychological well-being; and (2) that the alleged conduct actually affected the well-being of plaintiff.[43] The Sixth Circuit also held that the totality of the circumstances test should include such factors as "the lexicon of obscenity that pervade[s] the environment of the workplace both before and after the plaintiff's introduction into its environs, coupled with the reasonable expectations of the plaintiff upon voluntarily entering that environment."[44] Accordingly, the Sixth Circuit announced that Title VII was not meant to have a "magical" effect on altering the American workplace where "humor and language are rough hewn and vulgar" or where "sexual jokes, sexual conversations and girlie magazines may abound."[45] Over the next seven years, *Rabidue* sparked enormous controversy and a diverse reaction in jurisprudence among lower courts.[46]

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41. *See Rabidue*, 805 F.2d at 623 (Keith, J., dissenting) (discussing facts of case); *see also* Matusewitch, *supra* note 3, at 9 (same). One poster that remained visible at the company for eight years displayed "a woman with a golf ball on her breasts with a man standing over her, golf club in hand, yelling 'Fore.'" *Rabidue*, 805 F.2d at 624 (Keith, J., dissenting) (describing common work areas of company).

42. *See Rabidue*, 805 F.2d at 624 (Keith, J., dissenting) (discussing facts of case).

43. *See id.* at 620 (discussing standard to be used).

44. *Id.* The court stated explicitly that "the presence of actionable sexual harassment would be different depending upon the personality of the plaintiff and the prevailing work environment and must be considered and evaluated upon an ad hoc basis." *Id.*

45. *Id.* at 620-21 (articulating purview of Title VII). The court agreed that:

> [I]t cannot seriously be disputed that in some work environments, humor and language are rough hewn and vulgar. Sexual jokes, sexual conversations and girlie magazines may abound. Title VII was not meant to—[n]or can it change this. It must never be forgotten that Title VII is the federal court mainstay in the struggle for equal employment opportunity for the female workers of America. But it is quite different to claim that Title VII was designed to bring about a magical transformation in the social mores of American workers. Clearly, the Court's qualification is necessary to enable *29 C.F.R. § 1604.11(a)(3)* to function as a workable judicial standard.

Id. (quoting Newblatt, Dist. J.).

46. *See* Dolkhart, supra note 36, at 163 (describing jurisprudence after *Rabidue*). Some commentators believe that the *Rabidue* court condoned the very behavior that Title VII intended to prohibit. *See Rabidue*, 805 F.2d at 626 (Keith, J., dissenting) ("Sexual jokes, sexual conversations and girlie magazines may abound . . . . Title VII's precise purpose is to prevent such behavior and attitudes from

In *Harris v. Forklift Systems, Inc.*,[47] the United States Supreme Court resolved part of the controversy by setting the standard for judging whether conduct is severe and pervasive enough to violate Title VII.[48] The Court held that in order for a claim to prevail, the employee must "subjectively perceive" the harassment as sufficiently severe and pervasive to alter the terms or conditions of their employment, and this subjective perception must be objectively reasonable.[49] Therefore, the Court held that a "hostile" or "abusive" environment should be determined by looking at all

poisoning the work environment of classes protected under the Act."); Dolkhart, *supra* note 36, at 162 ("The *Rabidue* decision has been much criticized for shielding and condoning misogynist behavior in the workplace."); *see also* Anita Bernstein, *Law, Culture, and Harassment*, 142 U. PA. L. REV. 1227, 1259 (1994) (stating that *Rabidue* judges were apologists for sexual harassers). As one commentator has pointed out, many courts at that time adopted the *Rabidue* standard, but others employed various tests from the reasonable woman standard to the reasonable victim standard. *See* Dolkhart, *supra* note 36, at 163-64 (describing various standards used amongst courts).

47. 510 U.S. 17 (1993).

48. *See Harris*, 510 U.S. at 21-23 (articulating standard for determining whether conduct is severe and pervasive enough to constitute Title VII violation). Plaintiff Harris was a manager at Forklift Systems, an equipment rental company. *See id.* at 18 (discussing facts of case). Defendant company's president, Hardy, supervised Harris and often targeted her as well as other female employees with unwelcome sexual innuendoes. *See id.* (same). Plaintiff complained to Hardy about his conduct, but he did not comply and, as result of further repeated sexual innuendoes, Plaintiff filed suit for sexual discrimination due to an "abusive work environment." *See id.* (same).

The United States District Court for the Middle District of Tennessee relied on *Rabidue* to deny Plaintiff's claim. *See id.* (describing district court's holding). The United States Court of Appeals for the Sixth Circuit affirmed and the Supreme Court granted certiorari to "resolve a conflict among the Circuits on whether conduct, to be actionable as 'abusive work environment' harassment, must 'seriously affect [an employee's] psychological well-being' or lead the plaintiff to 'suffer injury.'" *Id.* (comparing Rabidue; with Vance *v. S. Bell Tele. & Tele. Co.*, 863 F.2d 1503, 1510 (11th Cir. 1989); and Downes *v. FAA*, 775 F.2d 288, 292 (Fed. Cir. 1985), with Ellison *v. Brady*, 924 F.2d 872, 877-878 (9th Cir. 1991).

49. *See id.* at 21-22 (articulating standard to be used in determination of whether conduct is severe and pervasive). There was debate among leading civil rights organizations and feminist legal scholars about what should be the proper standard. *See* Dolkhart, *supra* note 36, at 165-67 (discussing various arguments made before Supreme Court regarding issue). For instance, the Women's Legal Defense Fund, in their amicus brief, rejected the reasonableness standard in favor of a subjective standard. *See id.* at 165 & n.47 (comparing standards put forth by other scholars and organizations). Even after the *Harris* decision, there has been debate over what standard should be applied. *Compare* Goodman-Delahunty, *supra* note 19, at 521 (supporting the reasonable victim standard), *with* Dolkhart, *supra* note 36, at 153 (proposing individualized standard such as test used in battered women self-defense cases). Different standards proposed and applied range from the "reasonable woman test" or the "reasonable victim test" to the "reasonable employee test." Goodman-Delahunty, *supra* note 19, at 521.

One particularly interesting argument proposes an individualized standard that takes into consideration the factors that inform the plaintiff's experience of harassment. *See generally* Dolkhart, *supra* note 36, at 167 (proposing individualized standard). The Court determined that "the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's

the circumstances such as frequency of conduct, type of conduct and whether the conduct interferes with an employee's work performance.[50]

Justice Scalia, in his dissent, criticized the majority opinion for failing to outline a cohesive legal standard that defines what conduct is "hostile" or "abusive."[51] Although the Supreme Court clarified the standard for judging a hostile work environment claim, the lower courts were left with considerable leeway in determining what evidence should credit or discredit a hostile work environment when judging the conduct by the totality of the circumstances.[52]

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position, considering 'all the circumstances.'" *See* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81 (1998) (quoting *Harris*, 510 U.S. at 23).

In addition, the Court held that the plaintiff did not need to prove "concrete psychological harm." *See id.* ("So long as the environment would reasonably be perceived, and is perceived, as hostile or abusive, there is no need for it also to be psychologically injurious."). The Court held that Title VII bars conduct that would seriously affect a reasonable person's psychological well being, but is not limited to this type of conduct. *See id.* (overruling psychological requirement of hostile work environment claim).

50. *See Harris*, 510 U.S. at 23 (articulating circumstances that should be considered in determining totality of circumstances). The Court held that the determination of severe and pervasive conduct cannot be "a mathematically precise test." *Id.* As a result, the Court suggests looking at all the circumstances such as "frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Id.* Justice Scalia agreed with the majority's list of factors that contribute to a hostile work environment, but wrote separately to state that no single factor is determinative. *See id.* at 24 (Scalia, J., dissenting).

51. *See id.* at 24 (Scalia, J., dissenting) ("'Abusive' or 'hostile,' which in this context I take to mean the same thing, does not seem to me a very clear standard.").

52. *See id.* (Scalia, J., dissenting) (criticizing majority opinion's indecisiveness). Justice Scalia suggested that the majority opinion would leave juries "virtually unguided" to decide whether there has been sex-related "misconduct." *Id.* Furthermore, Justice Scalia suggested that the standard articulated by the majority "open[s] more expansive vistas of litigation." *Id.*

As the Court noted in *Harris*, the determination of what is severe or pervasive is not a "mathematically precise test." *See id.* at 23 (discussing standard to be used in determination). Whether evidence is sufficient to be considered "severe or pervasive" in order to constitute a hostile work environment is extremely fact-sensitive and varies from jurisdiction to jurisdiction. *Compare* Stacks v. S.W. Bell Yellow Pages, Inc., 27 F.3d 1316, 1327 (8th Cir. 1994) (finding pornographic video that was shown at work probative of sexually hostile workplace), Beardsley v. Webb, 30 F.3d 524, 528, 532 (4th Cir. 1994) (holding supervisor who called plaintiff "honey" and "dear" and inappropriately touched her constituted hostile work environment), Kotcher v. Rose & Sullivan Appliances Ctr., 957 F.2d 59, 63 (2d Cir. 1992) (holding that numerous vulgar comments, lewd gestures, grabbing and comments about plaintiff's body constitute hostile work environment), Flom v. Waste Mg., No. 95C1934, 1997 U.S. Dist. LEXIS 3575, *18 (N.D. Ill. Mar. 17,1997) (denying summary judgment where plaintiff alleged four incidents of harassment together with daily abuse over five-year period), *and* Laughinghouse v. Risser, 786 F. Supp. 920, 929 (D. Kan. 1992) (finding that one-and-one-half years of unwanted touching and engaging in offensive conduct after plaintiff rejected sexual proposition was pervasive enough to constitute Title VII violation), *with* Hocevar v. Purdue

B. *Prevailing Workplace Norms*

In *Rabidue*, the Sixth Circuit announced two important principles to use in judging a hostile work environment claim: (1) the legal standard for judging whether alleged conduct is severe and pervasive; and (2) the concrete factors to consider in the totality of circumstances.[53] Although the Supreme Court in *Harris* overruled the *Rabidue* standard for judging whether conduct is severe and pervasive enough to constitute hostile work environment in violation of Title VII, it did not address whether existing conduct and a plaintiff's voluntary entry into such an environment should be factors in the totality of the circumstances test.[54] As a result, some

Frederick Co., No. 98-4075, 2000 U.S. App. LEXIS 19061, at *60 (8th Cir. Aug. 9, 2000) (affirming grant of summary judgment for hostile work environment claim based on evidence that co-workers made threats of violence towards women, referred to women as "fucking bitches" and played sexually explicit prank phone calls on co-workers), Stuart v. Gen. Motors Corp., 217 F.3d 621, 632, 634 (8th Cir. 2000) (holding that pornographic computer programs did not constitute hostile work environment), Wolak v. Vill. of Pelham Manor, 217 F.3d 157, 157 (2d Cir. 2000) (holding verdict that pornographic posters, videos and magazines shown at work did not constitute hostile work environment should stand), Hartsell v. Duplex Prods., 123 F.3d 766, 776 (4th Cir. 1997) (holding that alleged offensive comments were only mildly offensive and did not constitute hostile work environment), Brill v. Lante Corp., 119 F.3d 1266, 1274 (7th Cir. 1997) (finding four incidents over twelve-month period were not enough to survive summary judgment), Black v. Zaring Homes Inc., 104 F.3d 822, 826 (6th Cir. 1997) (holding that, despite finding verbal comments offensive and inappropriate, evidence revealed that company's employees did not always act professionally and comments made during meetings were not directed at plaintiff), McKenzie v. Ill. Dept. of Transp., 92 F.3d 473, 480 (7th Cir. 1996) (holding three comments over three-month period were not pervasive enough to constitute hostile work environment), *and* Weiss v. Coca-Cola Bottling Co., 990 F.2d 333, 334 (7th Cir. 1993) (holding that being called "dumb blonde" and being asked out for dates by supervisors were not sufficient to find hostile work environment).

53. *See* Rabidue v. Osceola Ref. Co., 805 F.2d 611, 620 (6th Cir. 1986) (articulating standard and factors to be considered when judging claim). Determining what behavior is considered severe and pervasive to constitute a hostile environment under Title VII has never been easy. *Cf.* Hostetler v. Quality Dining, Inc., 218 F.3d 798, 807 (7th Cir. 2000) (articulating where court made distinction whether conduct violates Title VII). As the United States Court of Appeals for the Seventh Circuit pointed out in *Hostetler*, the Title VII threshold is passed with conduct such as sexual assaults, other physical contact, sexual solicitations, intimidating words or acts, obscene language or gestures and pornographic pictures. *See id.* (explaining conduct considered to be violation of Title VII (citing *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 430-31 (7th Cir. 2000))). Yet, "occasional vulgar banter, tinged with sexual innuendo" does not pass the threshold. *Id.* (citing *Baskerville*, 50 F.3d at 430-31).

The distinction or combination of conduct that constitutes a hostile work environment is blurred, which creates difficulty in predicting case to case or jurisdiction to jurisdiction what will constitute a hostile work environment. *See* Guidelines on Discrimination Because of Sex, Sexual Harassment, 29 C.F.R. § 1604.11(b) (2000) ("The determination of the legality of a particular action will be made from the facts, on a case by case basis.").

54. *See Harris*, 510 U.S. at 21-23 (announcing standard and factors to consider when viewing circumstances). The Court in *Harris* did not address existing conduct of that in *Rabidue* because the facts of *Harris* did not include company wide

courts rely on *Rabidue* to hold that these factors should be considered in the totality of the circumstances.[55]

In *Gross v. Burggraf Construction Co.*,[56] for example, the United States Court of Appeals for the Tenth Circuit was persuaded by the analysis used in *Rabidue*.[57] The plaintiff in *Gross* was an operator of a water truck at a construction site.[58] She alleged that her supervisor repeatedly used profanity in reference to her and demeaned her in front of others.[59] The Tenth Circuit, relying in part on the reasoning of *Rabidue*, held that "[i]n the real world of construction work, profanity and vulgarity are not perceived as hostile or abusive[,]" and that plaintiff's claim should be evaluated "in the context of a blue collar environment . . . ."[60] As a result, the Tenth Circuit affirmed the grant of summary judgment in favor of the defendant.[61]

Other courts specifically focus on whether the alleged offensive conduct pre-existed plaintiff's arrival and on plaintiff's choice of entering such an environment.[62] The EEOC, however, explicitly rejected both vari-

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sexual misconduct. *Compare Rabidue*, 805 F.2d at 623-24 (Keith, J., dissenting), *with Harris*, 510 U.S. at 19.

55. *See* Eiland v. Detroit Bd. of Educ., No. 92-CV-76328-DT, 1997 U.S. Dist. LEXIS 18404, at *18 (E.D. Mich. Sept. 30, 1997) (using factors articulated in *Rabidue* to grant summary judgment for employer); *see also* Fortner v. Kansas, 934 F. Supp. 1252, 1269 (D. Kan. 1996) (relying on factors articulated in *Rabidue* to grant summary judgment in favor of defendant because "profanity and cussing are part of the daily life in the military"). In fact, some courts allow employers to assert a "prevailing work environment or customary business practice defense" against a hostile work environment harassment claim. *See* Allan H. Weitzman, *Employer Defenses to Sexual Harassment Claims*, 6 DUKE J. GENDER L. & POL'Y 27, 52 (1999) (describing defense generally); *see also* Matusewitch, *supra* note 3, at 9 (discussing viability of defense).

56. 53 F.3d 1531 (10th Cir. 1995).

57. *See Gross*, 53 F.3d at 1538 (relying on *Rabidue* to alter standard).

58. *See id.* at 1535-36 (discussing facts of case). The supervisor once declared, to one of the plaintiff's male co-workers, in reference to the plaintiff: "[D]on't you just want to smash a woman in the face?" *See id.* at 1535 (describing facts of case).

59. *See id.* at 1536 (describing facts of Title VII claim).

60. *Id.* at 1537-38. The Court also remarked, "Speech that might be offensive or unacceptable in a prep school faculty meeting, or on the floor of Congress, is tolerated in other work environments." *Id.*

61. *See id.* at 1547-48 (affirming grant of summary judgment). The United States Court of appeals for the Tenth Circuit held that when it looked at the evidence as a whole, the totality of the circumstances did not support a viable Title VII claim. *See id.* at 1547 (stating that when viewing totality of circumstances, plaintiff failed to demonstrate genuine issue of material fact).

62. *See* Ukarish v. Magnesium Elektron, 31 FEP Cases (BNA) 1315 (D.N.J. 1983) (finding no hostile work environment at chemical plant where sexually oriented language pre-existed plaintiff's arrival); *see also* Eiland v. Detroit Bd. of Educ., No. 92-CV-76328-DT, 1997 U.S. LEXIS 18404, at *17-19 (E.D. Mich. Sept. 30, 1997) (relying on reasoning in *Rabidue* to adjust prevailing work place norms standard). Focusing on this part of the *Rabidue* decision is essentially an assumption of the risk defense similar to that used in tort litigation. *See* Weitzman, *supra* note 55, at 54 (stating that "assumption of the risk defense, like the prevailing work environment defense is based on the voluntariness, consent and knowledge," of

ations of the prevailing workplace defense and criticized the reasoning in *Rabidue*.[63] The EEOC holds that the reasonable person standard should be viewed from the victim's perspective and not stereotypical notions of acceptable behavior.[64] Similarly, some courts reject the defense created

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the woman when she entered into employment). The assumption of the risk and "prevailing workplace norms" defenses are suggested as viable defenses for employers. *See id.* at 52-56; *see also* Matusewitch, *supra* note 3, at 9 (describing court split on "prevailing workplace norms defense."). Other courts suggest that the defense "should only be used in suits that arise against non-employees or where 'sex appeal is a substantial part of [the defendant's] business and of [the plaintiff's] job in particular.'" *See* Weitzman, *supra* note 55, at 53. (quoting Kelly Ann Cahill, *Hooters: Should There Be an Assumption of Risk Defense to Some Hostile Work Environment Sexual Harassment Claims?*, 48 VAND. L. REV. 1107, 1138 (1995)). Advocates of the defense believe that by allowing women to assume the risk of sexual harassment, women are permitted to make voluntary decisions and freely market their sexuality if they wish. *See id.* (discussing assumption of risk defense). The viability of assumption of the risk defense and the prevailing workplace norms defense, however, becomes more questionable depending upon the type of employment involved. *See generally* Cahill, *supra* (addressing whether assumption of risk defense should apply to certain hostile work environment claims).

For instance, the controversy over this type of defense was highlighted when a sexual harassment suit was filed against Hooters Restaurants. *See id.* at 1108 (describing assumption of risk defense). "Hooters" is a slang term for women's breasts and Hooters Restaurant is an establishment known for employing waitresses "'available . . . to be ogled . . . .'" Cahill, *supra* at 1108 & n.2 (quoting remark of Patricia Ireland, President of National Organization for Women in Patty Shillington, *Hooters Concept: Sexist or Just Good, Clean Fun?*, MIAMI HERALD, Aug. 1, 1993).

Several former waitresses filed suit alleging sexual harassment against Hooters. *See id.* (describing facts of case). The plaintiffs claimed that the name of the restaurant and the uniforms that they were required to wear contributed to the hostile work environment and thus fostered sexual harassment. *See id.* (describing details of complaint). Although the case ended in settlement, it illustrates the extreme position in favor of allowing an assumption of the risk defense as well as the fact sensitivity of hostile work environment suits. *See* Weitzman, *supra* note 55, at 53-54 (describing sparse application of assumption of risk defense).

Interestingly, one court held that a former receptionist who was warned during an initial interview that she would be exposed to coarse language and affirmed that she could handle it, was not barred from bringing an action against her employer for hostile work environment sexual harassment. *See* Williams v. Snyder Roofing & Sheet Metal, 995 F. Supp. 1148, 1151 (D. Or. 1998) ("No facts were stated which would put [plaintiff] on notice that she was agreeing to waive her statutory right to work in an environment free from discriminatory intimidation, ridicule and insult."). The *Williams* court denied defendant's summary judgment motion, finding:

> The facts relied upon by [defendant] do not as a matter of law constitute a knowing waiver of [plaintiff's] statutory rights under Title VII. [Plaintiff] is not equitably estopped from proceeding with her claim for damages for a sexually hostile work environment because of her representation in the initial employment interview that bad language would not offend her.

Id.

63. *See* EEOC COMP. MAN., *supra* note 16, § 615 Vol. at n.20 (rejecting reasoning in *Rabidue*).

64. *See id.* (providing guidance on the issue). The EEOC holds that a woman does not give up her right to be free from sexual harassment when choosing to

by *Rabidue* and hold that a male-dominated work environment can credit a claim of a hostile work environment.[65] In addition, other courts go further to find a duty on the part of the male-dominated employer to ensure that female employees are not sexually harassed.[66]

In *Andrews v. City of Philadelphia*,[67] for example, the United States Court of Appeals for the Third Circuit announced a duty on the part of the employer to dispel sexist sentiment in the workplace.[68] The plaintiffs were former police officers who were subjected to repeated harassment by

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work in an environment that has traditionally included vulgar, anti-female language. *See id.* (citing *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 626 (Keith, C.J., dissenting) (rejecting explicitly Sixth Circuit reasoning in *Rabidue*). The Commission "believes that a workplace in which sexual slurs, displays of 'girlie' pictures, and other offensive conduct abound can constitute a hostile work environment even if many people deem it to be harmless or insignificant." *Id.*

65. *See, e.g.*, Slayton v. Ohio Dep't of Youth Servs., 206 F.3d 669, 678 (6th Cir. 2000) (affirming jury verdict for plaintiff corrections officer who alleged hostile work environment because she was routinely called "bitch" and continually being exposed to explicit rap music, among other sexual innuendos and offensive references); Hall v. Gus Constr. Co., 842 F.2d 1010 (8th Cir. 1988) (holding that, in male-dominated construction site, "[i]ntimidation and hostility toward women because they are women can obviously result from conduct other than explicit sexual advances"); Gonzalez v. Bratton, No. 96 Civ. 6330(VM), 2000 U.S. Dist. LEXIS 12002, at *3 (S.D.N.Y. Aug. 21, 2000) (denying summary judgment for defendant police department due to evidence of systematic incidents of misconduct in male-dominated environment); Magnuson v. Peak Technical Servs., Inc., 808 F. Supp. 500, 505 (E.D. Va. 1992) (holding that genuine issues of material fact existed in plaintiff's claims of hostile work environment based on evidence that she was called "sweetheart" and "hon" by co-workers in a male-dominated car dealership where they occasionally hired strip dancers to perform at work). *But see e.g.*, Rouse v. City of Milwaukee, 921 F. Supp. 583, 589-90 (E.D. Wis. 1996) (granting summary judgment for defendant despite court's "cognizan[ce] of the fact that the combination of a male-dominated institution and the alleged existence of a code of silence on the police force could produce a stifling environment for sexual harassment claims").

66. *See generally* Jenson v. Eveleth Taconite Co., 130 F.3d 1287, 1304 (8th Cir. 1997) (holding that Eveleth's pattern of sexual harassment "destroyed the self-esteem of the [women exposed to it]"). In *Jenson*, the court declined to view the culture of the mining industry, which allows sexual harassment, as a mitigating factor of Eveleth's culpability. *See id.* at 1292 (rejecting culture defense).

Female employees of Eveleth Mines filed a class action suit alleging sexual discrimination in violation of Title VII. *See id.* at 1290 (discussing beginning of class action suit). The district court found that the male-dominated workplace made many references to sex and to women as sexual objects that created a sexualized workplace. *See id.* at 1292 (discussing district court's findings). The United States Court of Appeals for the Eighth Circuit recognized that the female employees were subjected to "humiliation and degradation" and it found that the employer had an increased obligation to prevent a hostile work environment for females. *See id.* at 1304 (denouncing the "callous pattern and practice of sexual harassment engaged in by [defendant company]").

67. 895 F.2d 1469 (3rd Cir. 1990).

68. *See Andrews*, 895 F.2d at 1486 (holding employers have duty to prohibit sexist sentiment in male-dominated workplace).

their fellow workers and supervisors.[69] The defendants "vigorously argued" a prevailing workplace norms defense, stating "that a police station need not be run like a day care center."[70] The Third Circuit held that employers cannot be held accountable for isolated incidents of sexism but did not "consider it an unfair burden of an employer of both genders to take measures to prevent an atmosphere of sexism to pervade the workplace."[71] Although not all courts go as far as the Third Circuit, most courts hold that prevailing workplace norms such as pornography, sexual conversations and jokes should not discredit a claim for hostile work environment sexual harassment.[72]

Recently, in *Oncale v. Sundowner Offshore Services Inc.*,[73] the United States Supreme Court provided further guidance on the factors to be included in the determination of the totality of the circumstances.[74] Al-

69. *See id.* at 1471 (discussing facts of case). The alleged harassment included "abusive language, destruction of property and work product, anonymous telephone calls and . . . physical injury to [one plaintiff]". *See id.* (discussing facts of case).

70. *Id.* at 1486.

71. *Id.* The court did not entertain the defense and found that an employer has a duty to "take measures to prevent an atmosphere of sexism to pervade the workplace." *Id.* Furthermore, the court elaborated that "[w]hile Title VII does not require that an employer fire all 'Archie Bunkers' in its employ, the law does require that an employer take prompt action to prevent such bigots from expressing their opinion in a way that abuses or offends their co-workers." *Id.* (quoting *Davis v. Monsanto Chem. Co.*, 858 F.2d 345, 350 (6th Cir. 1988)). In addition, the court held that the totality of the circumstances test is the cumulative effect of individual incidents. *See id.* at 1484 (holding that factfinder must look at gravity of all incidents together). The court stated "that the fact finder should not 'necessarily examine each alleged incident of alleged harassment in a vacuum.'" *Id.* (quoting *Vance v. S. Bell Tel. & Tel. Co.*, 863 F.2d 1503, 1510 (11th Cir. 1989)).

72. *See* White v. N.H. Dep't of Corrs., 221 F.3d 254, 260 (1st Cir. 2000) (upholding jury verdict for plaintiff-employee of corrections facility where evidence demonstrated that pornography and sexual slurs were commonplace); *see also* Barbetta v. Chemlawn Servs. Corp., 669 F. Supp. 569, 573 (W.D.N.Y. 1987) (holding that hostile work environment could be based on anti-female language and posters). In *Barbetta*, the district court criticized the reasoning in *Rabidue* and found that a hostile work environment could be established by commonplace pornography and vulgar comments about plaintiff and other females in the office. *See id.* at 573 n.2 (criticizing *Rabidue*); *see also* Bennett v. N.Y. City Dep't of Corr., 705 F. Supp. 979, 986 (S.D.N.Y. 1989) (holding that prison atmosphere "does not mean that anything goes" between co-workers). Some courts find that a "boys will be boys" defense reinforces the prevailing level of discrimination. *See* Matusewitch, *supra* note 3, at 9 (citing *Atwood v. Biondi Mitsubishi*, 61 FEP Cases (BNA) 1357 (W.D. Pa. 1993).

73. 523 U.S. 75 (1998).

74. *See Oncale*, 523 U.S. at 81 (holding that there must be "careful consideration of the social context" in Title VII sexual harassment cases). This case was a same-sex harassment case where plaintiff alleged that he was "forcibly subjected to sex-related, humiliating actions" and was physically assaulted in a sexual manner. *See id.* at 77 (describing facts of case). Oncale complained to his supervisors but the conduct did not stop. *See id.* (same). Oncale filed suit alleging he was discriminated against in his employment because of his sex. *See id.* (discussing claim filed in district court). The question presented was "whether workplace harassment can

though the Supreme Court has never explicitly addressed the issue of whether prevailing workplace norms can discredit misconduct in the totality of the circumstances, dicta in *Oncale* suggests that the alleged misconduct should be determined by looking at the "social context" of the workplace.[75] Accordingly, the Court emphasized the importance of determining all harassment cases with "careful consideration of social context in which particular behavior occurs and is experienced by its target."[76] To ensure that Title VII does not become a "general civility code" for the American workplace, the Court suggested discounting alleged sexual misconduct by looking with "an appropriate sensitivity to social context."[77] The Court proposed that "common sense" and "an appropriate sensitivity to social context" are two of the factors that judges and juries can use to properly determine whether conduct constitutes a hostile work environment for the plaintiff.[78] These criteria, however, are vague and can be interpreted to support opposite positions.[79] Courts wishing to consider the prevailing workplace norms find support in these vague statements in *Oncale*, whereas other courts use the vague statements to mean that pre-

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violate Title VII's prohibition against 'discrimination . . . because of . . . sex.'" *Id.* at 76 (quoting 42 U.S.C. § 2000e-2(a)(1)).

The Court held that: (1) Title VII prohibits discrimination "because of . . . sex" for men as well as women; (2) conduct need not be motivated by sexual desire; (3) a plaintiff must prove in same-sex harassment cases under Title VII that the conduct is at issue because of sex; and (4) in Title VII sexual harassment cases, there must be a careful consideration of the social context in which conduct occurs and is experienced by the target of the behavior. *See id.* at 78-81 (holding that same-sex harassment is actionable under Title VII).

75. *See id.* at 82 (articulating social impact of workplace behavior).

76. *Id.* at 81 (discussing inquiry of totality of circumstances). The Court stated:

> Title VII does not prohibit all verbal or physical harassment in the workplace; it is directed only at 'discrimination . . . because of . . . sex.' We have never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words use, have sexual content or connotations.

Id. at 80.

77. *See id.* at 82 ("Common sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing . . . and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive."). In addition, the Court held that "[t]he real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed." *Id.* at 81-82.

78. *See id.* at 82 (addressing courts' and juries' ability to distinguish between "simple teasing" or "conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive").

79. *See* Weitzman, *supra* note 55, at 58-59 (discussing recent Supreme Court opinions that provide little guidance on sexual harassment law). As Weitzman points out: "[*Oncale*] ha[s] provided a glass that is either half-full or half-empty . . . . [I]t is clear that there is still a great deal of maneuvering room within the language of the Court." *Id.* at 59.

vailing workplace norms should not discredit a hostile work environment claim.[80]

In *Smith v. Sheahan*,[81] for instance, the United States Courts of Appeals for the Seventh Circuit relied on the dicta in *Oncale* to hold that the prevailing work place norms defense should not prevail in the courts.[82] The Seventh Circuit held that the district court erred in relying on *Rabidue* to discount the seriousness of defendant's misconduct.[83] The Seventh Circuit held that such reasoning, as employed by the district court in this case and by the Sixth Circuit in *Rabidue*, misconstrues Title VII's true purpose.[84] Specifically, the Seventh Circuit held that "[e]ven if this aspect of *Rabidue* survived *Harris*, we think it did not outlive *Oncale*."[85] Conversely, even though the Seventh Circuit held *Oncale* overruled this remaining aspect of *Rabidue*, it recognized that juries and judges are in a discretionary position to use "common sense" and "an appropriate sensitivity to social context" to determine whether the prevailing workplace norms should discredit a claim in the totality of the circumstances.[86] Thus, the *Smith* deci-

80. *See id.* (discussing vagueness of recent Supreme Court opinions).

81. 189 F.3d 529 (7th Cir. 1999).

82. *See id.* at 535 (noting that "nothing in *Oncale* . . . hints at the idea that prevailing culture can excuse discriminatory actions"). In *Sheahan*, the plaintiff was a guard at defendant's jailhouse who alleged hostile work environment sexual harassment after being assaulted by a co-worker who routinely called her "bitch" and threatened to "kick [her] ass." *See id.* at 530-31 (discussing grounds for grant of summary judgment in district court). The district court granted summary judgment on the grounds that plaintiff's experience of harassment was too isolated to be actionable under Title VII and was discounted partially because she "'voluntarily' stepped into the 'aggressive setting' of the jail." *See id.* at 530, 534 (discussing decision of court below).

83. *See id.* at 534 (discussing district court's reasoning).

84. *See id.* at 534-35 (criticizing reasoning in *Rabidue*). The reasoning in *Rabidue*, as the court explains, would bar minorities and women from bringing a Title VII hostile work environment claim unless the conduct was "out of line with the subculture of that particular work setting." *Id.* The Seventh Circuit also criticized the district court for relying on the assumption of the risk reasoning in *Rabidue* to discount the seriousness of the misconduct. *See id.* The court pointed out that under *Rabidue* reasoning:

> [A]n African-American worker in an otherwise all-white workplace in an area with a history of race discrimination would have to withstand a heightened degree of race-based abuse before he could bring an actionable claim than the same worker in a setting with a greater tradition of interracial tolerance.

Id. at 535.

85. *Id.* at 535 (holding that nothing in *Oncale* suggests that "prevailing culture can excuse discriminatory actions"). Further, the court suggested that because the dicta in *Oncale* is silent on the issue, it prohibits the inclusion of prevailing workplace norms into the totality of the circumstances. *See id.* at 534-35 (holding that "nothing in *Oncale* even hints at the idea that prevailing culture can excuse discriminatory actions").

86. *See id.* at 535 (noting that juries should determine on case by case basis how much weight to give to prevailing culture). Yet, the court also pointed out that "the culture of workplaces does differ from setting to setting" and thus, reaffirms that juries and judges "must" use their "common sense" and "appropriate

sion illustrates that the dicta in *Oncale* creates ambiguous criteria for determining whether prevailing workplace norms should be included in the totality of the circumstances analysis.[87] Similarly, in *Williams v. General Motors Corp.*,[88] the United States Court of Appeals for the Sixth Circuit entered the debate regarding the degree to which prevailing workplace norms should be evaluated in the totality of the circumstances and put forth its interpretation of the *Oncale* dicta.[89]

III. FACTS: *WILLIAMS V. GENERAL MOTORS CORP.*

Plaintiff Marilyn Williams sued General Motors Corporation ("GM") alleging hostile work environment sexual harassment under Title VII of the Civil Rights Act.[90] The plant where she worked was male-dominated.[91] In May 1995, she was transferred to the "midnight shift" to fill a vacancy caused by another employee's retirement.[92] During the year on the midnight shift, co-workers referred to plaintiff as "slut" and subjected her to several pranks and sexual remarks.[93] For example, Williams' supervisor repeatedly made her a target of harsh sexual innuendo.[94] For instance, one day when Williams was bending over, the supervisor came up behind her and said, "You can back right up to me."[95]

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sensitivity to social context" when determining whether certain behavior violated Title VII. *Id.* (relying on *Oncale*).

87. *See id.* ("[N]othing in *Oncale* even hints at the idea that prevailing culture can excuse discriminatory actions . . . . At the same time, we recognize that the cultures of workplaces does [sic] differ from setting to setting."); *see also* Weitzman, *supra* note 55, at 59 (arguing that *Oncale* can provide support for opposite positions).

88. 187 F.3d 553 (6th Cir. 1999).

89. *See Williams*, 187 F.3d at 562 (clarifying totality of circumstances test).

90. *See id.* at 558 (discussing facts of case). Plaintiff was employed at GM for more than thirty years. *See id.* (summarizing procedural and factual background).

91. *See id.* at 563 (discussing plant's work environment).

92. *See id.* (stating facts). Plaintiff had various jobs during her thirty years at the plant. *See id.* at 559 (discussing facts of case).

93. *See id.* at 559 (same). The district court summarized fifteen specific alleged incidents in its unpublished memorandum opinion. *See id.* (same). The incidents ranged from general use of profanity to a co-worker, telling her to "rub up against [him] anytime." *Id.*

94. *See id.* at 563 (discussing facts of case). Once plaintiff's supervisor said, while looking at her breasts, "'You can rub up against me anytime.'" *Id.* On another occasion, plaintiff's supervisor placed his hand around her neck and placed his face against hers, and noticing that she had written "Hancock Furniture Company" on a piece of paper, said, "'You left the dick out of the hand.'" *Id.*

95. *Id.* at 559. Other incidents included co-workers saying to Williams, "Hey Slut" and "I'm sick and tired of these fucking women." *Id.* Pranks directed toward the plaintiff included being locked in her work area, being hit with a thrown box and finding her office supplies glued to her desk. *See id.* (listing facts that were more than "merely oafish behavior").

A year after switching to the midnight shift, Williams filed suit against GM under Title VII of the Civil Rights Act and under Ohio state law.[96] The United States District Court for the Northern District of Ohio granted summary judgment in favor of GM, finding that although the incidents offensive, they "were not so severe and pervasive as to constitute a hostile work environment under the standard set out in *Harris*."[97] The district court separated the plaintiff's complaints of alleged hostile work environment into: "(1) foul language in the workplace; (2) mean or annoying treatment by co-workers; (3) perceived inequities of treatment; and (4) sexually related remarks directed towards [Williams]."[98] The district court examined the plaintiff's enumerated allegations and dismissed each of them, claiming that some of her allegations were a "second class of complaints."[99] On appeal, the United States Court of Appeals for the Sixth Circuit reversed the grant of summary judgment and clarified the factors to be considered in the totality of the circumstances test when determining a hostile work environment claim involving prevailing workplace norms typical of a male-dominated workplace.[100]

IV. ANALYSIS

A. *Narrative Analysis*

1. *Majority Opinion*

In reversing the grant of summary judgment on the hostile work environment claim, the Sixth Circuit first discussed the standard of review and the background for hostile work environment claims.[101] Second, the

96. *See id.* (noting procedure of case). Plaintiff "also alleged retaliation under Title VII for having filed sex and race discrimination charges with the Ohio Civil Right Commission." *Id.* at 560 (detailing time-line of events of case).

97. *Id.* (describing holding of district court). Similarly, the court held that plaintiff did not allege a prima facie case of retaliation under Title VII. *See id.* at 558 (summarizing holding in district court).

98. *Id.* at 562.

99. *See id.* (quoting district court's holding). On the allegation of foul language, the district court noted that "although not condoned by the Court and though certainly well beyond the boundaries of polite behavior, [it] does not satisfy the test enunciated in *Harris*." *Id.*

100. *See id.* at 559, 562-64 (articulating analysis to be used for plaintiffs alleging harassment in male-dominated workplaces).

101. *See id.* at 560 (discussing court's review of procedure of case). The court explained that review of a district court's grant of summary judgment is de novo. *See id.* (citing *City of Mt. Clemens v. EPA*, 917 F.2d 908, 914 (6th Cir. 1990)). The court noted that summary judgment is only proper where there are no genuine issues of material fact and the moving party is entitled to a judgment as a matter of law. *See id.* (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986)). Further, the court determined that all evidence and inferences must be viewed in the light most favorable to the non-moving party, in this case the plaintiff. *See id.* (citing *Smith v. Hudson*, 600 F.2d 60, 66 (6th Cir. 1979)). Therefore, the court concluded that "'[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial,'" and summary

Sixth Circuit discussed the standard developed in *Harris* and reaffirmed in *Oncale* for the totality of the circumstances analysis.[102] The court held that a hostile work environment violation of Title VII must be determined by the totality of circumstances using "'common sense'" and an "'appropriate sensitivity to social context'" in the analysis.[103] Third, relying on this premise, the Sixth Circuit held that the district court improperly analyzed each allegation separately.[104] Accordingly, the Sixth Circuit reasoned that when incidents are separated into their "theoretical component parts," each complaint could be more easily dismissed.[105] As a result, the Sixth Circuit stressed that the "totality-of-circumstances examination should be viewed as the most basic tenet of the hostile-work-environment cause of action."[106]

Fourth, in holding that anti-female conduct in a male-dominated workplace could violate Title VII, the Sixth Circuit determined that this evidence about the work environment should be not allowed to discredit

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judgment should be granted. *See id.* (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)).

The court also summarized the precedent in hostile work environment case law. For a further discussion of hostile work environment case law, see *supra* notes 31-52 and accompanying text. The court also explained the standards announced recently for employer liability under Title VII. *See Williams*, 187 F.3d at 560-61 (providing overview of employer liability under Title VII). The court noted that, according to recent Supreme Court case law, "[i]f a plaintiff can prove a tangible employment action, liability is automatic; if however, there was no tangible employment action, employers have an affirmative defense to liability . . . ." *See id.* at 561 n.2 (citing *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764 (1998)).

102. *See id.* at 562 (articulating proper standard to be used in hostile work environment analysis).

103. *See id.* (quoting *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 81 (1998)). The court noted that the district court "divorced" the incidents from their social context. *See id.* ("The [district] court's analysis is clearly premised on an impermissible disaggregation of the incidents . . . .").

104. *See id.* at 563 ("[T]he totality-of-the-circumstances test mandates that district courts consider harassment by all perpetrators combined when analyzing whether a plaintiff has alleged the existence of a hostile work environment . . . ." (citing *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1524 (M.D. Fla. 1991))). The court held that determining hostile work environment should be based on the accumulated effect in which a "holistic perspective is necessary." *Id.* (quoting *Robinson*, 760 F. Supp. at 1524).

105. *See id.* at 562-63 (providing that incidents must be aggregated in determination of hostile work environment). The court held further that the issue should not be whether each incident could pass the *Harris* test, but whether all of the incidents together constitute a hostile work environment. *See id.* The court emphasized that where individual instances of sexual harassment do not stand on their own to create a hostile work environment, "the accumulated effect of such incidents may result in a Title VII violation." *Id.*

106. *Id.* at 563. The court held that the lower courts should examine the work environment as a whole, rather than focusing solely on individual acts of alleged hostility. *See id.* (same). The court quotes *Robinson*, reaffirming that the totality of the circumstances analysis must be viewed from a "holistic perspective." *See id.* (citing *Robinson*, 760 F. Supp. at 1524).

the pervasiveness of the alleged misconduct within the totality of the circumstances.[107] Accordingly, the Sixth Circuit held that the district court erred in concluding that the conduct alleged was "'infrequent, not severe, not threatening or humiliating, but merely offensive,'" and stressed that, at a minimum, the question was for the jury.[108] The court explained that, when viewed in the proper context and in their entirety, the incidents could constitute a hostile work environment for the plaintiff.[109]

The Sixth Circuit recognized that social context must be part of the totality of circumstances under *Oncale*, but clarified that the proper context does not allow district courts to "point to long-standing or traditional hostility toward women to excuse hostile-work-environment harassment."[110] The court declared that it: (1) rejected a standard that changes depending upon the work environment; and (2) held that a woman who chooses to work in the male-dominated trades does not thereby relinquish her right to be free from sexual harassment.[111] In fact, the court reasoned that this argument would create the notion that women working in male-dominated occupations deserve less protection from the law than women working in a courthouse.[112] Similarly, the Sixth Circuit held that "raising the standard for women in these professions" would require them to prove something beyond the objective and subjective standards set forth in *Harris* and that Title VII would essentially become a general civility code, which would go against the dicta in *Oncale*.[113]

Finally, the Sixth Circuit held that summary judgment was improper for the hostile work environment claim.[114] While the court used the factors that were suggested in the *Oncale* dicta, it held that the assumption of the risk doctrine for a hostile work environment claim is totally im-

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107. *See id.* at 564 (rejecting shifting standard dependent upon work environment).

108. *Id.* at 563-65 (quoting district court).

109. *See id.* at 563-64 (distinguishing allegations as more than merely offensive).

110. *Id.*

111. *See id.* (quoting *Gross v. Burggraf Constr. Co.*, 53 F.3d 1531, 1538 (10th Cir. 1995)). The court explicitly disagreed with the Tenth Circuit's holding in *Gross*, finding such an argument illogical. *See id.* (stating rationale for court's disagreement with Tenth Circuit).

112. *See id.* (reasoning that raising standard for women in some professions is unnecessary). The court stated:

> [W]e find this reasoning to be illogical, because it means that the more hostile the environment, and the more prevalent the sexism, the more difficult it is for a Title VII plaintiff to prove that sex based conduct is sufficiently severe or pervasive to constitute a hostile work environment.

Id.

113. *See id.* (citing *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 81 (1998)). The court emphasized that "[s]urely women working in the trades do not deserve less protection from the law than women working in a courthouse." *Id.*

114. *See id.* (holding that "a work environment viewed as a whole may satisfy the legal definition of an abusive work environment, for purposes of a hostile environment claim, even though no single episode crosses the Title VII threshold").

proper.[115] The court held that Williams' allegations raised questions of whether she was subjected to more than "'genuine but innocuous differences in the ways men and women routinely interact,'" and therefore summary judgment was improper.[116]

2. *Dissent*

Judge Ryan, in his dissent, vehemently disagreed with the majority's interpretation of the dicta in *Oncale*.[117] He emphasized that, contrary to the majority, "[t]he Supreme Court has made it very clear that the workplace environment indeed is a component of the totality of circumstances to be taken into account in assessing a claim of sexual harassment under Title VII . . . ."[118] Furthermore, Judge Ryan stated that "common sense" essentially means changing the standard of sexual harassment to fit the prevailing workplace norm.[119] Accordingly, Judge Ryan held that while the prevailing workplace norms like the crude language and sexual innuendo alleged by plaintiff may be generally offensive, these types of conduct are not what *Meritor*, *Harris* and *Oncale* held to be actionable under Title VII.[120]

Judge Ryan further emphasized that although Title VII was enacted to provided "[e]quality of opportunity for women across the entire spectrum of the workplace," this does not mean that federal courts have been "commissioned by Congress to force a heightened level of civility upon the blue collar workplace . . . or . . . redefin[e] workplace sex discrimination far

115. *See id.* (citing *Oncale*, 523 U.S. at 81).

116. *Id.* (citing *Oncale*, 523 U.S. at 81). The court also discussed whether conduct must be "sexual" in nature, and whether Williams subjectively felt that the environment was hostile as required by *Harris*. *See id.* at 564-68 (discussing whether conduct need not be sexual and subjective test). In addition, the court discusses the retaliation claim. *See id.* at 568 (discussing Williams' retaliation claim for filing complaint with Ohio Civil Rights Commission).

117. *See id.* at 569-71 (Ryan, J., dissenting in Part II, concurring in Parts I and III) (stating that majority's interpretation of requirements for totality of circumstances test is "dead wrong"). Judge Ryan dissented because "the majority opinion has so dramatically and radically changed the law in [the] circuit," by disregarding Supreme Court authority and the Sixth Circuit's binding precedent on the totality of circumstances test. *Id.* at 569 (Ryan, J., dissenting).

118. *Id.* at 571 (Ryan, J., dissenting) (emphasis added).

119. *See id.* (Ryan, J., dissenting) (quoting *Gross v. Burggraf Constr. Co.*, 53 F.3d 1531, 1538 (10th Cir. 1995)). Judge Ryan felt that the Tenth Circuit used the "appropriate common sense" when deciding that plaintiff, a construction worker, should have her alleged discrimination viewed in "a blue collar environment." *See id.* (Ryan, J., dissenting) (discussing use of common sense test (citing *Gross*, 53 F.3d at 1538)).

120. *See id.* (Ryan, J., dissenting). Judge Ryan stated that "[w]hen a female of ordinary civility, sensibilities, and morality walks into a work milieu that may be tastelessly suffused with rudeness, personal insensitivity, crude behavior, and locker room language, she must do so with the understanding that Congress has not legislated against such behavior and such a workplace environment." *Id.*

more broadly than Congress has defined it in Title VII."[121] Therefore, Judge Ryan posited that the "customary 'culture'" must be considered in the totality of the circumstances analysis.[122] In sum, Judge Ryan argued that the legal standard articulated in *Harris* includes an inquiry of pervasiveness, and thus the context of the "ordinary conditions" is relevant and inherently important when looking at the totality of the circumstances.[123] In closing, Judge Ryan criticized the majority for "reinvent[ing] the law of sexual harassment in the workplace [to be] consistent with its view of what Title VII *ought* to proscribe."[124]

B. *Critical Analysis*

The Sixth Circuit addressed whether traditionally anti-female behavior in a male-dominated workplace: (1) should be considered when evaluating the totality of circumstances; (2) bars plaintiffs who voluntarily enter such a workplace from bringing claims of sexual harassment; and (3) violates Title VII if taken as a whole.[125] Although the Sixth Circuit reached the proper result and upheld the intent of Title VII to ensure equal opportunity for women in the workplace, it did so by creating inconsistent precedent and by perpetuating vague standards for the courts to apply in the totality of the circumstances analysis.[126] The Sixth Circuit achieved this result by: (1) holding that offensive conduct should be considered as a whole in the totality of circumstances, but that the offensive nature of the

121. *Id.* at 572 (Ryan, J., dissenting). Judge Ryan stated that although Title VII was meant to create equal opportunities for women, it was not created to police the American workplace. *See id.* (Ryan, J., dissenting) (discussing purview of Title VII). Judge Ryan stated that, "[e]quality of opportunity for women across the entire spectrum of workplace circumstances is a civil right guaranteed in the Constitution and made enforceable through Title VII. And that includes opportunities for employment in occupations and undertakings in which women have not always been involved." *Id.* (Ryan, J., dissenting). Conversely, Judge Ryan said:

> [This intent] does not mean that federal appellate courts have been commissioned by Congress to force a heightened level of civility upon the blue collar workplace–or any other, for that matter—by redefining workplace sex discrimination far more broadly than Congress has defined it in Title VII, more expansively than the United States Supreme Court has interpreted it in *Meritor*, *Harris*, and *Oncale* . . . ."

Id. (Ryan, J., dissenting).

122. *See id.* at 571 (Ryan, J., dissenting) (discussing what conduct violates Title VII). Judge Ryan interpreted *Oncale* as holding that "'in all harassment cases, that inquiry requires a careful consideration of the social context in which particular behavior occurs and is experienced by its target.'" *Id.* (Ryan, J., dissenting) (quoting *Oncale*, 523 U.S at 82).

123. *See id.* (Ryan, J., dissenting) (stating legal standard that inquiries into conditions of employment require courts to decide question of pervasiveness in context of ordinary conditions of relevant workplace).

124. *Id.* at 572 (Ryan, J., dissenting).

125. *See id.* at 562-64 (clarifying totality of circumstances test for sexual harassment claims).

126. For a discussion of the court's analysis, see *supra* notes 100-25 and *infra* notes 127-57 and accompanying text.

workplace should not be considered at all; (2) shifting precedent without addressing its opinion in *Rabidue*; and (3) perpetuating the *Oncale* dicta that puts forth vague criteria for judging the totality of the circumstances.[127]

1. *The Whole Picture*

As the EEOC Guidelines suggest, a proper analysis of whether a work environment is severe and pervasive enough to the reasonable person begins with examining the record as a whole and the totality of the circumstances.[128] Similarly, the Sixth Circuit viewed the record in its totality and held that the accumulated effect of the work environment as a whole can violate Title VII even if no single incident passes the Title VII threshold.[129]

127. For a discussion of the court's analysis, see *supra* notes 100-25 and *infra* notes 128-57 and accompanying text.

128. *See* EEOC Guidelines on Discrimination Because of Sex, Sexual Harassment, 29 C.F.R. § 1604.11(b) (2000) (articulating that whether alleged conduct constitutes sexual harassment should be determined by record as whole and by totality of circumstances, such as nature of sexual advances and context of workplace). Furthermore, the EEOC provides that the objective standard should not be applied in a vacuum. *See* EEOC COMP. MAN., *supra* note 16, § 615 (discussing application of standard).

Generally, a "hostile environment" claim requires a showing of a pattern of offensive conduct. *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 22 (1993) (holding that hostile work environment claim requires conduct that reasonable person under totality of circumstances would have felt to be so severe and pervasive as to alter terms and conditions of one's employment); *see also* Downes v. Fed. Aviation Admin., 775 F.2d 288, 293 (Fed. Cir. 1985) (stating that "Title VII [does] not create a claim of sexual harassment for each and every crude joke or sexually explicit remark made on the job[;] . . . . [instead, a] pattern of offensive conduct must be proved"). Aggregation of the conduct tends to prove the pattern of offensive conduct. *See* Andrews v. City of Philadelphia., 895 F.2d 1469, 1484 (3d Cir. 1990) ("What may appear to be a legitimate justification for a single incident of alleged harassment may look pretextual when viewed in the context of several other related incidents.") (quoting *Vance v. S. Bell Tel. & Tel. Co.*, 863 F.2d 1503, 1510 (11th Cir. 1989)).

129. *See Williams*, 187 F.3d at 563 ("[E]ven where individual instances of sexual harassment do not on their own create a hostile environment, the accumulated effect of such incidents may result in a Title VII violation."). One factor considered in "the totality of the circumstances test is the cumulative effect of individual incidents." ERNEST C. HADLEY & GEORGE M. CHUZI, SEXUAL HARASSMENT: FEDERAL LAW 98-99 (1994) (discussing totality of circumstances test). In reversing summary judgment, the Sixth Circuit properly held that the totality of the circumstances test includes all incidents of alleged misconduct and should not be examined separately until determining employer liability. *See Williams*, 187 F.3d at 563; *see also Andrews*, 895 F.2d at 1472 (holding that incidents should be viewed together); Calloway v. E.I. Dupont de Nemours & Co., No. 98-669-SLR, 2000 U.S. Dist. LEXIS 12642, at *14-15 (D. Del. Aug. 8, 2000) (holding that courts should not judge hostile environment claims on incident-by-incident basis). In *Andrews*, the Third Circuit recognized that:

> Particularly in the discrimination area, it is often difficult to determine the motivations of an action and any analysis is filled with pitfalls and ambiguities. A play cannot be understood on the basis of some of its scenes but only on its entire performance, and similarly, a discrimination

Thus, the court held a "holistic perspective" is needed to determine the accumulative effect of all the conduct.[130] The Sixth Circuit distinguished *Gross* in holding that the totality of the circumstances should not vary depending upon the work environment.[131] In doing so, the court essentially held that the conduct should be viewed as a whole, but that the work environment should not be considered at all. This reasoning complicates the standard for determining what conduct is severe and pervasive enough to constitute a hostile work environment.[132]

Despite the inconsistency in its articulation of the test, the court properly held that prevailing workplace norms are inappropriate factors for the totality of the circumstances test.[133] If prevailing workplace norms are allowed to discredit evidence of a hostile work environment, not only will there be an unequal application of Title VII, but also Title VII's true purpose will be impeded.[134] Based on the same reasoning, the court also accurately recognized that the assumption of the risk doctrine is an inappropriate defense to sexual harassment claims and that allowing it would raise the bar of proof for women in male-dominated professions.[135]

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analysis must concentrate not on individual incidents, but on the overall scenario.

Andrews, 895 F.2d at 1484.

130. Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1524 (M.D. Fla. 1991).

131. *See Williams*, 187 F.3d at 564 (disagreeing with Tenth Circuit analysis in *Gross*); *see also* Eric Schnapper, *Some of Them Still Don't Get It: Hostile Work Environment Litigation in the Lower Courts*, 1999 U. CHI. LEGAL F. 277, 341-42 (1999) (criticizing reasoning in *Gross*).

132. *See Williams*, 187 F.3d at 571 (Ryan, J., dissenting) (stating that legal standard allows courts to look at ordinary work conditions). As Judge Ryan notes, the standard is geared toward determining pervasiveness of the conduct that affects plaintiff's terms and conditions. *See id.* (Ryan, J., dissenting) (discussing measure of legal standard). Thus, to determine pervasiveness, the court must look into the ordinary conditions of a workplace. *See id.* (Ryan, J., dissenting) (describing pervasiveness test).

133. *See id.* at 564 (discussing holding); *see also* Smith v. Sheahan, 189 F.3d 529, 535 (7th Cir. 1999) ("Employers who tolerate workplaces marred by exclusionary practices and bigoted attitudes cannot use their discriminatory pasts to shield them from the present-day mandate of Title VII."); Rabidue v. Osceola Ref. Co., 805 F.2d 611, 626-27 (6th Cir. 1986) (Keith, J., concurring in part and dissenting in part) ("[N]o woman should be subjected to an environment where her sexual dignity and reasonable sensibilities are visually, verbally or physically assaulted as a matter of prevailing male prerogative . . . ."); EEOC COMPL. MAN., *supra* note 16, § 615, at 3233 ("The Commission believes . . . that a woman does not assume the risk of harassment by voluntarily entering an abusive, anti-female environment.").

134. *See Sheahan*, 189 F.3d at 535 (holding that allowing traditionally hostile behavior in workplace to discredit claims is illogical and outside the purpose of Title VII); *see also Rabidue*, 805 F.2d at 626-27 (Keith, J., dissenting) (discussing rationale of prevailing workplace norms in Title VII analysis).

135. *See Williams*, 187 F.3d at 564 (discussing assumption of risk analysis); *see also Sheahan*, 189 F.3d at 535 ("There is no assumption-of-the-risk defense to charges of workplace discrimination.").

2. *Shifting Precedent*

The Sixth Circuit also shifted its previous opinion on the purview of Title VII.[136] By holding that prevailing workplace norms should not discredit the pervasiveness of a hostile work environment, the Sixth Circuit in *Williams* correctly held that this type of conduct should not excuse hostile work environment harassment.[137] More importantly, the *Williams* court recognized that an unequal application of the law would result from allowing prevailing workplace norms to discredit claims of sexual harassment.[138] This holding, however, is a severe departure from the court's earlier benchmark holding in *Rabidue*.[139]

The *Williams* court held that a woman's choice to work in a male-dominated occupation does not mean that she relinquishes her right to be free from sexual harassment.[140] On the other hand, the Sixth Circuit in

136. *Compare Rabidue*, 805 F.2d at 620-21 (affirming lower court finding that Title VII was not meant to change prevailing workplace norms such as sexual jokes, sexual conversations, vulgar language or pornographic magazines), *with Williams*, 187 F.3d at 564 (holding that requiring women in male-dominated professions to prove conduct beyond objectively hostile standard by allowing prevailing workplace norms to discredit alleged misconduct is beyond what plaintiff must prove under Title VII).

137. *See Williams*, 187 F.3d at 564 (stating that summary judgment was inappropriate); *see also Rabidue*, 805 F.2d at 626 (Keith, J., dissenting) (arguing that prevailing workplace norms are prohibited under Title VII to prevent such conduct from plaguing work environment for those protected by Act); EEOC COMPL. MAN., *supra* note 16, § 615, at 3205 (discussing requirements of harassment-free workplace). The Commission holds that the standard should not consider stereotyped notions of acceptable behavior. *See id.* (discussing findings of Commission); *see also Sheahan*, 189 F.3d at 535 (holding that "[e]mployers who tolerate workplaces marred by exclusionary practices and bigoted attitudes cannot use their discriminatory pasts to shield them from the present-day mandate of Title VII"); Andrews v. City of Philadelphia, 895 F.2d 1469, 1486 (3rd Cir. 1990) (holding that "Title VII may advance the goal of eliminating prejudices and biases in our society") (citations omitted). *But see* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81 (1998) (holding Title VII "does not reach genuine but innocuous differences in the ways men and women routinely interact with members of the . . . opposite sex"); *see also Williams*, 187 F.3d at 571 (Ryan, J., dissenting) (reasoning that Congress and Supreme Court have not provided that anti-female prevailing workplace norms are prohibited by Title VII).

138. *See Williams*, 187 F.3d at 564 (holding that women in different types of workplaces deserve same protection from Title VII).

139. *Compare Williams*, 187 F.3d at 564 (holding totality of circumstance test should not vary depending on work environment), *with Rabidue*, 805 F.2d at 620 (holding that level of obscenities in work environment that existed both before and after plaintiff's arrival must be examined).

140. *Compare Williams*, 187 F.3d at 564 (holding assumption of risk doctrine is not valid in claims of sexual harassment), *with Rabidue*, 805 F.2d at 620 (concluding that plaintiff's reasonable expectations and voluntary entry with knowledge of work environment should be evaluated when determining hostile work environment claim). The *Rabidue* court described the assumption of the risk doctrine in the sexual harassment arena when it held that "the reasonable expectation of the plaintiff upon voluntarily entering [an] environment" should be considered in the totality of the circumstances. *See Rabidue*, 805 F.2d at 620 (articulating assumption of the risk doctrine); *see also* Weitzman, *supra* note 55, at 54 (discussing assumption

Rabidue held that prevailing workplace norms should be factored into the totality of circumstances.[141] As a result, the *Williams* court effectively overruled *Rabidue* without explicitly doing so.[142] The *Williams* opinion does not explicitly state its departure from its former holding in *Rabidue*.[143] The court, in fact, criticized the Tenth Circuit in *Gross* without noting that the *Gross* court solely relied on *Rabidue* when articulating the principle that the standard in reviewing Title VII cases should vary depending on the workplace.[144] By leaving the *Rabidue* decision unmentioned, the *Williams* court leaves room for other courts to conclude that this type of reasoning is still permitted.[145]

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of risk defense). Today, the Sixth Circuit, as articulated in *Williams*, holds that the standard should not be raised for women who work in male-dominated workplaces because all working women should be equally covered by the law. *See Williams*, 187 F.3d at 564 (holding that assumption of risk doctrine is illogical in this arena and would afford less protection to those women in workplaces where misconduct is prevalent).

141. *Compare Rabidue*, 805 F.2d at 620 (holding that traditional types of misconduct of workplace should be considered in totality of circumstances), *with Williams*, 187 F.3d at 564 (holding that traditional misconduct should not be used to excuse hostile work environment claims and should not influence standard in totality of circumstances test).

142. *See Williams*, 187 F.3d at 564 (holding long-standing misconduct should not excuse hostile work environment sexual harassment). The majority criticizes *Gross v. Burggraf Constr. Co.*, 53 F.3d 1531 (10th Cir. 1995), but fails to recognize, as the dissent points out, that some courts may consider taking the prevailing culture into account as "common sense" and "appropriate sensitivity." *See id.* at 571 (Ryan, J., dissenting) (discussing majority's use of dicta in *Oncale*). Judge Ryan states the dicta in *Oncale* was previously recognized by "a sister circuit" which held: "[W]e must evaluate [the plaintiff's] claim . . . in the context of a blue collar environment where crude language is commonly used." *Id.* (Ryan, J., dissenting) (quoting *Gross v. Burggraf Constr. Co.*, 53 F.3d 1531, 1538 (10th Cir. 1995)).

143. *See Williams*, 187 F.3d at 564 (criticizing reasoning in *Gross*). The court held that the standard for sexual harassment does not vary depending on the work environment and cited *Gross* instead of *Rabidue*. *See id.* (same). The *Gross* analysis relied in part on *Rabidue*, and yet the Sixth Circuit did not mention its own case anywhere in the opinion. *See Gross*, 53 F.3d at 1538 (relying on *Rabidue v. Osceola Ref. Co.*, 584 F. Supp 419, 430 (E.D. Mich. 1984), *aff'd*, 805 F.2d 611 (6th Cir. 1986)). The *Rabidue* decision was the benchmark decision for the use of prevailing workplace norms in the totality of circumstances. *See Rabidue*, 584 F. Supp. at 430 (discussing totality of circumstances test). For a discussion of totality of the circumstances, see *supra* notes 39-55 and accompanying text. The Seventh Circuit also held that this principle in *Rabidue* was overruled in *Harris*, or at the very least was overruled by *Oncale*. *See* Smith v. Sheahan, 189 F.3d 529, 534-35 (7th Cir. 1999) (holding *Rabidue* was overruled by *Harris* or *Oncale*).

144. *See Williams*, 187 F.3d at 564 (distinguishing Tenth Circuit's decision in *Gross*).

145. *See Sheahan*, 189 F.3d at 532-35 (7th Cir. 1999) (discussing standards under Title VII). The district court in *Smith* relied on *Rabidue* to discount the seriousness of defendant's misconduct. *See id.* at 534 (criticizing district court's decision to rely on *Rabidue*).

3. *Interpreting Dicta in* Oncale

The dicta in *Oncale* is ambiguous and can support the conflicting contentions regarding the inclusion of prevailing workplace norms in the determination of whether conduct passes the threshold test under Title VII.[146] Although the Sixth Circuit recognized that prevailing workplace norms and assumption of the risk should not discredit a woman's hostile work environment claim against a male-dominated employer, the court failed to see that other judges and juries can just as easily use "common sense" and "an appropriate sensitivity to social context" to justify allowing such prevailing norms to discount a plaintiff's claim.[147] In fact, Judge Ryan, in his dissent, equally relied on *Oncale* to support the argument that prevailing workplace norms can tend to discredit the pervasiveness of conduct when judged by the totality of the circumstances.[148] By ignoring Judge Ryan's contention and failing to put forth more concrete factors, the Sixth Circuit perpetuates vagueness in the application of Title VII.[149]

Furthermore, the Sixth Circuit misunderstood the dicta in *Oncale* when it held that varying the standard to the particular workplace is unnecessary.[150] The Sixth Circuit said that the existing standard under *Harris* sufficiently ensures that Title VII will not become a general civility code.[151] In *Oncale*, on the other hand, the Supreme Court instructed that judges and juries must look to social context to ensure that Title VII is not expanded into a general civility code.[152] Therefore, where the *Williams* court uses this premise of civility to keep the standard equal for plaintiffs in male-dominated professions, the *Oncale* Court would effectively raise the bar.[153]

146. For a discussion on the dicta articulated in *Oncale*, see *supra* notes 73-89 and accompanying text.

147. *See Williams*, 187 F.3d at 571 (Ryan, J., dissenting) (arguing that standard for violation should vary depending on work environment).

148. *See id.* (Ryan, J., dissenting) (relying on *Oncale* to support argument to vary standard according to traditional social context of workplace).

149. For a discussion of application of the law, see *supra* notes 53-89 and accompanying text. Before *Oncale* and *Williams*, there was a circuit split among the courts regarding whether prevailing workplace norms should be part of the totality of circumstances test and whether these norms could be used to discredit alleged misconduct. *See Williams*, 187 F.3d (Ryan, J., dissenting) (discussing disparity between majority opinion and other courts' decisions regarding inclusion of prevailing workplace norms in totality of circumstances test).

150. *See Williams*, 187 F.3d at 564 (citing *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 81 (1998)).

151. *See id.* (holding that raising bar for women in male-dominated professions is outside purview of Title VII as explained in *Oncale*).

152. *See* Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 81-82 (1998) (finding that judges and juries should not mistake ordinary socializing among coworkers for sexual harassment because doing so would go beyond purview of Title VII).

153. *Compare Williams*, 187 F.3d at 564 (arguing for using existing standard of totality of circumstances), *with Oncale*, 523 U.S. at 81-82 (instructing juries and judges to look beyond standard to social context and common sense).

Based on the above analysis, the Sixth Circuit can reasonably be seen to have reached the proper result while perpetuating more confusion in the totality of the circumstances analysis when prevailing workplace norms of a male-dominated work environment are at issue. Therefore, the Sixth Circuit opinion in *Williams* illustrates the need for clarification of the ambiguity in deciding whether to include such factors as prevailing workplace norms and assumption of the risk into the totality of the circumstances analysis.

V. IMPACT

Despite the proper result in *Williams*, the Sixth Circuit did not provide sufficient measures to ensure that prevailing workplace norms will not be used in a totality of circumstances analysis in the lower courts.[154] By allowing the *Oncale* dicta to be the basis for the totality of the circumstance test, the *Williams* court may ironically make it easier for courts to grant summary judgment against the plaintiffs in these cases.[155] Some commentators suggest that the potential for hostile work environment claims to be decided at the summary judgment phase is particularly dangerous because often only men will determine whether a particular pattern of harassment creates a hostile work environment for women.[156] Although the Supreme Court in *Oncale* was confident that juries and judges could use the social context of a workplace to distinguish between "simple teasing" or "mere utterance" and sexual harassment, commentators purport that there is a difference between the stories of harassment being told by women and the

154. *See Williams*, 187 F.3d at 562 (using factors articulated in dicta in *Oncale* for totality of circumstances test). The factors articulated in *Oncale* do not provide concrete guidance for courts to determine whether prevailing workplace norms must be considered in the totality of the circumstances test. *See* Weitzman, *supra* note 55, at 57-59 (arguing that *Oncale* can provide support for opposite positions). Judge Ryan noted that not only can *Oncale* be read to require courts to look at prevailing culture, but also that the majority improperly interpreted *Oncale*, *Harris* and *Meritor* in its holding. *See Williams*, 187 F.3d at 569 (Ryan, J., dissenting) (criticizing majority opinion's interpretation of Supreme Court precedent).

155. *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993) (articulating standard for hostile work environment claims). Sexual harassment cases are increasingly being decided by judicial fact finding instead of a jury. *See* Theresa M. Beiner, *The Misuse of Summary Judgment in Hostile Environment Cases*, 34 WAKE FOREST L. REV. 71, 97 (1999) (discussing summary judgment of sexual harassment claims in lower courts).

156. *See* Schnapper, *supra* note 131, at 294 (discussing general practice of lower courts to decide hostile work environment claims at summary judgment phase). As some commentators suggest, this determination is better left to a jury of one's peers instead of a judge sitting in isolation. *See* Beiner, *supra* note 155, at 75 (noting benefits of jury trial in these cases); *see also* Judith Olans Brown et al., *The Mythogenesis of Gender: Judicial Images of Women in Paid and Unpaid Labor*, 6 UCLA WOMEN'S L.J. 457, 459 (1996) ("One of our most cherished myths is that judges, insulated from the political process and sequestered from the hubbub of daily living, are free to develop the objective intellectual abstractions (legal doctrine) which govern the conduct of society.").

understanding of those stories by judges and juries.[157] As a result, female plaintiffs may have less success in bringing hostile work environment claims against male-dominated employers.[158]

If women plaintiffs are not afforded opportunity in the courts, they will be undoubtedly afforded less opportunity in the workplace. Thus, the Supreme Court may need to clarify the meaning of Title VII for sexual harassment cases once again.[159] This task, however, could be difficult because there is essentially no legislative history on the addition of sexual discrimination to Title VII.[160] Another alternative is to create an evidentiary rule that would govern whether prevailing workplace norms and assumption of the risk should be weighed in the totality of the circumstances.[161] The challenge in creating such an evidentiary determination would be recognizing the extreme fact sensitivity of the determination of hostile work environment claims.[162]

In turn, if courts allow prevailing workplace norms to discount claims of a hostile work environment, not only will there be an unequal application of the law, but Title VII's purpose of providing equal opportunity to women in the workplace will be thwarted, demoralizing women in the workplace.[163] In addition, sexual harassment is costly for employees and

157. *See* Dolkhart, *supra* note 36, at 156 (discussing "dialectic between practice and theory, experience and knowledge as applied to the developing hostile environment case law"). One commentator suggests that this belief is a common misconception that is perpetuated by misogynistic myths about men and women's roles in the workplace. *See* Brown, *supra* note 156, at 459 (discussing myth that judges can be impartial in deciding sexual harassment cases).

158. *See generally* Brown et al., *supra* note 156 at 516 (asserting that today's legal standards and societal myths are preventing female plaintiffs from prevailing in sexual harassment claims).

159. *See* Weitzman, *supra* note 55, at 56 (discussing recent Supreme Court opinions that provide little guidance on sexual harassment law). As one commentator surmises: "[*Oncale*] ha[s] provided a glass that is both half-full or half-empty . . . . [and] it is clear that there is still a great deal of maneuvering room within the language of the Court." *Id.* at 59.

160. *See* Meritor Savs. Bank v. Vinson, 477 U.S. 57, 63 (1985) (citing 110 CONG. REC. 2577-2584 (1964)); *see also* Goodman-Delahunty, *supra* note 19, at 521 (describing sentiment at time of enactment of Title VII).

161. *See generally* Schultz, *supra* note 1, at 1692 (discussing need to revamp sexual harassment law in America).

162. *See* Deb Lussier, Oncale v. Sundowner Offshore Services Inc. *and the Future of Title VII Sexual Harassment Jurisprudence*, 39 B.C. L. REV. 937, 939 (1998) (arguing for courts to permit only direct comparative evidence to support finding of discrimination because of sex).

163. *See* Rabidue v. Osceola Ref. Co., 805 F.2d 611, 624 (6th Cir. 1986) (Keith, J., dissenting) (commenting on demoralizing effects of harassment for female employees); *see also* Weitzman, *supra* note 55, at 27-28 (noting costs of harassment to employers and employees). Many courts hold that the proliferation of pornography, demeaning comments and generally anti-female animus, if sufficiently continuous and pervasive, "may be found to create an atmosphere in which women are viewed as men's sexual playthings rather than as their equal co-workers." Barbetta v. Chemlawn Servs. Corp., 669 F. Supp. 569, 573 (W.D.N.Y. 1987).

employers alike.[164] Although sexual harassment in every aspect is economically costly, it may also prove to cause a decrease in worker productivity and an increase in turnover and morale.[165] As a result, the cost that sexual harassment creates on the workplace could result in costs for society as a whole.[166]

Maresa Torregrossa

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164. *See* Gary Meyers, *Sexual Harassment Can Be Costly for Everyone*, ST. J. REG. at 44 (Jan. 10, 1999) (discussing costs of suits for employers and employees); *see also* STEPHEN J. MOREWITZ, PH.D., SEXUAL HARASSMENT & SOCIAL CHANGE IN AMERICAN SOCIETY 159-61 (1996) (discussing studies that show sexual harassment negatively affects workers). Some feel that "costly lawsuits and poor employee morale can and will affect everyone's personal bottom line." Meyers, *supra*, at 44.

165. *See* Weitzman, *supra* note 55, at 27-28 (describing impact of sexual harassment on workplace). Sexual harassment may also lead to poor concentration and increased accidents by workers. *See id.* (same).

166. *See id.* (suggesting that costs get passed to consumers).