Golden Gate University Law Review

Volume 34
Issue 1 *Ninth Circuit Survey*

Article 6

January 2004

Customizing the Reasonable-Woman Standard to Fit Emotionally and Financially Disabled Plaintiffs is Outside the Scope of the Civil Rights Act's Prohibition on Sex-Based Discrimination: Holly D. v. California Institute Of Technology

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COMMENT

CUSTOMIZING THE REASONABLE-WOMAN STANDARD TO FIT EMOTIONALLY AND FINANCIALLY DISABLED PLAINTIFFS IS OUTSIDE THE SCOPE OF THE CIVIL RIGHTS ACT'S PROHIBITION ON SEX-BASED DISCRIMINATION:

HOLLY D. V. CALIFORNIA INSTITUTE OF TECHNOLOGY

INTRODUCTION

Workplace sexual harassment is a developing area of federal law.[1] As federal courts define the contours of sexual har-

[1] Changes to the standard of employer liability for supervisor harassment in 1998 have made it necessary for lower federal courts to reconsider many aspects of federal sexual harassment law. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998) (held that employers are strictly vicariously liable for supervisor harassment, however, employer may invoke an affirmative reasonable-care defense if the plaintiff has not suffered a tangible employment action). *See also* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998). In light of the U.S. Supreme Court's holding on liability lower federal courts have had to decide whether coerced submission and constructive discharge are tangible employment actions. Jin v. Metro. Life Ins. Co., 310 F.3d 84, 94 (2nd Cir. 2002) (holding that coerced submission is a tangible employment action); Holly D. v. Cal. Inst. of Tech., 339 F.3d 1158, 1173 (9th Cir. 2003) (holding that coerced submission is a tangible employment action); *but see* Fisher v. Elec. Data Sys., 278 F. Supp. 2d 980, 988 (S.D. Iowa 2003) (submission to a quid pro quo threat is not tangible employment action harassment); *see* Suders v. Easton, 325 F.3d 432, 461 (3rd.

assment, it is important that these courts shape the law in a way that furthers the purposes behind Title VII of the Civil Rights Act.[2] Recently, the Ninth Circuit decided a novel issue in sexual harassment law.[3] In *Holly D. v. California Institute of Technology*, the plaintiff alleged that she engaged in sexual relations with her supervisor in order to retain her position with the California Institute of Technology.[4] The Ninth Circuit held that employers are strictly vicariously liable when a supervisor threatens job-related consequences, such as termination or demotion, to coerce a subordinate into sexual relations.[5] The threat can be implicit or explicit.[6] To find an implicit threat in the Ninth Circuit, courts look for a nexus between the supervisor's sexual advances and the supervisor's exercise of authority over the employee alleging that she was harassed.[7] When the threat is implicit, the plaintiff must show that a reasonable woman in her position would have believed that her continued employment depended upon submitting to her supervisor sexually.[8] In a footnote, the Ninth Circuit suggested that it might consider an employee's emotional and financial disabilities in a case in which the employee alleges that her supervisor used implicit threats to coerce her into a sexual re-

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Cir. 2003) (constructive discharge is a tangible employment action). For a more extensive discussion of the development of federal anti-sexual harassment law, *see infra* notes 21-143 and accompanying text.

[2] Title VII of the Civil Rights Act of 1964, 42 U.S.C. A. § 2000e-1-17 (West 2004); *see* Faragher v. City of Boca Raton, 524 U.S. 775, 805-6 (1998) (the policies behind Title VII are reflected in the Court's creation of the reasonable-care defense. The Court's attention to these policies when shaping the law indicates that while sexual harassment law is not directly addressed by Title VII, the development of federal anti-harassment law under this Act should remain consistent with the purposes behind the Civil Rights Act).

[3] Holly D. v. Cal. Inst. of Tech., 339 F.3d 1158, 1167 (9th Cir. 2003).

[4] *Id.* at 1161-62.

[5] *Id.* at 1162.

[6] *Id.* at 1173.

[7] *E.g.* Nichols v. Frank, 42 F.3d 503, 512-13 (9th Cir. 1994).

[8] Holly D. v. Cal. Inst. of Tech., 339 F.3d 1158, 1173-74 (9th Cir. 2003). Currently, the Ninth Circuit uses a reasonable-woman standard in sexual harassment cases when the plaintiff is female and a reasonable man standard when the plaintiff is a male. Ellison v. Brady, 924 F.2d 872, 879 & n.11 (9th Cir. 1991). *But see* Nichols v. Frank, 42 F.3d 503, 512 (9th Cir. 1994) (listing other traits that the Ninth Circuit might incorporate into the reasonable woman standard, such as "race, age, physical or mental disability, and sexual orientation"); Fuller v. City of Oakland, 47 F.3d 1522, 1527 (9th Cir. 1995) ("hostile work environment" must be determined from the perspective of a reasonable person with the same fundamental characteristics)."

lationship.[9] Holly D., however, did not argue that her emotional and financial disabilities should have been considered by the court.[10] Consequently, the Ninth Circuit applied the reasonable-woman standard, merely noting that these disabilities *might* have a legal effect if raised in a later case.[11] This Comment suggests that the Ninth Circuit should not customize the reasonable-woman standard to include a plaintiff's emotional and financial disabilities.

Tailoring the reasonable-woman standard to include select disabilities is problematic because employer liability would improperly depend upon the effect that the victim's disability had on the victim's perception, instead of on the agency relationship between the supervisor and the employer.[12] Furthermore, these subjective standards would prevent employers from successfully invoking the reasonable care defense.[13] Using these tailored standards would also result in discriminatory treatment under the law for women who did not qualify for one of these customized standards.[14] Finally, customized standards

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[9] Holly D. v. Cal. Inst. of Tech., 339 F.3d 1158, 1174 n.19 (9th Cir. 2003) ("Holly D. did not...argue that a different standard of "reasonableness" should be applied to her than to the average woman who held the type of job she held. Finally, she did not present argument or evidence as to what any different standard should be in the case of women in financial or psychological difficulty. Under these circumstances, we do not address the issue of whether the supervisor's conduct as alleged here could constitute a tangible employment action in the case of a woman who alleges that her responses must be viewed not from the standpoint of an average reasonable-woman but from that of a reasonable woman suffering from serious financial and emotional disabilities. We reserve that issue for an appropriate case)." *Id.* This Comment focuses solely on sexual harassment by a supervisory employee against a subordinate as sexual harassment by a supervisor carries strict liability for the plaintiff's employer under Title VII of the Civil Rights Act. Faragher v. City of Boca Raton, 524 U.S. 775, 780 (1998) ("employer is vicariously liable for actionable [sexual harassment] caused by a supervisor"); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998) (employer is vicariously liable for hostile work environment sexual harassment caused by a supervisor).

[10] Holly D. v. Cal. Inst. of Tech., 339 F.3d 1158, 1174 n.19 (9th Cir. 2003).

[11] *Id.* The reasonable-woman standard is a legal construct created to evaluate an alleged harasser's conduct. *See* Ellison v. Brady, 924 F.2d 872, 879-81 (9th Cir. 1991). A female plaintiff must demonstrate to the factfinder that a reasonable woman would have found the defendant's misconduct severe enough to alter the victim's working conditions. *Id* at 879. This standard is used in hostile work environment sexual harassment cases and in tangible employment action cases involving an implicit threat. Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991) (hostile work environment claim standard is reasonable-woman); Holly D. v. Cal. Inst. of Tech., 339 F.3d 1158, 1173 (9th Cir. 2003) (the existence of an implicit quid pro quo in a tangible employment action claim threat is determined through a reasonable-woman standard).

[12] *See infra* notes 153-165 and accompanying text.

[13] *See infra* note 166-168 and accompanying text.

[14] *See infra* notes 177-183 and accompanying text.

would sterilize American workplaces.[15] In support of this Comment's assertions against factoring the emotional and financial difficulties of the actual plaintiff into the reasonable-woman standard, Part I provides a background of federal sexual harassment law, ending with a review of the Ninth Circuit's recent decision in *Holly D. v. California Institute of Technology*.[16] Part II (a) discusses how customized standards would enlarge the scope of employer liability, conflicting with the principles of agency law that justify holding employers strictly vicariously liable for supervisor harassment and decreasing employers' abilities to use the reasonable care defense.[17] Part II (b) suggests that customized reasonable-woman standards create unequal treatment for women under the law, a contravention of anti-discrimination laws.[18] Part II (c) proposes that customized standards would strike a death blow to workplace romances because supervisors and employers would fear that innocent relationships might lead to sanctions.[19] Part III concludes that customized reasonable-woman standards cause a number of problems that can be best avoided by leaving these standards buried in a *Holly D. v. California Institute of Technology* footnote.[20]

I. BACKGROUND

A. SEXUAL HARASSMENT VIOLATES TITLE VII'S PROHIBITION ON SEX DISCRIMINATION

Title VII of the Civil Rights Act (hereinafter, Title VII) prohibits employers from making employment decisions because of the sex of the employee (or applicant) or from discriminating against an employee in the "compensation, terms, conditions or privileges of employment" because of that employee's sex.[21] Conservative legislators added sex as a last minute attempt to kill the Civil Rights Act.[22] Those legislators'

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[15] *See infra* notes 184-201 and accompanying text.
[16] *See infra* notes 21-143 and accompanying text.
[17] *See* supra notes 12 and 13.
[18] *See supra* note 14.
[19] *See supra note* 15.
[20] *See infra* notes 201-204 and accompanying text.
[21] 42 U.S.C.A. § 2000-e-2 (a)(1) (West 2004).
[22] Meritor Sav. Bank v. Vinson, 477 U.S. 57, 63 (1986).

plans backfired, and the bill passed as amended.[23] Since sex was a last minute addition, there is little legislative history to indicate Congress's intentions in banning sexual discrimination.[24] As a result, gender discrimination under Title VII has developed through case law and agency guidelines.[25]

In 1980, the Equal Employment Opportunity Commission (hereinafter, "EEOC"), chartered by Congress to enforce the Civil Rights Act, recognized sexual harassment as a violation of Title VII of the Civil Rights Act.[26] The EEOC issues administrative guidelines entitled, "Guidelines on Discrimination Because Of Sex" that provide the public with the EEOC's stance on statutory compliance.[27] These guidelines cover a spectrum of sexual harassment issues, from defining harassment that violates Title VII to advising employers on how to eliminate sexual harassment through preventive measures.[28] According to the EEOC guidelines, sexual harassment violates Title VII when the harasser explicitly or implicitly conditions the victim's continued employment on the victim's willingness to submit to unwanted sexual advances, requests for sexual relations, or other verbal or physical acts of a sexual nature.[29] Courts commonly refer to this type of harassment as quid pro quo harassment.[30] Title VII also prohibits harassing conduct

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[23] *Id.* at 64.

[24] *Id.*

[25] The Equal Employment Opportunity Commission is the federal agency responsible for enforcing Title VII of the Civil Rights Act. 42 U.S.C.A. § 2000e-4(g) (West 2004); Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64-65 (1986).

[26] The Equal Employment Opportunity Commission is a 5 member board empowered to enforce Title VII of the Civil Rights Act. 42 U.S.C.A. § 2000e-4(a) (West 2004); 42 U.S.C. 2000e-5(a) (West 2004). *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986) (acknowledging that the EEOC determined that sexual harassment was a violation of Title VII of the Civil Rights Act in 1980); *see also* 29 C.F.R. § 1604.11 (2004) (originally issued in 1980).

[27] 29 C.F.R. § 1604.11 (2004).

[28] 29 C.F.R. § 1604.11(a)-(g) (2004).

[29] 29 C.F.R. § 1604.11(a)(1)-(2) (2004).

[30] For examples of this terminology, see Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986); *see also* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 752-53 (1998); Gorski v. N.H. Dep't of Corr., 290 F.3d 466, 472 (1st Cir. 2002); Leibovitz v. New York City Transit Auth., 252 F.3d 179, 188 (2nd Cir. 2001); Suders v. Easton, 325 F.3d 432, 441 (3rd. Cir. 2003); Spriggs v. Diamond Auto Glass, 242 F.3d 179, 186 (4th Cir. 2001); Ackel v. Nat'l Communications., Inc., 339 F.3d 376, 381-82 (5th Cir. 2003); Akers v. Alvey, 338 F.3d 491, 500 (6th Cir. 2003); Robinson v. Sappington, 351 F.3d 317, 324-25 (7th Cir. 2003); Hocevar v. Purdue Frederick Co., 223 F.3d 721, 735 (8th Cir. 2000); Wilson v. Muckala, 303 F.3d 1207, 1221 (10th Cir. 2002); Pipkins v. City of Temple Terrace, 267 F.3d 1197, 1200 (11th Cir. 2001); Peyton v. DiMario, 287 F.3d 1121, 1124

that has the effect of unreasonably interfering with the victim's work environment.[31] Courts commonly refer to this type of harassment as "hostile work environment sexual harassment."[32]

Sexual harassment as a violation of Title VII first came before the U.S. Supreme Court in *Meritor Savings Bank v. Vinson*.[33] *Meritor Savings Bank v. Vinson* held that "hostile work environment sexual harassment" was a form of sex discrimination that violated Title VII.[34] Furthermore, an employer is not automatically liable for a supervisor's harassing behavior.[35] Instead, federal courts should look to the principles of agency law to determine when an employer is liable for its supervisor's misconduct.[36] For twelve years, the U.S. Supreme Court allowed the lower federal courts to determine employer liability

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(D.C. Cir. 2002). *But see* Holly D. v. Cal. Inst. of Tech., 359 F.3d 1158, 1167 n.13 (9th Cir. 2003) (in light of Supreme Court's changes in the liability standard the Ninth Circuit now distinguishes between "tangible employment action sexual harassment" and "hostile environment sexual harassment"). *Id.* "Quid pro quo" is Latin for "something for something." BLACK'S LAW DICTIONARY 1261 (7th ed. 1999).

[31] 29 C.F.R. § 1604.11(a)(3) (2004).

[32] For examples of this terminology, see Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986); *see also* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 752-753 (1998); Gorski v. N.H. Dep't of Corr., 290 F.3d 466, 472 (1st Cir. 2002); Leibovitz v. New York City Transit Auth., 252 F.3d 179, 188 (2nd Cir. 2001); Suders v. Easton, 325 F.3d 432, 441 (3rd. Cir. 2003); Spriggs v. Diamond Auto Glass, 242 F.3d 179, 186 (4th Cir. 2001); Ackel v. Nat'l Communications., Inc., 339 F.3d 376, 381-82 (5th Cir. 2003); Akers v. Alvey, 338 F.3d 491, 500 (6th Cir. 2003); Robinson v. Sappington, 351 F.3d 317, 324-325 (7th Cir. 2003); Hocevar v. Purdue Frederick Co., 223 F.3d 721, 735 (8th Cir. 2000); Wilson v. Muckala, 303 F.3d 1207, 1221 (10th Cir. 2002); Pipkins v. City of Temple Terrace, 267 F.3d 1197, 1200 (11th Cir. 2001); Peyton v. DiMario, 287 F.3d 1121, 1124 (D.C. Cir. 2002). Holly D. v. Cal. Inst. of Tech., 359 F.3d 1158, 1167 n. 13 (9th Cir. 2003). "Hostile work environment," "hostile work environment harassment," and "hostile work environment sexual harassment" will be used interchangeably throughout this Comment.

[33] Meritor Sav. Bank v. Vinson, 477 U.S. 57, 59 (1986).

[34] *Id.* at 64-66. Meritor did not directly decided whether quid pro quo harassment violated Title VII; however, the court's adoption of the EEOC's guidelines strongly indicates that the Court agreed that both quid pro quo and hostile work environment harassment violated Title VII. *See id.* at 65-67. The court supported its holding with two arguments. *Id.* First, the court found that the inclusion of the words "terms, conditions or privileges of employment [in the 42 U.S.C. 2000e] evince [d] a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment." *Id.* at 64 (internal quotations omitted). Second, the court adopted the EEOC conclusions, based upon racial harassment case law, that a hostile work environment which affected an employee's ability to perform her job or that was abusive, offensive, or intimidating violated Title VII by changing the terms and conditions of the affected individual's employment. *Id.* at 65-66.

[35] *Id.* at 72-73.

[36] *Id.* at 73.

for sexual harassment committed by a supervisor.[37] During this time, "quid pro quo" and "hostile work environment" sexual harassment carried different types of liability.[38] Employer liability for "quid pro quo harassment" carried vicarious liability, and liability for "hostile work environment sexual harassment" varied.[39]

B. EMPLOYER LIABILITY FOR SEXUAL HARASSMENT BY A SUPERVISORY EMPLOYEE: THE U.S. SUPREME COURT HOLDS EMPLOYERS STRICTLY VICARIOUSLY LIABLE

Twelve years after the U.S. Supreme Court announced its decision in *Meritor Savings Bank v. Vinson*, the Court again considered the issue of employer liability when a supervisor sexually harasses a subordinate.[40] *Burlington Industries, Inc. v. Ellerth* and *Faragher v. City of Boca Raton*, companion cases handed down on the same day, held that an employer is strictly liable when a supervisor sexually harasses a subordinate.[41] The Court, however, created an affirmative reasonable-care defense available to employers when the supervisor's harassment does not result in a "tangible employment action," such as firing, demoting, or failing to promote.[42]

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[37] *See* Faragher v. City of Boca Raton, 524 U.S. 775, 780 (1998); *see also* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 746-47 (1998).

[38] Faragher v. City of Boca Raton, 524 U.S. 775,788-91 (1998) (discussing the different standards used by district courts for "quid pro quo" and "hostile work environment" sexual harassment); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 752-53 (1998) (discussing the fact that lower federal courts used a vicarious liability standard for "quid pro quo sexual harassment."

[39] *See supra* note 38.

[40] Faragher v. City of Boca Raton, 524 U.S. 775, 780 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 746-47 (1998).

[41] Faragher v. City of Boca Raton, 524 U.S. 775, 780 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998).

[42] Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998). A tangible employment action is an employment decision that significantly alters the terms or conditions of an employee's job. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998). Examples given by the Court include hiring, firing, and failing to promote an employee. *Id.*

The affirmative reasonable-care defense consists of two prongs.[43] First, the employer must demonstrate that it made efforts to prevent and correct sexual harassment.[44] Second, the employer must show that the plaintiff-employee failed to act reasonably to avoid harm by using the employer's complaint procedures or through other means.[45] If the employer meets the two prong test, then the employer is not liable for actionable sexual harassment.[46]

C. STRICT LIABILITY UNDER THE PRINCIPLES OF AGENCY LAW

Title VII imposes liability on the employer, not on the harasser.[47] When a supervisor is the culprit, the employer is strictly liable for the injury caused by the supervisor.[48] In *Burlington Industries, Inc. v. Ellerth* and *Faragher v. City of Boca Raton*, the U.S. Supreme Court turned to the Restatement of Agency Law, section 219 to determine employer liability for supervisor sexual harassment of a subordinate.[49] An employer is liable for the tort of its employee committed while acting

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[43] Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998). "The defense comprises two necessary elements: (a) that the employer exercised reasonable-care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998).

[44] Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998).

[45] Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998).

[46] Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998).

[47] Holly D. v. Cal. Inst. of Tech., 339 F.3d 1158, 1179 (9th Cir. 2003).

[48] Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998).

[49] Faragher v. City of Boca Raton, 524 U.S. 775, 793, 797, 801-2 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 755-58 (1998). Restatement § 219(1) "A master is subject to liability for the torts of his servants committed while acting in the scope of their employment; (2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless: (d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relationship." *Id.* at 758 (quoting Restatement (Second) of Agency Law § 219 (1958)). The Restatement of Agency Law is "[o] ne of several influential treatises, published by the American Law Institute, describing the law in a given area and guiding its development." BLACK'S LAW DICTIONARY 1314-1315 (7th ed. 1999). Restatements are not binding authority. Id.

within the scope of employment.[50] Conversely, an employer is not liable if the employee's tort is outside the scope of employment, unless the agency relationship aids the employee in the commission of the tort.[51] Since sexual harassment is outside the scope of a supervisor's duties, the Court premised employer liability for supervisor harassment on the fact that the agency relationship empowers a supervisor with the employer's authority to make job-affecting decisions.[52] Even if the supervisor does not directly threaten, for example, to fire or demote an employee, subordinates are constantly aware of the supervisor's power to make these types of decisions.[53] This authority increases the likelihood that an employee will endure a supervisor's sexually harassing behavior.[54] Although an employee might feel comfortable rebuking the advances of a co-worker without fear of retribution, the same may not be true when the harasser is the employee's supervisor.[55] Thus, an argument exists that the agency relationship always aids a supervisor to harass subordinates.[56]

While the agency relationship could potentially justify strict vicarious liability for every instance of supervisor harassment, the Court previously rejected automatic employer liability in *Meritor Savings Bank v. Vinson.*[57] To resolve a potential conflict between *Meritor Savings Bank v. Vinson* and *Faragher v. City of Boca Raton* and *Burlington Industries v.*

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[50] Faragher v. City of Boca Raton, 524 U.S. 775, 801 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 755-56 (1998). Restatement (Second) of Agency Law § 219(2)(d) (1958). A tort is "[a] civil wrong for which a remedy may be obtained, usu [ally] in the form of damages; a breach of a duty that the law imposes on everyone in the same relation to one another as those involved in a given transaction." BLACK'S LAW DICTIONARY 1496 (7th ed. 1999).

[51] Faragher v. City of Boca Raton, 524 U.S. 775, 801 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 758 (1998).

[52] Faragher v. City of Boca Raton, 524 U.S. 775, 799-802 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 757, 759-60 (1998).

[53] Faragher v. City of Boca Raton, 524 U.S. 775, 805 (1998).

[54] Faragher v. City of Boca Raton, 524 U.S. 775, 803 (1998); *see* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 763 (1998) (quoting Meritor Sav. Bank v. Vinson, 477 U.S. 57, 77 (1986).

[55] Faragher v. City of Boca Raton, 524 U.S. 775, 803 (1998); *see* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 763 (1998).

[56] Faragher v. City of Boca Raton, 524 U.S. 775, 802 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 763 (1998).

[57] Faragher v. City of Boca Raton, 524 U.S. 775, 804 & n.4 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 763 (1998); Meritor Sav. Bank v. Vinson, 477 U.S. 57,73 (1986).

Ellerth, the Court created a reasonable-care defense that is available to employers when the harassment does not result in a tangible employment action.[58] A "tangible employment action" is a job-affecting decision that requires use of the power invested in the supervisor by the employer, "such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."[59] Tangible employment actions justify automatic liability because deciding to fire or demote an employee who rejects a supervisor sexually is a decision that the supervisor was able to make because of the agency relationship.[60] On the other hand, when a supervisor harasses other employees by telling dirty jokes or making sexually derogatory comments, the importance of the supervisor's position within the company is less apparent.[61] Thus, employers have an opportunity to avoid automatic liability for otherwise actionable harassment by showing that they acted reasonably to prevent and correct sexual harassment and that the victim-employees acted unreasonably by failing to avoid harm.[62]

D. THE REASONABLE-CARE DEFENSE REFLECTS IMPORTANT PRINCIPLES BEHIND TITLE VII OF THE CIVIL RIGHTS ACT

Moreover, the reasonable-care defense reflects important policies behind Title VII, such as preventing discrimination and avoiding unnecessary injury.[63] Employers have an affirmative duty to prevent workplace harassment, and employees have a duty to avoid unnecessary harm.[64] When no tangible employment action occurs, the employer can escape liability for

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[58] Faragher v. City of Boca Raton, 524 U.S. 775, 804 & n.4 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998).

[59] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).

[60] *Id.* at 762-63.

[61] *Id.* at 763.

[62] Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998).

[63] Faragher v. City of Boca Raton, 524 U.S. 775, 805-806 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 764 (1998). ("Title VII borrows from tort law the avoidable consequences doctrine") The avoidable consequences doctrine states that the injured party should not recover for more injuries than those injuries that she could not avoid through her own due diligence. Ford Motor Co. v. EEOC 458 U.S. 219, 232 n.15 (1982).

[64] Faragher v. City of Boca Raton, 524 U.S. 775, 806 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 764 (1998)

otherwise actionable harassment by establishing the following elements: (1) the employer acted reasonably to prevent or correct the harassment; and (2) that the plaintiff failed to reasonably avoid harm by taking advantage of the employer's preventive or corrective opportunities or through other available means.[65]

Under the first prong of the reasonable-care defense, an employer is required to take preventive action in accordance with the employment situation.[66] An employer should inform employees that the employer will not tolerate sexual harassment in its workplace.[67] Furthermore, the employer should encourage employees to report harassment.[68] Additionally, employers should educate employees about harassment so that employees know the difference between appropriate and inappropriate conduct.[69] Formal anti-harassment policies are encouraged, but they are not required.[70] The larger the employer, the more likely courts will find that the employer needs a formal grievance procedure.[71] Under the second prong of the defense, employees should use whatever means the employer has made available to complain about sexual harassment.[72] Under certain circumstances, however, an employee's failure to use the employer's grievance mechanism may be reasonable.[73] For example, if the employer does not inform its employees about its anti-harassment policy and complaint procedures, then the employee's failure to use the complaint procedures would be reasonable.[74]

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[65] Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998).

[66] Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998).

[67] 29 C.F.R. § 1604.11(f) (2004).

[68] 29 C.F.R. § 1604.11(f) (2004).

[69] 29 C.F.R. § 1604.11(f) (2004).

[70] Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998).

[71] *See* Faragher v. City of Boca Raton, 524 U.S. 775, 808-9 (1998).

[72] Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998).

[73] *See* Faragher v. City of Boca Raton, 524 U.S. 775, 808-9 (1998).

[74] *See id.*

E. THE REASONABLE-WOMAN STANDARD

When internal procedures fail and the harassed employee files suit against the employer, the factfinder must decide whether actionable sexual harassment has occurred.[75] In *Ellison v. Brady*, the Ninth Circuit, recognizing that the reasonable person standard tended to be male-biased, held that the factfinder should evaluate the severity and pervasiveness of a "hostile work environment" from the perspective of the victim.[76] A contrary decision would allow the harasser to determine the level of acceptable workplace conduct.[77] By adopting a reasonable-woman standard, the Ninth Circuit explained that it would take into account the common concerns women share about sexual behavior that men do not share.[78] At the same time, this objective standard protects employers from "the idiosyncratic concerns of the rare hyper-sensitive [sic] employee."[79] The reasonable-woman standard arises in "hostile environment" cases and tangible employment action cases when plaintiffs allege that their supervisors made implicit threats to coerce the plaintiffs into sexual relationships.[80]

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[75] Elements of a quid pro quo sexual harassment claim include: "showing that a supervisor explicitly or implicitly condition[ed] a job, a job benefit, or a job detriment, upon an employee's acceptance of sexual conduct." Holly D. v. Cal. Inst. of Tech., 339 F.3d 1158, 1170 n.15 (9th Cir. 2003) (internal quotations omitted). Elements of a "hostile work environment sexual harassment" claim include: 1) conduct of verbal or sexual nature, 2) conduct "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." Fuller v. City of Oakland, 47 F.3d 1522, 1527 (9th Cir. 1995). *See generally* Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 79-80 (1998) (to be actionable sexual harassment must be sex discrimination).

[76] Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991).

[77] *Id.* at 878.

[78] *Id.* at 879.

[79] *Id.*

[80] Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991) (reasonable-woman standard used in hostile environment harassment cases); Holly D. v. Cal. Inst. of Tech., 339 F.3d 1158, 1173 (9th Cir. 2003) (reasonable-woman standard used in coerced submission cases).

F. *HOLLY D. V. CALIFORNIA INSTITUTE OF TECHNOLOGY*

1. Factual and Procedural History

Holly D. presented a novel issue to the Ninth Circuit: whether an employee who submits to a supervisor's implicit quid pro quo threat has suffered a tangible employment action.[81] Holly D., was a single parent suffering from clinical depression and financial difficulties who worked for several years at Caltech.[82] After approximately four years, Caltech promoted Holly D. to Senior Division Assistant, working under Professor Stephen Wiggins in Caltech's Control Dynamic Systems department.[83] Caltech policy required Holly D. to go through a six-month probationary period.[84] During her probationary period, she alleged that Professor Wiggins eyed her chests and buttocks, made inappropriate comments of a sexual nature, and exposed her to pornographic websites.[85] Holly D. also alleged that Professor Wiggins complained about the quality of her work and threatened to retain her on probationary status indefinitely.[86] Holly D. admitted that Professor Wiggins would stop his sexually offensive conduct when she expressed uninterest.[87] After her probationary period ended, she received a performance evaluation from Professor Wiggins that she considered negative.[88] Holly D. believed that Professor Wiggins gave her a "negative" evaluation because she rebuked his sexual advances.[89] Holly D. decided that she would have to submit to Professor Wiggins sexually in order to retain her job.[90]

Holly D.'s and Professor Wiggins's first sexual encounter occurred in July of 1997, shortly after her review.[91] Professor

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[81] Holly D. v. Cal. Inst. of Tech., 339 F.3d 1158, 1167 (9th Cir. 2003).
[82] *Id.* at 1162.
[83] *Id.*
[84] *Id.*
[85] *Id.* at 1163.
[86] *Id.*
[87] *Id.* at 1163.
[88] *Id.* at 1163 & n.2. The court reviewed the evaluation and noted that the overall evaluation was good but not one of the eight individually rated categories was rated higher than satisfactory and half were rated unsatisfactory or fair. *Id.* 1163 n.2.
[89] *Id.* at 1163.
[90] *Id.* at 1163.
[91] *Id.* at 1164.

Wiggins came into Holly D.'s office and asked her what turned her on.[92] She replied, "[w] hen people talk dirty."[93] Professor Wiggins then asked her, "[w] ill you suck my dick?" She replied, "yes."[94] After their last sexual encounter in July of 1998, Holly D. spit semen onto her coat to preserve evidence of the encounter.[95]

Holly D. knew that Professor Wiggins was sexually harassing her.[96] She also knew that Caltech had a sexual harassment policy.[97] She did not report the harassment, however, because she believed the university would favor a professor over a clerical employee.[98] After the sexual relationship stopped, Holly D. applied unsuccessfully for several positions within the university.[99] Believing that the other departments denied her transfers because she had previously taken disability leave for her clinical depression, Holly D. filed a disability discrimination claim with the EEOC.[100] The EEOC investigated her complaint, but the EEOC found insufficient evidence to support her disability charge.[101] Shortly after the EEOC's determination, Holly D. reported the sexual harassment to an ombudsman.[102]

In 1999, Holly D. filed a complaint with the EEOC alleging sexual harassment.[103] The EEOC sent Caltech a letter informing the university of Holly D.'s complaint.[104] Pursuant to Cal-

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[92] *Id.* at 1164.
[93] *Id. at* [116]*4.*
[94] *Id.*
[95] *Id.*
[96] *Id.* at 1165, [11]77.
[97] *Id.*
[98] *Id.* at 1165.
[99] *Id.* at 1164.
[100] *Id.*
[101] *Id.*
[102] *Id.* An ombudsman is "[a] n official appointed to receive, investigate, and report on private citizens' complaints about the government [or] [a] similar appointee in a nongovernmental organization (such as a company or university)." BLACK'S LAW DICTIONARY 1115 (7th ed. 1999).
[103] Holly D. v. Cal. Inst. of Tech., 339 F.3d 1158, 1164 (9th Cir. 2003). "At Holly D.'s request, the EEOC issued her a right-to-sue notice without an investigation." *Id.* at 1165. Right-to-sue notices are mandated by statute. 42 U.S.C. 2000e-5 (West 2004) (notice must be given to parties after investigation is completed). "A right-to-sue notice is issued to the charging party after the EEOC concludes its investigation if any. The charging party has 90 days after receipt of the right-to sue notice in which to file her suit." EEOC, *Charge Processing Procedures,* at http://www.eeoc.gov/charge/overview_charge_processing.html (last accessed on Mar. 13, 2004).
[104] Holly D. v. Cal. Inst. of Tech., 339 F.3d 1158, 1165 (9th Cir. 2003).

tech policy, Caltech assembled a neutral committee to investigate Holly D.'s sexual harassment allegations.[105] The committee investigated Holly D.'s claim by interviewing Holly D., Professor Wiggins, and other employees.[106] Professor Wiggins denied that he and Holly D. had sexual relations.[107] During the initial investigation, Holly D. did not produce the specimen that she had kept.[108] The committee found insufficient evidence to support Holly D.'s claim.[109] It recommended, however, that Caltech transfer Holly D. to a female professor and review the sexual harassment policy with Professor Wiggins.[110]

Originally, Holly D. brought her sexual harassment claims under Title VII and the Fair Employment and Housing Act against Wiggins and Caltech in California state court.[111] "Caltech removed the case to the [United States] District Court for the Central District of California, and then moved for summary judgment."[112] The district court granted summary judgment against Holly D.'s Title VII claims, holding that she had not suffered a tangible employment action because she retained her position, received raises, and she did not lose any employment benefits.[113] On appeal, the Ninth Circuit affirmed summary judgment on the Title VII claims, but adopted a different legal standard to evaluate the tangible employment action issue.[114]

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[105] *Id.* at 1165.

[106] *Id.*

[107] *Id.*

[108] *Id.* at 1165 n.7. After Holly D. filed her suit, the semen stain on the coat was tested. *Id.* The semen was identified as Professor Wiggins's, and Caltech requested that Wiggins resign from his position. *Id.*

[109] *Id.* at 1165.

[110] *Id.*

[111] *Id.* Holly D. also alleged claims under the Americans with Disabilities Act of 1990 and several state law tort causes of action. *Id.* Holly D.'s Title VII claim against Professor Wiggins is omitted for the remainder of this summation because Title VII does not allow recovery by a plaintiff against a supervisor, even if the supervisor was the harasser. *Id.* at 1179.

[112] *Id.* at 1165.

[113] *Id.*

[114] *Id.* at 1167-69, 1179. The Ninth circuit reversed the lower court's grant of summary judgment on Holly D.'s state law claims and remanded the state law claims with instructions to remand the state law claims back to state court. *Id.* at 1181.

2. *Ninth Circuit's Analysis*

In light of the U.S. Supreme Court's *Burlington Industries, Inc. v. Ellerth* and *Faragher v. City of Boca Raton* holdings, the Ninth Circuit dealt first with the issue of whether coerced submission constituted a tangible employment action.[115] Neither *Burlington Industries, Inc. v. Ellerth* nor *Faragher v. City of Boca Raton* considered whether a tangible employment action occurs when an employee submits sexually to her supervisor to keep her job.[116] Successful coercion, achieved by threats of termination and demotion, and unsuccessful coercion, resulting in the employee's termination or demotion, derive from the same abuse of supervisorial power.[117] In both situations, the supervisor uses the "weight of the employer's enterprise in order to achieve the unlawful purpose."[118] Therefore, in the Ninth Circuit, retaining an employee who submits to a quid-pro-quo threat is a tangible employment action.[119] When a supervisor successfully coerces sex from a subordinate by threatening a tangible employment action, the supervisor has made participation in unwanted sexual acts a condition of employment.[120] The agency relationship makes the supervisor's threat successful, and thus, the employer is liable to the harassment victim.[121]

To make a prima facie case for successful coercion the plaintiff must establish that the supervisor made an explicit or implicit quid-pro-quo threat.[122] Holly D. alleged that Professor Wiggins implicitly conditioned her employment upon sexual submission to him.[123] To prove an implicit threat, the plaintiff must show that a reasonable-woman in her position would have believed that her supervisor was conditioning her employment on her willingness to submit to his sexual advances.[124] The Ninth Circuit noted that Holly D. failed to argue that a

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[115] *Id.* at 1166.

[116] *Id.* at 1168.

[117] *Id.* at 1168.

[118] *Id.*

[119] *Id.* at 1171 n.18.

[120] *Id.* at 1169.

[121] Faragher v. City of Boca Raton, 524 U.S. 775, 802-3, 805 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 763 (1998) (citing Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986)); Holly D. v. Cal. Inst. of Tech., 339 F.3d 1158, 1168 (9th Cir. 2003).

[122] Holly D. v. Cal. Inst. of Tech., 339 F.3d 1158, 1173 (9th Cir. 2003).

[123] *Id.*

[124] *Id.* at 1173-74.

different standard of reasonableness should apply in light of her financial and psychological difficulties.[125]

Implicit threats require cautious consideration in order to protect the innocent party, whether that party is the defendant or the plaintiff.[126] Creating sterile or barren workplaces is not a Title VII objective.[127] Anti-sexual harassment law under Title VII should protect consensual romances in the work place.[128] Weighing the evidence that Holly D. presented, the Ninth Circuit held that a reasonable woman in her position would not have believed that Professor Wiggins implicitly threatened to fire her if she rejected his sexual advances.[129] Although Professor Wiggins created a sexually charged environment, Holly D. knew that he would stop this behavior if she asked him to.[130] Furthermore, Holly D. did not produce any evidence that Professor Wiggins ever made a connection between the sexual and the employment relationships.[131] On the day of their first sexual encounter, Holly D. and Professor Wiggins did not discuss work.[132] Their conversation was purely sexual.[133]

After holding that Professor Wiggins did not coerce Holly D. into a sexual relationship, the Ninth Circuit considered Holly D.'s claim under a "hostile work environment" theory.[134] The Ninth Circuit assumed that Holly D. presented sufficient evidence at the district court level to make a prima facie case for "hostile work environment sexual harassment" against Caltech.[135] Next, the Ninth Circuit considered whether Caltech met the elements of the reasonable-care defense.[136] Holly D.

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[125] *Id.* 1174 n.19.

[126] *Id.* 1174.

[127] *Id.*

[128] *See id.* at 1174.

[129] *Id.* at 1175.

[130] *Id.*

[131] *Id.* The court notes that she provided three instances in deposition testimony of his conduct that she believed proved he was threatening her; however, all three occurred a significant amount of time outside of the time period in which the sexual relationship took place. *Id.* at 1164 n.3.

[132] *Id.* at 1175.

[133] *Id.*

[134] *Id.* at 1176. The Court discusses the fact that "hostile environment harassment" might not be the best phrase for sexual harassment that does not involve a tangible employment action; however, it uses this term for lack of a better one. *Id.* at 1167 n.13.

[135] *Id.* at 1176.

[136] *Id.* at 1177-79.

used affidavits from an expert to argue that Caltech acted unreasonably in designing its sexual harassment policy.[137] The Ninth Circuit rejected her argument because the reasonable-care defense is not a question of what the employer should have done to improve its anti-harassment policy.[138] Instead, an employer discharges its duty under the reasonable-care defense if its actions were reasonably calculated to prevent and correct sexual harassment.[139] Caltech acted reasonably by immediately investigating Holly D.'s claim after Caltech received notice of her complaint.[140] Furthermore, Holly D.'s complete failure to use Caltech's reporting procedures was unreasonable.[141] Caltech qualified for the reasonable-care defense.[142] The Ninth Circuit affirmed the district court's ruling and remanded the state law claims.[143]

II. CRITIQUE OF THE REASONABLE WOMAN SUFFERING FROM EMOTIONAL OR FINANCIAL DISABILITIES STANDARDS

In *Holly D.*, the Ninth Circuit suggested that a plaintiff's subjective emotional or financial disabilities might have legal significance in sexual harassment litigation brought under Title VII.[144] Adopting this suggestion would create customized standards of reasonableness, and would adversely affect both employers and employees.[145] Such a change would detrimen-

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[137] *Id.* at 1177. The expert's affidavit claimed that there were six different things that Caltech could have done differently to make its anti-harassment policy reasonable, the court mentions two of them:
Mandatory trainings and peer review of supervisors. *Id.* at 1177.

[138] *Id.* at 1177.

[139] *Id.*

[140] *Id.* at 1177-78.

[141] *Id.* at 1179.

[142] *Id.* at 1177-79.

[143] *Id.* at 1181.

[144] *Id.* at 1174 n.19 (noting that the Ninth Circuit may consider the effects of a plaintiff's emotional and financial disabilities if raised in a future case).

[145] Customized standards of reasonableness are virtually subjective standards for plaintiffs who have emotional or financial disabilities. Although the Ninth Circuit phrased its suggested new standards in objective terms, the truth is that the more the reasonable-woman standard resembles the actual plaintiff, the less objective it becomes. Holly D. v. Cal. Inst. of Tech., 339 F.3d 1158, 1174 n.19 (9th Cir. 2003) (reasonable-woman suffering with emotional or financial disabilities); *cf.* JOHN L. DIAMOND ET AL., UNDERSTANDING TORTS 55-56 (2d ed. 2000) (discussing the use of the characteristics of the reasonable person standard in relation to the tort of negligence). "Customized" "subjective" or "tailored" as used to modify standard or reasonable-woman stan-

tally affect an employer's liability for supervisor harassment of a subordinate, and an employer's ability to use the reasonable-care defense.[146] Customized reasonable-woman standards would harm employees by creating inconsistent results in Title VII cases and by forcing romance out of the workplace.[147]

Customizing the reasonable-woman standard for plaintiffs who suffer from emotional and financial disabilities would be problematic for three reasons. First, these customized standards increase the scope of employer liability for supervisor sexual harassment of a subordinate by allowing the plaintiff's disabilities to control when a supervisor has misused the employer's authority and by allowing the plaintiff's disability to excuse the plaintiff from reporting harassment.[148] Second, applying multiple standards to this decision would lead to discriminatory treatment of women under the law.[149] Women with factually similar cases would find themselves with contradictory holdings.[150] Finally, customized standards would stifle romance in the workplace.[151] Employers and supervisors would have greater reason to fear sanctions under these more subjective standards that would discourage social relationships between consenting employees.[152]

A. WIDENING THE SCOPE OF EMPLOYER LIABILITY BY DECLARING THAT WHICH IS UNREASONABLE, REASONABLE

Customized standards of reasonableness would increase the scope of employer liability in two distinct ways. First, these standards would increase the occurrence of "tangible employment action sexual harassment" where the plaintiff alleges that the supervisor made an implicit quid-pro-quo threat. The existence of a threat would depend on the plaintiff's disability and not the supervisor's use of authority to extort sex. Hence, the Ninth Circuit would broaden employer liability beyond the

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dard refer to the reasonable-woman suffering with emotional or financial disabilities standard.

[146] *See infra* notes 153-176 and accompanying text.

[147] *See infra* notes 177-201 and accompanying text.

[148] *See infra* notes 153-168 and accompanying text.

[149] *See infra* notes 177-183 and accompanying text.

[150] *See infra* notes 177-183 and accompanying text.

[151] *See infra* notes 184-201 and accompanying text.

[152] *See infra* notes 184-201 and accompanying text.

principles of agency law. Second, customized standards would interfere with employers' successful use of the reasonable-care defense by treating employees who fail to use their employers' grievance procedures as reasonable. The Ninth Circuit can avoid these undesirable results by maintaining the reasonable-woman standard.

In cases alleging that the supervisor used an implicit threat to coerce the plaintiff into sexual relations, the fact-finder should carefully consider the facts and look for a nexus between the supervisor's allegedly threatening behavior, and the supervisor's request for sexual relations.[153] If there is a nexus between the threatening behavior and the sexual advances, then the factfinder should hold the employer liable for "tangible employment action sexual harassment."[154] If the fact-finder finds that the supervisor did not use implicit threats to coerce the plaintiff into performing sexual acts with the supervisor, then the factfinder should find that that the employer is not liable for "tangible employment action sexual harassment."[155] Maintaining focus on the interactions between the supervisor and the plaintiff prevents falsely holding employers liable for "tangible employment action sexual harassment."[156]

Under customized standards, the plaintiff would divert the factfinder's attention from the supervisor's conduct, redirecting that attention to the plaintiff's disability. This diversion would occur because the plaintiff would need to convince the jury that she suffered from a disability and that this disability affected her perception of the supervisor's conduct.[157] Focusing on the plaintiff's disabilities is problematic because depression and

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[153] Holly D. v. Cal. Inst. of Tech., 339 F.3d 1158, 1174, 1175 (9th Cir. 2003) "Harassment in cases of implicit conditioning can be inferred only from the particular facts and circumstances of the case. We must examine each such charge with the utmost care, for an error either way can result in a gross injustice and will often have a disastrous impact on the life of whichever person is truly the injured party)." *Id.* at 1174.

[154] *Id.* at 1169, 1173.

[155] *See* Holly D. v. Cal. Inst. of Tech., 339 F.3d 1158, 1176 (9th Cir. 2003) (holding that Holly D. failed to establish that Wiggins coerced her into a sexual relationship).

[156] *See* Holly D. v. Cal. Inst. of Tech., 339 F.3d 1158, 1174 (9th Cir. 2003) (citing Nichols v. Frank, 42 F.3d 503, 512 (9th Cir. 1994)).

[157] Since the Ninth Circuit did not consider the effects of Holly D.'s disabilities on her perception of Wiggins's conduct because she did not present evidence showing that a different standard should apply to her, a future plaintiff who wishes to use this standard would need to provide the factfinder with evidence to establish the effects of these disabilities on the plaintiff's perception. Holly D. v. Cal. Inst. of Tech., 339 F.3d 1158, 1174 n.19 (9th Cir. 2003).

economic difficulties can distort perception.[158] Customized standards would create situations where the jury might find an implicit threat that is the product of a plaintiff's psychological distress.[159] Agency principles do not justify this result. Employers are liable for supervisor harassment because they empower their supervisors with job-affecting authority.[160] Courts should not impose liability on employers when the cause of the problem is the plaintiff's psychological difficulties.

Consider, for example, Holly D.'s allegation that Professor Wiggins gave her an unsatisfactory review about three weeks before coming to her office and asking her "what turned her on."[161] Had Holly D. raised the issue of the effect of her depression and financial troubles to the court, she would likely have left the court victorious.[162] Her victory, however, would have

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[158] *See* Ronald Pitzer, Negative Thinking and Depression, Stress Management Briefs from the University of Minnesota (1985, copyright 2004), at http://www.extension.umn.edu/distribution/familydevelopment/components/7269ca.html. (negative thinking thought to cause depression. Also, depressed individuals "may base an overall conclusion on a single event);" *see also* Melissa Dittmann, The Social Class Factor Psychologists conveyed poverty's mental health effects on the disadvantaged and chronically ill, Monitor on Psychology, Vol. 34, No. 9, Oct. 2003, at 36 (available at http://www.apa.org/monitor/oct03/socialclass.html)(last accessed on Mar. 13, 2004)
(poverty is connected to depression, feeling of low self-esteem, and helplessness). In regards to economic disabilities, a future plaintiff might argue that her extreme financial needs colored her understanding of her supervisor's conduct. *Cf.* Holly D. v. Cal. Inst. of Tech., 339 F3d. 1158, 1172 (9th Cir. 2003) (focusing on the supervisor's threat in a coercion case instead of the subordinate's "capacity to resist his advances" because the Ninth Circuit recognized that some employees may desperately need the income to make a house payment or the health benefits for a sick child); *see also* Jin v. Metro. Life Ins. Co., 310 F.3d 84, 99 (2nd Cir. 2002). It is difficult to predict the intentions of another person. An employee who cannot afford to lose her position would arguably be more likely submit and arguably more likely to see a threat in the first instance. Her economic position does not leave her room to gamble on the chance that her supervisor is a decent person who would not use his position with the company to coerce sex from other employees.

[159] *See supra* note 158.

[160] Faragher v. City of Boca Raton, 524 U.S. 775, 799-802 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 757, 759-760 (1998) (citing Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986)); Holly D. v. Cal. Inst. of Tech., 339 F.3d 1158, 1168 (9th Cir. 2003).

[161] Holly D. v. Cal. Inst. of Tech., 339 F.3d 1158, 1163-64 (9th Cir. 2003).

[162] The fact that the Ninth Circuit noted that it would consider this issue if it was appropriately raised in a future case implies that if Holly D. had established that depression and financial difficulties affected her view of Wiggins's behavior that the Ninth Circuit would have taken her disabilities into account. *See* Holly D. v. Cal. Inst. of Tech., 339 F.3d 1158, 1174 n.19 (9th Cir. 2003); *see also* Nichols v. Frank, 42 F.3d 503, 512 (9th Cir. 1994) (listing other traits that the Ninth Circuit might incorporate into the reasonable woman standard, such as "race, age, physical or mental disability, and sexual orientation"); Fuller v. City of Oakland, 47 F.3d 1522, 1527 (9th Cir. 1995)

been at the expense of justice because her victory would have been due to her personal difficulties and not because Professor Wiggins abused his supervisory power to coerce her into having sex with him.[163] If the Ninth Circuit adopts customized standards of reasonableness, it would in effect begin to hold employers liable for hiring individuals with emotional or financial difficulties.

Conditioning employer liability on the plaintiff's distorted perception of the supervisor's conduct does not further workplace equality. While the idea of an emotionally or financially depressed individual submitting sexually to her supervisor in order to "save" her job is distressing, the fact remains that Title VII is concerned with eliminating gender discrimination.[164] Furthermore, compensating a plaintiff for an injury that she suffered because of her emotional or financial depression does not resolve the plaintiff's real problem. Title VII litigation should result in verdicts that breakdown barriers for women in the workplace, not verdicts that attempt to sooth the ailing psyches of the plaintiffs.[165]

In addition to increasing the number of coerced submission cases, customized standards would also interfere with employers' abilities to successfully invoke the reasonable-care defense in "hostile work environment sexual harassment" cases. Employees have a duty to avoid unnecessary harm; reporting the

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("hostile work environment" must be determined from the perspective of a reasonable person with the same fundamental characteristics)." Holly D.'s disabilities could have affected her perception thus making it reasonable for her to construe Wiggins' words and actions as an implicit threat if she did not engage in sex with him. *See infra* note 157.

[163] Holly D. v. Cal. Inst. of Tech., 339 F.3d 1158, 1173 (9th Cir. 2003) (Holly D. alleged that Professor Wiggins's conduct constituted an implicit threat).

[164] The U.S. Supreme Court has made it very clear that sexual conduct violates Title VII only if the alleged harasser treated the plaintiff differently because of the plaintiff's sex. Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 80 (1998) (citing Ginsburg's concurrence in Harris v. Forklift Sys., Inc., 510 U.S. 17, 25 (1993).

[165] It would be a very different situation if the plaintiff sought to prove that her supervisor used her disability to his advantage in order to obtain sexual favors. *See* Nichols v. Frank, 42 F.3d 503, (9th Cir. 1994). If a plaintiff can show actual knowledge of her disabilities and actual intent on the part of the supervisor to use those disabilities to harass her, then I believe that the effect of these disabilities would be important to determining the existence of an implicit threat. *Id.* However, in Holly D. v. California Institute of Technology, the Ninth Circuit did not suggest that it would require the plaintiff to show that the supervisor had actual knowledge of the plaintiff's disabilities. *See* Holly D. v. Cal. Inst. of Tech., 359 F3d 1158, 1173-74 & n.19 (9th Cir. 2003).

harassment to the employer usually discharges this duty.[166] Under customized standards, however, there would be a very strong possibility that courts might excuse emotionally or financially depressed employees from reporting harassment to their employers. Low self-esteem and feelings of helplessness are symptoms of these conditions.[167] An employee who feels helpless is likely to believe, just as Holly D. did, that reporting the harassment would be useless.[168] Thus, it would be reasonable for an emotionally or financially depressed woman to forego reporting harassment to her employer. Unfortunately, short of video surveillance many large employers might not be able to adequately police their workplaces for harassment without the help of their employees. The courts should not encourage employees to avoid reporting sexual harassment by calling this omission "reasonable" for employees who suffer from emotional or financial disabilities.

By maintaining the status quo and rejecting customized standards, the Ninth Circuit can ensure that employer liability extends from the principles of agency law and not judicial sympathy for the terrible effects of psychological disabilities. Furthermore, the Ninth Circuit can protect the important Title VII policies that the reasonable-care defense furthers.[169] The reasonable-woman standard is the appropriate standard to apply because it balances the interests of all parties concerned.[170]

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[166] Faragher v. City of Boca Raton, 524 U.S. 775, 807-808 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998).

[167] 4 ENCYCLOPEDIA BRITANNICA, INC., DEPRESSION, 21 (2002); *see* Melissa Dittmann, *supra* note 158.

[168] *See* Holly D. v. Cal. Inst. of Tech., 339 F.3d 1158, 1177-79 (9th Cir. 2003) (Holly D. did not report the harassment because she thought that it would be useless.)

[169] Faragher v. City of Boca Raton, 524 U.S. 775, 805-6 (1998) (discussing policies behind Title VII of the Civil Rights Act).

[170] Ellison v. Brady, 924 F.2d 872, 878-79 (9th Cir. 1991) (the reasonable-care defense rewards employers who meet their duty to attempt to rid their workplaces of sexual harassment and it holds employees reasonable for avoiding unnecessary injury). For a deeper appreciation of the arguments for and against the use of gender specific standards see Paul P. Dumont, Comment, *Radtke v. Everett: An Analysis of the Michigan Supreme Court's Rejection of the Reasonable Woman/Victim Standard: Treating Perspectives That Are Different as Though They Were Exactly Alike*, 27 GOLDEN GATE U.L. REV. 255 (1997) (using feminist theory to support the reasonable woman standard); *but see* Saba Ashraf, *The Reasonableness of the "Reasonable Woman" Standard: An Evaluation of Its Use in Hostile Environment Sexual Harassment Claims Under Title VII of the Civil Rights Act*, 21 HOFSTRA L. REV. 483 (1992) (asserting that the reasonable person standard is the appropriate standard for evaluating "hostile work environment harassment)."

The reasonable-woman standard stops the supervisor and the employer from discriminating against women by denying them the right to set the standard of appropriate workplace conduct.[171] The reasonable-woman standard also takes the concerns of women into consideration in defining actionable sexual harassment.[172] Furthermore, this standard protects employers from liability by checking the plaintiff's notions of unacceptable workplace conduct against that of a reasonable female.[173] Congress did not intend Title VII to prevent all offensive behavior.[174] What Title VII does restrict is the use of immutable characteristics to bar certain individuals with these characteristics from an equal opportunity to enter the workforce and succeed at their jobs.[175] Through the reasonable-woman standard, courts can ensure that they do not turn Title VII into a civility statute.[176]

B. UNEQUAL TREATMENT OF WOMEN UNDER THE LAW

The second problem customized standards would create is inconsistent verdicts for the same or similar conduct. Title VII seeks to end discriminatory employment decisions made on the basis of an individual's membership in a particular group.[177] Interpreting the statute should not result in legal standards that create a preference for one group over another.[178] Furthermore, courts should not create favored sub-groups within a protected group.[179] Doing so furthers discrimination, instead of ending it. Customizing the reasonable-woman standard for emotionally and financially disabled women would discrimi-

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[171] Ellison v. Brady, 924 F.2d 872, 878 (9th Cir. 1991).

[172] *Id.* at 879

[173] *Id.* at 879.

[174] Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 80 (1998).

[175] *See id.*

[176] *Id.*at 81(Title VII does not protect individuals from every insult or injury that they might suffer in the workplace).

[177] Griggs v. Duke Power Co., 401 U.S. 424, 431, (1971). (Racial discrimination case). "Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate based on racial or other impermissible classification." *Id.*

[178] *See Id.*

[179] Women would be the main protected group and emotionally or financially disabled women would be sub-groups within this protected group.

nate against women who would not qualify for one of these standards. Two women with identical complaints might find themselves with disparate responses from the courts if only one of these women could take advantage of the customized standards proposed by the Ninth Circuit.

To illustrate this point, consider the following scenarios. In scenario one, supervisor Sam is attracted to employee Eve. Sam flirts with Eve. Believing that she reciprocates his attraction, he asks her out on a date. Eve rejects Sam's invitation, explaining that she does not think it would be a good idea to date her boss. Sam ignores her rejection, telling Eve that they could keep the date a secret. Eve persists in her rejection so Sam nods and walks away. Three weeks later, Sam calls Eve into his office and counsels her about some errors she made on the last report she submitted. Eve has been having trouble in her personal life. She recently divorced, and her teenage son is not adjusting well. She does not tell Sam about her home troubles because she does not want to seem as if she is making excuses.

Sam tells Eve that she is an excellent worker and that he would not be so concerned about her recent errors if it were not for the fact that the company is talking about eliminating jobs. He suggests that she be extra careful to avoid errors in the future. Then, if the company decides to eliminate some of its workforce, she would not be one of the workers laid off. Eve is distraught over this meeting, unsure whether the supervisor is trying to help her keep her job, or make her fear that she is losing it. A week after this meeting, Sam and Eve are at a retirement party hosted by their company for one of its vice-presidents. Champagne flows, and Sam strikes up a conversation with Eve. Their conversation begins with pleasantries and then moves into the office. Eve asks Sam whether the rumors about layoffs starting in the next couple of weeks are true. He tells her that he cannot answer her question. Sam knows that lay-offs will happen in a couple of weeks, but the company instructed supervisors to keep that knowledge to themselves until the company officially announces its decision.

They talk more as the night progresses; eventually, Sam asks Eve to dance. At the end of the evening, Sam offers Eve a ride home. She agrees so that she will not have to wait for a taxi. Parked in front of Eve's home, Sam kisses her. Eve does not push Sam way so he asks if he might come in for a night-

cap. Eve considers Sam's request for a few moments, more than a little concerned that rejecting him again might cost her job. She believes the rumors about lay-offs are true, and feels that Sam's evasive response earlier that evening confirms her belief. She does not want to lose her job so she invites him inside. Later that night, Sam and Eve have sex.

A couple of weeks pass, the company orders its supervisors to pick employees for the first round of lay-offs. Sam picks three employees, but retains Eve. Believing that Sam kept her because she slept with him, Eve continues the sexual relationship. Eventually, she feels as though she can no longer continue in her relationship with Sam, but she is afraid to end it because the company is still laying people off.

She talks to a friend about her problem. This friend suggests that she contact an attorney. Taking her friend's advice, Eve contacts a lawyer who tells her that her employer could be liable for sexual harassment if a jury finds that her supervisor unlawfully coerced her into sexual relations. She decides to file a complaint with the EEOC, requesting a right-to-sue notice without an investigation. Subsequently, she files her suit in the appropriate district court within the Ninth Circuit. Eve is financially and emotionally stable. Therefore, she would be subject to the reasonable-woman standard. The employer moves for summary judgment, arguing that a reasonable-woman would not have believed that her supervisor was conditioning her continued employment on her willingness to submit to him sexually. The court carefully considers the facts of the case and holds that there is an insufficient nexus between Sam's sexual advances and his employment decisions to find that the Sam abused his power in order to extort sex from Eve. The district court grants summary judgment in favor of the employer.

Scenario two consists of the same set of facts as scenario one, except that it involves supervisor Steve and employee Elaine. Elaine has not handled her recent divorce well. Shortly after her divorce, she began seeing a psychiatrist who diagnosed her with depression. Elaine presents affidavits to the court from an expert who swears to testify that Elaine's depression made it reasonable for Elaine to believe that Steve implicitly threatened Elaine with termination if she did not have sex with Steve. The district court excludes the expert's testimony because the Ninth Circuit uses a reasonable-woman

standard to determine the existence of an implicit threat. The plaintiff appeals the lower court's decision.

On appeal, the Ninth Circuit considers the employee's disabilities in deciding whether it was reasonable for her to conclude that her supervisor was conditioning her continued employment on her willingness to engage in sexual relations with him. The court reasons that depressed women have special concerns that "normal" women do not share. Negative thinking and depression are companions; an individual suffering with depression could reasonably conclude that her supervisor counseled her about her errors to threaten her job, not to save it.[180] The Ninth Circuit holds that the factfinder should view Eve's Title VII claims from the perspective of a reasonable-woman suffering with depression. The case is then remanded to the district court for further proceedings consistent with its holding. At trial, the expert testifies that depressed woman would view Steve's actions as threatening.[181] The trial judge determines that the expert's testimony is reliable and instructs the jury to consider the evidence in light of the plaintiff's emotional difficulties. The jury finds for the plaintiff, holding the defendant liable for Elaine's injuries to the tune of $500,000.

The conclusions of these two cases would result in Elaine receiving compensation for the "wrong" she suffered, while Eve is left to forge on, believing that she has been wronged not only by her supervisor and her employer, but also by the justice system. These conflicting results would defy justification under Title VII. Discriminatory treatment by the courts does not further Congress's efforts to eliminate discriminatory employment decisions.[182] Equal treatment in the workplace should result in equal treatment under the law. While emotionally or financially depressed individuals have special concerns that not all women share, individuals with these concerns should not receive preferential treatment under a statute concerned with

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[180] *See* Pitzer, *supra* note 158.

[181] *Id.*

[182] *See* Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 80 (1998) (Congress struck at all disparate treatment between the sexes); *see also* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64 (1986).

eliminating disparate employment decisions made because of an individual's gender.[183]

C. THE FRIGID WORKPLACE

Customized standards would unduly burden consensual workplace romance by making the risk outweigh the benefit of finding love at work. Under the reasonable-care defense, an employer must show that it acted reasonably to prevent and correct sexual harassment.[184] One way that an employer can meet this duty is by creating and enforcing a sexual harassment grievance procedure.[185] In the Ninth Circuit, an employer discharges this duty by demonstrating that it designed a plan that it reasonably expected would prevent and correct sexual harassment.[186] Customized standards of reasonableness would charge employers with the responsibility of devising separate plans that would adequately protect employees who suffered from one of the named disabilities, as well as for employees who did not. Although it might seem easier for the employer to resolve this issue by setting the standard of workplace conduct by the higher threshold that customized standards would demand, this solution would not work because employers also face liability if they wrongfully sanction an employee for violating the anti-harassment policy.[187] Thus, the law would burden employers with devising plans that meet the needs of the emotionally and financially disabled as well as those of typical employees.

A problem that is inherent in fashioning anti-harassment policies that incorporate definitions of harassment for emotionally and financially disabled employees is the fact that these disabilities affect perception.[188] Therefore, both problems would

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[183] *See* Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 80 (1998) (stressing the fact that sexual harassment violates Title VII when it is discrimination because of the victim's sex).

[184] Faragher v. City of Boca Raton, 524 U.S. 775, 806-7 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998).

[185] Faragher v. City of Boca Raton, 524 U.S. 775, 808-9 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 764 (1998).

[186] Holly D. v. Cal. Inst. of Tech., 339 F.3d 1158, 1177 (9th Cir. 2003).

[187] *See* 29 C.F.R. § 1604.11(f) (2004) (employers should properly sanction employees who sexually harass other employees).

[188] *See supra* note 158.

require advanced knowledge of social psychology.[189] In essence, employers would be asking their supervisors first to diagnosis their subordinates and then act accordingly. This expectation would be unreasonable, as most supervisors are not going to have the training needed to determine if employees suffer with one of these conditions. Even if a supervisor does assume that an employee has one of these problems, it is unreasonable to expect the supervisor to understand how the individual's condition might affect her perception of the supervisor's conduct. In light of the issues raised by customized standards, employers would need to find alternatives to reduce their risk of liability.

One alternative that employers would likely find attractive is an anti-fraternization policy.[190] Anti-fraternization policies exist in different forms: some employers place an outright prohibition on supervisor-subordinate dating, while others require that dating co-workers sign love contracts.[191] Anti-fraternization policies may effectively prevent sexual harassment; however, these policies are undesirable because they solve the problem by avoiding the real issue.[192] Under federal law, sexual harassment is not merely a question of sexually offensive behavior; it is an issue of treating someone differently because of that person's gender.[193] Conduct of a sexual nature must be severe and pervasive enough to change the conditions of the victim's employment before the accused harasser can be

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[189] Social Psychology is "the psychological study of social behavior, esp[ecially] of the reciprocal influence of the individual and the group with which the individual interacts." WEBSTER'S UNABRIDGED DICTIONARY, 1811 (Sol Steinmetz, et al. eds,. 2nd ed. 1999).

[190] *See* Vicki Schultz, *The Sanitized Workplace,* 112 YALE L.J. 2061, 2120 (2003). Ms. Schultz discussed the attraction employers have to anti-fraternization policies under the current state of anti-harassment law. *See id.* I am proposing that customized reasonable-woman standards will increase the prevalence of anti-fraternization policies in the workplace.

[191] *Id.* at 2122-2123, 2126-2129 (describing a "love contract" as a letter sent to the subordinate employee by the supervising employee explaining that the relationship is voluntary and requiring her signature to show that she understands that the relationship has no bearing on her position with the employer).

[192] Seth Howard Borden, Note, *Love's Labor Law: Establishing a Uniform Interpretation of New York's "Legal Recreational Activities" Law to Allow Employers to Enforce No-dating Policies*, 62 BROOK. L. REV. 353, 379 (1996). Mr. Borden argues in favor of anti-harassment policies, explaining that forbidding relationships between employees will reduce the number of quid pro quo cases as long as most employees follow the rules. *Id.*

[193] *E.g.* Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 80 (1998).

found to have violated Title VII.[194] Forbidding supervisor-subordinate dating makes it easier for an employer to avoid liability.[195] Unfortunately, this supposed solution to the problem of sexual harassment would not eliminate work-related decisions made on the basis of gender. Banning dating merely makes the opposite sex forbidden fruit. Anti-fraternization policies fail to address the real problem with sexual harassment: using sex to belittle a person or to make an individual feel incompetent at her job is discrimination because of that person's sex.[196] Furthermore, anti-fraternization policies that prohibit dating contradict the Ninth Circuit's charge that sexual harassment should not result in sterile workplaces.[197]

Even if the employer does not implement an anti-fraternization policy, supervisors are likely to self-impose workplace abstinence, as the risk of violating the anti-harassment policy would increase under customized standards.[198] The Ninth Circuit recognizes that employees of different ranks within an organization can fall in love.[199] If protecting consensual relationships is important to the Ninth Circuit, as stated in *Holly D. v. California Institute of Technology*, then the court will not implement customized standards.[200] Moreover, by rejecting customized standards, the Ninth Circuit would help to ensure that employers do not unjustly sanction supervisors for behavior that Title VII does not prohibit. While finding love at work may not be of interest to all employees, the courts and employers should not use federal anti-harassment law as a blocking mechanism for employees who might meet that special someone who just happens to be sitting three cubicles away.[201]

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[194] Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67 (1986).

[195] Borden, *supra*, note 192 at 379.

[196] Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986).

[197] Holly D. v. Cal. Inst. of Tech., 339 F.3d 1158, 1174 (9th Cir. 2003); *see also* Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 81 (1998) (the Supreme Court has also discouraged using Title VII to prevent workplace romance).

[198] *See supra* notes 184-201 and accompanying text.

[199] Holly D. v. Cal. Inst. of Tech., 339 F.3d 1158, 1174 (9th Cir. 2003) (citations omitted).

[200] *Id.*

[201] A poll of 1000 workers found that 47% engaged in workplace romances and another 19% would be willing to engage in a workplace romance. Sue Shellenbarger, *Workplace romances encounter obstacles,* Wall Street Journal, *reprinted* in Contra Costa Times, Feb. 20, 2004, available at

III. CONCLUSION

Instead of making changes to the reasonable-woman standard, the Ninth Circuit should focus on encouraging employers to properly police their workplaces for sexual harassment. The reasonable-care defense creates an incentive for employers to make use of these internal justice systems to eliminate workplace harassment.[202] The Ninth Circuit's holding in *Holly D. v. California Institute of Technology* should further reinforce employers' incentives to ensure that employees are encouraged to report threats.[203] By barring employers from using the reasonable-care defense in coercion cases, the Ninth Circuit reinforced the importance of *preventing* sexual harassment.[204] Employers who wish to avoid liability for coercion cases need to vigorously promulgate their anti-harassment policies and procedures, and make efforts to encourage employees to use these procedures instead of submitting themselves sexually to supervisors. Adopting customized reasonable-woman standards would undermine the positive effects of the Ninth Circuit's decision in *Holly D. v. California Institute of Technology*.

The Ninth Circuit's suggestion that it might consider the legal effects of a plaintiff's emotional and financial difficulties in deciding implicit threat sexual harassment cases raises a number of troubling issues.[205] Creating a more subjective standard leads to unjustifiable employer liability and unfairly denies employers the ability to use the reasonable-care defense. Furthermore, custom-fit standards of reasonableness would

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http://www.contracostatimes.com/mld/cctimes/business/7998950.htm (last accessed on Mar. 13, 2004).

[202] Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998).

[203] Holly D. v. Cal. Inst. of Tech., 339 F.3d 1158 (9th Cir. 2003) (holding that coerced submission is a tangible employment action).

[204] *But see* Maria Greco Danahar, *Relationships Between Supervisors And Subordinates May Lead To Legal Liability*, 5 NO. 19 LAWYERS J.6 (2003). This article reviews the Ninth Circuit's decision in Holly D. v. Cal. Inst. of Tech., 339 F3d. 1158 and then warns employers that they must acknowledge that supervisor-subordinate dating can lead to liability for sexual harassment. While this article does not directly encourage the use of anti-fraternization policies, it suggests that the Holly D. decision has incited fear in the employers' bar. This fear may encourage employers to take drastic measures, such as anti-fraternization policies, instead of more meaningful ones such as encouraging employees to use the complaint procedures.

[205] Holly D. v. Cal. Inst. of Tech., 339 F.3d 1158, 1174 n.19 (9th Cir. 2003) (suggesting that emotional and financial disabilities might be incorporated into the reasonable woman standard).

result in unequal treatment of women in the workplace and would quash workplace romance. To avoid the ramifications of tailoring the reasonable-woman standard to fit individual plaintiffs with certain disabilities, the Ninth Circuit should maintain the objective reasonable-woman standard.

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* J.D. Candidate, Golden Gate University School of Law, 2005; B.A. (*Cum Laude*), California State University, Sacramento, 2001. I would like to thank Ed Baskauskas for his thoughtful commentary on this Comment, and my journal editor Randy Nicholson for his endless patience and assistance, Associate Dean David Oppenheimer for his invaluable expertise in the area of employment discrimination. I would also like to thank my family for their support, without which this Comment and my future as an attorney would be a distant dream.